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# CALIFORNIA CASES IN THIS VOLUME

(172 PACIFIC REPORTER)

## SUPREME COURT

Page	Page
Ackerman v. Schultz (Cal.)       609         Adams v. Anthony (Cal.)       593         Allen v. Narver (Cal.)       980	Hughes Mfg. & Lumber Co. v. Elliott (Cal.)
Allen v. Narver (Cal.)       980         Anderson v. Wickliffe (Cal.)       381         Asebez v. Bliss (Cal.)       595	Jepson's Estate, In re (Cal.)
Benoist v. Benoist (Cal.)       1109         Boal v. Gassen (Cal.)       588         Bresee v. Dunn (Cal.)       387         Butler v. Union Trust Co. (Cal.)       601	Kinsey v. Pacific Mut. Life Ins. Co. of Cal- ifornia (Cal.)
California Gas & Electric Corp. v. Union Trust Co. of San Francisco (Cal.) 146	Levi v. Chesley (Cal.)       607         Lowe v. Lowe (Cal.)       583         Lowe's Estate, In re (Cal.)       583
Chambers v. Princeton University (Cal.) 390. Chung Sing v. Southern Pac. Co. (Cal.)1103 Citizens' Trust & Savings Bank v. Tuffree	Mana, Ex parte (Cal.) 986
(Cal.)       586         Clarkin v. Morris (Cal.)       981         Cooper v. Huntington (Cal.)       591	Neale v. Atchison, T. & S. F. R. Co. (Cal.)1105 O'Hare's Estate, In re (Cal.) 385
cooper v. Huntington (Cai.)	
Edmonds v. Wilcox (Cal.)1101	People v. Beggs (Cal.)
Fiske's Estate, In re (Cal.)       390         Foster v. Branen (Cal.)       382         French v. Farmer (Cal.)       1102         Friedman's Estate, In re (Cal.)       140	Ramish v. Marsh (Cal.)
Garrett v. Garrett (Cal.)       587         Gerardi v. Bonoff (Cal.)       598         Graff v. United Railroads of San Francisco (Cal.)       603         Gumpel v. San Diego Electric R. Co. (Cal.)       605	Sharpless v. Pantages (Cal.)       384         Soper v. Dominguez (Cal.)       586         Stow v. Superior Court of California in and for Alameda County (Cal.)       598         Sweinhart v. Plant Inv. Co. (Cal.)       386
Hamaker v. Bryan (Cal.)	Turner's Estate, In re (Cal.)
Bldg. Co. (Cal.)	Union Hollywood Water Co. v. Los Angeles (Cal.)
man (('al.)	Whiting-Mead Commercial Co. v. Bayside         598           Land Co. (Cal.)
COURT OF	APPEALS
Amundson v. Shafer (Cal. App.)	Duncan v. Tom Poste, Inc. (Cal. App.) 163
A. P. Hotaling & Co. v. Hamilton (Cal.	Ewing v. Richvale Land Co. (Cal. App.) 645
App.)	Fergus v. Venice Inv. Co. (Cal. App.) 396 Foster v. Los Angeles Trust & Savings Bank (Cal. App.) 392
App.)	George J. Birkel Co. v. Curtet (Cal. App.) 165 Greene v. Locke-Paddon Co. (Cal. App.) 168
Birkel Co. v. Curtet (Cal. App.)	Haight v. Stewart (Cal. App.)
Carrera, Ex parte (Cal. App.)	App.)
Dodge v. Avery (Cal. App.)	App.)       404         Hart, Ex parte (Cal. App.)       610         Holmes v. Snow Mountain Water & Power Co. (Cal. App.)       178         Hotaling & Co. v. Hamilton (Cal. App.)       393

## CALIFORNIA CASES IN THIS VOLUME

Page	Page
	People v. Lee (Cal. App.)
Ilardi         v. Central         California         Traction         Co.         763           (Cal. App.)	People v. Shaw (Cal. App.)
Jesus Maria Rancho v. Southern Pac. Co.	Prophet v. Katzenberger (Cal. App.) 775
(Cal. App.)       183         Johnston v. Murphy (Cal. App.)       616         Jolly v. McCoy (Cal. App.)       618	Reynolds v. E. Clemens Horst Co. (Cal. App.) 623
Keiper v. Pacific Gas & Electric Co. (Cal. App.)180	Schwitalla, Ex parte (Cal. App.) 617 S. C. Smith Estate v. J. M. Dunn Auto Co.
Lanterman v. Anderson (Cal. App.) 625	(Cal. App.)
Lobbett & Dean v. Oakland, A. & E. Ry. (Cal. App.)1123 Long v. John Breuner Co. (Cal. App.)1132	dent Commission (Cal. App.)
Machado v. Machado (Cal. App.)1124	App.)
Macrado W. Machado (Cal. App.)	Maier (Cal. App.)
Nathan v. Porter (Cal. App.)       170         Nelson v. Thomas (Cal. App.)       398	Town of Calistoga v. Adams (Cal. App.) 624 Turner v. Watkins (Cal. App.) 620
New England Equitable Ins. Co. v. Chicago Bonding & Surety Co. (Cal. App.)1122	Union Mach. Co. v. Chicago Bonding & Surety Co. (Cal. App.)
Partridge v. Richmond (Cal. App.) 166 Patten & Davies Lumber Co. v. Durfling-	Unwin v. Barstow-San Antonio Oil Co. (Cal. App.)
er (Cal. App.)	Verdier v. Stoll (Cal. App.)1127
People v. Hill (Cal. App.)1114	Wells, In re (Cal. App.) 93
ii 1	172 P.

# Report Citation of CALIFORNIA Supreme and Appellate Court Cases in the PACIFIC REPORTER, VOL. 172.

hand column shows the page of this volume on which a case begins, against which are shown the volume and State Report where same case is to be found.

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State Report	Repr.	State Report	Repr.	State Bened	Repr.	State Desert
_						
6 Cal. App. 785						
178 Cal. 27		Cal. App. 454				
178 Cal. 65		Cal. App. 425				
178 Cal. 79		Cal. App. 430				
i Cal. App. 323	398236	Cal. App. 433	61136	Cal. App. 463	1098317	78 Cal. 153
i Cal. App. 370	40136	Cal. App. 441	61336	Cal. App. 500	110017	78 Cal. 217
Cal. App. 413						
3 Cal. App. 391						78 Cal. 218
3 Cal. App. 389						
3 Cal. App. 352	41236	Cal. App. 416	61636	Cal. App. 469	11051	
3 Cal. App. 372					11071	78 Cal. 257
3 Cal. App. 410					1109 1	
<sup>6</sup> Cal. App. 356						
6 Cal. App. 398						
в Cal. App. 384						
6 Cal. App. 406	587	178 Cal. 131	62436	Cal. App. 486	1114136 C	al. App. 582
6 Cal. App. 394						al. App. 574
6 Cal. App. 362						al. App. 589
6 Cal. App. 375						
		178 Cal. 158				al. App. 584
178 Cal. 120						al. App. 641
178 Cal. 118						al. App. 646
178 Cal. 107						al. App. 579
178 Cal. 122						
178 Cal. 114						
178 Cal. 125						al. App. 567
178 Cal. 96					1130236 Ca	
178 Cal. 116	603	178 Cal. 171	9792*	Cal. App.	113236 C	al. App. 630
178 Cal. 128	605	178 Cal. 166	979336	Cal. App. 817	i	

\*Not reported in State Reports.

[End of Table.]



# This is a Key-Numbered Volume

Each syllabus paragraph in this volume is marked with the topic and Key-Number section — under which the point will eventually appear in the American Digest System.

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# CASES REPORTED

Page	l Page
Aberdeen State Bank v. Spokane Pav. &	Bekins Van & Storage Co., Hood v. (Cal.) 594
Const. Co. (Wash.)	Bell, State v. (Wash.)
Abraham v. Weister (Kan.)	Benoist v. Benoist (Cal.)
Adams v. Anthony (Cal.) 593	Benton v. Hunt (Cal. App.)
Adams, Town of Calistoga v. (Cal. App.) 624 Adler, Powell v. (Okl.)	Benton & Hopkins Inv. Co., Duncan v.
Adler, Powell v. (Okl.)	(Kan.)
Airington, Oklahoma State Bank v. (Okl.) 462 Akeyson, Carlson v. (Colo.)	Berry v. Dewey (Kan.)
Alaska S. S. Co., Walsh v. (Wash.) 269	Borrybill v Jackson (Okl)
Alexander, Pottawatomie County v. (Okl.) 436	Biaggi, In re (Cal. App.)
Allen, Kunz v. (Kan.)	Bier, Tyler v. (Or.)
Allen v. Narver (Cal.) 980 Allendorph, Rucker v. (Kan.) 524	Biaggi, In re (Cal. App.)
American Nat. Bank v. Funk (Okl.)1078	Co. v. (Okl.)
American Sav. Bank & Trust Co., National	Binion, Kibby v. (Okl.)
Surety Co. v. (Wash.)	Birkel Co. v. Curtet (Cal. App.) 165
American Smelting & Refining Co. v. Hicks (Colo.)	Blair, Kahlotus Grain & Supply Co. v. (Wash.)
Amundson v. Shafer (Cal. App.) 173	Blanton v. Kansas City Cotton Mills Co.
Anderson, Lanterman v. (Cal. App.) 625	l (Kan.) 987
Anderson, Midland Casualty Co. v. (Colo.) 1067	Bliss, Asebez v. (Cal.) 595
Anderson v. Wickliffe (Cal.)	Bliss v. Southern Pac. Co. (Cal. App.) 760
Anderson v. Wilcox (Cal. App.) 398 Angeles Brewing Co. McRae v. (Wash.) 263	Blocker, Stevens v. (Kan.)
Angeles Brewing Co., McRae v. (Wash.) 263 Anthony, Adams v. (Cal.)	Boal v. Gassen (Cal.)
Antrim Lumber Co., King v. (Okl.) 958	Board of Com'rs of Hughes County, Car-
A. P. Hotaling & Co. v. Hamilton (Cal.	rell v. (Okl.)
App.)	Board of Com'rs of Johnson County, Lillard v. (Kan.)
Armstrong v. Spokane International R. Co.	Board of Com'rs of Shawnee County,
(Wash.) 578	Washburn v. (Kan.) 997
(Wash.)	Board of Education of City of Roswell v.
(Kan.)	Seay (N. M.)
Art Institute of Chicago v. Denison	V. (Ariz.)
(Colo.) 5	Bond. Ostran v. (Okl.)
Asebez v. Bliss (Cal.)	Bond. State v. (Nev.)
Askey v. New York Life Ins. Co. (Wash.) 887	Bonham v. Bonham (Wyo.)
Atchison, T. & S. F. R. Co., Carson v. (Kan.)	v. (Okl.)
Atchison, T. & S. F. R. Co., Lantry Con-	Bonoff, Gerardi v. (Cal.) 596
tracting Co. v. (Kan.)	Bookhout v. Vuich (Wash.) 740
Atchison, T. & S. F. R. Co., Neale v. (Cal.)1105 Atchison, T. & S. F. R. Co. v. Wagner	Borba v. De Mello (Cal. App.)
(Kan.)	Borgeson v. Tubb (Mont.)
Avery, Dodge v. (Cal. App.)	Bovier's Estate, In re (Utah) 683
Avery v. Howell (Kan.)	Rowker v Linton (Okl.) 442
Azbill v. State (Ariz.) 658	Bradley, Bricklayers', Masons' & Plaster- ers' International Union of America v.
Bachechi, Gradi v. (N. M.)	(Okl.) 440
Baker, State v., two cases (Okl.)1088	Brandes v. Superior Court in and for Santa
Balcom Mills v. Seattle (Wash.) 338	Barbara County (Cal. App.)
Balles, State v. (N. M.)	Branen, Foster v. (Cal.)
Bank of Commerce v. Webster (Okl.) 942 Bank of Commerce v. Webster (Okl.) 943	ber Co. v. (Cal.)
Barker v. Savas (Utah)	Brennan v. Hunter (Okl.)
Barnes v. Massachusetts Bonding & Ins.	Bresee v. Dunn (Cal.)
Co. (Or.)	Breuner Co., Long v. (Cal. App.)1132
Barstow-San Antonio Oil Co., Unwin v. (Cal. App.)	Brice v. State (Okl. Cr. App.) 978 Bricklayers', Masons' & Plasterers' Inter-
Bay Shoe Laundry Co. v. Industrial Acci-	national Union of America v. Bradley
dent Commission of California (Cal.	(Okl.)
App.)1128	Brodigan, Maclean v. (Nev.)
Bayside Land Co., Whiting-Mead Commercial Co. v. (Cal.)598	Brown v. Brown (Kan.)
Bean v. Rumrill (Okl.)	Brown v. Jamison (Wash.)
Beard, Harvey v. (Colo.) 420	Brown v. Jamison (Wash.)
Beck v. Lee (Utah)	Brown, Snyder Co-op. Assn v. (Oki.) 109
Becker v. Emerson-Brantingham Implement Co. (Colo.)	Brown's Estate, In re (Wash)
Becknell v. State (Okl.)	Bruce, St. Paul Machinery Mfg. Co. v.
Becknell v. State (Okl.)	(Mont.)
Beers v. Walker (Wash.)       861         Beggs, People v. (Cal.)       152	Bruen, In re (Wash.)
Beggs, People v. (Cal.)	Bruenn v. North Yakima School Dist. No. 7, Yakima County (Wash.) 569
179 D	

Digitized by Google

Page	Page
Bryan, Hamaker v. (Cal.) 391	City of Los Angeles, Union Hollywood Wa-
Bryce v. State (Okl. Cr. App.)	ter Co. v. (Cal.)
Ruffum Schrader v (Wash)	City of Muskogee, State v. (Okl.) 796
Bunch, Daniels v. (Okl.)	City of Pasco v. Pacific Coast Casualty Co.
Bundy v. Petroleum Products Co. (Kan.)1020 Buntin v. Chicago, M. & St. P. R. Co.	City of Raymond v. Willapa Power Co.
(Mont) 330	(Wash.)1176
Burkhart, Parkes v. (Wash.)	City of Reno v. Dixon (Nev.)
Butler v. Union Trust Co. (Cal.) 601	City of Roslyn, Domrese v. (Wash.) 243 City of Seattle, Balcom Mills v. (Wash.) 338
Rutte Central & Roston Copper Corp.,	City of Seattle, Balcom Mills v. (Wash.) 338
Strong v. (Mont.)1033	City of Seattle, Clark v., two cases (Wash.)
Calder's Park Co. v. Corless (Utah) 310	City of Seattle v. Rothweiler (Wash.) 825
California Gas & Electric Corp. v. Union	City of Seattle v. Washington Refining Co. (Wash.)
Trust Co. of San Francisco (Cal.) 146 Calkins v. Salina Northern R. Co. (Kan.) 20	City of Spokane v. Knight (Wash.) 823
Calkins-Rice, Hill v. (Wash.) 829	Clark, Colvin v. (Wash.)
Callahan v. Thurmond (Okl.)	Clark v. Groger (Wash.)
Campbell, Petition of (Wash.) 338	Clarkin v. Morris (Cal.) 981
Campbell v. Dick (Okl.)	Clemens Horst Co., Reynolds v. (Cal. App.)
Capitol State Bank, Southwestern Surety	Cleveland Petroleum Refining Co. v. Bonner
Ins. Co. v. (Okl.) 990	(Okl.) 639
Capitol State Bank, Western Casualty & Guaranty Ins. Co. v. (Okl.) 954	Cleveland Trinidad Pav. Co., Partee v. (Okl.)
Carkonen v. Columbia & P. S. R. Co.	Clift, State v. (Kan.)
(Wash.)	Clift, Winbigler v. (Kan.)
Carlson v. Akeyson (Colo.)	Cocannouer, Fuss v. (Okl.)1077
Carr, Hughes v. (Wash.)	Cohn, Crown Co. v. (Or.) 804
County (Okl.) 450	Cole v. Industrial Sav. Soc. (Okl.) 451 Cole, Rampton v. (Utah) 477
Corrers Ex parts (Cal. ADD.)	Colkett v. Hammond (Wash.)
Carroll, McKeown v. (Kan.)	Collins, Trimble v. (Colo.)
(Kan) 1000	of Colorado v., two cases (Colo.)1064
Case Plow Works v. Thorne (Kan.) 38 Casualty Co. of America, Peters v.	Columbia & P. S. R. Co., Carkonen v. (Wash.)
(Wash.)	(Wash.)
Cawley Co., Wichita Falls & N. W. R. Co. v. (Okl.) 70	Comanche Ice & Fuel Co. v. Binder & Hill-
C. D. Stimson Co., Hills v. (Wash.)1181	ery (Okl.)
Central California Traction Co., Ilarui v.	(Okl.) 792
Central Say, Bank, Halsted v. (Cal. App.) 613	Compton, Leslie v. (Kan.)
Central Sav. Bank, Halsted v. (Cal. App.) 614	Savings Bank v. (Cal.)
Certain Intoxicating Liquors, State v. (Utah)	Consumers' League of Colorado v. Colora-   do & S. R. Co., two cases (Colo.)1064
Chambers v. Princeton University (Cal.) 390	Cooper v. Huntington (Cal.)591
Chesley, Levi v. (Cal.)	Cooper v. State (Ariz.)
land Equitable Ins. Co. v. (Cal. App.)1122	Corless, Calder's Park Co. v. (Utah) 310 Corlett, Nebraska Inv. Co. v. (Wash.) 851
Chicago Bonding & Surety Co., Union Mach. Co. v. (Cal. App.)1118	Correa, Ex parte (Cal. App.)
Chicago, M. & St. P. R. Co., Buntin v.	Coryell v. Olmsted (Colo.)
(Mont.)	Costello v. Cunningham (Ariz.) 664
(Wash.) 810	Costello v. Gleeson (Ariz.)
Chicago, M. & St. P. R. Co. v. Poland	Cox. Huston v. (Kan.)
(Mont.)	Coyle, McFarland v. (Okl.)
Chung Sing v. Southern Pac. Co. (Cal.)1103	Craig, Gray v. (Kan.)
Church, Henriod v. (Utah)	Craig v. Salina Northern R. Co. (Kan.) 21 Crane, Oliphant v. (Okl.)
(Okl.) 924	Crane. Oliphant v. (Okl.)
Citizens' State Bank, Hahn v. (Wyo.) 705 Citizens' Trust & Savings Bank v. Tuffree	Crane Co. v. Musgrave & Blake (Wash.) 866 Crane Co. v. Naylor (Okl.) 956
(Cal.)	Cronice United Artisans v. (Or.) 109
City and County of Denver, Lindsley v.	Crooks v. Stevens County (Wash.)1158
(Colo.)	Crown Co. v. Cohn (Or.)
Loan Soc. v. (Colo.)	Cruce, Wilhite v. (Okl.)
City Council of Oakland, Rockridge Place Co. v. (Cal.)1110	Curtet, George J. Birkel Co. v. (Cal.App.) 165 Curtis v. Tillamook_City (Or.) 122
City of Butte, State v. (Mont.) 134	Cushing v. White (Wash.) 229
City of Courtland, Smith v., two cases	Cutler, Kurtz v. (Cal)
(Kan.)	Dallas v. Swigart (N. M.) 416
City of Duncan v. Brown (Okl.) 79	Daly Mining Co., Industrial Commission of Utah v. (Utah)
City of Everett v. McCulloch (Wash.) 863 City of Everett, State v. (Wash.) 752	Daniels v. Bunch (Okl.)1086
•	



Page	Page
Daniels Mercantile Co., First Nat. Bank	Edmonds v. Wilcox (Cal.)
v. (Colo.)	Edwards v. Heaton (Wash.) 839 Edwards v. Phillips (Okl.) 949
Davin v. Kansas Medical, Missionary and Benevolent Ass'n (Kan.)1002	Egelund v. Fayter (Utah)
Davis, Mohney v. (Wash.)	Elliott, Hughes Mfg. & Lumber Co. v.
Davis, Nelson v. (Wash.)	(Cal.)
(Okl.) 638	Ellis v. First Nat. Bank (Ariz.) 281
Dawkins v. Billingsley (Okl.)	Ellis, Whitaker v. (Wash.)
Day, Rockwell v. (Wash)	Embagi v. Northwestern Imp. Co. (Wash.) 834
CO. V. (OKI.)	Emerson-Brantingham Co. v. Lyons (Kan.) 513 Emerson-Brantingham Implement Co.,
De Beaumont, Florence v. (Wash.) 340 De Foe v. De Foe (Or.) 980	Becker v. (Colo.)
De Mello, Borba v. (Cal. App.)1113	Engelbrecht v. Herrington (Kan.) 715
Denison, Art Institute of Chicago v. (Colo.) 5	Evans v. Diehl (Kan.)
Denver Tramway Co. v. Lewis (Colo.)1064	
Denver Tramway Co. v. Orbach (Colo.) 1063 Denver & R. G. R. Co. v. Public Utilities	Farmer, French v. (Cal.)
Commission of Utah (Utah) 479	l Farmers' & Bankers' Life Ins. Co., Tav-
Denver & R. G. R. Co. v. Teufel (Colo.)1060 De Weese, State v. (Utah)	lor v. (Kan.)
De Weese, State v. (Utah)       290         Dewey, Berry v. (Kan.)       27         Dick, Campbell v. (Okl.)       783	(Wash.)1146
Dickinson v. Bryant (Okl.)	Farr v. Stein (Mont.)
Dickinson v. State (Okl.)	Feldman v. Feldman (Wash.)
Diehl, Evans v. (Kan.)	Fergus v. Venice Inv. Co. (Cal. App.) 396
Dietrich, Southwestern Surety Ins. Co. v. (Okl.)	Ferguson's Estate, In re (Wash.)
District Court of First Judicial Dist. in	Finney, Capital Iron Works Co. v. (Kan.) 999
and for Lewis and Clark County, State v. (Mont.)1030	First Nat. Bank v. Daniels Mercantile Co. (Colo.)
District Court of Fourteenth Judicial	First Nat. Bank, Ellis v. (Ariz.) 281
Dist. in and for Wheatland County, State v. (Mont.)	First Nat. Bank, Haines v. (Or.) 505 First Nat. Bank v. Ketchum (Okl.) 81
District Court of Second Judicial Dist. in and for Silver Bow County, State v.	First Nat. Bank, McNamee v. (Or.) 801 First Nat. Bank, P. Pastene & Co. v.
(Mont.) 539	(Ariz.) 656
District Court of Seventeenth Judicial Dist. in and for Phillips County, State	First Nat. Bank v. Shafer (Colo.)
v. (Mont.)	First Nat. Bank. Springheld Fire & Ma-
Dixon v. Southern Pac. Co. (Nev.) 368	rine Ins. Co. v. (Okl.)
Dixon & Oliver v. Parker, Moran & Parker (Wash.)	Land Co. v. (Colo.)
Doak, Waggoner Bank & Trust Co. v.	First State Bank, Scales v. (Or.) 499
(Okl.)	Fiske's Estate, In re (Cal.)
Doering, Muskogee Electric Traction Co.	Fleming, McCornack v. (Okl.)
v. (Ökl.)	Florence v. De Beaumont (Wash.) 340 Floyd, State v. (N. M.) 188
Dorsey v Dorsey (Utsh) 722	Foley v. Pier e County School Dist. No. 10 (Wash.)
Dorsey v. Dorsey (Utah)	Fontron v. Kruse (Kan.)1007
(Wash.)	Ford, State v. (Or.)
Dowell, Ex parte (Cal.App.)1121	Foster, Ex parte (Okl. Cr. App.) 980
Drach v. Leckenby (Colo.) 424 Drake v. High (Okl.) 53	Foster v. Los Angeles Trust & Savings
Drouillard v. Southern Pac. Co. (Cal.	Bank (Cal. App.)
App.)	Fox, Minneapolis Threshing Mach. Co. v. (Utah)
Duncan v. Benton & Hopkins Inv. Co.	Francis, Jastro V. (N. M.)
Duncan, State v. (Wash.) 915	Fraysier, People v. (Cal. App.)1126 Freeburn Coal Co., Courtis v. (Wash.) 860
Duncan v. Tom Poste, Inc. (Cal. App.) 163 Dunn. Bresee v. (Cal.)	Freeman, Rowe v. (Or.)
Dunn, Bresee v. (Cal.)	French v. Farmer (Cal.)
Dunn v. State (Okl. Cr. App.)	French, State v. (Wash.)
(Cal. App.)	abled v. (Cal.)
v. (Cal. App.)	F. R. Woodbury Lumber Co., Douglass v.
Eagleson, Melgard v. (Idaho) 655	(Wash.) 906 Funk, American Nat. Bank v. (Okl.) 1078
Easley v. Elmer (Wash.)	Furlong v. Tilley (Utah)
East Aberdeen Land Co. v. Grays Harbor County (Wash.)	Fuss v. Cocannouer (Okl.)1077
E. Clemens Horst Co., Reynolds v. (Cal.	Gadd, Maltbie v. (Wash.)
App.) 623 Ecuyer v. New York Life Ins. Co. (Wash.) 359	Gallatin Valley Milling Co., Scheytt v. (Mont.) 321

Pag	
Gardner, Myers v. (Kan.) 98	7 Hellman Commercial Trust & Savings Bank
Garner, Littlefield v. (Okl.)	8 v. Condon (Cal.)
Garnett Light & Fuel Co., Arnold v.	Hendrickson, Union Trust Co. v. (Okl.) 440
(Kan.)	Hendrickson, Union Trust Co. v. (Okl.) 440 Hendrix v. Hendrix (Wash.)
Garrett v. Garrett (Cal.)	7 Henriod v. Church (Utah)
Gassen, Boal v. (Cal.)	8 Herr. Gates v. (Wash.)
Gates v. Herr (Wash.)	8 Herr, Gates v. (Wash.)
Gault v. Hurd (Kan.)	Herzig v. Sandberg (Mont.) 132
Geddes, Hoglan v. (Wyo.)	Hicks, American Smelting & Refining Co.
George J. Birkel Co. v. Curtet (Cal. App.) 163	v. (Colo.)
Gerardi v. Bonoff (Cal.)	
Gibson v. New York Life Ins. Co. (Wash.) 920	Hill v. Calkins-Rice (Wash.) 829
Gill w McFarland (Week)	B Hill, People v. (Cal. App.)
Gill v. McFarland (Wash.)	Hills of D. Stimes Co. (Week)
Gleeson, Costello v. (Ariz.)	Hills v. C. D. Stimson Co. (Wash.)1181
Chadian Darkardi (N. M.)	Hinton v. Trout (Okl.)
Gradi v. Bachechi (N. M.)	Hinton, Walker v. (Okl.)
Graff v. United Railroads of San Francisco	Hirsh v. Ogden Furniture & Carpet Co.
(Cal.) 603	(Utah)
Graham, Moller_v. (Wash.) 226	s inite. State v. (N. M.)
Gray v. Craig (Kan.)	Hoffman v. M. Gottstein Inv. Co. (Wash.) 573
Gray, Koehler v. (Kan.)	5   Hoffman, Ogden v. (Or.)
Gravs Harbor County, East Aberdeen	Hoffman Bros. Inv. Co. v. Porter (Okl.) 632
Land Co. v. (Wash.) 876	Hoglan v. Geddes (Wyo.)
Great Falls Town-Site Co. v. Kowell, two	Holden v. State (Okl. Cr. App.) 977
cases (Mont.)	
Great Northern R. Co., Schommers v.	Holloway, Williamson v. (Okl.) 44
(Wash.)	1771 ~ 37
(Wash.) 848 Great Northern R. Co., State v. (Wash.) 546	Co. (Cal. App.)
Great Western Mfg. Co. v. Porter (Kan.) 1018	Home Telephone & Telegraph Co. of Spo-
Green v. Bouton (Wash.)	
Greene v. Locke-Paddon Co. (Cal. App.) 168	
Gress v. Wessinger (Or.)	Honking w Craib (Wesh) 201
Grey, Knights and Ladies of Security v.	Hopkins v. Craib (Wash.)
(Okl.) 933	Hopkins, Sevier v. (Wash.) 550 Hornburg, Price v. (Wash.) 575
Gridley, Sugg v. (Wash.)	Tracking Mantage Coal & Jan. Co. 140
Griffith v. Washington Water Power Co.	Hoskins, Montana Coal & Iron Co. v. (Or.) 118
(Wash.) 822	Hoskinson, Nelson v. (Kan.)
Groger, Clark v. (Wash.)1164	Hotaling & Co. v. Hamilton (Cal. App.) 393
Guaranty State Bank, Mitchell v. (Okl.) 47	I Hotelikin v. McNaught-Comins 1mb. Co.
Guardianship of Bayer's Estate, In re	(Wash.)
(Wash.) 842	rioughton v. Hoy (Wash.)1148
Gumpel v. San Diego Electric R. Co. (Cal.) 605	Hover-Schiffner Co., Hatch v. (Wash.) 817
Gwinnup v. Walton Trust Co. (Okl.) 936	Howell, Avery v. (Kan.)
Gypsy Oil Co., Withington v. (Okl.) 634	Hoy, Houghton v. (Wash.)
TOP TO COMPANY TO THE TOP TO COMPANY TO COMP	
Hagen Olean w (Week) 1179	Hubbard v. Tacoma Eastern R. Co.
Hagan, Olsen v. (Wash.)	(Wash.) 222
Hagbery, White v. (Mont.)	Hudson, Riddle v Okl.)
Hahn v. Citizens' State Bank (Wyo.) 715	Hughes v. Carr (Wash.)
Haight v. Stewart (Cal. App.) 769	Hughes Mig. & Lumber Co. v. Elliott
Haines v. First Nat. Bank (Or.) 505	(Cal.)
Halsted v. Central Sav. Bank (Cal. App.) 613	Hunt. Benton v. (Cal. App.) 177
Halsted v. Central Sav. Bank (Cal. App.) 614	Hunt, Levin v. (Okl.)
Halsted v. First Sav. Bank (Cal. App.) 613	Hunter, Brennan v. (Okl.) 49
Halsted v. Oakland Bank of Savings (Cal.	Huntington, Cooper v. (Cal.) 591
App.) 614	Huntington v. Vavra (Cal. App.) 166
Hamaker v. Bryan (Cal.)	Hurd, Gault v. (Kan.)
Hamilton, A. P. Hotaling & Co. v. (Cal.	Hurlburt, Kenney v. (Or.)
App.) 393	Hurn, State v. (Wash.)
Hamilton Nat. Bank, Snyder v. (Colo.)1069	Huston v. Cox (Kan.) 992
Hamm, Ex parte (N. M.)	
Hammond, Colkett v. (Wash.) 548	Ilardi v. Central California Traction Co.
Hammond Lumber Co. v. Brawley Co-op.	(Cal. App.)
Bldg. Co. (Cal.)	Imus, McDonald v. (Wash.)
Hammond Lumber Co. v. Kearsley (Cal.	Incorporated Town of Comanche v. Works
App.)	(Okl.)
Hamp v. Pend Oreille County (Wash.) 869	Independence Gas Co., State v., two cases
Harkins v. State (Okl. Cr. App.) 469	(Kan.) 713
Harley, McNally v. (Okl.)	Industrial Accident Commission, Moore &
Harney, Interested Building & Loon Co	Scott Iron Works v. (Cal. App.)1114
Harn v. Interstate Building & Loan Co.	Industrial Accident Commission, Shell Co.
(Okl.)	of California v. (Cal. App.) 611
Harrah, Ostran v. (Okl.)	
Hart, Ex parte (Cal. App.)	Industrial Accident Commission of California, Bay Shore Laundry Co. v. (Cal.
Hartford v. Stout (Wash.)	Ann ) 1190
Hartog, Turner v. (Or.)	App.)
Harvey v. Beard (Colo.)	Industrial Commission of Colorado v.
H. A. Seinsheimer & Co. v. Jacobson (N.	Johnson (Colo.)
_M.)1042	Industrial Commission of Utah v. Daly
Hastings v. Hastings (Wash.) 833	Mining Co. (Utah)
Hatch v. Hover-Schiffner Co. (Wash.) 817	Industrial Ins. Commission, Kline v.
Hay, State v. (Utah)	(Wash.) 343
Heaton, Edwards v. (Wash.) 839	Industrial Ins. Department, Parker v.
Heber v. Portland Gold Mining Co. (Colo.) 12 (	(Wash.) 830
Hebrew Home for Aged Disabled v. Fried-	Industrial Sav. Soc., Cole v. (Okl.) 451
140	Ingle Mfg Co w Scales (Cal Ann ) 169

Page	r Page
Interstate Building & Loan Co., Harn v.	Koehler v. Gray (Kan.)
(Okl.)	Kowell, Great Falls Town-Site Co. v., two
Iowa Nat. Bank v. Citizens' Nat. Bank	cases (Mont.)
(Okl.) 924	Kramer v. Walters (Kan.)
Irwin v. J. K. Lumber Co. (Wash.) 911	Kruse, Fontron v. (Kan.)
Island Gun Club v. National Surety Co.	Kuchenmeister v. Los Angeles & S. L. R.
(Wash.) 209	Co. (Utah)
	Kunz v. Allen (Kan.)
Jackson, Berryhill v. (Okl.) 787	Kurtz v. Cutler (Cal.) 590
Jacobson, H. A. Seinsheimer & Co. v.	T
(N. M.)	Laclede Oil & Gas Co. v. Miller (Okl.) 84
James McCord Co. v. Johnson Grocery Co.	Landrum v. Ramer (Colo.)
(Okl.)	Langford, Longest v. (Okl.) 927
Jamison, Brown v. (Wash.)	Lanigan v. Miles (Wash.)
Jastro V. Francis (N. M.)	Lanterman v. Anderson (Cal. App.) 625
Jefferson, Linsey v. (Okl.)	Lantry Contracting Co. v. Atchison, T. &
Jepson's Estate, In re (Cal.)	S. F. R. Co. (Kan.)
Jesus Maria Rancho v. Southern Pac. Co. (Cal. App.)	Larue v. Farmers' & Mechanics' Bank
J. I. Case Plow Works v. Thorne (Kan.) 38	(Wash.)
J. I. Case Plow Works v. Thorne (Kan.) 38 J. K. Lumber Co., Irwin v. (Wash.) 911	Lebrecht v. State (Okl.)
J. M. Dunn Auto Co., S. C. Smith Estate	Lee, Beck v. (Utah)
v. (Cal. App.)415	Lec, People v. (Cal. App.)
John Breuner Co., Long v. (Cal. App.)1132	Lee, Ross v. (Okl.) 444
Johnson v. Bloedel (Wash.)	Leslie v. Compton (Kan.)1015
Johnson, Industrial Commission of Colo-	Letcher v. Maloney (Okl.) 972
rado v. (Colo.)	Levi. v. Chesley (Cal.)
Johnson, State v. (N. M.)	Levin v. Hunt (Okl.) 940
Johnson, State v. (N. M.)	Levin v. Hunt (Okl.)
v. (Okl.)	Lewis, Salina City v. (Utah) 286
Johnston v. Murnhy (Cal App.) 616	Lillard v. Board of Com'rs of Johnson
Jolly v. McCoy (Cal. App.) 618	County (Kan.)
Jones v. Chicago, M. & St. P. R. Co.	Lima, People v. (Cal. App.)
(Wash.)	Lincoln, Little-Wetzel Co. v. (Wash.) 746
Jones v. Smyth (Okl.)	Lindsley v. Denver (Colo.) 707
Jones' Estate, In re (Cal.) 979	Linsey v. Jefferson (Okl.) 641
Jones' Estate, In re (Wash.) 206	Linton, Bowker v. (Okl.)
Joseph, Wilson v. (Wash.)	Littlefield v. Brown (Okl.) 643
Judkins, Morris v. (Cal. App.) 163	Littlefield v. Garner (Okl.)
Justice's Court of Goldfield Tp., Esmeral-	
da County, Mazade v. (Nev.) 378	Lobbett & Dean v. Oakland, A. & E. Ry.
	Cal. App.)1123
Kahlotus Grain & Supply Co. v. Blair	Locke, Chicago, R. I. & P. R. Co. v. (Okl.) 52
(Wash.) 818	Locke-Paddon Co., Greene v. (Cal. App.) 168
Kansas City Cotton Mills Co., Blanton v.	Lombard v. Uhrich (Kan.)
(Kan.)	Long v. John Breuner Co. (Cal. App.)1132
Kansas City Cotton Mills Co., Lubek v.	Longest v. Langford (Okl.) 927
(Kan.) 987	Los Angeles Trust & Savings Bank, Foster v. (Cal. App.)
Kansas Medical, Missionary & Benevolent	
Ass'n, Davin v. (Kan.)	Los Angeles & S. L. R. Co., Kuchenmeister v. (Utah)
Katzenberger, Prophet v. (Cal. App.) 775	Los Angeles & S. L. R. Co. v. Richards
Kearsley, Hammond Lumber Co. v. (Cal.	(Utah)
App.)	Lowe v. Lowe (Cal.)
Keegan, Stevens v. (Kan.)1025	Lowe's Estate, In re (Cal.)
Keiper v. Pacific Gas & Electric Co.	Lubek v. Kansas City Cotton Mills Co.
(Cal Ann)	(Kan) 987
Kelley, Siegley v. (Wash.)	Lucas v. King (Okl.)
Kelley v. Smith (Wash.)	Lusk v. Ricks (Okl.)
Kelly, State v. (Wash.)	Lusk v. Wilkes (Okl.)
Kenney v. Hurlburt (Or.)	Lynch v. Union Pac. R. Co. (Colo.)1061
Ketchum, First Nat. Bank v. (Okl.) 81	Lyons, Emerson-Brantingham Co. v.
Keyes v. Sabin (Wash.) 835	(Kan.) 513
Kibby v. Binion (Okl.)	Lyons, Tacoma Ass'n of Credit Men v.
Kies v. Wilkinson (Wash.)	(Wash.) 823
Kilgore v. Rowland (Okl.)	Lytle v. Ramp (Or.) 503
King v. Antrim Lumber Co. (Okl.) 958	16-O-11 O-14h = (O-1 A)
King, Lucas v. (Okl.)	McCallum, Smith v. (Cal. App.) 408
King V. People (Colo.)	McCord Co. v. Johnson Grocery Co. (Okl.) 438
King, Schwartz v. (Colo.)	McCornack v. Fleming (Okl.) 952
King, Southwestern Surety Ins. Co. v.	McCoy, Jolly v. (Cal. App.)       618         McCoy, Tietjen v. (N. M.)       1042         McCoy, Tietjen v. (N. M.)       1144
(Okl.)	McCov Tietien v (N. M.)
Linsey v. Pacific Mut. Life Ins. Co. of Cal-	McCulloch, City of Everett v. (Wash.) 863
ifornia (Cal.)1098	McCurtain, State v. (Utah)
Kittitas County, Robinson v. (Wash.) 553	McDermott v. Tolt Land Co. (Wash.) 207
Kline v. Industrial Ins. Commission	McDonald v. Imus (Wash.)
(Wash.)	McDorman v. Dunn (Wash.)
Knight, City of Spokane v. (Wash.) 823	McFarland v. Coyle (Okl.)
Knight v. Cossitt (Kan.)	McFarland, Gill v. (Wash.)
Knight v. Southern Pac. Co. (Utah) 689	McFarland, Gill v. (Wash.)
Knights and Ladies of Security v. Grey	Machado v. Machado (Cal. App.)1124
(Okl.)	McInnis v. Day Lumber Co. (Wash.) 844
Knights and Ladies of Security, Robinson	McIntosh v. Reason (Okl.)
v. (Or.)	McKeown v. Carroll (Kan.) 525

Page (	Page
Maclean v. Brodigan (Nev.) 375	New England Equitable Ins. Co. v. Chicago
McNally v. Harley (Okl.) 46	Bonding & Surety Co. (Cal. App.)1122 New England Equitable Ins. Co., Wasco
McNamee v. First Nat. Bank (Or.) 801 McNaught-Collins Imp. Co., Hotchkin v.	New England Equitable Ins. Co., Wasco County v. (Or.)
(Wash.)	County v. (Or.)
(Wash.)	(Wash.)
Maier, Southern California Iron & Steel	New York Life Ins. Co., Askey v. (Wash.) 887
Co. v. (Cal. App.)	New York Life Ins. Co., Ecuyer v.
Maloney, Letcher v. (Okl.) 972	(Wash.) 350
Maltbie v. Gadd (Wash)	New York Life Ins. Co., Gibson v. (Wash.) 920
Mana, Ex parte (Cal.) 986	New York Life Ins. Co., Skala v. (N. M.)1046
Mann v. Marshfield (Or.)	Nichols, Arnold v. (Wyo.)
Manney, Union Savings & Trust Co. of Se-	Nichols' Estate, In re (Wash.)1146 Noell, Muirheid v. (Okl.)435
attle v. (Wash.)	North v. Hooker (Okl.)
Maricopa County, Yuma County v. (Ariz.) 276	Northern Pac. R. Co., Rosenbaum v.
Marsh, Ramish v. (Cal.)1100	(Wash.) 238
Marsh v. Votaw (Kan.)	Northern Pac. R. Co. v. Snohomish Coun-
Marshall v. Sitton (Okl.) 964	ty (Wash.)
Marshall-Wells Hardware Co., Vogt v. (Or.) 123	Northern Pac. R. Co., Tacoma Mill Co. v. (Wash.)
Martin, State v. (Wash.)	Northwestern Imp. Co., Embagi v.
Massachusetts Bonding & Ins. Co., Barnes	(Wash.)
v. (Or.) 95	North Yakima School Dist. No. 7. Ya-
Maxey v. Board of Sup'rs of Yuma County	kima County, Bruenn v. (Wash.) 569
(Ariz.)	Nulse v. Peterson (Wash.)
Mazade v. Justices' Court of Goldfield Tp.,	Nut House, The, v. Pacific Oil Mills (Wash.) 841
Esmeralda County (Nev.)	(11484.)
Melgard v. Eagleson (Idaho)	Oakland, A. & E. Ry., Lobbett & Dean v.
Mentze v. Rice (Kan.)	(Cal. App.)
M. Gottstein Inv. Co., Hoffman v. (Wash.) 573	Oakland Bank of Savings, Halsted v. (Cal.
Midland Casualty Co. v. Anderson (Colo.) 1067	App.)
Miles, Lanigan v. (Wash.)	Oechsli, Roberts v. (Mont.)
Miller v. Miller (Kan.)	Ogden Furniture & Carpet Co., Hirsh v.
Miller v. Reeves (Wash.)	(Utah)
Millikin, Thompson v. (Kan.) 534	O'Hare's Estate, in re (Cal.) 385
Mills v. Title Guaranty & Surety Co.	Oklahoma State Bank v. Airington (Okl.) 462
(Wash.) 248	Oliphant v. Crane (Okl.)
Minneapolis Threshing Mach. Co. v. Fox	Olmsted, Coryell v. (Colo.)
(Utah)	Olsen v. Hagan (Wash.)
(Kan.) 17	One Cadillac Automobile v. State (Okl.) 62
Missouri, K. & T. R. Co. v. Public Utili-	One Moon Automobile v. State (Okl.) 66
ties Commission (Kan.)	O'Neill v. Mutual Life Ins. Co. of New York (Utah)
Mitchell v. Guaranty State Bank (Okl.) 47 Mitchell, Phillips v. (Okl.) 85	One Packard Autombile, State v. (Okl.) 66
Mohney v. Davis (Wash.)	Orbach, Denver Tramway Co. v. (Colo.)1063
Moller v. Graham (Wash.)	Oregon Home Builders v. Eisman (Or.) 114
Montana Coal & Iron Co. v. Hoskins (Or.) 118	Oregon Surety & Casualty Co., Yett v.
Moore & Scott Iron Works v. Industrial	Orient Ins. Co., Schwabacher Bros. & Co.
Accident Commission (Cal. App.)	v. (Wash.)
Morris, Clarkin v. (Cal.)	Osborn v. Osborn (Kan.) 23
Morris v. Judkins (Cal. App.) 163	Oshorne v. Oshorne (N. M.)
Morrison, Daraveleas v. (Wash.) 814	Ostran v. Bond (Okl.)
Moss, State v. (N. M.)	Ostran v. Harrah (Okl.)
Muirheid v. Noell (Okl.)	Owens, induces v. (wash.)
Mulryan, Stevens v. (Kan.)1025	Pace v. Pace (Okl.)
Murphy, Johnston v. (Cal. App.) 616	Pacific Coast Casualty Co., City of Pasco
Murphy, State v. (Wash.)	v. (Wash.)
Musgrave & Blake, Crane Co. v. (Wash.) 866 Muskogee Electric Traction Co. v. Doer-	Pacific Gas & Electric Co., Keiper v. (Cal.
ing (Okl.)	App.)
Musselman, State v. (Wash.)	Kinsey v. (Cal.)
Mutual Life Ins. Co. of New York, O'Neill	Pacific Oil Mills, Nut House, The, v.
v. (Utah)	(Wash.) 841
Myers v. Gardner (Kan.) 987	Pacific Wall Paper & Paint Co., State v. (Nev.)
Nakata, Appeal of (Wash.)	Palmer, Strickland v. (Okl.) 932
Narver, Allen v. (Cal.)	Pantages, Sharpless v. (Cal.) 384
Nathan v. Porter (Cal. App.) 170	Parker v. Industrial Ins. Department
National Surety Co v American Sov	(Wash.) 830
Bank & Trust Co. (Wash.)	Parker, Moran & Parker, Dixon & Oliver v. (Wash.)856
National Surety Co., Island Gun Club v. (Wash.)	
Navlor, Crane Co. v. (Okl.) 956	Parkes v. Burkhart (Wash.)
Neale v. Atchison, T. & S. F. R. Co. (Cal.)1105	Partee v. Cleveland Trinidad Pav. Co.
Nebraska Inv. Co. v. Corlett (Wash.) 851	(Okl.) 948
Neilsen, Salina City v. (Utah) 290	Partridge v. Richmond (Cal. App.) 166
Nelson v. Davis (Wash	Pastene & Co. v. First Nat. Bank (Ariz.) 656
Nelson v. Hoskinson (Kan.)	Patten & Davies Lumber Co. v. Durfling-

Page	Page
Payne, State v. (Okl. Cr. App.)1096	Roberts v. Stiltner (Wash.)
Payne, State v. (Okl. Cr. App.)1098	Robinson v. Kittitas County (Wash.) 553
Peebler, Thomas v. (Or.)	Robinson v. Knights and Ladies of Security (Or.)
People v. Beggs (Cal.)	Rockridge Place Co. v. City Council of
People v. Fraysier (Cal. App.)1126 People v. Hill (Cal. App.)1114	Oakland (Cal.)
People, King v. (Colo.)	Rockwell v. Day (Wash.)
People v. Lee (Cal. App.)	(Wash.)
People. Scott v. (Colo.) 9	Ross v. Wertz (Okl.) 968
People v. Shaw (Cal. App.)         401           People v. Webster (Cal. App.)         768	Rothweiler, City of Seattle v. (Wash.) 825
People v. Webster (Cal. App.)1116	Rowe v. Freeman (Or.)
Peters v. Casualty Co. of America (Wash.) 220	Rubens v. Rubens (Wash.)         831           Rucker v. Allendorph (Kan.)         524
Peters' Estate, In re (Wash.)	Rumrill, Bean v. (Okl.)
Petroleum Products Co., Bundy v. (Kan.) 1020	Rushton v. Reeve (Cal.) 608
Philips & Co. v. Newoc Co. (Wash.) 355 Phillips, Edwards v. (Okl.) 949	Rust v. Washington Tool & Hardware Co. (Wash.)
Phillips v. Mitchell (Okl.)	
Phillips v. Springer (Kan.)	Sabin, Keyes v. (Wash.)
v. (Wash.)	(Okl.) 637
Piluso v Spanear (Cal App.)	St. Paul Machinery Mfg. Co. v. Bruce (Mont.)
Piluso v. Spencer (Cal. App.)	Salina City v. Lewis (Utah)
Poland, Chicago, M. & St. P. R. Co. v.	Salina City v. Neilsen (Utah)
(Mont.)	Salina Northern R. Co., Craig v. (Kan.) 21
Porter, Hoffman Bros. Inv. Co. v. (Okl.) 632	Salisbury v. Poulson (Utah) 315
Porter, Nathan v. (Cal. App.)	Salt Lake & O. R. Co., Williamson v. (Utah)
Postal Talegraph, Cable Co. of Washington.	Sandberg, Herzig v. (Mont.) 132
State v. (Wash.)	San Diego Electric R. Co., Gumpel v. (Cal.)
Pottawatomie County v. Alexander (Okl.) 436 Poulson, Salisbury v. (Utah) 315	Sargent v. Shaver (Okl.)
Powell v. Adler (Okl.)	Savas, Barker v. (Utah)
P. Pastene & Co. v. First Nat. Bank	Scales, Ingle Mfg. Co. v. (Cal. App.) 169
(Ariz.)	Scheytt v. Gallatin Valley Milling Co.   (Mont.) 321
Price v. Hornburg (Wash.)	Schommers v. Great Northern R. Co.
Princeton University, Chambers v. (Cal.) 390 Proctor & Gamble Mfg. Co., Minturn v.	(Wash.) 848 School Dist. No. 51, Noble County, Rivers
(Kan.)	v, (Okl.) 778
Prophet v. Katzenberger (Cal. App.) 775 Provident Loan Soc. v. Denver (Colo.) 10	Schrader v. Buffum (Wash.)
Pruett. State v. (N. M.)	Schwabacher Bros. & Co. v. Orient Ins.
Public Service Commission of Washington, State v. (Wash.)	Co. (Wash.)
Public Utilities Commission, Missouri, K.	Schwitalla. Ex parte (Cal. App.) 617
& T. R. Co. v. (Kan.)	Scott v. People (Colo.) 9 Scott, State v. (Wash.) 234
ver & R. G. R. Co. v. (Utah) 479	S. C. Smith Estate v. J. M. Dunn Auto Co.
Rainbolt, Ex parte (Colo.)1068	(Cal. App.)
Raithel, State v. (N. M.)	Seny, Board of Education of City of Ros- well v. (N. M.)
Ramish v. Marsh (Cal.)	Seingheimer & Co. v. Jacobson (N. M.)1042
Ramp, Lytle v. (Or.)         503           Rampton v. Cole (Utah)         477	Severy State Bank v. Hoyt (Kan.) 994 Sevier v. Hopkins (Wash.) 550
Reason, McIntosh v. (Okl.) 446	Shafer, Amundson v. (Cal. App.) 173
Reed v. Reed (Cal.)	Shafer, First Nat. Bank v. (Colo.) 1 Sharpless v. Pantages (Cal.) 384
Reeves, Miller v. (Wash.)	Shaver, Sargent v. (Okl.)
Referendum Petition No. 31, In re (Okl.) 639	Shaver, Sargent v. (Okl.)       445         Shaw, People v. (Cal. App.)       401         Sheek v. State (Ariz.)       662
Rentie v. Rentie (Okl.)	Shell Co. of California v. Industrial Acci-
App.)	dent Commission (Cal. App.) 611 Shilshole Ave. in City of Seattle, In re
Rhodes v. Owens (Wash.)	(Wesh) 338
Rich, Elliott v. (N. M.)	Shirey, Dourte v. (Colo.)
Rich v. Roberts (Kan.)	(Mont.) 324
(Utah)	Shuttee v. Coalgate Grain Co. (Okl.) 780 Siegley v. Kelley (Wash.) 203
Woldson v. (Wash.)1162	Sitton, Marshall v. (Okl.) 964
Richvale Land Co., Ewing v. (Cal. App.) 645 Ricks, Lusk v. (Okl.)	Skala v. New York Life Ins. Co. (N. M.) 1046 Skinner v. Weaver (Kan.)
Riddle v. Hudson (Okl.)	Smeltzer v. Webb (Wash.)
Rivers v. School Dist. No. 51, Noble County (Okl.)	Smith v. Courtland, two cases (Kan.)1027 Smith v. Fenner (Kan.)
Roberts v. Oechsli (Mont.)	Smith. Kelley v. (Wash.) 542
Roperts, Kich v. (Kan.) 996	Smith v. McCallum (Cal. App.) 408

Page :	Page
Smith v. Parman (Kan.)	State v. Great Northern R. Co. (Wash.) 546
Smith Estate v. J. M. Dunn Auto Co. (Cal.	State, Harkins v. (Okl. Cr. App.) 469
App.) 415	State v. Hay (Utah)
Smyth, Jones v. (Okl.)	State v. Hite (N. M.)
Snohomish County, Northern Pac. R. Co.	State, Holden v. (Okl. Cr. App.) 977
v. (Wash.)	State, Holden v. (Okl. Cr. App.) 978
Snohomish Logging Co., Thayer v.	State v. Home Telephone & Telegraph Co.
(Wash.)	of Spokane (Wash.)
Snook, Warner v. (Kan.)	State v. Hurn (Wash.)
Holmes v. (Cal. App.)	State v. Independence Gas Co., two cases
Snyder v. Hamilton Nat. Bank (Colo.)1069	(Kan.)
Snyder, State v. (Nev.)	State, Keddington v. (Ariz.)
Snyder Co-op. Ass'n v. Brown (Okl.) 789	State v. Kelly (Wash.)
Soper v. Dominguez (Cal.)	State, Lebrecht v. (Okl.)65
Southern California Iron & Steel Co. v.	State v. McCurtain (Utah)
Maier (Cal. App.)	State v. McFarlin (Nev.) 371
Southern Pac. Co., Bliss v. (Cal. App.) 760	State v. Martin (Wash.) 349
Southern Pac. Co., Chung Sing v. (Cal.)1103	State, Meigs v. (Okl. Cr. App.) 974
Southern Pac. Co., Dixon v. (Nev.) 368	State, Morgan v., two cases (Okl. Cr. App.) 974
Southern Pac. Co., Drouillard v. (Cal.	State v. Moss (N. M.)
App.)	State v. Murphy (Wash.)
v. (Cal. App.)	State v. Muskogee (Okl.)
	State v. Musselman (Wash.) 346
Southern Pac. Co., Knight v. (Utah) 689 Southern Pac. Co., Stool v. (Or.) 101	State, One Cadillac Automobile v. (Okl.) 62   State, One Moon Automobile v. (Okl.) 66
Southwestern Surety Ins. Co. v. Capitol	State v. One Packard Automobile (Okl.) 68
State Bank (Okl.)	State v. Pacific Wall Paper & Paint Co.
Southwestern Surety Ins. Co. v. Dietrich	(Nev.)
(Okl.) 51	State v. Payne (Okl. Cr. App.)1096
Southwestern Surety Ins. Co. v. King	State v. Payne (Okl. Cr. App.)1098
(Okl.)	State v. Pierson (Wash.)
Spark's Estate, In re (Wash.) 545	State v. Postal Telegraph-Cable Co. of
Spencer, Piluso v. (Cal. App.)	Washington (Wash.)
Spokane International R. Co., Armstrong	State v. Public Service Commission of
v. (Wash.) 578	Washington (Wash.)
Spokane Pav. & Const. Co., Aberdeen	State v. Raithel (N. M.)
State Bank v. (Wash.)	State v. Scott (Wash.)
Spokane Taxicab Co. v. White (Wash.) 233	State, Sheek v. (Ariz.)
Spokane & I. R. Co., French v. (Wash.)1159 Springer, Phillips v. (Kan.)1017	State v. Snyder (Nev.)
Springfield Fire & Marine Ins. Co. v. First	State, State Nat. Bank v. (Okl.)1073
Nat. Bank (Okl.)	State v. Superior Court for King County (Wash.)
Stanley, City of Cushing v. (Okl.) 628	
Stanton v. Zercher (Wash.) 559	State v. Superior Court for King County (Wash.)
State, Azbill v. (Ariz.)	State v. Superior Court of Pierce County
State v. Baker, two cases (Okl.)1088	(Wash.)
State v. Balles (N. M.)	State v. Superior Court of Washington for
State v. Behringer (Ariz.)	King County (Wash.)
State v. Bell (Wash.)	State v. Taylor (Wash.)
State v. Bond (Nev.)	State v. Thomas (Wash.)
State, Brice v. (Okl. Cr. App.)	State v. Van Vlack (Wash.) 563
State, Brown v. (Okl. Cr. App.)1098	State, Vaughan v. (Okl. Cr. App.) 975 State v. Wallace (Wash.) 581
State, Bryce v. (Okl. Cr. App.) 976	State, Westbrook v. (Okl. Cr. App.) 464
State v. Butte (Mont.)	State v. West Pub. Co. (Utah)
State v. Certain Intoxicating Liquors (Utah)1050	State v. Wheeler (Wash.)
State v. Clift (Kan.)	State v. Will (Kan.)1003
State, Cooper v. (Ariz.)	State v. Wilson (Kan.) 41
State v. De Weese (Utah) 290	State Industrial Commission, Davis v.
State, Dickinson v. (Okl.)	(Ukl.)
State, Dickinson v. (Okl.)	State Nat. Bank v. State (Okl.)1073
State v. District Court of First Judicial	Stein, Farr v. (Mont.)
Dist. in and for Lewis and Clark County (Mont.)	Stevens v. Keegan (Kan.)
(Mont.)	Stevens v. Mulryan (Kan.)
Dist. in and for Silver Bow County	Stevens County, Crooks v. (Wash.)1158
(Mont.) 539	Stewart, Haight v. (Cal. App.) 769
State v. District Court of Fourteenth Judi-	Stiltner. Roberts v. (Wash.) 738
cial Dist. in and for Wheatland County	Stimson Co., Hills v. (Wash.)       1181         Stoll, Verdier v. (Cal. App.)       1127
(Mont.)	Stoll, Verdier v. (Cal. App.)
State v. District Court of Seventeenth Ju-	Stout, Hartford v. (Wash.)1168
dicial Dist. in and for Phillips County	Stow v. Superior Court of California in and
(Mont.)	for Alameda County (Cal.)
State v. Duncan (Wash.) 915	Strickland v. Palmer (Okl.) 932
State. Dunn v. (Okl. Cr. App.) 463	Strom, Petition of (Wash.) 247
State v. Everett (Wash.)	Strong v. Butte Central & Boston Copper
State v. Farmers' State Bank (Mont.) 130	Corp. (Mont.)
State v. Field (N. M.)       1136         State v. Floyd (N. M.)       188	Stults, Toner v. (Wash.)
State v. Ford (Or)	Superior Court for King County, State v.
*:*****	makering countries and areas, court is any



Page ;	Page
Superior Court in and for Santa Barbara	Vavra, Huntington v. (Cal. App.) 166
County, Brandes v. (Cal. App.)1130 Superior Court of California in and for	Vawter, Zane v. (Kan.)
Superior Court of California in and for Alameda County, Stow v. (Cal.) 598 Superior Court of King County, State v.	Venice Inv. Co., Fergus v. (Cal. App.) 396 Verdier v. Stoll (Cal. App.)1127 Vogt v. Marshall-Wells Hardware Co.
(Wash.)	(Or.) 123
v. (Wash.)	Von Marcard, Flood v. (Wash.) 884 Votaw, Marsh v. (Kan.) 30
Superior Court of Washington for King County, State v. (Wash.)	Vuich, Bookhout v. (Wash.) 740
Susman v. loung Men's Christian Ass'n	Waddell, In re (Mont.)1036
of Seattle (Wash.)	Waggoner Bank & Trust Co. v. Doak (Okl.)
Swigart, Dallas v. (N. M.) 416	Wagner, Atchison, T. & S. F. R. Co. v.
Tacoma Ass'n of Credit Men v. Lyons	(Kan.) 519 Wah-Tsa-e-o-she v. Webster (Okl.) 78
(Wash.)	Walker, Beers v. (Wash.)
(Wash.) 222	Wallace, State v. (Wash.) 581
Tacoma Mill Co. v. Northern Pac. R. Co. (Wash.)	Walsh v. Alaska S. S. Co. (Wash.)
Taylor v. Farmers' & Bankers' Life Ins. Co. (Kan.)	Walters v. United Grocery Co. (Utah) 473
Taylor, State v. (Wash.)	Walton Trust Co., Gwinnup v. (Okl.) 936 Warner v. Snook (Kan.) 521
Teufel, Denver & R. G. R. Co. v. (Colo.) 1060 Thayer v. Snohomish Logging Co. (Wash.) 552	Wasco County v. New England Equitable Ins. Co. (Or.)
Thomas, Nelson v. (Cal.App.)	Washburn v. Board of Com'rs of Shawnee
Thomas, State v. (Wash.) 650	County (Kan.)
Thompson v. Millikin (Kan.)	v. (Wash.)1161 Washington Tool & Hardware Co., Rust
Thorne, J. I. Case Plow Works v. (Kan.) 38 Thourot's Estate, In re (Utah) 697	v. (Wash.)
Thurmond, Callahan v. (Okl.)	_(Wash.) 822
Tilley, Furlong v. (Utah)	Waters of Umatilla River, In re (Or.) 97 Watkins, Turner v. (Cal. App.) 620
Tipton, Worthington v. (N. M.)	Watkins, Turner v. (Cal. App.)       620         Weaver, Skinner v. (Kan.)       1024         Webb, Smeltzer v. (Wash.)       750
Tietjen v. McCoy (N. M.)	Webster, Bank of Commerce v. (Okl.) 942
Title Guaranty & Surety Co., Mills v. (Wash.)	Webster, Bank of Commerce v. (Okl.) 943 Webster, People v. (Cal. App.) 768
Tolleson, Berry v. (Okl.)	Webster, People v. (Cal. App.)
Tom Poste, Inc., Duncan v. (Cal. App.) 163 Town of Calistoga v. Adams (Cal. App.) 624	Wells, In re (Cal. App.)
Trimble v. Collins (Colo.)	Wertz, Ross v. (Okl.)
Trout, Hinton v. (Okl.)	Westbrook v. State (Okl. Cr. App.) 464 Western Casualty & Guaranty Ins. Co. v.
Tuffree, Citizens' Trust & Savings Bank v. (Cal.)	Capitol State Bank (Okl.)
Turner, Comanche Light & Power Co. v.	Nat. Bank (Colo.)
(Okl.)	Nat. Bank (Colo.)       6         Western Union Tel. Co., Bentley v.       1172         (Wash.)       1172
Turner v. Watkins (Cal. App.)	West Pub. Co., State v. (Utah) 678
Tyler v. Bier (Or.)	Wheeler, State v. (Wash.)
Tyner v. Stults (Wash.)	White, Cushing v. (Wash.)
Uhrich, Lombard v. (Kan.)	White v. Hagbery (Mont.)
les (Cal.)	Whitefield, St. Louis & S. F. R. Co. v. (Okl.)
Surety Co. (Cal. App.)	Whiting-Mead Commercial Co. v. Bayside Land Co. (Cal.)
Union Pac. R. Co., Lynch v. (Colo.)1061 Union Savings & Trust Co. of Scattle v.	Wichita Falls & N. W. R. Co. v. D. Caw-
Manney (Wash.)	ley Co. (Okl.)
Union State Bank v. Mueller (Okl.) 650 Union Traction Co., Thompson v. (Kan.) 990	Wilcox, Edmonds v. (Cal.) 398 Wilcox, Edmonds v. (Cal.) 1101
Union Trust Co., Butler v. (Cal.) 601 Union Trust Co. v. Hendrickson (Okl.) 440	Wilhite v. Cruce (Okl.)
Union Trust Co. of San Francisco, Cali-	Wilkinson, Kies v. (Wash.) 351
fornia Gas & Electric Corp. v. (Cal.) 146 United Artisans v. Cronise (Or.) 109	Will, State v. (Kan.)
United Grocery Co., Walters v. (Utah) 473 United Railroads of San Francisco, Graff	(Wash.)
v. (Cal.)	Williams v. Youtz (Cal.)
(Mont.) 324	Williamson v. Holloway (Okl.) 44 Williamson v. Salt Lake & O. R. Co.
Unwin v. Barstow-San Antonio Oil Co. (Cal. App.)	(Utah)
	Wilson v. Joseph (Wash.)
Van Vlack, State v. (Wash.)	Wilson, People v. (Cal. App.)1116 Wilson, State v. (Kan.)
Vaughan v. State (Okl. Cr. App.) 975	Winbigler v. Clift (Kan.) 537

Page	Page
Withington v. Gypsy Oil Co. (Okl.) 634	Yett v. Oregon Surety & Casualty Co.
Woldson v. Richmond Mining, Milling &	(Or.) 486
Reducing Co. (Wash.)1162	Young Men's Christian Ass'n of Seattle,
Woodbury Lumber Co., Douglass v.	Susman v. (Wash.)
(Wash.) 906	Yuma County v. Maricopa County (Ariz.) 200
Works, Incorporated Town of Comanche	Youtz, Williams v. (Cal.) 383
v. (Okl.)	
Worthington v. Tipton (N. M.)1048	Zane v. Vawter (Kan.)
Wright v. Seattle Grocery Co. (Wash.) 345	Zercher, Stanton v. (Wash.) 559

# REHEARINGS DENIED

[Cases in which rehearings have been denied, without the rendition of a written opinion, since the publication of the original opinions in previous volumes of this Reporter.]

#### CALIFORNIA.

Jones v. Southern Pac. Co., 168 P. 586. Rehearing denied by Supreme Court.

#### NEVADA.

De Remer v. Anderson, 169 P. 737. Forsyth v. Heward, 170 P. 21. Gay v. District Court of Tenth Judicial Dist. in and for Clark County, 171 P. 156.

## OREGON.

Enneberg v. State Industrial Accident Commission, 171 P. 765. Gable v. Armstrong, 171 P. 190. Gile v. Lasselle, 171 P. 741. Schmid v. Thorsen, 170 P. 930.

See End of Index for Tables of Pacific Cases in State Reports

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#### THE

# PACIFIC REPORTER

## VOLUME 172

FIRST NAT. BANK OF FT. COLLINS v. SHAFER et al. (No. 8989.)

(Supreme Court of Colorado. April 1, 1918.)

1. TRIAL \$\infty\$368 - AGREED STATEMENT OF FACTS-MATTERS NOT INCLUDED.

In suit tried on an agreed statement of facts, one of the parties desiring to rely on a contract between the parties must set out the contract in the statement, or the evidence in respect to it from which its existence can be determined by the court.

2. CHATTEL MORTGAGES \$\infty 200 - Fraud of MORTGAGEE IN PERMITTING CONVERSION OF

SECURITY.

Where chattel mortgagee permitted and aided mortgagor in selling sufficient of the mortgaged property to pay the mortgage debt, and in converting proceeds to his own use, and took possession of remainder of the property, a fraud possession or remainder of the property, a fraud was perpetrated on the mortgagor's general creditors, and the mortgage was void as to a judgment creditor of the mortgagor who had an execution outstanding at the time of the sale of such remaining property under the mortgage, and the proceeds of such sale was subject to garnishment to satisfy such judgment.

3. CHATTEL MORTGAGES \$== 179-FRAUD AS TO GENERAL CREDITOR — EFFECT OF TAKING POSSESSION.

Where the acts of both mortgagor and mortgagee have been such as to unlawfully defeat the rights of the general creditors of the mortgagor in the collection of their debts, thereby perpetrating a fraud, the mortgagee cannot avoid the effect of his acts by taking possession under the mortgage.

White, Garrigues, and Bailey, JJ., dissenting.

En Banc. Error to Weld County Court; Herbert M. Baker, Judge.

Action by John E. Shafer and others, doing business as the Shafer Hardware Company, against Peter Balmer, in which the First National Bank of Ft. Collins was gar-Upon appeal to the county court from a judgment of the justice court there was judgment against garnishee, and it brings error. Affirmed.

Lee & Shaw, of Ft. Collins, for plaintiff in error. John Paul Lee, of Eaton, for defendants in error.

HILL, C. J. This case, instituted before a justice of the peace, was, upon appeal, tried to the court upon an agreed statement of facts. The judgment was against the plaintiff in error bank, who, upon a traverse of its answer to a garnishee summons, was held Barnes for \$13.41; one to M. C. Andrews of

whom the defendant in error had a judgment. The agreed record on error discloses that on June 4, 1915, Balmer was a farm tenant of one Signor, at which time they gave a joint note to the plaintiff in error for \$1,300, due December 4th, following, securing'it by a chattel mortgage on certain stock, machinery, and crops then growing on the Signor place; that on November 4, 1915, Balmer and Signor executed to plaintiff in error another note for \$340, due November 20th, same year, and secured it by chattel mortgage on that portion of the same property not then disposed of; that on December the 27th, following, Balmer turned over to plaintiff in error bank the stock and machinery covered by the mortgages: that on January 6, 1916, the bank sold it at public sale for the sum of \$1,007 net. The testimony of Nelson, the bank's cashier, is to the effect that, after crediting all amounts received from Balmer, he was still indebted to the bank on the note \$147. It is admitted that the garnishee summons was served on Nelson immediately at the close of said public sale, the proceeds being in his possession, but that no indorsement of them had been made on the notes. What Signor's interest in the matter was is not disclosed. As the briefs treat the debt evidenced by the notes and the property covered by the mortgages as that of Balmer alone, we shall acquiesce in this view of it.

The record shows that in August, September, October, November, and December, 1915, Balmer sold to one Ogden \$639.25 worth of oats and potatoes, which were covered by the first mortgage, and what was remaining when it was executed by the second; that he received in payment for these sales nine checks for \$549.74; that the balance, \$89.51, was used in the purchase of sacks, coal, and the rent of sacks; that all of these checks but four, for a total of \$94.73, went through plaintiff in error's bank; that in one of them for \$108.90 the bank's name was inserted as one of the payees; that a sugar company gave checks for beets covered by these mortgages as follows: One for \$431.45 payable to the bank, Balmer, and Signor; one for beet seed for \$150 (the payee in this check is not shown by the record); one to W. H. to be the debtor of Peter Balmer, against \$119.77; and one to the bank, Balmer, and

last named for \$838.39. Balmer testified that none of the \$431.45 check went to the bank to pay off his notes, but that he was given permission to use this money to pay for hauling of beets and pay the help, protecting the bank's interest in the crops; that he was not clear as to the amounts paid out, but testified to items as follows, beet hauling \$75, threshing \$116, cutting grain \$40. for labor \$93.90; that he paid \$45 to a man in Ault on an old debt of his, \$25 to Barnes for a cultivator, \$15 for a hog, and \$45 to an implement company; that he fed most of the wheat and alfalfa covered by the mortgages to his hogs; that he had given the bank a rough estimate of the amounts paid out; that so far as he knew the bank had no knowledge that the funds were being used for other purposes than to save crops, except that he told Nelson of purchasing cultivator from Barnes and feeding some of the wheat and alfalfa to his hogs. Nelson admitted that he gave Balmer permission to use some of the money, but stated that it was for the sole purpose of harvesting the crops; that he had never asked him for payment of any settlement.

The record shows that early in December, 1915, and before the bank took possession of the property it sold, a bank at Severance had secured a judgment against Balmer and garnished the sugar company; that the plaintiff in error bank paid \$178 of the money received by it from the sales of these crops to the Severance bank in satisfaction of this judgment; that this payment was with the consent of Balmer; that the advertisement of the public sale of the property was signed by the auctioneer, but included the language "First National Bank of Ft. Collins, mortgagee"; that at the time of the service of the garnishee summons upon Nelson as cashier of the bank, the only credit indorsed on the notes was one for \$414.98, bearing date December 23, 1915. The judgment was against the bank for \$270.89, being the amount of the Balmer judgment in favor of the defendant in error. The position of the trial court was that the public sale of the remainder of the property not theretofore sold by Balmer was under the purported chattel mortgages by consent of Balmer, and not under any agreement between him and the bank by which he turned it over to them as security for the debt, or otherwise, than a surrender of possession under the purported mortgages; that upon account of the acts of Balmer and the bank pertaining to the mortgaged property, its disposition, etc., the mortgages were void as against the attaching creditors of Balmer.

[1] The contention of the plaintiff in error that the property was turned over to the bank by Balmer under an agreement outside of the mortgages, that the bank was to receive it as security for its debt, have it sold, and it thus continued to so do up to the time

Signor for \$93.90; two others to the parties and apply the proceeds thereon, is not sustained by the record. While the agreed statement of facts is not very clear on several things, the deductions to be gathered from it on this are that the bank took possession with the consent of Balmer under its purported chattel mortgages, and that it was purporting to sell the property thereunder; otherwise why insert in the sale notice the words "First National Bank of Ft. Collins, mortgagee." Tht record is silent as to any express declarations concerning such an agreement. If it had been made, it should have been inserted in the agreed statement of facts by appropriate language, and not left uncertain to be urged by deductions. If such agreement could not be secured, then the testimony concerning it should have been produced and set forth in the record. This was not attempted. From the record before us, we are of opinion that there was no error in the ruling as made on this subject.

[2] The record contains sufficient to sustain findings that Balmer gave to the bank two notes for \$1,640 and interest and chattel mortgages to secure each on his stock, equipment, farming implements, and crops; that thereafter and during what is termed the life of the mortgages, it allowed Balmer to sell about \$2,286 worth of crops covered by the mortgages and apply the proceeds to his own use, except \$431.45, which the bank credited upon the notes; that checks for about \$1,400 received from the sales of these crops included the name of the bank as one of the payees; that checks for an additional sum of about \$300 payable to Balmer received from the sale of these crops also passed through the plaintiff in error's bank; that the bank knowingly permitted Balmer to otherwise appropriate the most of the wheat and alfalfa crops covered by the mortgages. In such circumstances, we cannot agree with the contention of plaintiff in error that there is no testimony to sustain the findings of the trial court; that the action of the parties to the mortgages constitute a fraud against the right of the judgment creditors of Balmer. The defendant in error was entitled to its judgment as rendered. It had an execution or attachment outstanding against Balmer at the time of the sale. It was looking for something to levy upon. The bank had all his property covered by the two chattel mortgages, and it was not only allowing him to sell part of it and convert the proceeds to his own use, thereby preventing his other creditors from collecting their claims, but was aiding him in such transaction by having or allowing the checks received therefrom to include its name as payee by collecting, or indorsing them to him, and, instead of applying the proceeds in payment of his debts secured by the mortgages, it turned the money back to him, yet keeping the remainder of the property still covered by the mortgages,

it took possession of the balance of the property not in this manner theretofore disposed of.

[3] It may be conceded, as urged by counsel, that after a mortgagee takes possession the mortgage, although otherwise defective or for some reason invalid, is good as between the mortgagor and mortgagee, and also as against creditors of the mortgagor where the mortgagee, in good faith, takes possession before the rights of other creditors have intervened by lien or levy. We cannot agree, however, that this rule should be extended to cover cases where the acts of both mortgagor and mortgagee have been such as to unlawfully defeat the rights of other creditors of the mortgagor in the collection of their debts, or in securing liens upon his property as an aid to their collection, thereby perpetrating a fraud against them. In such cases, the authorities are to the effect that the mortgage is void as against such creditors, and that the taking of possession by the mortgagees, under such circumstances, does not change this rule. Wilson v. Voight, 9 Colo. 614, 13 Pac. 726; Livingston v. Dry Goods Co., 12 Colo. App. 331, 56 Pac. 355; Brasher v. Christophe, 10 Colo. 284, 15 Pac. 403; Durr v. Wildish, 108 Wis. 401, 84 N. W. 437; Andrews v. Partee, 79 Miss. 80, 29 South. 788; Putnam v. Osgood, 51 N. H. 192; Robbins v. Parker, 3 Metc. (44 Mass.) 117.

In the circumstances of this case, as between these creditors of Balmer, so far as the remainder of the property covered by these mortgages or the proceeds derived from the sale thereof are concerned, equity and good conscience require that the mortgage debt should be treated as having been previously satisfied out of the proceeds received from the prior sales of the other property covered by the mortgages, or at least that they be held inferior, so far as any lien thereon is concerned, to that claimed by the other attaching judgment creditor.

The judgment is affirmed. Affirmed.

WHITE, GARRIGUES, and BAILEY, JJ., dissent.

#### FIRST NAT. BANK OF FT. COLLINS v. DANIELS MERCANTILE CO. (No. 8990.)

(Supreme Court of Colorado. April 1, 1918.) En Banc. Error to Weld County Court;

Herbert M. Baker, Judge.
Action by the Daniels Mercantile Company.
against a debtor, in which the First National
Bank of Ft. Collins was garnished. From a
judgment rendered, garnishee brings error. Af-

Lee & Shaw, of Ft. Collins, for plaintiff in error. John Paul Lee, of Eaton, for defendant in error.

HILL, C. J. This action was tried with No.

tiff in error, v. John E. Shafer & Bert A. Shafer, doing business as the Shafer Hardware Company, defendants in error, 172 Pac. 1. The same state of facts applies to both. The opinion in the other case controls this, and justifies an affirmance of the judgment, which is ordered. Affirmed.

WHITE, GARRIGUES, and BAILEY, JJ.,

LANDRUM et al. v. RAMER, Secretary of State. (No. 8926.)

(Supreme Court of Colorado. April 1, 1918.) 1. Officers ⇔70½, New, vol. 17 Key-No. Series—Recall—Petition—When Filed.

A mere deposit with the Secretary of State of a petition to recall an officer under Const. Amend art. 21, § 2 (see Laws 1913, p. 673), is not a filing until the secretary has examined it and determined that it is a petition and has actually filed it, and the filing does not date back to the date of deposit, and hence protests can be made any time within 15 days of such actual fil-

2. OFFICERS \$\infty\$70\frac{1}{2}, New, vol. 17 Key-No. Series\infty\$Recall\infty\$Perfition\infty\$"\$\signers."\$

Under Const. Amend. art. 21, § 2 (see Laws 1913, p. 673), a signature to a recall petition is not complete, and the writer of it not a "signer," unless there be added the date. unless there be added the date of signing and place of residence.

White, J., dissenting.

En Banc. Error to District Court, City and County of Denver; Charles C. Butler, Judge.

Proceeding by John W. Landrum and others to recall a judge. From a judgment of the district court affirming the action of John E. Ramer, Secretary of State of Colorado, in holding insufficient a petition filed with him, the petitioners bring error. Af-

Thomas Ward, Jr., of Denver, for plaintiffs in error. Fred Farrar, Atty. Gen., Francis E. Bouck, Deputy Atty. Gen., and John F. Mail and Allen & Webster, all of Denver, for defendant in error.

TELLER, J. This cause is before us on error to a judgment of the district court affirming the action of defendant in error, as Secretary of State, in holding insufficient a petition, filed with him for the recall of the judge of the Thirteenth judicial district.

 Under the constitutional amendment which provides for the recall of officers a period of 15 days after the filing of a recall petition is allowed for the filing of protests.

The protest in this case was filed on the 27th day of November, 1915, and plaintiffs in error insist that the petition was, in law, filed on the 2d day of November; hence the protest came too late.

It is conceded that the defendant in error, the Secretary of State, gave to the parties who delivered the petition to him a receipt as follows, "Received for consideration on November 2nd, 1915," and he alleg-8989, First National Bank of Ft. Collins, plain- ed in his answer and testified that it was

agreed between him and said parties that the petition would not be filed until he had carefully examined it. The testimony in this respect is fully corroborated. Evidence was introduced to show why so great a delay occurred in passing on the sufficiency of the petition preliminary to its filing.

It is not consistent with the known purpose of the amendment, nor with its language. It provides for a series of steps leading up to a recall election, and the first act which partakes of an official character is the filing of a recall petition in the office of the secretary of State. The instrument to be

The court found, as a fact, that the committee "acquiesced in the suggestion made by the Attorney General that the Secretary of State would receive it for examination and not at that time for filing"; also, that, under the testimony, the time consumed was reasonable. The record contains nothing which justifies the reflections made by counsel for plaintiffs in error on the good faith and fairness of the Secretary of State. He acted upon the advice of the Attorney General, and evidently tried to do his duty. This finding that the petition was received by the officer for examination, and not for present filing, being fully supported by the evidence, is binding upon us. The parties, having agreed that the petition should be filed when the officer had found it sufficient, cannot now be heard to say that it was, as a matter of law, filed when delivered.

This does not present the question which would have arisen had the committee delivered the petition for filing at that time. Here they delivered it for consideration, and to be filed subsequently if found entitled thereto. Counsel for plaintiffs in error, however, insist that the question to be determined is: Was the petition filed on November 2, 1915, when delivered to the Secretary of State, or at the time the filing indorsement was placed thereon? Opposing counsel have fully discussed that question, and, in view of its importance, it ought, perhaps, to be determined, especially as it has been suggested that, though the filing mark was not placed upon it until the 12th, the filing dated back, in legal effect, to the day on which the Secretary of State received the instrument.

[1] The recall amendment provides that:

"All petitions shall be deemed and held to be sufficient if they appear to be signed by the requisite number of signers, and such signers shall be deemed and held to be qualified electors, unless a protest in writing under oath shall be filed in the office in which such petition has been filed, by some qualified elector, within fifteen days after such petition is filed, setting forth specifically the grounds of such protest. \* \* \* When such petition is sufficient, the officer, with whom such recall petition was filed, shall forth-with submit said petition, together with a certificate of its sufficiency to the Governor." Constitutional Amendment, Recall from Office, Session Laws 1913, § 2, pp. 673, 674.

It is urged that a petition "should be filed when received, without an examination by the Secretary of State, or the person in whose office the petition for recall is filed." This view was rejected by the trial court, and we think rightly so. If counsel's contention is right, the officer has nothing to do but to receive the collection of papers bearing signatures, and file them as a recall peti-

purpose of the amendment, nor with its language. It provides for a series of steps leading up to a recall election, and the first act which partakes of an official character is the filing of a recall petition in the office of the Secretary of State. The instrument to be filed is to be of the form and substance prescribed by the amendment, and nothing short of that is a petition with a right to be filed. Until there is such a petition, the movement for an election is not initiated. The importance of this instrument is fully recognized in the amendment by the several provisions concerning it. The signers must be qualified electors; each one must add to his signature the date of signing and his place of residence, with street and number, if in town or city; and the genuineness of the signatures must be attested under oath by the circulator of the sheets for signature. The petition is to contain a statement of the grounds of recall, in not more than 200 words, and must be signed by electors in number equal to one quarter of the vote cast at the last preceding election. Each section of the petition must contain its full title and text.

In the light of these facts, how can it be supposed that the officer, to whom certain official duties are committed by the filing of a petition, has no right to determine whether or not the papers filed, in fact, constitute a petition? If he must accept and act upon a collection of sheets which appear to be a petition, though not in fact a petition within the definition of the amendment, all these specifications, which constitute such definition, are of no effect. On that postulate, a collection of sheets with numerous signatures being filed, and no protest made, the Secretary of State in due time certifies them to the Governor, and an election is called and held on a so-called petition which may not comply with the most important provision of the law. The taxpayers of the state, or a district, are burdened with the cost of an election on the petition of a far smaller number of signers than the people by this amendment decided should be required to set the recall machinery in motion. This result is inevitable if the Secretary of State is a mere depositary of the papers alleged to be a petition. Unless some elector protests within 15 days, the papers become in effect a petition no matter how defective in form or matter. Such a construction should be adopted only upon the clearest necessity, and no such necessity exists.

[2] The language of the amendment is, not that all petitions shall be deemed sufficient if they appear to be petitions, but if they appear to be signed by the requisite number of signers. A signature is not complete, and the writer of it not a "signer" in the sense of the amendment, unless there be added the date of signing and place of residence. Until it has been determined

that the requisite number of persons have signed, and added to their signatures the matters required, and the verifying affidavits have been made, no one can say that there is a recall petition at all. These matters can be determined from the papers by inspection and computation; but the one important question which could not be so determined, to wit, whether or not the signers are qualified electors, need not be considered in the first instance; their qualification is presumed until a protest is filed. This is a reasonable and almost necessary provision, in order to make it possible to file a petition within a reasonable time after it is presented. There is no such reason for presuming correctness as to the matters which appear on the face of the papers, and it is worthy of notice that there is but one of all the requirements to which this presumption attaches. Why does not the old maxim apply, "Expressio unius est exclusio alterius"?

The authorities cited on this point by the plaintiffs in error do not support the contention. They refer to the filing of bonds, etc., properly holding that an instrument which is received for filing is in law then filed although the filing marks are not put on until later. However, even in cases of ordinary instruments, in jurisdictions where only acknowledged or certified instruments are entitled to record, the officer receiving them must by examination determine whether or not they may be filed. A deposit with him is not a filing.

From the above consideration it results that the petition was not filed until November 12th and the protest was in time.

The judgment is therefore affirmed. Judgment affirmed.

WHITE, J., dissents. HILL, C. J., and SCOTT, J., not participating.

ART INSTITUTE OF CHICAGO et al. v. DENISON et al. (No. 8986.)

(Supreme Court of Colorado. April 1, 1918.)

JUDGMENT 4 729 CONCLUSIVENESS.

JUDGMENT & 729—CONCLUSIVENESS.

Although right of attorneys to lien was in issue on first hearing involving distribution of trust fund, and decree rendered made no allowance thereof, where decree was opened on petition of interveners, and the right to assert attorneys' lien expressly reserved in amended decree, interveners cannot, in a subsequent proceeding to compel trustee to pay amount retained for lien claim of attorneys, be heard to say that the right to the claim is berned by the statute of the right to the claim is barred by the statute of the state where the estate of deceased beneficiary is under administration; they having submitted to the jurisdiction of the court of the state of the forum.

Error to District Court, City and County of Denver; H. P. Burke, Judge.

Controversy between the Art Institute of Chicago and another, as executors of the last | titioners the sum retained for the lien claim. will of Stella Jerome Prager, deceased, and On answer, replication, and evidence taken,

John H. Denison, as successor in trust of the Milton Jerome Fund, and others. From judgment rendered, the former bring error. Affirmed.

Philip S. Van Cise, of Denver, for plaintiffs in error. Paul Knowles and W. S. Bicksler, both of Denver, E. G. Bennett, of Las Vegas, Nev., and George L. Nye, of Denver, for defendants in error other than Den-

TELLER, J. The defendant in error was, in a proceeding in the district court, appointed trustee of a fund of which there were several beneficiaries. When the fund was ready for distribution, a firm of attorneys filed in the cause an attorney's lien on the shares of several of the beneficiaries for services rendered in establishing their right to share in said fund. The trustee later filed a supplemental complaint in the cause setting forth the names of the parties claiming an interest in the fund, including the said attorneys, and asking that the court ascertain and direct how distribution should be made. The attorneys asserted their claim by answer, and their right to it was put in issue by replication. A decree was entered, and approved by one of said attorneys, without mention of the lien claim, except that it recites that all claim to lien on the share of Helen L. Hannum, one of the beneficiaries, had been waived by said attorneys in open court.

It does not appear that the right to said lien was litigated on the hearing on the distribution of the fund, but a one-twelfth interest was directed to be paid to one of the attorneys whose firm claimed a lien on it. It is the lien on this interest which is the subject of this controversy. The court retained jurisdiction of the distribution of said fund. Thereafter the plaintiffs in error filed a petition in intervention, claiming said onetwelfth interest under the will of the beneficlary who was entitled to it. The intervention was allowed, and the decree opened and modified so as to give to the plaintiffs in error said interest, so far as it had not been paid over to the heir at law of their testatrix. The claim of the attorneys was recited in the decree, which was stated to be without prejudice to their right to assert said claim. The trustee paid to the Art Institute all the money which it claimed except the sum of \$134.45, which he retained because of said lien claim. Thereupon the plaintiffs in error filed a petition in said cause, setting up the aforementioned proceedings, alleging that the lien claim was barred by the statutes of Illinois, where the estate of the deceased beneficiary was under administration, and praying that the trustee be ordered to pay to pe-



the court found for the respondents, and di- | where the issue was whether there had been an rected the trustee to pay their claim.

Plaintiffs in error urge that, since the right to the lien claim was in issue on the first hearing, it was adjudicated, and that, there being no allowance of it, the decree is final as to it. It is unnecessary, because of the subsequent proceedings, to determine what might have been the effect of the decree, if it had not been modified. It is to be observed that the decree was opened on the application of the plaintiffs in error for their benefit, and that the right of the attorneys to assert their claim was expressly reserved in the amended decree; the trustee being required only to pay over to the interveners' attorney such sums as "belonged" to their testatrix. When the trustee, knowing that the attorneys still had full right to assert their claim, declined to recognize the right of the interveners to the full sum, the plaintiffs in error invoked the aid of the court to recover it. The fund was at all times under the control of the court, and, when the plaintiffs in error submitted themselves to its jurisdiction and obtained the relief originally sought, they could not be heard to say that the right to the claim depended upon the action of any other court, either of Illinois or of this state, even had there been no lien on the fund. They cannot recognize the jurisdiction so long as it is exercised in their favor, and deny it when they cease to profit from it.

No attack is made upon the justice of the claim, and the court appears to have followed the law and the dictates of justice in the judgment rendered. The judgment is accordingly affirmed.

Judgment affirmed.

HILL, O. J., and WHITE, J., concur.

#### WESTERN INVESTMENT & LAND CO. v. FIRST NAT. BANK OF DENVER. (No. 8232.)

(Supreme Court of Colorado. March 4, 1918.)

1. BILLS AND NOTES \$== 537(2) - DELIVERY

QUESTION FOR JURY.

In a suit against a company as indorser of a note, held, on the evidence, that whether the note which had been made to it by its president, who had indorsed it, was ever delivered to defendant, was question for the jury.

2. Bills and Notes €=537(5)—Indobsement

QUESTION FOR JURY.

In such suit, held, on the evidence, that whether the company had ever indorsed the note by an indorsement in its name made by its president, who was also the maker of the note, was a question for the jury.

3. PRINCIPAL AND AGENT \$\instruction\text{—} 194(3)\text{—} RATIFICATION\text{—} INSTRUCTION\text{—} EVIDENCE.

In an action against an indorser, the refus-al of an instruction that there could be no rati-fication of an unauthorized indorsement in the defendant company's behalf unless it was known

express ratification.

4: Principal and Agent \$\infty\$=166(1)-Ratifi-CATION-EFFECT.

OATION—EFFECT.

If a principal deliberately ratifies an agent's act upon such knowledge as he has, assuming any risk or failing to make full inquiry, he is bound and cannot avoid the effect of his act on the ground of want of knowledge.

5. Principal and Agent 6=174-Ratifica-

TION-QUESTION FOR JURY.

In a suit against a company on a note made by its president and indorsed by him in the name of the defendant company and given in payment for an automobile, held, on the evidence, that whether the purchase of the automobile and the indorsement and delivery of the note were ratified by the company was for the jury.

6. WITNESSES \$\infty 276-ADVERSE PARTY-STAT-UTE-ADMISSION OF TESTIMONY. In such action, if a party defendant was call-

and by plaintiff for examination under Rev. St. 1908, § 7284, and had suffered a default he was no longer within the statute, but, in view of the practice of examination by both sides, the admission of his testimony was not error.

7. EVIDENCE 4-471(26) — OPINION EVIDENCE
—OWNERSHIP OF PERSONAL PROPERTY.

In an action upon a note made by defendant company's president and by him indorsed in the name of the company and which had been given in payment for an automobile, his testimony that the company had never owned the automobile, a fact of which he had only such knowledge as might be acquired from the facts proved, was inadmissible.

8. Evidence \$\sim 471(2)\$—Opinion Evidence— ADMISSIBILITY.

Where the question involves a fact clearly within the witness' knowledge and does not call for an expression of an opinion upon facts proven, it is admissible; but, where it involves the construction of the facts proven, it is inadmis-

9. Evidence = 123(3)—Admissibility—Part OF TRANSACTION.

In action upon a note indorsed by defendant company's president, who as such had power to contract on behalf of the company, testimony as to his declarations to a witness as to his authority and his own testimony as to the same declarations was competent as a part of the transaction in controversy.

10. BILLS AND NOTES €=== 186—INDORSEMENT-

CONSIDERATION.

Where the jury might find that an automobile was bought for defendant company, was used in its business, and became its property. it received a consideration for its indorsement of a note given in payment by its president and was bound by it.

11. TRIAL \$\infty 260(1) - REQUESTED INSTRUC-TIONS-GIVEN INSTRUCTIONS.

The refusal of requested instructions is not error where their substance is covered by the instructions given.

Scott, J., dissenting.

En Banc. Error to District Court, City and County of Denver; Geo. W. Allen. Judge.

Suit by the First National Bank of Denver, Colo., against the Western Investment & Land Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Howard J. Clark, of Des Moines, Iowa, and L. Ward Bannister and Leroy McWhinto and approved by the company was not error, ney, both of Denver, for plaintiff in error. ly, of Chicago, Ill., and Charles H. Haines, of Denver, for defendant in error.

The defendant in error TELLER, J. brought suit against the plaintiff in error on a promissory note upon which the latter appeared as indorser. Verdict for plaintiff and judgment accordingly.

The note was executed by one Macarthy to the defendant below-he being at the time the president and manager of defendant company-was indorsed in the name of said company, and delivered to one Colburn in payment for an automobile. The note was subsequently and before maturity transferred to the plaintiff. Presentment and protest were duly made.

[1,2] The defense was and is that the note was never delivered to the defendant. and that it never indorsed the same. It is alleged in answer that the indorsement in the name of the company was made by said Macarthy, who was also the maker of the note, of which fact Colburn had knowledge when he received the note; that Macarthy had no authority to execute and deliver to defendant the said note: that it never owned the note: and that the automobile was purchased by Macarthy for his own use, and not for the defendant.

There was evidence as to the defendant's business, of which Macarthy was in sole charge in this state; of the contract of purchase of the automobile; of the use of cars in the business; of the knowledge of some of the directors of such use; of advertising by the company that it used automobiles in its business of selling lands: of differences between Macarthy and his father-in-law, who owned more than one-half of the stock of the defendant company; of a transfer of Macarthy's stock to his father-in-law; of a charge of \$10,005.95 against Macarthy on the company's books; of a resolution by the directors, and the stockholders, approving and confirming all the acts of Macarthy as president; and of his ceasing to have any connection with the defendant.

The court submitted to the jury the question whether Macarthy purchased the automobile for himself individually, or as manager for the company, and for it; also, if purchased for the company, whether Macarthy had authority to make the purchase and execute the note in suit to pay therefor. The jury was instructed that they should find for the defendant unless they found that Macarthy had authority to purchase an automobile for the company and did so purchase the automobile in question; and that he had authority to indorse and deliver the note in suit; or that his act in so doing was ratified by the company.

We cannot agree with plaintiff in error that there is no substantial evidence from which authority on the part of Macarthy either to in 64 Hun, 639.

N. Walter Dixon, of Denver, Harry E. Kel-1 buy the automobile, or to indorse the note for the company, may be inferred. From the evidence above recited the jury might reasonably find that Macarthy had authority to buy the automobile, and to indorse the note as he did.

[3] Neither do we think that the court erred in refusing to give an instruction:

"That there can be no ratification of an unauthorized act done in a corporation's behalf unless the act is known to the ratifying author-ity, and is therefore approved."

The requested instruction stated a general rule, to which, however, there is a wellknown exception, within which the case at har falls.

We are dealing here not with acts from which a ratification may be inferred, but with an express ratification.

[4] It is well settled that if a principal deliberately ratifles upon such knowledge as he has, assuming such risk as there may be in failing to make full inquiry, he is bound, and cannot avoid the effect of his act or. the ground of want of knowledge. Ehrmanntraut v. Robinson, 52 Minn. 333, 54 N. W. 188; Stokes v. Mackay, 19 N. Y. Supp. 918;1 Wilder v. Beede, 119 Cal. 646, 51 Pac. 1083; Kelley v. N. & A. H. Ry. Co., 141 Mass. 496, 6 N. E. 745; Mechem on Agency (2d Ed.) § 393 et seq.; and Ewell's Evans on Agency,

[5] The testimony of J. K. Gilcrest, who owned more than one-half of the stock, was

"In the settlement it was included that Macarthy turned the stock back. By 'settlement' I mean when the new books were opened and an accounting made with him and myself. The ratification resolution was a part of the settlement. The agreement was that if Macarthy would turn over the stock to me the corporation would turn over the stock to me the corporation. would ratify all of his acts as president and gen-eral manager to that date. The transaction was entirely carried out between me and Macarthy and the company, and Macarthy turned over his stock to me. Macarthy's indebtedness to me was paid in the form of a company indebtedness to me, pursuant to that agreement.

Reading the resolution of ratification, with its all-inclusive terms, in the light of this testimony, it cannot be said that the jury was not justified in finding that the purchase of the automobile and the indorsement and delivery of the note were ratified and approved. It is a fair and natural inference from the facts in evidence that the defendant company, as a consideration for the surrender by Macarthy of his stock, agreed to become responsible for all that he had done. The language of the resolution of ratification fully justifies this conclusion. It also appears that Macarthy was charged with \$10,-005.95, and the witnesses for defendants now disclaim all knowledge of the items of that indebtedness. They cannot explain the charge. We cannot say that the jury might

<sup>1</sup> Reported in full in the New York Supplement: reported as a memorandum decision without opinion

not properly infer that the sum so charged mony, it is said, violates the rule that an was itself a consideration for the company's assumption of liability for Macarthy's acts, known or unknown.

[6] Objection is made to the testimony of defendant Macarthy-called by the plaintiff for examination under section 7284, R. S. 1908-on the ground that he had already suffered default: and cases from Wisconsin and Minnesota are cited to support the objection. In the Minnesota case (Suter v. Page, 64 Minn, 444, 67 N. W. 67) it was held not error to reject such testimony; the court declining to determine whether or not the trial court, in its discretion, might not have admitted the testimony. In Moore v. May, 117 Wis. 192, 94 N. W. 48, the court gives as a reason for holding the testimony inadmissible the fact that the other side has no right to cross-examine the witness. Under our practice a witness thus called may be examined by both sides, and the reason which apparently induced the holdings mentioned does not exist here. Clearly, if a party called as an adverse witness appears to the trial court not to be adverse, he should not be held to come within the statute in question; and, as the Minnesota case recognizes, the matter should be left largely to the discretion of the court. We do not think it was error to admit the testimony to which the objection is made, especially as the witness was fully cross-examined.

[7.8] It is further objected that the trial court erred in striking out the following question and answer: "Q. Did it (the company) ever own the limousine machine? A. No." Counsel cite authorities to support the statement "that a witness may always answer a question as to the ownership of personal property." The statement is too broad, and is not supported by the cases cited. Where the question involves a fact clearly within the knowledge of the witness, and does not call for the expression of an opinion upon facts proven, it is admissible. But where the testimony involves the construction of the facts proved, it is not competent. Nicolay v. Unger, 80 N. Y. 54. In Pichler v. Reese, 171 N. Y. 577, 64 N. E. 441, it is said:

"There is a distinction between asking a witness to testify to a fact, the existence of which depends upon an inference from a collection of facts, \* \* \* and asking him to testify to a fact which is necessarily within his knowledge."

Here the witness was called upon to testify to a fact of which he had only such knowledge as might be acquired from the facts proved, and the testimony was not admis-

[9] Complaint is made also that the witness Colburn was permitted to repeat the declarations made to him by Macarthy as to the latter's authority in behalf of the defendant, and that Macarthy was allowed to testify to the same declarations. This testicannot be said not to have been prejudiced by

agent's authority cannot be established by his own declarations. But that is not this case. That Macarthy was the president and manager of the company is beyond dispute. The answer admits that he was president of the company, and the by-laws, in evidence, make the president the general manager with power to make contracts on behalf of the corporation. The testimony was concerning declarations of one whose agency was established, and was competent as a part of the transaction in controversy. R. E. Lee Co. v. O. & G. S. & R. Co., 16 Colo. 118, 26 Pac. 326.

[10] There was evidence from which the jury might properly find that the automobile was bought for the defendant, was used in its business, and became its property. That being so, the defendant received a consideration for its indorsement, and is bound by it. Pelton v. Spider Lake Sawmill Co., 132 Wis. 221, 112 N. W. 29, 122 Am. St. Rep. 963; Lyon Potter & Co. v. Bank, 85 Fed. 120, 29 C. C. A. 45; Whitney Arms Co. v. Barlow, 63 N. Y. 62, 20 Am. Rep. 504; Hays v. Galion Gas Co., 29 Ohio St. 340; and Bradley v. Ballard, 55 Ill. 413, 8 Am. Rep. 656. This eliminates all question as to right of Macarthy to execute or indorse the note for the company.

This fact—that is, that the defendant is estopped to deny its liability on the indorsement-fully meets the objections to the first three instructions, which are alleged to be bad because they ignore the proposition that the irregularity on the face of the note was notice to the indorsee. The objection to instruction No. 5 is that the jury were permitted to take into consideration implied or apparent authority in the president and manager to indorse the note. We see no merit in the objection.

[11] Nor do we find error in the refusal of instructions. The substance of some of them was given, and the others do not correctly state the law as applied to the facts,

Finding no error in the record, the judgment is affirmed, and the former opinion is withdrawn.

Judgment affirmed.

ALLEN, J., not participating. SCOTT, J., dissents.

KING v. PEOPLE. (No. 9241.)

(Supreme Court of Colorado. April 1, 1918.)

1. WITNESSES \$=354-IMPEACHMENT-IMMA-TERIAL MATTER.

Defendant tried for larceny of a beef animal cannot be impeached on the immaterial matter of his ever having killed any beef.

CRIMINAL LAW \$==1169(1) - PREJUDICIAL ERROR-IMPEACHMENT.

Defendant tried for larceny of a beef animal

evidence, under the guise of impeachment, of his v. Owens, 20 Colo. 107, 36 Pac. 848; Mullen having stolen live stock long before.

En Banc. Error to District Court, Prowers County; A. Watson McHendrie, Judge.

Roy King was convicted of larceny, and brings error. Reversed and remanded.

Gordon & Gordon, of Lamar, for plaintiff in error. Leslie E. Hubbard, Atty. Gen. (J. W. Kelley, of Denver, of counsel), for the People.

GARRIGUES, J. Defendant King was convicted in the district court of Prowers county under an information charging him with the larceny of live stock, the transaction occurring, according to the people's evidence, November 23, 1916, and he brings the case here for review.

[1, 2] The only assignment of error necessary to be considered relates to the attempted impeachment of defendant as a witness in his own behalf, on a matter immaterial to the issue on trial. Defendant when on the witness stand denied in chief that he had taken any part in butchering the animal in question, but testified that he had assisted in butchering a hog. He was then asked: "Did you at any time butcher any beef?" to which he replied: "No, sir; I didn't." On his cross-examination, the following occurred:

"Q. How long has it been now, since you have had any range beef around your place? A. I never had had any. Q. State whether or not, some time in September, 1915, at your house, Miss Effie O'Dell came over there about dusk and if the following conversation in substance didn't take place between you and her: Miss O'Dell came in, and you had just brought in either the whole or a part of the carcass of a beef which had been butchered, and you asked her if she could keep a secret, and she replied that she could. She then asked you where you had gotten the beef, and you said you had butchered a calf and asked her if she would like to have some of it, and she asked you whose it was, and you said that it was House's, and she replied: 'No, thank you; I don't eat stolen meat.' And she then asked you how it came that you had killed it, and you said, 'Oh, we were coming across the prairie and just shot it.' (Objection and exception.) Q. Did you have substantially that conversation with Miss O'Dell? A. No, sir.' I didn't. Q. And you didn't have any beef in your house at that time? A. No, sir."

In rebuttal, for the purpose of impeachment, the state called Miss O'Dell as a witness, who was permitted to testify, over defendant's objection, that she had had such a conversation with him, and that she saw part of a carcass of fresh beef at his house at that time.

1. The only theory upon which this evidence of the witness O'Dell was admissible was that it tended to impeach the defendant as a witness. It is fundamental that the impeachment of a witness must be upon a matter material to the issue on trial. Rose v. Otis, 18 Colo. 59, 31 Pac. 493; Denver Co.

v. McKim, 22 Colo. 468, 45 Pac. 416; Askew v. People, 23 Colo. 446, 48 Pac. 524; Mitsunaga v. People, 54 Colo. 108, 129 Pac. 241. The issue was: Did defendant King, in the county of Prowers, state of Colorado, on or about November 23, 1916, unlawfully and feloniously steal a neat animal, the property of House. Whether defendant killed an animal or had stolen meat in his possession in September, 1915, more than a year prior to the transaction upon which he was being tried, and a matter in no way connected with the case on trial, could certainly have nothing to do with this issue. Such evidence was wholly incompetent for the purpose of impeachment and, upon objection, should have been excluded.

We cannot say that this testimony, introduced under the guise of impeachment, to the effect that defendant had, long prior to the transaction under investigation, been guilty of the larceny of live stock, did not prejudice his case before the jury, and the judgment of the lower court will be reversed and the cause remanded.

Judgment reversed.

SCOTT v. PEOPLE ex rel. BOARD OF COM'RS OF YUMA COUNTY. (No. 9102.)

(Supreme Court of Colorado. April 1, 1918.)

1. BAIL \$\iiii 80\$—Bond—Discharge of Surety.

The surety upon a bail bond is entitled to discharge from liability if he surrenders the principal, the defendant in the criminal case, before judgment is rendered in an action on the bond.

2. Bail \$\sim 93\text{-Action on Surety's Bond-"Judgment."}

In an action against the surety upon a ball bond, the trial judge's general finding of the issues of law and fact against the defendant, with an order that judgment be entered against the defendant, and staying judgment until final disposition of his motion for a new trial, was merely the announcement of the court's decision and did not amount to a judgment; the term "judgment," as used in Mills' Ann. St. 1912, § 2075 (Rev. St. 1908, § 1948), relieving sureties on surrendering the principal before judgment, meaning a judgment defined in Mills' Ann. Code, § 221, as the final determination of the rights of the parties in the action, the findings of a court not constituting a judgment.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Judgment.]

En Banc. Error to District Court, Yuma County; Haslett P. Burke, Judge.

Action by the People of the State of Colorado, on relation of the Board of County Commissioners of Yuma County, State of Colorado, against Lincoln R. Scott. Judgment for plaintiff, and defendant brings error. Reversed and remanded, with directions to dismiss the action.

John T. Bottom, of Denver, for plaintiff in | law and of fact in favor of the plaintiff. The error. Jo. A. Fowler, of Denver, and Robert M. Work, Dist. Atty., of Ft. Morgan, for defendant in error.

ALLEN, J. This is an action wherein the plaintiff in error is sued as surety upon a bail bond. Upon trial the court found the issues of law and of fact for the plaintiff and against the defendant. The plaintiff in error, defendant below, duly filed his motion for new trial. Before the motion for new trial was disposed of, and at the hearing thereon, the defendant showed to the court that he had surrendered the principal to the sheriff and had paid the costs which had accrued in the criminal action in which the bail bond had been given and also the costs in this action. The facts thus shown were admitted by plaintiff.

[1] It is now contended by plaintiff in error that the trial court erred in failing to dismiss the action after the showing above mentioned was made. The plaintiff in error was entitled to be discharged from liability upon the bail bond if he surrendered the principal, who was the defendant in the criminal case, before judgment was rendered in this action. Huston v. People, 12 Colo. App. 271, 55 Pac. 262. The defendant in error, however, insists that, at the time of the surrender of the principal, the judgment in this action had been rendered.

[2] At the time the principal was surrendered by the surety, in the instant case, no judgment had been entered against the surety. The record shows that, at the conclusion of the trial of this case, the trial judge employed the following language:

"At this time the court finds generally the issues of law and fact in this case for the plaintiff and orders that judgment be entered against the defendant on the bond in question in the sum of \$1,000, with interest thereon from the 9th day of October, 1912, and for costs. Let the record show the exception of the defendant to the findings and order for judgment and the judgment to be entered thereon. Ten days given in which to file a motion for a new trial. The entry of judgment will be stayed during that time. If a motion be filed, entry of judgment will be further stayed until the final disposition of the motion for a new trial

The foregoing did not amount to a rendition of a judgment, but was merely the announcement of the decision of the court. The term "judgment," as used in the statute, section 2075, Mills' Ann. Sts. 1912 (section 1948, R. S. 1908), relieving sureties upon the surrender of the principal, means a judgment as ordinarily defined, and as defined in section 221, Mills' Ann. Code, "the final determination of the rights of the parties in the action." Such final determination, according to the record in this case, would not take place until after the motion for a new trial was disposed of. Prior to that time there was no judgment either rendered or en-

findings of a court do not constitute a judgment. McKnight v. Ballif, 45 Colo. 138, 100

The trial court therefore erred in assuming that it had rendered a judgment before the principal was surrenderd by the surety, and in failing to dismiss the case upon the showing made by the surety, prior to November 1, 1916, when the court ordered judgment entered in favor of plaintiff, that he had surrendered the principal and paid the costs in the criminal case and in the case at bar.

The judgment is reversed, and the cause remanded, with directions to dismiss the ac-

Reversed and remanded.

### PROVIDENT LOAN SOC. v. CITY AND COUNTY OF DENVER. (No. 9367.)

(Supreme Court of Colorado. April 1, 1918.)

MUNICIPAL CORPORATIONS = 111(4) — OBDINANCES—INVALIDITY IN PART.
 The section of an ordinance providing for li-

censing pawnbrokers, being complete in itself, may be valid, though other parts of the ordinance be invalid.

2. MUNICIPAL CORPORATIONS 592(1) - OR-DINANCES - CONFLICT WITH STATUTE - LI-CENSING PAWNBROKERS.

An ordinance requiring pawnbrokers to obtain a license, and defining them to include certain classes, without regard to rate of interest charged, is not invalid as in conflict with Laws 1897, pp. 250, 252, 254, §§ 1, 8, 16, requiring pawnbrokers to obtain licenses from cities in which they do business, and defining them to in-cude persons charging 3 per cent, per month in-terest; such definition being only for the pur-pose of the statute, and licensing of those charging less not being prohibited.

Error to County Court, City and County of Denver; Ira C. Rothgerber, Judge.

Action by the City and County of Denver against the Provident Loan Society for violation of an ordinance as to licensing pawnbrokers. Conviction in the municipal court was affirmed in the county court, and defendant brings error. Affirmed.

Symes & Farrar and Ivor O. Wingren, all of Denver, for plaintiff in error. James A. Marsh and Jacob J. Lieberman, both of Denver, for defendant in error.

ALLEN, J. This is an action wherein the Provident Loan Society, a corporation, is charged with a violation of section 1390, article 1, chapter 35, of the Municipal Code of 1906, of the city and county of Denver, which section reads as follows:

"Sec. 1390. License Required. unlawful for any person, firm or corporation to establish or conduct the business of pawnbroker unless such person, firm or corporation shall have first procured a license to conduct such business, in manner and form as in this ordithere was no judgment either rendered or en-nance provided. Every person or corporation tered. The court merely found the issues of lengaged in the business of receiving property in

pledge, or as security for money or other thing advanced to the pawner or pledger, shall be held and is hereby declared and defined to be a pawnbroker."

It is conceded that the loan society, above named, is and was a pawnbroker as defined by the ordinance, and that, as charged, it violated the ordinance by conducting the business of a pawnbroker without having first procured a license from the city.

This action was instituted in the municipal court, where the defendant loan society was tried and found guilty as charged. An appeal was taken to the county court, where, upon trial, a like result was reached and a judgment was rendered in favor of the plaintiff below, the city and county of Denver. The loan society, defendant below, brings the case here for review, and asks that the writ of error herein be made a supersedeas. The various assignments of error are all made or based upon the theory that the ordinance in question is invalid.

It is contended by the loan society, the plaintiff in error, that the ordinance is in conflict with the statute on pawnbrokers. Chapter 66, p. 250, Session Laws 1897. This is the principal question presented for our determination. The first section of the statute provides that:

"\* \* It shall be unlawful for any corporation, company or person to establish or conduct the business of pawnbroker within the state of Colorado, unless such corporation, company or person shall have first procured a license from the proper authorities of the town or city in which they are engaged in such business," and shall furnish a bond. Section 4804. R. S. 1908; section 5393, Mills' Ann. Sts. 1912.

The eighth section of the act provides, in substance, that no pawnbroker shall charge a greater rate of interest upon money advanced than that of 3 per cent. per month. Section 4811, R. S. 1908; section 5400, Mills' Ann. Sts. 1912. Section 16 of the pawnbroker statute provides that:

"Any person or persons loaning money on personal property and charging as much as the maximum rate of interest herein provided, shall be deemed a pawnbroker, and such person doing business without a license shall be guilty of a misdemeanor. \* \* \* " Section 4819, R. S. 1908; section 5408, Mills' Aun. Sts. 1912.

[1] The plaintiff in error refers to numerous sections of the statute and of the ordinance, and contends that there is "a sharp conflict" between the provisions of the statute and those of the ordinance. The section of the ordinance under which the plaintiff in error was prosecuted is complete within itself, even when the other sections of the ordinance which relate to the rate of interest to be charged by a pawnbroker and to the time and manner of sale of a pledge are deemed to be stricken out. The ordinance, therefore, even if invalid as to certain parts, may still be valid so far as its licensing provisions are concerned. Vinsonhaler v. People, 48 Colo. 79, 81, 108 Pac. 993. We need not, therefore, consider or examine any other part of the interest to be licensed; so does the ordi-

ordinance than the section under which this action was brought, namely, section 1390 of the Municipal Code, hereinbefore quoted.

[2] The plaintiff in error claims that this section of the Municipal Code is in conflict with the statute because "the statute defines a pawnbroker as one making loans \* who charges as much as 3% per month interest," while "the ordinance declares every one who engages in the business of receiving property in pledge or as security for money or other thing advanced \* \* \* a pawnbroker, regardless of the rate of interest charged." It is apparent from a comparison . of the ordinance with the statute that a person, firm, or corporation may be a "pawnbroker," within the definition given by the ordinance, and yet, because not "charging as much as the maximum rate of interest." not be a pawnbroker within the meaning of the statute. The plaintiff in error, according to the evidence, charges interest on its loans at a rate not exceeding 2 per cent. per month of the amount of money actually loaned or advanced. Since the loan society did not charge as much as the maximum rate of interest, or 3 per cent. per month, it was not a "pawnbroker" within the meaning of the statute, but was a pawnbroker as defined by the ordinance. The statute, however, did not prevent the loan society from being deemed, or being in fact, a pawnbroker.

When the statute designates who "shall be deemed to be a pawnbroker" it merely refers to the class of pawnbrokers who are affected by the statute, or to the class of persons who are to be dealt with by the statute as pawnbrokers. Other pawnbrokers are in no way affected by the statute. The definition given by the statute is not made a general rule of law. It applies no further than to the statute itself. The result is that by this and other sections of the pawnbroker statute the state exercises the power to regulate and control the business or avocation of pawnbroking, but only where such business is conducted by pawnbrokers charging as much as 3 per cent. per month interest. The state is not attempting to regulate or control the business of pawnbroking where such business is carried on by loaning money on personal property at a rate of interest less than 3 per cent. per month. It follows that if a municipality requires a license of pawnbrokers belonging to the class last described, and by ordinance attempts to, or does, regulate and control their business, it does nothing in conflict with the statute, because there is no statute governing that part of the pawnbroking business. Neither does the municipality interfere with the state's regulation and control of the business of pawnbroking. The ordinance is neither inconsistent nor in conflict with the statute. The statute requires pawnbrokers who charge as much as 3 per cent. per month

nance, because it requires all pawnbrokers | 163, page 861, of the volume just cited, it to be licensed. The ordinance does not exclude, but does include, those who are pawnbrokers under and governed by the statute. If the statute had provided that no license should be imposed on pawnbrokers except those charging the maximum of 3 per cent. per month interest, then there might have been a conflict between the statute and the ordinance, but no such provision appears in the statute, nor can it be implied from the language thereof.

It is well settled that the mere fact that the state, in the exercise of the police power, has made certain regulations does not, however, prohibit a municipality from exacting additional requirements. So long as there is no conflict between the two, and the requirements of the municipal by-law are not in themselves pernicious, as being unreasonable or discriminatory, both will stand. 19 R. C. L. 804. § 110. Thus a municipal ordinance making it an offense to permit gaming in the place or house of any person is not invalid because the state had enacted a statute which prohibited such acts in public places. Greenville v. Kemmis, 58 S. C. 427, 36 S. E. 727, 50 L. R. A. 725. An ordinance declaring it unlawful for an automobile to be driven on public streets at a greater rate of speed than six miles per hour was held not to be in conflict with a statute prohibiting the driving of automobiles "within the thickly settled or business portion of any city at a greater speed than twelve miles per hour." Bellingham v. Cissna, 44 Wash. 397, 87 Pac. 481. There is no difference upon principle between an ordinance enlarging a class of acts and one enlarging a class of persons dealt with by a statute. The Legislature, while providing that pawnbrokers charging 3 per cent. interest per month must be licensed, did not enact any law with reference to the licensing of other pawnbrokers, nor any law prohibiting the licensing and regulation of such other pawnbrokers. Upon the principle followed in the authorities cited, there is clearly no conflict between the statute and the ordinance involved in the instant case. The ordinance is neither inconsistent with nor repugnant to the general law, and does not in the least tend to limit or to interfere with the operation of the statute.

The city has the power to legislate upon local and municipal matters. If, as contended by plaintiff in error, the business of pawnbroking is a matter of state-wide interest, this fact does not prevent such business from being also a matter of municipal interest. The preservation of the health, safety, welfare, and comfort of dwellers in urban centers of population requires the enforcement of very different and usually much more stringent police regulations in such districts than are necessary in a state taken as a whole. 19 R. C. L. 798, \$ 106. In section | brought suit against the plaintiffs in error,

is said:

"The business of pawnbrokers, because of the facility it furnishes for the commission of crime and for its concealment, is one which belongs to a class where the strictest police regulation may be imposed.'

And in section 258 of the same work is the following:

"Among the occupations which have been held to affect the public interest so far that a municipal corporation may lawfully require a license as a condition of engaging therein are \* \* \* keeping a \* \* \* pawnbrokers shop." pawnbrokers shop."

In section 1023, McQuillen, Munic. Corp., it is said:

"The law recognizes that the business of pawnbroker is of such a character as to justify and imperatively require rigid police supervi-sion, and as a means to this end a permit or license to conduct such business may be demand-

For the reasons hereinbefore stated, we hold that section 1390 of the Municipal Code of 1906, of the city and county of Denver, being the section of the ordinance involved in this case, is valid, and that no error was committed by the county court in finding and determining that plaintiff in error was a pawnbroker under the ordinance and subject to the penalties provided for the violation of the section of the ordinance in question. The application for a supersedeas will therefore be denied, and the judgment affirmed.

Affirmed.

HILL, C. J., and BAILEY, J., concur.

HEBER et al. v. PORTLAND GOLD MIN-ING CO. et al. (No. 8494.)

(Supreme Court of Colorado. April 1, 1918.) 1. Injunction €==103;—Crimes.

Injunction will not lie to restrain storckeepers and assayers from carrying on the business of purchasing, knowingly, stolen ores, from plaintiff's employés; this being a felony by stat-

2. Jury \$\infty 31(11)\text{—Infringement of Right\text{—}} Injunction.

To restrain a storekeeper and assayer from carrying on the business of purchasing from plaintiff's employés ore stolen from plaintiff's mine, such act, constituting a felony, would deny defendant the right to trial by jury.

Garrigues, Allen, and Bailey, JJ., dissenting.

En Banc. Error to District Court, Teller County; W. S. Morris, Judge.

Action by the Portland Gold Mining Company and others against George Heber and others. From an order overruling demurrer to the complaint, defendants bring error. Reversed.

E. G. Vanatta, of Casper, Wyo., for plaintiffs in error. E. J. Boughton, N. Walter Dixon, and Thomas J. Dixon, all of Denver, for defendants in error.

TELLER, J. The defendants in error

for injunctive relief.

[1] The complaint aileged that the plaintiffs were the owners and operators of mining and milling property in the Cripple Creek mining district; that in said district there were many other persons and corporations owning and mining their properties in the same general way as were the plaintiffs; that in the said operations the plaintiffs and the mine operators have expended many million dollars; that the said mining properties contain gold bearing ores, some of which are what is commonly known as "high grade" ores, of great value; that said high-grade ores may be distinguished by their physical appearance; that since the beginning of mining in said district they have been subject to theft by employes of plaintiffs and the other mine owners to the amount of millions of dollars; that large numbers of men are employed in said mines; that such thefts of ore are profitable only because of the existence of a class of assayers whose principal business is dealing in such stolen ores; that the defendants belong to said class of "high-grade assayers," and are engaged solely in buying ores which they know to have been stolen; that they encourage said employes to steal said ores, and aid and assist one another in said unlawful acts and in escaping detection therein; that they buy also from said employés precipitates, amalgam, and bullion known to have been stolen; that they do not comply with the law which requires the purchaser of ores to keep a book in which shall be recorded all the particulars of such purchases; that, unless restrained by order of court, they will continue to buy stolen ores; that, by reason of the fact that each theft is usually of a small quantity of ore, it is almost impossible for the plaintiffs to detect it at the time: that they constitute repeated trespasses that would involve plaintiffs in a multiplicity of suits to recover the amounts taken; that defendants are insolvent; that plaintiffs have no adequate remedy at law; and that defendants by their acts inflict irreparable injury upon plaintiffs.

The prayer is that defendants be enjoined "from carrying on the business of purchasing knowingly stolen ores, concentrates," etc., in the said district, "and from purchasing, receiving, or in any way handling or dealing with, directly or indirectly, in said mining \* which they district, any ores, etc., \* may know, or have reason to believe, were stolen"; and for an accounting for all stolen cres theretofore purchased.

A demurrer to the complaint was overruled, and, on defendants' election to stand upon the demurrer, judgment was entered against the plaintiffs in error, and other defendants who were in default, perpetually enjoining and restraining them "from carrying on the business of purchasing knowingly stolen ores, concentrates, precipitates, amalgam, or bullion which they or he may know,

and several others who do not appear here, or have reason to believe, were stolen." The overruling of the demurrer is assigned as The principal ground of demurrer error. argued is that the complaint does not state facts constituting a cause of action.

It is objected that the purpose of the suit is to enjoin the commission of a criminal offense. It is pointed out that our statutes make the buying of stolen ore a felony, and that they provide an elaborate system of recording every purchase of ore, all of which provisions are intended to accomplish the precise purpose at which this suit aims. Defendants in error reply that equity has jurisdiction to enjoin an action even though it be criminal, if, at the same time, it protects personal or property rights. The question here presented, then, is: Do the facts alleged present a case falling within the principle last stated?

It is not to be questioned that, where the direct and immediate purpose of a suit in equity is to protect property, an injunction may issue, although incidentally it enjoins the perpetration of a crime.

In the case at bar, plaintiffs below allege that, if the sale of stolen ores be prevented, the stealing of ores will thereby be discouraged, and plaintiffs' losses to that extent be decreased. No case is cited in which the jurisdiction of equity is sustained to protect property in this indirect manner.

In the case of In re Debs, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092, on which defendants in error rely, the effect of the injunctive order was direct. The defendants in that case were enjoined from obstructing interstate commerce and the carrying of United States mails. It is not authority for the proposition maintained here by defendants in error.

They also rely on People ex rel. v. District Court, 26 Colo. 386, 58 Pac. 604, 46 L. R. A. 850, and quote from it as follows:

"Courts of equity have no jurisdiction by in-junction to restrain the commission of criminal acts which do not violate some personal or prop-erty right."

It is argued that the violation of plaintiffs' rights in this case is such as to bring it within the italicized portion of the above quotation. We think, however, that, for the reason above given, the case does not apply. The protection of property rights in this case appears only by a course of reasoning, to wit: That, if these defendants are prevented from buying stolen ores, the employes of plaintiffs who steal ore, finding it no longer profitable, will cease their thefts. The results of the injunction are therefore not determinate, but inferential only. The only actual and direct result is the enjoining of a criminal offense.

Defendants in error rely also upon Kirby v. U. P. R. R. Co., 51 Colo. 509, 119 Pac. 1042, Ann. Cas. 1913B, 461, in which railroad ticket brokers were enjoined from purchasing special rate tickets. That case, however, is not in point, since it dealt, not with criminal | any degree, should receive no favor from offenses, but with acts which the court held to be fraudulent.

The injunction directly protected plaintiffs' rights.

Every theft is an invasion of some one's property rights. The fact that in this instance an injunction is sought only against a certain class is not material. There are other lines of business in which thefts are extremely common and difficult to detect. If one class may be enjoined either directly or indirectly from stealing, other classes may be treated in the same manner. Modern penal laws are intended both to punish the criminal and to deter others from perpetrating like offenses. The purpose of the law, then, is to accomplish the very same end which the injunction would accomplish, according to the reasoning of defendants in error. Where a criminal prosecution will effectually redress the plaintiff's wrong, he has no remedy in equity. 22 Cyc. 775.

The fact that the criminal statutes are not properly enforced was urged as a ground for injunction in People v. District Court, supra. This court, in discussing that charge in the complaint, said:

"It is a plain attempt, through the aid of a court of equity, to prevent the violation of the penal statutes of the state, and to confer upon that court the administration of the criminal law, solely because the sworn officers neglect or refuse to perform their duty in this regard. The failure of these officers to perform their duty constitutes no ground for the interference of a court of equity."

If it is so difficult to detect these thefts of ore—and, therefore, the criminal law is not enforced-there is no reason apparent why it would not be equally difficult to show a violation of the injunction, unless dependence be placed upon that part of it which enjoins the purchasing of ore which the buyers have reason to believe have been stolen. In such a case, one cited for contempt would not know what evidence he ought to be prepared to meet. It would open a wide field of conjecture and speculation, and make it possible for the court to inflict a penalty on grounds upon which no two persons might hold the same view.

[2] Another effect of the injunction would be to deny one cited for contempt a trial by jury in what is in effect a criminal case. In other words, a court, without a jury, might convict persons of an offense which the statutes of the state make a felony, and, upon conviction, might inflict such punishment as to the court seemed proper. This fact alone should limit the right to an injunction to cases in which its direct effect is the protection of rights or property, and where it is necessary to such protection. It is a truism that courts of equity are not fitted for the administration of criminal law, and attempts to extend their jurisdiction to that field, in secure the cancellation of the judgment,

those whose duty it is to preserve the landmarks of the law.

The plaintiffs have as adequate a remedy in the premises as have others whose property is liable to be stolen, and the complaint does not state a cause of action.

The demurrer should have been sustained. The judgment is therefore reversed.

GARRIGUES, ALLEN, and BAILEY, JJ., dissent.

CORYELL v. OLMSTED et al. (No. 8951.) (Supreme Court of Colorado. April 1, 1918.)

In action by creditors to set aside a confessed judgment, the answer of the judgment debtor is not evidence against the judgment creditor, and constituted no basis for setting aside the judgment as fraudulent.

2. Fraudulent Conveyances 30 - Con-FESSING JUDGMENT.

That a creditor to whom a debtor confessed judgment promised such debtor to withhold execution was no concern of other creditors, and did not tend to show that the confession of judgment by the debtor was with fraudulent intent as to other creditors.

3. Fraudulent Conveyances 5-30 - Con-

FESSION OF JUDGMENT—PRIOR AGREEMENT.
That an insolvent and a creditor to whom judgment was confessed had previously agreed on a confession of judgment would not render the confession fraudulent as to other creditors, because there could not be a confession of judgment without an agreement.

4. Fraudulent Conveyances €== 123 - Con-FESSION OF JUDGMENT-PREFERENCES.

An insolvent can prefer a bona fide creditor, and can confess judgment in his favor, although creditors are hindered and delayed, because there could be no preference without hindering or delaying other creditors.

FRAUDULENT CONVEYANCES \$\infty 299(7) - CONFESSION OF JUDGMENT—EVIDENCE. Evidence held not to show that a confession

of judgment by an insolvent was covinly, maliciously, or wantonly made with intent to hinder and delay creditors.

6. Fraudulent Conveyances 5-123 — C FESSION OF JUDGMENT—DEBTS NOT DUE.

An insolvent can confess judgment on notes not yet due without being guilty of an unlawful preference.

from District Court, County: John T. Shumate, Judge.

Suit by Victor R. Olmsted and Marie K. Kingsbury against Minnie B. Coryell and another to set aside a judgment. Judgment for plaintiffs, and the named defendant brings error. Reversed and remanded, with directions.

Defendants in error Olmsted and Kingsbury commenced this suit November 15, 1913, as a direct attack upon a confessed judgment for \$7,809.15, entered against one Fawcett, July 22, 1913, in favor of Coryell, plaintiff in error. The purpose of the action was to error.

enjoin and restrain the sheriff of Garfield the judgment of confession against Fawcett county from selling the property of Fawcett on execution, and to procure the appointment of a receiver to take charge of the propertv.

### The Pleadings.

The complaint alleges that June 24, 1913, Kingsbury recovered judgment against Fawcett for \$170.40, on which execution was issued and placed in the hands of the sheriff August 21, 1913; that September 15, 1913, Olmsted obtained a judgment against Fawcett for \$468.28, and forthwith caused a transcript to be filed in the office of the clerk and recorder's office; that no part of the judgments has been satisfied; that Fawcett owes more than \$22,000 and is insolvent; that she is the owner of 560 acres of land in Garfield county; that July 22, 1913, in case No. 1655, while insolvent, and for the purpose of hindering, delaying, and defrauding her creditors, Fawcett confessed judgment in favor of Coryell in the sum of \$7,809.15, in a suit brought by Coryell against Fawcett in the district court of Garfield county: that the judgment in that case is based upon certain promissory notes alleged to have been given by Fawcett to Coryell, which were not exhibited in court nor tendered for cancellation and, if they existed, which is denied, it is alleged were executed without valid consideration and for the purpose of hindering, delaying, defrauding, and cheating her credthat September 7, 1913, caused the sheriff to levy upon the property of Fawcett and is about to sell it on execution; that there was filed with the confession of judgment an agreement of date July 21, 1913, signed by Coryell, to the effect that the judgment should not draw a greater rate of interest than 6 per cent. from date until satisned; that the judgment so confessed upon the suit and complaint of Coryell was entered by collusion and fraud between Fawcett and Coryell for the purpose of giving preference to Coryell, who had no other security; and that plaintiffs and other creditors will be defrauded of their just claims unless a receiver be appointed to take charge of the property and assets of Fawcett. Prayer that the judgment be set aside and the suit in that case dismissed, that a receiver be appointed, and Coryell enjoined from selling under execution, and for general relief. November 17, 1913, Fawcett by separate answer admitted all the allegations of the complaint and petition, consented to the appointment of a receiver, and alleged that she owned other property in addition to that described in the complaint. November 18th, the court entered a finding on the pleadings that the actual parties in interest were Fawcett and plaintiffs, and without notice to Coryell entered an order appointing a receiver of all the property and effects of Fawcett and enjoining and restraining Coryell the event of nonpayment of interest when

in case No. 1655. January 5, 1914, Coryell answered, alleging that July 22, 1913 she obtained judgment by confession against Fawcett for \$7,809.15, upon three promissory notes which were given for a valid consideration and were considered merged in the judgment; admitting the sheriff levied on the property and had a custodian in charge thereof until displaced by the receiver; that it was agreed in anticipation of the judgment that it should draw 6 per cent. interest; but denying that a sheriff's sale on execution will defraud plaintiffs or any of Fawcett's creditors of their just dues, or that the judgment was confessed for the purpose of hindering and delaying creditors.

## The Evidence.

The uncontradicted evidence shows that Fawcett rented from Coryell what is known as the Red Soil ranch for the years 1912 and 1913, at the agreed price of \$600 a year; that March 21, 1913, Fawcett owed Corvell \$600 for the rent of 1912, \$49.25 for hay, and \$100 for a gasoline engine, a total of \$749.25; that Coryell received from Fawcett, to be credited on this account, \$225, leaving a balance due on settlement of \$524.25, for which she gave Coryell a promissory note dated March 21, 1913, payable in 30 days with interest at 10 per cent., no part of which was paid, and which entered into the confession of judgment; that March 31, 1913, Fawcettgave Coryell another note for \$600, the consideration being the rent for the ranch for 1913, with interest at 10 per cent., no part of which was paid, and which also entered into the confession of judgment; that January. 1911, negotiations were commenced by Fawcett which resulted in the purchase, or agreement to purchase, from Coryell, what is called the Pierce tract, at the agreed price of \$6,000. The deed to Fawcett was made and acknowledged in Denver, April 26, 1911, at which time a note for \$6,000 was prepared, representing the purchase price; that the papers were not exchanged until October 20. 1911, when Fawcett signed and delivered the note to Coryell who delivered the deed. Fawcett withheld this deed from record until July 17, 1913, when Coryell ascertained that creditors had already and were obtaining judgments against Fawcett, which were becoming liens against the land, while the \$6,000 note for its purchase price was unsecured. This note is dated April 26, 1911, the day the deed was acknowledged, and matured January 1, 1918, with interest at 6 per cent., payable annually, the first interest payment to be due January 1, 1913. No part of this note was paid, and it was also included in the judgment by confession, less the interest, which was deducted to October 20, 1911, the date when the note was delivered and the deed accepted. It provided that in from proceeding further in any manner under the same should become due, and after 30

days' notice to Fawcett, the \$6,000, with ac-1 that Fawcett confessed judgment for the crued interest, should become due and payable. It contains another statement that the note is given for the purchase price of the land, on which it shall be a lien. Coryell pegan a suit on these three notes by filing a complaint in the district court, upon which Fawcett confessed judgment July 22, 1913. As an inducement for this judgment, Coryell agreed in writing that the judgment should draw interest only at the rate of 6 per cent., the same as the \$6,000 note. This judgment the lower court set aside and vacated upon the ground that Fawcett had confessed it for the purpose of hindering and delaying creditors. The court found the \$6,000 was based upon a valid consideration, but that it was not due when the judgment was confessed. and for this reason should not prorate with other claims against the Fawcett estate. The judgment as a whole was set aside, the levy on execution vacated, and the property turned over to the receiver, thereby destroying the judgment lien Coryell had obtained, and leaving her an unsecured creditor for the amount of the two notes aggregating \$1.124.25.

John L. Noonan and J. W. Dollison, both of Glenwood Springs, for plaintiff in error. Edwin C. Kingsbury, of Denver, for defendants in error.

GARRIGUES, J. (after stating the facts as above). [1,2] 1. The only point in the case relates to the finding of the court that Fawcett confessed judgment for the purpose of hindering and delaying creditors. There is not a particle of evidence upon which to base such a finding or conclusion. The court seems to have proceeded upon the theory that plaintiffs and Fawcett were the only interested parties in this suit. Not so. Coryell was vitally interested. The pleadings were not evidence against Coryell, and constituted no basis for setting aside the judgment. It was the evidence given in court by Fawcett, and not her answer, that constituted her evidence against Coryell. There is no evidence to warrant an inference that the judgment was confessed wantonly, covinly, or maliciously, for the purpose of hindering or delaying creditors. Fawcett testifled she purchased the Pierce tract for \$6,000; that she considered it worth that sum; that she gave her note for the purchase price expecting and intending to pay it; and that she owned the land and owed the note. She says Coryell represented that the confession of judgment would save costs, and promised in the event she would agree to the entry of judgment, that it should draw only 6 per cent. interest instead of the legal rate, and that she would hold off execution and assist her in securing a loan on the land by which she could pay all her creditors. If true, this was only a matter between Coryell and Fawcett, was of no concern to plain-

purpose of hindering or delaying creditors.

[3] It is evident that no judgment could be confessed, except by agreement which must necessarily precede the judgment. The judgment being based upon valid obligations. the agreement in advance to confess it in no way affects its validity.

[4] Confession of judgment is not a badge of fraud. Preferring creditors, when one is insolvent, is not iniquitous, and there is no evidence that this is a vicious judgment. It was practicing no fraud upon plaintiffs to take a confession of judgment based upon just and valid obligations, even though Fawcett was insolvent and it worked a preference of creditors. The burden was upon plaintiffs to show that some equitable rights of creditors were invaded by the confession of judgment, which they failed to do. The court seems to have set aside the judgment merely because it hindered and delayed creditors. and this was error. Burr v. Clement, 9. Colo. 1-8, 9 Pac. 633; Stockgrowers' Bank v. Newton, 13 Colo. 245, 22 Pac. 444; Walton v. First Nat. Bank, 13 Colo. 265, 22 Pac. 440, 5 L. R. A. 765, 16 Am. St. Rep. 200; Sutton v. Dana, 15 Colo. 98, 25 Pac. 90; Sweet v. D. & R. G. Co., 59 Colo. 134, 147 Pac. 669; Eversman v. Clements, 6 Colo. App. 224, 40 Pac. 575; Wilson v. American Nat. Bank, 7 Colo. App. 194, 42 Pac. 1037; People ex rel. v. Rio Grande Co., 11 Colo. App. 124, 52 Pac.

In Sweet v. D. & R. G. Co., supra, it is said:

"We have yet to learn that there is any iniquity in consenting to a judgment upon just and valid obligations."

In Walton v. First National Bank, supra, it is said at page 276 of 13 Colo., at page 443 of 22 Pac., 55 L. R. A. 765, 16 Am. St. Rep. 200:

"It is not to be understood from this opinion that, in the absence of statutory restriction, a debtor may not, under ordinary circumstances, lawfully give preference to one creditor over others; nor that it is a badge of fraud for a creditor to secure such preference."

In Sutton v. Dana, supra, it is said:

An insolvent "might lawfully prefer some of his creditors to others, and pay some of them in full, leaving others partially or wholly unpaid so far as he should be without means of payment. \* \* The law permits an insolvent debtor to make choice of the creditors he will pay, and the mode or means by which he will make such payment, and that something beyond such preference or payment must appear before the transaction is to be considered fraudulent. The preference of creditors by a failing debtor is not necessarily fraudulent." debtor is not necessarily fraudulent.

The court properly held there was no fraud in the account upon which judgment was based; but found it was confessed for the purpose of hindering and delaying creditors. We have seen that an insolvent debtor may prefer creditors, and it follows as a necessary consequence if he prefers one creditor over another either by assignment, paytiffs, and tended in no way to establish ment, or confession of judgment, that it will hinder and delay other creditors. It would be impossible for an insolvent debtor to prefer one creditor over another without hindering and delaying other creditors, and if that is what is meant by the rule regarding hindering and delaying creditors, any preference would bring about such a result. In Burr v. Clement, supra, it is held that the hindering and delaying meant by the law, as vitlating an assignment, is that hindering and delaying intended to be produced by the assignor through covin, malice, or for his own benefit and advantage.

[5] This rule applies equally well to a confession of judgment. There is not the slightest evidence that the confession of judgment in this case was covinly, or maliciously, or wantonly made by Fawcett with intent to hinder and delay creditors, or that she derived any unlawful, invalid, or improper advantage, or any favor or benefit of any kind over her creditors by her action in that regard.

[6] The court found that the \$6,000 note was not due when judgment was confessed, and for that reason held it was not a valid claim against the estate of Fawcett. This was error. A judgment by confession is a judgment by agreement or consent. It is an admission that the demand is just and valid, and is a waiver of all technical defenses. Fawcett's own evidence shows that she could not have prevented a judgment on the \$6,000 note, although she might have delayed it until the notice was given, or caused two suits to be instituted. Instead of doing this, she consented to the judgment by which the provision regarding the 30 days' notice was waived. No doubt she could waive the notice if she wished, and the confession of judgment certainly waived it.

The judgment is reversed and the cause remanded, with directions to the lower court to enter a judgment in accordance with the views herein expressed, but without interfering with the order appointing the receiver. Reversed and remanded, with directions.

HILL, C. J., and SCOTT, J., concur.

MINTURN v. PROCTOR & GAMBLE MFG. CO. (No. 21479.)

(Supreme Court of Kansas. April 6, 1918.)

(Syllabus by the Court.)

MASTES AND SERVANT \$\ightharpoonup 398 - Workmen's Compensation Act - Action by Minos -CLAIM FOR COMPENSATION.

The action of a minor, by his next friend, to recover under the Workmen's Compensation Act, is not barred because the written claim for compensation was not served within three months from the date of the injury; no guardian having been appointed. Section 5904, Gen. St. 1915.

Appeal from District Court, Wyandotte County.

Action by Harrold Minturn, a minor, by his mother and next friend, Martha Minturn, against the Proctor & Gamble Manufacturing Company. Judgment for plaintiff, and defendants appeals. Affirmed.

J. K. Cubbison, of Kansas City, Kan., and Wm. G. Holt, of Kansas City, Mo., for appellant. Meade & McCarty and W. C. Rickel, all of Kansas City, Kan., for appellee.

WEST, J. A minor, by his next friend. brought this action to recover under the Workmen's Compensation Act for an injury to his hand, received while working in the defendant's plant. A demurrer to his evidence was overruled, and a recovery was had. The defendant appeals, and contends that the plaintiff cannot prevail, because the three months' claim for compensation provided by the statute was not given; six months having elapsed before the defendant was noti-

Section 68 of the act (section 5916, Gen. Stat. 1915) provides that the action shall not be maintainable unless a claim for compensation has been made within three months after the accident or in case of death within six months from the date thereof. If this statute governed, the defendant would be correct in its position. But section 5904 providea:

"In case an injured workman is mentally in-competent or a minor \* \* \* at the time at the time competent or a minor at the time when any right, privilege or election accrues to him under this act, his guardian may, in his behalf, claim and exercise such right, privilege, or election, and no limitation of time, in this act provided for, shall run, so long as such incompetent or minor has no guardian."

The petition alleged that no guardian had been appointed and that the minor was 20 years of age. The action was begun January 15. 1917 and the injury occurred August 10, 1916. A written claim for compensation was served by him January 15, 1917, signed by his mother and next friend; no guardian having been appointed. This met the requirements of the statute, and the action is not barred.

The judgment is affirmed. All the Justices concurring.

EVANS v. DIEHL. (No. 21178.) (Supreme Court of Kansas. April 6, 1918.)

(Syllabus by the Court.)

1. WATERS AND WATER COURSES \$== 126(3) --

FINDINGS OF FACT—CONFLICT.
Findings of fact upon which a judgment enjoining the maintenance of a drain and ditch was based, examined, and no substantial conflict discerned therein.

2. Waters and Water Courses €==38 —
"Natural Water Course"—Depression in LAND.

A depression in a plaintiff's land of lower elevation than a depression in defendant's land, and into which waters from defendant's depression flow in times of heavy rain, is not necessarily a "natural water course" into which the defendant may lawfully drain the waters from his depression under section 2 of chapter 175 of the Laws of 1911.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Natural Water Course.]

3. Waters and Water Courses \$\iiii 38 -"Natural Water Course"-Depression in LAND.

A depression into which surface and standing waters may be drained is not necessarily a natural water course merely because flood wathat depression when the river is in flood.

4. APPEAL AND ERBOR \$== 1008(1)-QUESTION OF FACT-JUDGMENT OF TRIAL COURT.

Where there is room for differences of opinthe determination of an ultimate and controlling fact, the opinion and judgment of the trial court thereon is conclusive on appeal.

5. Waters and Water Courses 4=124 — Construction of Ditch and Drain — In-JUNCTION.

Defendant constructed a drain and ditch on his own land, in the natural course of drainage towards the land of plaintiff, which drain and ditch discharged their waters into a lower depression on plaintiff's land; but such lower depression was not a natural water course. Held, that such ditch and drain were not authorized by section 2 of chapter 175 of the Laws of 1911, nor otherwise, and were properly enjoined.

Appeal from District Court, Saline County. Action for injunction by M. S. Evans against Plus Diehl. Decree for plaintiff, and defendant appeals. Affirmed.

Burch, Litowich & Royce, of Salina, for appellant. Z. C. Millikin, of Salina, for appellee.

DAWSON, J. This is an appeal from a decree enjoining the defendant from maintaining a tile drain constructed by him to draw off surface and standing water from his own land and which cast it on neighboring land belonging to the plaintiff.

The lands of plaintiff and defendant lie in the west half of section 24, township 13 south, range 1 west, near the Solomon river in Saline county. The plaintiff's land lies north of defendant's, and they are separated by the right of way of the Rock Island Railway, which runs in a northeasterly direction in that locality. There is a depression of an old river bed on plaintiff's land near the Solomon river, just north of the railway. but this depression does not drain into the Solomon except when the latter is in flood, at which time the river overflows into plaintiff's depression and fills it; and if the river flood be high enough the water backs still further, through a culvert in the railway into a depression of another ancient river bed on defendant's land. The old river bed on defendant's land, more elevated than plaintiff's, is a swale where surface water accumulates to a depth of a few inches, perhaps two feet at the most. When more surface water than that amount accumulates, it starts to flow northeastwardly through defendant's land and through the railway culon defendant's land, more elevated than

vert into the depression or old river bed in plaintiff's land. For the most part, the general lay of the land south of the railway, on defendant's land and for some distance west of it, is in a northeasterly direction. ditch on the south side of the railway drains part of the surface water of that locality. This railway ditch empties through the railway culvert into plaintiff's old river bed. If the rainfall is unusual, this railway ditch overflows and its waters find their way towards defendant's land and into the depression thereon, and if their volume be sufficient such waters flow with the other accumulated waters in that depression over a slight natural ridge or barrier near the north side of defendant's land and through the railway culvert into plaintiff's land.

The drain and ditch enjoined in this lawsuit were constructed by defendant in the depression of his land and through this slight natural barrier to the railway ditch, and the waters of this drain and ditch are thus discharged into the railway ditch and thence through the railway culvert into the depression or old river bed in plaintiff's The drain is laid in the same general course taken by the waters when the latter are high enough to flow. In ordinary years the plaintiff's depression is fit for farming and is farmed notwithstanding the discharge of waters into it from the ordinary drainage of the railway ditch but, if it has to receive in addition thereto the waters which commonly stand in defendant's depression and which are held therein by the slight natural barrier at the north side of defendant's land, about eight or ten acres of plaintiff's land will ordinarily be rendered unfit for farming. Defendant's drain and ditch, if not enjoined, would make six or eight acres of his land fit for farming.

The trial court made extended findings of fact upon which it based its judgment enjoining the maintenance and use of defendant's drain; and it is the contention of defendant in this appeal that, upon the facts found by the court, the judgment should have been for defendant and not for plain-

The principal and only important issue in the case was whether the depression or old river bed in plaintiff's land was a natural water course for the outlet of surface and standing waters from defendant's land. Laws 1911, c. 175, § 2; Wood v. Brown, 98 Kan. 597, 159 Pac. 396. On this point the trial court's controlling findings are:

. . . The north portion of this [plaintiff's] river bed is the shallowest and has an out-

ditch on the south side of the grade of the Rock Island Railroad down through the culvert mentioned and through the same into the river bed upon plaintiff's land. \* \* \* Some of it flows across the southeast quarter of section twenty-three [adjoining land west of defendant's] and into a low place and follows what is called a ravine through the south portion of the southeast quarter of section 23 into defendant's said depression or river bed, and, in the times of heavy and excessive rains, a portion of such water flows into said Rock Island ditch and thence under the railroad culvert mentioned, and into plaintiff's river bed. \* \* \* In case of excessive and heavy rains the water following the south side of the railroad track overflows the railroad ditch into defendant's depression or river bed and follows the same in its course through the southeast quarter of section 23 around through defendant's land, a large part of it emptying into plaintiff's river bed. In times of excessive and heavy rains a large portion of the surface water which collects upon the land south of the Rock Island track and west from this culvert, for a distance of two miles through these different depressions, flows through the said culvert into plaintiff's river bed. \* \*

"(9) In the years 1903, 1904, 1903, 1915, the Solomon river entered plaintiff's river bed from the north and backed through the railroad culvert and flowed into defendant's river bed or depression.

depression. \* \* \*
"(11) Defendant's tile drain extends in about
the same direction as the surface water flows in
times of excessive rains and when such water is
high enough to flow over the elevation at the
north side of defendant's land. \* \*

"(14) The natural formation between plaintiff's land and defendant's land is such that without ditches no water will enter upon plaintiff's land from defendant's land until water has accumulated upon defendant's land to a depth of at least two feet, on account of a natural elevation or barrier on the north and northeast of defendant's land ranging in height from two to six feet. \* \* \*

of defendant's land ranging in neight from two
to six feet. \* \* \*
"(17) The years 1903, 1904, 1908, and 1915,
as mentioned in finding numbered 9, are shown
by the evidence to have been 'flood years'; the
rain falling upon the territory drained by the
Solomon river having been unusual and extraor-

"(20) Defendant has no outlet for water flowing upon his land from the higher land west of it except through said culvert in the plaintiff's river bed. \* \*

"(24) In order to construct his tile drain it was necessary for the defendant to cut through a barrier or natural elevation about five feet high near the north line of his farm."

[1-3] Defendant says that findings 14 and 24 concerning the "barrier" are inconsistent with every other finding made by the court. It is possible that the trial court miscalculated the height of the "barrier," but that is unimportant. Since the depression in defendant's land lies at a greater elevation than plaintiff's old river bed, a barrier of some height must intervene; otherwise, the water would not stand in plaintiff's depression to any extent. But for some barrier, surface water would not accumulate to a depth of a few inches or up to two feet before it would flow without artificial tiling and drainage into plaintiff's land. Moreover, no matter how high the barrier, since it was

that barrier if the water to be discharged thereby were carried into a natural water course. Section 2 of chapter 175 of the Laws of 1911, in part, reads:

"Owners of land may drain the same in the general course of natural drainage by constructing open or covered drains, whereby the water will be carried into some natural water course, \* \* \* for the purpose of securing proper drainage to such land and when such drainage is wholly upon the owner's land he shall not be liable in damages therefor to any person, etc." Gen. Stat. 1915, § 4051.

The trial court found that the plaintiff's old river bed into which defendant drains his land is not a natural water course. Since there is no well-defined channel therein through which the waters can flow into some indisputable natural water course in that vicinity—like the Solomon river, for example—this court cannot disturb that finding unless the other findings are irreconcilable with that finding.

In Wood v. Brown, 98 Kan. 597, 159 Pac. 396, a natural water course was defined:

"Section 2 of chapter 175 of the Laws of 1911, permitting an owner of land to drain the same in the course of natural drainage by constructing open or closed drains whereby water will be carried into some natural water course, uses the term 'water course' according to its previously accepted meaning, which excluded depressions lacking the characteristic of a distinct channel cut in the soil by running water and having a bed and banks discernible by casual glance." (Syl.); Palmer v. Waddell, 22 Kan. 352; Gibbs v. Williams, 25 Kan. 214, 37 Am. Rep. 241, Syl. par. 2.

In C., K. & N. Ry. Co. v. Steck, 51 Kan. 737, 741, 33 Pac. 601, 602, it was said:

"But to constitute such a water course: "There must be a channel, a bed in the stream, and not merely low land, or a depression in the prairie over which water flows. It matters not what the width or depth may be, a water course implies a distinct channel, a way cut and kept open by running water; a passage whose appearance, different from that of the adjacent land, discloses to every eye, on a mere casual glance, the bed of a constant or frequent stream." Gibbs v. Williams, 25 Kan. 214 [37 Am. Rep. 241]."

See, also, Rait v. Furrow, 74 Kan. 101, 85 Pac. 934, 6 L. R. A. (N. S.) 157, 10 Ann. Cas. 1044.

This court can discern no substantial conflict in the findings. The findings that defendant's depression is higher than plaintiff's old river bed, that surplus waters occasioned by heavy rains flow in the general direction in which defendant's drain was laid, and that in times of extraordinary floods in the Solomon that river overflows into plaintiff's river bed and backs its waters through the railway culvert into defendant's depression, do not necessarily compel the conclusion that plaintiff's depression is a natural water course. Opinions on that proposition, on that ultimate fact, might differ; but, since there is room for differences of opinion, the determination of the trial court must govern.

no matter how high the barrier, since it was [4, 5] In Perkins v. Accident Ass'n, 96 in defendant's own land, he might cut through Kan. 553, 555, 152 Pac. 786, 787, it was said:

"It can avail naught that this court might | right of way took 6.39 acres. The report of think the evidence rather meager to warrant that conclusion. This was a case where judges might entertain an honest difference of opinion, but the determination of the facts was strictly within the province of the trial court, and its finding is conclusive."

The court has not overlooked the authorities cited by defendant, but the finding that the plaintiff's river bed is not a water course forecloses all controversy as to the right of defendant to collect his surface and standing waters and by drainage to discharge them upon plaintiff's land.

Affirmed. All the Justices concurring.

CALKINS v. SALINA NORTHERN R. CO. (No. 21448.)

(Supreme Court of Kansas. April 6, 1918.)

(Syllabus by the Court.)

1. EMINENT DOMAIN @= 223-CONDEMNATION PROCEEDINGS-FINDINGS-EVIDENCE.

In a condemnation proceeding, a special finding of a jury that there was no evidence of the depreciation of each part of a farm lying on either side of the right of way does not conflict with another finding of the damage to the land as a whole, nor indicate that the finding as to damages awarded for the land not taken for right of way was not supported by the evidence. 2. EMINENT DOMAIN \$\infty\$ 166, 247(2)—CONDEMNATION PROCEEDING—INTEREST—"TORT."

A proceeding to condemn private property for public use does not involve a tort, and an owner whose land is so appropriated is entitled to interest on the damages sustained by him be-tween the time of the appropriation and the time of the rendition of judgment.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Tort.]

Appeal from District Court, Saline County. Action by Royal D. Calkins against the Salina Northern Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

David Ritchie, of Salina, for appellant. Burch, Litowich & Royce, of Salina, for ap-

JOHNSTON, C. J. The action in the district court was an appeal from an award in a condemnation proceeding. Defendant appeals from the judgment in favor of plaintiff.

The plaintiff's farm, through which defendant built its road, is comprised of the south half of a quarter section. The right of way runs lengthwise through the farm in a general southeasterly direction, dividing it about in halves, each triangular in shape. Plaintiff's house stands in the south portion near the south line of his farm. Nearly the whole length of the right of way is in a cut, the greatest depth of which is not more than five feet, and on each side of the track is a ditch. About halfway across the farm a crossing was built to enable plaintiff to go from one part of the farm to the other; cattle guards and gates to be built later at this point. The ing from the taking of property for a right

the commissioners, filed April 21, 1915, allowed the sum of \$579.25 as the value of the land taken and the damage to that not taken, and this amount was deposited by the defendant with the county treasurer on July 21, 1915. about which time the defendant took active possession of the land. At the trial the jury made the following, among other, special find-

Q. Without reference to the value of the land actually taken for right of way, what was the amount of damages, if any, to the remainder of the farm by reason of the taking of said 6.39 acres for the right of way? A. \$1,361.00.

"3. Q. How much was the damage to that eart of the farm lying north of the right of way,

if any? A. No evidence.

"4. Q. How much was the damage to that part of the farm lying south of the right of way, if any? A. No evidence."

[1] In this appeal no question is raised as to the award made for land taken for right of way, but it is contended that the special findings of the jury relating to the depreciation of that not taken are fatally inconsistent with each other. It is said that findings Nos. 3 and 4 conflict with finding No. 2, and in effect negative it. After finding that the damages to the land not taken was \$1,361, the jury in answer to questions 3 and 4 found that there was no evidence as to the depreciation of the respective parts into which the farm was divided by the railroad. The finding that there was no evidence of the damages sustained as to a particular fraction of the farm does not imply that there was no evidence as to the depreciation of the farm as a whole. There was evidence of the damage to the entire farm resulting from the condemnation, and sufficient to sustain finding No. 2; but it appears that no evidence was produced, nor did the parties deem it material to show the exact quantity of the plaintiff's land which lay on each side of the right of way, nor the exact depreciation of each tract by reason of the condemnation, any more than they sought to ascertain the depreciation of the five acres on which the buildings were situated, or of any other fraction of the farm. It was not necessary, and, as the case was tried, the jury had no basis for finding the loss on each part. There was no real conflict or inconsistency in the findings, nor can it be said that finding No. 2 is without support.

[2] The defendant objects to the allowance of interest on the award prior to the verdict. It appears that interest was allowed on the compensation between the condemnation and the rendition of the verdict, less the amount defendant had deposited with the county treasurer. It is insisted that, as interest is not allowed for torts, like the destruction of property by fire (A., T. & S. F. R. Co. v. Ayers, 56 Kan. 176, 42 Pac. 722; U. P. R. Co. v. Holmes, 68 Kan. 810, 74 Pac. 606), none should be allowed for damages resultof way. The condemnation of land for a valuable by reason of the location of the railpublic purpose cannot be regarded as a tort. 15 Cyc. 557. An appropriation of land for this purpose is a proper exercise of governmental power, and all property is held subject to that right. The award is compensation for property taken, not wrongfully, but in a manner authorized by law, and the amount of the compensation can be readily ascertained by recognized standards of valuation. That interest may be recovered on an award from the time of condemnation to the time of the judgment is not an open question in this state. In Missouri River, I't. S. & Gulf Railroad Co. v. Owen, 8 Kan. 409, it was held that a landowner was entitled to interest on an award from the time of the appropriation, regardless of the fact that the railway company had deposited the amount assessed by the commissioners with the treasurer. In Cohen v. St. L., Ft. S. & W. R. Co., 34 Kan. 158, 8 Pac. 138, 55 Am. Rep. 242, it was decided that, where a railroad company has taken and held possession of land for a right of way, interest should be allowed on the amount of the award from the time possession was taken until the time of trial. See, also, W. & W. R. Co. v. Kuhn, 38 Kan. 104, 16 Pac. 75; Irrigation Co. v. McLain, 69 Kan. 334, 76 Pac. 853; Smith v. Railway Co., 90 Kan. 757, 136 Pac. 253.

No error being found in the record, the judgment is affirmed. All the Justices concurring.

CRAIG v. SALINA NORTHERN R. CO. (No. 21449.)

(Supreme Court of Kansas. April 6, 1918.)

(Syllabus by the Court.)

1. Evidence \$502-Cross-Examination SCOPE.

In the trial of an appeal from an award of damages for the appropriation of a railroad right of way through a farm, a witness for the landowner testified that he could give an opinion as to the value of the farm as a whole, but not of the separate tracts of which it was composed. Held, that no reversible error was committed in sustaining objections to questions asked him on cross-examination as to the value of specific tracts, and as how he could tell what the whole was worth, without knowing the value of the different parts.

2. Eminent Domain \$\iff 261-Appeal from AWARD—INSTRUCTIONS.

The instructions in such a case held not to

be objectionable, as failing to state the issues.

3. Eminent Domain @==261 - Appeal from AWARD-SPECIAL FINDINGS.

In such a case no error is committed in the refusal to require the jury to answer questions as to how much depreciation in the value of each of several tracts forming a part of the farm was caused by the appropriation of the right of WAY.

4. Eminent Domain 6=261 - Appeal from AWARD-SPECIAL FINDINGS.

In such a case no error is committed in the refusal to require the jury to enumerate the considerations that tended to make the farm less

road.

5. VERDICT-PASSION OR PREJUDICE.

The record held not to show that the verdict was the result of passion or prejudice.

6. Eminent Domain @==247(2)-Appeal from AWARD-ALLOWANCE OF INTEREST.

On an appeal from an award in condemna-tion proceedings the allowance of interest from a date subsequent to the appropriation is held not to have been erroneous.

Appeal from District Court, Saline County. John Craig appealed from the award of commissioners in a condemnation proceeding by the Salina Northern Railroad Company. From the district court's award of a larger sum. the Company appeals. Affirmed.

David Ritchie, of Salina, for appellant. Burch, Litowich & Royce, of Salina, for appellee.

MASON, J. The Salina Northern Railroad Company acquired a right of way across the farm of John Craig by condemnation. He appealed from the award of the commissioners, and on a trial in the district court was allowed a larger sum. The company now appeals.

[1] 1. A witness for the plaintiff testified that he could estimate the value of the plaintiff's farm before and after the condemnation, and he undertook to do so. On crossexamination he was asked if he could give the value of one of the tracts of which it was composed. He answered:

"I don't know as I can in the separate tracts. I wasn't figuring on the farm that way."

He was then asked if he had any opinion as to the value of each of a number of tracts in turn. Objections to these questions, as involving repetition, were sustained, and complaint is made of these rulings. We see no error in this regard. The witness had in substance disclaimed ability to place a separate valuation on the several tracts. The rights of the defendant were not invaded by the refusal to permit the matter to be gone over with respect to each of them. The witness was also asked on cross-examination how he could form a judgment of the value of the whole farm, if he could not tell what the different parts were worth, and an objection to this question, as being argumentative and repetition, was sustained. Doubtless it would not have been improper for the court to have allowed the question to be answered, on the theory that something might be developed which would aid the jury in determining the weight to be attached to the opinion of the witness: but we regard its exclusion as within the reasonable discretion of the court in supervising the examination. The defendant had the opportunity of arguing to the jury that, if the witness could not put a valuation on the tracts separately, his valuation of the whole was the less likely to be correct, and what,



if anything, the witness might have been able to say in reply to that suggestion was not highly important.

[2] 2. The contention is made that the court erred in failing to instruct the jury as to the elements to be considered in arriving at the amount to be awarded. No special instructions were asked, and no specific omission is pointed out in the brief. The jury were told that they could not consider benefits to the land, nor damages from risk of fire, or of injury to stock, or of teams being frightened, or of depredations by tramps. The amounts allowed for the land taken and for the injury to the remainder were separately found. We perceive no vital omission in the charge.

[3] 3. Special questions were submitted, asking the jury how much damage they allowed to each of several tracts forming a part of the farm. To each of these questions the answer was returned: "No evidence on separate tracts taken as a whole farm." The defendant asked that the jury be required to return a more specific answer, but the request was refused. The contentions are made that the answer is untrue, because there was some evidence as to the value of the separate tracts before and after the condemnation, and that the defendant was entitled to have the questions definitely answered. The jury's answer that there was no evidence as to the value of the particular tract does not amount to a statement on their part that no evidence whatever was introduced on the subject. It is to be interpreted as meaning that there was no persuasive evidence-no preponderance of the evidence-such as to enable them to form a judgment in the matter. Jolliff v. Railway Co., 88 Kan. 758, 129 Pac. 1178. We do not regard as erroneous the refusal to require other answers to be made. Several of the particular parcels inquired about were not touched by the right of way, and, considered as separate and independent tracts, could have suffered no depreciation. If the damage to the whole farm were to be arrived at by estimating the loss to each tract and adding together the amounts so obtained, there would be a purpose in requiring the award to be itemized; but such is not the case. The actual loss to the owner could only be arrived at by considering the farm as a whole, in view of the use to which it was put. After the amount had been so ascertained, it might possibly have been apportioned among the different parcels according to some principle of distribution; but no benefit could accrue from such a process, as the allowance was not made piecemeal, and could not have been reached in that manner.

"In estimating the damages to a farm occasioned by the condemnation of a portion of it for railroad purposes, the various subdivisions of the farm, like wheat field, corn field, meadow, pasture, house lot, garden lot, barnyard, etc., cannot be considered separately, and damages assigned to each. An entire tract, when occu-

pied, improved, and used as a farm, cannot be valued in such detached parcels." Railway Co. v. Roe, 77 Kan. 224, 226, 94 Pac. 259, 260 (15 L. R. A. [N. S.] 679).

A suggestion is made that one of the tracts in question is separated from the house by a highway, and also by a creek. These considerations are not fatal to the right of the plaintiff to have the farm treated as a unit. 2 Lewis, Eminent Domain (3d Ed.) \$ 698.

[4] 4. The jury were asked what elements of damages they considered in making up the award, aside from the value of the property taken, and answered: "Depreciation of value of the farm as a whole." Complaint is made on the ground that a fuller answer should have been exacted. It has been specifically held that the jury need not be required to show the amount of loss deemed due to each factor in the depreciation. Leavenworth, T. & S. W. Ry. Co. v. Paul, 28 Kan. 816. We think no error was committed in refusing to compel the jury to enumerate all the considerations that tended to make the farm less valuable by reason of the location of the railroad. As has been said in a similar case:

"A party desiring special findings should submit particular questions, instead of general ones, and should not leave the jury to analyze and separately state the constituent elements of the damage suffered. The jury may be interrogated as to any particular element about which there was testimony offered, but to require them to distinguish and describe all the sources of damage, and the amount allowed for each, would probably result in confusion, delay, and uncertainty. Such a procedure is not within the purpose of the statute, and has already been disapproved of by this court." L. & W. Ry. Co. v. Hawk, 39 Kan. 638, 640, 18 Pac. 943, 944 (7 Am. St. Rep. 566).

[6] 5. It is urged that the amount awarded is so large as to show passion and prejudice. The verdict is not without some evidence in its support, and the approval of the trial court makes it conclusive.

[6] 6. The remaining question involved is whether error was committed in allowing interest on the difference between the amount deposited by the defendant and the amount here recovered, for the period between July 21, 1915, prior to which time the appropriation had taken place, and the return of the verdict. The defendant invokes the rule which forbids the allowance of interest as such in actions for unliquidated damages founded on tort. The present proceeding is not of that character, and the rule does not apply. Calkins v. Salina Northern R. Co., 172 Pac. 20, decided at this session. Interest is allowable from the date of condemnation, unless it is shown that the owner's possession was not interfered with and that he suffered no embarrassment or inconvenience therefrom. Irrigation Co. v. McLain, 69 Kan. 334, 341, 76 Pac. 853. No such showing was made; in fact, there was evidence that grading was begun in June, 1915. We conclude that the allowance of interest was proper.

The judgment is affirmed. All the Justices concurring.

OSBORN v. OSBORN et al. (No. 21614.)

(Supreme Court of Kansas. April 6, 1918.)

### (Syllabus by the Court.)

1. Dower \$\infty 12(1)\$—Construction of Statute.

Section 3831 of the General Statutes of 1915, providing that under certain circumstances a widow shall be entitled to one-half in value of real estate in which her husband in his lifetime had a legal or equitable interest, refers to legal or equitable interest capable of inheritance, and does not apply to interests in land which were extinguished by the husband's death.

2. Dowers \$\Pi\leftarrow\$12(5) — Share of Surviving

WIFE—LIFE ESTATES.

A widow has no interest, under the statute, in lands purchased by her husband with his own funds and deeded to him "and at his death to his sons"; his interest being a life estate only.

3. HUSBAND AND WIFE \$\infty\$6(2)\to HUSBAND'S DISPOSITION OF PERSONAL PROPERTY \to Validation Value of the control of the cont

The rule stated in the decisions in the cases of Small v. Small, 56 Kan. 1, 42 Pac. 323, 30 L. R. A. 243, 54 Am. St. Rep. 581, and Poole v. Poole, 96 Kan. 84, 150 Pac. 592, regarding the unlimited power of a husband to give away his money or personal property, although the intention or known effect be to deprive his wife of her statutory share should she survive him, followed.

4. Husband and Wife \$\infty 6(3)\to ''Colorable Transaction.''

A colorable transaction is one presenting an appearance which does not correspond with the reality, and, in the sense ordinarily contended for, an appearance intended to conceal or to deceive

5. Husband and Wife \$==6(3) — Colorable Transaction—Conveyance of Life Estate and Remainders.

Deeds of real estate conveying to a married man life estates and to his sons the remainders in fee, considered, and held not to be colorable.

6. Husband and Wife & 6(1)—Conveyance by Husband—Right to Payment.

Money paid a married man as the consideration for a conveyance of his real estate, in which his wife joins, belongs to him, unless it be definitely agreed that a specific portion shall belong to her individually.

7. Dower \$= 78 - Action for Statutory Share-Petition.

The petition considered, and held to contain no allegation of a contract whereby, in consideration of the surrender of the wife's marital interest in land sold by her husband, he agreed to invest her with a substituted marital interest in other land.

8. Dower &=78 — Action for Statutory Share—Petition—Fraud.
The petition considered, and held not to

The petition considered, and held not to charge the husband with perpetrating a fraud on his wife with respect to the surrender of her marital interest in land belonging to him which he sold.

9. Husband and Wife €⇒6(1) — Husband's Conveyance of Land—Wife's Interest in Proceeds—Fraud.

Without actual fraud in procuring a wife to join in a conveyance of her husband's land, giving her a clear right to impound the considera-

tion received by him or to control its use, she cannot pursue the fund.

10. Dower & 78-Surviving Wife's Share —Claim under Statute.

In order to recover under a petition claiming a widow's statutory interest in real estate, the widow must claim under the statute and through her husband.

Appeal from District Court, Douglas County.

Action by Katie A. Osborn against William F. Osborn, as executor, etc., and others. Judgment for defendants, and plaintiff appeals. Affirmed.

See, also, 99 Kan. 227, 161 Pac. 601.

Ralph E. Page, of Ottawa, and Curtis M. Oakes, of Oklahoma City, Okl., for appellant. Means & Rice, of Lawrence, and A. M. Harvey, of Topeka, for appellees.

BURCH, J. The action was one by a widow to recover her statutory share of lands in which her deceased husband, William F. Osborn, had been interested in his lifetime. She was defeated, and appeals.

It is not necessary to recite the proceedings. All the facts on which the plaintiff relied for recovery were stated in her third amended petition, and it will dispose of the appeal to determine whether or not those facts warranted judgment in her favor.

The defendants William F. Osborn, Jr., John L. Osborn, and Carl H. Osborn are sons of the deceased, but not of the plaintiff. The sons claim title under separate deeds to different tracts of land, made in 1906 and 1908, by Frank J. Bennett and wife, C. A. Hill and wife, and Charles S. Kidder and wife, to "William F. Osborn, and at his death to his sons." The consideration for these deeds was paid by William F. Osborn from his own funds, and the deeds were recorded soon after delivery. The statute under which the plaintiff claims reads as follows:

"One-half in value of all the real estate in which the husband, at any time during the marriage, had a legal or equitable interest, which has not been sold on execution or other judicial sale, and not necessary for the payment of debts, and of which the wife has made no conveyance, shall, under the direction of the probate court, be set apart by the executors as her property, in fee simple, upon the death of the husband, if she survives him: Provided, that the wife shall not be entitled to any interest, under the provisions of this section, in any land to which the husband has made a conveyance, when the wife, at the time of the conveyance, is not or never has been a resident of this state. Continuous cohabitation as husband and wife is presumptive evidence of marriage, for the purpose of giving the right aforesaid." Gen. Stat. 1915, § 3831.

The plaintiff advances the following propositions:

"(1) These transactions amount in law to the acquisition by the husband of a legal or equitable interest in real property under the statute (Gen. Stat. 1915, § 3831) and its conveyance to defendants without his wife's signature, leaving her statutory interest therein unimpaired.

"(2) The deeds conveyed to the husband the

whole title to the land, and the defendants ac-

quired no interest thereunder.

"(3) If the transactions should be considered "(3) If the transactions should be considered as a mere disposition by the husband of his personal property, under the rule announced in Small v. Small, 56 Kan. 1 [42 Pac. 323, 30 L. R. A. 243, 54 Am. St. Rep. 581], it is, nevertheless, a colorable transaction, and fraudulent as to the widow, as her husband's heir.

"(4) Upon the facts set forth in the third amended petition the widow would have her interest in this property under the resulting trust doctrine, and other equitable principles."

It will not be practicable to follow the elaborate arguments made in support of the foregoing propositions, and little more will be done than announce the conclusions of the court.

- [1, 2] Propositions 1 and 2 have no foundation on which to rest. The deeds specify the nature and quantity of estate which William F. Osborn obtained, and there is nothing to qualify or contradict them. The transactions disclosed by the deeds were between The whole estate grantors and grantees. passed from the grantors. Instead of taking an equitable estate, William F. Osborn took a legal estate, and instead of taking the whole estate, he took a life estate. The remainders in fee vested in his sons. character and extent of the estate which he took was not affected in the slightest degree by the fact that he had a wife who might outlive him. No equities remained to him, because the transactions were fully executed and he received what he desired. The estate which he took did not survive him. He had no interest, legal or equitable, in the remainders. After his death the whole estate in fee simple vested in his sons, and there was nothing to set apart to his widow. The statute refers to legal or equitable estates of the husband which are capable of inheritance, and does not apply to interests in land which are extinguished by his death.
- [3] The third proposition has no foundation on which to rest. The rule announced in Small v. Small, 56 Kan. 1, 42 Pac. 323, 30 L. R. A. 243, 54 Am. St. Rep. 581, is this: A married man may give to his children the bulk of his property when the known effect of the gift will be to deprive his widow of the fair share which otherwise would have fallen to her. If, however, the gift consist of real estate in this state, of which the wife has made no conveyance, she will be entitled to her statutory share if she were a resident of the state when the gift was made. Twenty years after the decision in Small v. Small was rendered the rule was again stated in even stronger terms:

"The general rule is that the law has placed roperty during his lifetime as he may elect." Poole v. Poole, 96 Kan. 84, 150 Pac. 592 (Syl. par. 1).

[4, 5] What is a colorable transaction? It is one which presents an appearance which does not correspond with the reality, and, in

tended to conceal or to deceive. If William F. Osborn had taken title in the name of his sons, but had in fact retained power to dispose of the land, he would have been the real owner, and not the sons. The outward appearance of the transactions would not have corresponded with their genuine character, and they would have been colorable. Nothing of the kind occurred. The deeds specify the actual interests of the grantees. The sons had no interest in the life estate. and the life tenant had no interest in the remainders. The gift to the sons was the consideration paid for the conveyances to them of the remainders in fee. Form and substance, appearance and reality, corresponded throughout, and the transactions were not colorable in any degree.

[6] The fourth proposition advanced by the plaintiff is without merit. The money used for the purchase of the real estate in question was money derived from the sale of property situated in Burlington, Kan., which William F. Osborn owned. His wife joined in the conveyance of the lands sold. The contingent interest which a wife has in her husband's land is property, and property subject to conveyance. She may join in his deed of such land, or may not, and may exact such consideration for joining as she please, or may find satisfaction in enabling her husband to convey an estate free from contingent reduction. Her property, however, is something entirely distinct from and wholly independent of his property, and, should she stand on her property right, she must have a definite agreement that a specific portion of the consideration paid for the conveyance belongs to her, or she has no title to that specific money. It belongs to her husband, and he can do with it as he pleases. Ordinarily a husband having money of his wife in his possession is simply her debtor. Under some circumstances a trust in her favor may be imposed on property purchased by him into which her money may be traced. But unless there be in the husband's hands a definite, provable sum of money which is the individual property of his wife, there is nothing on which to found a trust or other equitable claim.

[7-9] In support of the third and fourth propositions it is claimed the transactions culminating in the deeds were intrinsically fraudulent as to the plaintiff. The argument is, the deceased must have entertained an intention to defraud his wife, which he consummated by the deeds, because she was deprived of property she might have received except for the gifts. This contention is fully disposed of by the decisions in the cases of Small v. Small and Poole v. Poole. An intention to deprive the wife of her marital right by the means adopted is a lawful, and not a fraudulent. intention.

Some extrinsic facts are relied on to show the sense contended for, an appearance in | fraud-concealment of the gifts when made



and by subsequent statements, the good [ financial circumstances of the recipients of the gifts, and some others. These subjects are all fully disposed of, either specifically or in principle, by the cases of Small v. Small and Poole v. Poole.

The action was commenced in December. 1915. After several futile attempts to state a cause of action, the plaintiff finally filed an amended petition in May, 1917, in which she alleged her husband "assured" her if she would join in the deed to the Burlington property he would reinvest the proceeds in real estate in Lawrence and Baldwin, the property thus acquired to "take the place" of the Burlington property, and to be "sole property" of the husband. The plaintiff joined in the deed to the Burlington property "with the said understanding and agreement." The purpose of these vague allegations, charging neither fraudulent representations nor contract, was, of course, to try to get by a demurrer. The purpose is all the more apparent because the allegations were of communications concerning which the plaintiff was not competent to testify. Motions were made to require the plaintiff to plead according to well-understood rules. but the court denied the motions, and disposed of the case on the assumption the plaintiff had cut her garment according to her cloth.

There is no allegation of a definite and enforceable contract, whereby, in consideration of the surrender of the wife's marital interest in the Burlington property, her husband agreed to invest her with a substituted marital interest in other specified land. Such a contract would need to be in writing to be actionable, and the plaintiff does not claim that any such document ever existed.

[10] Giving the pleading its utmost force. it does not charge the husband with perpetrating a fraud on his wife. It indicates a purpose to dispose of real estate situated in a distant county and to invest in other real estate nearer home, which was only partially carried out. The wife concurred, believing it would be fully carried out. Conceding that the effect was to devest the wife of her marital interest in the Burlington property, the obligation, if any, to reinvest in other land was moral instead of legal. Unless there were actual fraud, giving the wife a clear right to impound the proceeds or to control their use, she cannot pursue them. The substantial claim made in the petition is for a widow's statutory interest in specific tracts of land, a fee-simple title to one-half in value. In order to recover, the plaintiff must claim under the statute and through her husband, and her husband had no interest in the property to which her statutory right could attach.

Some makeweight allegations are inserted

joint efforts of husband and wife incumbrances on the land in controversy were paid off, and valuable, permanent improvements were placed on it. The plaintiff does not ask for compensation, or for a Men. What she wants is one-half the land, something she is not entitled to receive.

The plaintiff presents no tenable theory, legal or equitable, according to which the relief demanded could be awarded, and the court knows of none. Therefore the judgment of the district court is affirmed. All the Justices concurring.

KOEHLER v. GRAY. (No. 21471.) (Supreme Court of Kansas. April 6, 1918.)

(Syllabus by the Court.)

1. Homestead @== 162(1) - Findings - In-STRUCTION.

Findings that the claimant of a homestead had not abandoned her residence in the city in which the property in question is situated, and that she considered that city as her residence, held to imply that she intended to return to the property and occupy it as a home.

2. Homestead €==142(1) — Exemption from SALE.

Property occupied as the homestead of the owner and his family remains exempt from sale for the payment of his debts after the death in-testate of himself and his wife, so long as an unmarried daughter of full age, who had lived with him as a part of his family, continues her residence thereon without interruption. Battey v. Barker, 62 Kan. 517, 64 Pac. 79, 56 L. R. A. 33, overruled.

8. Eminent Domain 4 126(1)—Homesteads

INTEREST IN PROCEEDS.

Where the daughter of an intestate occupies his homestead under such circumstances as to render it exempt from liability for his debts, and the property is taken for public purposes by eminent domain, she is entitled to compensation, not only for the share of the property owned by her, but also for the right to occupy the whole.

Appeal from District Court, Miami County.

Antoinette Louise Koehler objected to sale of land by F. H. Gray, administrator of the estate of Jacob Koehler, deceased, and from a judgment of the district court, affirming the probate court's order of sale, she appeals. Reversed and remanded.

Frank L. Barry, of Kansas City, Mo., and McAnany & Alden, Samuel Maher, and Thomas M. Van Cleave, all of Kansas City, Kan., for appellant. Coughlin & Coughlin. of Paola, for appellee.

MASON, J. Jacob Koehler died intestate in May, 1914, owning a house and a tract of land in Paola, occupied as a homestead by himself, his wife, and an unmarried daughter, Antoinette Louise Koehler, then 21 years old. He was survived by five other children, all of full age, having homes elsewhere. His widow died intestate in August, 1916. in the petition, to the effect that through the l December, 1916, the administrator of his escourt for the sale of the property referred to in order to apply the proceeds to the payment of his indebtedness, which exceeded the other assets by about \$11,000. daughter, Antoinette Louise Koehler, objected to the sale on the ground that the property was still occupied by her, and was exempt by reason of its character as a homestead. The probate court granted the order, and on an appeal to the district court The daughter its decision was affirmed. now appeals to this court.

[1] 1. The administrator contends that upon any theory of the homestead law the judgment must be affirmed, because at the time the order of sale was granted the appellant had ceased to occupy the property as a home. The district court made these findings bearing upon the matter:

"After the death of Jacob Koehler, the widow and the appellant continued for a time to occupy the homestead for about a year, after which they rented the homestead and went to New York City temporarily, partly on account of the health of the mother, and partly that the appellant might study music. They did not intend to establish a permanent home in New York.

York.

"The widow died August 22, 1916, and soon after the household goods that were still in the homestead were divided up among the children, the appellant retaining a portion of them; but they were all removed from the real estate in question, and the appellant returned to New York in October, 1916, for the purpose of continuing her musical studies.
"The appellant. Autoinette Koehler, does not

tinuing her musical studies.

"The appellant, Antoinette Koehler, does not intend to remain permanently in New York, but intends to go elsewhere, probably to Kansas City, for the purpose of teaching music, but considers Paola as her place of residence.

"At the time of the filing of this application in the probate court the appellant, Antoinette Koehler, had not abandoned her residence in Paola, Kan."

Paola, Kan.

The administrator insists that these findings merely show that the appellant retains her legal residence in Paola, and do not necessarily imply that she intends to make her home in the house where the family formerly lived. It is true that no explicit statement is made that she has had and still retains such an intention, but we think the findings that she considers Paola as her residence and had not abandoned her residence there must be given that effect. There is no suggestion that she ever had a residence in Paola elsewhere than on the property in question. That at one time was her residence. If her legal residence remained in Paola, it remained at the old home. The findings that she considered Paola her residence, and had not abandoned her residence there, must be regarded as referring to the property in question, and as implying an intention to return thereto; otherwise, they would have no bearing upon the issues to be determined. If the trial court had been of the opinion that the appellant did not (at the time the controversy arose) intend to reoccupy the house, a finding would natur-

tate applied for an order from the probate; the homestead as such, thus finally disposing of her claim of exemption.

> [2] 2. The question for determination, therefore, is whether property occupied as the homestead of the owner and his family remains exempt from sale for the payment of his debts after the death intestate of himself and his wife, so long as an unmarried daughter, of full age, who had lived with him as a part of his family, continues her residence thereon without interruption. The trial court followed the decision of this court in Battey v. Barker, 62 Kan. 517, 64 Pac. 79, 56 L. R. A. 33, in which substantially the same question is explicitly answered in the negative, and unless that case is overruled the judgment here must be affirmed. In that case it was suggested that a homestead necessarily loses its exempt character whenever it is liable to partition, and Dayton v. Donart, 22 Kan. 256, is cited in support of the suggestion. There, however, it was the abandonment of occupancy that rendered the property liable to sale. Actual partition does not necessarily destroy all homestead exemption (Trumbly v. Martell, 61 Kan. 703, 705, 60 Pac. 741; Cross v. Benson, 68 Kan. 495, 505, 75 Pac. 558, 64 L. R. A. 560), and mere liability to partition should not be deemed to affect it.

> The decision in the Battey-Barker Case, however, was largely influenced by the view that, inasmuch as "the homestead laws apply only to families, and not to single individuals, and apply only where the family occupies the homestead as a residence" (Farlin v. Sook, 28 Kan. 397, 404), the death of the father, leaving of the former members of his family only an adult daughter, destroyed the family relation, and with it the homestead character of the property. Cross v. Benson, 68 Kan. 495, 75 Pac. 558, 64 L. R. A. 560, it was held that property occupied as a homestead by the owner and his wife remained exempt from sale for his debts after his death, so long as his widow still lived there, on the ground that it was still "occupied as a residence by the family of the owner," within the meaning of that phrase as used in the Constitution (article 15, § 9), because she continued to be "the family of the owner" of the property. In the opinion it was said:

> "Some affirmations by way of argument and illustration appear to be opposed to the view here taken. But upon a careful discrimination here taken. But upon a careful discrimination of the precise points determined it will appear that no former decision need now be overturned. The case of Battey v. Barker, 62 Kan. 517, 64 Pac. 74, 56 L. R. A. 33, is most in conflict. The doctrine there applied is the strict one upon which Ellinger v. Thomas, 64 Kan. 180, 67 Pac. 529, is based. In the latter case it was held that a sole adult remnant could not himself that a sole adult remnant could not himself constitute his own family, so as to preserve land exempt from the payment of his own debts." 68 Kan. 509, 75 Pac. 563.

The Ellinger-Thomas Case was overruled in Weaver v. Bank, 76 Kan. 540, 94 Pac. 273, ally have been made that she had abandoned | 16 L. R. A. (N. S.) 110, 123 Am. St. Rep.



homestead cannot originate without the existence of a household consisting of more than one person, it may persist for the benefit of a single individual who is the sole survivor of the family. There the survivor was the widow of the former owner, and the rule as stated was limited to the survivorship of the husband or wife. We think, however, upon the same reasoning it should be extended to any member of the family. The exemption is for the benefit of the family as a whole, and of each individual composing it, so long as the relation is not severed. 13 R. C. L. 545. The circumstance that a daughter has arrived at majority should not in our judgment prevent her from being considered a part of her father's family (C. & N. W. Ry. Co. v. Chisholm, Jr., 79 Ill. 584; Strawn et al. v. Strawn, 53 Ill. 263; Brooks, &c., v. Collins, 11 Bush [74 Ky.] 622; In re Rafferty [D. C.] 112 Fed. 512; 2 Words and Phrases [2d Series] 464), although there is some conflict of opinion on the question (13 R. C. L. 554, 555). Nor is it necessary to that relation that there should be a legal duty to support her. 13 R. C. L. 553. The fact that the statute authorizes the partition of the property whenever the youngest child has reached majority (Gen. Stat. 1915, § 3828), irrespective of its continued occupancy as a homestead, does not affect the matter, for liability to sale for the purpose of partition is wholly distinct from and independent of liability to sale for the payment of debts (Towle v. Towle, 81 Kan. 675, 107 Pac. 228, 27 L. R. A. [N. S.] 550). The appellant was a constituent part of the family as it existed in the lifetime of her father and mother. By no act of hers has her relation to the family or the property been altered. She remains in the occupancy of the homestead. In the same sense in which the phrase was used in Cross v. Benson, she was "the family of the owner"—she was all that was left of it. We conclude, overruling Battey v. Barker, 62 Kan. 517, 64 Pac. 79, 56 L. R. A. 33, that the property was exempt from sale on order of the probate court.

[3] 3. After the issuance of the order of sale the board of education were about to condemn the property for a school site. A stipulation was entered into by the parties to this litigation to the effect that condemnation proceedings should be waived, the board should have the property for the agreed sum of \$4,200, which should be paid into court and disbursed in accordance with the final decision herein, the rights of none of the parties to be affected by the agreement. It seems to be assumed on both sides that all the money will go to the appellant or appellee. However, the concluding clause of the stipulation referred to reads:

"Should the appellant, Antoinette Louise Koehler, be successful in such [this] adjudica-

155, where it was determined that, while a tion, then the said fund shall be payable to her, homestead cannot originate without the ex-

The question as to just what disposition should be made of the fund has not been discussed by counsel. The problem seems to be one as to the distribution of the amount awarded for property taken by eminent domain, where there are various interests to be considered. The appellant is clearly entitled to one-fifth of the amount, as she owns onefifth of the property outright, exempt from all claims. She is (or was) entitled to occupy the entire property, unless it should be partitioned, so long as she saw fit to preserve the existing status. This was a valuable right, difficult, but not necessarily impossible, of appraisement, for which it would seem she should be compensated. The shares of the other owners were subject to her right of occupancy, and were diminished in value to that extent. As these owners are entitled to no exemptions on their own behalf, the remainder of the fund should doubtless go to the administrator.

The judgment is reversed, and the cause remanded for further proceedings in accordance herewith. All the Justices concurring.

BERRY v. DEWEY et al. (No. 21350.)

(Supreme Court of Kansas. March 9, 1918.)

(Syllabus by the Court.)

1. Judges \$\infty 25(2) - Disqualification - Substitute Judge.

Berry v. Dewey, 102 Kan. 392, 170 Pac. 1000, is followed on the question of the jurisdiction of the trial judge.

2. CONTINUANCE \$\infty 20(2) - REFUSAL - ABSENCE OF COUNSEL.

The defendants applied for a continuance on the ground that one of their attorneys was a member of the Legislature, and could not be present at the trial because the Legislature was in session. The application was properly denied.

3. CONTINUANCE \$\iiii 37\to Denial of Application\to Grounds.

It is not error to deny an application for a continuance, made on the ground that the person making the application is a party to the action and desires to attend the trial as a witness, and is prevented from so doing by the sickness of a member of his family, where that sickness is shown by the unverified certificate of attending physicians, and no one having knowledge of the sickness swears to either the certificate or the application.

4. DEATH & 67, 70 — WRONGFUL DEATH — DAMAGES—EVIDENCE.

In an action to recover damages for wrongful death, it is proper to prove the amount of property owned by, and the wage-earning capacity of, the deceased person.

5. Appeal and Ebrob &== 1047(3) -- With-Drawal of Impeaching Evidence -- Re-Versal.

A judgment will not be reversed on account of the withdrawal of evidence tending to impeach persons who are neither parties to the action nor witnesses therein, where the evidence withdrawn is on matters wholly collateral and

cannot assist the jury in determining the is- judgment in favor of the plaintiff for \$5,000. sues on trial.

6. Conspiracy 4=19-Sufficiency of Evi-DENCE.

There was evidence sufficient to show conspiracy on the part of the defendants.
7. Instructions—Sufficiency.

The instruction concerning conspiracy were fair, and they fully protected the rights of the defendant.

8. Trial \$\infty 260(1) — Requested Instructions—Given Instructions.

Of the instructions requested by the defendant, those that were proper were, in substance, given by the court, and those that were refused were properly refused.

9. Death \$\infty \text{90}(5)\$—Wrongful Death-Excessive Damages.

In an action brought by a mother to recover damages for the wrongful death of her son, a verdict and judgment for \$5,000 is not excessive, where the deceased was 33 years old at the time of his death, was in good health and vigorous, and was accumulating property, and was able to earn about \$1,000 a year.

10. DEATH \$==91-Wrongful DEATH-DAM-AGES-DEDUCTION OF FINANCIAL BENEFITS.

Financial benefits derived by the heir of a person who has lost his life by the wrongful act of another cannot be deducted from the damages sustained, and the verdict and judgment be reduced by the benefits received.

Appeal from District Court, Sherman County.

Action by Harriet M. Berry, administratrix of the estate of Burchard B. Berry, deceased, against Chauncey Dewey and others. Judgment for plaintiff, and defendants appeal. Affirmed.

See, also, 102 Kan, 392, 170 Pac. 1000.

Wm. R. Smith, of Topeka, and Harkless & Histed, of Kansas City, Mo., for appellants. L. W. Colby, of Beatrice, Neb., and A. M. Harvey, of Topeka, for appellee.

MARSHALL, J. In June, 1903, the defendants, with other persons, ten in all, armed, left the ranch of defendant Chauncey Dewey and went to the home of Alpheus Berry, about five miles distant, to get a water tank that had been purchased by Chauncey Dewey at an execution sale on the day previous. While Dewey and his party were at the home of Alpheus Berry, a battle occurred between Dewey and his party on the one side and Daniel Berry, Alpheus Berry, Burch Berry, Beach Berry, and Roy Berry on the other side. When the battle ended, Daniel Berry, Alpheus Berry, and Burch Berry had been killed by members of the Dewey party, and Roy Berry had been wounded by them. Beach Berry escaped. None of the Dewey party was injured. Daniel Berry was the father of Burch Berry and Alpheus Berry. Harriet M. Berry was the wife of Daniel Berry and the mother of Burch Berry and Alpheus Berry. In 1905, Harriet M. Berry was appointed administratrix of the estate of Burch Berry. She then commenced this action which, in March, 1917, resulted in a Kan. 480, 17 Pac. 159, this court said:

from which judgment the defendants appeal.

[1] 1. The defendants question the jurisdiction of Hon. J. C. Ruppenthal to try the action. They present the same questions that were presented in Berry v. Dewey et al., 102 Kan. 392, 170 Pac. 1000. The conclusion there reached is now followed.

[2] 2. The defendants applied for a continuance on the ground that B. F. Endres, one of their attorneys, was a member of the Legislature, and could not be present at the trial because the Legislature was in session. The continuance was refused. The defendants contend that the refusal was error. The trial court gave as a reason for refusing to grant a continuance on this ground that Mr. Endres did not appear to be of counsel for the defendants in kindred actions that had been on trial in the previous November and December, and that the court had every reason to believe that the employment of Endres in the present action was subsequent to his election to the Legislature. The court concluded that to grant a continuance on an application of this kind would be ignoring the provisions of sections 6050-6052 of the General Statutes of 1915, which authorize the court to prevent any abuse of the privileges granted by these sections of the statutes. This action had been pending in the district court 12 years; it was time to dispose of it. A continuance might have been granted, but there was no reversible error in refusing to grant it.

[3] 3. The defendants complain of the refusal of the court to grant a continuance on account of the absence of defendant Chauncey Dewey, who desired to be present and to testify as a witness. At the time of the trial, Mr. Dewey was in New Orleans, La. On March 1, 1917, he telegraphed from New Orleans that his only child was dangerously sick, and that he could not leave the child, and asked that the cause be continued. That telegram was sent to Clifford Histed, one of Dewey's attorneys. The certificate of three doctors in New Orleans was attached to, and made a part of, the application for a continuance. That certificate was dated March. 1, 1917, and read:

"To Whom it May Concern: This certifies that, owing to the critical condition of their child, Molly Dewey, Mr. Chauncey Dewey and wife will be unable to leave the city at present or in the near future."

The certificate was signed by three physicians and acknowledged—not sworn tobefore a notary public. The application was sworn to by James H. Harkless, one of the attorneys for the defendants. It disclosed the importance of Dewey's attendance, both as a witness and as a party. The basis of the application was the sickness of Dewey's child. In Harlow v. Warren, 38

"Where an application is made for the continuance of the trial of a case to another term, upon the ground that the party applying therefor is prevented from attending the court on account of his sickness; and the application is supported, as to the sickness of the party, only by the certificate of a physician; and no affidaby the certificate of a physician, and no americal vit is filed by the physician, or any other person having personal knowledge that the party is unable to attend court: *Held*, that the ruling of the district court in refusing a continuance of the case will not be reversed." Syl.

See, also, Beard v. Mackey, 51 Kan. 131, 32 Pac. 931: 9 Cyc. 97.

The present case and Harlow v. Warren, supra, are very closely parallel, and, under the authority of that case, the trial court did not abuse its discretion in refusing a continuance, and no reversible error was thereby committed.

[4] 4. The defendants contend that the court erred in admitting evidence concerning the property owned by, and the wage-earning capacity of, Burchard B. Berry. In an action to recover damages for wrongful death, it is proper to prove the amount of property owned by, and the wage-earning capacity of, the deceased person. K. P. Ry. Co. v. Cutter, 19 Kan. 83; Gas Co. v. Carter, 65 Kan. 565, 70 Pac. 635.

[5] 5. On the trial, the plaintiff, in order to show the good character of the Berrys. was permitted to prove that none of the Berrys had been engaged in stealing cattle prior to the shooting. The defendant then offered to introduce in evidence an indictment of Alpheus Berry and Daniel Berry, charging them with larceny and with having received stolen property in Boulder county, Colo., in October, 1891. The indictment, with other documents concerning the same matter, was admitted in evidence and afterward withdrawn. The defendants urge that it was error to withdraw that evidence from the consideration of the jury. The evidence may have been competent, but it was not material. It did not matter whether Alpheus Berry and Daniel Berry had previously been engaged in stealing cattle, or whether they had been indicted for larceny. Evidence on either of these questions could not assist the jury in determining the issues that were properly on trial in the present action. Neither Alpheus Berry nor Daniel Berry were witnesses; both had been killed by the Dewey party.

[6] 6. The defendants strenuously argue that there was not sufficient evidence to establish a conspiracy on their part. Although it is practically impossible to detail all the evidence which tended to prove that there was a conspiracy, yet some of the evidence which tended to show that fact was as follows: For some time there had been ill feeling between Dewey and his employes on the one side and the Berrys on the other side. Threats had been made, and each of the contending parties went armed as against

occurred, defendant Dewey, at a sheriff's sale under an execution, purchased a water tank that was then on the property of Alpheus Berry. On the day of the tragedy, ten men gathered at the ranch headquarters of defendant Dewey. The ten, all armed, then went to the home of Alpheus Berry to get the water tank, but, when they reached that home, no request or notice of any kind was given that the defendants desired to take the tank. They arranged themselves in such a way as to protect themselves in case shooting should occur. When the Berrys approached, the Dewey party began shooting. and, when the shooting ceased, three of the Berrys were dead and one was wounded: one had escaped. The tank was then forgotten, and the Deweys returned to their ranch. This evidence was sufficient to warrant the trial court in submitting to the jury the question of a conspiracy, and was sufficient to justify the jury in finding that there was a conspiracy.

[7] 7. Complaint is made of the instructions given by the court. The basis of this complaint is the question of conspiracy. The instructions have been examined; they appear to have been fair and to have fully protected all the rights of the defendant. No substantial error in them has been indicated by the defendants.

[8] 8. Complaint is made of the refusal of the court to give certain instructions asked by the defendant. Those of the instructions requested that were proper were, in substance, given by the court, and those that were not proper were refused. There was no error in refusing to give any of the instructions requested by the defendant.

[9] 9. Another matter urged is that the verdict was excessive. The verdict and judgment were for \$5,000. At the time Burch Berry lost his life, he was 33 years of age, in good health, vigorous, and was accumulating property, and was able to earn about \$1,000 a year. Burch Berry left neither wife nor children. \$5,000 was not an excessive verdict as compensation for the loss of support that would have been furnished to Harriet M. Berry by her son, had he lived after her husband and her other son were killed.

[10] 10. The last matter urged is that Harriet M. Berry, who was the sole heir of Burch Berry, received a substantial financial benefit as the result of the death of herson, and it is urged that the benefit should have been deducted from the amount of the verdict, and, if the benefit was greater than the damage sustained, no verdict should have been rendered for the plaintiff. The proposition is untenable. Although it appears to have standing in the courts of some of the states, it does not address itself to the judgment of this court as being sound, the other. On the day before the tragedy legal, equitable, or fair, and it cannot be perany way.

On the whole, substantial justice seems to have been done in this case, and the judgment is affirmed. All the Justices concurring.

MARSH v. VOTAW et ux. (No. 21257.) (Supreme Court of Kansas. April 6, 1918.)

### (Sullabus by the Court.)

1. Mortgages 494, 497(1), 526(7, 8) -Foreclosure — Erroneous Judgment -APPEAL-CURE OF IRREGULARITIES BY CON-FIRMATION-APPLICATION TO VACATE CON-FIRMATION.

On September 25, 1913, in a foreclosure suit, where the defendants were served with summons, judgment was entered by default and with a provision barring defendants from all right of redemption. The sheriff's sale, at which the plaintiff purchased, was confirmed December 16, 1913, the decree of confirmation reciting that the mortgage was for purchase money, that less than one-third thereof had been paid, and fixed the period of redemption at six months from the sale. On September 23, 1916, the defendants moved to have the sale and confirmation set moved to have the sale and confirmation set aside and the judgment modified, but stated no defense to the action, and made no offer to redeem. Held, that the original judgment, though erroneous, is not void; the error in the judgment could be taken advantage of only by appeal; other irregularities complained of were cured by the confirmation; and the defendants' application was made too late to entitle them to relief.

#### (Additional Syllabus by Editorial Staff.)

2. Mortgages 434—Foreclosure of Pubchase-Money Lien — Recitals in Judgment—Statute.

Code Civ. Proc. § 503 (Gen. St. 1915, § 7407), fixing six months' period of redemption in case of foreclosure of a lien for the purchase price before one-third has been paid, does not require a recital of the facts either in the pleadings or the judgment.

3. Mortgages == 535(3) - Foreclosure of SECOND MORTGAGE-SALE SUBJECT TO FIRST MORTGAGE.

Although the holder of the first mortgage was not a party to the foreclosure of the second mortgage, it was proper for the sheriff to sell the lands subject to the first mortgage, the validity of which was not in question.

from District Court. **Butler** Anpeal

Action of foreclosure by Hammond L. Marsh against E. J. Votaw and wife. From an order denying their motion to vacate an order of confirmation and to set aside a sheriff's sale and to amend the original decree in a foreclosure suit, defendants appeal. Order affirmed.

Clarence Spooner, of Newton, for appel-Leydig & Geddes, of Eldorado, Holmes, Yankey & Holmes, of Wichita, and E. W. Grant, of Eldorado, for appellee.

PORTER, J. This is an appeal by the defendants from an order denying their motion facts the court fixed the period of redemption

For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

mitted to reduce the amount of recovery in | set aside the sheriff's sale and to amend the original decree in a foreclosure suit.

> The defendants, E. J. Votaw and wife, were the owners of the land in controversy and held the fee-simple title subject to a first mortgage of \$1,200, and the mortgage to the plaintiff amounting to \$3,700. The plaintiff commenced foreclosure on the 16th of April. 1913, and obtained service of summons on the defendants at their residence. They made no appearance, and on September 25, 1913, judgment of foreclosure was entered. An order of sale issued and on December 2, 1913, the sheriff sold the property at public sale to the plaintiff for the sum of \$3,800 subject to the first mortgage. On the 16th day of December, 1913, the court confirmed the sale, the decree of confirmation reciting a finding that the mortgage was given for the purchase price, less than onethird of which had been paid, and upon these facts the court fixed the period of redemption at six months from the date of sale. On the 23d day of September, 1916, the defendants filed their motion to amend the decree, vacate the order of confirmation, and set aside the sheriff's sale. The hearing was had on the 20th day of December, 1916. As an explanation for the delay the defendants allege that they moved to California shortly after the suit was commenced, that they did not return to Kansas until September, 1916, and then learned the facts in regard to the irregularities in the proceedings. The plaintiff suggests that about the time the defendants filed these proceedings the property had become exceedingly valuable by reason of the discovery that it contains under it great quantities of oil and gas.

> The principal objection to the original judgment is the recital therein that from and after the sale the defendants were forever barred and foreclosed from all equity of redemption. It is obvious that the journal entry was drawn upon an old form in use before the statute of 1893 with respect to redemption was enacted. Of course, that part of the judgment was erroneous; but it was not void. Ogden v. Walters, 12 Kan. 282. There it was said that:

> "The decree in the foreclosure suit in terms barred all right of redemption, and this was binding upon all parties and privies, even if erroneous, and cannot now be attacked collater-Page 291.

> To the same effect is Ehrsam v. Smith, 61 Kan. 699, 60 Pac. 740.

[2] The decree of confirmation, after the usual recitals that an examination of the order of sale and the return showed the proceedings to be regular, contained a further finding that the mortgage was given for the purchase price of the property, less than onethird of which had been paid, and upon these to vacate an order of confirmation and to at six months from the date of the sale. It deemed within six months the sheriff should convey to the purchaser. If the court's attention had been called to the erroneous recital in the original decree, doubtless the first journal entry would have been corrected. In view of the fact that almost three years elapsed from the time the decree was entered before the defendants raised their objections, we think the order made at the confirmation should be regarded as in effect a modification of the original decree. law requires foreclosure sales to be confirmed, and the court retains jurisdiction over the subject-matter and the parties until confirmation. The provision in section 503 of the Code (Gen. St. 1915, § 7407), flxing the six months' period of redemption in case of foreclosure of the lien for the purchase price before one-third has been paid, does not require a recital of the facts either in the pleadings or the judgment.

It was held, however, in Martin v. Miller, 97 Kan. 723, 156 Pac. 709, that:

"The bidder at a judicial sale may properly look to the language of the judgment under which it is made for reliable information as to what he will get if his bid is accepted. The right to a deed and possession unless the property is redeemed within a year is quite a different thing from a right to a deed and possession unless redemption is made within eighteen months." 97 Kan. 725, 156 Pac. 710.

In that case it was held that the proper method for the correction of a decree of fore-closure which unduly limits the right of redemption, where that is the result of in-advertence or misapprehension of the facts, is by motion under the statute relating to irregularities, and that the remedy is open to one purchasing the land after the rendition of the judgment from a defendant who was not personally liable for its payment. While the facts in that case were held not sufficient to authorize the court to disregard the terms of the original judgment and fix a different period of redemption, it was ruled:

"Although the trial court by liberality of construction might have treated a request made after sale, to fix the time of redemption at the statutory period, as a motion to correct the original judgment in that regard, the omission to do so in the present case held not to constitute error." Syl. 4.

The owner of the property against whom the default judgment had been rendered quitclaimed to Lewis, and it was said in the opinion:

"If the trial court had treated Lewis' request as a motion to modify the judgment, and upon a finding of inadvertence or irregularity had changed the period of redemption as there fixed, from 12 months to 18, its action in that regard would have been unassailable." 97 Kan. 726, 156 Pac. 711.

In Neef v. Harrell, 82 Kan. 554, 109 Pac. months in which to redeem; and if they had 188, the judgment, while indicating that the sale was to be made subject to the statutory right of redemption, failed to specify the pired. Without offering in their application time of redemption. At the confirmation to redeem from the indebtedness represented

directed that if the property was not redeemed within six months the sheriff should convey to the purchaser. If the court's attention had been called to the erroneous recital in the original decree, doubtless the first journal entry would have been correct-

In Hines v. Kays, 93 Kan. 209, 144 Pac. 240, the petition alleged the mortgage was given for part of the purchase price, but no evidence was offered in support of the claim. At the confirmation upon evidence showing these facts the court fixed the period of redemption accordingly, and the practice was approved.

[1] The judgment was erroneous, but not void, and if it be conceded that the error was not cured by the subsequent provisions of the decree of confirmation, still the defendants are bound by the judgment, since the only way in which they could take advantage of the error was by appeal. Ogden v. Walters, supra; Ehrsam v. Smith, supra; Mills v. Ralston, 10 Kan. 206. The several irregularities in the sheriff's return of which complaint is made are not available to defendants, because they were all cured by the confirmation. Thompson v. Burge, 60 Kan. 549, 57 Pac. 110, 72 Am. St. Rep. 369; Hill v. Gatliff, 69 Kan. 179, 76 Pac. 428. Besides, they are unsubstantial.

[3] Although the holder of the first mortgage was not a party to the foreclosure, it was proper for the sheriff to sell the land subject to the first mortgage. Its validity was not in question. The return of the sheriff recited that he had caused a "notice of the said property" to be published. A part of the return consisted of a copy of the published notice from which it appeared to be the usual notice of a sheriff's sale. To the return there was attached the publisher's affidavit showing that the publication complied in all respects with the statute. It is too late for the defendants to complain that the court received no evidence on which to base the findings in the decree of confirmation; and their contention that the decree of confirmation is void and that the court had no jurisdiction to make it, is without merit. The order of sale directed that the proceeds be brought into court to abide the further order of the court. There was no inconsistency between this and the provisions of the original decree providing specifically how the proceeds should be applied.

There are no equities which entitle defendants to have the sale set aside. They were obviously guilty of laches in waiting almost three years after the sale and confirmation before seeking relief. Under the provision of the decree of confirmation they had six months in which to redeem; and if they had been entitled to the full period of eighteen months redemption, that had long since expired. Without offering in their application to redeem from the indebtedness represented

by the judgment, and without any suggestion [years, at \$4 a week, to be paid every two of a defense to the action, they rely apparently on their right to speculate upon the advancing value of the property, while permitting the judgment and sale to stand without objection until long after their rights of redemption would have expired if the judgment had been properly entered.

The order denying the motion is affirmed. All the Justices concurring.

LOMBARD v. UHRICH et al. (No. 21419.) (Supreme Court of Kansas. April 6, 1918.)

(Syllabus by the Court.)

1. MASTER AND SERVANT 4-4111/2 New, vol. 5A Key-No. Series-New TRIAL-FRAUD IN PROCUBING JUDGMENT.

PROCURING JUDGMENT.

Judgment was rendered under the Workmen's Compensation Act (Gen. St. 1915, §§ 5896-5942), providing for the payment of §4 a week during the period of plaintiff's partial incapacity, and providing that the defendants should be relieved from the payments if they continued the plaintiff in their employ and paid him the same wages as he received before he was injured, and providing that whenever the plaintiff should quit the defendants' employ, the payments should begin. A petition for a new trial was filed, alleging that the plaintiff acted fraudulently in procuring the judgment, in that he intended to quit the defendants' employ and seek employment elsewhere at increased and seek employment elsewhere at increased wages, and alleging that the plaintiff did quit the defendants' employ and did procure employment elsewhere at increased wages. Held, that the petition did not state facts sufficient to compel the trial court to grant a new trial.

2. MASTER AND SERVANT \$\iiis 385(20) - Work-men's Compensation Act - Default in Payment-Execution for Entire Amount. Under the circumstances disclosed in section 1 of this syllabus, the court ordered that if the defendants defaulted in the payment of \$4 a week, the entire amount of compensation should become due, and that execution should then issue therefor. Held, that it was not error that order ror to enter that order.

Appeal from District Court, Montgomery County.

Action by A. F. Lombard for compensation under the workmen's compensation law against O. W. Uhrich and B. H. Uhrich, partners under the firm name and style of Uhrich Planing Mill Company. Judgment for plaintiff, and defendants appeal.

Banks & O'Brien, of Independence, for appellants. Thomas E. Wagstaff. of Independence, for appellee.

MARSHALL, J. The defendants appeal from an order striking a petition for a new trial from the files. The action was brought to recover compensation under the work-men's compensation law. There was a trial by the court, without a jury, special findings of fact were made, and judgment was rendered in favor of the plaintiff for ten weeks' total incapacity, and for partial incapacity during the remainder of eight tiff employment at the same wage which he was

weeks, and-

"that the defendants shall be relieved from the periodical payments herein specified if they shall receive the plaintiff back into their employ and continue him therein and pay him the same wages as he was receiving at the time of his injury, but whenever plaintiff quits the defendants' employ the payments herein fixed for shall begin."

Each of the parties filed a motion for a new trial; both motions were afterwards withdrawn, and each of the parties consent-

"That the court shall fix the amount which the said defendants shall pay into court to satisfy the judgment heretofore rendered as to payments which the said plaintiff shall receive during the period of his total incapacity and during the further period that the said plaintiff was not in the employ of the said defendants, and the said plaintiff and the said defendants further joining in a request upon the court to fix the amount of attorney's fees for the attorney for the plaintiff herein."

Almost six months afterward the defendants filed a petition for a new trial, and in that petition alleged:

"That thereafter, and before the hearing of said motion for a new trial, it was agreed between the plaintiff and these defendants that the plaintiff would remain in the employ of these defendants, and that these defendants these defendants, and that these defendants would give him employment at the same wage that he had received from them before his said injury complained of in his petition filed herein, and that as long as these defendants furnished to plaintiff such employment, he would remain in the employ of these defendants, and that these defendants are that main in the employ of these defendants, and that these defendants should not under those circumstances pay nor be called upon to pay by the plaintiff the said sum of \$4 per week.

"It was further mutually agreed between the plaintiff and these defendants that, in consideration of the mutual agreement of the defendants

tion of the mutual agreement of the detendants to furnish employment to plaintiff and plaintiff to accept said employment as above set forth, each of the parties to this action would withdraw their motion for a new trial, and that the defendants would pay to plaintiff the sum of \$187.90 and the costs of this action, taxed at \$15.25.

of \$187.90 and the costs of this action, taxed at \$15.25. \* \* \* \*

"These defendants further state that since the said 31st day of October, A. D. 1916, they have procured newly discovered evidence by which they can prove that the said plaintiff, in entering into the agreements as set forth herein with them, entered into said agreements with the intention of violating the same, and with the intention of not remaining in the employ of these defendants, and with the intention, as soon as the judgment and agreement entered into in this case became final, that he would quit the employ of these defendants and enter into other employment where he could earn as quit the employ of these defendants and enter into other employment where he could earn as much money as he was being paid by these defendants, and after a period of time attempt to collect from these defendants the said sum of \$4 per week. That in so doing the said plaintiff willfully and intentionally deceived and defrauded this court and these defendants. \* \* \* "Defendants further state that the said plaintiff in quitting the employ of these defendants

"Detendants further state that the said plaintiff in quitting the employ of these defendants, quit said employ without any reason therefor, that they were then, and will now, and have at all times been willing, able, and ready to give the plaintiff employment as contemplated by this court in making the said findings and in rendering its said judgment herein, and that they are now ready, able, and willing to furnish plaintiff employment at the same wage which he was

The petition for a new trial was stricken from the files on the motion of the plaintiff. He made an application for an order to enforce the judgment. On that application the court made the following order:

"It is by the court further ordered that the defendants pay to the plaintiff within ten days from this date the sum of \$4 per week from October 31, A. D. 1916, to this date, and continue to pay to the plaintiff the sum of \$4 per week for the time and period fixed in the original judgment of this court. And that in default of any of such payments the whole amount of such payments in lump sum of the entire amount of compensation, payable as by such judgment, be and become due, and that the plaintiff is entitled to an execution for the whole of said amount in a lump sum upon such default." "It is by the court further ordered that the

The defendants appeal from these orders and assign each as error.

[1] 1. Did the court err in striking the defendants' petition from the files? In order to properly answer this question, it is necessary to analyze the petition. It states that since the judgment was rendered, evidence has been discovered to prove two facts; one that the plaintiff acted fraudulently when he procured the judgment against the defendants, and the other that the plaintiff's injuries, since they are healed, in no way interfere with his earning capacity. Assuming that the defendants' charge of fraud is true, and that it can be established, it cannot have any effect on the plaintiff's right to recover. The judgment contemplates that the plaintiff has the right to quit the defendants' employ at any time that he may choose so to do, and the judgment likewise contemplates that the defendants may discharge the plaintiff whenever they desire. In either event, the defendants must pay to the plaintiff compensation at the rate of \$4 a week. Neither party can compel the other to continue the employment under the judgment, and no judgment could have been legally rendered by which such an employment could be enforced. It has been held that:

"An employé, partially incapacitated by an injury from performing his labor, does not lose his right to compensation under the workmen's compensation act by remaining in the employment of his master at his former wages." Gailey v. Peet Bros. Mfg. Co., par. 2, Syl. 98 Kan. 53, 187 Pag. 421 157 Pac. 431.

The court reached its conclusion concerning the plaintiff's incapacity to labor after bearing all the evidence that was available at the time of the trial. The degree of the plaintiff's incapacity could not then be definitely ascertained. Not until the entire period has expired for which compensation is allowed can it be definitely and certainly

receiving, and which was contemplated he should receive by this court in making its said findings and in entering into the agreement and in rendering the judgment that was rendered in this cause, but that the said plaintiff prefers to leave the employment of these defendants, for the sole plaintiff was injured on October 31, 1913; reason that he can and is able to earn as much or more money by working for other people in a like capacity." en was entered on April 16, 1917. During that time economic conditions changed, and wages greatly increased. At the time the last order was made, there was great demand for laborers, and any one who could work could receive good wages. If during that time the demand for labor had not changed, probably the plaintiff could not have secured employment except at reduced

The fact that the plaintiff, after he quit the employ of the defendants, was employed in a like capacity, for other parties at a more remunerative wage, does not defeat his right to recover under the workmen's compensation act. In Sauvain v. Battelle, 100 Kan. 468, 164 Pac. 1086, this court said:

"It is settled that when one is totally or partially incapacitated for hard manual labor, he is not to be denied compensation because he obtains employment, even at better wages, at a task which he is physically able to perform." 100 Kan. 471, 184 Pac. 1087.

See, also, Gailey v. Manufacturing Co., 98 Kan. 53, 157 Pac. 431; Dennis v. Cafferty, 99 Kan. 810, 163 Pac. 461.

Neither of the facts urged, nor both together, if proved, would relieve the defendants from paying to the plaintiff the compensation fixed by law. The petition did not state facts sufficient to compel the court to grant a new trial.

[2] 2. Did the court commit error in sustaining the plaintiff's motion to enforce the judgment? To answer this question, all that is necessary to say is that, even after the plaintiff quit the employ of the defendants, they should continue the payment of \$4 a week. The court, when the plaintiff and the defendants were before it, in the present action, rendered the judgment that could have been rendered on the trial. It was not error for the court to make the order to enforce the judgment and to compel the defendants to pay the entire compensation at one time, if they refuse at any time to make the payments.

The judgment is affirmed. All the Justices concurring.

SMITH v. PARMAN et al. (No. 21429.) (Supreme Court of Kansas. April 6, 1918.)

(Syllabus by the Court.)

1. MALICIOUS PROSECUTION \$== 44 - ACTION-LIMITATIONS.

In an action for malicious prosecution, the first count of the petition is held subject to demurrer because the action was barred by the one-year statute of limitations. Civ. Code, § 17, subd. 4 (Gen. St. 1915, § 6907, subd. 4).

€==127(16) - | Limitation of Actions \$\inside 127\$. Amendment—New Cause of Action. 2. LIMITATION

The second count of the petition is held bar-red because an amendment, alleging that defend-ants gave false testimony at the trial which resulted in plaintiff's conviction, brought in a new and different cause of action, and, having been filed more than one year after the cause of action accrued, it was too late.

3. MALICIOUS PROSECUTION \$\iff 24(5)\$, 35(1) — TERMINATION—PROBABLE CAUSE.

The third count in the petition is held to state no cause of action because it shows that the prosecution of plaintiff resulted in his conviction; notwithstanding his appeal and acquittal in the district court, the conviction in the police court is conclusive of probable cause.

Appeal from District Court, Cowley County. Action by Charles W. Smith against John Parman and others. From a judgment sustaining a demurrer to plaintiff's petition, he appeals. Affirmed.

C. T. Atkinson, of Arkansas City, for appellant. John Parman, of Arkansas City, for

PORTER, J. This is an appeal from a judgment sustaining a demurrer to the plaintiff's petition.

[1] The action was one to recover damages for malicious prosecution. A plea in abatement by Parman, alleging that he acted in the matter as city attorney, resulted in a dismissal of the case as to him, which ruling was affirmed when the case was here before. Smith v. Parman, 101 Kan. 115, 165 Pac. 663, L. R. A. 1917F, 698. The case then proceeded against the other two defendants. The plaintiff filed an amended petition on the 5th day of May, 1916, and the only question involved is whether the demurrer to it was rightly sustained. The petition contains three counts. The first alleges that on September 14, 1914, the defendants maliciously caused the plaintiff's arrest whereby he was detained at the police headquarters in the city of Arkansas City without probable cause and compelled to pay a fine of \$5. This cause of action was barred by the statute which requires actions for malicious prosecution to be commenced within one year from the time the cause of action accrues. Civ. Code, \$ 17 (Gen. Stat. 1915, \$ 6907). Moreover, it shows a judgment of conviction, without even alleging that an appeal had been taken therefrom, and the judgment was conclusive of the fact that probable cause existed.

[2] The second count makes the averments of the first a part thereof, and alleges that on September 14, 1914, the defendants maliciously and without probable cause filed a complaint before the police judge charging plaintiff with operating an automobile through the streets at a rate of speed in excess of six miles per hour contrary to a city ordinance; that plaintiff was arrested, brought before the police judge, and forced to give a bond in order to keep from being been obtained by means of fraud." Syl. 3.

placed in jail; that after his conviction he appealed to the district court, where on the 6th day of March, 1915, he was acquitted by

Thus far the averments follow substantially those of the original petition, although there appears some attempt to lay stress upon the existence of a conspiracy between the defendants, but the original petition charged that the defendants conspired together. The principal amendment consists of a statement that defendants gave false testimony in the police court upon which the plaintiff was convicted; that, having taken an appeal in order to escape the judgment, the defendants gave perjured testlmony at the trial in the district court. In the original petition it was alleged in this count that defendant Morhain testified falsely against plaintiff on the trial in the district court: but there was no statement that either of the defendants had testified falsely before the police judge. The plaintiff insists that no new or different cause of action is brought in by the amendment; that it merely amplifies and makes more specific the averments of the original petition within the rule declared in Union Pacific R. Co. v. Sweet, 78 Kan. 243, 96 Pac. 657, and cases cited in the opinion. The plaintiff was confronted with the proposition that his conviction in the police court established the existence of probable cause, notwithstanding his acquittal in the district court. In Cooley on Torts (2d Ed.) p. 185, it is said:

"If the defendant is convicted in the first instance, and appeals, and is acquitted in the appellate court, the conviction below is conclusive of probable cause."

To the same effect is Whitney v. Peckham, 15 Mass. 243; Griffs v. Sellers, 2 Dev. & B. 492; Clements v. Odorless, etc., Co., 67 Md. 461, 605, 10 Atl. 442, 13 Atl. 632, 1 Am. St. Rep. 409, where it was said:

"A judgment thus rendered ought to be considered conclusive as to the question of probable cause, although it was reversed on appeal by the supreme court; otherwise, in every case of reversal an action would lie for the institution of the original suit."

See, also, Adams v. Bicknell, 126 Ind. 210, 25 N. E. 804, 22 Am. St. Rep. 576; Boeger v. Langenberg, 97 Mo. 390, 11 S. W. 223, and note to the same case 10 Am. St. Rep. 322.

It has been held, however, that an exception to this rule obtains where the conviction was secured by false testimony or fraud.

In Crescent Live Stock Co. v. Butchers' Union, 120 U. S. 141, 7 Sup. Ct. 472, 30 L. Ed. 614, it was held that:

"The judgment of the court, in favor of the plaintiff, is conclusive proof of probable cause for the prosecution of the suit alleged to be ma-

In Ross v. Hixon, 46 Kan. 550, 554, 26 Pac. | 2. IMMATERIAL MATTERS—Action on Policy. 955, 956 (12 L. R. A. 760, 26 Am. St. Rep. 123) it was said in the opinion:

"Again, while a conviction is generally con-clusive of probable cause, yet it may be over-come by a showing that it was procured by fraud, undue means, or the false testimony of the prosecution"—citing authorities.

It seems altogether probable that the amendment to the second count was made for the purpose of introducing an element which had been omitted from the original petition in order to escape the doctrine that the conviction in the police court established the existence of probable cause. It can hardly be said, therefore, that the amendment merely amplified the statements already contained in the original petition. Our conclusion is that the amendment came too late.

[3] The third count alleges that the defendants on the 3d day of March, 1915, wrongfully, unlawfully, and maliciously arrested plaintiff and took him before the police judge, where in order to obtain his freedom until the day of the trial he was compelled to give bond for his appearance and to employ counsel; that he suffered the humiliation of a public trial, after which he was discharged and now stands fully acquitted. The statement that he was arrested and taken before the police judge on the 3d day of March, 1915, we assume to be a mistake, because the averments of the other counts in the petition and the exhibits are made a part thereof, and these show that the arrest was made in September, 1914. No cause of action was stated in this count, because, notwithstanding the acquittal in the district court, the conviction in the police court is conclusive of probable cause.

The judgment is affirmed. All the Justices concurring.

TAYLOR et al. v. FARMERS' & BANKERS' LIFE INS. CO. (No. 21462.)

(Supreme Court of Kansas. April 6, 1918.)

(Syllabus by the Court.)

1. INSURANCE \$\infty 349(3)\text{—Insured's Failure} \text{To Pay Premium Note}\text{—Effect.} \text{The defendant insurance company, on receipt from an agent of an application for a policy and a note for the first year's premium, returned the note with a policy to the agent, stating that it had been unable to get satisfactory references on the note.

"However we are inclosing this area."

"However, we are inclosing this policy herewith, although you understand of course that the collateral which we hold will not, in view of the references which we have, guarantee the payment of this premium, and the delivering of this policy under the circumstances to the insured will be at your own risk.

The agent to whose order the note was made payable, deeming the note good, delivered the policy. Held, that this left the company in the attitude of relying on the agent as the ultimate paymaster, and it cannot defeat an action on the

A loose use of the word "collateral" and a peculiar method of bookkeeping held not to affect seriously or materially the real question involved.

3. RULINGS ON EVIDENCE.

Certain rulings on evidence examined, and held not to be substantially prejudicial.

4. FINDINGS OF FACT-SETTING ASIDE. The refusal to set aside certain findings of fact was not error.

5. APPEAL AND ERROR 4 1151(2)-JUDGMENT MODIFICATION.

The verdict and judgment being for more than the policy called for, the judgment is modified to conform to the terms of the policy, and, thus modified, the judgment is affirmed.

Appeal from District Court, Cloud County. Action by John C. Taylor and Adelia A. Taylor, minors, by Alice Taylor, their mother. guardian, and next friend, and by Charles Ross Taylor, a minor, by Anna Taylor, as next friend, against the Farmers' & Bankers' Life Insurance Company. Judgment for plaintiffs, and defendant appeals. Remanded, with directions to enter judgment for \$2,000, and, as thus modified, affirmed.

Sturges & Sturges, of Concordia, and J. A. Brubacher, of Wichita, for appellant. Pulsifer, Hunt & Short, of Concordia, for appel-

WEST, J. An agent of the defendant company took the application of Charles L. Taylor for a policy of insurance, the latter giving his note for the premium of the first year, payable to the order of the agent in the sum of \$163.28. The contract provided that failure to pay such note at maturity should avoid the policy and work a forfeiture of all previous payments except as provided in the policy. The agent sent the application and note to the company, and received acknowledgment of their receipt at the Salina office. Later he received a letter from the home office containing the following:

"We acknowledge receipt of note for \$163.28 on this case. We will at once secure references on this note, and if good will forward you check for two-thirds of your commission as an advance on it, balance of commission to be paid upon payment of the note; if not good, we will advise you at once and await your instructions.'

Later he received a letter containing the following:

"With reference to the policy of Charles L. Taylor, whose application you secured some time ago, will advise that we have been unable to get satisfactory references on this note. However, we are inclosing this policy herewith, although you understand of course that the collateral which we hold will not, in view of the references which we have, guarantee the payment of this premium, and the delivering of this policy under the circumstances to the insured will be at your own risk.

The agent, feeling that the applicant would meet the note, delivered the policy to him. and testified that he was willing for the company to charge up against him the net policy because the insured did not pay the note. premium, which he was willing to pay whether the insured paid the note or not. The | less the note is paid at maturity, the failure agent was charged with the net amount due the company. Shortly after the issuance of the policy the insured became insane, and later the agent was written to as follows by the defendant:

"Pursuant to your request of the 24th inst, we inclose the C. L. Taylor note for \$163.28, indorsed with a credit of the unearned premium, \$81.64. Policy No. 3234 lapsed on September 14, 1913."

The insured, shortly after receiving the policy, offered to turn over to the agent two horses in payment of the note, which he declined, and on another occasion offered to go to the bank and get the money and pay the note, but was told by the agent that it was unnecessary to do so. The agent testified that he understood the reference to delivering the policy at his own risk to mean that if he delivered the policy and the note was not paid he would have to pay the net to the company. Upon learning of the insanity of the insured the agent wrote to the company thereof, stating that the agent had not realized on the note, and that it might be he could collect it now better than to let it go longer, or that he might get the policy returned as the father-in-law had refused to pay, for the reason that the beneficiary was not the wife of the insured. The company was requested to send the note so that the agent could push the collection or take up the policy. In reply the company forwarded the note, stating:

"Upon collection of same we would request that you would kindly forward remittance to cover to this office. I hope that you will be able either to collect it or take up the policy."

When he received the note back from the company it had indorsed thereon "\$81.64 unearned premium" and a notation that the policy was lapsed. The agent testified that the Salina agent had asked permission of him to cancel the policy, stating that he would see that the nets charged against the agent would be credited back. It seems that on final settlement the agent paid one-half of the net, which was \$24.49. The agent testified that he owned the note at the time of trial. It was offered to show by the treasurer that when the policy was issued the company looked to the insured for payment of the note, and in event of its nonpayment by him when due it looked to the agent for the payment of the earned net. On objection this offer was refused. tiffs recovered, and the defendant appeals.

In Marshall v. Insurance Co., 98 Kan. 502, 159 Pac. 17, in an action against the same company, it was held that when a premium note is taken by the agent as such and delivered to the company, and by an arrangement between them he is conditionally charged with the company's share of the premium, the charge to remain if the note is not paid, such note belongs to the company, and, when the policy provides that it shall be void unof the assured to pay the premium and note avoids the policy. Certain admissions which characterized that case were held to show that credit was not independently extended to the applicant by the agent on his own responsibility.

[1] The controlling question here is whether the company looked to the assured or to the agent for payment of the premium. Substantially all the facts covering this point have been already set forth. There are many others more or less dwelt upon in the briefs which could be stated, but are not of enough materiality to warrant taking up space with them. It is plain that, when the application and note had been received and the latter inquired about at the bank, the company returned both to the agent, with directions that it was not satisfied with the note, and that, if he desired to deliver the policy, he could do so at his own risk. The only fair meaning to be placed on this direction is that, if the premium were not paid, the company would look to him for the portion thereof earned by it. Of course it was natural and proper that upon learning that the policy had been delivered the company would hope and look for the payment of the note by the insured. But the real dependence of the company was upon the agent, and not upon the applicant. Having seen fit to issue this policy and permit it to be delivered to the assured, looking for its final source of remuneration to the agent, it was substantially in the attitude it would have been in had the agent or some friend purchased the policy for the insured and paid the year's premium therefor.

[2] There was some loose use of the word "collateral," there was some peculiar bookkeeping, and there were other matters which give ground to arguments and suggestions, but they are not of enough import to require discussion.

[3] Rulings concerning the omission of evidence are complained of, and, while a few of them might well have been different, we find nothing therein amounting to substantially prejudicial error.

The same may be said concerning instructions given and refused, those which were given being found upon examination to have fairly covered the legal questions involved.

[4, 5] In answer to special questions 3, 4, and 5 the jury said that the defendant never received any money from the first annual premium except that paid by Swenson, and that that amount was \$24.49. Complaint is made that the trial court did not set aside these findings for lack of evidence to support them, but, as already indicated, final settlement was made between the company and the agent for \$24.49, which seems to be the only money received by the company for the pol-

One matter, however, requires attention.

It was alleged in the petition that, while the policy covered two \$1,000 gold bonds, it was agreed:

"That at the option of the said beneficiaries it would instead of issuing said two bonds of one thousand (\$1,000) dollars each, pay in cash upon the death of assured the sum of \$1,500 for each bond, or the total sum of \$3,000."

The answer contained a general denial. There was no such provision contained in the policy. The case seemed to have proceeded without the attention of the court being called to this matter until on the hearing of motion for new trial, or on motion for judgment on the verdict, although the court instructed the jury, if they found for the plaintiff, to award \$3,000, with interest, writing the amount in the verdict then submitted, with no exceptions taken to this instruction or this form of verdict. It is contended that in a circular issued by the company there was a statement to the effect that the redemption value of the bond at death was \$1,500, or at the end of the first year \$1,480. But it is admitted that this statement in the circular was not introduced in evidence. While the matter should have been called to the court's. attention earlier, failure to do so is not sufficient reason for requiring the company to go beyond the terms of its policy, which undertook to pay "on each bond \$1,000 in gold coin of United States of America, or its equivalent, and \* \* \* interest \* \* at the rate of seven per cent. Therefore, instead of a judgment for \$3,000 and interest, there should be one for \$2,000 and interest.

The cause is remanded, with directions to enter judgment for \$2,000 and interest instead of \$3,000 and interest, and thus modified the judgment is affirmed. All the Justices concurring.

ZANE v. VAWTER. (No. 21500.)

(Supreme Court of Kansas. April 6, 1918.)

(Syllabus by the Court.)

VENUE € 5(1, 3)—FRAUD—ACTION TO COMPEL RECONVEYANCE — STATUTE — "TRANSITORY ACTION" — "ACTION FOR DETERMINATION OF INTEREST IN REAL PROPERTY."

An action to compel the defendant to re-

An action to compel the defendant to reconvey land claimed by him under a deed alleged to have been procured through his fraud is transitory and not local, and may be brought in any county where personal service can be had upon him. The statute (Gen. St. 1915, § 6938), requiring actions "for the determination in any form" of an interest in real property to be brought in the county where it is situated relates only to actions in which such result is sought by means operating directly upon the property, and does not apply to those by which the conduct of the defendant is sought to be controlled, although the title to the property may thereby be affected.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Transitory Action.]

Appeal from District Court, Shawnee County.

Action by Alfred Zane against Mary Zane Vawter. From the granting of defendant's motion to dismiss the case, plaintiff appeals. Reversed, and cause remanded, with directions.

D. R. Hite, of Topeka, for appellant. A. M. Harvey, of Topeka, for appellee.

MASON, J. Alfred Zane brought an action in Shawnee county against Mary Zane Vawter, who first filed an answer and afterwards moved to dismiss the case for the reason that the court had no jurisdiction of the subjectmatter. The motion was sustained, and the plaintiff appeals.

The petition alleges that the plaintiff is an heir of Susan Zane, who in her lifetime was the owner of a quarter section of land in Kingman county; that the defendant by fraud obtained from her a deed to the land. The prayer is that the deed be set aside and the defendant be directed to deliver it up for cancellation, and "also for such other and further relief as may be consistent with the premises and with the principles of equity." The case was dismissed on the theory that the action was local and could only be maintained in Kingman county. The statute includes, in the enumeration of actions which "must be brought in the county in which the subject of the action is situated," those "for the recovery of real property, or of any estate or interest therein, or for the determination in any form of any such right or interest, or to bar any defendant therefrom." Gen. Stat. 1915, § 6938. Jurisdiction of an action of the character described in the language quoted is exclusive in the district court of the county in which the real property is situated. Randall v. Ross, 94 Kan. 708, 147 Pac. 72. The present case in one aspect falls within the description. So far as the relief sought is the setting aside of the deed, and that is specifically asked, the action is local, and cannot be maintained in Shawnee county. But the plaintiff also asks for any equitable relief to which he may be entitled, and the dismissal was erroneous if the facts stated are such as to authorize any relief which the court had jurisdiction to order and enforce, for a prayer for relief which the court has no power to grant does not vitiate the pleading, but may be rejected as surplusage. The district court of Shawnee county could not render any effective decree operating directly upon the title to or possession of land in Kingman county. could not cancel the deed executed by the plaintiff's ancestor. If it could order the surrender of the deed, that would not be an effective remedy, for such surrender would not necessarily cause the title to revest in the grantor, or in the grantor's heirs. But it

defendant to execute a deed to the plaintiff. If the district court of Kingman county were to make such an order, and it should not be complied with, the judgment itself would operate as a conveyance. Gen. Stat. 1915, § 7302. No such effect could be given the decree of the Shawnee district court, for it has no jurisdiction over the land. But although that court has no control over the "rem," it has over the person of the defendant, and it may, in the exercise of its equitable jurisdiction, investigate the allegations of fraud, and, if it finds them well founded, direct the defendant to take such action as will rectify the wrong, and undertake to compel obedience thereto by process directed against her personally. True, the remedy thus afforded is not complete. If the court should order the defendant to execute a deed and she should be committed for contempt in refusing to do so, the title would remain unchanged until she should see fit to act, and the court would have no power to affect it directly in any way. The remedy could not on that account, however, be regarded as necessarily ineffectual. The 'presumption should be that the order of the court would be obeyed rather than that it would be disregarded. Meador v. Manlove, 97 Kan. 706, 709, 156 Pac. 731. Moreover, in a subsequent local action in Kingman county, the decision in Shawnee county might be invoked as a conclusive adjudication upon the issue whether or not fraud had been committed.

These conclusions follow from the application of principles upon which there is a substantial agreement of judicial opinion. Courts frequently render judgments against persons the effect of which is to constrain action affecting the title even to lands in other states. Notes 23 L. R. A. (N. S.) 924: 69 L. R. A. 673. "It is well settled that actions involving title and possession of real property are local in character, and can be tried only in the state wherein the land lies, but it is equally well settled that, jurisdiction having been acquired, equitable relief may be afforded without regard to the location of the subject-matter, where it is enforceable against the person of the defendant." Caldwell v. Newton, 99 Kan. 848, 163 Pac. 163.

An action brought by the plaintiff in Shawnee county, to compel the defendant to execute a deed conveying to him land in Kingman county, is not, within the meaning of the statute, one "for the recovery of real property, or of any estate or interest therein, or for the determination in any form of any such right or interest, or to bar any defendant therefrom," because such statutory language is generally—and as we think, rightly—construed to refer only to proceedings for the direct accomplishment of the results indicated, by a judgment operating upon the

could, upon a sufficient showing, order the defendant to execute a deed to the plaintiff. If the district court of Kingman county were to make such an order, and it should not be complied with, the judgment itself would operate as a conveyance. Gen. Stat. 1915, \$\\$7302. No such effect could be given the decree of the Shawnee district court, for it has no jurisdiction over the land. But although that court has no control over the "rem," it has over the person of the defendant, and it may, in the exercise of its equitable jurisdic-

The judgment is reversed, and the cause is remanded, with directions to overrule the motion to dismiss. All the Justices concurring.

## J. I. CASE PLOW WORKS v. THORNE. (No. 21454.)

(Supreme Court of Kansas. April 6, 1918.)

### (Syllabus by the Court.)

1. CONTRACTS ← 22(1) — PRINCIPAL AND AGENT ← 123(3)—ACTION AGAINST AGENT—APPARENT AUTHORITY OF TRAVELING SALESMAN—EVIDENCE—EXISTENCE.

After appointing defendant its local dealer to

After appointing defendant its local dealer to sell its plows, plaintiff wrote him proposing to ship him a certain plow it had previously sold in his territory through its traveling salesman and to charge him the wholesale price, with directions that upon delivering the plow he should make settlement in his favor with the purchaser and take the latter's notes which would leave him a small profit. The letter concluded with the statement, "and unless we hear from you to the contrary will proceed as above." The defendant made no reply to the letter, and plaintiff shipped him the plow and charged his account with the price. Before the plow was delivered, defendant notified the traveling salesman that he would have nothing to do with the transaction, but agreed at the request of the salesman to receipt for the plow and turn it over to the purchaser, which he did. In an action against the dealer to recover the purchase price, held, that the evidence was sufficient to sustain a finding of apparent authority in the traveling salesman to make the arrangement carried out, and that the contract sued upon never became effective because there was no acceptance of the proposition for the purpose stated in the letter.

#### (Additional Syllabus by Editorial Staff.)

2. Principal and Agent €==99 — Agent's Apparent Authority.

Where no limitation of an agent's authority is shown, his apparent, and not his actual, authority, controls.

3. PRINCIPAL AND AGENT €=123(1) - ACTUAL OR APPARENT AUTHORITY—CIRCUMSTANTIAL EVIDENCE.

An agent's actual or apparent authority may be shown by circumstantial evidence.

Appeal from District Court, Kingman County.

Action by the J. I. Case Plow Works against H. O. Thorne. Judgment for defendant, and plaintiff appeals. Affirmed.

S. S. Alexander, of Kingman, and Ellis, Cook & Barnett and Roy K. Dietrick, all

For other cases see same tonic and KEY-NUMBER in all Key-Numbered Digests and Indexes

& Connaughton, of Kingman, for appellee.

PORTER, J. On June 10, 1915, Ira L. Haynes, a traveling salesman of the J. I. Case Plow Works, sold an engine plow to P. P. Jones, a farmer of Kingman county; the order for the plow being on a written form which provided that the contract should not be binding until it was accepted by the plaintiff. About the same time the traveling salesman made an arrangement with the defendant, H. O. Thorne, who was engaged in the hardware and implement business at Norwich, by which Thorne became the local dealer for the plaintiff.

On June 25th, the plaintiff wrote the following letter to Thorne:

"We attach letter which we are writing to Mr. P. P. Jones of Belmont, Kansas.
"Mr. Haynes has just advised us that he wishes you to make the profit on this deal, so we want you to understand it thoroughly. In shipping this plow we will bill it to you at \$460.00 with extra shares, terms, Nov. 1st, or 7½ per cent. for cash September 1st. Upon delivering the plow, you can make settlement in your favor with Mr. Jones, and since his notes are to draw 8 per cent. interest from September 1st, you will see the deal will carry itself. Now, as a matter of fact, the margin in this deal is small, only \$34.50, but if Mr. Jones' paper is sman, only \$34.50, but if Mr. Jones' paper is good, feel sure you will be satisfied with the deal, and unless we have for a satisfied with the deal, and unless we hear from you to the contrary, will proceed as above."

On the same day plaintiff wrote to Jones as follows:

"Mr. Haynes has just forwarded us your letter of the 23d, in which you ask that we reinstate your order, and we beg to advise that we

are doing so.
"Our understanding of the order is that you want our Lever Left Engine Gang Plow, equipped with 8,14" Bottoms with extra shares, price, f. o. b. Kansas City, to be \$460.00. Terms, ½ December 1st, 1915, ½ December 1st, 1916, with 8 per cent. interest from Sept. 1st, 1915. We will proceed with the order and make ship-We will proceed with the order and make ship-ment July 1st, or prior to that date if possible. For your convenience we will arrange to ship this through our agent Mr. H. O. Thorne of Norwich, Kansas, who will be glad to handle the delivery and settlement for you."

Receiving no reply from the defendant, the plaintiff shipped to him the plow it had sold to Jones. When the plow arrived at Nor-.wich, Jones came in to receive it, and the defendant advanced the freight, receipted for the plow, and turned it over to Jones, who reimbursed him for the freight. In the fall of 1915, Jones wrote plaintiff that he would not be able to pay more than \$100 on the purchase price and would require time for the balance. The plaintiff thereupon brought this action against Thorne, the local dealer, to recover the purchase price on the theory that, by his failure to reply to their letter of June 25th and his having receipted to the railway company for the plow when it arrived at Norwich, he became liable upon the terms stated in the letter.

In addition to the general denial in the answer, the defendant alleged that the plow

of Kansas City, Mo., for appellant. Walter to the authorized agent of the plaintiff and accepted by plaintiff; that he had nothing to do with the sale of the plow, did not receive it, but that it was received by Jones and the freight paid by Jones; that defendant had notified the agent of the plaintiff that he would have nothing to do with the transaction, would not accept the plow, nor be held responsible for the price: that thereupon the agent of the plaintiff agreed that the plaintiff would look to Jones for payment, and afterwards went to Jones and made a settlement with him in regard to the payment. The verified reply denied that Haynes was authorized to make any change in the terms of the proposed contract.

At the trial the station agent at Norwich produced the freight records showing that the freight charges had been paid by check signed in Thorne's name, and testified that the plow was delivered to Thorne, but the witness was unable to find the receipt. On cross-examination he stated that Sipes, a clerk in the employ of Thorne, usually transacted the business with the railway and wrote the check and signed the original freight bill; that Jones unloaded the freight; and that in a conversation Thorne told him the plow was for Jones. The defendant testified that Jones reimbursed him for the freight; that, at the time he accepted the appointment as local dealer, Haynes wanted him to take over the deal with Jones for the plow he had sold, but he refused at that time to have anything to do with the transaction because the plow had been sold at wholesale price, and there was not enough in it to pay him to bother with it. He testified that, after receiving the letter of June 25th and before the plow arrived, Haynes was there, and he told Haynes he would have nothing to do with the plow because the sale had been made before he took the agency; Haynes said, "They probably would ship the plow to me anyway, being I was the agent there," and he again told him he would have nothing to do with it; that Haynes then asked him to see that Jones received the plow; that, some time after the plow had been delivered to Jones, Haynes was in Norwich again, and said he had been out to see Jones for the purpose of settling; Jones had been too busy with harvesting to try out the plow, but he intended to see him again and settle. The testimony of the defendant is somewhat confusing respecting the dates of the several conversations he claims to have had with the traveling salesman; but he testified that there were several conversations, and that the one in which he was authorized to turn the plow over to Jones was after the letter had been received and before the plow was delivered.

Mr. Sipes, defendant's clerk, testified that he was present at a conversation after the letter of June 25th and before the plow was was sold to Jones upon a written order given received, in which Haynes told the defendant

shipped to him on account of his taking the agency, and for him to see that Mr. Jones got it anyway, even if he did not take over the deal. He further testified that he was present when Haynes came to make a settlement with Mr. Jones, and heard his statement why the settlement had not been effected and that he would try again in the near future. So there was testimony which justifled the jury in finding that the defendant notified the company through its traveling salesman that he would not be bound by the terms of the company's letter, and that in receipting for the plow and turning it over to Jones he was carrying out the instructions of the traveling salesman who had sold the plow to Jones

The testimony of the principal witness of the plaintiff, who was the manager of the Kansas City, Oklahoma City & Denver branch offices, respecting the duties and authority of the traveling salesman Haynes, is very unsatisfactory and seems to be lacking in frankness; or perhaps the witness did not know what authority the agent possessed. He testified that Haynes was employed as a special salesman only, and not to look after collections; had never made any collections, and was not authorized to do so. Asked if he had authority to make such contracts as the one in question, he testifled that he had authority to write orders and submit them to the company; that to the knowledge of the witness he was never sent out to make settlements and collections at any time. Asked if he had made the contract with defendant Thorne, he replied:

"A. I will say that Mr. Haynes was not employed to make contracts with our regular dealers. Q. Well, he did make a contract with Mr. Thorne, didn't he, as a regular dealer? A. Mr. Thorne was not a dealer of ours at the time. Mr. Haynes made the contract. \* \* \* No, he was out to call on dealers, new dealers, dealers we didn't have. Prospective dealers, I will say. That was his duty. That was the reason he was not a territory man. He was to call on any one; get new trade for us and he was to have a commission. \* \* \* Q. His duty was to make sales? A. Yes, sir. \* \* \* Q. General authority along that line? A. Well, duty was to make sales? A. Yes, sir. \* \* \* Q. General authority along that line? A. Well, I don't know what you mean by general authority. He was out to sell goods and submit his orders. Q. By the Court: He was out to sell goods for your company. He was authorized to sell goods? A. He had the prices and terms and order blanks, and of course he was to keep on selecting dealers for us and help them make sales possibly with consumers and then submit to us. \* \* \* Q. Was the authority in writing from your company? A. No, I can't say it was. Q. Who employed him? A. I employed him. \* \* He was only to do special work for us for a short time. He was not a regular representative. We have regular representatives stationed here and there, but he resentatives stationed here and there, but he represented to us that he could get a certain class of business that we were not getting, and I employed him as a special man on a commis-

that this plow would more than likely be A. We would call that canceled. We always shipped to him on account of his taking the operate that through the dealer. In selling an article to a consumer, then he need or need not submit us that order. We should submit it to the dealer, I should say."

On direct examination he was asked if he had authority to make deals with consumers, such as Mr. Jones. He replied:

"A. No, we did not employ him to call on consumers. Our business relations are entirely with dealers. With the dealer, I will say, and any time any of our salesmen wish to assist in with dealers. With the dealer, I will say, and any time any of our salesmen wish to assist in helping our dealers to sell to a consumer, we are glad to do that. Q. He had authority, did he, to assist your dealer in making a sale to a consumer? A. That much. We are glad to line in a consumer and assist if we can. Q. He had that authority? A. I don't know as I authorized him. Q. Don't you, as a matter of fact, employ him to do that and accept the benefit of his services in so doing? A. It is the custom with us. \* \* Q. Thorne was not a dealer at the time you took this contract from Jones? \* \* A. Yes, sir; he had made a contract with Mr. Haynes two days prior to the time that Mr. Haynes still had authority to sell to Mr. Jones. Q. Mr. Haynes still had authority to sell to Mr. Jones even though Mr. Thorne was not an agent? A. Mr. Haynes didn't have authority to sell to any one. He had authority to submit his orders. \* \* Q. Mr. Haynes had full authority to do what he did do there with reference to the Jones matter? A. Well, I wouldn't say that we authorized him to do that, but at the same time there were no chiefction to his gosay that we authorized him to do that, but at the same time there was no objection to his go-ing out and selling to Mr. Jones that plow."

[1] Since there was evidence to sustain defendant's contention that, before the plow was received and before he accepted the written proposition, he was directed by the traveling salesman to receipt for it and see that Jones got it, the only remaining question is whether there was evidence to warrant the jury in finding that the traveling salesman had authority to make this arrangement. At the time the arrangement was made there was no contract in existence. There was a written offer on certain terms requiring the defendant's acceptance before it would become a contract. In the meantime the traveling salesman who had made the sale in the first place, and had already been informed that defendant would have nothing to do with the transaction, was notified again that defendant would not accept the terms of the proposition contained in the company's letter, and he directed the defendant to receive the plow and turn it over to Jones. In view of the fact that he was the agent who represented the company in appointing the defendant local dealer, had made the sale or preliminary arrangements for a sale with Jones, it would be quite natural for the defendant to assume, without question, that he had sufficient authority to authorize him to accept the plow and turn it over to Jones. Notwithstanding the manager of the Kansas City branch stated in his testimony that Haynes had no such authorsion basis to get out and get that, and he was ity, his testimony taken altogether indicates to submit his order, and, if passed, we would place them in. Q. If he should procure an order from an individual, how was the deal closed?

A. You mean consumer or dealer? Q. Farmer. In fact, we think it justified the jury in finding that Haynes had authority to do the pay into the state treasury certain moneys very thing he did.

[2, 3] Before the contract sued upon became effective, there had to be an acceptance by the defendant of the terms proposed, and the acceptance, of course, must have been for the purpose comprised in the offer. limitation of the agent's authority was disclosed, and apparent and not actual authority is what is controlling in such a case. Aultman v. Knoll, 71 Kan. 109, 114, 79 Pac. 1074. We think the acts of Havnes in this case were within the apparent scope of his authority. McAdow v. Railway Co., 100 Kan. 309, 164 Pac. 177, L. R. A. 1917E, 539. The plaintiff was not entitled to the peremptory instruction asked, and the instructions requested were predicated upon the wrong theory with respect to agency and did not make clear the distinction between apparent and actual authority. Either character of agency, of course, may be proved by circumstantial evidence. The instructions which the court gave fairly stated the law, and, since we find no error in the record, the judgment will be affirmed.

The judgment is affirmed. All the Justices concurring.

STATE ex rel. BREWSTER, Atty. Gen., v. WILSON, State Superintendent of Insurance, et al. (No. 21338.)

(Supreme Court of Kansas. April 6, 1918.)

(Syllabus by the Court.)

TAXATION \$\insurance Companies ANNUAL STATE TAX—COMPUTATION

The annual state tax of 2 per cent. upon all premiums received by foreign insurance companies on account of their yearly business in this state, imposed by sections 5177, 5467, and 5468, of the General Statutes of 1915, should be computed upon the total amount of premiums collected, retained, and devoted to the business of the insurance companies, but any surplus of premiums not so used, but returned to the policy holders or credited to them as abatements or dividends, should be excluded from the com-

Original mandamus by State of Kansas, on relation of S. M. Brewster, Attorney General, against Carey J. Wilson, as Superintendent of Insurance of the State of Kansas, and oth-Writ denied.

S. M. Brewster, Atty. Gen., and J. L. Hunt and S. N. Hawkes, both of Topeka, for plaintiff. Stone & McDermott and H. O. Caster, all of Topeka, W. J. Tully, of New York City, John Barnes, of Milwaukee, Wis., F. G. Dunham, of Albany, N. Y., and Wm. C. Craige, of Philadelphia, Pa., for defendants.

DAWSON, J. This is an original action to secure an authoritative interpretation of a statute relating to the taxation of insurance companies. It takes the form of mandamus necessary to the financial demands of the

exacted by him from the defendant insurance companies, over their protest, pursuant to a debatable construction of section 5467 of the General Statutes of 1915, which reads:

"Every insurance, guaranty and accident company or association not organized under the laws of this state shall, as hereinufter provided. annually pay a state tax upon all premiums received, whether in cash or in notes, in this state, or on account of business done in this state, for insurance of life, property or interests in this state, or guaranty companies, at the rate of two per cent per annum, which amount of tax shall be assessed by the superintendent of the insurance department, as hereinafter provided."

Other related provisions of the statute read:

"Every such company or association shall, on or before the 15th day of January in each year, make a return, verified by the affidavit of its president and secretary or other chief officers, to the superintendent of the insurance department, stating the amount of all premiums received by said company, whether in cash or notes, in this state, during the year ending on the 31st day of December next preceding. Upon receipt of such returns the superintendent on receipt of such returns the superintendent of the insurance department shall verify the same, and assess the taxes upon the various companies on the basis and at the rate provided for in section 1 of this act, and proceed to collect the same from the insurance companies and cover the same into the state treasury."

Section 5468 All insurance companies, partnerships and associations organized under any foreign government engaged in the transaction of the business of insurance in this state, as provided for in this act, shall annually, on or before the first day of March in each year, pay to the superintendent of insurance two per cent. to the superintendent of insurance two per cent. on all premiums received in cash or otherwise by their attorneys or agents in this state during the year ending on the preceding thirty-first day of December, which sum shall be paid, in addition to its other license fees, into the state treasury for the insurance fund. treasury for Section 5177.

In his answer and return to the alternative writ, the superintendent of insurance says he merely awaits the court's direction and protection in the discharge of his duty. The real defense is made by the insurance companies. Their several answers only differ in details; their main contentions are alike. They say they have no quarrel with the statute, and that pursuant to its terms they pay to the state many thousands of dollars annually: but they claim that the computation of the precise sums due from them is made incorrectly. In substance, each company says it pays the 2 per cent. tax willingly upon the net annual premiums exacted from its policy holders which are retained and used by the company, but each protests against the payment of the tax upon the surplus of the premiums which it returns to the policy holders when it develops, at the close of the year's business, that a surplus or overcharge of premiums has been collected, and which is not to require the superintendent of insurance to | company. One of the defendants illustrates

the point thus: To insure its solvency its | necticut General Life Ins. Co. v. Eaton (D. C.) financial policy has three main factors of safety: First, it assumes that its death losses will be higher than the mortality tables of human experience commonly disclose; second, it assumes that its expenses of administration, taxation, etc., will be higher than past experience would suggest; and third, that its income from assets, capital, reserves, and the like will be less than past experience would suggest. On this broad leeway of assumptions sometimes called "the loading." it fixes the premiums to be exacted from its policy holders, and its contracts of insurance so provide. But when at the close of the year's business it is disclosed that these broad precautions of safety were not necessary, that its business for the year has been normal, and that consequently the exaction of the full amount of premiums contracted for and collected was not necessary, it refunds or abates to its policy holders a part of the premiums—such part as it can spare without injury to its financial safety. It is the state's right to tax such returned or abated portions of the premium moneys which is questioned.

Another of defendants illustrates its contention by exhibiting a table relating to its account with one of its policy holders whose stipulated premium was \$609 per annum. Each year after the first, part of his premium was returned to him as an abatement, commonly, but not quite accurately, designated as a "dividend." This table reads:

Year.	Prem. Stipulated in Policy.		Amt. Paid to Company.	Amt. Report- ed Subject to Tax.
1912	609.00	None.	609.00	609.00
1918	609.00	111.70	497.30	497.30
1914	609.00	118,40	490.60	490.60
1915	609.00	125.10	483.90	483.90
1916	609.00	132.00	477.00	477.00
1917	609.00	139.10	469.90	469.90

The question in this case, as applied to the policy in the table submitted, is whether the state's 2 per cent. tax on premiums shall be exacted each year on the sum of \$609, the stipulated premium which the company has the right to collect and the right to keep, or upon that amount, less the dividend or abatement to the policy holder, when, at the conclusion of the business of the year in which it was collected, it was disclosed that the company's financial condition did not require its retention.

With almost an entire unanimity the courts which have had occasion to consider this question have determined that the tax only reaches the sum retained and kept for the company's business, and does not apply to such portion of the sum as is returned to the policy holder or abated to his account. Some of the pertinent decisions are: Mutual Benefit Life Ins. Co. v. Herold (D. C.) 198 Fed. 199; Herold v. Mutual Ben. Life Ins. Co., 201 Fed. 918, 120 C. C. A. 256; Con- upon premiums received during the year un-

218 Fed. 188; Eaton v. Connecticut General Life Ins. Co., 223 Fed. 1022, 138 C. C. A. 663; Mutual Benefit Life Ins. Co. v. Commonwealth, 128 Ky. 174, 107 S. W. 802; New York Life Ins. Co. v. Chaves, Supt. of Ins., 21 N. M. 264, 153 Pac. 303; Commonwealth of Pennsylvania, Appellant, v. Penn Mut. L. Ins. Co., 252 Pa. 512, 97 Atl. 677; Commonwealth, Appellant, v. Metropolitan L. Ins. Co., 254 Pa. 510, 98 Atl. 1072; New York Life Ins. Co. v. Styles, 59 Law J. Rep. Q. B. 291.

The case of German All. Ins. Co. v. Van Cleave, 191 Ill. 410, 61 N. E. 94, is to the same effect, although it related only to the tax on fire insurance premiums.

The case of Metropolitan Life Ins. Co. v. State (Ind.) 116 N. E. 579, is largely at variance with the prevailing view of the cases cited above. The court has examined all these cases, but it would unduly extend this opinion to quote from them.

It is a prudent policy which for the time being exacts from the policy holder somewhat more than the estimated amount needed to pay the proper charges on an insurance business. The inherent uncertainties of any business commend such foresight. But neither the insurance company nor its patrons should be penalized for so doing; and moneys received as premiums, but returned because not necessary for premiums, should not be taxed as such. True it is that:

"He who hopes a faultless tax to see Hopes what ne'er was, nor is, nor e'er shall be."

But Legislatures do not purposely intend to impose irrational, illogical, or unjust burdens of taxation. Statutory language. imposing an exceptional or irrational burden of taxation, should be so clear and unambiguous as to leave no room for debatable interpretations. It cannot be presumed that the Legislature intended that the collection or noncollection of the premium tax should be governed by a question of bookkeeping nor on an undue significance to mere words of terminology.

In the answers of the defendant insurance companies, the truth of which are admitted by the pleadings, the moneys upon which the right of taxation is disputed are variously designated as abatements, dividends, surplus, rebates, refunds, excess of tentative or experimental premiums, excess of gross or estimated premiums over net or mathematical premiums, overcharge of premium, difference between estimated premiums and actual cost of insurance, difference between level premium and adjusted losses and costs afterwards determined. The court holds that such moneys not actually devoted as premiums to the business of the insurance company for the current year in which they are collected, but which are returned or otherwise abated or credited to the policy holders' account, are not subject to the 2 per cent. tax exacted der sections 5177 and 5467 of the General | Rowland, defendant in error, against the Statutes of 1915.

A special question is raised concerning the premium collections of the defendant Metropolitan Life Insurance Company. company issues industrial policies calling for payments of a few cents each week. It employs agents at considerable expense to collect these small items. To lessen this expense, its contracts provided that if the policy holder will remit his payments promptly and regularly for one year, an abatement of 10 per cent. will be awarded him, that being about the cost of collection. This situation is governed by the general rule which we have considered. If the full payments received are retained, the tax thereon should be paid; where it is not retained, but returned or abated to the policy holders' account, the tax is not due thereon.

As to all the defendants, they should pay the tax upon the total sum of premiums which they receive and retain, but the statute does not require them to pay upon the refunded or abated surplus or excess of premiums which is not thus retained.

Writ denied. All the Justices concurring.

## KILGORE et al. v. ROWLAND et al. (No. 8803.)

(Supreme Court of Oklahoma. April 9, 1918.)

(Syllabus by the Court.)

1. TRESPASS 4=61-CUTTING AND REMOVAL OF TIMBER-MEASURE OF DAMAGES.

Where one willfully and without authority from the owner enters upon the land of another and cuts and removes the timber therefrom, under section 2883 of the Revised Laws of 1910, the measure of damages is three times such sum as would compensate the owner for the actual interest. tual injury.

2. TRESPASS \$\$\\$67\$\text{—TRIAL} \$\\$\\$\\$\\$\\$170\$\text{—CUTTING} AND REMOVAL OF TIMBER \to DEMURRER TO EVIDENCE\text{—DIRECTED} VERDICT.

The evidence of the plaintiff in this cause examined, and held, that the court properly overruled the demurrer thereto, and, upon the defendant's failure to introduce any evidence, properly directed a verdict thereon for plaintiff.

Commissioners' Opinion, Division No. 3. Error from District Court, McCurtain County; Chas. B. Wilson, Judge.

Action by Gus Rowland against E. A. Kilgore and W. R. Kilgore, partners, doing business as the Kilgore Lumber Company, in which John and Mary Denison interpleaded. Judgment for plaintiff Rowland upon a directed verdict, and defendants bring er-Affirmed.

Head & Barrett, of Idabel, for plaintiffs in error. E. C. Armstrong and J. Randall Connell, both of Idabel, for defendants in er-TOT.

PRYOR, C. This action was commenced

plaintiffs in error, E. A. Kilgore and W. A. Kilgore, partners, doing business as Kilgore Lumber Company, for the recovery of damages for the wrongful cutting of timber from lands belonging to the said Gus Rowland. The petition states, in substance, that the plaintiff is the owner of a certain tract of land lying in McCurtain county, Okl., and that the defendants, during the months of April and May, 1914, wrongfully, willfully, and fraudulently, and without any authority from the plaintiff, cut and removed from said premises about 98,600 feet of cottonwood and redwood timber of the value of \$4 per thousand, and asks judgment for damages in treble the reasonable value of said timber. The defendants in error John W. Denison and Mary Denison interpleaded and claim that the timber was cut from said premises by the defendants before sale of said premises to the plaintiff Rowland by them, and that they are entitled to the damages incurred by the wrongful cutting and removing of timber from said premises, and ask judgment therefor. The answer of the defendants is, in effect, that they removed said timber under contract with one Tom Thompson, the agent of John and Mary Denison, and authorized by them to sell said timber; that they subsequently ratified the acts of their agent, Tom Thompson, and that they were estopped to deny the validity of the contract of Tom Thompson by allowing the defendants to remove said timber from said premises without objecting. At the conclusion of plaintiff's evidence, defendants interposed a demurrer thereto, which was by the court overruled, and, the defendants not introducing any evidence, the court instructed the jury to return a verdict in favor of the plaintiff Rowland in the sum of \$563.40, and the defendants appeal.

[2] The contentions of the defendants may be stated generally that the verdict and judgment of the trial court is contrary to the law and the evidence. It is the contention of the defendants that the evidence is not sufficient to support the verdict for the reason that the plaintiff failed to prove ownership of the land, and that no damage was sus-

The defendants in their answer allege that the Denisons were the owners of the premises, and that they took the timber from said premises under contract entered into with the agent of the Denisons.

The plaintiff testified that he purchased from the Denisons and introduced deed to that effect. Under the allegations of the pleadings, this evidence was amply sufficient to establish ownership in Rowland.

The county surveyor testified on behalf of the plaintiff that the amount of timber cut on said premises was 93,000 feet, that on the 1st day of February, 1915, by Gus he measured the timber and made as accu-

rate an estimate of the timber cut as possible, and that the amount cut from said premuses was 93,000 feet.

[1] One of the defendants was introduced as a witness for the plaintiff and testified that the timber was worth \$2 per thousand. On this basis the court calculated the amount of the verdict. The evidence, with the admissions of the defendants in their answer, is sufficient to sustain the verdict and to authorize the court in directing a verdict for the plaintiff.

The next contention of the defendants is that treble damages is unauthorized by law, and that the damages fixed by the court and jury does not come within the class of cases provided for in section 2883 of the Revised Laws of 1910. The section referred to is as follows:

"That the measure of damages is three times such sum as would compensate for actual detriment, except where the trespass was casual and involuntary, or committed under the belief that the land belonged to the trespasser."

The allegations of the petition of the plaintiff are to the effect that the defendants willfully, fraudulently, and without authority from the owner, appropriated the timber to their own use and benefit. The evidence shows that there was no authority whatever for the cutting and removal of the timber from the said premises. This brings this case squarely within the class of cases for which the statutes allow treble damages, and, under the pleading and the evidence, it cannot fall within the excepting clause, "except where the trespass was casual and involuntary, or committed under the belief that the land belonged to the trespasser."

Therefore there was no error in the allowing of treble damages by the court, and the judgment of the trial court should be affirmed.

PER CURIAM. Adopted in whole.

# WILLIAMSON et al. v. HOLLOWAY. (No. 7885.)

(Supreme Court of Oklahoma. April 9, 1918.)

(Syllabus by the Court.)

1. TRIAL \$==171-DIRECTED VERDICT-POWER OF COURT.

It is error for the trial court, of its own mo-tion, to direct a verdict for the plaintiff before the defendant has rested his case.

2. APPEAL AND ERROR \$\infty 233(1)\$\to Directed Verdict\to Sufficiency.

Where the court directs a verdict for plaintiff before defendant has rested, and defendant excepts and objects because the case has not been concluded, the error is sufficiently saved. Defendant is not required to offer additional evidence to preserve his exception.

Commissioners' Opinion, Division No. 1. Error from District Court, Okfuskee County; Geo. C. Crump, Judge.

Action by Robert Holloway against David M. Williamson and others. Judgment for plaintiff, and defendants bring error. Reversed and remanded.

Burris & Burris, of Okemah, for plaintiffs in error. Martin L. Frerichs, of Okemah, for defendant in error.

RUMMONS, C. This action was commenced by the plaintiff against defendants to recover the sum of \$1,315.43 upon a guardian's bond executed by David M. Williamson and his sureties. The defense pleaded was an accord and satisfaction entered into by the plaintiff and his guardian David M. Williamson after the plaintiff had reached his majority. Upon the trial the plaintift offered his evidence and rested. The defendants offered several witnesses, the last of whom was the plaintiff. The last question asked this witness and answered by him and the further proceedings in this case as appears from the record are as follows:

"Q. Did he try to make a settlement? A. Yes sir; I told him to turn this over, and he said well, didn't make any difference, it was not nec-

essary at that time.
"By the Court: That will do. Gentlemen of by the Court. That will do. deficient of the jury, this is a case wherein there was a guardian appointed for a minor, who was Robert Holloway. The guardian failed to perform his duties as by law required. The object of the has dulies as by law required. The object of the law in giving these bonds is to hold the estate intact for the minor and to keep the guardian from squandering it. By virtue of the relationship and confidential relationship existing besmp and condendal relationship existing between the guardian and ward and by virtue of the relationship of the attorney and his clients, a confidential relationship exists, and the guardian and the attorney owe to the ward the duty to protect his interest and not destroy it. The testimony presents this case to me that the laws of this extra establish these funds in the heads of of this state establish these funds in the hands of the guardian. He took the oath to perform his duty in accordance with the law and account for all funds coming into his hands, and he did not do so, and his liability figures \$1,815.43. He has been presuming to represent this negro boy, who hasn't got much sense, but he has to take an old negro woman and deeded 60 acres of land to relieve his bondsmen. Now that boy did not understand it that way. If you were to return a verdict contrary to that, I would set it aside, and I know you would not do it, and let's don't have any such methods of doing business like this. He gave a bond to the county court, and he must come right up and settle with the coun-ty court, and the bondsmen would be liable for the amount and I am going to instruct you men to return a verdict for the plaintiff. "By Mr. Burris: To the instruction of the court the defendant excepts, which exception is

duly allowed.
"By Mr. Burris: Comes now the defendants, and objects to the remarks of the court, for the reason that the case has not been concluded, and the defendants had no showing to make out a case. (Here the jury was instructed to return a verdict for the plaintiff, which is done by the

"By the Court: Judgment will be rendered upon the verdict for the amount sued for upon the bond, and when any amount is paid upon any one of the bonds, it shall be credited on the full amount of \$1,315.43. The liability of each surety will be fixed in accordance with the bond, not to exceed the amount as fixed by the bond."

new trial, which being overruled, bring this proceeding in error to reverse the judgment of the court below.

[1] The principal error complained of and the one which requires a reversal of the judgment in this cause is that the court instructed the jury to find for the plaintiff before the defendants closed their case. Section 5002, R. L. 1910, provides an orderly method for the trial of all civil causes as follows:

"When the jury has been sworn, the trial shall proceed in the following order, unless the court for special reasons otherwise directs: First, the party on whom rests the burden of the issues may briefly state his case, and the evidence by which he expects to sustain it. Second. The adverse party may then briefly state his defense, and the evidence he expects to offer in support of it. Third. The party on whom rests the burden of the issues must first produce his evidence; after he has closed his evidence the adverse party may interpose and file a demurrer thereto, upon the ground that no cause of action or de-fense is proved. If the court shall sustain the demurrer, such judgment shall be rendered for the party demurring as the state of the plead-ings or the proof shall demand. If the demurrer be overruled, the adverse party will then pro-duce his evidence. Fourth. The parties will then be confined to rebutting evidence unless the court, for good reasons in furtherance of justice, permits them to offer evidence in the original case. Fifth. When the evidence is concluded and either party desires special instructions to be given to the jury, such instructions shall be reduced to writing, numbered, and signed by the party or his attorney asking the same, and delivered to the court. The court shall give general ered to the court. The court shall give general instructions to the jury, which shall be in writing, and be numbered, and signed by the judge, if required by either party. Sixth. When either party asks special instructions to be given to the jury, the court shall either give such instructions as requested, or positively refuse to do so; or give the instructions with modification in such meaner their is shall distinctly and tion in such manner that it shall distinctly appear what instructions were given in whole or part, and in like manner those refused, so that either party may except to the instructions as asked for, or as modified, or to the modification, or to the refusal. All instructions given by the court must be signed by the judge; and filed together with those asked for by the parties as a part of the record. Seventh. After the instructions have been given to the jury the cause may

It is apparent that the trial court clearly overlooked the provisions of this section which are in line with the ordinary procedure in all code states.

To permit the trial court, upon his own motion, before both parties have rested their cause in the ordinary course of trial, without the presenting of a demurrer to the evidence or an objection to the sufficiency of the petition, to stop the progress of the cause and instruct the jury for either party would make the administration of justice a travesty. Though either party may have failed to make his case at any time in the progress of the trial the court cannot presume that he will not or cannot produce additional testimony which will tend to establish his case.

In the case of Franch v. National Laundry Co., 31 App. D. C. 105, the plaintiff brought assignment of error by the trial court for

The defendants duly filed motion for a, an action against the laundry company to recover for personal injuries when in its employ. The plaintiff was the first witness examined in her own behalf. When the crossexamination was concluded she was dismissed from the witness stand. The court on its own motion instructed the jury to return a verdict for the defendant, and Mr. Justice Van Orsdel, who delivered the opinion of the court, says:

> "The chief question before us is whether or "The chief question before us is whether or not the trial court erred in thus summarily disposing of the case. We are clearly of the opinion that this was error. The rule to be applied to the action of the court in this case is absolute, and will admit of no exception. The strict rule applied where the court peremptorily instructs a verdict, either when plaintiff rests its case in chief, or when all the evidence, both of plaintiff and of defendant, has been submitted, has no application here. Plaintiff had not rested her case. The record is silent as to whether ed her case. The record is silent as to whether or not she had further evidence to offer. The or not she had further evidence to ouer. The fact remains that she had not rested, and, until she did, she had the manifest right to offer additional evidence in support of her declaration. The action of the court in instructing the jury to return a verdict for the defendant, under the circumstances here disclosed, would constitute error in any case. Plaintiff was not bound to circumstances here disclosed, would constitute error in any case. Plaintiff was not bound to establish her case by her own evidence, or by a particular number of witnesses. The record discloses that others were present when the accident occurred, and it is fair to presume that plaintiff had other witnesses to offer in support of her declaration. The testimony of the persons present, it is reasonable to assume, would have thrown much light upon the case. Every presumption must be resolved against the court, when it assumes to deprive a litigant of the right to produce competent witnesses in support of a declaration, which, if proved, would justify a recovery.

In the case of Miller et al. v. House et al., 63 Iowa, 82, 18 N. W. 708, the court says:

"Where plaintiffs were suing upon a promissory note, and they offered in evidence part of a deposition taken by defendants, but, on defendants' motion, they were required to read the whole deposition, which tended to show that plaintiffs had no title to the note in question, it was error for the court, at that stage of the trial, and before plaintiffs had rested their case, to order a verdict for defendants, without allowing plaintiffs to introduce other evidence to establish their title to the note."

In the case of Field et al. v. Clippert, 78 Mich. 26, 43 N. W. 1084, the court says:

"Directing a verdict for the defendant in a replevin suit before either of the parties has rested, and while the case was in the hands of the defense, and the plaintiffs stated that they desired to offer further testimony, among which was the appraisal of the property, is error, calling for a reversal."

In Crown Point Min. Co. v. Buck, 97 Fed. 462, 38 C. C. A. 278, the court says:

"It is error to stop the trial of a case, and direct a verdict, before competent evidence offered upon material issues has been received." Mau v. Stoner, 10 Wyo. 125, 67 Pac. 618.

It is clear under the foregoing authorities and section 5002, R. L. 1910, that the trial court transcended its authority and thereby deprived the defendants of a substantial right.

[2] The only contention made against this

the plaintiff is that the defendants did not partners. Upon issues being joined the case properly save their exceptions thereto in the trial court. It is urged that they did not offer to produce any other witnesses or introduce other additional testimony. We cannot agree with this contention of the plaintiff. When counsel for the defendants excepted to the instructions of the court and objected to the remarks of the court, because the case had not been concluded, that the defendants had no showing to make out a case, the court was certainly advised of the objection to the procedure taken by the defendants. court thereupon, as the record discloses, without ruling upon the objection to the remarks of the court, instructed the jury to return a verdict for the plaintiff, which was done. We think counsel for defendants sufficiently saved their exceptions. For them to have offered new witnesses or offered to introduce additional testimony after the remarks of the court would possibly have caused a wrangle between counsel and the court, and might have subjected counsel to punishment for contempt. It is well established that counsel are not required to continuously and repeatedly present the same objection after it has been passed upon by the court.

The judgment of the trial court should be reversed, and the cause remanded for a new trial.

PER CURIAM. Adopted in whole.

McNALLY v. HARLEY. (No. 8672.) (Supreme Court of Oklahoma. April 9, 1918.)

(Syllabus by the Court.)

1. Partnership 4=53 - Evidence-Suffi-CIENCY.

Evidence examined, and held that the facts proven show the existence of a partnership between plaintiff and defendant.

2. TRIAL \$\infty 82-OBJECTIONS TO EVIDENCE. A general objection to the introduction of testimony without specifying any ground upon which the evidence offered is inadmissible is too indefinite and general, and it is not error to overrule same.

Error from District Court, Coal County; J. H. Linebaugh, Judge.

Action by Pat Harley against C. D. Mc-Nally. Judgment for plaintiff, and defendant brings error. Affirmed.

Wilhelm & Holland, of Coalgate, and W. F. Semple, of Durant, for plaintiff in error. John T. Harley and George Trice, both of Coalgate, for defendant in error.

HARDY, J. This action was commenced in the district court of Coal county by Pat Harley, who filed a petition against C. D. McNally, wherein he prayed a dissolution of a partnership alleged to exist between the parties, for a receiver of the partnership ment of the trial court is not only sustained

was tried to the court, who found in favor of plaintiff decreeing the existence of a partnership, appointed a receiver of the partnership property, ordered a sale thereof, and appointed a referee, to whom was referred all issues respecting an accounting between the partners, from which decree defendant prosecutes error.

[1] The only question properly presented is whether the evidence was sufficient to sustain the judgment. There is no controversy as to the law of the case. Section 4431, Rev. L. 1910, defines a partnership as follows:

"A partnership is the association of two or more persons for the purpose of carrying on business together, and dividing the profits between them.

It appears from the evidence that McNally had previously been engaged in business. Becoming bankrupt his stock had been sold and was purchased with money advanced by Harley and turned over to McNally under an agreement that he should conduct the business, receive \$60 per month for his services. after which the profits were to be divided between Harley and McNally. For five or six years thereafter the business was conducted in Harley's name, all goods being bought and checks issued in his name. After this time negotiations were had with one Mr. Day looking to his purchase of an interest in the business, and for a time the business was conducted under the name of Day, Harley & Co. The deal with Day not being consummated, the name was changed to Harley & McNally. During all this time Harley would frequently visit the store and confer with McNally about the condition of the business, and was introduced by McNally to salesmen as a partner in the business, and employés were told he was a member of the firm, and on occasions when visiting Oklahoma City would place orders for merchandise. When differences arose between Harley and McNally, Harley's son commenced negotiations with McNally for the purpose of taking over his father's interest in the business. These negotiations were not successful, but at no time during their progress did McNally deny that Harley was interested therein. At the time of trial a sign was in front of the place of business with the name "Harley & McNally" thereon. Plaintiff's name was on all the stationery used, and was in the invoices and bills, and the firm name was signed to all checks drawn by defendant. During the conduct of the business numerous actions were brought to collect amounts due the firm, wherein pleadings were filed and sworn to by defendant containing the allegation that plaintiff was a member of said firm. Upon an examination of the record we are convinced that the judgproperty, and for an accounting between the by the testimony, but that the clear weight

during such negotiations defendant at no time disputed plaintiff's interest in the business. The testimony of the witness Cardwell was to the effect that he was at one time employed by the firm, and while engaged in his duties plaintiff entered the place of business and witness asked who he was, to which defendant McNally answered. "Don't you know your own boss?" Error is alleged upon an admission of this testimony. The objection thereto was general, and called the attention of the court to no ground upon which same was inadmissible. A general objection of this character is too indefinite to present any question to the trial court, and it was not error to overrule same. Fender, Adm'r, et al. v. Segro et al., 41 Okl. 318, 137 Pac. 103. The record fails to show that any exception was taken to the ruling of the court upon said objection. It might be added, however, that had proper objection been made and exception reserved the testimony was properly admitted, for the issues in this case being the existence of a partnership between the parties, and no written contract having been entered into, that relation might be shown by other evidence, and it was competent to show admission by either party to the effect that a partnership in fact existed. Cobb v. Martin et al., 32 Okl. 588, 123 Pac. 422.

The judgment is affirmed. All the Justices concur, except RAINEY, J., disqualified.

MITCHELL et al. v. GUARANTY STATE BANK OF OKMULGEE. (No. 8632.)

(Supreme Court of Oklahoma, April 9, 1918.)

(Syllabus by the Court.)

APPEAL AND ERBOR \$\infty 1010(1)\to Review-FINDINGS OF FACT BY COURT.

In an action for conversion of personal property, which was tried to the court without the aid of a jury, the court's findings of fact will be given the same weight as the verdict of a jury, and will not be set aside if there is any evidence reasonably tending to support such findings.

2. CHATTEL MORTGAGES \$\infty\$ 18, 135 - AFTER-ACQUIRED PROPERTY-STATUTES.

Under the provisions of section 3829, Rev. Laws 1910, which provides: "An agreement may be made to create a lien upon property may be made to create a hen upon property not yet acquired by the party agreeing to give the lien, or not yet in existence"—a mortgage may be given and a lien created upon chattels to be subsequently acquired by the mortgagor, and the lien attaches from the time when the party giving the mortgage acquires an interest in the chattels mortgaged to the extent of such interest.

3. CHATTEL MORTGAGES 4== 124 -- AFTER-AC-QUIRED PROPERTY-INTENT.

Where the chattels were acquired by the mortgagor soon after the execution of the mort- Levi Pickering were partners, doing busi-

of the evidence supports the finding of the court that a partnership existed.

[2] During the trial John Harley, son of plaintiff, testified to certain negotiations with defendant, and further testified that cover such property is sufficiently disclosed.

CHATTEL MORTGAGES 4-47-DESCRIPTION-SUFFICIENCY.

A description in a chattel mortgage of the mortgaged property is sufficient if it will enable a third person, aided by inquiry, when pursued, to identify the property.

5. CHATTEL MORTGAGES 6-47-DESCRIPTION

LOCATION OF PROPERTY.

Where a chattel mortgage of certain oxen accurately described the property mortgaged, the mere fact that the oxen were not at the place where the mortgage recited they were will not vitiate the mortgage.

Another County—Filing—"Notice."

Under section 4032, Rev. Laws 1910, relating to chattel mortgages, the filing of the mortgage a few days after its execution in the county to which the property was subsequently removed constitutes notice, though the mortgage had not been filed in the county in which the mortgaged property was situated at the time mortgaged property was situated at the time of its execution, and such a mortgage need not be withdrawn and refiled after the arrival of the property.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Notice.]

Error from County Court, Okmulgee County; Mark L. Bozarth, Judge.

Action by the Guaranty State Bank of Okmulgee against Louise Mitchell, as executrix of the will of George W. Mitchell, deceased, and another. Judgment for plaintiff, and defendants bring error. Affirmed.

Belford & Hiatt, of Okmulgee, for plaintiffs in error. M. A. Dennis and McCrory & Johns, all of Okmulgee, for defendant in

RAINEY, J. The Guaranty State Bank of Okmulgee, Okl., in an action instituted by it against Louise Mitchell, as executrix of the last will and testament of George W. Mitchell, deceased, and Levi Pickering, recovered judgment in the county court of Okmulgee county, for the alleged conversion of some oxen, from which judgment the defendants have brought the case to this court for review. The parties will hereinafter be designated as they appeared in the county court.

The facts out of which the controversy arose are substantially as follows: On May 23, 1913, one W. N. Avery executed to the plaintiff a chattel mortgage on the oxen in controversy and some other personal property, as security for a note in the sum of \$275, executed by him to the plaintiff on the same day. At the time of the execution of the mortgage, the oxen were in McIntosh county, Okl.; but a horse included in the mortgage was in the town of Okmulgee. The mortgage was filed for record in Okmulgee county, on May 26, 1913, but was never filed for record in McIntosh county. George W. Mitchell and

ness under the firm name of Mitchell & Co., , which firm, after the note to the plaintiff became due, entered into negotiations in Mc-Intosh county with W. N. Avery for the purchase of the oxen, which were then situated in McIntosh county. Pending the negotiations the oxen were brought into Okmulgee county, where they were subsequently purchased from Avery by Mitchell & Co. Thereafter the firm of Mitchell & Co. sold the oxen and shipped them out of the country. It appears that W. N. Avery was not the owner of the oxen described at the time of the giving of the mortgage, but did become the owner thereof prior to the time that he sold them to Mitchell & Co. It also appears that neither Mitchell & Co. nor any member of the firm had any actual knowledge of the existence of plaintiff's mortgage or of any claim of the plaintiff. Under this state of facts, the court found that the plaintiffs were entitled to recover.

[1] The first error assigned is that the findings of fact of the trial court, which are substantially as above, are not sustained by the evidence. We have examined the evidence in the case, and are of the opinion that the same reasonably supports the findings of the trial court, and for this reason they will not be disturbed. Semple v. Baken, 39 Okl. 563, 135 Pac. 1141; School Dist. No. 13, Latimer Co., v. Ward, 40 Okl. 97, 136 Pac. 588; Galer et al. v. Berrian et al., 43 Okl. 303, 140 Pac. 155; Sango et al. v. Parks et al., 44 Okl. 223, 143 Pac. 1158.

[2] It is next contended that it was error for the court to conclude, as a matter of law, that plaintiff's mortgage covered the oxen in controversy, for the reason that Avery was not the owner of the oxen at the time of the execution of the mortgage. The common-law rule is that a chattel mortgage can operate only on property actually in existence at the time of the giving of the mortgage, and then actually belonging to the mortgagor, or potentially belonging to him as an incident of other property then in existence and belonging to him. 5 Ruling Case Law, p. 403. But this rule has been modified in this state by section 3188, Oklahoma Statutes of 1893, which is identical with section 3829, Rev. Laws of Oklahoma 1910, and which has been construed by this court as authorizing a chattel mortgage upon property to be acquired by the party giving the mortgage, and the lien agreed for is held to attach from the time when the party giving the mortgage acquires an interest in the chattels mortgaged to the extent of such interest. Eckles v. Ray & Lawyer, 13 Okl. 541, 75 Pac. 286; Payne v. Mc-Cormick Harvesting Machine Co., 11 Okl. 318, 66 Pac. 287; Garrison et al. v. Street & Harper Co., 21 Okl. 643, 97 Pac. 978, 129 Am. St. Rep. 799.

[3] We are in accord with the authorities against subsequent creditors, purchasers, mortwhich hold that, in order for a mortgage on gages or incumbrancers for a longer period

after-acquired property to be operative, it must show the intention of the mortgagor to cover the after-acquired property; but where, as in this case, the chattels were acquired by the mortgagor soon after the execution of the mortgage, and were particularly described therein, and there is not any evidence in the record tending to prove that the mortgagor had other property of the same or similar description, or that the mortgage was not intended to cover such property, we think the intent of the mortgagor that the mortgage was to cover such property is sufficiently disclosed.

[4] The description of the oxen, as contained in the mortgage, is as follows:

"Two red Polish bulls, 5 years old, broken to work with yoke. Four red steers, 7 or 8 years old, broken to work with yoke."

It is insisted that this description of the oxen is too indefinite to charge the defendants with notice. In this jurisdiction any description in a chattel mortgage, sufficient to put a third person upon inquiry, which, when pursued, will enable him to ascertain the property intended to be included in the mortgage, is good. First Nat. Bank v. Rogers, 24 Okl. 357, 103 Pac. 582; Chattanooga State Bank v. Citizens' State Bank, 39 Okl. 255, 134 Pac. 954; Jones on Chattel Mortgages, § 251. We think the description comes within the rule, and are inclined to agree with counsel for plaintiffs when they say:

"It would seem, in this day and age of traction plows, high-powered automobiles, and aeroplanes, that the mere mention of such rare remants of the past as oxen would, of itself, be a sufficient description. An ox, with the scars of yoke and chain, differs as much from the ordinary steer, as a galley slave from a well-fed, royalty-collecting Creek freedman."

[5] Nor does the fact that the oxen, at the time of the execution of the mortgage, were not at the place where the mortgage recited they were, vitiate the mortgage. Jones v. Workman, 65 Wis. 269, 27 N. W. 158; Adams v. Hill, 10 Kan. 627.

[6] The mortgage recited that the mortgaged property was situated in Okmulgee county, but the trial court found that at the time of its execution the oxen were in Mc-Intosh county, and it is contended that, since the mortgage was not filed in McIntosh county, Mitchell & Co. would not have constructive notice thereof, although it was filed in Okmulgee county.

Section 4032 of our Statutes reads as follows:

"The filing of a mortgage of personal property, in conformity to the provisions of this article, operates as notice thereof to all subsequent purchasers and incumbrancers of so much of said property as is at the time mentioned in the preceding section located in the county or counties wherein such mortgage or authenticated copy thereof is filed: Provided, that when a mortgaged chattel is moved into this state, or from one county to another, any previous filing of the mortgage shall not operate as notice as against subsequent creditors, purchasers, mortgagees or incumbrancers for a longer period

than one hundred and twenty days after such | removal, but such mortgage must be refiled in the county to which the chattel is removed and in which it is permanently located."

In the case of Ames Iron Works v. Chinn, 15 Tex. Civ. App. 88, 38 S. W. 247, a Texas statute substantially the same as the above was applied by the Supreme Court of Texas to a similar state of facts, and it was held that the filing of the mortgage in the county to which the property was to be removed was proper, and constituted notice to subsequent purchasers. The court, in the syllabus of the case, said:

"Under the Act of 1879, relating to chattel "Under the Act of 1879, relating to chattel mortgages, which, in effect, provides that, where the mortgage is recorded in the county where the property was originally, this registration will be valid in the county to which it may be removed, for four months, against all persons, but after that time the mortgagee must register the mortgage in the county to which the property was removed, the registration of the mort-gage in the county to which the property was removed constitutes notice, though the mortgage has not before been registered at all.

Where a chattel mortgage has been filed for registration in a county to which the property mortgaged is destined, but before its arrival there, the mortgage need not be withdrawn and refiled after the arrival of the property."

We think the filing of the mortgage in Okmulgee county was a substantial compliance with the statute.

The judgment is affirmed. All the Justices concur.

## BRENNAN et al. v. HUNTER et al. (No. 8471.)

(Supreme Court of Oklahoma. April 9, 1918.)

## (Syllabus by the Court.)

1. Mines and Minerals (== 78(6) - Oil and Gas Lease-Forfiture.

Ordinarily the lessor in an oil and gas lease is the only person who can take advantage of a provision therein providing for a forfeiture thereof for failure of the lessees to comply with its terms, unless there is an express stipulation that the lease shall be void upon failure to comply with its terms.

2. MINES AND MINEBALS \$= 78(6)-OIL LEAS-ES-FORFEITURE.

The lessor is the only person who can avoid an oil and gas lease on the ground that it is ren-dered unilateral by reason of a surrender clause contained therein, and claim a cancellation thereof because of such surrender clause.

3. Mines and Minerals 4 78(1) - Oil and GAS LEASE-CONSTRUCTION.

The lease in question conferred upon the lessees the right to go on its premises and search for oil and gas within the initial period, and to commence operations within that time, and continue same with reasonable diligence until it vas determined whether the premises were barren or oil and gas, or either of them were found thereon in paying quantities, and, while the lessees acquired no vested estate in the premise. es, yet they had the right to the possession of the land to the extent reasonably necessary to perform the obligations imposed upon them by the terms of the lease. 4. MINES AND MINERALS \$= 78(1)-OIL AND

GAS LEASE—POSSESSION.
After oil and gas or either of them are found upon the leased premises in paying quantities, the lessees thereby acquired a vested, though limited, estate in the leased premises for the purposes named in the lease, and are entitled to be protected in the exercise of their rights according to the terms and conditions of their contract, unless the lease has been forfeited for a viola-tion of some of its terms or has been abandoned by them.

Mines and Minerals (==78(1)—Oil and Gas Lease—Construction.

An oil and gas lease is not a grant of the oil and gas that is in the ground, but of such part thereof as the lessee may find, and passes no estate that can be the subject of an ejectment or other real action.

Error from District Court, McIntosh County; R. W. Higgins, Judge.

Action by Josephine Hill and William Brennan against Frank J. Hunter and oth-Judgment for defendants, and plaintiffs bring error. Affirmed.

Brook & Brook, of Muskogee, for plaintiffs in error. Malcolm E. Rosser, of Muskogee, and William M. Matthews, of Okmulgee, for defendants in error.

HARDY, J. Josephine Hill and William Brennan commenced an action in the district court of McIntosh county to cancel and annul an oil and gas lease executed by plaintiff Hill on certain lands situated in said county to Frank J. Hunter, J. A. English, and S. W. Caudle. The court made findings in favor of defendants upon all issues joined, whereupon plaintiffs filed motion for new trial, which was overruled. By leave of court plaintiff Hill dismissed her petition without prejudice, and judgment was rendered in favor of defendants and against plaintiff Brennan, who brings the case here, joining Hill as plaintiff in error, who files motion to advance and affirm the judgment.

It is urged for reversal that the court erred, first, in not holding there was failure of consideration moving from defendants to plaintiff Hill; second, in not holding that the lease executed by Hill to defendants had been abandoned; third, in not holding that the lease was unilateral and showed upon its face a lack of mutuality between the contracting parties; and, fourth, in not holding that the terms of the lease had been violated in that the advance gas rentals, as provided therein, amounting to \$200 per year, had not been paid.

The brief of plaintiff in error was apparently prepared and filed on the theory that Hill was urging a reversal of the case, as she is named in the brief as plaintiff in error. and no mention is made therein of the fact that she had dismissed her petition in the trial court without prejudice, and was here urging an affirmance of the judgment appealed from.

[1] Ordinarily the lessor is the only person

who can take advantage of a provision in a vested, though limited, estate in the lands a lease providing for a forfeiture thereof for failure of the lessee to comply with its terms, unless there is an express stipulation in the lease that same shall be null and void upon failure of the lessee to comply with their rights according to the terms and conditions of their contract, unless the lease has upon failure of the lessee to comply with the terms. Cohn v. Clark, 48 Okl. 500, 150 terms, or has been abandoned by them, neither of which contingencies has occurred accord-

[2] And likewise the lessor is the only person who can urge that a lease is unilateral by reason of the presence of a surrender clause therein, and claim a cancellation of the lease because the lessee in a subsequent lease cannot urge the invalidity of a prior lease for that reason. Bearman v. Dux Oil & Gas Co., 166 Pac. 199.

[3-5] But assuming that plaintiff Brennan is in position to urge a review of the findings of fact by the court, the judgment should be affirmed; for, upon an examination of the record, we are unwilling to say that the findings of the trial court are against the clear weight of the evidence.

The lease to Hunter and associates was dated February 18, 1914, and required the lessees to commence development within 90 days thereafter. The lease did not contain a provision for delay in development by the payment of rentals such as is usually contained in oil and gas leases. Development was commenced within 90 days, and a well completed, in which gas was found in paying quantities, and, according to the terms of the lease, Hunter and his associates paid to Hill \$200 as rental upon said well for a period of 12 months.

The court having found in favor of defendants, and plaintiff Hill having acquiesced in that judgment, the question is now presented: What are the rights of Brennan under his lease as against Hunter and associates? The lease from Hill to Hunter and associates conferred on the lessees the right to go on the premises and search for oil within the initial period, and to commence operations within that period, and continue same until it was determined whether the premises were barren, or oil and gas, or either of them, were found thereon in paying quantities, and, while the lessees acquired no vested estate in the premises prior to the discovery of oil and gas, yet they had the right to the possession of the land to the extent reasonably necessary to perform the obligations imposed upon them by the terms of the lease. Frank Oil Co. v. Belleview Gas & Oil Co., 29 Okl. 719, 119 Pac. 260, 43 L. R. (N. S.) 487.

In this case possession was delivered to them and operations commenced, and a well drilled in which gas was found in paying quantities, and the lessees thereby acquired

for the purposes named in the lease, and are entitled to be protected in the exercise of their rights according to the terms and conditions of their contract, unless the lease has been forfeited for a violation of some of its terms, or has been abandoned by them, neither of which contingencies has occurred according to the findings of the court. The views above expressed are sustained by the great weight of authority, if not by the unanimous opinions of the courts. Petroleum Co. v. Coal Co., 89 Tenn. 381, 18 S. W. 65; Lowther Oil Co. v. Miller-Silby Oil Co., 53 W. Va. 507, 44 S. E. 433, 97 Am. St. Rep. 1027; Venture Oil Co. v. Fretts, 152 Pa. 457, 25 Atl. 732; Harris v. Ohio Oil Co., 57 Ohio St. 118, 48 N. E. 502; Carr v. Huntington Light & Fuel Co., 33 Ind. App. 1, 70 N. E. 552; Headley v. Hoopengarner, 60 W. Va. 626, 55 S. E. 744; Lindlay v. Raydure (D. C.) 239 Fed. 928; Doddridge County Oil & Gas Co. v. Smith (C. C.) 154 Fed. 970; Dickey v. Coffeyville Vitrified Brick & Tile Co., 69 Kan. 106, 79 Pac. 398; Richlands Oil Co. v. Morriss, 108 Va. 288, 61 S. E. 762.

Besides the lease under which plaintiff Brennan claims contains a surrender clause by the terms of which said plaintiff may at any time upon the payment of \$1, surrender said premises, and relieve himself from any obligation under the lease; and, this being true, his lease is unilateral, and is such a one as a court of equity will refuse to enforce, and will not furnish the basis for an action in ejectment or other real action. Kolachny v. Galbreath, 26 Okl. 772, 110 Pac. 902, 38 L. R. A. (N. S.) 451; Brown v. Wilson, 160 Pac. 94, L. R. A. 1917B, 1184; Hill Oil & Gas Co. v. White, 157 Pac. 710.

A similar situation was presented in Kolachny v. Galbreath et al., supra. The lease under which Kolachny claimed was executed on May 7, 1904, by Sallie Garrett Scott, the original allottee, and was duly filed for record, but was never approved by the Secretary of the Interior. Thereafter Scott sold the premises to Severs, who executed a lease to Galbreath and others. Kolachny brought an action to cancel the lease held by Galbreath and associates, and to restrain them from developing the land, and to permit him to operate under his lease. This was held to amount to a specific performance in equity, and the relief was denied. Brown v. Wilson is not in conflict with the holding in Kolachny v. Galbreath et al., for in that case Ruhl and wife, who were the owners of the premises, were plaintiffs in the action to have a forfeiture of the premises judicially declared.

The judgment is affirmed.

SOUTHWESTERN SURETY INS. CO. et al. v. DIETRICH. (No. 9543.)

(Supreme Court of Oklahoma. April 9, 1918.)

(Syllabus by the Court.)

(Syllabus by the Court.)

APPEAL AND ERROR \$\iff=567(2)\$—PERFECTION OF
WRIT OF ERROR—MOTION TO DISMISS.

Where due notice is given of the time and
place that a case-made will be presented to the
trial judge for settlement and signature, the
party upon whom such notice is served cannot
ignore the same, or treat it as a nullity, although the time fixed therein for presenting
such case to the judge for settlement and signing may be at a time earlier than it could properly be settled and signed and when the trial
judge, in the absence of the party upon whom judge, in the absence of the party upon whom such notice has been served, and without ob-jection from him, or from any other person, settles and signs such case-made when presentsettles and signs such case-made when presented to him, and nothing further is done in reference thereto, the Supreme Court will, in the absence of other irregularities, treat the case as valid and will not permit same to be questioned in the absence of a showing that application was made to the trial judge to allow the time to which such narty was entitled by the time to which such party was entitled by the order and that by reason of the failure of the court or judge to grant such time the party was prevented from suggesting amendments which he would have suggested and was entitled to have considered in the settlement of such to have considered in the settlement of such case.

Turner and Kane, JJ., dissenting.

Error from District Court, Caddo County; Will Linn, Judge.

Action between the Southwestern Surety Insurance Company and others, and Lotsie B. Dietrich. There was a judgment for the latter, and the former bring error. On motion to dismiss. Motion denied.

G. A. Paul, of Oklahoma City, and Dyke Ballinger, of Miami, for plaintiffs in error. L. E. McKnight, of Anadarko, for defendant in error.

HARDY, J. This case comes on to be heard upon motion to dismiss appeal filed herein November 24, 1917. The grounds of the motion are that the case-made is a nullity because it was settled and signed in the absence of defendant in error and her attorneys without their consent and prior to the expiration of the time fixed for the suggestion of amendments thereto. Judgment was rendered on May 27, 1917, and on the same day motion for new trial was filed and overruled and an extension of 90 days was granted in which to prepare and serve case-made, and 10 days thereafter to suggest amendments, same to be settled and signed on 5 days' notice. August 8, 1917, an order was made granting an additional 60 days' time in which to prepare and serve case-made, and three days after the service of same in which to suggest amendments. The case was served September 22, 1917, and on September 28th notice was served that same would be presented to the trial judge for settlement and

case was settled and signed without an appearance or waiver by defendant in error or her attorney.

From the facts stated it is seen that the time for serving the case under the order of extension made August 8th did not expire until October 12, 1917, and the case was in fact settled and signed October 2, 1917, which was 10 days before the expiration of the time fixed by the order within which same should be served and 13 days before the expiration of the time allowed to suggest amendments. It further appears that there was no appearance by defendant in error in person or by attorney; no amendments were suggested nor any waiver filed in her behalf. The time in which to suggest amendments under the order began to run from the expiration of the time allowed in which to prepare and serve case-made, and not from the actual service thereof. Cummings v. Tate, 147 Pac. 304. And this was so even though the order directed that the amendments should be suggested within 10 days from the time of the service instead of from the expiration of the time fixed in the order in which service might be had. Memphis Steel Const. Co. v. Hutchinson, 147 Pac. 771; Frey v. McCune, 153 Pac. 109. Wilson v. Branigan (recently decided and not yet officially reported), 168 Pac. 819.

Under some previous holdings of this court a case-made thus settled and signed is a nullity and presents nothing to the Supreme Court for review, but we think this holding should be modified to the extent of saying that such a case-made is irregular but not void. It is a well-established rule that a judgment rendered upon service of summons made for a time less than that required or before the day named in the summons by which defendant is required to answer is not void but irregular, and unless attacked in a manner provided by law will be upheld. Freeman on Judgments, § 135; Black on Judgments, § 85; White v. Crow, etc., et al., 110 U. S. 183, 4 Sup. Ct. 71, 28 L. Ed. 113; Nelson v. Becker, 14 Kan. 509; Foster v. Markland Dodge & Moore, 37 Kan. 32, 14 Pac. 452.

So we say, with reference to the action of the trial judge in the settlement and signing of a case-made, where due notice is given of the time and place that same will be presented to such judge for settlement and signature, the party upon whom such notice is served cannot ignore the same or treat it as a nullity although the time fixed therein for presenting such case to the judge for settlement and signing may be at a time earlier than it could properly be settled and signed, and where the judge of the court, in the absence of the party upon whom such notice has been served and without objection from signing on October 2, 1917, on which day the him or from any other person, settles and

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signs such case-made when presented to him, | and nothing further is done in reference thereto, this court will, in the absence of other irregularities, treat the case as valid and will not permit the party to question same in this court in the absence of a showing that an application was made to the trial judge to allow the time to which the party was entitled under the order and that by reason of the failure of the court to grant such time the party was prevented from suggesting amendments which he would have suggested and was entitled to have considered in the settlement of such case. Gross v. Funk et al., 20 Kan. 655; Thomson v. Meridian Life Ins. Co. of Indianapolis, Ind., 36 S. D. 175, 153 N. W. 993.

We are of the opinion that the true rule is, and we so declare it to be, that where a case-made is settled and signed by the trial judge prior to the time it might properly be settled and signed upon notice duly given of the time and place, and no appearance is made or amendments suggested, or objections offered by the party upon whom the notice was served that the case-made is not a nullity, but at most the action of the trial court is merely an irregularity which could be corrected upon application, by the party interested, to the trial court.

The motion to dismiss is therefore overruled. All the Justices concur, except KANE and TURNER, JJ., who dissent.

# CHICAGO, R. I. & P. RY. CO. v. LOCKE. (No. 7993.)

(Supreme Court of Oklahoma. April 19, 1918.)

## (Syllabus by the Court.)

1. JUSTICES OF THE PEACE \$\sim 139\text{--Review} of JUDGMENT---METHODS.

There are two procedures for the review of a judgment of a justice of the peace court: (1) By appeal to a county, superior, or district court to be tried de novo upon both questions of law and fact; (2) by a review upon questions of law, upon a bill of exceptions and petition in error.

2. JUSTICES OF THE PEACE \$\infty\$145(1)\to JUDG-MENT\to REVIEW.

A review of a judgment of a justice of the peace court by a county, superior, or district court, upon questions of law, may be presented by a bill of exceptions and petition in error, regardless of the amount of such judgment.

Commissioners' Opinion, Division No. 1. Error from District Court, Leftore County; W. H. Brown, Judge.

Action by T. A. Locke against the Chicago, Rock Island & Pacific Railway Company. From a judgment for plaintiff and from an order dismissing its appeal, defendant brings error. Reversed and remanded, with instructions.

Kent W. Shartel, of Oklahoma City, and C. O. Blake, R. J. Roberts, and W. H. Moore,

all of El Reno, for plaintiff in error. Bagwell & Ellerbee, of Poteau, for defendant in error.

COLLIER, C. A judgment was rendered April 7, 1915, in a justice court, against the plaintiff in error, and in favor of the defendant in error, for the sum of \$15, and the plaintiff in error attempted a review in a district court of said judgment, by filing in said district court a petition in error, together with a bill of exception, which contained a history of the case as had in the justice court, including the finding of the justice court, which was duly certified to by the said justice. A summons was duly issued out of the district court, and served on the defendant in error. Thereafter the defendant in error filed a motion to dismiss in the district court "the attempted appeal," which, formal parts omitted, is as follows:

"Comes now the plaintiff, T. A. Locke, and moves the court to dismiss the attempted appeal in this case for the following reasons, to wit:

in this case for the following reasons, to wit:

"(1) Because this court has no jurisdiction to hear and determine the matters in controversy in this suit, for the reason that the amount involved is less than \$20, and the judgment obtained thereon in justice court is for a sum less than \$20, and that said judgment is final and the matters therein decided is now res judicata.

"(2) Because there is no mode of procedure provided by law in this state whereby a judgment obtained in justice court for a less sum than \$20, and where the amount in controversy was less than said amount, can be appealed or otherwise reviewed in the district court, by petition in error, as is attempted in this case."

Thereafter on the 23d day of November, 1915, the cause came on for hearing on said motion to dismiss, said motion was sustained, to which action of the court the plaintiff in error then and there excepted, and perfected an appeal to this court. The defendant in error filed a motion to dismiss this appeal, which said motion, being without merit, is overruled.

There is only one error assigned: "That the court erred in dismissing the action of the plaintiff in error."

[1] That a party aggrieved may have the proceedings of the justice of the peace court reviewed by a district court upon a bill of exceptions and petition in error 4s not an open question in this jurisdiction, such procedure being upheld by several decisions of this court.

Section 5456, Revised Laws 1910, provides: "Bills of exception may be made and signed in any case tried before a justice of the peace, whether the action be tried by a jury or by the justice, and such bill may be signed at any time within ten days from the day on which judgment is given in the action, and not thereafter."

There is no statute limiting the amount of judgment in which a review by bill of exceptions and petition in error may be had of a judgment of a justice of the peace court.

Section 5456, Revised Laws 1910, provides

for a review of a judgment of a justice of the peace court upon questions of law by bill of exceptions and petition in error, in any case.

[3] If there is an apparent conflict in the law governing review of judgment of the justice of peace court, upon bill of exceptions and petition in error, and an appeal from the justice of the peace court to be tried de novo, it is the duty of this court to reconcile said conflict, if possible, and find a field of operations for both of said laws.

"It is a cardinal rule in the construction of statutes that the intention of the Legislature, when ascertained, must govern, and that to ascertain the intent all the various provisions of legislative enactments upon the particular subject should be construed together and given effect as a whole." Board of Com'rs of Creek County et al. v. Alexander, State Treasurer, 159 Pac. 311.

"In the construction of statutes, harmony, not confusion, is to be sought. Conflicts between different provisions of the statute are not to be held to exist, if harmony, by any reasonable construction of them, can be discovered. The true rule has often been said to be that where two acts or parts of acts are reasonably susceptible of a construction that will give effect to both and to the words of each, without violence to either, it should be adopted in preference to one which, though reasonable, leads to the conclusion that there is a conflict. There is no conflict between different provisions of a statute if there is a reasonable meaning of the words used, considering the manner of their use, which will bring them into harmony. Sackett et al. v. Rose, 154 Pac. 1177, L. R. A. 1916D, 820.

[2] We are not unmindful that this court by numerous decisions (Willoughby v. Summers, 162 Pac. 206; Deming Inv. Co. v. Blakemore, 162 Pac. 201; Barnes et al. v. C. B. Cozart Grain Co., 158 Pac. 441) has held that an appeal will not lie to a judgment for less than \$20, but we do not think that these holdings are fatal to a review by bill of exceptions and petition in error of a judgment of a justice of the peace court, where the amount of a judgment sought to be recovered is less than \$20, as section 5456, Revised Laws, supra, provides: "In any case such review may be had."

We are therefore of the opinion that the right of review of a judgment of a justice of the peace court by a petition in error and bill of exceptions may be prosecuted regardless of the amount involved in the judgment rendered in said justice of the peace court. The trial court committed reversible error in dismissing the proceedings dismissed.

This case is reversed and remanded upon the authority of Faust v. Fenton, 166 Pac. 731, Talley v. Maupin, 166 Pac. 734, L. R. A. 1917F, 912, and McCullough v. Root, 166 Pac. 735, with instructions to set aside the order dismissing said proceeding for review of said judgment rendered by the justice of peace court, and to proceed to hear and determine the same.

PER CURIAM. Adopted in whole.

DRAKE et al. v. HIGH et al. (No. 8438.) (Supreme Court of Oklahoma. March 12, 1918. Rehearing Denied April 23, 1918.)

#### (Syllabus by the Court.)

The evidence in this case is examined, and held, that the finding of the trial court that the note and mortgage sued upon were procured by duress is sustained by the evidence.

2. ABATEMENT AND REVIVAL \$\infty\$56-Causes of Action Which Survive-Duress, Where the execution of a mortgage is pro-

Where the execution of a mortgage is procured by duress, and the maker thereof dies, his or her heirs may set up, in an action to foreclose said mortgage, the defense of duress, or such heirs may maintain an action for the cancellation of said mortgage on said ground.

Commissioners' Opinion, Division No. 3. Error from District Court, Craig County; Preston S. Davis, Judge.

Action by Arthur F. Drake against E. C. High and others. From the judgment plaintiff and defendant Nannie M. Neale bring error. Affirmed.

A. D. Neale, of Chetopa, Kan., and George B. Denison, of Vinita, for plaintiffs in error. F. O. Martin, of Chetopa, Kan., and George P. Fogle, of Vinita, for defendant in error W. J. High. W. H. Kornegay, of Vinita, for defendant in error C. E. High.

PRYOR, C. This action was commenced on the 20th day of December, 1914, in the district court of Craig county by A. F. Drake against C. E. High, W. J. High, E. J. Drake, L. W. Clapp, Nannie M. Neale, C. D. Murdock, E. L. Blasingame, L. Houck, and J. V. Foster, to recover on a promissory note and to foreclose a certain real estate mortgage given to secure the same.

The petition states in substance: That on the 28th day of June, 1913, one Sarah E. High and C. E. High executed their promissory note to E. J. Drake for the sum of \$396.19, due two years from date, bearing interest at 10 per cent. per annum from maturity. That before maturity plaintiff, A. F. Drake, purchased said note from E. J. Drake for value. The said E. J. Drake indorsed said note to the plaintiff, A. F. Drake, as follows: "Pay to the order of A. F. Drake, without recourse. E. J. Drake." That at the time of the execution of said note the said Sarah E. High, to secure the payment thereof gave the said E. J. Drake a real estate mortgage on the N. 1/2 of the S. E. 1/4, and the N. 1/2 of the N. D. 1/4 of section 33, township 29, range 20, in Craig county, Okl. That the note is due and unpaid. The petition further alleges that Sarah E. High died after the execution of said note and mortgage leaving as her surviving heirs the defendants C. E. High and W. J. High; that the defendant L. W. Clapp holds a prior mortgage on the N. 1/2 of the S. E. 1/4 above securing the payment of \$360; and that Nannie M. Neale

holds a mortgage on a portion of the above-|ed its judgment in favor of the defendants described property. The defendants C. D. Murdock and E. J. Drake made default, and tion that L. W. Clapp was given judgment defendants Blasingame and Houck failed for the amount of his note and judgment to file disclaimers, and are therefore elimi- foreclosing a mortgage on the N. 1/2 of the nated from the case.

The defendant W. J. High filed his answer denying the allegations of the petition except such matters as were admitted in his answer. He denies that Sarah E. High was the owner of the S. E. 1/4 of section 33, township 29, range 20; he alleges that he is a citizen of the Cherokee Nation of one-eighth Indian blood: that said land was allotted to him as his proportionate share of the lands of said Nation; he admits that on the 28th day of June, 1913, he executed a deed to his mother Sarah E. High, on said land, but alleges that said deed was never delivered or recorded during the life of his mother. He further alleges that at the time of the execution of said deed he was a minor under the age of 21 years. He further alleges that there was no consideration passed from his mother to him for said deed. He further sets up several transactions between himself and Drake, wherein E. J. Drake had advanced him money during his minority, amounting to the sum of \$244.63; he alleges that the note and mortgage were procured from his mother by means of fraud and duress; he alleges that the mortgage was a cloud upon his and his brother's title to the land of his mother and asked that same be canceled.

Defendant Nannie M. Neale filed her answer setting out that she was holder for value and in good faith of a certain promissory note given to C. D. Murdock by the said Sarah E. High, due in two years from date, and that said note was secured by mortgage given by said Sarah E. High to said Murdock on the S. E. 1/4 of section 33, township 29, range 20, and asked for judgment on said note and foreclosure of said mortgage.

The defendant W. J. High filed his answer alleging that the execution of said note and mortgage was procured by means of fraud, threats, and duress, and without any consideration whatever, and that the defendant Nannie M. Neale had knowledge of the want of consideration and the fraud; also alleges that the said Murdock had advanced him money while he was a minor at various times and procured the execution of said note and mortgage from his mother by having him (W. J. High) arrested and by means of threats made by his agent and a peace officer that they would send him to the penitentiary unless his mother executed said note.

The answer of C. E. High, in so far as material to this case, is the same as that of W. J. High. There is no contention made as to the validity of the note and mortgage of L. W. Clapp.

intervention of a jury, and the court render- would execute said note and mortgage the

W. J. High and C. E. High, with the excep-S. E. 4 of section 33, township 29, range 20, the allotment of Sarah E. High. From this judgment the plaintiff, A. F. Drake, and the defendant Nannie M. Neale appealed.

The assignment of error urged on appeal by the plaintiffs in error may be stated generally that the finding of the court is not sustained by the evidence. So far as the mortgage on the N. 1/2 of the N. E. 1/4 is concerned, there can be no contention as to its being void. This land was a portion of the allotment of W. J. High, a citizen by blood of the Cherokee Nation, and it is undisputed that he was a minor at the time he executed the deed to his mother. This being true, it makes no difference whether or not the deed was delivered and recorded, the deed being void and conveying no title to the land; assuming that the same was properly executed and delivered, the mortgage given by Sarah E. High as to this portion of the land is absolutely void.

[1] That threats of imprisonment and prosecution of a child made to the parent for the purpose of procuring the execution of a note and mortgage or other instrument constitutes duress is too well settled to require discussion. Anderson v. Kelley, 156 Pac. 1167; Harris-Lipsitz Co. v. Oldham, 155 Pac. 865; Williamson-Halsell-Frazier Co. v. Ackerman, 77 Kan. 502, 94 Pac. 807, 20 L. R. A. (N. S.) 484. A thorough examination of the evidence as disclosed by the record establishes the following facts: That Sarah E. High lived with her son, W. J. High, in the town of Chetopa, Kan. she was a citizen of the Cherokee Nation by blood, also was W. J. High, and the lands in controversy here were their respective allotments. That W. J. High had had various transactions while a minor with E. J. Drake, the payee in the note for \$396.19, on which suit is brought by plaintiff, A. F. Drake, and C. D. Murdock, the payee in the other note in the sum of \$672, on which Nannie M. Neale seeks recovery, whereby they had advanced him various sums of money for which he executed his note and gave mortgages on both personal and real estate. All of these transactions occurred while the said W. J. High was a That on or about the 28th day of minor. June, 1913, A. D. Neale, acting as an attorney and agent of E. J. Drake, filed information against W. J. High and had the said High arrested by the constable, R. B. Rhodes. That the said Neale went to the residence of Sarah E. High accompanied by said officer, and by threats made to Sarah E. High that they would send her son, W. J. High, to the The cause was tried to the court with the penitentiary, and that by promise if she

whole matter would be dropped, and there the purpose of placing them in the hands of would be no further prosecution of said W. J. High, procured the execution of the note and mortgage to E. J. Drake. That the said Neale was acting as agent and attorney of E. J. Drake. The evidence further shows that the said Sarah E. High was a decrepit old Indian; that she was very feeble, both physically and mentally.

The note and mortgage made to C. D. Murdock were procured by the same parties, Neale and Rhodes, constable, through the same method, and by the same means of fraud and duress. It appears that as soon as the execution of these notes and mortgages was procured the said W. J. High was released from custody and the prosecutions immediately dropped and nothing further ever heard of them. Both notes and mortgages were given for the claims of E. J. Drake and C. D. Murdock claimed against her minor son, W. J. High, and without further consideration whatever. The evidence further shows that Neale not only acted as agent for the payees of said notes in procuring the execution of the same, but he was the agent of the purchaser in the negotiation for the same; that Nannie M. Neale is the wife of A. D. Neale and that he purchased the note which she holds himself for her as her agent; that A. F. Drake is a brother of E. J. Drake; and the evidence shows that A. D. Neale was acting as agent and attorney for both of the Drakes in the purported sale of the note from E. J. Drake to A. F. Drake. The said Neale had full knowledge of the means and methods used to procure the execution of said notes and mortgages. The evidence shows that there never was any delivery of the note by E. J. Drake to A. F. Drake.

Weighing the evidence surrounding the execution of these notes and mortgages by Sarah E. High by the rule laid down by section 899, Rev. Laws 1910, "consent is deemed to have been obtained through one of the causes mentioned in the last section, only it would not have been given had such cause not existed" (referring to duress), there is not the least doubt left in the mind after considering the circumstances that Sarah E. High would have executed said notes and mortgages in the absence of the fraud, duress, intimidation, and impositions practiced upon her by the agent of the payees and mortgagees accompanied by the peace officer. The plain fact of the case is there can hardly be conceived a case of duress which is consummated with so many aggravating circometances. The acts perpetrated in the procuring and execution of these notes and mortgages are not only fraud in the very highest degree, but they have all the earmarks of compounding felonies. The circumstances in the case reasonably establish that the purported negotiation of the notes is a sham for F. B. Swank, Judge.

apparent innocent holders, that the collection of the same might be enforced and the fraud commenced in the execution of these notes might be finally consummated. Giving all the evidence and the circumstances as disclosed by the record a full and fair consideration, we cannot say that the lower court erred in its findings of fact, and therefore the findings of the lower court must be sustained.

[2] The plaintiffs in error make the further contention that the defense of duress is a defense strictly personal to Sarah E. High. and that her heirs cannot interpose the same. In this contention there is no merit. The rules governing the defense of duress are the same as in other frauds, and where the execution of an instrument had been procured by fraud, duress, or undue influence, and the person defrauded dies, her or his heirs or representatives may interpose such defense when the instrument is attempted to be enforced in legal proceedings, or they may maintain an action for the cancellation on the ground of fraud, duress, or undue influence. Brown v. Brown, 62 Kan. 666, 64 Pac. 599; Trubody v. Trubody, 137 Cal. 172, 69 Pac. 968; 14 Cyc. 147.

Therefore the judgment of the trial court should be affirmed.

PER CURIAM. Adopted in whole.

POWELL v. ADLER. (No. 7784.)

(Supreme Court of Oklahoma. March 12, 1918. Rehearing Denied April 23, 1918.)

(Syllabus by the Court.)

1. Trusts \$==921/2—Constructive—Purchase

of Realty by Agent—Fraudry, Statute of.
Where one assumes to act as the agent of another in the purchase of real estate, and by the terms of a parol agreement between them the agent is to pay for the same with his own money and cause the property to be conveyed to his principal, but in violation of his agreement causes the same to be conveyed to himself and refuses to convey the property to his principal, an action may be maintained in equity to compel him to do so, and the same is not within the statute of frauds.

SPECIFIC PERFORMANCE \$\infty\$ 13-ABILITY TO PERFORM.

While a court of equity may enforce contracts made by the parties, it cannot make new and different contracts and compel the performand different contracts and compet the performance of them. In this case, in view of the fact that the principal is not in a position to comply with the contract made with the agent, that is, to issue to him stock in the company for the property which the agent was to buy for it, a judgment of the court, directing the agent to convey the property to the principal upon the payment of the purchase price to him, cannot be sustained.

Commissioners' Opinion, Division No. 8. Error from District Court, Murray County: Mining & Milling Company, a corporation, against Isaac E. Powell to establish a trust. Judgment for plaintiff, and defendant brings error. Reversed.

Ames. Chambers. Lowe & Richardson, of Oklahoma City, for plaintiff in error. Geo. M. Nicholson, of Sulphur, for defendant in error.

HOOKER, C. Prior to the fall of 1912 the United Mining & Milling Company, a corporation, was engaged in the operation and development of a mine near Davis, Okl. There were a number of stockholders and directors, and about the time given above, owing to unsuccessful business, it was concluded to close the mill located upon the lease then owned by the company, and about the 1st of January, 1913, the directors convened for the purpose of discussing ways and means whereby the business of the company might be more properly operated. The plaintiff in error was present at that meeting; he being a stockholder and presumed to occupy the position of associate manager of the enterprise. No record of this meeting was kept, but the testimony of those present conclusively establishes: That the plaintiff in error and another made to the directors of the company a proposition that, if they would increase the capital stock of the company from \$50,000 to \$100,000, and deliver to them the increase, they would pay certain debts of the corporation, erect a mill upon the property leased by it, and in addition thereto would purchase the fee in said property for the corporation. This proposition was accepted by the company, and it was agreed that the plaintiff in error would go to Oklahoma and purchase said property for the corporation, make provisions for the erection of the mill and the adjustment of the indebtedness of the company, and that the corporation would increase its capital stock to \$100,000, and deliver to the plaintiff in error and his associates the capital stock agreed upon. That thereupon the plaintiff in error went to Davis, Okl., carrying a letter of introduction from one of the directors present to the cashier of a bank at Davis, Okl., and informed the cashier of said bank that his mission at' Davis was to purchase this property for his company. The plaintiff in error acquired an option upon this property in his own name, and in a short time thereafter consummated this deal by taking a deed to the property in his own name instead of the corporation, and refused to convey it to the company, although requested by it so to do. Thereafter a receiver was appointed to take charge of the assets of this company, and said receiver instituted this action in March, 1914, alleging in his petition the facts as outlined above, and tendering to the plaintiff in error the amount | \$ 96a, is cited:

Suit by Ike Adler, receiver of the United of money expended by him, and praying that the company be adjudged the owner of the equitable title, and that the plaintiff in error, as the holder of the legal title, be declared a trustee for said company, and that he be compelled to convey the same to the company. The answer of the plaintiff in error consisted of a general denial.

Upon the trial of this cause the lower court gave a judgment in favor of the defendant in error and against the plaintiff in error, declaring the plaintiff in error a trustee of said property, and directing him to make a conveyance to the company upon the payment of some of the money expended by him From this judgment in the purchase thereof. the defendant has appealed, and has assigned the following reasons why the judgment rendered is erroneous: First, that the contract set out in the plaintiff's petition and established by the evidence was within the statute of frauds; second, that by reason of the failure of the corporation to increase its capital stock, it is impossible for the court to specifically enforce the agreement between the parties by the delivering of certain stock in the company to the plaintiff in error, and that to require the plaintiff in error to accept the amount of the purchase money instead of the stock in the corporation would be the substitution of a new and entirely different contract.

Plaintiff in error asserts that the legal question involved in proposition No. 1 is governed by the fifth subdivision of section 941 of Revised Laws of 1910, which reads:

"Fifth. An agreement for the leasing for a longer period than one year, or for the sale of real property, or of an interest therein; and such agreement, if made by an agent of the party sought to be charged, is invalid, unless the authority of the agent be in writing, subscribed by the party sought to be charged."

And in support thereof, Sugden on Vendors, p. 438, is quoted:

"Where a man merely employs another person by parol, as an agent to buy an estate, who buys it for himself and denies the trust, and no part of the purchase money is paid by the principal, and there is no written agreement, he cannot compel the agent to convey the estate to him, as that would be directly in the teeth of the statute of frauds, even if the agent be afterwards convicted of perjury in denving the trust." convicted of perjury in denying the trust.

Also Story on Equity, § 1201a, is relied upon which is as follows:

"But the doctrine is strictly limited to cases where the purchase has been made in the name of one person and the purchase money has been paid by another. For, where a man employs an-other person by parol as an agent to buy an estate for him, and the latter buys it accordingly in his own name, and no part of the purchase money is paid by the principal there, if the agent denies the trust and there is no written agreement or document establishing it, he cannot, by a suit in equity, compel the agent to convey the estate to him; for, as has been truly said, that would be decidedly in the teeth of the statute of frauds."

Also Brown on Statute of Frauds (5th Ed.)



that, where one man employs another by parol as agent to buy an estate for him, and the latter buys it in his own name, with his own money, and denies the agency, the one who employed him cannot, by a suit in equity, compel a conveyance of the estate; for that, it is said, would be decidedly in the teeth of the statute of frauds. The case put is not that of an agreement that one party shall take title in his own name, and pay his own money, and afterward convey to the other, for that is evidently a contract to transfer an interest in land which one of them is afterwards to obtain.

See, also, Kellum v. Smith, 33 Pa. 158; Taliaferro v. Taliaferro, 6 Ala. 404; Raub v. Smith, 61 Mich. 543, 28 N. W. 676, 1 Am. St. Rep. 619; Robbins v. Kimball, 55 Ark. 414, 18 S. W. 457, 29 Am. St. Rep. 45; Burden v. Sheridan, 36 Iowa, 125, 14 Am. Rep. 505.

The authorities above cited sustain the proposition, in order for a resulting trust to be established, the consideration must be advanced by a person who claims under such trust, and that no resulting trust can be created where the purchase money is advanced and the title taken in the party advancing the money.

[1] It is admitted that the plaintiff in error used his own money in making the purchase of this property. Now, is this case within the statute of frauds? We think not. Under the evidence here a duty was delegated by the corporation to Powell which he was to exercise for the betterment of the company. This duty involved the exercise of good faith, trust and confidence. His mission was to purchase this property for the company in order that it might own the fee to the property upon which it then had a lease; he betrayed this trust and violated the confidence that the directors of the company had reposed in him when he was sent upon this mission. Clark & Skyles on the Law of Agency, vol. 1, p. 907, says:

"It is well settled that an agent occupies a fiduciary relation towards his principal, and that he is bound, in the execution of the agency, to act in the most perfect good faith and with loyalty to the interests of his principal; and so sedulously is this principal guarded that all departures from it are esteemed frauds upon the confidence bestowed. \* \* ""

And at page 909 thereof it is said:

"Good faith and loyalty to a principal's interest requires of an agent that he shall not take advantage of his position, and the confidence reposed in him, to deal with the principal's property, during the course of his agency, so as to make a profit out of it himself, beyond his lawful compensation. All profits accruing from the subject-matter of agency properly belong to the principal, and it is a fraud upon the latter for the agent to deal with or use the property so as to take these profits, or a part thereof, to himself. \* \* \*"

And at page 919 thereof, it is said:

"It is also a well-settled rule that if an agent undertakes to purchase property for his principal, he cannot be permitted to deal in the matter of that agency for his own benefit and upon his own account; and if he purchased such property for himself, and takes a conveyance thereto in his own name, without his principal's

knowledge or consent, he will be considered in equity, although he makes such purchase with his own money, as holding it in trust for his principal, and will be ordered to convey it to the principal, upon a proceeding in equity for that purpose, accompanied by a repayment or tender of the amount of purchase money. • • • "

And at page 922 thereof it is said:

"There is some conflict in the cases, however, as to the effect of the statute of frauds, where an agent authorized to purchase land purchases it in his own name and takes title to himself. In some cases it is held that a trust in favor of the principal will not arise, unless the agreement between the principal and agent is in writing, or unless the consideration, or some definite part of it, which was paid for the land, is furnished by the principal at the time of the purchase, and a subsequent payment will not suffice. Or, in other words, if the agreement between the parties is not in writing or no part of the purchase money is furnished by the principal at the time of the purchase, and the agent purchases the property in his own name, the principal cannot compel the agent to convey the property to him, by showing by parol that the purchase was made for his benefit or on his account. Some of these cases base their decisions more on the ground that a resulting trust does not arise in such cases, and hence it cannot be enforced. \* \* But, the better opinion seems to be that the statute of frauds cannot be invoked as a defense by the agent, in such cases, for the reason that a court of equity will not permit the statute of frauds to be used as an instrument of fraud, and for the further reason that when a person, through the influence of confidential relation acquires title to property. obtains an advantage which he cannot conscientiously retain, the court, to prevent the use of confidence, will grant relief."

See authorities cited at note 200, on page 924.

Mechem on Agency (2d Ed.) p. 869, lays down the rule as follows:

"An agent, instructed to purchase property for his principal and relied upon to buy in the principal's name and for his direct account, will not be permitted, without his principal's knowledge and consent, to become the purchaser of the same property for himself. If the property be land and is purchased with the principal's money, the agent will clearly be a trustee; and, even though he purchased with his own money, he will nevertheless be considered as holding the property in trust for his principal, and the latter, upon repaying or tendering him the amount of the purchase price and his reasonable compensation, may, by prior proceeding in equity, compel a conveyance to himself.

In Rose v. Hayden, 35 Kan. 106, 10 Pac. 554, 57 Am. Rep. 145, it is said:

"In this state, the action of ejectment is an equitable remedy as well as a legal remedy, and in such action the party holding the paramount title, whether legal or equitable, or both, or partly one and partly the other, may recover. The only question, then, for us to consider in this case is, Which has the paramount title to the property in controversy, the plaintiff, or the defendant? That the defendant with his partner was the agent of the plaintiff to carry on negotiations for the purchase of the lots in controversy for the plaintiff there can be no question, and but little question as to the nature and character of the agency. The defendant, with his partner, was simply to carry on negotiations for the purchase of the lots, under the directions and instructions of the plaintiff and for the plaintiff. Under such circumstances, could the defendant purchase the property for himself, in his own name and with his own money, and take the title to himself, without be

coming a trustee for the plaintiff, at the option of the plaintiff, and holding the legal title to the property merely in trust for the plaintiff, and until the plaintiff should repay him the amount which he had expended in the purchase of the property and reasonable compensation for his services? Except for the statute of frauds, which we shall hereafter consider, we think he could not." See cases cited page 109.
"But can the statute of frauds make any difference? Under the authorities cited by the defendant, plaintiff in error, he claims that it not only can but does. Under such authorities he claims that the plaintiff has no remedy and is not entitled to any relief. The following are the principal authorities cited by the defendant." See authorities cited page 109.

"Under the authorities cited by the plaintiff, it is claimed that the statute of frauds makes no difference. It is claimed that with or without the statute of frauds a trust resulted by operating the principal surfaces of the plaintiff.

difference. It is claimed that with or without the statute of frauds a trust resulted by operation of law in favor of the plaintiff, and that the defendant simply holds the legal title to the property in trust for the plaintiff. The principal authorities cited by the plaintiff in addition to those which we have already cited for him are the following: Chastain v. Smith, 30 Ga. 96; Cameron v. Lewis, 56 Miss. 76; \* \* \* Sanford v. Norris, 4 Abb. (N. Y.) App. Dec. 144; \* \* \*" and other cases cited on page 110.

"The plaintiff in the present case does not claim to have any interest in the real estate in controversy, except such as arises by operation

controversy, except such as arises by operation of law. He does not claim any interest in the of law. He does not claim any interest in the real estate in controversy by virtue of the express terms of any contract, written or oral. There was no contract, written or oral, that purported to transfer the property, or any interest therein, to the plaintiff. Nor did the plaintiff employ the defendant to take or hold the title to the property, either for the plaintiff or for the defendant, nor with or without the defendant's own money. He simply employed the defendant by a simple parol contract to negotiate for the purchase of the real estate for the plaintiff, and of course the plaintiff expected to pay for it himself, \* \* \* and to take such title by a formal and valid written instrument; title by a formal and valid written instrument; and when the defendant took the title in the defendant's own name, instead of following the terms of the contract between himself and the plaintiff, he violated the terms of his contract, and abused the confidence reposed in him by the plaintiff. Under the contract as it was actually made—and it was a parol contract which did mate—and it was a party contract which did not in terms give the property to the plaintiff—and under the facts and circumstances connected with the contract, and with the parties to the contract, before and afterward, and with the property is dispute, all that the plaintiff claims is merely that which results to him through the operation of law. We think it is clear that section 5 of the statute of frauds cannot apply to

"The principal defect, as we think, in the reasoning of the defendant is in his not making any distinction between trusts or interests in real estate which are expressly created by the terms of the parol contract itself and trusts or interests which arise from facts and circumstances which sometimes include a parol contract, but which arise from such facts and circumstances only by implication or operation of law; and the authorities which he cites are, so far as they are applicable to this case, and so far as they maintain the doctrine which he urges, alike defective, and, indeed, we do not think that they truly state the law. The defendant and his authorities also make the mistake of supposing that the statute of frauds may be used as an instrument of fraud. Such was not the intention of the Legislature. The intention of the Legislature in enacting the statute was to prevent fraud, and the statute should be enforced in its spirit and not merely as to its letestate which are expressly created by the terms in its spirit and not merely as to its let-

"In 1844, Mr. Story, as judge of the United States Circuit Court for the First Circuit, and in the case of Jenkins v. Eldredge, 3 Story, 289, 290 [Fed. Cas. No. 7,266] uses the following language: 'It appears to me that here a confidential relation of principal and agent did exist; and that, being once shown, it disables the party from insisting upon the objection that the trust is void, as being by parol. The very confidential relation of principal and agent has been treated, as for this purpose, a case sui generis. treated, as for this purpose, a case sui generis. It is deemed a fraud for an agent to avail himtreated, as for this purpose, a case sui generis. It is deemed a fraud for an agent to avail himself of his confidential relation to drive a bargain, or create an interest adverse to that of his principal in the transaction; and that fraud creates a trust, even when the agency itself may be, nay, must be, proved only by parol. Bartlett v. Pickersgill, I Eden, 515. s. c. 1 Cox, 15, 4 East, 577n, and Leman v. Whitley, 4 Russ. 423, are, I admit, against this doctrine—not wholly, but to a limited extent; for the latter case excludes a case of fraud. But then Lees v. Nuttall, 1 Russ. & Mylne, 53, expressly decides that if an agent, employed to purchase an estate, purchase for himself and on his account, he becomes a trustee for the principal. In that case the whole agency and trust was made out by parol, and the purchase was from a third person. Carter v. Palmer, 11 Bligh, 397, 418. 419, goes the full length of the same proposition. "Also, Mr. Browne, in his work on Frauds, § 96, uses the following language: 'It seems to have been held that where, in a case of trust arising upon an agency, the defendant's answer denied the fact of agency, parol evidence was inadmissible to prove it; but the latter English cases favor a contrary doctrine.' See, also, Browne on Frauds, § 84. \* \* \*

"It seems to be admitted by the defendant, and also by the authorities which he cites, that where the principal advances the purchasee money to the agent, and the agent then purchasee

also by the authorities which he cites, that where the principal advances the purchase money to the agent, and the agent then purchases the property in his own name and for himself, a trust would result in favor of the principal, and the agent would hold the property merely in trust for the principal. But the defendant claims, and the authorities cited by him seem to sustain him, that as the plaintiff in this case did not advance any of the purchase money, and that as the defendant purchased the property with his own money, no such resulting trust has arisen or could arise. Of course where the purchase money is advanced by the principal to the chase money is advanced by the principal to the agent, and the agent then purchases the proper-ty with his principal's money, and in his own name, it makes out a stronger case of resulting trust than where the agent himself advances the purchase money; but the fact that the principal advances the purchase money cannot be the controlling fact in the case. Many authorities hold that where the agent furnishes the purchase money with the consent of the principal, it will be considered as a loan, and the agent will hold the property purchased in trust for his principal, and as a security to himself for the money advanced by him. Kendall v. Mann. [11 Allen] 93 Mass. 15; Sandfoss v. Jones, 35 Cal. 481; Soggins v. Heard, 31 Miss. 426. \* \* \* This outstanding adverse title may be very good or very bad; but whether good or bad, the doctrine cannot at all be tolerated that the agent may, in violation of his duties as agent, purchase for himself the outstanding adverse title, and hold the same adversely to his principal, merely because his principal has not advanced the purchase money, when, in fact, at the time of the employment of the agent the amount of the purchase money could not be at all known. advances the purchase money cannot be the conthe purchase money could not be at all known. The question of the advancement of purchase money in such a case should not have much weight. \* \* The controlling question in this case is not whether the principal advanced the purchase money or not, but it is whether in equity and good conscience the agent who in fact purchased the property with his own money in his own name, in violation of his agreement

with his principal and in abuse of the confidence reposed in him by his principal, can be allowed to retain the fruits of his perfidy. The weight of authority is, we think, that he cannot." See authorities cited at page 119.

This court in the case of McCaleb v. Mc-Kinley, 156 Pac. 1166, which was a suit brought for the purpose of having a trust declared in a certain real estate transaction wherein the plaintiff and one Moss entered into an agreement with Cloud, the owner of the land, to purchase the same at a stipulated price, and, not being able to finance it, they entered into an oral agreement with McKinley, whereby he agreed that if the plaintiff and Moss would place the legal title to said real estate in him as trustee, he would advance the purchase money, less a certain amount theretofore paid by the plaintiff, and, upon being reimbursed, would execute deeds to them according to their interest, and upon his failure to comply with his agreement, instituted an action to have him declared trustee. A demurrer was filed to the petition and was sustained, and upon an appeal here this court said:

"It seems reasonably clear to us, from the authorities cited by counsel for plaintiff in error, that the demurrer to the petition ought to have been overruled. \* \* Rose v. Hayden, 35 Kan. 106, 10 Pac. 554 [57 Am. Rep. 145]; \* \* Hayden v. Dannenberg, 42 Okl. 776, 143 Pac. 859 [Ann. Cas. 1916D, 1191]; Thompson v. McKee, 43 Okl. 243, 142 Pac. 755 [L. R. A. 1915A, 521]; \* \* Franklin v. Colley, 10 Kan. 261; Weekly v. Ellis, 30 Kan. 507 [2 Pac. 96]. \* \* \*"

In Hayden v. Dannenberg, 42 Okl. 776, 143 Pac. 859, Ann. Cas. 1916D, 1191, it is held:

"Where a party obtains the legal title to property, not only by fraud or by violation of confidence, or of fiduciary relations, but in any other unconscientious manner, so that he cannot equitably retain it against the rightful owner, equity carries out its theory of a double ownership, equitable and legal, by impressing a constructive trust upon the property in favor of the one who is in good conscience entitled to it, and who is considered in equity as the beneficial owner."

That sought here is to enforce a constructive trust, as appears plainly from the allegations of the petition. What a constructive trust is, is clearly stated in 1 Pomeroy's Eq. Juris. § 155, as follows:

"Trusts Arising by Operation of Law.—The second great division of trusts, and the one which in this country especially affords the widest field for the jurisdiction of equity in granting its special remedies so superior to mere recoveries of damages, embraces those which arise by operation of law from the deeds, wills, contracts, act, or conduct of parties, without any express intention, and often without any intention, but always without any words of declaration or creation. They are of two species, 'resulting' and 'constructive,' which latter are sometimes called trusts ex maleficio; and both these species are properly described by the generic term 'implied trust.' Resulting trusts arise where the legal estate is disposed of or acquired, not fraudulently or in violation of any fiduciary duty, but the intent in theory of equity appears or is inferred or assumed from the terms of the disposition, or form of the accompanying facts and circumstances, that the beneficial interest is not to be given with the legal title. In such

a case a trust 'results' in favor of the person for whom the equitable interest is thus assumed to have been intended, and whom equity deems to be the real owner. Constructive trusts are raised by equity for the purpose of working out rights and justice, where there was no intention of the party to create such a relation, and often directly contrary to the intention of the one holding the legal title. All instances of constructive trusts may be referred to what equity denominates 'fraud,' either actual or constructive, including acts of omission in violation of fiduciary obligations. If one obtains the legal title to property, not only by fraud or by violation of confidence or fiduciary relation, but in any other inconscientious manner, so that he cannot equitably retain the property which really belongs to another, equity carries out its theory of a double ownership, equitable and legal, by imposing a constructive trust upon the property in favor of the one who is in good conscience entitled to it, and who is considered in equity as the beneficial owner."

It is clear, from what is said in the foregoing authorities, that Powell in purchasing the property for himself, which he had undertaken to purchase for the corporation, committed a breach of his fiduciary relation, and acted in violation of confidence imposed in him by it through its board of directors. O'Neill v. Otero, 15 N. M. 707, 113 Pac. 614, holding:

"2. One who takes advantage of his position as agent and representative of another, and thereby fraudulently obtains title to certain mining claims which in equity and good conscience belong to his principal, will be charged in equity as a trustee ex maleficio of his principal."

And it matters not whether the fiduciary relation be that of agent of the corporation, or of directors or other officers of the corporation, who are agents, as it can but act through agents; if the trust is betrayed to gain a private advantage, equity will declare a constructive trust, for the question is not what position the one guilty of bad faith held, or by what name it was called, but dld he violate his fiduciary relation to the corporation, and its confidence imposed in him? If he did, a constructive trust is declared in favor of the one whose confidence is violated. This is illustrated by the following: Averell v. Barber, 53 Hun. 636, 6 N. Y. Supp. 255; Blake v. Railway Co., 56 N. Y. 485; De Bardeleben v. Bessemer Land & Improvement Co., 140 Ala. 621, 37 South. 511; Wasatch Mining Co. v. Jennings, 5 Utah, 385, 16 Pac. 399; Badger Oil & Gas Co. v. Preston, 152 Pac. 383: 3 Clark & Marshall, Private Corp. p.

As we have seen, this is a constructive trust, and it is well settled in this jurisdiction that such trusts are not within the statute of frauds. McCoy v. McCoy, 30 Okl. 379, 121 Pac. 176, Ann. Cas. 1913C, 146; Ewing v. Ewing, 33 Okl. 414, 126 Pac. 811.

Section 7267, Comp. Laws of 1909, now section 6659 of Revised Laws of 1910, recognizes that trusts in relation to real estate may be created by operation of law. This action is one to declare a trust arising by operation of

law on account of facts and circumstances stated above.

[2] If the company or the defendant in error, as the representative of the company, was in a position to comply with its contract and issue to the plaintiff in error the stock contemplated by the agreement between the parties, there can be no doubt as to his right to compel a conveyance of this property to the company, but under the admitted facts this company is not now in operation, and it is no longer in a position to issue stock or to comply with the agreement made by Powell and his associates with it. court cannot make contracts between litigants-it may enforce the contracts as they are made, but the power to compel the parties to perform contracts which they never entered into may well be doubted. The contract between these parties contemplated that Powell was to buy this property, pay for the same with his own money, which he did, and he was also to erect a mill and pay certain debts of the company, for all of which he was to receive a certain amount of stock to be issued to him by the company, and no part thereof has ever been issued or delivered, nor any offer made so to do, nor is it now in a position to comply therewith. But the court in the decree here did not attempt to enforce this contract, but rendered a judgment, directing the payment of the money in consideration of the property which he ordered conveyed to the receiver. This it could

The judgment of the lower court is therefore reversed.

PER CURIAM. Adopted in whole.

INCORPORATED TOWN OF COMANCHE v. WORKS. (No. 8763.)

(Supreme Court of Oklahoma. April 9, 1918.)

(Syllabus by the Court.)

1. APPEAL AND EBBOR \$\infty\$171(1)\topPleadING \$\infty\$406(6) \top Theory of Case Below \top

6:3406(6) — THEORY OF CASE BELOW — CHANGE ON APPEAL—OBJECTIONS.

The parties to an action, having presented their case, or defense, to the trial court upon a certain, definite theory, are bound thereby and will not be permitted to change the theory of the case, either, at any subsequent stage in the trial court, or in the appellate court upon appeal

2. APPEAL AND ERBOR \$\infty\$1001(1)—QUESTIONS OF FACT—REVIEW.

In actions at law the finding and verdict of the jury upon questions of fact, reasonably sup-ported by the evidence, will not be disturbed by the appellate court.

3. ELECTRICITY \$==11-Action for Services VERDICT—SUFFICIENCY OF EVIDENCE.
Record examined, and held, that the verdict

is supported by the evidence.

Commissioners' Opinion, Division No. 2. Error from District Court, Stephens County; Cham Jones, Judge.

Action by G. W. Works against the Incorporated Town of Comanche. Judgment for the plaintiff and defendant appeals. Af-

J. B. Wilkinson, of Duncan, for plaintiff in error. A. W. Reynolds, of Duncan, and Chas. L. Moore, of Oklahoma City, for defendant in error.

GALBRAITH, C. This lawsuit resulted from a disagreement between the owner of an electric light plant and the municipal corporation over an account for services for lights furnished under an ordinance directing an extension of the plant and an agreement of the town to subscribe and pay for a certain number of lights on such extension as provided in the franchise under which the plant was established and operated. The defendant in error, as owner of the plant, contends that the town council of Comanche had ordered him to make certain extensions to the plant in the month of October, 1908, and agreed to put up and pay for a certain number of lights per block on such extension; that the extension was made as directed by the ordinance and according to the plat furnished by the council, and maintained from December 1, 1908, to June 1, 1910; that the town council failed, neglected, and refused to pay for the full number of lights it was obligated to subscribe for under the provisions of the franchise and as it had agreed to do; and that he had furnished the service and fully complied with his part of the obligation, and the town was indebted to him for such services in the sum of \$1,120. The town answers denying generally and specifically, and also denied liability for the special reason that the ordinance under which the extension of the plant was made was void. There was a trial to the court and a jury, and a verdict and judgment against the town for \$550, from which this appeal was prosecuted.

In submitting the case to the jury, the court in its instructions stated the issues as

"In this case, gentlemen of the jury, you are instructed that if you find by a preponderance of the evidence that the plaintiff and defendant entered into an agreement whereby the light plant was to be extended as has been testified to in your hearing, and you further find that the defendant through its duly elected and qualified board of trustees subscribed for or agreed to pay for a certain specified number of lights per block including said extension, you should find for the plaintiff and assess his recovery at such sum as you find him justly entitled to under the evidence in this case, in no event to exceed the sum sued for; or should you find that the agreement for the extension was made as alleged and that the ordinance or franchise under which said electric light plant was constructed, op-erated, and maintained, made it compulsory and required that the city should subscribe for and use a certain specified number of lights, or a specific candle power, and you further find that the plaintiff fulfilled his part of the agreement, erected and maintained the extension as alleged,

then you should find for the plaintiff and assess his recovery at such a sum as you find him entitled to under the evidence and the terms and conditions of the ordinance and franchise, if any.

any.

"On the other hand, you are instructed that, should you fail to find by a preponderance of the evidence that the agreement between plaintiff and defendant for the extension of said electric light plant was made, then you should find for the defendant; or, should you find from all the facts and circumstances in evidence that the plaintiff voluntarily erected and maintained the extension of said light plant as has been testified to in your hearing without a specific agreement and understanding with the defendant through its then acting council, then you are instructed that he would not be entitled to recover and you should so say in your verdict."

[1] These instructions were not excepted to, nor were any special instructions submitted or requested, either objecting to the theory upon which the cause was submitted to the jury or requesting that it be submitted upon some other theory. The parties are therefore held to have consented to the cause being submitted upon the issue as stated by the court in the above instructions. lace v. Killian, 40 Okl. 631, 140 Pac. 162. Therefore the contention of the plaintiff in error that the cause was submitted to the jury upon the wrong theory-that is, that the plaintiff's cause of action, if any, was for damages for breach of contract and not on account, and that the cause should have been submitted on that theory-must be denied. Horne v. Oklahoma State Bank, 42 Okl. 37, 139 Pac. 992.

[2, 3] Again, it is contended by the plaintiff in error that the verdict and judgment were not supported by the evidence. An examination of the testimony shows that there was testimony by the defendant in error, and by the party who was clerk of the town council at the time the extension of the plant was ordered, to the effect that an agreement as contended by the defendant in error was entered into between him and the town coun-The case was submitted to the jury upon this single issue. The verdict was responsive to the issue upon which the case was submitted, and the same, being reasonably supported by the evidence, is conclusive upon this appeal. McConnell v. Watkins, 42 Okl. 214, 140 Pac. 1167.

The assignment to the overruling of the demurrer to the evidence is not well taken, for the reason that there was competent evidence tending to support the contention made by the defendant in error, and that to the overruling of the demurrer to the first, second, and third amended petitions is not well taken, since no one was injured by such ruling, inasmuch as the case was not tried upon any one of these pleadings, but upon an amended pleading filed without objection, the sufficiency of which was not challenged by demurrer or in any other proper manner.

The assignment as to the admission of in- the notice of the agreement between defendcompetent, irrevelant, and immaterial testi- ant and Gamble. At the trial the defendant

mony does not raise any questions for review upon this appeal, since the objectionable testimony is not set out in printed brief or otherwise identified.

It therefore appears that no one of the errors assigned are well taken, and that the judgment appealed from should be affirmed.

PER CURIAM. Adopted in whole.

WAGGONER BANK & TRUST CO. v. DOAK. (No. 8708.)

(Supreme Court of Oklahoma. April 9, 1918.)

(Syllabus by the Court.)

EVIDENCE @== 444(2) — PAROL EVIDENCE — AD-MISSIBILITY TO VARY WRITTEN INSTRUMENT. Parol evidence is not admissible to vary the terms of a written contract, but parol evidence

terms of a written contract, but parol evidence may be introduced to prove a separate parol agreement constituting a condition precedent to the taking effect of the written contract.

Commissioners' Opinion, Division No. 1. Error from District Court, Stephens County; Cham Jones, Judge.

Action by the Waggoner Bank & Trust Company against J. T. Doak. Judgment for defendant, and plaintiff brings error. Affirmed.

Robert Burns, of Oklahoma City, for plaintiff in error. Womack & Brown and C. Riley, all of Duncan, for defendant in error.

RUMMONS, C. The plaintiff in error, plaintiff below, brought this action against defendant in error to recover upon a promissory note. The defendant answered, admitting the execution of the note, but alleged that said note was given as part payment on the purchase price of 100 shares of stock in the American Home Life Insurance Company; that it was agreed between defendant and the payee of the note, L. P. Gamble, that the purchase price of 100 shares of stock, the sum of \$2,650, should be paid by the defendant out of the proceeds of a loan of \$2,500 to be made defendant by the American Home Life Insurance Company; that it was agreed between plaintiff and said L. P. Gamble that, in the event said loan was not made, the subscription of defendant for said 100 shares of stock should be canceled and the promissory note for the sum of \$650, here in controversy, should be returned to the defendant; that the American Home Life Insurance Company failed and refused to make the loan in any sum, and therefore the conditions upon which the note was signed failed, and the defendant was not liable thereon. It was further alleged that the plaintiff was not a holder in good faith of said note, but that it took the same with the notice of the agreement between defendoffered evidence tending to show that the note was executed upon the condition set out in his answer; that T. B. Yarborough, the vice president and manager of the plaintiff, was a stockholder and treasurer of the American Home Life Insurance Company and a member of the firm of Stewart, Walker & Co. by whom L. P. Gamble was employed as a stock salesman to sell the stock of the American Home Life Insurance Company. The cause was tried to a jury, which returned a verdict for the defendant. Judgment being rendered on said verdict, the plaintiff brings this proceeding in error to reverse such judgment.

The plaintiff complains of the overruling of its demurrer to the evidence of the defendant, its motion to direct a verdict for plaintiff, and its motion for a new trial. These assignments of error are submitted upon the one proposition that the terms of a written contract cannot be varied by parol evidence. In the case of Tovera v. Parker, 35 Okl. 74, 128 Pac. 101, this court says:

"A promissory note may be delivered by the maker to the payee upon condition, or as an escrow."

In Gamble v. Riley, 39 Okl. 363, 135 Pac. 390, this court says:

"It is elementary that parol evidence is inadmissible to contradict or vary the terms of a valid written instrument. But the rule is almost equally well settled that parol evidence may be given to prove the existence of any separate parol agreement constituting a condition precedent to the attaching of any obligation under the written instrument; this is not to vary the terms of a written instrument, but to prove that no contract was ever made; that its obligation never commenced."

The case last cited is apparently upon all fours with the instant case, being a transaction with L. P. Gamble for the purchase of shares of stock in the American Home Life Insurance Company to be paid for out of the proceeds of a loan upon Oklahoma real estate to be made by said American Home Life Insurance Company. In Adams et al. v. Thurmond, 48 Okl. 189, 149 Pac. 1141, it is said:

"A promissory note may be delivered conditionally, and this may be accomplished by a delivery to the payee himself, with proper agreement as regards the conditions. Parol evidence is not admissible to vary the terms of a written contract, but the rule is equally well settled that parol evidence may be given to prove a separate parol agreement constituting a condition precedent to the attaching of any obligation under the written instrument."

Under this authority the evidence introduced by the defendant was competent to show the delivery of the promissory note to Gamble upon condition. There being sufficient competent evidence to reasonably support the finding of the jury in behalf of the defendant, the trial court did not err in overruling the demurrer of plaintiff to defendant's evidence, its motion to direct a significant in his possession until discharged by due process of law. At the time fixed to hear and determine whether or not the property so seized or any part thereof was used, kept, or possessed with the intention of violating the law, the plaintiff in error, State Exchange Bank of Oklahoma City, appeared and by written plea of intervention claimed the automobile under a mortgage executed to it

verdict in its favor, or its motion for a new trial.

The judgment of the trial court should be affirmed.

PER OURIAM. Adopted in whole.

ONE CADILLAC AUTOMOBILE v. STATE. (No. 9008.)

(Supreme Court of Oklahoma. April 9, 1918. Dissenting Opinion, April 11, 1918.)

(Syllabus by the Court.)

Intoxicating Liquors \$\iff 246\to Seizure and Forfeiture\to Statute\to "Appurtenance."

An automobile used January 3, 1917, in the

An automobile used January 3, 1917, in the unlawful conveyance of intoxicating liquor in the presence of an officer having power to serve criminal process, was not subject to seizure by such official and forfeiture to the state under the provision of section 3617, Rev. Laws 1910, and is not an "appurtenance" within the meaning of that section, which provided: "When a violation of any provision of this chapter (chapter 39, Intoxicating Liquors) shall occur in the presence of any sheriff, constable, marshal, or other officer having power to serve criminal process, it shall be the duty of such officer, without warrant, to arrest the offender and seize the liquor, bars, furniture, fixtures, vessels, and appurtenances thereunto belonging so unlawfully used" (citing Words and Phrases, Appurtenance).

Brett, J., dissenting.

Error from County Court, Cotton County; J. C. Norman, Judge.

Proceeding by the State against One Cadillac Automobile; State Exchange Bank of Oklahoma City, claimant. Judgment for the State, confiscating the automobile, claimant's motion for new trial overruled, and it brings error. Judgment reversed, and cause remanded, with instructions to restore it to the person entitled to its possession.

A. E. Pearson and W. R. Withington, both of Oklahoma City, for plaintiff in error. E. L. Richardson, of Walters, for the State.

MILEY, J. On January 3, 1917, L. O. Watson, deputy sheriff of Cotton county, arrested without a warrant two persons who were unlawfully conveying certain intoxicating liquors in his presence and seized the liquors and the automobile in which the same were being conveyed. He made return to the county court setting forth a particular description of the liquor and automobile, whereupon a warrant issued commanding and directing him to hold the property so seized in his possession until discharged by due process of law. At the time fixed to hear and determine whether or not the property so seized or any part thereof was used, kept, or possessed with the intention of violating the law, the plaintiff in error, State Exchange Bank of Oklahoma City, appeared and by written plea of intervention claimed the

by the owner to secure the payment of a question much discussed in the briefs. The promissory note, and among other things alleged that the seizure was wrongful and without authority of law. On January 27, 1917, there was trial by jury resulting in a verdict against intervener and for the state, and judgment was rendered thereon that the automobile be confiscated to the state and ordered delivered to the commissioners of Cotton county to be disposed of according to law for the benefit of the court fund of the county. Motion of the bank for a new trial having been overruled, it brings the cause here and seeks the reversal of the judgment on several grounds, only one of which it will be necessary to consider.

Assuming that the liquor was being transported in the automobile in the presence of the officer in violation of law, the question is whether the automobile was subject to seizure and confiscation. It is conceded on the part of the state that such seizure and confiscation must have the warrant of some statute. There was no statute in force at the time specifically providing for the forfeiture of automobiles or other vehicles used in the unlawful transportation of liquor. Chapter 188, Session Laws 1917, p. 352, so providing, was enacted subsequently to the seizure and entry of judgment thereon here complained of. That law cannot, of course, retroact. The authority for the seizure and forfeiture is claimed by the state by virtue of section 3617. Rev. Laws 1910, in force at the time, which provided as follows:

"When a violation of any provision of this chapter shall occur in the presence of any sheriff, constable, marshal, or other officer having power to serve criminal process, it shall be the duty of such officer, without wararnt, to arrest the offender and seize the liquor, bars, furniture, histores, vessels, and appurtenances thereunto belonging so unlawfully used, and to take the same immediately before the court or judge hav-ing jurisdiction in the premises, and there make complaint, under oath, charging the offense so committed, and he shall also make return, set-ting forth a particular description of the liq-nor and property seized, and of the place where the same was so seized, whereupon the court or judge shall issue a warrant commanding and directing the officer to hold the property so seized in his possession until discharged by due process of law, and such property shall be held and a hearing and adjudication on said return had in like manner as if the seizure had been made under a warrant therefor."

One of the provisions of the chapter referred to in this section is that part of section 3605 providing that it shall be unlawful for any person to ship or in any way convey certain liquors from one place within the state to another place therein. On behalf of the state, it is argued that the officer had the right and that it was his duty under section 3617 to arrest without warrant any person violating the law in his presence by unlawfully conveying liquor and seize the liquor and the means by which it was being zonveyed, in this case the automobile, as an appurtenance thereto. Whether section 3617 plaintiff in error contends that the rule of strict construction applies, while counsel for the state contend for liberal construction. We are inclined to the view that the statutes designed to suppress traffic in intoxicating liquor should be construed according to the fair import of their terms, with a view to effecting their objects and of promoting justice, and so as not to disarm the officers charged with the arduous and difficult duty of enforcing the law of a power which has been confided to them to be used for the general good. Sections 2948, 4642, Rev. Laws 1910.

It is easy to perceive, especially since high-powered and expensive automobiles have been employed for the purpose, that to subject to forfeiture as contraband property. not only the liquor unlawfully conveyed, but also the means or vehicle by which it is transported, would be a great aid in the suppression of the evil aimed at, and, although the statutes in force at the time did not in express terms provide for the forfeiture of automobiles so unlawfully employed, yet if there were in the statutes any general words, the fair and reasonable import of which included such property, we would not be inclined to so strictly construe them as to exclude it. The language of the statute is "seize the liquor, bars, furniture, fixtures, vessels, and appurtenances thereunto belonging, so unlawfully used." While counsel for the state in this and other cases now pending in which the same question is involved have ably argued the same with commendable zeal, they do not contend that an automobile is included in the designation of "bars." "furniture." "fixtures." or "vessels"; nor is it possible to stretch the ordinary meaning of those words to that extent. But it is insisted that authority to seize the means or vehicle used in the unlawful transportation is found in the words following the designation of the specific articles; i. e., "and appurtenances thereunto belonging so unlawfully used."

It is contended on behalf of the state that these words should be construed as meaning "any chattels used in violation of the prohibitory law." But we are unable to do so without violating our understanding of the meaning of the word "appurtenance." word is defined as:

"That which belongs to something else; an adjunct; an appendage; an accessory; something annexed to another thing more worthy; in common parlance and legal acceptation, something the something the source of the s thing belonging to another thing as principal and passing as incident to it, as a right of way or other easement to land, a right of way or or other easement to land, a right of way or common to pasture, an outhouse, barn, garden, or orchard to a house or messuage." Webster's New International Dictionary; Black's Law Dictionary.

See, also, 4 Corpus Juris, p. 1466; Bouvier's Law Dictionary. In Words and Phrases Judicially Defined will be found a collecshould be strictly or liberally construed is a tion of judicial definitions and applications of the word, but all within the comprehensive port of the words thereof. Section 3612 as definition given by Webster. In Stroud's amended by section 9, c. 70, Session Laws Judicial Dictionary, it is said:

"A thing may be 'used and enjoyed' or 'occupied' with something else without 'belonging or appertaining' thereto."

It is quite clear that "appurtenances" does not have the broad meaning claimed by counsel for the state, and does not include all personal property or things used in the commission of the crime, but only such of an inferior nature as belong or are incident to the other things designated as the principal things or things more worthy, viz.: "The liquors, bars, furniture, fixtures, or vessels." Within the designation of appurtenances would fall things such as show cases, screens, mirrors, bottles, and other paraphernalia of a bar, and articles such as glasses, spoons, and things used in preparing and serving intoxicating and other drinks. It is quite clear that an automobile is not an appurtenance to any of the things mentioned in the statute. There is no significance in the arrangement of the sentence so that the words "so unlawfully used" follow the words "appurtenances thereunto belonging." Those words apply to the "bars, fixtures, furniture and vessels," as well as the "appurtenances thereunto." The statute does not make the "liquors, bars, furniture, fixtures and vessels" per se contraband, but even they become so only when used in violation of the law or when kept for that purpose. This is quite clear because the inquiry at the hearing provided in section 3613, Rev. Laws 1910, as amended by section 10, c. 70, Session Laws 1910-11, is not only as to the character of the property seized, but also "whether" the same was "used, or in any manner kept or possessed by any person within the state, with the intention of violating any provisions of this act." Had it been the legislative intent to confiscate vehicles unlawfully used, it would have been so easy to mention them among the other things specifically designated that the omission of the express mention thereof is significant; or, had it been intended that all chattels and personal property used in violation of the prohibitive law should be subject to forfeiture, a more comprehensive term than "appurtenance" could and no doubt would have Even if the statute had been employed. read, "seize the liquors, bars, furniture, fixtures, vessels, and other chattels or personal property so unlawfully used," it would be doubtful, under the rule of ejusdem generis, if vehicles and automobiles should be held subject to seizure and forfeiture.

We find nothing in other sections of the statutes in force at the time fairly indicating an intention that automobiles used in unlawfully transporting liquor should be subject to seizure and forfeiture, or which would authorize a different construction of section 3617 than according to the plain im-

amended by section 9, c. 70, Session Laws 1910-11, relates to the search of premises where it is made to appear that liquor is manufactured, sold, bartered, given away, or otherwise furnished or is kept for such purpose, and has no relation to seizure of property used in the unlawful transportation of liquor. Section 3620, Rev. Laws 1910, declaring that there shall be no property rights in any of the things therein enumerated used for the purpose of violating the provisions of the act, does not and was not designed to extend the power of seizure to property not designated in section 3617, but it was designed to permit the forfeiture of the designated property so unlawfully used without regard to the claims thereto of persons who did not participate in or consent to the unlawful use. While section 3613 as amended by section 10, c. 70, Session Laws 1910-11, places upon the claimant the burden of proving his property right or interest in the thing claimed and that same is not used in violation of the provision of the act, this has reference to that class of property which the statutes otherwise provide the officer is authorized to seize under the search warrant or when the offense is committed in his presence, and does not mean that the claimant may not have returned to him property not of that class unless he proves that such other property was not used in violation of the act. The subsequent legislation found in chapter 188, Session Laws 1917, expressly providing for the forfeiture of all vehicles, including automobiles, and all animals used in hauling or transporting liquor, instead of indicating that such property was intended to be subjected to forfeiture under pevious enactments, rather indicates the contrary, and is an expression of legislative will to extend the power of forfeiture to a class of property not before subject thereto.

It follows in our opinion that, under a liberal construction of the then existing statute according to the fair and reasonable import of its terms, the seizure of the automobile under the circumstances was not authorized, and hence that the judgment confiscating the same was erroneous, and the judgment must be reversed and the cause remanded, with instructions to restore the automobile to the person entitled to possession thereof. All the Justices concur, except BRETT, J., who dissents.

BRETT, J. (dissenting). I must dissent from the opinion of the court on the question decisive in this case, to wit, whether or not the seizure of the automobile taken is authorized by statute.

The provisions of section 3617, Rev. Laws of 1910, are that:

"When a violation of any provision of this chapter shall occur in the presence of any sheriff, constable, marshal, or other officer having power to serve criminal process, it shall be the



duty of such officer, without warrant, to arrest the offender and seize the liquor, bars, furniture, fixtures, vessels, and appurtenances thereunto belonging so unlawfully used, and to take the same immediately before the court or judge having jurisdiction in the premises, and there make complaint, under oath, charging the offense so committed, and he shall also make return, setting forth a particular description of the liquor and property seized, and of the place where the same was so seized, whereupon the court or judge shall issue a warrant commanding and directing the officer to hold the property so seized in his possession until discharged due process of law, and such property shall be held and a hearing and adjudication on said return had in like manner as if the seizure had been made under a warrant therefor.

It will be noticed that the authority to seize is not confined to a violation of the provisions of any particular section; but is broader and provides that a violation of any provision of the chapter on prohibition, when it occurs in the presence of an officer. shall give him the right to seize such liquor and the appurtenances thereunto belonging or so unlawfully used. And section 3605 of that chapter makes it unlawful for any person "to ship or in any way convey such liquor from one place within this state to another place therein, except the conveyance of a lawful purchase, as herein authorized." And the illegal conveyance of liquor from one place in the state of Oklahoma to another place therein is as much a violation of the provisions of the chapter on prohibition as the sale of liquor over the bar. And the automobile, cart, wagon, or other vehicle, used in such unlawful conveyance, appertains to and is just as much an appurtenance of such unlawful conveyance, as the bar, glasses, furniture, and fixtures of a bar room are appurtenances of the unlawful sale of liquor over the bar.

If the provisions of section 3617, authorizing the seizure of appurtenances unlawfully used, was confined to simply the violation of one phase of the prohibition law, to wit, the unlawful sale of intoxicating liquors, then the contention of the plaintiff in error would be well taken; and an automobile, used in unlawfully conveying spirituous liquors from one place in the state to another, would not be subject to seizure. But the provision is broader, and is to the effect that when a violation of any provision of the chapter on prohibition shall occur in the presence of any officer, having authority to serve criminal process, he shall at once arrest the offender, and seize the liquor and that which appertains to such violation. The language is not that the violation of the provisions of any particular section shall authorize the arrest and seizure, but contemplates that a violation of any provision of the chapter on prohibition will give the officer the right to arrest the person violating such provision, and to seize the appurtenances unlawfully used in such violation.

Bouvier's Law Dictionary, vol. 1, p. 224, defines the word "appurtenant" as: "Belonging to; pertaining to." Then, can it be contended that the automobile, in which this liquor was being illegally hauled, did not pertain to and was not an appurtenance in the violation of the prohibited act?

If, under section 3617, we construe the right to seize appurtenances to be confined only to an appurtenance used in the illegal sale of intoxicating liquor, then that would leave an officer powerless to even seize liquor that was being illegally transported in his presence; for he derives the authority, not only to seize the appurtenances, but also the liquor from the same source. And the Legislature, to avert a narrow construction of the right of seizure, specifically and plainly provides that a violation of any provision of the entire chapter on prohibition, when it occurs in the presence of an officer, gives him the right to seize the liquor and everything appertaining to the violation, regardless of what particular phase of the prohibition law is being violated.

Then I am forced to the conclusion that when spirituous liquor is being illegally transported, the automobile, vehicle, cart, or wagon, in which it is being conveyed, is as much an appurtenance of that conveyance, as the glasses, bar, furniture, and fixtures used in a grogshop are appurtenances in the illegal sale of spirituous liquor over the bar. For the gist of the statute is that when a violation of any provision of the prohibition law occurs, in the presence of an officer having power to serve criminal process, he shall, without a warrant, arrest the offender and seize the liquor and the appurtenances so unlawfully used. So unlawfully used in what? In the sale of liquor? No! In the violation of any provision of the chapter on prohibition. The statute is aimed at every violation of the prohibition law, and it is the appurtenances used in the violation of any provision of that law that are authorized to be seized.

LEBRECHT v. STATE et al. (No. 8930.) (Supreme Court of Oklahoma. April 9, 1918.)

(Syllabus by the Court.)

Intoxicating Liquors 🖚 246 — Illegal

TRANSPORTATION—"APPURTENANCE."

An automobile used January 4, 1917, in the unlawful conveyance of intoxicating liquor in the presence of an officer having power to serve criminal process, was not subject to serve criminal process, was not subject to seizure by such official and forfeiture to the state under the provision of section 3617, Rev. Laws 1910, and is not an "appurtenance" with in the meaning of that section, which provided:
"When a violation of any provision of this chapter (chapter 39, Intoxicating Liquors) shall occur in the presence of any sheriff, constable, marshal, or other officer having power to serve criminal process, it shall be the duty of such officer, without warrant, to arrest the offender

and seize the liquor, bars, furniture, fixtures, vessels, and appurtenances thereunto belonging so unlawfully used."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Appurtenance.]

Brett, J., dissenting.

Error from County Court, Cotton County; J. C. Norman, Judge.

A. L. Wilson, Deputy Sheriff of Cotton County, arrested without warrant one Bob Lebrecht for the offense of unlawfully conveying intoxicating liquor, and seized the liquor and the automobile in which the same was being conveyed. The return of the seizure having been made, one Sol Lebrecht appeared and claimed the automobile. Judgment forfeiting the automobile to the State was rendered, and claimant brings error. Reversed and remanded, with directions.

B. M. Parmenter and John M. Young, both of Lawton, for plaintiff in error. E. L. Richardson, of Walters, for defendants in error.

MILEY, J. On January 4, 1917, A. L. Wilson, deputy sheriff of Cotton county, Okl., arrested without a warrant one Bob Lebrecht for the offense of unlawfully conveying certain intoxicating liquor, and seized the liquor and the automobile in which the same was being conveyed. Return of the seizure having been made to the county court of Cotton county, one Sol Lebrecht appeared at the date fixed for hearing the return and claimed the automobile, and, among other things, alleged that seizure was wrongful and without authority of law. Judgment was rendered January 29, 1917, adjudging the automobile forfeited to the state and ordered to deliver to the commissioners of Cotton county to be disposed of according to law for the benefit of the court fund of the county, to reverse which this proceeding in error is prosecuted.

Upon the authority of One Cadillac Automobile v. State of Oklahoma (No. 9008) 172 Pac. 62, this day decided, the said judgment is reversed, and the cause remanded, with instructions to restore the automobile to the person entitled to possession thereof. All Justices concur, except BRETT, J., who dissents.

STATE v. ONE PACKARD AUTOMOBILE. (No. 8644.)

(Supreme Court of Oklahoma. April 9, 1918.)

(Syllabus by the Court.)

Intoxicating Liquobs ( 246—Seizube and Forfeitube of Automobile — Statute — "Appurtenance."

An automobile used April 27, 1916, in the unlawful conveyance of intoxicating liquor in the presence of an officer having power to serve criminal process, was not subject to seizure by such official and forfeiture to the state under the provision of section 3617, Rev. Laws 1910, and is not an "appurtenance" within the mean-

ing of that section, which provided: "When a violation of any provision of this chapter (chapter 39, Intoxicating Liquors) shall occur in the presence of any sheriff, constable, marshal, or other officer having power to serve criminal process, it shall be the duty of such officer, without warrant, to arrest the offender and seize the liquor, bars, furniture, fixtures, vessels and appurtenances thereunto belonging so unlawfully used."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Appurtenance.]

Brett, J., dissenting.

Error from County Court, Craig County; E. M. Probasco, Judge.

Proceeding by the State against one Packard automobile; William Reed, claimant. From a judgment directing its delivery to claimant, the State brings error. Affirmed.

Willard H. Voyles, of Vinita, for the State.

MILEY, J. On April 27, 1916, L. P. Smartt, Sheriff of Craig county, Okl., arrested without a warrant J. Shaw and Judge Hatfield, who were unlawfully conveying certain intoxicating liquors in his presence, and seized the liquors and the automobile in which the same were being conveyed. Return having been made to the county court of Craig county, one William Reed appeared at the time fixed for the hearing, claimed to be the owner of the automobile, and asked that same be ordered delivered to him, alleging that the same was not subject to seizure and forfeiture. The contention of the claimant was sustained, and judgment rendered directing this automobile to be delivered to him, from which the state has appealed.

While the question was irregularly raised in the court below, yet since the automobile was not subject to seizure and forfeiture upon authority of One Cadillac Automobile v. State of Oklahoma (No. 9008) 172 Pac. 62, this day decided, the judgment complained of should be affirmed. All the Justices concur, except BRETT, J., who dissents.

ONE MOON AUTOMOBILE v. STATE. (No. 9009.)

(Supreme Court of Oklahoma. April 9, 1918.)

(Syllabus by the Court.)

Intoxicating Liquors &= 246—Seizure and Forfeiture of Automobile — Statute — "Appublication."

An automobile used January 4, 1917, in the unlawful conveyance of intoxicating liquor in the presence of an officer having power to serve criminal process, was not subject to seizure by such official and forfeiture to the state under the provision of section 3617, Rev. Laws 1910, and is not an "appurtenance" within the meaning of that section, which provided: "When a violation of any provision of this chapter (chapter 39, Intoxicating Liquors) shall occur in the presence of any sheriff, constable, marshal, or other officer having power to serve criminal process, it shall be the duty of such officer, without warrant, to arrest the offender



and seize the liquor, bars, furniture, fixtures, vessels and appurtenances thereunto belonging so unlawfully used."

[Ed. Note.-For other definitions, see Words and Phrases, First and Second Series, Appurtenance.]

Brett, J., dissenting.

Error from County Court, Cotton County; J. C. Norman, County Judge.

Proceeding by the State to forfeit one Moon automobile; State Exchange Bank of Oklahoma City, Okl., claimant. From a judgment of forfeiture, claimant brings error. Reversed and remanded as per stipulation.

A. E. Pearson and W. R. Withington, both of Oklahoma City, for plaintiff in error. S. P. Freeling, Atty. Gen., and Jno. B. Harrison, Asst. Atty. Gen., for the State.

MILEY, J. The parties hereto have stipulated that the same questions involved in No. 9008, One Cadillac Automobile et al. v. State, 172 Pac. 62, are involved herein, and that the same judgment should be rendered in this court in this case as in No. 9008.

It is therefore ordered that this cause be and the same is hereby reversed and remanded, with instructions to restore the automobile to person entitled to possession thereof for the reasons stated in the decision in said cause No. 9008, this day decided. All the justices concur, except BRETT, J., who dissents.

McFARLAND v. COYLE. (No. 8845.) (Supreme Court of Oklahoma. April 9, 1918.)

(Syllabus by the Court.)

1. Homestead €==32 - Necessity of Occu-

PANCY.
"A purchase of a homestead within the statutory limits as to quantity and value, with the intention in good faith of presently residing on it or residing thereon as soon as some temporary obstacle to such residence can be removed, or some necessary preparation for the same can be made, is equivalent to actual occupancy of the residence, and said property is exempt from lien, levy or forced sale." 160 Pac. 56.

 Homestead €==57(3)—Homestead Charac-TER-EVIDENCE.

Where the claimant testified that he purchased certain lands for the purpose and with the intent of making the same the home of himself and family; that he did not immediately assume occupancy of the premises for the reason that there was a tenant in possession of said premises under an unexpired lease from the claimant's grantor, and that he desired to re-tain his children in school in the town where he resided for the remainder of the term, and the house on the premises was not large enough to accommodate his family; that he consulted another as to the cost of building a dwelling suitable for the accommodation of his family, and a lumberman as to the cost of lumber necessary for the construction of such building, expressing his intention to the said lumberman and to the said third person of making said premises his home, both of whom corroborate his testimony as to considering the cost of the dwelling and the cost of the lumber, and as to his expressing his intention of making the prem- pose and with the intent of moving thereon

ises his home, and further testified that he did ises his home, and further testified that he did not own any other lands or homestead, and that he intended moving on said premises as soon as these obstacles were removed, and he could build a dwelling thereon suitable for his family; that he had a fixed intention of making said premises his homestead and never had abandoned such intention, and had made some improve-ment thereon—it is held, that such facts and circumstances are sufficient to impress the lands with the homestead character.

Commissioners' Opinion, Division No. 8. Error from District Court, Grady County: Will Linn, Judge.

Action by Lida McFarland against Ed. Coyle, with motion by defendant to quash a levy of execution. From a judgment sustaining the motion and quashing the levy of execution, plaintiff brings error. Affirmed.

Welborne & Bailey, of Chickasha, for plaintiff in error. Riddle & Hammerly, of Chickasha, for defendant in error.

PRYOR, C. This is an appeal of the plaintiff in error, Lida McFarland, from a judgment of the district court of Grady county, quashing levy of an execution. The plaintiff in error, Lida McFarland, obtained a judgment in the district court of Grady county in the sum of \$3,960, against Ed. Coyle, defendant in error, et al. On the 8th day of February, 1916, the plaintiff in error caused execution to be issued in said cause, and on the 9th day of February, 1916, the sheriff of Grady county levied the same on the northwest quarter of section 5, township 3 north, range 8, west, in said county. On the 2d day of March, 1916, defendant, Coyle, filed his application and motion to quash levy of execution on the above-described lands, on the ground that the same were his homestead. The plaintiff, Lida McFarland, filed answer to said motion, denying that said lands were the defendant, Coyle's, homestead. On hearing of said motion the trial court rendered judgment sustaining the motion and quashing the levy of execution. From this judgment the plaintiff in error appeals.

The only question involved on appeal is whether or not the lands levied on were the homestead of the defendant, Coyle, at the time of the levy of the execution on said lands by the sheriff.

The evidence of the movant, Ed. Coyle, offered for the purpose of proving that said lands were his homestead at the time of the issuance and levy of the execution, reasonably establish the following facts and circumstances: That the defendant, Coyle, lived in the town of Rush Springs, Okl., and had lived in the state of Oklahoma since statehood; that he was the head of a family. consisting of his wife and six children between the ages of 11 and 18 years; that during the month of October, 1915, Coyle purchased the lands in question for the purand making the same his homestead: that at the time of such purchase there was a tenant of his grantor in possession of the premises under lease which expired the 1st day of January, 1916; that the defendant, Coyle, intended to move on said premises as soon as he could secure possession; that during December, 1915, he refused to lease said premises, expressing at the time that it was his purpose to move on said premises himself with his family and make the same his home, but later he decided to remain in Rush Springs until May, 1916, for the reason that two of his children would graduate from the schools of said town on that date, and he decided to wait until they had graduated before moving to the farm; that he had a conversation with a Mr. Kerns about the cost of building a house on the lands in controversy, which would be large enough for a home for himself and family, comparing the cost of Mr. Kerns' house with the cost of the one he contemplated building, and expressed to Mr. Kerns at that time his intention of making the lands in controversy his home; that he consulted A. L. Evans, a lumberman, as to the cost of the lumber necessary to construct a house of the character he contemplated building and expressed to him his intention of making his home on the premises in question; that he (the defendant, Coyle), built himself, at his own expense, some fences which partially inclose the premises and ordered fruit trees put out on said land; all of the foregoing occurring before the issuance and levy of execution; that he (the defendant, Coyle), had a fixed intention to make said premises his home from the time of the purchase thereof and had never abandoned the same. The statements of defendant, Coyle, and his testimony regarding his expressing an intention to make the lands in controversy his home, and his conversation regarding the cost of building on said premises and as to the cost of lumber for said purpose, are corroborated by Mr. Kerns and Mr. A. L. Evans.

The facts show that there was a small house on the premises, but it was not large enough to accommodate a family of the size of Mr. Coyle's; further, the facts show that Coyle leased the premises to two tenants, Mr. Carrod and Mr. Ridley, for the year 1916, reserving, however, the meadow land; that Coyle's boys did some work on said premises during the year 1916. The facts further show that Coyle owned no other home or lands.

[1] The correctness of the judgment of the trial court depends on whether these facts are sufficient to constitute said premises the defendant's homestead. In the case of Illinois Life Ins. Co. v. Rogers et al., 160 Pac. 56, this court held:

"A purchase of a homestead within the statutory limits as to quantity and value, with the intention in good faith of presently residing on it or residing thereon as soon as some temporary obstacle to such residence can be removed,

or some necessary preparation for the same can be made, is equivalent to actual occupancy of the residence, and said property is exempt from lien, levy, or forced sale."

This rule was reaffirmed in the case of American Surety Co. v. Gibson, 166 Pac. 112, wherein it was held:

"A married man who owned a farm in Caddo county, and who had lived with his family thereon for about 10 years, traded this farm for one located in Canadian county, intending to remove his family thereon and to make the same their home. This Canadian county farm was rented at the time of the trade, and the tenant was occupying the one residence thereon, and for that reason he could not immediately establish the family in the new home. He rented a furnished house in El Reno for one month, and moved his family there, and was intending to go to Cushing for temporary employment, but before he got away, and about 10 days after his arrival at El Reno, he was sued upon an unsecured debt, and an attachment was issued and levied upon the farm; he moved to discharge the attachment on the ground that the farm was his homestead, \* \* . Held, that his motion was well taken, and was properly sustained."

In the case of Illinois Life Insurance Co. v. Rogers, supra, the court adopts with approval the following language of the Court of Civil Appeals of Texas, in the case of Foley v. Holtkamp, 28 Tex. Civ. App. 123, 66 S. W. 891:

"A homestead may be created by intention prior to actual occupancy when it appears that the owner is entitled to the exemption as the head of a family, and that this intention has been manifested by such acts as amount to reasonably sufficient notice of that intention; purpose of the law being to require such open purpose of the law being to require such open evidence of this intention as will prevent the use of this right as a shield for fraud. \* \* \* In Cameron v. Gebhard, 85 Tex. 610, 22 S. W. 1033, 34 Am. St. Rep. 832, it is said: 'The intention thus to appropriate the property shall not only be found in the mind of the party, but should be aridanced by some unmistakeable acts. should be evidenced by some unmistakable acts, showing an intention to carry out such design, or some sufficient reason should be given why this intention was not demonstrated by such acts.' In the same case this general rule is announced: 'From these decisions it is apparent that intention is almost the only thing that may not be dispensed with in some state of case, and it follows that this intention in good faith to occupy is the prime factor in securing the exemption. Preparation \* \* is but the corroborating witness to the declaration of inten-tion, the safeguard against fraud, and an as-surance of the bona fides of the declared inten-tion of the party.' Justice Brown in the same opinion says further: 'But the placing upon the premises unhewn logs, for the purpose of erecting thereon the humblest cabin, with a bona fide intention to occupy as soon as the cabin can be built, secures the right.' Questions of this sort most frequently arise where the claimant has bought unimproved property for the purpose of a home. In such case the declared purpose of a home. In such case the declared purpose for which the property was bought is necessarily a potent factor in establishing the exemption. But we can perceive no difference in principle between such a case and this. Here, while it is true the vacant property was acquired years before this controversy arose and at a time when appellee, being unmarried, was not entitled to the exemption, yet after all it is not the purchase for the purpose which se-cures the exemption, but the intention formed at a time when the party has a right to the exemption, and evidenced by the requisite acts.

failure to promptly follow them by occupancy and use may be accounted for, and in measuring the reasonableness of the excuse all the circumstances may be looked to by the jury. The presence of legal obstacles forbidding occupancy or further preparation has been held to excuse these otherwise requisite acts and permits bona fide intention coupled with declara-tions to secure the right."

The rule requiring that the mere intention must be accompanied by other acts indicative of the intention, seems to be well established. Thus it will be seen from the foregoing that the intention of the homestead claimant is the prime factor in determining whether or not a certain land is impressed with the homestead character. The acts required to accompany this intention are not acts essential to the creation of a homestead, but are acts indicative of such intention. The purpose of such acts is primarily to corroborate his declaration that such intention existed in his mind. To establish this intention the mere statement under oath of claimant that such intention existed in his mind is not sufficient, but his statement must be corroborated by that of external facts or circumstances.

[2] The facts and circumstances above set forth sufficiently corroborate his statement that it was his intention to make said lands his homestead, and such facts and circumstances sufficiently satisfy the ruling requiring facts and circumstances to be shown indicative of his intention. All of the facts and circumstances taken together sufficiently and reasonably sustain the holding of the trial court that said lands were the homestead of the defendant Coyle.

Therefore the judgment of the trial court should be affirmed.

PER CURIAM. Adopted in whole.

DAWKINS v. BILLINGSLEY. (No. 8593.) (Supreme Court of Oklahoma. April 9, 1918.)

(Syllabus by the Court.)

1. Libel and Slander €==6(4), 41—Entry in School Register—"Privileged Communications."

An entry made in a register by the teacher of a district school, concerning a pupil, that he "was ruined by tobacco and whisky," is defamatory, and the same is not "privileged communication" or publication within the purview of any provision of section 4958, Rev. Laws 1910.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Privileged Communication.]

2. Libel and Slander 4-69, 123(1)-Proof EVIDENCE

Under section 4959, Rev. Laws 1910, in all civil actions to recover damages for libel or slander, it shall be sufficient for the plaintiff to establish what the defamatory matter was, and that it was published or spoken of the plaintiff, and to allege any general or special damage caused thereby, and in order for him to recover matter was spoken or published by the defendant concerning him. The evidence in this case ant concerning him. The evidence in this case examined, and held, that it was error for the trial court to sustain a demurrer to the evidence offered by the plaintiff below.

3. Libel and Slander 4 71 — Issues and Proof—Defenses.

In such actions the defendant may deny and offer evidence to disprove the charges made, or he may prove that the matter charged as de-famatory was true, and in certain cases that it was published or spoken under such circumstances as to render it a privileged communica-

Commissioners' Opinion, Division No. 3. Error from District Court, Hughes County: Geo. C. Crump, Judge.

Action by Wallace Dawkins, by next friend, L. G. Dawkins, against A. L. Billingsley. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

Guy L. Andrews, of So. McAlester, for plaintiff in error. W. T. Anglin and J. L. Skinner, both of Holdenville, for defendant

HOOKER, C. This is an action for libel. The evidence presented by the plaintiff in error, to which a demurrer was sustained by the trial court, established: That Billingsley was the principal of a district school in which Wallace Dawkins was a pupil. That Billingsley, as such teacher, kept a register of the daily attendance and grades of pupils attending said school, and at the close of the term Billingsley caused the register to be delivered to the clerk of the school board of said district, which register was afterwards seen by various persons, and upon said register there had been written by said Billingsley, as a report of the attendance and grade of Wallace Dawkins, these words. "Drag all the time." "Ruined by tobacco and whisky." That the plaintiff in error never drank any whisky in his life, and only used tobacco occasionally and in moderate form. That young Dawkins was a boy of good habits, of average intelligence, and fairly studious. That no report concerning him was made by Billingsley to the board or to his parents during the school term. Plaintiff in error asserts that the trial court should not have sustained the demurrer to the evidence, while the defendant in error contends that, inasmuch as there was no malice upon the part of the defendant below, and the publication being a qualified privilege, the trial court did not err.

[1] Section 7828, Rev. Laws 1910, requires all teachers of district school in this state to keep a register, and members of the school board to visit the school and examine that register. The other provisions of the statute require pupils of certain ages, in all districts of this state, to attend school so many months in the year, and the plain provision of this statute requiring teachers to keep it is only necessary for him to prove that the registers and members of the school board

to examine that register is for the purpose of enabling members of the school board to ascertain whether the pupils in the district are attending school the required time, and thereby gives them an opportunity to examine into and ascertain the cause of the absence of said pupils from the school, and to enforce the law with reference to the attendance thereat. It is clearly the duty of the teacher to enter into this register a full, fair, complete, and true report of the attendance and grades of the pupils; but he has no right to enter therein any defamatory matter concerning any of his pupils, and, if he does so, he is not protected by the statute.

Section 4958, Rev. Laws 1910, defines what is a privileged publication or communication, and this court, in the case of German Ins. Co. v. Huntley, 161 Pac. 817, in construing this provision of the statute, says:

"It seems clear that the legislative intention was to recognize two classes of privileged publications, viz.: (1) Those where the occasions designated, regardless of malice, constitute an absolute excuse and preclude recovery of damages; and (2) those in which the circumstances of the defamatory publication, together with testimony, rebut the presumption of malice, thus affording a conditional excuse. The first three paragraphs of the foregoing section specifically enumerate those occasions upon which absolute privilege attends a defamatory publication, and in this respect may be said to be exclusive. The fourth paragraph, however, is general in terms, comprehending 'all cases' where the occasion of such a publication is not absolutely privileged, and provides that malice shall be presumed therefrom, unless the fact and the testimony rebut the same.

We are of the opinion that the publication complained of here does not come within either provision of this statute, and, if untrue, that it is a false and malicious, unprivileged publication by writing, which tends to deprive the plaintiff in error of public confidence and injure him.

[2, 3] Section 4959, Rev. Laws 1910, provides:

"In all civil actions to recover damages for libel or slander, it shall be sufficient to state generally what the defamatory matter was, and that it was published or spoken of the plaintiff, and to allege any general or special damage caused thereby and the plaintiff to recover shall only be held to prove that the matter was published or spoken by the defendant concerning the plaintiff. As a defense thereto the defendant may deny and offer evidence to disprove the charges made, or he may prove that the matter charged as defamatory was true, and in addition thereto, that it was published or spoken under such circumstances as to render it a privileged communication."

In 25 Cyc. 259, it is said:

"Publications imputing mere impairment of mental faculties or intellectual weakness not amounting to insanity are libelous per se"—citing Morse v. Times-R. Printing Co., 124 Iowa, 707, 100 N. W. 867; Belknap v. Ball, 83 Mich. 583, 47 N. W. 674, 11 L. R. A. 72, 21 Am. St. Rep. 622; Wood v. Boyle, 177 Pa. 620, 35 Atl. 853, 55 Am. St. Rep. 747; Candrian v. Miller, 98 Wis. 164, 73 N. W. 1004.

And on page 260 thereof it is said:

"A written or printed publication imputing roguery, rascality, or general depravity, which carries with it a charge of moral turpitude and degradation of character, the natural tendency of which is to hold the party up to contempt and expose him to the reprobation of the virtuous and honorable, is libelous per se."

And it has been held libelous to charge one with being a drunkard. See cases cited in the notes.

Applying the rule announced in this section of the statute to the case at bar, we must hold that the trial court committed an error in sustaining a demurrer offered by the defendant to the plaintiff's evidence. The evidence here clearly established that the words written by the defendant below concerning the plaintiff were defamatory, and, the same being within the class designated as a privileged publication, the evidence was sufficient to take the case to the fury.

The judgment of the lower court is therefore reversed, and this cause remanded for a new trial.

PER CURIAM. Adopted in whole.

WICHITA FALLS & N. W. RY. CO. v. D. CAWLEY CO. et al. (No. 8717.)
(Supreme Court of Oklahoma. April 9, 1918.)

(Syllabus by the Court.)

 CARRIERS \$\insigma 105(1)\$—Delay in Transit— Measure of Damages.

The measure of damages for delay in transit of a shipment of merchandise in the absence of the shipper having communicated to the carrier all of the facts and circumstances of the shipment, which do not ordinarily attend the carriage, is the depreciation of the merchandise at the market value at the place of delivery between the date at which it ought to have been delivered and the date of its actual delivery.

2. Cabriers \$\leftarrow\$ 105(2)\leftarrow\$ Delay in Transit—Special Damages.

In order to recover special damages for delay in a shipment of freight, it must be shown that such damages were within the contemplation of both parties to the contract.

3. Cabriers = 105(1)—Delay in Teansit— Damages.

In an action for damages for delay in transit in a shipment of merchandise, damages occurring after receipt of the merchandise by the consignee, by reason of the fact that said merchandise had to be carried over to another season, cannot be recovered.

4. Carbiers \$\insigm 103 - Delay in Transit - Damages-Evidence.

In the absence of pleading and proof of special damages in an action to recover damages for delay in transit of a shipment of merchandise, it is error to admit evidence of the depreciation of the value of the merchandise, after its receipt by the consignee, by reason that said merchandise had to be carried over to another season.

5. TRIAL \$\infty 178 - DIRECTED VERDICT - EVI-DENCE.

Where, admitting the truth of all the evidence in favor of the plaintiff, together with such inferences and conclusions as may reason-

dict for the plaintiff.

8. Carriers 6-104-Delay in Transit-Ver-

DICT—SUFFICIENCY OF EVIDENCE.

The evidence in this case carefully considered, and found not sufficient to support a verdict for the plaintiff.

Commissioners' Opinion, Division No. 1. Error from District Court, Major County; James B. Cullison, Judge.

Action by the D. Cawley Company, a partnership, composed of Denny Cawley and others, against the Wichita Falls & Northwestern Railway Company and the Kansas City, Mexico & Orient Railroad Company. Case dismissed as to Kansas City, Mexico & Orient Railroad Company, and judgment for plaintiff, and defendant Wichita Falls & Northwestern Railway Company bring error. Reversed and remanded.

Robinson & Whiteside, of Altus, for plaintiff in error. John V. Roberts, of Fairview, and S. A. Norton, of Oklahoma City, for defendants in error.

COLLIER. C. This action was brought by the plaintiffs in error against the defendants in error to recover damages in the sum of \$620.22, alleged to have been sustained by reason of delay in transit of certain goods described in the petition. Hereinafter the parties will be designated as they were in the trial court.

Upon the conclusion of the evidence, each of the defendants separately demurred to the evidence. The court sustained the demurrer of the Kansas City, Mexico & Orient Railroad Company, and dismissed the case as to it. The court overruled the demurrer of the Wichita Falls & Northwestern Railway Company, to which said company duly excepted. Thereupon the court instructed the jury "to return a verdict in favor of the plaintiffs against the Wichita Falls & Northwestern Railway Company in such amount as they find from the evidence in this case that the plaintiff has been damaged, in the event they find the plaintiff has been damaged not exceeding \$620.22." The jury returned a verdict against the Wichita Falls & Northwestern Railway Company in the sum of \$150, to which the said company duly excepted. The Wichita Falls & Northwestern Railway Company made timely motion for a new trial, which was overruled and excepted to, and judgment entered in accord with the verdict to which said company duly excepted, and perfected an appeal to this court.

The evidence in the case shows that the plaintiffs shipped merchandise over the said railroads, the goods consisting of 6 rolls wall paper, 2 coat racks, 1 settee, 1 stove, 1 pipe, 1 sign, and 16 boxes clothes and shoes, but there is no evidence in the record to show the value of said merchandise. The record shows that the shipment was made November

ably be drawn therefrom, it is insufficient to sustain a verdict in favor of the plaintiff, it is reversible error for the court to direct a verific at their destination on the 21st day of November 1914. The evidence further of November, 1914. The evidence further shows that the plaintiffs were engaged in the general mercantile business, and had shipped said goods to their place of business for the purpose of disposing of them at a ten-day sale which they had advertised, that said goods were received too late for said sale, and that said goods in consequence had to be carried over to another season, and against the objection and exception of the defendants; voluminous evidence was allowed to go to the jury as to the percentage of value that the said goods depreciated by reason of having to be carried over. The evidence further shows that from the point of shipment to the point to which the goods were shipped did not exceed 200 miles.

There are no assignments of error in the brief, but there are several assignments of error in the petition in error, but the only ones we deem necessary, for a proper review of this case, to consider, is the overruling of the demurrer to the evidence of the Wichita Falls & Northwestern Railway Company. the improper admission of testimony, and the instructions of the court to the jury directing a verdict for the plaintiffs in such sum as they might be damaged.

[1] The law is well settled as to the measure of damages for delay in the shipment of goods, and that measure is the difference in the market value of the merchandise at the time and place when it ought to have been delivered, and the time of its delivery. Section 2869 of Revised Laws 1910 is as follows:

"The detriment caused by a carrier's delay in "The detriment caused by a carrier's delay in the delivery of freight, is deemed to be the depreciation in the intrinsic value of the freight during the delay, and also the depreciation, if any, in the market value thereof, otherwise than by reason of a depreciation in its intrinsic value, at the place where it ought to have been delivered and hat week the day at which it ought. livered, and between the day at which it ought to have been delivered and the day of its actual delivery.

In the recent case of Missouri, K. & T. Ry. Co. et al. v. Foote, 46 Okl. 578, 149 Pac. 223, Ann. Cas. 1917D, 173, it is held:

"Under section 2869, Rev. Laws 1910, the detriment caused by a carrier's delay in the delivery of freight is deemed to be the depreciation in the intrinsic value of the freight during the delay, and also the depreciation, if any, in the market value thereof, otherwise than by reason of a depreciation in its intrinsic value, at the place where it ought to have been delivered, and between the day at which it ought to have been delivered and the day of its actual delivery.

See Kansas Pac. Ry. Co. v. Reynolds, 8 Kan. 623; Klass Com. Co. v. Wabash R. R. Co., 80 Mo. App. 164; Chicago, Rock Island & P. Ry. Co. v. C. C. Mill Elevator & Light Company (Tex. Civ. App.) 87 S. W. 753; Cowherd v. St. Louis & San Francisco R. R. Co., 151 Mo. App. 1, 131 S. W. 755; Southern Express Company v. Hanaw, 134 Ga. 445, 67 S. E. 944, 137 Am. St. Rep. 227; Gulf, Colorado & Santa Fé v. Barber, 60 Tex. Civ. App. 234, 127 S. W. 258; McCabe v. Atchison, Topeka & Santa Fé R. R. Co., 154 Ill. App. 380.

[2-4] Whatever damages may have accrued after the delivery of said merchandise to plaintiffs by reason of having to carry over said goods to another season are too remote, and cannot be recovered, and the court committed reversible error in permitting evidence to go to the jury as to the depreciation of the value of the merchandise in question by carrying them over to another season. Again, the value of the goods shipped are not shown by the evidence: it was therefore impossible for the jury upon a percentage basis of depreciation of the goods, which line of evidence was the only evidence as to the amount of depreciation by being carried over, to have evidence upon which to properly predicate a verdict, and consequently the verdict in this case is based upon surmise and conjecture, which is not sufficient to support the same. In Kansas City Southern Ry. Co. v. Henderson, 153 Pac. 872, it is held:

"The verdict of a jury must be rendered upon evidence reasonably tending to support same, and not upon conjecture."

In Moore v. Mo. Pac. Ry. Co., 28 Mo. App. 622, it is held:

"A verdict evidently founded upon mere conjecture of possibilities or probabilities, however reasonable, will not be permitted to stand."

See, also, 3 Cyc. 352, and authorities there cited.

There is no evidence in the case to show that the carrier was informed of any special purpose that the merchandise shipped were to be used, and therefore special damages could not be recovered. In Williams v. Atl. Coast Line R. R. Co.; 56 Fla. 735, 48 South. 209, 24 L. R. A. (N. S.) 134, 131 Am. St. Rep. 169, it is said:

"Only such damages may be recovered as were contemplated or might reasonably be supposed to have entered into the contemplation of the parties to the contract of carriage. If the owner of the goods would charge the carrier with any special damages, he must have communicated to the carrier all the facts and circumstances of the case which do not ordinarily attend the carriage or the peculiar character and value of the property carried, for otherwise such peculiar circumstances cannot be contemplated by the carrier."

The rule laid down in Hadley v. Baxendale, 9 Ex. Ch. 341, Sedgwick's Leading Cases on Measure of Damages, 126, which has been followed by the Supreme Court of the United States, and most of the states of the Union, establishes this doctrine:

"Where two parties have made a contract, which one of them has broken, the damages which the other party ought to receive in respect to such breach of contract should be such as may fairly and reasonably be considered either arising naturally, according to the actual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of it."

In the case of Illinois Central Ry. Co. v. Johnson, 116 Tenn. 624, 94 S. W. 600, parties had the contract for boring a deep well in the state of Arkansas, and in contemplation of such work they delivered to the railroad company machinery for the purpose of doing the work. The party who made the shipment stated to the agent of the company that the machinery was needed right away, and that the shipment was for immediate delivery, that the shipper was at heavy expense in keeping a crew awaiting the arrival of the shipment for the purpose of carrying out the contract. The shipment was delayed, and the parties brought suit. Under that state of facts, recovery was denied, and in so doing the court said:

"One seeking to recover special damages for breach of a contract must show that such damages were within the contemplation of both parties to the contract; otherwise he can only recover such damages as in the usual course of things flow from a breach."

Chicago, Rock Island & Pacific Railway Company v. George W. Broe, 16 Okl. 25, 86 Pac. 441, was an action to recover damages for the delay in a shipment of carload of wire and nails. As a part of the measure of damages claimed by plaintiff was the loss of trade during the delay of freight. In said opinion Judge Burwell says:

"The jury had absolutely no justification for allowing the consignee anything for loss of trade. There was no evidence on which to base such a finding, and even if there had been it could not be considered, as the carrier's liability is fixed by the section of the statute above quoted, and loss of trade is not referred to therein."

[5, 6] There is no evidence whatever in the record that the merchandise deteriorated in value during the delay in transit, and if they did so deteriorate the amount therefor is not shown, consequently there was no evidence to support a verdict for plaintiffs, and the court committed reversible error in overruling the demurrer of the Wichita Falls & Northwestern Railway Company, to the evidence. In Chickasha Inv. Co. v. Phillips et al., 161 Pac. 223, it is held:

"The question presented on a motion to direct a verdict is whether, admitting the truth of all the evidence in favor of the party against whom the action is contemplated, together with such inferences and conclusions as may be reasonably drawn from it, there is enough competent evidence to reasonably sustain a verdict in favor of such party."

Applying the rule in the instant case, admitting the truth of all the evidence in favor of the plaintiff, together with such inferences and conclusions as may be reasonably drawn from it, there is not enough competent evidence to reasonably sustain the verdict directed by the court, and the court committed reversible error in directing a verdict for the plaintiff.

For the errors pointed out, this cause is reversed and remanded.

PER CURIAM. Adopted in whole.

WALKER et al. v. HINTON. (No. 8850.)\*
(Supreme Court of Oklahoma. April 9, 1918.)

### (Syllabus by the Court.)

REPLEVIN 557—PETITION—SUFFICIENCY.

A petition in replevin, which contains the allegation that the plaintiff is the owner of the property therein described and entitled to immediate possession thereof and that the defendant wrongfully detains the possession thereof from the plaintiff, states facts sufficient to constitute a cause of action.

Commissioners' Opinion, Division No. 3. Error from District Court, Garvin County; F. B. Swank, Judge.

Replevin by C. C. Walker and another against W. L. Hinton. Demurrer to amended petition sustained and cause dismissed, and plaintiffs bring error. Reversed, with directions to set aside the order sustaining the demurrer and dismissing the cause and to reinstate the cause.

W. L. Eagleton, of Norman, and Ledbetter, Stuart & Bell, of Oklahoma City, for plaintiffs in error. H. R. Jacobs, of Purcell, and Thompson, Patterson & Hampton, of Pauls Valley, for defendant in error.

PRYOR, C. This is an action in replevin commenced on the 9th day of October, 1913, by plaintiffs in error, C. C. Walker, and H. M. Walker, against W. L. Hinton, defendant in error, for the possession of an iron gray Percheron stallion and for damages for the wrongful retention thereof in the sum of \$500.

The amended petition of the plaintiff contains the following allegations:

"Plaintiffs for their cause of action against the defendant allege and state that they are at this time, and were, on, to wit, the 9th day of October, 1913, the owners and entitled at the time to the immediate possession of one certain iron gray Percheron stallion, named 'Dewey,' whose registered number is 72743, and that they are still at this time the owners and entitled to the immediate possession of said stallion and have been ever since and prior to the bringing of this action; that due and legal demand was made of defendant, W. L. Hinton, for the possession of said stallion, before the bringing of this suit, but he, the said defendant, failed and refused, and still fails and refuses, to deliver said stallion to these plaintiffs, or either of them, and therefore these plaintiffs allege and state that said defendant is in wrongful possession of said stallion, and these plaintiffs are wrongfully and illegally deprived of his possession."

The plaintiffs further allege that they are entitled to damages for the usable value of said stallion, and ask for judgment for the return of said stallion or his value in the sum of \$500, and for damages for the usable value of said stallion in the sum of \$1,300, and costs of action.

Defendant interposed a general and special demurrer containing the following assign-

ments of error: (1) That the amended petition does not state facts sufficient to constitute a cause of action; (2) that the allegations contained in petition of plaintiffs in regard to damages do not comply with an order of the court previously entered in said cause requiring plaintiffs to make their petition in regard to alleged damages more definite and certain

On the 4th day of September, 1916, the court, in the absence of plaintiffs or their attorney, sustained the demurrer of defendant to the plaintiffs' amended petition, dismissed said cause, and taxed the plaintiffs with the cost of the action in the sum of \$22.05. At the same term of court, on the 4th day of September, 1916, plaintiffs filed their application in said cause to have the order of the court sustaining the demurrer and dismissing said cause set aside. The trial court refused to set aside the order sustaining the demurrer of defendant to the plaintiffs' amended petition and order dismissing said CRUSE. From this judgment sustaining the demurrer and dismissing said cause and overruling said motion, the plaintiffs appeal.

Plaintiffs assign as error: (1) That the court erred in sustaining the demurrer of defendant to the plaintiffs' amended petition, and in dismissing plaintiffs' cause of action; (2) that the court erred in refusing to set aside its judgment sustaining the demurrer to plaintiffs' petition and dismissing said cause.

The petition of the plaintiffs clearly states facts sufficient to constitute a cause of action. A petition in replevin which contains the allegations that the plaintiffs are the owners and entitled to the immediate possession of the property in controversy and describing the said property, and alleging defendant wrongfully withholds the possession of such property from plaintiffs, states facts sufficient to constitute a cause of action, and is good against a general demurrer. Stone v. American Nat. Bank, 34 Okl. 786, 127 Pac. The allegations in regard to damages are clearly sufficient. As the petition stated facts sufficient to entitle plaintiffs to possession of the property in controversy, even if it had been fatally defective in regard to damages, it would still be good against a general demurrer. A casual reading of the petition discloses the fact that it was sufficient and that the general and special demurrer was frivolous. The court clearly erred in arbitrarily sustaining this demurrer, and arbitrarily dismissing plaintiffs' cause of action and taxing the costs against them.

Therefore the judgment of the trial court should be reversed, with directions to set aside the order sustaining the demurrer to plaintiffs' petition and the order dismissing said cause, and to reinstate said cause.

PER CURIAM. Adopted in whole.

SOUTHWESTERN SURETY INS. CO. v. KING et al. (No. 8974.)

(Supreme Court of Oklahoma. April 9, 1918.)

(Syllabus by the Court.)

APPEAL AND EBBOR \$1232—REPLEVIN \$120—SUBBOGATION \$17(8)—PRINCIPAL AND SUBETY—LIABILITY OF SURETIES.

Mrs. K. sued G. L. K. and W. C. K. in replevin. S. W. Co. became surety for the defendants on the redelivery bond. Judgment was rendered for Mrs. K., and G. L. K. and W. C. K. appealed to the Supreme Court and gave a supersedeas bond to stay execution of the judgment, with J. E. L. and F. E. B. as sureties. S. W. Co. did not procure or consent to the giving of the supersedeas bond and stay of execution of the supersedeas bond and stay of executions of the supersedeas bond and stay of executions of the supersedeas bond and stay of executions. S. W. Co. did not procure or consent to the giving of the supersedeas bond and stay of execution. The judgment was modified and affirmed in the Supreme Court. Suit was then commenced by Mrs. K. against the principals and sureties on both bonds. *Held*: (1) That Mrs. K. was entitled to a joint and several judgment against the principals and sureties on each bond. (2) As between the sureties on the respective (2) As between the sureties on the respective bonds, the sureties on the supersedeas bond were primarily liable, and the surety on the redeliv-ery bond, upon payment of the judgment, is entitled to be subrogated to the rights of the judgment creditor as against the sureties on the supersedeas bond.

Error from District Court, Grady County; Will Linn, Judge.

Actions by Mrs. Ardie King, administratrix, against G. L. King and another and the Southwestern Surety Insurance Company, a corporation, and against J. E. Lucas and F. E. Baker, which were consolidated. There was a judgment for plaintiff against the several defendants, and for defendants Lucas and Baker against the Southwestern Surety Insurance Company, which brings error. Judgment for plaintiff affirmed, but judgments against the Southwestern Surety Insurance Company reversed.

G. A. Paul, of Oklahoma City, for plaintiff in error. Riddle & Hammerly, of Chickasha, for defendant in error King. Chas. West, of Oklahoma City, for defendant in error Lucas. Bond, Melton & Melton, of Chickasha, for defendant in error Baker.

RAINEY, J. Mrs. Ardie King, as administratrix of the estate of her deceased husband, instituted an action in replevin in the superior court of Grady county, Okl., against G. L. King and W. C. King, to recover possession of some mules which had been mortgaged to her deceased husband, as security for a debt evidenced by a note. At the commencement of the action a writ of replevin was issued and placed in the hands of the sheriff, who levied upon some of the mules described in the petition. Thereupon, the defendants G. L. King and W. C. King, as principals, and the Southwestern Surety Insurance Company, as surety, executed a redelivery bond in the sum of \$1,250, conditioned as required by law. The trial of this case resulted in a judgment for Mrs. King, as administratrix, for possession of the property that there is not any evidence in the record

or its value in the sum of \$1.475. The defendants appealed the case to the Supreme Court, and, for the purpose of staying execution, filed a supersedeas bond in the sum of \$1,500, with J. E. Lucas and F. E. Baker as sureties thereon. This court modified and affirmed the judgment of the superior court. See King v. King, 42 Okl. 405, 141 Pac. 788.

The defendants in the replevin action having failed to return the property or to pay the value thereof, as fixed by the court, Mrs. King, as administratrix, instituted two separate suits in the district court of Grady county, Oki., against the defendants G. L. King and W. C. King and their surety, the Southwestern Surety Insurance Company and J. E. Lucas and F. E. Baker, the sureties on the respective redelivery and supersedeas bonds. By agreement the actions were consolidated and tried as one action. At the conclusion of the evidence the plaintiff moved the court for judgment against the defendants and each of them for the amount sued for, and interest and costs. At the same time the Southwestern Surety Insurance Company filed a motion praying that. in the event judgment was rendered in favor of the plaintiffs and against the defendants, the court should also render judgment in its favor against the defendants J. E. Lucas and F. E. Baker. Counsel for the defendants J. E. Lucas and F. E. Baker thereupon prayed the court for judgment in their favor against the Southwestern Surety Insurance Company for the full amount of the judgment which the court might award against them, except the costs of the appeal in the Supreme Court. After taking the case under advisement for several weeks, the court rendered the following judgment:

lowing judgment:

"It is therefore by the court considered, ordered, and adjudged that plaintiff, Ardie King, as administratrix of the estate of ——, deceased, have and recover judgment against the defendants Southwestern Surety Insurance Company, J. E. Lucas, and F. E. Baker and each of them for sum of eight hundred ninety-four and \$9/100 (\$894.39) dollars with 10 per cent. interest thereon from October 6, 1911, and the costs of this action, and in addition from the defendants J. E. Lucas and F. E. Baker for the sum of the costs of the appeal to the Supreme Court in the cause No. 3453, King, etc., v. King et al., to which defendant Southwestern Surety Insurance Company excepted at the time, and the defendants J. E. Lucas and F. E. Baker have and recover judgment against Southwestern Surety Insurance Company for the sum of \$894.39 with interest herein recovered against them by the plaintiff above and defendant Southwestern them by the plaintiff above and defendant South-western Surety Insurance Company excepted

at the time.
"It is also ordered and adjudged that upon the satisfaction and payment of said judgment by the defendant Southwestern Surety Insurance Company, as herein directed, then said judg-ment herein rendered in favor of defendants Lu-cas and Baker shall be satisfied and discharged by the clerk of this court.'

Complaining of the judgment in favor of the plaintiff, the surety company contends



showing whether the conditions of the redelivery bond were complied with by returning the mules, or that a demand was made for their return. Assuming that it was necessary for the plaintiff to prove this breach of the redelivery bond, we have examined the record and find that there was ample testimony authorizing the court to find that the bond was breached in this particular, and that plaintiff had made the demand.

The second proposition argued in the brief of counsel for the surety company is that since Mrs. King, as administratrix, instituted the first action against the sureties on the supersedeas bond only, she could not thereafter bring a joint action against the sureties on the supersedeas and the surety on the redelivery bond. Counsel have evidently misread the record in this respect, for the first action was brought against the principals and sureties on both bonds.

The principal question involved in this appeal is: Are the equities of the sureties on the supersedeas bond superior to the equities of the surety on the redelivery bond, and which surety, if either, is subrogated to the rights of the judgment creditor against the other surety or sureties?

It is generally held that successive sureties on judicial bonds are liable to each other in the inverse order in which they became sure-Brandt on Suretyship and Guaranty (2d Ed.) vol. 1, p. 395; Stearns on the Law of Suretyship, § 271; Pingrey on Suretyship and Guaranty (2d Ed.) § 168, p. 191. In such cases the right of sureties to substitution or subrogation is based upon principles of equity and is not a right arising out of any. contractual relation. The principles underlying the vast majority of the reported cases are clearly enunciated in the early Ohio case of John W. Hartwell v. Oliver Smith, 15 Ohio St. 200. We quote from the language of Justice Scott, who delivered the opinion of

"There are two distinct and firmly established rights of sureties, which are involved in the consideration of this case: First, that of substitution, or subrogation, through which a surety paying off the debt of his principal is entitled to stand in the place of the creditor, and have all the rights which he has, for the purpose of reimthe rights which he has, for the purpose of reimbursement. A statement of this right was made in clear and forcible terms by the Chancellor (Lord Brougham), in Hodgson v. Shaw, 3 My. & K. 183, where it was said: 'It is hardly possible to put this right of substitution too high, and the right results more from equity than from contract or quasi contract; unless in so far as the known equity may he supposed to be imported. known equity may be supposed to be imported

known equity may be supposed to be imported into any transaction, and so raise a contract by implication."

"The doctrine of the court in this respect was luminously expounded in the argument of Sir Samuel Romilly, in Craythorne v. Swinburne (14 Vesey, 160); and Lord Eldon in giving judgment in that case sanctioned the exposition by his full approval. 'A surety,' to use the language of Sir S. Romilly's reply, 'will be entitled to every remedy which the creditor has, against the principal debtor, to enforce every security and all means of payment; to stand in the place of the creditor, not only through the medium on the first bond.

of contract, but even by means of securities entered into without the knowledge of the sure-

tered into without the knowledge of the surety; having a right to have those securities transferred to him, though there was no stipulation for that; and to avail himself of all those securities against the debtor.' \* \* \* "In regard to this question of superiority of equities, which is liable to arise in the case of prior and subsequent bonds, executed by different sureties, for distinct purposes, and both constituting securities in the hands of the creditor for the same debt, it is well settled that if the interposition of the second surety is for the benefit of the principal alone, without the sanction interposition of the second surety is for the benefit of the principal alone, without the sanction or assent of the first surety, who may be prejudiced thereby; as when the effect of the second bond is to prevent the enforcement of present payment from the principal, and thus to prolong the responsibility of the first surety; in such a case the equity of the first surety is superior, and he is entitled to be subrogated to the rights of the creditor as against the second. Parsons & Cole v. Briddook, 2 Vern. 608; Pott v. Nathans, 1 Watts & S. [Pa.] 155 [37 Am. Dec. 456]; Burns v. Huntington Bk., 1 Pen. & W. [Pa.] 395; Brandenburg v. Flynn's Adm'r, 12 B. Mon. [Ky.] 397; Dunlap v. Foster, 7 Ala. R. 734 (N. S.).

"And this doctrine seems to be entirely equitable, for it is but reasonable that the benefit in-

table, for it is but reasonable that the benefit intended for the principal alone, by the second surety, should be conferred, if at all, at his own risk, and not at the risk or to the prejudice of other parties whose wishes were not consulted

in the transaction.
"But the rule is otherwise, where the surety in the second bond becomes bound for a purpose in which both the principal and the prior sure-ty concur, in which they both have an interest, and where the assent of the prior surety is expressly given, or is clearly to be inferred from the circumstances of the case. In such a case the last surety has a right to look for his in-demnity, not only to his principal, but to such fixed securities as had been given to the creditor, when his engagement was entered into, and on the faith of which he may be presumed to have incurred his obligation. Howe y. Frazier, 2 Robinson [La.] 424, and authorities cited

2 Robinson [La.] 424, and authorness creasupra.

"It is settled law that if a creditor, by valid contract with his principal debtor, without the consent of the surety, extend the time of payment, by thus tying up his own hands, and suspending his right of action, on the original contract, against the principal, he discharges the surety. But if the contract for extending the time be made with the assent of the surety, his liability remains unaffected. Upon a principle quite analogous to this, do the conflicting equites of prior and subsequent sureties, in cases like the present, depend. If, without the conlike the present, depend. If, without the consent of the first surety, the creditor is arrested in the collection of his debt from the principal, by the interposition of a second surety, the forby the interposition of a second surety, the for-mer will be allowed, for his indemnity, to be subrogated to the rights of the creditor against the latter. But this equitable right can have no place, where the first surety assents to the second contract of suretyship; and especially where it is entered into at his instance, or for his benefit. His unqualified assent and concurrence leaves his prior liability in full force, as between the two sureties, and entitles the latter to the full right of substitution as against him.

In the case from which we have just quoted, the surety on the first bond united with the judgment debtor in executing the undertaking on appeal, in order to stay execution, and, because the appeal was taken with his assent and by his active procurement, it was held that he was not released from liability

In a Kentucky case, Brandenburg v. Flynn's Adm'r. 12 B. Mon. (Ky.) 397, the rule is stated as follows:

"We know of no case in which, on the ground either of contribution among cosureties or of substitution to the securities of the creditor, a subsequent surety coming in aid of the debtor alone, without the request or concurrence of the original sureties, and in the regular course of the remedy for coercing the debt from him alone, or for the purpose of obstructing its collection by his own separate proceeding and for his own benefit, has obtained in equity either partial or full reimbursement from the prior sureties. On the contrary, the doctrine established by the adjudged cases, and as we think in conformity with the true principles of equity, is that, if under such circumstances the prior surety is compelled to pay the debts, he thereby becomes entitled by substitution to the rights of the creditor required the subsequent surety to the whole expenses. against the subsequent surety to the whole ex-tent of the payment made and of the obligation of the subsequent surety; which precludes all right on the part of the subsequent surety, should the debt be coerced from him, to claim reimbursement from the prior surety.

The following authorities support plaintiff in error's contention that, in cases where the appeal is not taken with the consent of the prior surety, the first surety, upon payment of the obligation of his bond, is entitled to be subrogated to the rights of the creditor as against the sureties on the supersedeas bond. Brandenburg v. Flynn's Adm'r, 12 B. Mon. (Ky.) 397; Harnsberger et al. v. Yancey et al., 33 Grat. (Va.) 527; Friberg et al. v. Donovan, 23 Ill. App. 58; Kellar v. Williams, 10 Bush (73 Ky.) 216; Chrisman v. Jones et al., 34 Ark. 73; Moore, Adm'r, v. Lassiter et al., 16 Lea. (84 Tenn.) 630; Hinckley v. Kreitz et al., 58 N. Y. 583; Culliford v. Walser et al., 158 N. Y. 65, 52 N. E. 648, 70 Am. St. Rep. 437.

On the other hand, where the appeal is taken at the instance of, or by the procurement of, the surety on the first bond, the contrary rule is announced and followed. Hartwell v. Smith, supra; Dillon v. Scofield, 11 Neb. 419, 9 N. W. 554.

In a few cases it has been held that the sureties on a supersedeas bond are entitled to be subrogated to the rights of the creditor as against the sureties on a dissolving bond in attachment, on the theory that such bonds are a substitute for and stand in lieu of the property attached and released by the execution of the bond. Day v. McPhee, 41 Colo. 467, 93 Pac. 671; Rosenbaum v. Goodman et al., 78 Va. 121.

We do not think such cases have any application to the instant case, for the reason that a redelivery bond in replevin in this state is not, in the strict sense, a substitute for the property released in pursuance thereof, nor has the surety on the redelivery bond the option to return the property or its value, as contended by counsel for Mr. Lucas.

Section 4804, Rev. Laws of Oklahoma 1910, requires that the conditions of the undertaking shall be that:

will pay all costs or damages that may be awarded against him."

Under section 4807, Rev. Laws of Oklahoma 1910, the judgment for the plaintiff in an action to recover the possession of personal property may be for possession or the recovery of possession or the value thereof, in case delivery cannot be had.

It is very clear to us that in the instant action it was the duty of the obligors in the redelivery bond to return the property if possible, and, in the event this could not be done. the plaintiff was entitled to a judgment for the value thereof in an action on the bond. The judgment in the replevin action was for the return of the property, the execution of which judgment was stayed by the giving of the undertaking on appeal. The liability of the sureties on the supersedeas bond then became the same, as regards the return of the property, as that of the surety on the redelivery bond.

There is not any evidence in the record before us disclosing that the surety company procured or consented to the appeal and stay execution of the judgment rendered against the defendants in the replevin action. although, when the surety company executed the redelivery bond, as surety for said defendants, it was charged with the knowledge that under the law they were entitled to appeal. Still an appeal could have been taken by them without their giving a supersedeas bond; but, if so taken, execution would not have been stayed and the plaintiff would have been entitled to the possession of the property pending the appeal. And in that event, upon affirmance of the judgment, the plaintiff could have resorted to such property in her possession and subjected it to the payment of her claim. Under such circumstances, the surety on the redelivery bond would have been at least partially relieved from the burdens of its obligations. But Mr. Baker and Mr. Lucas, by becoming sureties for the defendants on their supersedeas bond, enabled them to obtain a stay of execution of the judgment until the case was finally disposed of in the Supreme Court, and thereby prevented the collection of the plaintiff's judgment until that time, which was some months after the appeal was taken. This delay was secured by Mr. Baker and Mr. Lucas agreeing to pay the judgment in the event the same was affirmed, and except for their intervention the judgment may have been enforced against the defendants in the replevin action. This delay may have injuriously affected the position of the surety company on the redelivery bond, and undoubtedly did in this case. It would seem, as between the parties thus situated, that justice would demand that the primary liability should be imposed upon those who caused the delay.

The court was therefore in error in rendering judgment in favor of Mr. Lucas and "The defendant will deliver the property to the plaintiff, if such delivery be adjudged, and Mr. Baker as against the surety company,

and this part of the judgment is reversed. rers, 38 Okl. 648, 134 Pac. 851. The affidavit The case, however, will be affirmed as to the of counsel for movant states, in effect, that judgment rendered against all the defendants in favor of the plaintiff. All the Justices concur.

NORTH v. HOOKER. (No. 9317.) (Supreme Court of Oklahoma. April 9, 1918.)

(Syllabus by the Court.)

1. JUDGMENT €==298, 341 - VACATION OB MODIFICATION DURING TERM.

It is a general rule of law that all the judgments, decrees, or other orders of the court, however conclusive in their character, are under the control of the court which pronounces them, during the term at which they are rendered or entered of record, and may be set aside, vacated, or modified by the court.

2. APPEAL AND ERROR \$\infty\$=957(1)—REVIEW-ABUSE OF DISCRETION.

Where it does not clearly appear that the court below abused its discretion, its action in relation to such motion will not be disturbed on appeal.

3. TRIAL \$==21-DUTY OF COURT TO CALL

COUNSEL.

When a cause is regularly set for trial, it is not the duty of the court to call counsel when absent, and it is no abuse of discretion to proceed to trial when the cause is reached in its order, where no postponement of the case has been taken, and no leave to be absent has been granted to the parties or their counsel.

Error from District Court, Tulsa County: Conn Linn, Judge.

Action between E. N. North and W. S. Hooker. There was a judgment for the latter, and the former brings error. Affirmed.

A. A. Small, of Tulsa, for plaintiff in error. Davidson & Williams, of Tulsa, for defendant in error.

KANE, J. The only question for review presented by the record before us is the action of the trial court in overruling a motion to reinstate the judgment by default rendered against the plaintiff in error herein. This motion was heard upon affidavits and oral evidence, and after overruling the same a motion for new trial was filed and overruled. As the motion for new trial was not properly allowable under our practice, any question sought to be presented thereby will be laid out of the case and not considered. Powell et.al. v. Nichols et al., 26 Okl. 734, 110 Pac. 762, 29 L. R. A. (N. S.) 886; Chivers v. Board of Com'rs of Johnston County, 161 Pac. 822, L. R. A. 1917B, 1296.

[1-3] The motion to reinstate upon its face stated no specific grounds for setting aside the judgment rendered for want of prosecution, but from the affidavits and oral evidence adduced in support thereof, we gather, the motion is not based upon any statutory ground, but merely invokes the inherent discretionary power of the trial court over its own judgments during the term at which they are rendered. Philip Carey Co. v. Vick- order. The clerk of the court testified that

the cause was set for trial for the 13th day of May, 1917, before Judge McNeill, one of the trial judges of the district court sitting in and for Tulsa county; that on said date Judge McNeill, finding it impracticable to try the cause, ordered it set for trial before Judge Linn, another of the judges of said county, on the following day; that affiant was not aware that said cause had been set for trial for the 13th of May, nor that it had been transferred to Judge Linn to be tried on the following day. It further appears that the cause was regularly called for trial by Judge Linn at 9 o'clock a. m. of the day on which it was set for trial before him, and that neither plaintiff nor his counsel being present, the plaintiff and his attorney of record and his assistant counsel were called in open court three times to appear and prosecute said cause, and came not. At this point counsel for defendant in error, who was present and ready for trial, endeavored to find counsel for plaintiff by telephoning his office and to his residence without avail. There was other evidence to the effect that the attorney of record for the movant had actual notice of the setting of the cause for about ten days before the date of trial, and that associate counsel, Mr. Small, who had active control of the case, but who did not appear as counsel of record for the reason that he had not been admitted to the bar, was informed by the deputy court clerk twenty minutes before the case was dismissed that the same was on call for trial before Judge Linn, and that Mr. Small, who was in the courtroom of Judge McNeill across the hall from Judge Linn's court, answered that he would not appear before Judge Linn, and that upon this information being conveyed to Judge Linn, judgment was entered by default for want of prosecution, as stated.

It further appears that shortly after the rendition of the judgment counsel for movant appeared, and thereafter, on the same day, filed a motion to set aside the judgment by default, and reinstate his cause, which was overruled. We find nothing irregular in the action of the trial court in setting the cause for trial. It had been at issue for more than ten days, and was therefore ready to be placed upon the trial docket. Section 5040, Rev. Laws 1910, provides that when actions are ready for trial they shall be set for particular days in the order prescribed by the judge of the court, and so arranged that the cases set for each day shall be as nearly as may be considered on that day. Counsel for movant seem to make some point on the fact that it does not appear that the order of the trial judge setting the case for trial on a particular day, to wit, the 13th day of May, does not appear on the journals as a court when this order was made by the judge he placed the case upon the calendar for trial on the 13th. This is all that was necessary; no order of court being required to set a case for trial on a particular day. Section 5042, Rev. Laws 1910, provides that the trial of an issue of fact and the assessment of damages in any case shall be in the order in which they are placed upon the trial docket, unless the court in its discretion shall otherwise direct. The court exercised this discretion in the case at bar by directing the cause to be heard on the following day out of its order before Judge Linn, and the order, being by the court, properly appears upon the journal. As no statutory right of the plaintiff in error was invaded, nothing remains for discussion, except the question whether the trial court abused its discretion in overruling the motion to set aside the judgment. We are not disposed to so hold. Counsel must take notice that by the provisions of section 5043, Rev. Laws 1910, "All actions are triable at the first term of court, after or during which the issues therein, by the time fixed for pleading are, or shall have been made up," and that if it be a trial case it shall stand for trial at such term ten days after the issues are made up. These statutes do not mean that a cause must be set for trial for a particular day, for ten days or any other specified time before it can be tried, but merely that the cases so set must be selected from the cases which have been at issue for the requisite length of time, and set for trial for such particular day as will best facilitate the transaction of the business of the court. When a case is regularly set for trial it is not the duty of the court to call counsel when absent, and it is no abuse of discretion to proceed to trial when the cause is reached in its order where no postponement of the case has been taken and no leave to be absent has been granted to the parties or their counsel. Linderman v. Nolan, 16 Okl. 352, 83 Pac. 796.

In the case at bar it may be barely possible that counsel had no actual notice of the setting of his case before Judge Linn, but there was evidence to the effect that he had notice before the rendition of the judgment that his case was being called for trial in the county court room across the hall from where counsel was, and that he stated that he would not appear before Judge Linn, and that judgment was not rendered against him until after this information had been conveyed to Judge Linn. In these circumstances, we believe that the trial court was entirely justified in entering judgment by default and proceeding with the public business of the court. Counsel does not undertake to explain his conduct in refusing to appear before Judge Linn, except by stating that he had an agreement with counsel for the other side to try the case before Judge McNeill. We find

no evidence of any such agreement, and if there was, such an agreement, it would not be binding upon Judge McNeill, if it appeared to him that the public business of the court required a transfer of this case for trial before Judge Linn.

For the reason stated, the judgment of the court below must be affirmed. All the Justices concur.

WAH-TSA-E-O-SHE et al. v. WEBSTER. (No. 8801.)

(Supreme Court of Oklahoma. April 9, 1918.)

#### (Syllabus by the Court.)

1. STATES & 9—INDIANS—TRIBAL CUSTOMS. Since statehood, an attempted divorce between members of the Osage Tribe of Indians in accordance with the custom of the said tribe existing before statehood is a nullity. A divorce between such members is controlled by the divorce laws of the state and must be effected in accordance therewith.

2. Indians & 28—Appealable Orders.

A final judgment or order made by the county court in the administration of the estate of a deceased Osage Indian is appealable the same as final orders or judgments made in estates of other citizens.

Commissioners' Opinion, Division No. 3. Error from District Court, Osage County; R. H. Hudson, Judge.

Suit between Nicholas Webster and Wahtsa-e-o-she and others to determine heirship. Judgment for Webster, and Wah-tsa-e-o-she and others bring error. Affirmed.

Leahy & MacDonald, of Pawhuska, for plaintiffs in error. Preston A. Shinn, of Pawhuska, for defendant in error.

PRYOR, C. This is an appeal from the district court of Osage county, Okl., from a judgment determining the heirs entitled to inherit the allotted lands of Lo-tah-tse-a, deceased, Osage allottee Indian.

The facts, in so far as material to the determination of the issues raised on appeal, are as follows: Lo-tah-tse-a and Wah-tsa-eo-she and Nicholas Webster were full-blood Osage Indians. In March, 1907, Nicholas Webster, in accordance with the Osage Indian custom, was married to Wah-tsa-e-o-she and Lo-tah-tse-a. Thereafter, in July, 1907, in accordance with the Osage Indian custom, Nicholas Webster was divorced from Wah-During the month of March, tsa-e-o-she. 1909. Lo-tah-tse-a divorced the said Nicholas Webster according to the Osage Indian custom. On the 13th day of September, 1909, Lo-tah-tse-a died, leaving surviving her no father or mother and no issue. That she left surviving her To-wah-gah-she, a half-brother, and Wah-tsa-e-o-she, half-sister, and George and Julia Dunlap, children of a deceased brother. Lo-tah-tse-a, deceased, had received an allotment of lands of the Osage Tribe of Indians of 657 acres, and left money bestates government as trustee for her in the amount of \$5.819.76. that these Indians should become citizens thereof. It would be anomalous, indeed, to say that the Indians had a right to partici-

There are two questions involved in this case on appeal: (1) Whether or not Nicholas Webster was the husband of Lo-tah-tse-a at the time of her death and entitled to share as an heir in her property; (2) whether or not an appeal lies from a judgment of the county court in determining the heirs of a deceased Osage Indian allottee.

[1] The first question depends on whether or not a divorce can be effected between members of the Osage Tribe of Indians after statehood according to the Osage Indian custom, or if such divorces are controlled by the state laws. The county court held that the divorce of Webster by Lo-tah-tse-a, in accordance with the tribal custom, was effective, and that Webster at the time of her death was not her husband, and not entitled to inherit. On appeal to the district court, the divorce was held to be ineffective and Webster was the husband of the deceased and entitled to share as an heir in her estate.

This question, it seems, must be determined from the effect upon the relation of the Indians to the state under the Enabling Act and the Constitution of the state and the incorporation of the Osage Tribe of Indians within the state's jurisdiction, and the intent of the state and federal government as gathered from these laws and acts. The Enabling Act and the Constitution included in and made the Osage Nation a part of the state. The second section of the Enabling Act provides:

"That all male persons, over the age of twenty-one years, who are citizens of the United States, or who are members of any Indian nation or tribe in said Indian Territory and Oklahoma, and who have resided within the limits of said proposed state for at least six months next preceding the election, are hereby authorized to vote for and choose delegates to form a constitutional convention for said proposed state."

Section 1, art. 3, of the Constitution of the state of Oklahoma, provides:

"The qualified electors of the state shall be male citizens of the United States, male citizens of the state, and male persons of Indian descent native of the United States, who are over the age of twenty-one years."

In the formation of the state it was one of requirements of Congress that these Indians should be allowed to participate in the direction of the affairs of the state and in the formation of the government thereof, also in framing of its Constitution, the fundamental laws of the state. It was specifically provided that the Osage Nation should be allowed to elect delegates to the constitutional convention for the purpose of adopting the Constitution. Clearly, it was the purpose and intent of Congress and of the people of the proposed state in the erection of the state and in creating its government

thereof. It would be anomalous, indeed, to say that the Indians had a right to participate in the making of the laws of the state and to have a voice in the government thereof and that they were not amenable to the laws of the state. Having the right to participate in the making of the laws of the state and to have a voice in the government thereof, they are, the same as other citizens, entitled to all the rights, privileges, and immunities thereof, but at the same time they must bear the burdens and responsibilities of citizenship and make their conduct conformable to the laws of the state, except where especially exempted therefrom; that their domestic relations since statehood are governed by the laws of the state, and there can be no divorces except such as are recognized by the state, and this is true notwithstanding the fact that Congress reserved in the Enabling Act the right to enact legislation in regard to the Indians and their property. It is clear that it was the purpose and intent of Congress that those Indians should be citizens of the state just as other citizens, with the right reserved to Congress to enact such legislation as it deemed necessary for their protection and the protection of their property.

[2] The second contention of the plaintiff in error is that the judgment of the county court was final and no appeal lies therefrom. Section 3 of the Act of April 18, 1912 (36 Stat. 86, c. 83), gives the county courts of Oklahoma jurisdiction over the property of the deceased Indians. In investing this jurisdiction in the county court, Congress could not have had any reason to have made any distinction between this class of cases and other cases. Certainly there is no reason why under this act, conferring jurisdiction upon county courts of these matters, Osage Indians should be deprived of the right to appeal the same as other citizens, and there is no reason why the county court's judgment should be final.

It must be held that an appeal lies from the judgment of the county court in cases between Indian citizens just the same as would lie between other citizens. The judgment of the trial court should be affirmed.

PER CURIAM. Adopted in whole.

CITY OF DUNCAN v. BROWN. (No. 8731.) (Supreme Court of Oklahoma. April 9, 1918.)

(Syllabus by the Court.)

1. Municipal Corporations \$\infty 768(3)\$—Sidewalks—Personal Injury—Negligence.

ing the Constitution. Clearly, it was the purpose and intent of Congress and of the proposed state in the erection of the state and in creating its government.

A sidewalk of one of the principal streets of a city, constructed upon request of its mayor by the adjoining property owner, was so constructed that it was six inches lower than the connecting sidewalk, and the city for more than

a year had notice of the condition of said sidewalk. An action was brought to recover damages for alleged personal injuries resulting from said condition of the sidewalk. *Held*, that the said construction of said sidewalk and the failure of the city to correct the same upon notice was actionable negligence, and the city was lia-ble for personal injuries resulting from the condition of said sidewalk.

2. APPEAL AND ERROR @== 757(4) - REVIEW

Instructions.

To have reviewed by this court instructions given or refused, it is mandatory that such instructions, to which exceptions have been taken, be set out in totidem verbis in brief. Following E. Van Winkle Gin & Machine Works v. Brooks, 156 Pac. 1152.

3. APPEAL AND ERROR \$\infty\$=1002\to QUESTION OF FACT\to VERDICT.

Where the evidence in an action at law is in conflict, if there is sufficient competent evidence to reasonably sustain the verdict rendered, this court will not disturb the verdict.

Commissioners' Opinion, Division No. 1. Error from District Court, Stephens County; Cham Jones, Judge.

Action by Nellie B. Brown against the City of Duncan, Okl. Judgment for plaintiff, and defendant brings error. Affirmed, and judgment rendered against the United States Fidelity & Guaranty Company, the surety on the supersedeas bond.

E. H. Bond and J. M. Sandlin, both of Duncan, and Chas. L. Moore, of Oklahoma City, for plaintiff in error. J. B. Wilkinson, of Duncan, for defendant in error.

COLLIER, C. This is an action brought by the defendant in error against the plaintiff in error to recover damages for personal injury alleged to have resulted to her by reason of negligence on the part of the city in maintaining a defective sidewalk. Hereinafter the parties will be designated as they were in the trial court. The undenied evidence in the case is that the plaintiff, about 7 o'clock at night, was on her way along one of the principal streets of the defendant to a picture show: that the said street was lighted, and in addition to the lights of the city there was also light from the picture show near which the injury complained of was received; that the sidewalk was not constructed by the city, but was constructed upon request of the mayor of the city by one of the adjacent property owners; that the said sidewalk was constructed so that the same was not even, said sidewalk being six inches lower than the adjoining parts of said sidewalk, and that said condition of the sidewalk existed for more than a year prior to the happening of the alleged injury to plain-The evidence was in conflict as to whether or not the plaintiff received any injury by reason of falling at said place by a part of the pavement being lower than the other part thereof, and whether or not the fall was due to the character of shoes the plaintiff wore, and as to whether the plaintiff previous to being injured knew of the

condition of said sidewalk. The defendant demurred to the petition, which demurrer was overruled and exceptions saved. Thereupon the defendant answered, denying liability. Upon the conclusion of the evidence the defendant demurred thereto, which demurrer was overruled and excepted to. Exceptions were saved to instructions given by the court, and to the refusal of the court to give requested instructions, but not any one of said instructions given, or instructions refused, are at all set out in defendant's brief. The jury returned a verdict for the plaintiff in the sum of \$300, to which the defendant duly excepted, and timely moved for a new trial, which was overruled, excepted to, and error brought to this court.

The assignment of errors are as follows: "(1) Said court erred in overruling the motion of plaintiff in error for a new trial, which ruling was duly excepted to by plaintiff in error,

at the time.

"(2) Said court erred in overruling the demurrer to the petition, which ruling was duly ex-

cepted to.

"(3) Said court erred in not rendering judgment for the plaintiff in error on the pleadings.

"(4) Said court erred in giving the following instructions to the jury, to wit: Instrucing instructions to the jury, to wit: Instructions numbered 4, 5, 6, and 7, set out in the case-made at pages 80 to 82, both inclusive, which instructions were duly excepted to by the

plaintiff in error at the time.

"(5) Said court erred in refusing to give the following instructions to the jury, asked for by the plaintiff in error, to wit: Requested in-structions, numbered from 1 to 8, both inclusive, set out in the case-made at pages 76 to 78, both inclusive; said refusal being excepted to by the plaintiff in error at the time.

"(6) Said court erred in admitting illegal and

incompetent evidence on the part of the defendant in error, the same having been objected to by plaintiff in error, and an exception saved to

the ruling of the court thereon.

"(7) Said court erred in refusing and ruling out competent and legal evidence on the part of which action of the court the plaintiff in error, which action of the court was duly excepted to at the time.

The overruling of the demurrer to the evidence is not assigned as error.

The record does not disclose that the defendant made a motion for judgment on the pleadings, and the refusal of the trial court to render such judgment is not referred to in defendant's brief, and therefore such alleged error is abandoned.

The demurrer to the amended petition is not argued in the brief, or any defects in the petition to which the demurrer is addressed pointed out; hence the assignment as to the demurrer to the petition must be regarded as abandoned.

It is not set out in the brief, the evidence complained of, and the ground upon which objection to such evidence was predicated, therefore this court will not consider said assignments sixth and seventh.

"In order to have reviewed by this court the action of the trial court in the admission or rejection of evidence, it must be clearly shown by the brief the evidence complained of and the ground upon which objection to such evidence is predicated." Connelly et al. v. Adams et al., 152 Pac. 607; First Bank of Maysville et al. v. Alexander, 153 Pac. 646.

[2] The instructions given and excepted to. and the instructions requested by the defendant refused and excepted to, are not set out in the briefs in totidem verbis as required by part of rule 25th of this court, and therefore the same cannot be considered. In E. Van Winkle Gin & Machine Works v. Brooks, 156 Pac. 1152, Chief Justice Kane says:

"If counsel desired to present for review error predicated upon instructions given or refused, it was incumbent upon him to follow that part of rule 25 (137 Pac. xi) of this court, which provides: 'Where a party complains of instructions given or refused, he shall set out in totidem verbis in his brief the portion to which he objects or may save exceptions.' There has been no effort on the part of counsel to observe this rule, although it has been many times held to be mandatory. Lynn v. Jackson, 26 Okl. 852, 110 Pac. 727; Jantzen v. Emanuel German Baptist Church, 27 Okl. 473, 112 Pac. 1127, Ann. Cas. 1912C, 659; Reynolds v. Hill, 28 Okl. 533, 114 Pac. 1108; Seaver v. Rulison, 29 Okl. 128, 116 Pac. 802; Arkansas Valley Nat. Bank v. Clark, 31 Okl. 413, 122 Pac. Nat. Bank v. Clark, 31 Okl. 413, 122 Pac. 135."

Therefore the only error assigned which we can consider is "that the court erred in overruling motion of plaintiff in error for a new trial."

[1] The evidence disclosing that the condition of the sidewalk had existed for more than a year prior to the happening of the accident resulting in the injury of the plaintiff, it was actionable negligence for the defendant to permit the sidewalk to remain in the condtion it was. Whether or not the plaintiff was exercising ordinary whether or not she was injured by reason of the condition of the sidewalk, and whether or not the city had or ought to have had notice of the condition of the sidewalk, are questions of fact for the jury; and, there being evidence to sustain the verdict, though in conflict, the verdict of the jury is conclusive on these points: In the City of Woodward v. Bowder, 149 Pac. 138, it is held:

"The existence of the fact of actionable notice, or of facts constructively equivalent as matter of law to actual notice, as well as the reasonable sufficiency of the measures taken to prevent injury from an unsafe condition of a sidewalk, are ordinarily questions for the jury to determine."

In Cleveland Trinidad Paving Co. v. Mitchell et al., 42 Okl. 49, 140 Pac. 416, it is held:

'The notice of a defective street or sidewalk to a city may be actual or constructive. The question of notice is one of fact for the jury to determine.

In Town of Norman v. Ursula J. Teel, 12 Okl. 69, 69 Pac. 791, the following rule is stated:

"The sufficiency of the notice to fasten liability upon a city for a defective sidewalk is a question of fact to be determined by a jury un-der all the circumstances surrounding the par-It is not essential that the corporation shall have actual notice.

tive condition of the street or sidewalk has existed for such a period of time that by the exercise of ordinary care and diligence the city authorities could have repaired the defect and placed the street or sidewalk in a reasonably safe condition, and it fails to do so, then it is liable for any injuries that may be occasioned thereby by reason of such negligence, provided the injured party was in the exercise of ordinary care.

[3] While the evidence is in direct conflict as to whether or not the plaintiff was injured by the fall, and whether or not said fall was due to the character of shoes she wore. or the condition of the sidewalk, and whether or not she had, previous to the time of receiving the alleged injury, knowledge of the condition of the sidewalk, but there being evidence sufficient to sustain the verdict, we will not disturb the same, notwithstanding the evidence is in conflict.

We are unable to see that the trial court erred in overruling the motion for a new

Finding no error in the record, this cause is affirmed.

It being made to appear by the record in this case that the judgment rendered in this cause was superseded by the execution of a supersedeas bond with the United State Fidelity & Guaranty Company, a corporation, as surety, it is hereby adjudged and ordered that judgment be rendered against said United States Fidelity & Guaranty Company, a corporation, for the sum of \$300, with interest thereon from April 20, 1916, at 6 per cent. per annum, and costs for which let execution issue out of the trial court.

PER CURIAM. Adopted in whole.

FIRST NAT. BANK OF CUSHING v. KETCHUM. (No. 8645.)

(Supreme Court of Oklahoma. April 9, 1918.)

(Syllabus by the Court.)

Banks and Banking \$\infty\$=154(5)—Deposit-

ORS—PLEADING—EVIDENCE.
Where plaintiff brought an action against a bank to recover moneys deposited and the bank pleaded payment of said sum upon checks drawn by plaintiff and alleged that after same had been charged to plaintiff's account he claimed that a certain check had been forged by raising the amount thereof, whereupon the bank credit-ed his account with the amount thereof and brought suit against the person who presented said check to recover the amount paid thereon, and alleged further that, if said check had been altered, said alteration was made possible by the negligent manner in which plaintiff had executed said check, held, that it was not error to permit plaintiff to testify as to the alteration made in said check.

2. BANKS AND BANKING \$\iiii 154(6)\$—AOTIONS —BURDEN OF PROOF.

In an action by a depositor against a bank to recover a balance due, where the bank pleads payment the burden is on the bank to show that that the corpo-if the defection out on checks drawn by him.

FECT.

Where an instrument, when executed, is complete on its face and after delivery thereof by the maker is materially altered, it is annulled except as against a party who made, authorized, or assented to the alteration.

Error from District Court, Payne County; R. W. Higgins, Judge.

Action by H. R. Ketchum against the First National Bank of Cushing, Okl. There was a judgment for plaintiff, and defendant brings error. Affirmed.

John R. Hadley and Walter Mathews, both of Cushing, for plaintiff in error. Thomas A. Higgins and Sylvester J. Berton, both of Cushing, for defendant in error.

HARDY, J. H. R. Ketchum commenced an action against First National Bank of Cushing to recover a balance due on certain deposits made by him and for damages for wrongfully protesting two checks which had been drawn by him against his account when sufficient funds were on deposit to pay said checks. The bank answered pleading payment of the deposit and set out in detail the checks paid by it which had been drawn by plaintiff against his account, among which was one check for the sum of \$80, about which last-mentioned check this controversy Verdict and judgment were for Ketchum, and the bank appeals. The parties will be referred to as they appeared in the trial court.

[1] The court permitted plaintiff, over objections by defendant, to testify that a certain check purporting to be for the sum of \$80 which had been charged to his account by defendant had been altered after its execution and delivery by him, in that the amount thereof had been raised from 80 cents to 80 dollars, and this action of the court is urged as error for the reason, as counsel claims, there was no allegation in any of the pleadings tendering an issue as to the amount of said check. Defendant alleged in its answer that, after this check had been paid by defendant and charged against the deposit of plaintiff in the sum of \$80, plaintiff objected to the charge and claimed the check had been raised from 80 cents to 80 dollars and that defendant thereupon credited plaintiff's account with the sum of \$79.20, and entered into an agreement whereby an action was to be commenced against the person presenting said check for payment to recover said sum, and further alleged that if said check had been altered as claimed the alteration thereof was made possible through the negligence of plaintiff because of the manner in which said check was executed. Under these allegations the evidence was properly admitted.

The court instructed the jury that the burden was on defendant to prove that the the check was written. check as paid by it was in the same condi-|"only" was erased, a hole plainly appears

3. ALTERATION OF INSTRUMENTS €==16 — Er- | tion as when drawn by defendant, and refused to instruct upon defendant's request that the burden was on plaintiff to prove an alteration in the check.

> [2] The relation between plaintiff and defendant was that of debtor and creditor, and there being no controversy over the fact that plaintiff had deposited certain funds to his credit with defendant, defendant seeking to avoid a recovery by plaintiff upon the plea of payment, was charged with the burden of sustaining that plea by a preponderance of the evidence. Winton v. Myers, 8 Okl. 421, 58 Pac. 634; Edwards et al. v. Johnston-Larimer D. G. Co., 158 Pac. 446: Standard Fashion Co. v. Joels, 159 Pac. 846; Zane on Banks and Banking 291; 7 C. J. 668.

> The defendant could not lawfully pay out moneys on deposit with it to plaintiff's credit except as directed by him, and in maintaining its defense of payment it was incumbent upon defendant to show that the checks upon which said moneys were disbursed were drawn by plaintiff, and this it sought to do by showing a credit of \$80 which had been paid out on a check which defendant claimed had been executed by plaintiff. It was not enough to show that the moneys had in fact been paid out, but it was necessary to go further and show that same had been paid out according to the directions of plaintiff, and that the checks for the payment of which credit was claimed were the checks of plaintiff. Cushman v. Ill. Starch Co., 79 Ill. 281; Harris v. Jacksonville Bank, 22 Fla. 501, 1 South. 140, 1 Am. St. Rep. 201; Zane on Banks & Banking, 291.

> [3] Irrespective of the question as to where lay the burden of proof, the evidence conclusively establishes the alteration of the check in controversy. The original instrument is before us, and an examination thereof establishes beyond any reasonable doubt that it has been altered as claimed. It was originally written in ink, and, at the end of the line opposite the name of the payee where the amount of the check is usually designated in figures, the maker had, according to his testimony, written the amount thus, "X80/100," and in the line where the amount was written out, stated the amount thus, "only eighty cents." The check as it now is, and was at the time of its payment, shows the original writing to have been retraced with an indelible pencil, and opposite the name of the payee, where the amount was designated as above stated. same has been changed to read "\$80.00," and on the line where the words "only eighty cents" were written the words "only" and "cents" have been erased, leaving the word "eighty" in writing, and at the right end of the line appears the word "dollars," which is a part of the blank printed form on which Where the word

> > Digitized by Google

in the paper, and where the word "cents" was erased the paper is much thinner, and upon being held up to the light shows plainly that an erasure has been made, and where the figures "\$80.00" now appear an erasure also is plainly shown to have been made. There cannot be any reasonable doubt that the check has been materially altered, and the testimony of plaintiff that the alteration was made after its execution and delivery by him is uncontradicted, and, even if the court committed error in its instructions as to the burden of proof, we would not reverse the case for that reason.

Defendant claims that plaintiff was negligent in drawing the check, and thereby made it possible for the alteration to be made, and for that reason is not entitled to recover, and that the court committed error in instructing the jury that the fact whether or not the check was negligently drawn was not to be considered by them. The negligence alleged is said to consist in the failure of plaintiff to draw a line through or erase the dollar mark at the end of the line where the amount of the check was designated in figures and in failing to erase the printed word "dollars" at the end of the line where the amount of the check was written in words, and because of his failure to do this it was made possible for the person altering the check to make the erasures hereinbefore described and leave the check in its present condition. The rule urged has frequently been applied where an instrument was executed leaving certain blanks therein which were afterwards filled out in such a manner as to leave no mark or indication of an alteration therein; but the distinction between an instrument executed in blank as to the date, the name of the payee, or the amount when signed and delivered to another for use, and with authority to fill in blanks thus left, and an instrument complete on its face when signed and delivered in which material alterations have been made is emphasized in many of the cases. In the latter case there is no implied authority to change the instrument as delivered, and the negligence of the maker under such circumstances cannot be said to cause the loss which required the commission of a crime by another to effect. Where the maker of an instrument carelessly leaves blank spaces therein which he intrusts to another to fill, and that other person disobeys instructions and fills up the space for a larger amount, the rule may well be invoked, for the loss occasioned thereby is the natural and probable result of his negligence and should have been foreseen by him: but, on the other hand, when a person ex-

ecutes an instrument complete in itself. though unskillfully drawn, he should be protected from its alteration by forgery in any manner, for he has as much right to presume that the holder thereof will not commit the crime of forgery by its alteration as there is for others to presume that it has not been so altered. This rule has been declared in this state by statute. Section 4174. Rev. L. 1910, provides as follows:

"Where a negotiable instrument is materially "Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided, except as against a party who has himself made, authorized, or assented to the alteration, and subsequent indorsers. But when an instrument has been materially altered and is in the hands of a holder in due course not a party to the alteration, he may enforce payment thereof according to its original tenor."

The alteration is palpable, and the most ordinary examination of the check upon the part of the bank would have revealed it. It was discredited on its face by its very appearance at the time the bank took it, and, instead of the plaintiff being negligent, the evidence convinces us that the bank was extremely careless in paying this check in the condition it was when it was presented, and is not in a position to say that its loss was occasioned by any negligence of plaintiff.

The holding a maker bound by an altered instrument, when he was not negligent in its execution, is in effect to say that the crime of forgery was committed under implied authority from him and renders him liable upon a contract which he never executed, authorized, nor ratifled, and places upon him the burden of anticipating and guarding against the many and devious ways by which the crime of forgery is committed. The great weight of authority rejects this view and holds in line with our statute above quoted that a material alteration in a negotiable instrument after its execution and delivery as a complete contract avoids it except as against parties consenting to the This doctrine rests upon the alteration. sound principle that parties are only liable on their contracts as made and entered into by them in the absence of ratification or estoppel. Greenfield Savings Bank v. Stowell et al., 123 Mass. 196, 25 Am. Rep. 67; Holmes v. Trumper, 22 Mich. 427, 7 Am. Rep. 661; Knoxville Nat. Bank v. Clark, 51 Iowa, 264, 1 N. W. 491, 33 Am. Rep. 129; Fordyce v. Kosminski, 49 Ark. 40, 3 S. W. 892, 4 Am. St. Rep. 18; Burrows v. Klunk, 70 Md. 451, 17 Atl. 378, 3 L. R. A. 576, 14 Am. St. Rep. 371; Goodman v. Eastman, 4 N. H. 455; Exchange Nat. Bank v. Bank of Little Rock. 58 Fed. 140, 7 C. C. A. 111, 22 L. R. A. 686. The judgment is affirmed. All the Justices

LACLEDE OIL & GAS CO. v. MILLER. (No. 8700.)

(Supreme Court of Oklahoma. April 9, 1918.)
(Syllabus by the Court.)

1. APPEAL AND EBBOR \$==110, 561 - NEW TRIAL \$==85, 93-DEFAULT-CASE-MADE.

A party against whom a judgment is rendered, though in default of appearance in the case, may file a motion for a new trial within three days from the rendition of the judgment and appeal from an order of the court overruling such motion. If the case is one requiring the introduction of testimony in order to render judgment, such party is entitled to have the testimony transcribed by the official court reporter and incorporated into a case-made on proper request therefor and payment of the lawful charges; and, if the errors properly presented on appeal necessitate a review of the evidence, and it becomes impossible to make a case-made incorporating such testimony, through no fault of such party, a new trial will be granted on proper application therefor.

2. APPEAL AND ERROR \$\infty 230\text{-Sufficiency} of Evidence\text{-Exception.}

In an action where defendant defaults, the case being one which requires the introduction of testimony, and the case is tried before the court without a jury, resulting in judgment against the defendant, an assignment that the testimony is not sufficient to sustain the judgment, which error was timely presented to the trial court by motion for a new trial, overruled by the court, exceptions being reserved by the defendant, properly presents to the appellate court the question of the sufficiency of the testimony to sustain the judgment, and the testimony will be reviewed for such purpose.

APPEAL AND ERROR \$\infty\$=230 — EXCESSIVE DAMAGES—EXCEPTION.

Where a defendant defaults, judgment for damages being rendered against him without his appearance, an assignment of excessive damages appearing to have been given under the influence of passion or prejudice, based upon exceptions preserved to the overruling of a motion for a new trial, duly filed and presenting such error to the trial court, authorizes the reviewing on appeal of the testimony for the purpose of ascertaining whether or not the damages awarded are excessive.

Commissioners' Opinion, Division No. 1. Error from District Court, Kay County; W. M. Bowles, Judge.

Action by Mollie A. Miller against the Laclede Oil & Gas Company. Judgment on default for plaintiff, and defendant appeals from judgment overruling petition for a new trial. Reversed and remanded for new trial.

L. A. Maris, of Ponca City, for plaintiff in error. B. C. Wieck, of Ponca City, for defendant in error.

STEWART, C. [1] On September 2, 1916, the defendants were duly summoned to answer petition of the plaintiff asking judgment for damages to lands of plaintiff alleged to result from the negligent acts of the defendant in throwing salt water, oil waste, and refuse matter on said lands, causing the same to become foul, unproductive, and valueless for grazing and agricultural purposes. The case came on regularly for hearing be-

fore the court on March 27, 1916. The defendant did not file any answer or other plea to the petition of plaintiffs and did not appear at the time the case was called for trial. Judgment was rendered against the defendant in the sum of \$800 on testimony introduced by the plaintiff. On the following day, March 28, 1916, the defendant filed motion for a new trial setting up statutory grounds but not offering any excuse for failure to plead or to appear at the time judgment was rendered. The motion was overruled: the defendant gave notice of appeal and was granted an extension of time within which to make and serve case-made, which time was further extended by subsequent orders of the court. On September 4, 1916, the defendant filed a petition, as authorized by statute, for new trial, setting up in substance that, without fault of the defendant, it was impossible to make a case-made; that the defendant had diligently and persistently requested the court reporter who took the stenographic notes of the testimony and of the proceedings to furnish the defendant a correct transcript of such proceedings, including the testimony of the witnesses to be incorporated into the case-made; that the stenographer had lost his notes and was unable to find the same, and because of such fact the defendant was unable to prepare a complete case-made. The defendant urges that he was entitled to a new trial under subdivision 9 of section 5033, R. L. 1910, which authorizes the granting of a new trial when without fault of the complaining party, it becomes impossible to make a casemade. Plaintiff filed response admitting that a transcript of the testimony, through no fault of the defendant, could not be procured, and that the defendant had diligently attempted and failed to obtain the same, but averring that the defendant could have been furnished with a transcript of the pleadings and proceedings filed and had in said cause, except a transcript of the testimony of witnesses introduced by plaintiff.

It is well settled that all final orders of the trial court may be appealed from whether on default or otherwise, and that an appeal lies from an order granting or refusing a new trial. The statute does not limit the right to file motion for new trial to parties who appear at or before the trial, but authorizes the "party aggrieved" to make the application. A defendant in default may file the motion within the time fixed by statute. The defendant in this case filed motion in due time and was entitled to have the order of the court denying the motion reviewed by the court. It is true that, as a general rule, errors occurring during the course of the trial will not be considered unless exceptions are preserved. It is likewise true that the defendant could have had a tran-



script of the record proper and have present- the sufficiency of the testimony to sustain ed such error, if any, as appeared on the face of the judgment roll. The question arises: Could this court have considered the testimony in the case at bar for any purpose? If so, the defendant had the right to have the same in his case-made. But if, in no event, the testimony could serve any purpose in the appeal, the defendant is not entitled to a new trial because of inability to procure the same.

[2, 3] It has been uniformly held by this court that the sufficiency of the evidence cannot be reviewed on appeal unless such sufficiency is challenged during the trial. This rule is, however, qualified to the extent that the testimony may be reviewed for the purpose of determining whether or not the damages are excessive and appear to have been given under the influence of passion or prejudice when such question is raised in the motion for a new trial and properly presented to this court by assignment of error. Van Arsdale & Osborne Brokerage Co. v. Hart, 162 Pac. 461; Simpson v. Mauldin, 160 Pac. 481; Reed v. Scott, 151 Pac. 484; Muskogee Electric Traction Co. v. Reed, 35 Okl. 334, 130 Pac. 157. We may further say that the case at bar, having been heard and determined by the court without a jury, would also come under the rule announced by Mr. Commissioner Collier in Lambert v. Harrison, No. 8514, 171 Pac. 45, not yet officially reported, which rule reads as follows:

"In a trial of a cause by the court, the question of a sufficiency of the evidence to support the judgment may be reviewed by this court upon the overruling of the motion for a new trial alleging the insufficiency of the evidence, al-though there has been no demurrer to the evidence or request for judgment for the defendant."

The defendant in the motion for a new trial and in the petition in error, among other matters, presents the following error:

"Fourth. Excessive damages appearing to have been given under the influence of passion or prejudice. Fifth. Error in the assessment of the amount of recovery, in that too much damages for injury to property were awarded. Sixth. That the decision is not sustained by sufficient evidence and is contrary to law.

In our opinion the court would have had the authority to review the testimony in the case at bar in order to determine whether or not the same is excessive and further to pass on the sufficiency of the testimony. statute does not confine such authority to cases where there has been an appearance by the party claiming to be aggrieved. It is sufficient if the aggrieved party calls timely attention of the trial court to such errors in the manner prescribed by law; that is, by filing a motion for a new trial. In the case under consideration, we hold that the exceptions to overruling the motion for new

the judgment. Such being our view, the defendant in the case at bar was entitled to. have the testimony incorporated in a casemade. The admitted facts being that defendant has diligently but vainly sought to obtain the same and is without fault, a new trial should be awarded.

The cause is reversed, and remanded for a new trial.

PER CURIAM. Adopted in whole.

PHILLIPS et al. v. MITCHELL et al. (No. 4568.)

(Supreme Court of Oklahoma. Nov. 20, 1917. Rehearing Denied April 23, 1918.)

## (Syllabus by the Court.)

1. Parties \$\sim 92(1)-Misjoinder-Waiver. The objection that there is a misjoinder of parties must be raised in some proper manner before trial, or same will be waived.

2. ABATEMENT AND REVIVAL \$== 84-JUBISDIC-TION-OBJECTIONS.

A party who denies the jurisdiction of the court over his person must raise the point before he answers to the merits.

EVIDENCE \$\sim 581\text{—Testimony of Absent Witness\text{—Discretion.}}

It is within the sound discretion of the trial court to determine the degree of preliminary proof necessary to admit the testimony of an absent witness given at a former trial in the same case.

Evidence == 253(1) -- Admissibility --STATEMENTS BY ASSOCIATE.

Plaintiff and another were endeavoring to make a joint sale of stock owned by them in a corporation. The other party in order to in-duce a purchaser of said stock made a written statement of the financial condition of the cor-poration. *Held*, in the absence of a showing that plaintiff authorized the statement or was in some way connected therewith, the same was inadmissible against him.

APPEAL AND ERROR \$\infty\$1046(5)\to Remarks of Court-Prejudice.

Remarks of the court made during the trial examined, and held not prejudicial.

6. Action €=59—Consolidation - Powers OF COURT.

Where parties consent to the consolidation of two separate actions and agree that same may be tried as one action, the power and jurisdiction of the court with respect thereto is the same as if it had originally been brought as one action containing all the issues embraced within the consolidated case.

7. COURTS \$\infty\$ 150\frac{1}{2}, New, vol. 12 Key-No. Series—Equitable Jurisdiction of District Court—Fraud.

The equitable jurisdiction of the district court extends to all actions of fraud, except only that limited class of cases in which a judgment for damages affords adequate relief and fraudulent sales or exchanges of land form no exception to the rule, and it is not an insuper-able objection to such jurisdiction that an award of damages may be had, for unless such award affords full and adequate relief in order to avoid trial properly saved the question of exces-circuity of action equity may award all the sive damages and the further question of relief appropriate to the case.

8. APPEAL AND EBROR \$\infty\$ 173(11)—PLEADING swered by general denial, and filed a cross-Set-Off Below.

SET-OFF BELOW.

Where defendant did not plead certain matters as a set-off against plaintiff's claim for damages and insisted in the trial court and in this court upon the original submission that said matters could not be set off against plaintiff's cause of action, said defendants cannot for the first time in this court upon a rehearing urge said matters as a set-off.

9. EXCHANGE OF PROPERTY \$\instructure{1} 3(1)\$—Relief in Case of Fraud.

Where plaintiff was induced by fraudulent misrepresentations as to the value of certain corporate stock to exchange therefor certain lands, and as a part of said agreement of exchange plaintiff obligated himself to pay off certain incumbrances against said land, and where to indemnify himself against said outstanding obligations defendant retained a large amount of the stock sold to plaintiff and also took from plaintiff and wife a mortgage upon certain other real estate, and where defendant failed to account for said stock, held that, in an action by plaintiff for damages and for equitable relief based upon said fraudulent transaction, defendant was properly charged with the stock retained by him, which at the time of the fraudulent transactions exceeded in value the amount of the outstanding incumbrances upon the lands sold to defendant, and that plaintiff was entitled as against defendant to be relieved of his agreement to discharge said incumbrances.

(Additional Syllabus by Editorial Staff.)

10. Action ⇔50(3)—Joinder of Causes of Action—Suits Growing out of Same Subject-Matter,

A cause of action by a husband that he had been defrauded of his lands in exchange for corporate stock may be joined with a cause of action by his wife that by reason of fraud practiced on him she had been induced to execute the mortgage upon her separate property, to secure his obligations; Rev. Laws 1910, § 4690, providing that all persons having an interest in the subject of the action and in obtaining the relief may be joined as plaintiffs, and section 4738, permitting plaintiffs to unite causes of action in the same petition where they all arise out of the action.

Sharp, C. J., and Thacker and Miley, JJ., dissenting in part.

Error from District Court, Logan County; A. H. Huston, Judge.

Suit by R. I. Phillips against W. O. Mitchell and wife for reformation of a deed, consolidated with a suit by defendants against D. M. Phillips, R. I. Phillips, and others for damages, and heard together by agreement. Judgment for W. O. Mitchell and wife, and D. M. Phillips and others bring error. Affirmed.

See, also, 152 Pac. 610.

Milton Brown, Giddings & Giddings, and Tom F. McMechan, all of Oklahoma City, for plaintiffs in error. Horace Speed, of Tulsa, for defendants in error.

HARDY, J. R. I. Phillips instituted suit in the superior court of Logan county, seeking reformation of a certain deed, executed to him by W. O. Mitchell and Helen E. Mitchell, his wife. Mitchell and wife an-

petition, alleging fraud in the procurement of said deed, and prayed damages in the sum of \$21,000 against D. M. Phillips, R. I. Phillips, H. E. Diehl, and Otto Meek. Upon motion of plaintiff, this cross-petition was stricken, after which plaintiff therein filed an action in the superior court of Logan county against all of said defendants, setting forth the facts alleged in said cross-petition, and service of summons was had upon R. I. Phillips in Logan county, and upon the other defendants in Oklahoma county. Defendants answered this action by a general denial. Both of said suits were thereafter transferred to the district court of Logan county, and by agreement of the parties consoli-

This controversy grows out of a transaction between D. M. Phillips and W. O. Mitchell. Phillips, his wife, and son, originally owned all the stock of the O. K. Bus & Carriage Company, which was incorporated for \$1,000. In 1909, the capital stock was increased to \$60,000, and 594 shares of stock of the new corporation were in the name of D. M. Phillips; his wife held 3 shares, and his son, R. I. Phillips, 3 shares. The par value of the stock was \$100 per share. Various shares of such stock passed into the hands of other parties, some of which were obtained by trade or purchase, and some were transferred to certain persons without consideration to be held in trust for D. M. Phillips. In the fall of 1909, D. M. Phillips traded plaintiff W. O. Mitchell 200 shares of said stock for a farm in Logan county, and later traded him 110 shares for other farm lands in Logan county and Oklahoma City property, comprising the residence of Mitchell and wife. As a part consideration for said last-mentioned stock, Mitchell and wife executed to Phillips a note for \$1,000 and a mortgage for \$3,500 upon certain lands in Oklahoma City, which mortgage secured said \$1,000 note, and the sum of \$2,500 being the amount of a mortgage against the land conveyed in the second transaction which Mitchell agreed to discharge. The land conveyed in the first transaction was mortgaged in the sum of \$7,100, which plaintiff W. O. Mitchell agreed to pay and defendant D. M. Phillips retained as an indemnity 170 shares of stock in the corporation which was to secure the payment of the entire \$9,600. Helen E. Mitchell, the wife of W. O. Mitchell, joined in the conveyance of the real estate and the execution of said mortgage. One of the farms located in Logan county was at the request of defendant D. M. Phillips conveyed to his son, R. I. Phillips, and the land so conveyed was, by mistake, misdescribed in the deed. W. O. Mitchell assumed the management of the corporation in January, 1910. It having been learned that the property con-



veyed to R. I. Phillips had been misdescrib- rights of both, and one judgment will be a ed, request was made of W. O. Mitchell that he make a new deed with a correct description of the property, which he refused to do, giving as a reason therefor that he had been defrauded in the trade with D. M. Phillips. Shortly thereafter the action of R. I. Phillips for reformation of the deed was com-At the trial of the consolidated case, the court submitted certain issues to the jury which returned a verdict against D. M. Phillips, H. E. Diehl, and Otto Meek in the sum of \$12,000, and in favor of R. I. Phillips. Judgment was rendered correcting the deed as prayed by R. I. Phillips and in favor of plaintiffs in accordance with the verdict of the jury, and it was further decreed that plaintiff W. O. Mitchell be not required to pay to defendant D. M. Phillips nor in his behalf to protect him in his title to the lands conveyed in so far as plaintiff had obligated himself to discharge the incumbrances thereon, and that plaintiff's agreement to pay same should not operate.as a set-off against the judgment rendered, and canceling plaintiff's agreement with said defendant to pay said obligations, and also canceling the mortgage for \$3,500 given by Mitchell and wife on the Oklahoma City property. The court further found that D. M. Phillips had advanced W. O. Mitchell \$1,-000 in cash for which he was entitled to credit, and reduced the amount of the money judgment to \$11,000, which was entered against defendants D. M. Phillips, H. E. Diehl, and Otto Meek. Motion for new trial having been overruled, said defendants prosecute error.

[1] Defendants first urge that Helen E. Mitchell, wife of W. O. Mitchell, was not a proper party to the suit. She joined in the original petition by her husband to which defendants replied by general denial, and the objection here urged was not raised until after the jury had returned their verdict, and motion for new trial had been overruled. This objection comes too late, because it was not raised by timely motion or in any other way before the trial.

[10] Helen E. Mitchell was the owner of the property described in the mortgage for \$3,500, and had a substantial interest in the subject-matter of this litigation. Mitchell's cause of action was that he had been defrauded of the lands given by him in exchange for the stock of the corporation, and the wife's cause of action was that by reason of the fraud practiced upon her husband she had been induced to execute the mortgage upon her separate property to secure the obligations of her husband. These causes of action are not identical, yet they grow out of the same transaction, and both plaintiffs were defrauded by the same means, and their respective rights were effected by the same acts. One recovery will adjust the Warren v. State, 6 Okl. Cr. 1, 115 Pac. 812.

bar to another action by either of the plaintiffs, and hence there is a common interest in the subject-matter of the litigation such as will authorize them to join in one suit, although the injury which is sustained by each may be separate and distinct. Section 4690 of the Revised Laws 1910 enacts that all persons having an interest in the subject of the action and in obtaining the relief demanded may be joined as plaintiffs except as otherwise provided, and section 4738 permits the plaintiffs to unite several causes of action in the same petition where they all arise out of the same transaction or transactions connected with the subject of the action, and affect all the parties to the action except in actions to enforce mortgages or other liens. Simar v. Canaday, 58 N. Y. 298, 13 Am. Rep. 526; Montgomery v. McLaury, 143 Cal. 83, 76 Pac. 964.

[2] The next question urged is that all of the defendants except R. I. Phillips were served with summons outside of Logan county, and, as the verdict of the jury was in favor of R. I. Phillips, that the district court of Logan county was without jurisdiction to render judgment against the other defendants. This objection, if it possessed any merit, goes to the jurisdiction of the person of defendants only, which can be waived and was waived because all of said defendants, without objecting to the jurisdiction of the court over their person, appeared, answered, and went to trial, and the point was not urged until after the verdict was returned, when it was too late. Fitzgerald v. Foster, 11 Okl. 558, 69 Pac. 878; Whitaker v. Hughes, 14 Okl. 510, 78 Pac. 383; Appeal of Floyd, 31 Okl. 549, 122 Pac. 516.

[3] At the trial, plaintiff offered the testimony given by two witnesses in a former trial, claiming that said witnesses were beyond the limits of Logan county; one residing in Oklahoma county and another in Dallas, Tex. As a predicate for the admission of this testimony, plaintiff W. O. Mitchell testified that Witness Otti lived in Oklahoma City at the time of the first trial, and resided in Dallas, Tex., at the time the testimony was offered; that he had a letter from said witness, mailed at Dallas about two weeks before the trial; that he made no inquiry in Oklahoma City for said witness because he knew witness had left, and had not inquired for him in Logan county. As to the other witness, Feltz, he testified that said witness lived in Oklahoma City, and was not in Logan The sufficiency of the showing to county. authorize the introduction of this testimony was a matter within the sound discretion of the trial court, and its ruling will not be disturbed on appeal unless it be made to appear that such discretion was abused. The preliminary proof in this case was sufficient to justify the court in admitting such testimony.

Okl. Cr. 306, 131 Pac. 956, 44 L. R. A. (N. S.) 701; 2 Wigmore, Ev. par. 1405.

[4] Defendants offered in evidence a statement made by one Braden as to the assets and financial condition of the corporation which was rejected, and error is assigned upon the action of the court in so doing. It appears that, after Mitchell had purchased stock in the corporation. Braden acquired possession of 150 shares of the stock, and had been elected secretary and treasurer. Braden and Mitchell were endeavoring to dispose of their stock, and Braden made said statement to a probable purchaser, which statement presented the financial status of the corporation in rather an optimistic and overdrawn way. Defendants made an effort to connect Mitchell with this statement, but failed, and, while Braden stated that he and Mitchell were trying to sell their stock together, he testified that the statement had been made on his own responsibility, and that Mitchell had not directed him to prepare the same and was not in any way connected with it. The facts show that Mitchell had nothing to do with the statement in any way. He did not authorize nor adopt it, and there was no such association between him and Braden as to warrant the conclusion that Braden was acting as his agent in the preparation of such statement, and its exclusion by the court was entirely proper.

[5] Complaint is made of the conduct of the trial court during the progress of the trial. The alleged misconduct consisted of certain remarks indulged in by the court during a colloquy with defendant's counsel and in certain oral remarks while reading his instructions to the jury. It does not appear that anything said by the court influenced the verdict of the jury, or that any prejudice therefrom resulted to the defendant, and therefore this contention is without merit. And this is true, also, because the court adopted and approved the verdict and himself made findings of fact in accordance therewith.

[6] The defendants insist that, while the action of R. I. Phillips seeking reformation of his deed was an equitable one, the action of plaintiff against the defendants for damages was an action at law, and, while the two actions were consolidated and tried together for convenience, they still remained separate, and the first should have been tried as an equitable action and the latter as an action at law. When the parties consented to a consolidation of the two actions, they in fact agreed that the separate actions should be discontinued, and a new and distinct one created from the two so consolidated in which should be included and litigated all of the questions presented by the pleadings in the two former actions. The power and jurisdiction of the court with reference to this new action was the same as if it had been

34 L. R. A. (N. S.) 1121; Edwards v. State, 9 actions were originally instituted. 4 Enc. P. & P. 701.

> The distinction between actions at law and suits in equity and the forms of all such actions and suits have been abolished by the Code, and in their places there is but one form of action, which is called a "civil action," and the rules of pleading which formerly prevailed in civil actions have been abolished, and the forms of pleading in courts of record and the rules by which their sufficiency must be determined are those prescribed by the Code. The object of the Legislature in adopting the Code was, not only to abolish the distinctions which formerly existed between actions at law and suits in equity, but also to relieve litigants of the intricate and technical distinctions in commonlaw rules of pleading, and to provide a plainer, simpler, more speedy, and less cumbersome system of procedure by which their rights might be determined. St. L. & S. F. Ry. Co. v. Yount, 30 Okl. 371, 120 Pac. 627.

> We have no courts exercising equity jurisdiction separate and apart from jurisdiction in matters which were formerly denominated legal, but the district courts possess jurisdiction to administer in a proper case both kinds of relief, and the rights of the litigants are to be determined from the facts alleged and established at the trial. It seems clear from the whole frame of the petition, and from the relief demanded, that it was the intention of the pleader to set forth all the facts surrounding the transaction and to pray any and every kind of relief to which upon the facts found he might be entitled. This is ordinarily the correct method of pleading under the Code. Hawkins v. Overstreet, 7 Okl. 277, 54 Pac. 472; St. L. & S. F. Ry. Co. v. Yount, supra.

Notwithstanding this great liberality, it sometimes becomes necessary for a party seeking redress to choose between two inconsistent positions, and such defendants contend is the situation here. The doctrine is well settled that one who has been induced by fraud and deceit to part with title to real property, and is seeking relief, has a choice of remedies. He may affirm the contract and sue for damages, or he may rescind; but he cannot do both. Wesley et al. v. Diamond et al., 26 Okl. 170, 109 Pac. 524. Urging this rule of law, defendants contend that plaintiff's cause of action is based upon an affirmance of the contract, and that an award of damages would afford full and complete relief, and that the allegations of the petition are such as to preclude him from equitable relief. When equity has obtained jurisdiction of the controversy on any ground or for any purpose, it will retain such jurisdiction for the purpose of administering complete relief, and doing entire justice with respect to the subject-matter, and to avoid multiplicity of suits. Cook v. Warner, 41 Okl. 781, 140 Pac. originally brought in the manner in which 424; Murray et al. v. Speed et al., 153 Pac.

181; Galbreath Gas Co. v. Lindsey, 161 Pac. the matters in controversy. The evidence

[7] The jurisdiction of equity extends to all actions of fraud, except only that limited class of cases in which a judgment for damages affords adequate relief to the injured party, and fraudulent sales or exchanges of land furnish no exception to the rule, and it is not an insuperable objection to such jurisdiction that an award of damages may be had for unless such award affords full and complete relief in order to avoid circuity of action equity may award all the relief appropriate to the case. Montgomery v. Mc-Laury, 143 Cal. 83, 76 Pac. 964; Bradley v. Bosley, 1 Barb. Ch. (N. Y.) 125.

This court has held in a long line of cases that, where personal injuries have been suffered for which a liability exists and a release thereof has been fraudulently obtained for a grossly inadequate sum, an action for damages may be maintained without first obtaining a decree to rescind or cancel said release, and that plaintiff may attack such release for fraud in its procurement when it is set up as a defense without returning or tendering back the consideration received by him at the time the release was obtained. St. L. & S. F. v. Richards, 23 Okl. 256, 102 Pac. 92, 23 L. R. A. (N. S.) 1032; St. L. & S. F. Ry. Co. v. Nichols, 39 Okl. 522, 136 Pac. 159; Herndon v. St. L. & S. F. Ry. Co., 37 Okl. 256, 128 Pac. 727; St. L. & S. F. Ry. Co. v. Reed, 37 Okl. 350, 132 Pac. 355; St. L. & S. F. Ry. Co. v. Chester, 41 Okl. 369, 138 Pac. 156.

In Montgomery v. McLaury, 143 Cal. 83, 76 Pac. 964, which was an action for fraud in an exchange of certain lands, plaintiff was awarded a verdict for damages, and in addition thereto obtained cancellation of a mortgage given to secure a portion of the consideration for the exchange, and it was held that the judgment was proper. Another case supporting this view is Bradley v. Bosley, 1 Barb. Ch. 125. In that case, Chancellor Walworth, after statement of the facts, held that plaintiff was only entitled to be compensated for the difference between the value of the land received by him in exchange and that which he had conveyed with interest on such difference, and held that equity had jurisdiction to give the complainant relief upon the facts of the case. In the opinion it was said:

"Indeed, it may be considered as a settled principle of this court, in all cases of fraud, that if the party who has been defrauded is entitled to come here for any relief arising out of the contract in which he has been defrauded. and where it is necessary for him to allege and establish the fraud in order to obtain such relief, he may obtain full relief here, without resorting to a suit at law, although as to the part of the relief claimed he had a perfect remedy in an action at law for damages."

The petition in this case, in connection with the facts found by the court, was sufficient to authorize the court to take jurisdic-

sustains the verdict of the jury and the judgment of the court pronounced thereon. It is shown that Phillips was the owner of the O. K. Bus, Baggage & Carriage Company, a corporation, capitalized at \$1,000; that in the summer of 1909 the capital stock was increased to \$60,000, which was distributed among Phillips, Meek, Diehl and others, some claiming to have traded for it and others to be holding in trust for Phillips. Phillips owned the barn in Oklahoma City where the business was being carried on. It was represented to Mitchell that the business was a very profitable one, paying Phillips a rental of \$400 per month, making a large profit besides, and that it was the best paying concern in the city, and statements were exhibited to Mitchell, showing large profits. Phillips testified that when he traded some of the stock to Diehl he agreed not to charge any rent for the use of the barns by the corporation for a period of three months, and that he neglected for the three months after the expiration of this period to charge any rent until after the trade with Mitchell, by reason of which no rents appeared in the expense account submitted to Mitchell. After the trade, Phillips removed all the fine, big teams and all the most valuable horses as his individual property. The trial court found that Mitchell had been led to believe that all of the property removed by Phillips was among the assets of the corporation. Mitchell was also induced to believe that Phillips who was experienced in the management of the business only desired to dispose of a part of the stock, and would remain in the active management of the business, and, as a safeguard against being left a minority stockholder, it was agreed that Mitchell should have the refusal of enough of the stock to give him a majority in case Phillips should later desire Within a week or two after the to sell. first contract was executed, instead of remaining in charge of the business, as he had promised, Phillips declared an intention of selling, and Mitchell to protect himself purchased the second block of stock. Phillips retained \$17,000 worth of Mitchell's stock as indemnity, and after he had removed the property mentioned, and retired from the active management thereof, the business proved a failure, and Phillips purchased all the assets of the business at the receiver's sale at a comparatively small sum, and has at no time in his pleadings or otherwise offered to account for other stock retained by

[8, 9] That portion of the decree which held that plaintiff W. O. Mitchell should not be held or required to pay defendant D. M. Phillips, nor for or in his behalf discharge. the incumbrances against the land conveyed tion of the entire case and determine all to Phillips, was right. Having retained \$17,-

000 of the corporate stock as indemnity; view of the case, the mortgage should be against said incumbrances for which he had failed to account, it would have been inequitable for him to keep this stock, and at the same time compel plaintiff to discharge the obligations for which it was retained as in-The amount of the incumbrances which plaintiff agreed to pay amounted to \$9,600, and, had this stock possessed the value which Phillips represented it to have, it would have exceeded the amount of such obligations, leaving a large balance due plaintiff. But giving it the value placed thereon by the jury, it was still in excess of the total amount of said incumbrances. Had the property retained by Phillips consisted of live stock or merchandise, or any other kind of tangible property, no one would hesitate to say that he should be held to account for it. The principle applicable to the present case is no different, and, keeping in mind the fact that Mitchell only received \$14,000 of the \$31,000 of stock purchased by him, it was proper for the court, in addition to the damages awarded by the verdict of the jury, which merely represented the difference between the actual value of the stock purchased by Mitchell and that value which Phillips represented it to possess, to charge Phillips with that portion of the stock retained by him; and, the value of such stock at the time of trade being largely in excess of the obligations which Mitchell had undertaken to discharge, there was no error in that portion of the decree which declared that said obligations should not operate as a set-off against the verdict for damages. If such were permitted, the judgment would not award Mitchell all the relief to which he was entitled, nor would any judgment award him the full measure of his relief until an accounting was had for the stock retained by Phillips, and that was what the court did, when he charged Phillips with this stock, and relieved Mitchell of his obligation to pay such incumbrances in so far as defendant was concerned. Defendants did not plead the agreement of Mitchell to discharge said incumbrances as a set-off in the trial court, and upon the original hearing in this court insisted that said matters could not be permitted as a set-off against plaintiff's claim for damages (Brief of Plaintiff in Error, p. 76), and said matters cannot be urged as proper subject for set-off for the first time on appeal, and certainly not upon a rehearing. Section 4745, R. L. 1910; 3 Corp. Jur. 712.

This leaves for consideration that portion of the decree canceling the mortgage for \$3,-500 given by the Mitchells to R. M. Phillips. This mortgage was given to secure the payment by Mitchell of a part of the incumbrances upon the land traded to Phillips, and we have just held that the court committed no error in canceling Mitchell's agreement in so far as defendant is concerned to

canceled irrespective of the fact that the property embraced therein was the separate property of Helen E. Mitchell.

The judgment is affirmed. All the Justices concur. except SHARP, C. J., and THACK-ER and MILEY, JJ., who dissent from that portion of the opinion which affirms the judgment of the trial court canceling Mitchell's obligations to discharge outstanding incumbrances against the land traded to Phillips.

THACKER, J. (dissenting in part). I dissent with all possible emphasis from that portion of the decision and opinion of the court which affirms the decree of the trial court in the name of equity relieving W. O. Mitchell of his contractual obligation to D. M. Phillips to discharge certain mortgage liens to the amount of \$9,600, upon the lands traded to Phillips and to pay direct to the latter the additional sum of \$1,000, making in all \$10,600, as, in my opinion, there is not only no equitable ground but not so much as a trace of equitable atmosphere to support this part of the decree affirmed, and such affirmance strikes down an adjudicated contractual right after it has become absolute.

In my opinion, the verdict and judgment recovered by W. O. and Helen E. Mitchell in this case for \$12,000 as a difference between the actual and the falsely represented value of the 310 shares of the stock acquired by W. O. Mitchell in the Oklahoma Bus & Baggage Company in exchange for the aforesaid lands was the full measure of their damages recoverable in this case, and such damages were recovered upon the theory that the Mitchells affirmed in its entirety the trade contract under the terms of which W. O. Mitchell obligated himself to pay said \$10,-600 and gave D. M. Phillips the right to continue to hold 170 of the said 310 shares of stock as "indemnity" against the failure of W. O. Mitchell to perform his obligations in this regard.

In my opinion, the verdict and judgment for \$12,000, not only gave the Mitchells the full measure of compensation recoverable by them in this case, but fixed as firmly and as absolutely as any adjudication could fix W. O. Mitchell's legal obligation to D. M. Phillips to pay said \$10,600, and as firmly and as absolutely as any adjudication could fix the latter's legal right to retain said 170 shares of stock as "indemnity" against the former's failure to perform his obligation by the payment of the same.

In my opinion, when the trial court approved this verdict and gave this judgment for \$12,000, the Mitchells were entitled to no further relief under any known principle of law or of equity, or of common justice, unless, as decided in the cases of Bradley v. Bosley, 1 Barb. Ch. (N. Y.) 125, and Montgomery v. McLaury, 143 Cal. 83, 76 Pac. 964, the Mitchells were, or would have been if discharge said incumbrances, and, under this they had demanded it, entitled in equity to an enforcement of an equitable lien upon the lands traded Phillips as a means of satisfying their judgment for the \$12,000, or, if they preferred, to an equitable offset of \$10,600 of said \$12,000 against Mitchell's obligation to pay said \$10,600, and to an enforcement of an equitable lien upon the lands traded Phillips for \$1,400 as the balance of said judgment for \$12,000.

This judgment for \$12,000 left no issue of fact, or of law, or of equity to be determined between the Mitchells and D. M. Phillips; it left nothing but the duty of performance of the contract affirmed, which included a reformation of the deed to R. I. Phillips and a payment of said \$10,600 by W. O. Mitchell. It appears from a statement of the trial judge in making the said decree, if not from one or more of the briefs of the parties, although not from any evidence in the case, that at the time of that decree, which was more than a month after the court had rendered judgment upon the verdict for \$12,000, the 170 shares of stock held by Phillips as "indemnity" had been sold at a trustee's sale; but it does not appear whether as the property of Mitchell or the property of Phillips, or whether the trustee's sale was for the benefit of Mitchell or Phillips or both of them, or for what cause or causes it was made; and that sale is irrelevant and wholly foreign to any question involved in this case.

After the verdict and judgment for \$12,000, the contractual situation of the parties was simply this: D. M. Phillips was entitled to a decree reforming the deed to R. I. Phillips as a matter of course and to hold said 170 shares of stock as "indemnity" until W. O. Mitchell performed his obligation to pay said \$10,600.

The cases of Bradley v. Bosley, supra, and Montgomery v. McLaury, supra, to which reference is above made, are cases of affirmance of the contracts, and are the authorities and the only authorities upon which the court bases the proposition from which I dissent; but those cases are quicksands to the tread of that proposition when properly analyzed and understood. The Bradley Case merely holds that, when one elects to affirm his contract notwithstanding a fraud upon him in respect to the value of the property he acquired, he may sue in a court of equity to establish an equitable lien upon the property he traded for the same to the extent of the difference between the actual and the falsely represented value of the property he acquired, and that such court of equity, having acquired jurisdiction for the purpose of enforcing such lien, may also determine the difference between the actual and the falsely represented value of the property he acquired as the measure of his damages. The Montgomery Case merely holds that, upon the principle announced in the Bradley Case,

equity to subject his own obligations to pay money, by canceling the same, to the satisfaction of his damages measured by the difference between the actual and the falsely represented value of the property he acquired, and that a court of equity, having acquired jurisdiction for this purpose, may determine the amount of such damages and give a personal judgment for that amount by which it exceeds the plaintiff's indebtedness that is canceled. There is some loose and inaccurate language used in this Montgomery Case: but an examination of the case will show that it holds nothing more nor less than I have stated. Both the Bradley and the Montgomery Cases incidentally announce the rule for which I contend in the instant case in terms entirely satisfactory to me. For instance, in the third and fourth paragraphs of the syllabus in the Bradley Case, it is said:

"Where a party has been defrauded by another, in the purchase or sale of property, he may rescind the contract, so as to restore the parties to the same situation they were in when the contract was made; or he may affirin the contract, so far as it has been executed, and claim a compensation for the fraud.

claim a compensation for the fraud.

"But it must be a very special case which will authorize the injured party to come into a court of equity to have a contract partially rescinded; and it must be one in which the court can see that no possible injustice will be done by such a course."

And in the second and third paragraphs of the syllabus in the Montgomery Case it is said:

"An election to disaffirm a contract induced by fraud, and an effort to obtain a reacission, will not, if resisted, and especially if rendered impossible or of doubtful advantage by the act of the guilty party, bar an action on a subsequent affirmance.

quent affirmance.

"Where a party has been induced to enter into a contract by fraud, the commencement by him of an action against the other party based on the theory of an affirmance constitutes in itself an affirmance of the contract."

However, it is immaterial what courts of other jurisdictions have held in this regard, as our own court has repeatedly (as for instance in the case of Wesley v. Diamond, 26 Okl. 170, 109 Pac. 524) announced in unequivocal language the familiar rule that a party who has been defrauded in such cases as this may affirm the contract and sue for damages or, if he prefers, may rescind the contract and recover back what he gave the adverse party; but he cannot do both. It is true that under exceptional circumstances a party may affirm in part and rescind in part a contract of this character; but no such question is here involved as the contract in the instant case is affirmed in whole by a recovery of the full amount of the difference between the actual and the falsely represented value of the property traded.

ly represented value of the property he acquired as the measure of his damages. The Mitchells received in the verdict and judgment for \$12,000 full compensation for Montgomery Case merely holds that, upon the principle announced in the Bradley Case, the plaintiff may invoke the jurisdiction of M. Phillips, so that no issue justiciable

thereafter existed or could thereafter arise in this case without repudiating that verdict and judgment. This verdict and judgment for this amount placed the Mitchells in the same position, in the eyes of the law, as they would have been in if the 310 shares of stock had been worth precisely what it was represented to them to be worth. It left nothing to be done except a performance of the contract according to its terms; but the decree from which I dissent relieves W. O. Mitchell from his legal obligation to perform.

In their petition the Mitchells alleged the difference between the actual value and the represented value of these 310 shares of stock to be \$21,000; but, after the jury and the judge had solemnly determined that this difference was only \$12,000 by giving the verdict and judgment for that amount upon the theory that the parties were bound to perform this contract, the judge by the decree from which I dissent strikes down a part of the contract and gives W. O. Mitchell an additional \$10,600, which makes a total recovery of \$22,600, or \$1,600 more than the Mitchells claimed in their petition to be the difference between the actual and the falsely represented value of the 310 shares of stock

It is true that the Mitchells' petition apparently attempts the impossible feat of combining an action for the full amount of damages sustained by them, as if they desired to affirm and stand upon the entire contract, with a suit in equity for a rescission of that part of the contract which obligated W. O. Mitchell to pay said \$10,600, without any reduction from their damages on account of such rescission; but, until after the verdict for \$12,000 and the judgment of the trial court approving the same, the parties and that court treated this as an ordinary action at law for compensatory damages based upon an affirmance of the entire contract.

This is shown by the instructions of the court, without objection by either party, to the effect that the measure of the Mitchells' damages was the difference between the actual and the falsely represented value of the said 310 shares of stock, and by the verdict of the jury, in accord with this instruction, for \$12,000 as representing such difference in value.

It is also shown by what was said upon the examination of W. O. Mitchell as a witness in behalf of the plaintiffs during which examination he and his counsel, and the trial judge, referring to his obligation under the contract to pay said \$10,600, indicated that they understood that, whether the Mitchells lost or won their action at law for damages. W. O. Mitchell would be bound to pay said \$10.600. Counsel for the Mitchells questioned W. O. Mitchell as follows: "And no matter what this law suit results in, you are to pay those off as between you and him" (evidently referring to the mortgages for \$10,600 as "those" and to D. M. Phillips as "him")to which question adverse counsel objected, whereupon the judge stated, "What the contract is you have that in writing," to which Mitchell's counsel responded by the following question: "There is no other contract?" and W. O. Mitchell answered: "No, sir; no other contract."

The foregoing statement of my dissent from that portion of the opinion of the court which I have discussed is made with all possible deference to and respect for the adverse view of the majority of my Associates.

I think the decree from which I dissent should be reversed, and that the judgment for \$12,000 less the offset of \$1,000 allowed without objection should be affirmed; and I concur in the opinion of the court except in the respect shown by the above dissent.

SHARP, C. J., concurs in the dissent.

In re WELLS. (Cr. 336.) (District Court of Appeal, Third District, California. April 16, 1918.)

ATTORNEY AND CLIENT \$\,\\_40\)—ADMISSION TO PRACTICE—REVOCATION OF ORDER—IMPOSI-TION ON COURT.

Where an applicant to a District Court of Appeal for admission to the bar failed to apprise the court that he had previously applied on two different occasions to another District Court of Appeal to be admitted to practice, and had withdrawn his applications when confronted with objections by the bar association of the county of his residence founded upon his lack of good moral character, etc., the District Court of Appeal is justified in revoking its order admitting him to practice.

In the matter of the admission of T. Alonzo Wells to practice law. Petition by the bar association of the county of Orange praying for an order revoking an order by the District Court of Appeal admitting Wells to the practice of the law, etc. Order admitting to practice revoked, license canceled, etc.

See, also, 174 Cal. 467, 163 Pac. 657; 171 Pac. 110.

Clyde Bishop, R. Y. Williams, J. C. Burke. L. A. West, and S. M. Reinhaus, all of Santa Ana, for petitioners. H. N. Mitchell, of Sacramento, and T. Alonzo Wells, of Santa Ana, for respondent.

PER CURIAM. In the month of October, 1915, the respondent, Wells, was admitted to practice law by the Supreme Court of the state of Nevada, after having been a resident of said state for the period of approximately six months. Within a few days after being so admitted as a member of the bar and late in the said month of October he was, upon the motion of H. N. Mitchell, Esq., an attorney-at-law and a member of the Sacramento city bar, and on the production of his license from the Supreme Court of Nevada and the assurance of the said Mitchell that the applicant was a person of good moral character, admitted by this court to practice law in all the courts of the state of California. Thereafter a committee of the bar association of the county of Orange, this state, acting for and in behalf of said association, presented a petition to this court, praying for an order revoking the order by this court admitting the respondent to the practice of the law in the courts of this state, and revoking and canceling the license thereupon issued to said respondent evidencing his right so to practice the law in this state, and striking his name from the roll of attorneys and counselors at law in the state of California. The petition is founded on a number of specific charges involving the integrity and moral character of the respondent.

Here it should be stated that in a former opinion on this petition we took the position that the proceeding was, in legal character and effect, the equivalent of a proceeding in charges alleged against the respondent in the

disbarment, and that the same was therefore of a quasi criminal nature. We hence held that the rules of criminal pleading applied, and that the charges or the more serious of them were not set forth with that precision with which a charge of crime is required to be set out, and that as to the charges amenable to that objection there was no substantial ground upon which to predicate an order revoking the respondent's license to practice law. Some of the charges were stricken out on motion upon the ground that they revealed no ground justifying the order asked for in the petition. The result of these several rulings was that the petition was denied. See In re Wells, 174 Cal. 467, 163 Pac. 657. Subsequently to the decision by this court, a hearing was granted herein by the Supreme Court, and there it was held that the analogy drawn by this court between a proceeding of the character of the one now before us and a proceeding in disbarment was inept and without any foundation, particularly in so far as the purpose of the analogy was to invoke and apply the rules of criminal pleading to a proceeding of the kind under consideration. In re Wells, 174 Cal. 467, 163 Pac. 657. The court, among other things, said, quoting from the syllabi:

"An application to revoke an order admitting an attorney to practice law, on the ground that he obtained the order by means of a fraudulent concealment of his real character, is not a proceeding in disbarment. Allegations as to his character are necessary in such application in order to show that, if there shall be a bona fide inquiry regarding it, the court would be authorized to reject him because of the facts authorized to reject him because of the facts alleged. If the court should conclude that the fraudulent means were sufficiently established to justify a revocation of the order, it would then be its duty to inquire again into his moral character, and that inquiry would have the same scope, and be subject to the same rules, as if it had been made upon his original application."

Again, the Supreme Court properly said:

That it was not "advisable to take up in this court the investigation of these charges. It is proper to say that they are now mere allegaproper to say that they are now mere allega-tions which put the court upon inquiry as to the truth of the matter. The law has devolved that duty upon the District Court of Appeal. The court that should conduct the investiga-tion in this case, both as to the alleged fraud in obtaining the order and as to the good moral character of the applicant is the District Court character of the applicant, is the District Court of Appeal of the Third District, the court which, it is alleged, was improperly led to make the order sought to be revoked."

The matter was accordingly remanded to this court for further proceedings in accordance with the views of the Supreme Court as expressed in said opinion. Upon a return of the proceeding to this court, testimony bearing upon the charges preferred against the accused was taken at Santa Ana, the county seat of Orange county, before a referee commissioned by this court for that purpose.

As stated in the outset of this opinion, there were several different and distinct petition for the revocation of the order licensing him to practice law. As to some of these charges there was a pronounced conflict in the testimony. A large amount of testimony, pro and con, was presented upon the question of the general reputation of the respondent in the localities in Orange county in which the respondent had resided for many years for morality and truth, honesty. and integrity. The testimony upon this question was decidedly conflicting. But, after a full consideration of this matter as it is before us now, we do not regard it necessary to consider and determine the merits of the charges upon which the bar association opposed the admission of the respondent to practice by the Court of Appeal of the Second District and which charges are, as above stated, incorporated in the petition for the revocation of the order of this court admitting the respondent to practice law. As we now view the situation as it is presented here, the first inquiry presented is whether the respondent imposed upon this court when making his application by omitting to disclose to the court or justices thereof the fact that he had made two previous applications to the Second District Court of Appeal for admission to practice and had withdrawn each application upon the filing by the bar association of Orange county of a written objection to the allowance of his application, based upon charges challenging his moral fitness to become a licensed member of the bar. We will therefore confine ourselves to a consideration of that proposition, as to which the petition alleges:

"That, in January, 1911, said Wells filed his application in the District Court of Appeal of the Second District of the state of California to be admitted to practice law in all the courts of this state in accordance with rule 1 of the rules of the Supreme Court and District Courts of Appeal of the state of California, as adopted January, 1912."

The rules of the second appellant court regulating the matter of the application of persons to be admitted to practice law by said court are then set out in the petition. These rules provide, among other things, that, to afford the court an opportunity to inquire into and determine the moral fitness of applicants for admission to the bar, applicants shall file their applications and certificates with the clerk of the court at least 10 days before the date fixed for the examination. The petition proceeds:

"That there was at all times a practice of said court for the clerk thereof to transmit a copy of each application for admission to practice upon examination to the president of the bar association of the county in which the applicant was a resident; that, in accordance with said rule and practice, a copy of said application of said Wells was transmitted to the president of the bar association of the county of Orange, which met and considered the matter, and upon its being shown to the association by several of its members that said Wells was not a man of good moral character and had been guilty of serious irregularities in his practice in the justices' courts, a committee

was appointed through which the association filed charges and objections to his admission to practice; that, upon learning of the filing of said charges and objections to his admission, said Wells withdrew his application therefor."

It is alleged that, in July, 1912, said Wells again applied to the court of the second appellate district for admission to practice—"and asked the bar association of Orange county to give him a hearing before filing an objection to the granting of said application; that his request for such hearing was granted, and he personally appeared before the said bar association at a meeting at which practically every active member of the association was present; that, it appearing from the hearing that the original objections still continued to his admission, \* \* \* a committee was appointed and instructed to renew the charges and objections; and, although said Wells in his defense had assured the association that he would insist upon a hearing upon his application and a trial of the charge, he failed to do so and again withdrew his application."

Following these allegations is a statement of the several charges upon which the objection to his admission to practice by the second appellate court and to the order of this court admitting him to practice was and is founded. It is then charged, in substance and effect: That Wells, knowing that he would be unable to secure admission to practice law in the courts of California by examination therein (objections to his admission having been duly made known to the two other District Courts of Appeal), in the month of May, 1915, departed from the state of California and went to Carson City, in the state of Nevada, "where he and the facts hereinbefore alleged were unknown to the officers of the Supreme Court of Nevada," and that, by concealing said facts, in October, 1915, he secured admission by said Supreme Court of the state of Nevada to practice law in said state, that:

"In further pursuit of said purpose, said Wells thereafter, on October 20, 1915, presented his license to practice law from the Supreme Court of the state of Nevada to the District Court of Appeal of the Third Appellate District of the state of California and applied for admission thereon under and in accordance with the provisions of section 279 of the Code of Civil Procedure of this state. That said Wells and all of the facts hereinbefore alleged were unknown to the judges and officers of said court, the former clerk of said court, G. Horatio Chase, who had received and filed the former charges and objections to the admission to practice of said Wells, as hereinbefore stathaving in the meantime died, and that said Wells intentionally made such application to said court, so unacquainted with said facts, for the purpose, by fraudulent concealment of said facts hereinbefore alleged, of indirectly and fraudulently securing admission to practice law as an attorney-at-law in all the courts of this state, and to evade the law of said state and the rules and practices of the Supreme and ap-pellate courts therein, as hereinbefore set forth. That with the same intent, and in carrying out the same purpose, he also induced one H. N. Mitchell, Esq., an attorney-at-law, admitted to practice in all the courts of this state, who had no knowledge of said facts and was totally unacquainted with said Wells prior to the time of making said application, to move said court to grant said application and to vouch for the good moral character of the applicant."

under the view we now take of this proceeding, to pass upon or undertake to determine the merits of the several charges upon which objection to the admission of Wells to practice law by the Second District Court of Appeal was predicated. Nor is it necessary for the expression of an opinion by this court relative to the charge that Wells, for the purpose of overcoming the effect of the objection interposed by the Orange county bar association to his admission to practice, went to the state of Nevada and there sought and secured his admission to practice by the Supreme Court of that state. It is enough, to justify this court in revoking its order admitting him to practice in the courts of California under the circumstances alleged in the petition, to know, as we do know, that when he applied here for admission he failed to apprise this court of the fact that he had previously applied on two different occasions to another court of co-ordinate general jurisdiction with this court to be admitted to practice, and had withdrawn said applications when confronted with an objection by the bar association of the county in which he resided to his admission founded upon charges impeaching his personal character for those traits which are justly esteemed as among the first essentials of a practicing lawyer. We do not hold, assuming that there was substantial foundation for the charges, that he should then have admitted them to be true, but it cannot for a moment be questioned that it was his duty to have informed this court, at the time his application was presented to us, that he had withdrawn the previous applications upon the filing of charges involving an attack upon his moral fitness to be admitted into the practice of the law. This court was entitled to be put in possession of this information at the time mentioned, not that the fact of the mere filing of the charges and the subsequent acts of the respondent in withdrawing the applications would in and of themselves be sufficient or have been deemed sufficient to warrant a refusal to admit him but that this court might then, as it would have been its duty to do in such case, have prosecuted an investigation for the purpose of ascertaining and determining whether the objection to his admission interposed in the Court of Appeal of the Second District was or was not well founded. To this extent we hold that the respondent acted in bad faith with and thus imposed upon this court, and while we are not prepared to say that he purposely intended to do so, the necessary legal effect of his omission to furnish the court with the information mentioned at the time he presented his application amounted to a fraud upon the court and the justices thereof.

It is therefore ordered that the order of this court of October 20, 1915, admitting the respondent, T. Alonzo Wells, to practice law | the plaintiff appeals.

As above suggested, we are not required, in all the courts of the state of California is hereby revoked; that the license thereupon issued to said Wells evidencing his right so to practice law is hereby canceled; and that his name be, and the same is hereby, stricken from the roll of attorneys and counselors at law of the state of California.

## BARNES v. MASSACHUSETTS BONDING & INS. CO. et al.

(Supreme Court of Oregon. June 11, 1918.)

1. STATUTES 207—CONSTRUCTION.

Effect must be given to all the terms of a general statute, and where general terms or expressions in one part are inconsistent with more specific or particular provisions elsewhere, the particular provisions will be given effect as clearer and more definite expressions of the legislative will.

2. LIMITATION OF ACTIONS \$\sim 58(2)\to Liabil.

Z. LIMITATION OF ACTIONS \$\oplus 58(2)\$—LIABILITY CREATED BY STATUTE—LIABILITY FOR WRONGFUL LEVY—STATUTES.

Under L. O. L. §§ 6, 7, providing that an action on a liability created by statute, other than a penalty or forfeiture, must be commenced within six years, and that an action against a sheriff, coroner, or constable upon a liability incurred by the doing of an act in his official canacity, or by the omission of an official canacity, or by the omission of an official canacity. official capacity, or by the omission of an offi-cial duty, including the nonpayment of money cial duty, including the nonpayment of money collected on execution, must be commenced within three years, where a sheriff, by virtue of an execution, levied on property of a stranger to the writ, rendering his surety liable to such stranger pursuant to section 348, the latter was bound to bring her action against the sheriff and his surety within three years; the substance of the statute being that in general a statutory liability may be enforced within six years, but where the accountability of a sheriff, coroner, or constable is involved the action must coroner, or constable is involved the action must be commenced within three years.

3. Limitation of Actions === 167(1)-Bar of ACTION AGAINST PRINCIPAL AS AFFECTING SUBETY.

In relation to the matter of limitations, the sheriff's surety occupied no worse position than his principal, and the action against him was likewise barred in three years.

Department 1. Appeal from Circuit Court. Marion County; Percy R. Kelly, Judge.

Action by Grace D. Barnes against the Massachusetts Bonding & Insurance Company, a corporation, and William Esch. From judgment sustaining demurrer to the complaint, plaintiff appeals. Affirmed.

The defendant Esch was the sheriff of Marion county. The Massachusetts Bonding & Insurance Company was a surety on his official bond, which was conditioned, among other things, for him well and faithfully to perform the duties of the office. Equipped with an execution issued upon a judgment against L. S. Barnes in favor of A. B. Spencer, the sheriff levied upon and sold some shares of stock which the plaintiff here claims as her own. Upon these facts she began an action against him and his surety to recover damages for the levy and sale. The court, sustained a demurrer to the complaint, and

Grant Corby, of Salem, for appellant. Oscar Hayter, of Dallas (W. T. Slater, of Portland, on the brief), for respondents.

BURNETT, J. (after stating the facts as above). The ground of demurrer relied upon in the argument before us was "that the said action was not commenced within the time limited by the Code of Civil Procedure of the state of Oregon, to wit, within the time limited by section 7 of Lord's Oregon Laws." Under section 348, L. O. L., the official undertaking of a public officer to the state or to any county is deemed a security to all persons severally for the official delinquencies against which it is intended to provide. Claiming the benefit of this section, the plaintiff has instituted her action and the question is whether she began it in time.

The sale complained of occurred September 16, 1913. It is conceded that the action was commenced more than three years and less than six years after that date. Prescribing the periods within which actions at law shall be commenced, sections 6 and 7 of Lord's Oregon Laws, so far as applicable, read thus:

Section 6: "Within six years: \* \* \* 2. An action upon a liability created by statute, other than a penalty or forfeiture."
Section 7: "Within three years: \* \* \* \* 1. An action against a sheriff, coroner, or constable, upon a liability incurred by the doing of an act in his official capacity, and in virtue of his office; or by the omission of an official his office; or by the omission of an official duty; including the nonpayment of money collected upon an arguiting \* \* \*" lected upon an execution.

In the features here mentioned these provisions are part of a single statute (the act of October 11, 1862 [Laws 1862, p. 3]) to provide a Code of Civil Procedure.

[1] The rule of construction of a statute is that effect must be given to all of its terms, and "where general terms or expressions in one part of a statute are inconsistent with more specific or particular provisions in another part, the particular provisions will be given effect as clearer and more definite expressions of the legislative will." The rule is thus stated in 36 Cyc. 1130. Crane v. Reeder, 22 Mich. 322, 334:

"Where there are two acts or provisions, one of which is special and particular, and certainly includes the matter in question, and the other general, which, if standing alone, would include the same matter and thus conflict with the special act or provision, the special must be taken as intended to constitute an exception to the general act or provision, especially when such general and special acts or provisions are contemporaneous, as the Legislature are not to be presumed to have intended a conflict."

This precept is similarly enunciated in the following cases: Stadler v. Helena, 46 Mont. 128, 127 Pac. 454; Long v. Culp, 14 Kan. 412; Stockett v. Bird, 18 Md. 484; State ex rel. v. Nolan, 71 Neb. 136, 98 N. W. 657; Bartlett v. Trenton, 38 N. J. Law, 64: Sanford v. King, 19 S. D. 334, 103 N. W. 28; Commissioners v. Nashville, 134 Tenn. 612. 185 S. W. 694.

[2, 3] It may be conceded that the act of the sheriff in levying upon property of a stranger to the writ by virtue of an execution in his hands constitutes a breach of his oficial bond and results in a liability created by statute for the execution of a writ in his hands is an act in his official capacity and in virtue of his office. If it were not for the provisions of section 7, L. O. L., the action might well be brought within six years from the wrongful taking of the property. Speaking broadly of the facts mentioned in the complaint before us, they give rise to a liability created by statute and might come within the general provision of section 6, defining a limitation of six years, but they are more particularly mentioned in the short limitation of three years laid down in section 7.

The substance of this statute is that in general a statutory liability may be enforced within six years, but where the accountability of a sheriff, coroner, or constable is involved the action to enforce it must be commenced within three years. As stated in section 7, L. O. L., it is beyond dispute that if the action had been commenced against the sheriff alone it must necessarily have been instituted within three years; otherwise he escapes the consequence of his wrongdoing. No cause of action would lie on the official undertaking unless there was a default of the principal, the sheriff. That the surety occupies no worse position than the principal is taught by State v. Davis, 42 Or. 34, 71 Pac. 68, 72 Pac. 317. In the part quoted. section 7 relates only to sheriffs, coroners, and constables, who are thus put into the purview of a special statute forming an exception to the general rule enunciated in the next preceding section relating to a liability created by statute.

Howe v. Taylor, 6 Or. 284, was a suit against a county clerk and his sureties to recover damages for delinquencies in the conduct of his office: Multnomah County v. Kelly, 37 Or. 1, 60 Pac. 202, distinguished the position of tax collector from that of sheriff and enforced the additional tax collector's bond within six years, as distinguished from the regular official undertaking of the sheriff; and in State v. Davis, supra, the principal defendant was clerk of the board of school land commissioners. Although all three of these cases cited by the plaintiff speak of the liability as one created by statute within the scope of section 6, yet in each instance the officer whose delinquency was involved was not one mentioned in section 7.

Sheriffs, coroners, and constables form a special class of officials embraced in the shorter limitation. The particular language of section 7 takes the present case out of the State v. Moore, 108 Md. 636, 71 Atl. 461; more general terms of section 6 and constitutes the governing rule of limitation in the present instance. The circuit court was right in sustaining the demurrer on the ground mentioned.

The judgment is affirmed.

McBRIDE, C. J., and BENSON and HAR-RIS, JJ., concur.

In re WATERS OF UMATILLA RIVER. (Supreme Court of Oregon. April 16, 1918.)

1. Waters and Water Courses == 133-Ap-PROPRIATION-NOTICE.

I. O. L. § 6595, subd. 7, providing that attempted appropriation of water shall not be avoided because of insufficiency of notice, applies only where there was a mistake, and not where the notice expressed the intention.

2. WATERS AND WATER COURSES \$==152(8) APPROPRIATION-PURPOSE-EVIDENCE.

General testimony as to purposes when ap-propriation of waters was made, to irrigate all land that could be reached by extension of the ditch, must yield to specific testimony that there was then no intention to extend the ditches to certain lands.

3. WATERS AND WATER COURSES \$\instruct{\infty} 144-Ap-PROPRIATION-USE FOR OTHER LANDS.

That waters appropriated with intention to irrigate certain lands may be used to irrigate other lands, there must have been a continuing intention to irrigate a well-defined acreage; and intention to irrigate the first lands being abandoned before intention to irrigate the others becomes fixed, the water right is lost.

4. Waters and Water Courses \$\sim 135-Ap-PROPRIATION BY THE UNITED STATES

RIGHTS ACQUIRED.

Right of the United States, through compliance with L. O. L. § 6588, to all the waters not then appropriated, is not affected by its lack of diligence in completing its project, or by the fact of all the waters not being required to irrigate the lands served by its ditches; these matters not being conditions of the statute.

5. WATERS AND WATER COURSES \$\infty\$140-WATER COMPANIES-PRIORITIES OF CUSTOMERS. Priorities of persons supplied with water by water company depend not on the dates of their contracts, but on the priority of use of water on the lands.

6. Waters and Water Courses \( = 152(11) - Adjudication of Priorities-Water Mas-

Provision of the decree in proceeding for adjudication of the rights of the users of waters of a stream, that the specification of a definite amount of water per acre, in the findings, shall not be taken as granting that specific amount of water to any water user, but shall only be taken as a rule and guide for the water master in the distribution of a maximum amount master in the distribution of a maximum amount of water to any water user, is improper; the parties being entitled to have their rights de-termined, and such provision vesting the water master, an administrative officer charged with the duty of carrying out decrees fixing water rights, with large powers out of harmony with L. O. L. § 6617, defining his duties.

7. WATERS AND WATER COURSES \$== 152(12)-REVIEW-DETERMINATION OF RIGHTS.

The Supreme Court cannot, on appeal in a proceeding for determination of water rights, review the decree as to questions not involved in the appeal, at the instance of a nonappealing party.

In Banc. Appeal from Circuit Court, Umatilla County; Gilbert W. Phelps, Judge. On rehearing. Modified and affirmed. For former opinion, see 168 Pac. 922.

W. G. Drowley, of Vancouver, Wash., for appellant Western Land & Irrigation Co. Harrison Allen and R. R. Johnson, both of Portland (Frederick Steiwer, of Pendleton, on the brief), for respondent Dillon Irr. Co. James A. Fee, of Pendleton, for respondent Courtney Irr. Co. Stephen A. Lowell, of Pendleton, for respondent Brownell Ditch Co. Oliver P. Morton, of Portland, and Will R. King, of Washington, D. C., for respondent the United States. James R. Raley, of Pendleton, for respondents Oregon Land & Water Co., Pioneer Irr. Co., Maxwell Ditch Co., Furnish Ditch Co., W. T. Walton, Sidney Walton, Harry R. Newport, F. H. Gritman, and H. G. Hurlburt.

McCAMANT, J. A rehearing was granted in this case, not because we were dissatisfied with the conclusions reached by Mr. Justice Burnett, but because of the importance of the case and the earnest insistence of counsel for appellant that in the hurry of the Pendleton term no opportunity was given adequately to present the contentions relied on. The case has accordingly been reargued with ability, and we have been favored with additional written briefs, strongly presenting the contentions of the respective parties. With the assistance so rendered by counsel, we have reexamined the voluminous record.

Appellant's petition for a rehearing acquiesces in so much of the original opinion as holds that the rights initiated in 1891 were lost by abandonment. We think that there is no room for difference of opinion as to the correctness of the conclusions announced in the former opinion on this subject.

The contention on the part of appellant which is most strenuously presented is that the circuit court erred in dividing appellant's priorities, and in fixing its priority for 12,-747.48 acres as of July, 1907. Appellant claims that its entire appropriation of water should be referred to March 14, 1903. The decree of the lower court awarded to appellant a water right with a priority as of the latter date applicable to 4,109.68 acres. The lands covered by this priority under the decree of the circuit court are lands lying between the headgate of appellant's ditch and Butter creek, including also some hundreds of acres west of Butter creek, the priority covering substantially the bottom lands in the neighborhood of this water course. The lands as to which a 1907 priority is decreed lie west and north of the properties above referred to. They are all situate west of the Umatilla river and beyond the Butter creek Appellant's claim to the priority bottoms. contended for is predicated on its rights as

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Appellant directs our attention to section 6533, L. O. L. This statute is a part of the act of 1891. It requires the appropriator of water to commence the actual construction of his ditch within six months from the date of posting his notice of appropriation. statute directs that:

"The actual capacity of said ditch or canal or flume, when completed, shall determine the extent of the appropriation, anything contained in the notice to the contrary notwithstanding."

If appellant's rights are to be determined by this principle, we are driven to the conclusion that appellant was liberally dealt with by the decree appealed from. It appears from the testimony of H. D. Newell that he measured the water in the Hinkle ditch on January 16, 1906, which was four months subsequent to the time when the rights of the United States attached. He found that the ditch, 8 miles from the headgate, was carrying 39.9 second feet of water. The testimony shows that this amount of water would scarcely suffice for the irrigation of the lands as to which appellant was awarded a 1903 priority.

[1] In response to so much of the previous opinion as quotes the notice of appropriation posted by Hinkle Ditch Company March 14, 1903, appellant cites subdivision 7 of section 6595, L. O. L. This statute is as follows:

"Where appropriations of water heretofore attempted have been undertaken in good faith, and the work of construction or improvement thereunder has been in good faith commenced and diligently prosecuted, such appropriations shall not be set aside or avoided, in proceedings under this act, because of any irregularity or in-sufficiency of the notice by law, or in the manner of posting, recording, or publication thereof."

If it appeared that the notice of appropriation under which appellant claims was inaccurate through some mistake in drawing it, appellant could invoke the curative effect of the above statute with propriety. But it affirmatively appears that there was no such mistake. Mr. J. T. Hinkle, president of the Hinkle Ditch Company, which made the appropriation, was better qualified than any other witness to testify as to the intention of this company at the time when the appropriation was made. He was asked the following question:

"The location notice as filed by the Hinkle Ditch Company in 1903 properly expressed the intention of the company, did it, in regard to the irrigation of the lands?"

He answered:

"I think it fairly expressed the intention."

The notice of appropriation described a ditch or flume extending a distance of 12

the successor in interest of the Hinkle Ditch | The ditch noted on this map terminated at Butter creek. Mr. Hinkle and Mr. O. D. Teel were the promoters of the Hinkle Ditch Company, and were more familiar than any one else with its plans at the time when its appropriation of water was made. Mr. Hinkle testifies:

> "We proposed to build that canal on there and irrigate all the land that it would irrigate in any practical manner and to reach all the land we could reach by extension of it, and at that time we had no permanent surveys of our own, we were depending on some very uncertain preliminary work, and upon such record of previous surveys as we could find and we aimed to make the appropriation large enough to provide for ourselves, and to provide for the government, which was then doing some geological work in the neighborhood and preliminary work, and to provide for any other people who might come in and enlarge our canal and make use of it."

> This testimony tends to show that the Hinkle Ditch Company hoped that its enterprise would prove to be one of large dimensions. It is apparent that the plans were ill defined and lacked the precision essential to the creation of the rights now contended for. Mr. O. D. Teel testifies on this same subject as follows:

> "Q. What was the purpose of the Hinkle Ditch Company, and what lands in a general way did it intend to irrigate when its appropriation was made? A. We expected to irrigate all lands lying under the ditch that were not provided for by prior appropriations of other ditch-es. Q. Had you at the time you made the ap-propriation determined definitely what lands what lands would ultimately fall under the system when built? A. They were largely on Butter creek bottom, and beyond Butter creek; principally beyond Butter creek. Q. How did they correspond with the lands at present coming under the system? A. They were about the same, if not practically the same proposition."

> It appears that in 1903 and 1904 a number of homestead entries were made on the properties as to which a 1907 priority was awarded appellant. Mr. Teel testified with reference to the irrigation of the lands of these homesteaders as follows:

> "Q. Were the homesteaders expecting to get water from the Hinkle Company? A. When they went in there, I think they did not. Q. Did they later on, when the Hinkle Company started out to cover that section with its ditches? A. As I remember, they tried to make some contracts with us, and didn't have any money, and could not give any security and we could and could not give any security, and we could not build down in there to irrigate just what few there were in there, what few lands were available under the circumstances, that had available under the circumstances, that had something to do with the size of our headgate, the second one we put in there."

Mr. Hinkle testified on this same subject as follows:

"Q. Do you recall the time when these homestead entrymen attempted to get the Hinkle Ditch Company to construct a ditch down there? A. Yes, sir; I recollect it. Q. Do you recall that the Hinkle Ditch Company said, if ditch or flume extending a distance of 12 miles to Butter creek. The map filed at the time the appropriation was made, pursuant to the requirements of section 6529, L. O. L., covered no lands as to which the decree of the lower court gave appellant a 1907 priority.



A. No, that was along about 1905."

[2] We think the general testimony of Mr. Hinkle and Mr. Teel as to the purposes of Hinkle Ditch Company when it made its appropriation must yield to the specific testimony to the effect that the company did not intend, in 1905, to extend its ditches into the tracts of land as to which a priority of 1907 was awarded. The attitude of Mr. Hinkle and Mr. Teel with reference to this extension negatives the claim that in 1905 or at any time prior thereto the Hinkle Ditch Company had any matured plans for the reclamation of lands lying west and north of the Butter creek bottoms. Most of these lands were withdrawn from entry by the General Land Office on March 17, 1904, and were not restored until October 2, 1907.

The testimony clearly shows that at the inception of its undertaking the Hinkle Ditch Company constructed a ditch 11/2 miles in length. During the latter part of 1903 and during the years 1904 and 1905 but little work was done on the ditch by the Hinkle Ditch Company, and that little had to do with repairs and improvements, rather than with extensions. The extension work which was done during that period was done by the Butter Creek Water Company and the Cold Springs Irrigation Ditch Company, under contracts made by them with the Hinkle Ditch Company. The former corporation was interested in the irrigation of lands in the Butter creek bottoms, and the latter, in the irrigation of lands on the east side of the Umatilla river, now included in the government project. The work done by these corporations did not look to the irrigation of the 12,000 acres as to which this appellant was given a 1907 priority. It is doubtless true that appellant, as the successor in interest of the Hinkle Ditch Company, is entitled to avail itself of the work done on the ditch by these corporations, but we fail to find in the evidence any intimation that this work looked to the irrigation of the lands with which we are concerned on this appeal.

[3] It is intimated by Mr. Justice Wolverton in Nevada Ditch Company v. Bennett, 30 Or. 59, 94, 45 Pac. 472, 60 Am. St. Rep. 777, that where an appropriator acquires an inchoate right to water for purposes of irrigation, he may apply this water to lands other than those which he originally intended to irrigate. He may appropriate water with intent to irrigate Whiteacre, which he owns, and, if he proceeds with due diligence, he may use the right so initiated for the irrigation of Blackacre, providing it be equivalent in area and in its water requirements. In order that this doctrine may be properly applied there must be a continuing intention to irrigate a well-defined acreage. If the intention to irrigate Whiteacre is abandoned before the intention to irrigate Blackacre be-

That was about the summer of 1907, wasn't it? dence clearly shows that the intention to irrigate the lands east of the Umatilla river, now included in the Hermiston project of the federal government, was abandoned in the late summer of 1905, at the time when the government project took definite shape. The evidence strongly negatives any intention of the Hinkle Ditch Company at that time, or for a year or more thereafter, to irrigate the properties lying west and north of the Butter creek bottoms, as to which a 1907 priority has been awarded appellant. It appears that this was a period of discouragement to the officers of the Hinkle Ditch Company. Their resources were exceedingly limited, and on at least one occasion they offered to dispose of their project for a small sum of money,

It remains to apply the law arising on the above facts. In 2 Kinney on Irrigation and Water Rights (2d Ed.) p. 1221, it is said:

"In connection with the claim set forth in the notice, the court may also examine all the other facts in any particular case which tend to prove the actual intent of the appropriator. Such facts may be such as the purpose indicated in the notice, the actual amount of water required for such purpose, the acts of the appropriator in prosecuting the work necessary, the size of the ditch and its capacity, the method of diversion from the stream, the method of the application of the water, and any other facts which tend to show the true purpose of the appropriator.

Pomeroy on Riparian Rights (1st Ed.) § 47, says:

"There must be some such actual, positive, beneficial purpose, existing at the time, or con-templated in the future, as the object for which the water is to be utilized; otherwise no prior and exclusive right to the water can be ac

In Power v. Switzer, 21 Mont. 523, 530, 51 Pac. 32, 35, the court says:

"The intention of the claimant is most important factor in determining the validity of an appropriation of water. When that is ascertained, limitation of the quantity of water necessary to effectuate his intent can be applied according to the acts, diligence, and needs of the appropriator."

In Andrews v. Donnelly, 59 Or. 138, 147, 148, 116 Pac. 569, 573, Mr. Justice Burnett says:

"The right of a prior appropriator is paramount, but the right is limited to such an amount of water as is reasonably necessary for such useful purpose and project as may be fairly within contemplation at the time the appropria-tion is made. \* \* Any material enlarge-Any material enlargement of an original project or the inauguration of a new enterprise requiring additional water would call for a new appropriation which must be in subordination to the rights of others as then existing.

These principles are also announced in Simmons v. Winters, 21 Or. 35, 42, 27 Pac. 7, 28 Am, St. Rep. 727; Hindman v. Rizor. 21 Or. 112, 120, 27 Pac. 13; Union Mill Company v. Dangberg (C. C.) 81 Fed. 73, 106; Ortman v. Dixon, 13 Cal. 33, 38. The formation of a new intention to irrigate lands the irrigation of which was not at first contemplated marks the beginning of a new apcomes fixed, the water right is lost. The evi- propriation. Nevada Ditch Company v. Bennett, 30 Or. 59, 100, 45 Pac. 472, 60 Am. St. Rep. 777; Taughenbaugh v. Clark, 6 Colo. App. 235, 243, 40 Pac. 153; Toohey v. Campbell, 24 Mont. 13, 17, 60 Pac. 396.

On the whole case, we are satisfied that the Hinkle Ditch Company, appellant's predecessor in interest, had no well-defined and continuing plan prior to September 6, 1905, for the irrigation of lands lying west and north of the Butter creek bottoms. The decree of the lower court was liberal, as we read the evidence, in its allowance to appellant of the lands covered by its appropriation of March 14, 1903. The rights of the United States, which became fixed September 6, 1905, are certainly prior and paramount to those of this appellant, in the irrigation of the 12,747.48 acres as to which a priority of 1907 is awarded.

[4] Appellant also contends that the circuit court erred in awarding the United States 350 cubic feet of water per second, and in failing to make this allowance conditional on the diligence of the government in completing its project. This portion of the decree followed the plain mandate of the statute. Section 6588, L. O. L. This portion of appellant's petition argues a legislative, not a judicial, question. By the statute quoted in the previous opinion the Legislature withdrew from further appropriation the waters of such streams as the United States should elect to utilize in the manner therein pointed out. The United States has accepted the grant and conformed to the terms thereof. The Legislature could not displace water rights which had vested prior to the acceptance by the United States of the provisions of the statute, but the plain precept of the law vests the United States with title to all waters not theretofore appropriat-The claim of the government is limited to 350 cubic feet, but this claim must be sustained, regardless of the diligence of the government in matters not specified in the statute, and regardless of the amount of water required to irrigate the lands served by the government ditches.

[5] The circuit court made a finding on the subject of contracts between irrigation companies and water users to whom they supply water. It was provided:

"Such contract may provide for any reasonable and uniform method of pro rata distribu-tion of water, and such person, firm or corporation may make such reasonable and uniform rules and regulations as may be necessary to facilitate such distribution. In case such contract does not provide for such distribution of water then such water shall be supplied to the water users in the order of, and according to the date of priority of use upon the land, or at the place upon which such water is to be used.

\* \* All contracts for the use of water giving any preference other than as herein stated are against the public policy and laws of the state of Oregon, and void."

It is contended that the priority as between appellant's water users should be basv. Parker, 48 Or. 321, 323, 86 Pac. 598, 599, Mr. Chief Justice Bean says:

"An appropriator of water acquires a right therein only to the extent to which it is applied to a beneficial use.

This is also the doctrine of Claypool v. O'Neill, 65 Or. 511, 514, 133 Pac. 349. party holding a contract with appellant for the use of water should be required to apply the water to a beneficial purpose or to yield his priority to one who does make such beneficial use of the water. The foregoing was one of the incidental provisions of the decree, and it was properly incorporated therein, although the subject was not mentioned in the claims filed by the parties.

A great deal of testimony was taken on the subject of seepage and evaporation. This testimony was contradictory, but the conclusions of the circuit court are supported by cogent proof, and we are not convinced that they should be modified.

[6] Our attention is directed on the rehearing to the following provision in the decree of the circuit court:

"That the specification of a definite amount of water per acre, in these findings, shall not be water per acre, in these indings, shall not be taken as granting that specific amount of water to any water user, but shall only be taken as a rule and guide for the water master in the dis-tribution of a maximum amount of water to any water user.

As a result of this burdensome litigation the parties are entitled to have their rights determined. The conclusions reached are not to be disregarded and lightly set aside. The duties of water masters are defined by section 6617, L. O. L., and are in part as follows:

"It shall be the duty of the said water masters to divide the water of the natural streams or other sources of supply of his district among the several ditches and reservoirs, taking water therefrom, according to the rights of each re-spectively, in whole or in part, and to shut and fasten, or cause to be shut and fastened, the headgates of ditches, and shall regulate, or cause to be regulated, the controlling works of reservoirs, in time of scarcity of water, as may be necessary by reason of the rights existing from said streams of his district."

The water master is an administrative officer charged with the duty of carrying out decrees fixing water rights. The provision above quoted from the decree vests the water master with large powers out of harmony with the statute and with sound principles. That portion of the decree will be eliminated.

[7] The Dillon Irrigation Company presses its contentions upon us with great earnestness. It is argued that proceedings for the determination of water rights are sui generis, and that it has been determined in Hough v. Porter, 51 Or. 318, 437-440, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728, that in such a proceeding relief can be given in this court to a party who has not appealed. As we read the authority cited, it holds that where an appeal in a proceeding for the determination of water rights brings before the appellate ed on the dates of their contracts. In Mann court the parties entitled to the water, the entitled to under the law and the evidence, even though such decree be more favorable than that of the lower court to parties who have not appealed. The questions urged by the Dillon Irrigation Company are not involved in the appeal of Western Land & Irrigation Company, nor has that appellant shown a right to have the decree of the circuit court modified, except in the matter of administration above referred to. were to entertain the contentions of Dillon Irrigation Company, we would review the decree at the instance of a party who has not appealed, and our conclusions would be extrajudicial. Such action on our part would violate principles repeatedly reaffirmed and unquestionably sound. Thornton v. Krimbel, 28 Or. 271, 42 Pac. 995; Goldsmith v. Elwert, 31 Or. 539, 549, 50 Pac. 867; Board of Regents v. Hutchinson, 46 Or. 57, 58, 78 Pac. 1028: McCoy v. Crossfield, 54 Or. 591, 592, 104 Pac. 423; Mathews v. Chambers Power Company, 81 Or. 251, 255, 159 Pac. 564.

The decree will be modified in the respect above indicated. In all other respects the decree is affirmed, and the former opinion is adhered to.

BEAN, J., took no part in the consideration of this case.

## STOOL v. SOUTHERN PAC. CO.

(Supreme Court of Oregon. April 9, 1918.)

1. Commerce €==27(5) — Federal Employers' Liability Act—"Employed in Interstate Commerce."

A section man on a railroad engaged in interstate commerce, who was required to begin work at 7 o'clock, and who arrived at his place work at 7 o'clock, and who arrived at his place of work a few minutes before 7 o'clock, and who before that time was struck and killed by a work train, was "employed in interstate commerce" at the time of his death within Employers' Liability Act April 22, 1908, c. 149, § 1, 35 Stat. 65 (U. S. Comp. St. 1916, § 8657).

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

2. Commerce ←=27(5)—Federal Employers' Liability Act.

Evidence held to show that the section man, who left the toolhouse where he was to wait for the direction of the place on the road where he had worked the previous day, was engaged in an employment so connected with interstate commerce as to bring his dependents within the Employers' Liability Act, § 1, if the defendant's trainmen were guilty of negligence.

3. Negligence =101-Federal Employers' LIABILITY ACT—COMPARATIVE NEGLIGENCE—PROXIMATE CAUSE.

If the joint negligence of both the deceased section man and the defendant caused his death, it would be deemed the proximate cause, as under Employers' Liability Act, § 3 (U. S. Comp. St. 1916, § 8659), his contributory negligence would go only to reduce the quantum of damages.

court will pass such a decree as appellant is ! 4. Master and Servant @==137(4)-Speed of TRAIN-NEGLIGENCE.

As a general rule no rate of speed of a train is per se negligent, though a high rate of speed may become negligence in the particular circumstances.

APPEAL AND ERROR \$== 1003-Question of FACT-NEGLIGENCE.

In considering whether the speed of a train which killed a section man was negligent the Supreme Court on appeal cannot judge as to the weight of the testimony, but is confined to an in-quiry as to whether there was any testimony tending to show the alleged negligence.

6. Master and Servant \$\infty 286(31)\$—Federal Employers' Liability Act — Negli-

GENCE—QUESTION FOR JURY.

In an action under the federal Employers'
Liability Act by the dependents of a section
man killed by the work train of an employer engaged in interstate commerce, held, that whether defendant was negligent in respect to the speed of its train and as to the signals given was a question for the jury.

7. MASTER AND SERVANT \$\infty\$210(1)\to Assumption of Risk\to Scope.

The general rule is that an employe of a railroad company assumes all the risks ordinarily incident to his employment, including those arising from the ordinary operation of trains.

8. MASTER AND SERVANT 204(1, 3)-FEDER-AL EMPLOYERS' LIABILITY ACT - ASSUMP-TION OF RISK.

Under Employers' Liability Act, § 1, making the employer liable for the negligent act of an employer hade for the negligent act of an employe which results in injury to a coemployé, a section man did not assume any risk arising from such negligence, but assumed only such risks as a railroad employé ordinarily assumes where trains are passing and the usual precautions for the safety of persons lawfully upon the tracks are observed.

9. MASTER AND SERVANT \$\infty 288(16\frac{1}{2})\$ — SUMPTION OF RISK—QUESTION FOR JURY.

In an action under the federal Employers' Liability Act by the dependents of a section man killed by defendant's work train, held, that whether he assumed the risk of the negligent failure of the trainmen to give timely warning when his presence and apparent unconsciousness of danger were perceived was a question for the

10. MASTER AND SERVANT @==267(1)-PLACE OF ACCIDENT-STREET-EVIDENCE.

The admission of testimony as to the location of a certain street designated on the plat of a town and crossing the railroad track, not showing that it had been opened for the passage of vehicles, but showing that a part of the public used it for foot and horseback travel, was admissible to show that it was a street de facto by having been platted as such and used by the public.

11. Master and Servant €==267(1) - Evi-DENCE-ADMISSIBILITY.

In such case proof of proprietorship in the person assuming to dedicate the plat showing the street, or that it had never legally been opened to public travel, was aside from the main issue and irrelevant.

12. MASTER AND SERVANT \$\insigma 137(4)\$ — RAIL-ROADS \$\infty 274(5)\$, 367, 372(5)\$ — Speed of Trains—Signals.

A railroad operating its trains in a populous village or near a station where the public or its employés congregate must so regulate their speed and give such signals as experience has shown to be most conducive to the safety of employes, etc., and not inconsistent with the efficient operation of trains.

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LESS ERROR-EXAMINATION OF WITNESS.

In an action under the federal Employers' Liability Act for the death of section man, plaintiff's examination of his witness to show that he had been subprenaed by defendant and had talked with counsel for defendant, held not prejudicial to defendant.

14. DEATH \$==64.—EVIDENCE—DAMAGE.
The federal Employers' Liability Act is a dependency statute entitling a plaintiff to recover for such benefits and services as she had been accustomed to receive and would have been likely to receive had her deceased husband remained alive, and hence evidence that plaintiff was physically infirm and as to the habit of her deceased. ceased husband in taking care of her, of which valuable services she was deprived by his death, was admissible.

15. Master and Servant €=291(1)—Feder-al Employers' Liability Act — Instruc-TION.

In an action under the federal Employers' Liability Act for the death of a section man killed by a work train a few minutes before the time for beginning actual work, the modification of an instruction that plaintiff could not recover without showing that deceased was engaged in without snowing that deceased was engaged in interstate commerce and was killed through defendant's negligence, by stating that it was not necessary that he should have been engaged in actual work at the instant he was killed, and that plaintiff must prove that his death was wholly or party caused by defendant's negligence was not arrow. gence, was not error.

16. Trial €==253(9)—Instruction Ignoring Facts — Federal Employers' Liability

ACT.
The refusal of an instruction that in deter-The refusal of an instruction that in determining whether deceased at the time of his death was working for defendant in aid of its interstate commerce it was not sufficient that he generally performed work of that nature, but it must appear that at the particular time of the accident he was engaged in interstate commerce, was too narrow and misleading, in that it ignored fact that deceased might have been on his nored fact that deceased might have been on his way to work.

17. MASTER AND SERVANT \$\ightharpoonup 291(1) - Instruction-"Idling."

The refusal to instruct that at the time of the accident deceased was walking on the track the accident deceased was walking on the track and unnecessarily and unreasonably idling be-fore the time for actual work arrived was prop-er, where there was no evidence of "idling"; that term being merely synonymous with "loaf-ing," though, if used to indicate that he was "passing away the time" on the track, it was proper.

18. Master and Servant €==293(19)—Death OF SECTION MAN-INSTRUCTION.

The modification of an instruction as to defendant's negligence in respect to the speed of its trains by stating that railroad was expected to run its trains at high speed unless there was some exception or circumstances requiring a reasonably prudent person to run a train at a low speed was not error.

19. Trial ⇔260(8) — Instruction — Requests—Matters Covered—Assumption of Risk.

In such action a refusal to instruct on the general rule of assumption of risk and that, if deceased was killed by a train run in the usual and ordinary way, he would have assumed the risk, was objectionable, as making him assume the risk of defendant's habitual negligence, and its refusal was not error, in view of a proper instruction given.

13. APPEAL AND EEROR \$\infty\$ 1048(1) — HARM- 20. MASTER AND SERVANT \$\infty\$ 240(1) — TRIAL LESS EBROR—EXAMINATION OF WITNESS. 267(3)—CONTRIBUTORY NEGLIGENCE—IN-STRUCTION.

In such action the modification of a requested instruction as to contributory negligence cor-rectly stating that as matter of law deceased was guilty of some degree of negligence in walking on the track, not substantially differing from the original request, was not error.

21. MASTER AND SERVANT \$\infty 296(16)\$—FEDERAL EMPLOYERS' LIABILITY ACT — INSTRUC-TION—PROXIMATE CAUSE.

In such action the modification of a requested instruction by stating that, if such negligence of deceased was the "proximate" cause of the accident, his dependents could not recover, substituting the word "sole," was not misle was not misleading.

22. NEGLIGENCE \$\ightharpoonup 61(1)\$—Proximate Cause. Strictly speaking, there cannot be two "proximate" causes of an injury, and where two or more circumstances each involving negligence combine to cause an injury, the circumstances together constitute but one proximate cause.

23. Trial €==208 - Instruction to Disre-

GARD EVIDENCE. In an action under the federal Employers' Liability Act for the death of a section man killed by a work train on the track, the refusal of instruction to disregard plaintiff's evidence as to custom of defendant to run its work train upon a passing track was not error, where the practice was not in the class of customs required to be "immemorial, reasonable and certain," but was a practice so frequent that it might have caused deceased to neglect precautions for his own safety and have gone to diminish the degree of his contributory negligence.

24. Pleading \$\infty 430(2)\to Variance\text{Effect}\to

STATUTE.

Where the complaint alleged that deceased was on his way to the station when struck, while the evidence showed that he was on his way to his place of work or waiting for work to begin, the variance, in view of its immateriality and the failure of defendant to allege that he was misled, as required by L. O. L. § 97, was waived

Department 1. Appeal from Circuit Court, Marion County; Percy R. Kelly, Judge.

Action by Dorothea Stool, administratrix of the estate of Oluf Olson Stool, deceased, against the Southern Pacific Company. Verdict and judgment for plaintiff, and defendant appeals. Affirmed.

This is an action brought under the federal Employers' Liability Act by the plaintiff, on behalf of herself as widow and her infant son, to recover damages for the killing of her husband, Oluf Olson Stool, while employed as a section man for the defendant. The deceased had been in the employ of the defendant most of the time for a year previous to the accident which resulted in his death, with the exception of a lay-off on account of some slight ailment for about three weeks just before the accident. He had returned to work the day before he was killed. He resided about two miles from the depot at Turner, and the hour for beginning work on the section was 7 a.m. In order to be ready for work at the prescribed time, it was usual for workmen to assemble at a section or tool

road track about 800 feet south of the depot at Turner, and there await the coming of the foreman and receive their orders for the day. The situation may be briefly described as follows: Turner is a town of approximately 300 to 350 inhabitants. It is situated on the line of the Southern Pacific Railroad about 9 miles south of Salem, and is surrounded by a rather populous farming community. The depot is apparently pretty well toward the north end of the town, and in front of it and on the west side are two tracks, the one nearest the depot being the main track, and the one farther west a passing track. tracks run parallel for 1,000 feet or more to the south, and there is a space of 8 feet in the clear between them. Some 500 feet south of the depot is a house track or switch, which runs northeasterly up to the east side of the depot: 927 feet south of the depot is a filled trestle approximately 100 feet long, and south of this is a raised grade for some distance, not disclosed in the testimony. The trestle is within the city limits of Turner, and while there are streets crossing the track at the usual intervals delineated upon the plat of the town, it may be said that there are only two of them actually in use by the public. The principal one of these two is immediately south of the depot, and is the one used by teams and for general travel; the main portion of the town being apparently upon the east side of the railroad. South of the depot and immediately north of the trestle is a street frequently used by pedestrians, but shown not to be open for the use of vehicles. The evidence introduced by plaintiff tended in a greater or less degree to indicate that upon October 6. 1913, deceased, with others, had been at work along the house track north of the toolhouse before mentioned, and that the tools used were stored in the toolhouse. Whether the men carried their tools to and from the toolhouse or whether they were conveyed to and from the place of work upon a hand car does not appear, though the testimony indicates that there was a hand car kept in the toolhouse.

On the morning of the 7th day of October. 1913, at a time estimated at from 10 minutes to 7 o'clock to about 7 o'clock, deceased appeared at the toolhouse, set down his dinner pail, and started to walk slowly along the passing track north in the direction of the depot. At a point less than 100 feet from the switch stand of the house track he walked diagonally across from the passing track to the main track, and was walking on the main track when the accident occurred. The evidence tended to show that the locomotive which caused the injury had sounded a whistle about a mile south of the station, and had also sounded a crossing whistle some 600 or 700 feet south of where the deceased was

house situated on the west side of the rail-i danger and is different from the station or crossing whistle was not sounded until the train was within from 100 to 150 feet of deceased. The evidence for the plaintiff tended to show that the train was running at a speed of from 30 to 35 miles an hour, while defendant's witnesses estimated the speed at from 20 to 25 miles. The train was a work train consisting of a locomotive and tender. one box car, and a caboose. There was evidence tending to show that the frequent, if not usual, custom at this place was for such trains, as this work train arriving at this hour to run in to the station upon the passing track and wait there for the north-bound passenger train, which at that time was due to leave Turner at nine minutes past 7 o'clock a. m. The deceased was about 48 years of age and possessed of all his facul-

> The foregoing is not a full detail of the evidence, which consumes several hundred pages, but is deemed sufficient for the purposes of this case. There was a trial and verdict and judgment for plaintiff, from which defendant appeals.

> Roscoe C. Nelson, of Portland (Ben C. Dey, of Portland, on the brief), for appellant. A. S. Bennett and Francis V. Galloway, both of The Dalles, for respondent.

> McBRIDE, C. J. (after stating the facts as above). Learned counsel for defendant has stated concisely the basic questions which arise in the examination of this case, namely: (1) Was decedent injured while performing duties connected with interstate commerce? and (2) Was defendant guilty of negligence in any particular constituting a proximate cause of the injury? A-multitude of minor questions relating to the admission of testimony and the giving or refusing of instructions are discussed in the briefs, and will be considered in their order, but, as those above noted are fundamental and go to the right of plaintiff to recover in any event. they will be first considered.

[1] It is conceded that defendant's road is an interstate road, and that defendant at the time of the injury was engaged in interstate commerce, and it is also conceded that deceased was at the time of the injury in the employ of the defendant as a section hand, whose duty it was to render service to defendant in repairing its road. It is agreed that pursuant to such employment deceased was present at the toolhouse of defendant a few minutes before 7 o'clock in the morning in order to be ready to resume work at precisely 7 o'clock, which was the hour prescribed by defendant. The toolhouse seems to have been the place at which the workmen were accustomed to assemble, and in order to be on hand promptly it was natural that a workman residing at some distance, in decedent's case two miles, from the place of struck. The warning whistle that indicates assembly, should endeavor to be there a little ahead of time so as not to delay the work ! or lose time. Does the fact that the accident occurred while the deceased was waiting for the moment to come when actual labor was to begin deprive his dependents of the benefits of the federal Employers' Liability Act? We think not. It was necessary and convenient both for himself and his employer that he should be there in readiness to resume his labor at 7 o'clock, and that the time devoted to actual work with the pick and shovel should not be partly consumed by traveling to the place where it was to be done. His employer had a right to expect as a part of his contract of labor that he would be on the ground ready to use the tools necessary for the accomplishment of his work when the bell tapped seven. It was a part of his duty in order that he should render efficient service to be upon the ground, and the fact that in his zeal to comply with his duty he was there somewhere from one minute to ten minutes before the time his physical labors were to be required should not be held to deprive his dependents of the benefits of the Employers' Liability Act. We think the case in this respect comes within the spirit of the rule laid down in the following cases, although the circumstances of none of them are in all respects identical with that of the case at bar: Lamphere v. Oregon R. & Nav. Co., 196 Fed. 336, 116 C. C. A. 156, 47 L. R. A. (N. S.) 1; Horton v. O.-W. R. R. Co., 72 Wash. 503, 130 Pac. 897, 47 L. R. A. (N. S.) 8; St. L., San F. & Texas Ry. Co. v. Seale, 229 U. S. 156, 33 Sup. Ct. 651, 57 L. Ed. 1129, Ann. Cas. 1914C, 156; Stone-Webster Engineering Corp. v. Collins, 199 Fed. 581, 118 C. C. A. 55; Baltimore & Ohio R. R. Co. v. Whitacre, 124 Md. 411, 92 Atl. 1060; North Carolina R. R. Co. v. Zachary, 232 U. S. 248, 34 Sup. Ct. 305, 58 L. Ed. 591, Ann. Cas. 1914C, 159. Holding, as we do, therefore, that the presence of the decedent upon the grounds of the defendant under the circumstances last detailed did not deprive his dependents of the benefits of the Liability Act, we will consider further whether his leaving the immediate vicinity of the toolhouse has such an effect.

[2] This case was tried two years after the happening of the accident, and, if any of the fellow employés of deceased were present near the scene of the accident, they were not called; the probabilities are that none were The most that can be said in any event is that the place chosen by deceased to wait for his foreman was not the safest. and that he might have chosen a safer place. Why he left the toolhouse and walked down the track is a matter of speculation. might have gone upon some personal errand, although this seems improbable under the circumstances. He was going in the direction of the place on the road where he had worked the day previous, and the most reasonable theory would seem to be that he expected to resume his labor in that vicinity

at noon to the toolhouse, where he left his dinner pail, and that, instead of loitering on the track, he was actually on his way to where his services were required. The hand car, which is the usual conveyance for tools from one part of a railroad section to another, was locked up with the other tools in the toolhouse, and nothing could be more natural than for deceased to leave his dinner bucket there and walk down the track so as to resume his labors where he had left off the evening before. The section foreman of defendant, whose memory seemed remarkably retentive on most subjects, testified that he could not remember where his section gang was intending to work that morning, but it is a fair inference, and one that the jury had a right to draw from the facts proven, that deceased was on his way to the place where the gang had left off the evening before, with the intent to resume his work there when the car had arrived with the tools. We take it, therefore, that there was evidence tending to show that deceased was engaged in an employment so connected with interstate commerce as to bring his dependents within the scope of the act, and that he was upon defendant's track for the purpose of pursuing that employment, and that, if there is any testimony tending to show that defendant's servants engaged in the management of the work train were guilty of the acts of negligence charged in the complaint, the verdict for plaintiff ought to stand, unless the proceedings upon the trial were so erroneous in other respects as to justify a reversal.

[3] It may be conceded, in fact, it may be said to be conclusively proven, that the deceased was negligent in not keeping a better lookout for approaching trains, but if defendant's engineer was also negligent in respect to warning deceased of his danger after his presence on the track had been perceived, so that the joint negligence of both the deceased and defendant brought about an injury which but for such combined negligence would not have happened, then such combined negligence must be deemed the proximate cause of the injury. And while at common law the contributory negligence of the deceased would have been a complete defense, yet in an action under the federal Employers' Liability Act such contributory negligence only goes to reduce the quantum of damages. Section 3, Employers' Liability Act 1908.

[4-6] We will now consider the question as to the negligence of the defendant. It may be conceded that as a general rule no rate of speed by a train is per se negligent. Russell v. O. R. & N. Co., 54 Or. 128, 102 Pac. 619. But it does not follow that because a high rate of speed is not negligence per se that a high rate of speed may not become negligence under particular circumstances. In considering the question in reference to the present case we are not permitted to judge on the morning of the accident, and return as to the weight of the testimony, but are confined to an inquiry as to whether there is any testimony tending to show such negligence. Tested by this rule, we think the court did not err in submitting the case to the inrv. We will enumerate these circumstances. It was in evidence that the work trains were accustomed to run in and stop on the passing track in order to allow the passenger train which left Turner going north at 7 o'clock to pass, and that this custom was known to deceased. It is also in evidence that the train came into the station at a speed of from 30 to 35 miles an hour; that, instead of coming in upon the passing track according to custom, and where deceased probably expected it would run, it came in upon the main track; that it sounded no whistle except the usual crossing whistle until it approached within from 100 to 150 feet of deceased, and too late to avert the disaster; that the station whistle and crossing whistle would apply as well to the passing track as to the main track, and of themselves were no warning to deceased that there was danger in leaving the passing track and going upon the main track; that he was seen upon the track apparently oblivious to the approaching train when it was from 500 to 600 feet distant. Some of this testimony was disputed, but it was in the case, and the jury had a right to believe it. In fact, the only reasonable explanation of the apparent indifference of deceased to the approach of the train is that, relying upon a custom of this character of trains to side-track on the passing track, he crossed to the main track as a measure of safety, or at least felt assured that the approaching train would run in on the passing track according to custom. Under the circumstances detailed above we think it was for the jury to say whether it was negligence for the defendant's engineer to fail to sound the warning signal sooner. Three things concurred to require more than usual caution from defendant's engineer: (1) The train was coming into the station where people were likely to be in the vicinity of the track at an extraordinary rate of speed for a work train; (2) it was deviating from the usual custom by coming through on the main track instead of side-tracking so the passenger train could pass; (3) deceased was seen for a distance of from 500 to 600 feet walking along the track in a place of danger and apparently oblivious to it, not even turning to look at the approaching train. For some reason he must have believed himself safe, and a warning whistle blown when he was first seen by the engineer might have prevented the accident. In addition to the circumstances above mentioned, it may be added that this work train was not running on schedule, and without the same reason for a high rate of speed that obtains with regular passenger trains. The fact that it was "running wild" and was likely to be unexpected furnished an additional reason for

populous community, and especially when it was deviating from its usual custom of running in upon a side track.

[7-9] Upon the two basic questions, therefore, which are involved in this appeal, we are in accord with the contention of plaintiff. and will now proceed to consider the other assignments of error specified in the very able brief of counsel for defendant. first and most plausible of these is that deceased assumed the risk of an injury of this character by virtue of his contract of employment. The general rule is that an employé of a railroad company assumes all the risks ordinarily incident to his employment, including those arising from the ordinary operation of trains upon the road. 4 Labatt Master & Servant, \$1313, and cases there cited. As section 1 of the Employers' Liability Act makes the employer liable for the negligent act of an employé, which results in injury to a coemployé, it cannot be contended that the plaintiff assumed any risk which might arise from such negligence. He only assumed such risks as one ordinarily assumes when contracting to work upon a railroad track where trains are passing and repassing, and the usual precautions for the safety of persons lawfully upon its track are observed. Doyle v. S. P. Co., 56 Or. 495. 516, 108 Pac. 201; Conners v. Burlington, C. R. & N. Ry. Co., 74 Iowa, 383, 37 N. W. 966. The unusual speed of the train, considered by itself, would probably be among the risks assumed by deceased. The change from the customary track to the main track, standing alone, might also be among the contingencies concerning which he should be held to have assumed the risk, but add to these the negligent failure to give timely warning when his presence and apparent unconsciousness of danger were perceived, and we have a case which we think the court was justified in submitting to a jury. The failure, therefore, of deceased to leave the track under the circumstances cannot be defended against upon the theory that he assumed the risk of a negligent failure to warn, but is referable rather to the theory that he was guilty of contributory negligence, which, as before stated, is not a complete defense under the federal statute. This phase of the case may be dismissed by a quotation from the opinion of Justice Fly in International & G. N. R. R. Co. v. Arias, 10 Tex. Civ. App. 190, 30 S. W. 446, wherein it is said:

"There is a reciprocal duty existing between the railroad company and the employe at work on the track, the one being that the railroad company must give signals where the nature of the locality requires, and in case there is danger of injuring the employe, to use diligence to prevent it, and the other being that the employe must keep an outlook and seek safety from any trains that may be passing."

lar passenger trains. The fact that it was "running wild" and was likely to be unexpected furnished an additional reason for observing caution in passing through a Turner as "G" street was located upon the

ground. The plaintiff first offered in evidence a plat of the town taken from the records of the county, which was admitted in evidence without objection. Counsel for plaintiff then asked the witness questions and received answers tending to show that the street crossed the railroad track south of the section house and north of the trestle heretofore referred to, that it had never been opened across the track for the passage of teams or vehicles, but that it had been used for the passage of pedestrians and persons on horseback and for driving cattle. this was objected to, and the objection overruled.

One ground of objection seems to have been that here was no proof of proprietorship in the person who assumed to dedicate the plat, and no evidence that the street had ever been legally open to public travel. would have been obviously improper for the court to have turned aside from the main issues in the case to engage in an investigation as to the technical legality of the dedication of the street. It was sufficient to show that it was a street de facto by having been platted as such and used by the public. The evidence onered tended to show this. It is true that it did not show that it had been opened for the passage of vehicles, but it did show that a portion of the public used it to the extent of foot and horseback travel.

The further objection was that, as this was not an action for injury at a crossing, and as it was not claimed that deceased was killed at the crossing, the evidence was irrelevant. It is not probable that the evidence had any effect on the verdict, but it did tend to some extent to show a disregard and heedlessness of the rights and safety of the public, including plaintiff, if the train was rushed past the station grounds and across two streets in a populous community at a high and unusual rate of speed, and without any signal being given to warn persons about the grounds or who might be using the highways that they were in possible danger. We do not consider the fact that there was not an ordinance prescribing a particular rate of speed for trains passing through the town as having the effect of a license to trains to run at any rate of speed that its engineer might choose. Such ordinances are but the expression of the corporate judgment of the maximum speed that may be employed without negligence. er a disregard of them constitutes negligence per se or is merely prima facie evidence of negligence is a question upon which courts differ, but, irrespective of any ordinance upon the subject, it is, no doubt, the duty of a railway company operating its trains in a populous village or near a station where the public or its employes are wont to congregate to so regulate their speed and give such signals as experience has demonstrated to be most likely to conduce to the ject-matter of this assignment has already

safety of such persons and not inconsistent with the efficient operation of its trains.

The third assignment of error relates to the admission of testimony regarding the alleged custom of defendant's work trains to come in upon the passing track, and has already been adverted to.

[13] The fourth assignment relates to questions asked by counsel for plaintiff of Harry Barnett, who was put upon the stand by plaintiff, and toward the conclusion of his testimony was asked if he had not been subpœnaed by defendant, to which he answered "Yes." He was then asked if he had not talked with counsel for defendant, to which he answered in the affirmative. The questions were probably not necessary under the circumstances, but there was nothing in them or in the answers returned that could have prejudiced defendant's case.

[14] Assignment No. 5 predicates error in the ruling of the court allowing plaintiff to testify as to the fact that she was physically infirm and as to the habit of her husband in taking care of her in her debilitated condi-We think the testimony was admistion. The statute under consideration is a sible. dependency statute, and the plaintiff is entitled to recover for such benefits and services as she had been accustomed to receive, and would therefore have been likely to receive had her husband remained alive. The evidence elicited the fact that the services rendered by deceased were necessary and valuable, and such as plaintiff will hereafter have either to dispense with or pay for, and, in our judgment, they were an element to be considered in determining the amount of her recovery. In Mich. C. R. Co. v. Vreeland, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. Ed. 417, Ann. Cas. 1914C, 176, the court, referring to this subject. observes:

"The pecuniary loss is not dependent upon any legal liability of the injured person to the beneficiary. That is not the sole test. There must, however, appear some reasonable expectation of pecuniary assistance or support of which they have been deprived. Compensation for such loss manifestly does not include damages \* \* for grief or wounded feelings. \* \* \* A pecuniary loss or damage must be one which can be measured by some standard. \* \* \* Nevertheless the word as judicially adopted is not so narrow as to exclude damages for the loss of services of the husband, wife, or child, and, when the beneficiary is a child, for the loss of that care, counsel, training and education which it might, under the evidence, have reasonably received from the parent, and which can only be supplied by the service of another for compensation. \* \* must, however, appear some reasonable expecta-

that by the death of the intestate his widow may have been deprived of some actual customary service from him, capable of measurement by some pecuniary standard, and that in some degree that service might include as ele-ments 'care and advice.'"

The sixth assignment of error appears to have been waived, and the seventh relates to the motion for a directed verdict. The sub-



been covered by what is said in respect to assignments 1, 2, and 3.

[15] Assignment No. 8 predicates error upon a modification by the court of the following requested instruction:

"Before plaintiff would be entitled to recover any damages at your hands, she must prove two

things:
"First. She must prove that at the time of the accident in which her husband was killed he was engaged in doing some work for the defendant, which work was in furtherance and aid of interstate commerce;

"Second. She must prove that her husband was killed through negligence on the part of the religious company"

railroad company.

The court gave this, but added:

"It is not necessary in order to bring the case within the law that the deceased should have been engaged in active work at the very instant he was killed. If his general employment was he was killed. If his general employment was interstate commerce, and he had come upon the premises of the defendant necessarily and at a customary and proper time to report for work, his presence there might be an incident to his interstate work, and if he was there under such circumstances for the purpose of taking up his work, he might be within the law, even though it were a few minutes before his active work

was to commence.
"Second. She must prove that the death of her husband was wholly or partly caused by negligence on the part of the railroad company."

We see no error in the modification. It is in line with N. C. R. Co. v. Zachary, supra. St. Louis R. R. Co. v. Seale, supra, and L. & N. R. Co. v. Walkers, 162 Ky. 209, 172 S. W. 519.

[16] Assignment No. 9 predicates error upon the refusal of the court to give the following instruction:

"In arriving at the question as to whether the deceased at the time of the accident was doing some work for the defendant in furtherance and aid of its interstate commerce, it is not sufficient that the deceased, during his working hours, generally performed work of that nature, but it must appear from a preponderance of the evidence that at the particular time of the accident he was then engaged in some work for the defendant, which work was assisting the defendant in its interstate commerce business.

We think the requested instruction was too narrow, in that it ignored the condition that defendant might have been on his way to work or was waiting on the grounds of the company for work to begin. In the form requested it had a tendency to mislead the jury.

[17] Assignment No. 10 is directed to the refusal of the court to give the following instruction, leaving out the words in italics, which were interpolated by the court:

"If, therefore, you find that at the time of the accident the deceased was not doing any work for the defendant, but was walking along defendant's track for the purpose of performing some errand personal to himself, or for the purpose of unnecessarily and unreasonably idling away the time until his working hours commenced, then the deceased would not at the time of the accident have been engaged in work for the defendant in furtherance of its interstate com-merce business, and the plaintiff would not be entitled to recover any verdict at your hands in this connection."

The instruction as given was fully as strong as the facts warranted. We have looked in vain for any evidence that the deceased was "idling" away his time. He was either waiting for work to begin or going to where he thought it would begin, as a prompt and industrious workman ought to have done. The term "idling" is so nearly synonymous with "loafing" as to be almost a term of reproach, and assumes a condition not disclosed by the testimony. chose a dangerous place in which to wait for work to begin, or chose a dangerous route to his work, might and would be negligent acts. but they would not necessarily defeat a recovery, if the element of negligence by the defendant was established. Given the usual meaning of the term used, and it would signify that deceased was a mere loafer upon defendant's grounds. Used to indicate that deceased was "passing away the time" on the track, which was evidently the sense in which the court construed the term "idling," the qualification given was proper.

Assignment No. 11 is practically waived: [18] Assignment No. 12 is predicated upon a modification of an instruction asked by defendant as given below, the words in brackets being the change interpolated by the

"In arriving at the question as to whether the defendant was negligent, I instruct you that as a matter of law a railroad company has the right [and is expected] to run its trains at high rates of speed, and unless there are some [excepcases or apecu, and unless there are some [exceptional] circumstances which would cause a reasonably prudent person to run a train at a low rate of speed, a railroad company has the right to run its trains at as high a rate of speed as it desires." it desires.

The instruction as asked was technically correct, and the modification does not alter it in substance, and was less likely to be misleading to a jury. In addition to the language above quoted the court added:

"And the rate of speed is not of itself negligence, but it should regulate the rate of speed with due and reasonable regard to the location and circumstances and to the danger, if any, which may occur to the life and limb of its employes and others who may be necessarily or lawfully along the tracks; and whether the rate of speed was negligence under the circumstances is a question of fact for you."

With this addition the instruction constituted an admirable and temperate statement of the law, which deserves commendation for its clearness

Assignment No. 13 relates to the refusal of the court to instruct in substance that there was no evidence tending to show a failure to give proper warning. This branch of the case has been discussed and need not be further considered.

[19] Assignment No. 14 predicates error upon the failure of the court to give the following requested instruction:

"The law says that when one man goes to work for another he assumes, as part of his con-tract of employment, all of the risks which are ordinarily incident to the business in which he engages. In other words, a section laborer, upon going to work for a railroad company, assumes all of the risks of being struck by moving trains upon the tracks of the railroad company, run in the usual and ordinary way, this being one of the risks incident to the business in which he engages. If, therefore, you find from the evidence that plaintiff's husband was killed by a train run over the tracks of the railroad company in the usual and ordinary way in which defendant's trains were run, then I instruct you that the accident to plaintiff's husband was a result of one of the risks which he assumed in going to work as a section laborer, and that plaintiff cannot recover in this action."

The instruction in a general way states the law, although the statement that, if the deceased was killed by a train run over the track of the railroad company in the usual and ordinary way which defendant's trains were run, he would be held to have assumed the risk, is subject to the criticism that, if defendant habitually neglected to give proper warning signals, or otherwise negligently managed its trains, the deceased would be held by such instruction to have assumed the risk of such habitual negligence, which is not the law, except in those instances where the injured party is shown to have had previous knowledge of such negligent custom. Upon this branch of the case the court gave the following instruction, which fully stated the

"The law says that, when one man goes to work for another, he assumes the risk of an injury arising from the dangers naturally incident to his employment, and the risk of those extraordinary dangers, if any, which are apparent or which he knows and appreciates, but this does not imply that he also assumes those additional risks, if any, arising by the negligent act, if any, of the master, after he has entered upon the performance of his work and of which he has no knowledge and by reasonable intendment could not be held to have known. \* \* \*

"Moreover, if the employé voluntarily continues without complaint or objection, after knowledge or notice of risks arising subsequent to the employment and during the course of the service, by reason of the employer's negligence, or otherwise, under conditions by which the employé is chargeable with an appreciation of the danger, and where ordinary prudence would require of him a different course, the employé takes upon himself the responsibility entailed by the risk he continues to incur, that is, he assumes such a risk. If the accident in which the deceased met his death was the result of a risk deemed by the law as stated to be assumed by him, then plaintiff could not recover, and your verdict should be for the defendant."

Assignment No. 15 is waived.

[20] Assignment No. 16 predicates error by reason of the court having modified a request for an instruction as to the contributory negligence of deceased; the modification being indicated by the words italicized in the following quotation:

"I instruct you as a matter of law that plaintiff's husband was guilty of some degree of negligence in walking on and along the railroad track without keeping a vigilant lookout for the approach of trains by both looking and listening, as it was his duty to do. When a person walks along a railroad track longitudinally, he must keep a constant lookout both forward and back, and exercise his faculties of sight and hearing for his protection."

The instruction as given correctly states the law, and does not differ substantially from the original request. The court is not bound to give an instruction in the language of the request, if the substance of the request is embodied in it as given. In a case of this character, where a rule obtains approximating comparative negligence, the degree of negligence of each party is a factor that suggests itself to the judicial mind, and the change made by the presiding judge was natural under the circumstances.

[21] The seventeenth assignment predicates error upon the modification of the following requested instruction:

"If you find that such negligence on the part of the plaintiff's husband was the *proximate* cause of the accident, then plaintiff would not be entitled to recover any damages from defendant."

For the word "proximate" the court substituted "sole" in the above. It would have been better to have given the instruction as requested, but the general instruction of the court upon proximate cause was so full and definite the jury could not have been misled.

[22] As to the eighteenth exception, in which the court used the word "sole" proximate cause instead of "proximate" cause, the instruction was correct. Strictly speaking, there cannot be two "proximate" causes for any injury. Where two or more circumstances, each involving negligence, combine to produce an injury which, but for all of them, would not have occurred, these circumstances taken together are the cause of the injury, and therefore constitute but one proximate cause.

[23] Assignment No. 19 predicates error upon the refusal of the court to instruct the jury to disregard the evidence of plaintiff as to the custom or practice of the defendant to run its work train upon the passing track. The refusal was not error, as the practice was not in the class of these "customs" which the law requires to be "immemorial, reasonable and certain," but rather to a practice so frequent that it might have so far influenced the mind of deceased as to cause him to neglect precautions for his own safety, which he otherwise would have taken, and thereby in a sense have gone to diminish the degree of his contributory negligence.

[24] An objection that may be noted here is that there is a material variance between the pleadings and the proof in the following particulars: It is said that the complaint alleges deceased was on his way to the depot when he was struck, while the evidence for plaintiff tends to show that deceased was on his way to his place of work or waiting on the tracks for work to begin. The variance was as to a mere matter of detail, and could not have misled the defendant and evidently did not, as no objection was made to the testimony upon this ground. Section 97, L. O. L., expressly requires a party claiming

the advantage of a variance to allege and [2. Insurance 4 819(1) - Change of Beneprove that he has been actually misled thereby to his prejudice. We are of the opinion that a failure to raise the question of variance by timely objection and in the manner indicated in section 97 constitutes a waiver except in those cases where the evidence offered constitutes an entire departure from the cause of action set forth in the complaint, so that to ignore it would, in effect, permit the plaintiff to allege one cause of action and try his case upon another cause not alleged. Section 99, L. O. L. Such is not the case here.

Other objections to instructions of the court are discussed in the brief, but all of them are simply elaborations of the theory contended for by plaintiff, namely, that the court did not correctly state and define the term "proximate cause," that there was no evidence of negligence on the part of defendant, and that there was no evidence of a failure on the part of defendant to give timely warning signals. As to each of these we are of the opinion that there was evidence which justified the instruction, although if this court sat as a trier of the fact it might differ from the jury as to its weight. The appeal has been so fairly and ably presented and the questions raised so close and difficult, it would be a pleasure to consider each in detail, but the length of this opinion, already far beyond the writer's customary limit, precludes further discussion, although each assignment has been carefully considered.

Finding no reversible error, the judgment is affirmed.

BURNETT, BENSON, and HARRIS, JJ., concur.

UNITED ARTISANS v. CRONISE et al.\* (Supreme Court of Oregon. April 16, 1918.)

1. EQUITY \$\insuperscript{\insupersc

The by-laws of a fraternal organization provided that any member might change the beneficiary by written request to the secretary of his assembly signed in the presence of the local secretary or two witnesses, which request with the certificate was to be forwarded to the supreme secretary, who should issue a new certificate, forward it to the local secretary, to go into effect at noon on the date issued by the supreme secretary. A member mailed written request on April 27th to local secretary, des-ignating his wife as beneficiary instead of chil-dren by a former marriage. The request should have reached the local secretary on the follow-ing day, and the supreme assembly by April 29th, but the local secretary did not receive it 25th, but the local secretary did not receive it until May 1st, and it did not reach the supreme secretary until May 3d. Assured died on May 2d. Held, that equity will consider that done which ought to have been done, and the new beneficiary was entitled to recover on the certificate.

FICTARY—FRAUD.

In an interpleader suit to determine the right to receive the benefit on a fraternal cer-tificate wherein the beneficiary had been changed, the evidence held not to show that such change was brought about by fraud and undue influence by the new beneficiary.

Department 2. Appeal from Circuit Court. Linn County; William Galloway, Judge.

Suit of interpleader by the United Artisans, a corporation, against Elizabeth F. Cronise and others. From the decree, defendant named appeals. Reversed.

This is a suit of interpleader filed by the United Artisan Lodge, a fraternal and benevolent organization, for the purpose of determining the ownership of the \$1,900 insurance due upon the life of Harry H. Cronise. A benefit certificate for \$2,000 was first issued to him by plaintiff on May 4, 1896. The money was paid into court. The defendant Elizabeth F. Cronise the surviving widow of the insured, made proof of loss and claimed the insurance money, and the defendants Harry Kratz Cronise and Mable Cronise Laughlin, children of the deceased assured by his first wife, also claimed the insurance money as beneficiaries named in the benefit certificate, and plaintiff asked that the court determine the ownership thereof. ant Elizabeth F. Cronise claims this money upon the grounds: (1) That soon after the marriage of Harry H. Cronise, a contract was entered into wherein he promised and agreed to make his wife, Elizabeth F. Cronise, beneficiary of his policy if she would make him beneficiary in her policy of the same lodge; that this contract was carried out by both parties as agreed; that Harry H. Cronise therefore became bound by such contract, and Elizabeth F. Cronise acquired a vested interest in his policy, and therefore the contract should be specifically enforced and the money paid to Elizabeth F. Cronise. (2) That where the by-laws require certain things to be done and performed by the assured in designating a change of beneficiary in his policy, and the assured before death has performed each and all of said conditions, but the clerical act of making the change has not yet been performed by the insuring lodge, then equity will consider that as done which ought to be done and declare the change as having been actually made.

Harry Kratz Cronise and Mable Cronise Laughlin, the defendant children by the first wife, claim that the change of the beneficiary was invalid and rely upon the by-laws which state that "the new benefit certificate shall go into effect at 12 o'clock noon on the date issued by the supreme secretary," and upon the proposition that the request of Harry H. Cronise to have his policy changed was not acted upon by the lodge until after his death. The respondents deny that the alleged contract set up by the appellant was ever made or consummated. They claim the fund as beneficiaries under the benefit certificate outstanding at the time of their father's death. They also allege and claim that fraud and undue influence were exercised.

The by-laws provide, in section 75:

"Any member may change the beneficiary or beneficiaries named in his certificate, by returning his certificate to the secretary of his assembly with a written request to have the certificate canceled and a new certificate issued, naming some other person or persons designated in such request, and not excluded by the laws. Such member shall pay a fee of \$1.00 for the new certificate. Such request must be signed in the presence of the local secretary or a supreme officer or a notary public or two persons who shall sign such request as witnesses. The secretary shall send the returned certificate and request to the supreme secretary, accompanied by the fee of \$1.00. The supreme secretary shall thereupon issue a new certificate in compliance with such request and forward it to the secretary of the subordinate assembly, to be delivered to the member. The new benefit certificate shall go into effect at 12 o'clock, noon, on the date issued by the supreme secretary."

The trial court found for the children by the first wife and decreed that the money be paid to them by the clerk of the court. An appeal is taken therefrom.

J. K. Weatherford, of Albany (Weatherford & Weatherford, of Albany, on the brief), for appellant. Wm. Maurice Hudson, of Portland, for respondent United Artisans. C. E. Sox, of Albany (Hewitt & Sox, of Albany, on the brief), for other respondents.

BEAN, J. (after stating the facts as above). [1] We will first consider the effect of the transfer of the benefit certificate or change of beneficiary. It appears without conflict that Harry H. Cronise did make the written request on Thursday, April 27, 1916, to have the certificate canceled and a new one issued, which he forwarded by mail upon the same date to his local secretary and paid the fee of one dollar; that the request was signed in the presence of two persons who signed as witnesses. The assured died on May 2, 1916. The request, as per form printed on the back of the certificate, was in conformity with the by-laws. With the certificate and fee it was mailed at Lyons. Or., addressed to the secretary of the local assembly at Corvallis. In due course of the mail it should have reached Corvallis on April 27th, the date of its mailing, and have been delivered not later than the morning of April 28th, on which day it should have been forwarded to the supreme assembly at Portland and acted upon by April 29th of that year. The local secretary states that he did not get this certificate until May 1st; that he forwarded it as requested on May 2d. It appears that he was busy with other matters at that time. The same was received by the supreme lodge in Portland and a new certificate issued on May 3d. naming Elizabeth F. Cronise as beneficiary therein.

It must be conceded that the assured, Harry H. Cronise, did all in his power and all that the by-laws of the order required him to do in order to change the beneficiary. This was done in ample time so that in the ordinary course of business the requested change could have been made, and his wife, Elizabeth F. Cronise, substituted as beneficiary in the benefit certificate before the time of his demise.

When the assured has pursued the course prescribed by the laws of the association and has done all that he can possibly do to change the beneficiary, and a sufficient time has elapsed for a new certificate to be issued in the ordinary course of business, but before the new certificate is actually issued he dies, a court of equity will consider that done which ought to have been done and act as though the new certificate had been issued before the death of the assured. Nothing done by the society after the death of the member can affect the right of a beneficiary. 14 R. C. L. § 556, p. 1392; 19 Cyc. 133(b): 1 Bacon, Ben. Soc., etc., § 309; Independent Foresters v. Keliher, 36 Or. 501, 507, 59 Pac. 324, 1109, 60 Pac. 563, 78 Am. St. Rep. 785; Stringham v. Dillon, 42 Or. 63, 70, 69 Pac. 1020; Supreme Conclave, Royal Adelphia, v. Cappella (C. C.) 41 Fed. 1. This latter case is the leading one around which many opinions center. See, also, Jory v. Sup. Council, 105 Cal. 20, 38 Pac. 524, 26 L. R. A. 733, 45 Am. St. Rep. 17; Lahey v. Lahey, 174 N. Y. 146, 66 N. E. 670, 61 L. R. A. 791, 95 Am. St. Rep. 554; Voigt v. Kersten, 164 Ill. 314, 45 N. E. 543, 545; Marsh v. S. C. A. Legion of Honor, 149 Mass. 512, 21 N. E. 1070, 1072, 4 L. R. A. 382; Modern Brotherhood of America v. Matkovitch, 56 Ind. App. 8, 104 N. E. 797; Isgrigg v. Schooley, 125 Ind. 94, 25 N. E. 151, 153; Wintergerst v. Court of Honor, 185 Mo. App. 373, 170 S. W. 352. In Independent Foresters v. Keliher, supra, it is stated that the general rule that in order to make a change of the beneficiary in such a benefit certificate the insured is bound to make such change in the manner pointed out in the policy and by-laws of the association is subject to three exceptions, the third of which is as follows:

"If the assured has pursued the course pointed out by the laws of the association, and has done all in his power to change the beneficiary, but, before the new certificate is actually issued, he dies, a court of equity will decree that to be done which ought to be done, and act as though the certificate had been issued."

The case at bar comes squarely within this exception. The rule is also stated to the same effect in 14 R. C. L. p. 1392, § 556:

"While it is true as a general rule, as stated in the preceding paragraph, that a change in beneficiaries cannot be made except by a substantial compliance with the regulations of the society, yet courts of equity recognize exceptions to this general principle. Equity does not domand impossible things, and will consider as done that which should have been done, and, when a member has complied with all the requirements of the rules for the purpose of making a substitution of beneficiaries within his power, he has done all that a court of equity demands."

There was a strict compliance on the part of the member with all the requirements of the rules of the assembly directing the manner of making a change of the recipient of the benevolent fund. Mrs. Cronise was a competent beneficiary to be named. There are no counter equities for us to consider. In order to effect such a change it is for the member to file the request with the secretary of his assembly and return to him the old certificate with the fee of \$1. This the member did, and the same was received by the secretary the day before the death of the insured. He was not required to send the application to the head office, as is sometimes the case. Nothing remained for the insured to do to effect the desired change. The issuance of the new certificate was a ministerial act. Sup. Ct. I. O. F. v. Frise, 183 Mich. 186, 150 N. W. 110.

Prior to the death of the member the beneficiary named in the certificate had no vested interest in it. Up to that time the assured had the privilege of changing his designation of beneficiary at will, even against the consent of such beneficiary. Sup. Conclave, Royal Adelphia, v. Cappella, supra. That the request for the change was made in conformity with the requirements of the order is evidenced by the fact that a new certificate was actually issued by the regular officer of the supreme assembly on May 3, 1916, before the death of the assured was known to them. It is contended, however, that, as the by-laws of the assembly specify that when such a change is made the new certificate shall take effect at 12 o'clock m. of the day upon which the certificate is issued, the rule announced in the above authorities is not applicable. If we should apply the principle that equity will decree that to be done which ought to have been done and consider the new certificate as issued prior to the death of the assured, say on the 30th day of April, 1916, then it would follow that the same took effect at 12 o'clock m. of that day. In other words, "the greater includes the less." The mandate that the certificate be deemed to have been issued and delivered at the time when, in the natural course of things, it should have been issued, is for the very purpose of giving effect to the instrument at that time. A minor detail should not thwart the main purpose of an honest endeavor to change the beneficiary. Luhrs v. Luhrs, 123 N. Y. 367, 25 N. E. 388, 9 L. R. A. 534, 20 Am. St. Rep. 754; Bishop v. Grand Lodge, 112 N. Y. 627, 20 N. E. 562. It is held that a substantial compliance with the rules and regulations of such a society will suffice to change the name of the beneficiary. McGowan v. Sup. Ct. I. O. F., 104 Wis. 173, 80 N. W. 603.

The by-laws of an association like the to Harry H. Cronise and entitled to the sum

United Artisans are made for the special protection of the society. When the association deposited in court the \$1.900 due upon the benefit certificate, its rights were fully protected. A slightly different question is raised where the interests of such a benevolent insurer are involved. We have examined the authorities cited by the learned counsel for respondents not referred to above. For the most part they relate to cases which come within the general rule and not within the exception noted herein. We find no expression of opinion contrary to the principle invoked embodied in the exception to the general rule. The question is usually one of application. Where the facts are like or of similar import to those in the case at bar, we find no refusal to apply the equitable

[2] It is claimed by the defendants who are the stepchildren of Elizabeth F. Cronise that the wife and stepmother exercised fraud and undue influence to obtain the change of the benefit certificate in her favor. A careful analysis of the evidence fails to discover a substantiation of the claim. The decedent. Harry H. Cronise, and Elizabeth F. Cronise, were married in 1908. Both had children by a former marriage. Mr. Cronise was usually employed by a railroad company. For some time prior to his last illness he was ticket agent for the Corvallis & Eastern Railway Company at Lyons, Or. Necessity compelled him to be away from the home which was owned by Mrs. Cronise at Albany. months and sometimes for a year or two she would be with her husband, making a somewhat temporary home with him and boarding at hotels. At other times she would remain at Albany, where the husband usually returned at the end of the week. When he was suffering with his last ailment, Mrs. Cronise went to Lyons and cared for him and also transacted the business in his stead for the railroad company. While the testimony shows that the position of a stepmother may differ from that of an own parent, it plainly indicates that at all times Mrs. Cronise was a dutiful and affectionate wife and was so esteemed by her husband. The change made in the certificate was a natural and proper one. Mrs. Cronise had some time prior thereto made provision for her husband to be the recipient of a like bounty in the event of her death taking place first. At the time of the transfer, Harry H. Cronise was perfectly capable of transacting any business. He was a competent, experienced man of affairs and fully understood the matter and intended to make the change in the instrument. Our view upon the question of the change of the beneficiary renders it unnecessary to consider the other claims made by the widow. It follows that the decree of the lower court must be reversed and one entered here declaring Mrs. Elizabeth F. Cronise the beneficiary named in the benefit certificate issued

of money due thereon which was deposited | in the lower court by the benevolent society. It is so ordered.

McBRIDE, C. J., and HARRIS and Mc-CAMANT, JJ., concur.

TYLER et al. v. BIER et al.

(Supreme Court of Oregon. April 16, 1918.) 1. APPEAL AND ERROR @== 907(1) - PRESUMP-

In the absence from the record of any of the evidence, it must be assumed that there was evidence to support the finding.

2. WILLS \$\infty 439-Construction-Intent.

In the construction of a will, the purpose is to discover the intention of the testator. 3. LIFE ESTATES €== 16-OBLIGATIONS TO PAY

MORTGAGE.

Under will devising all of estate to the wife, providing that on her death one half should go to her relatives and half to the relatives of the testator, the wife was a life tenant, and under no obligation to pay off the principal of a mortgage, even to prevent foreclosure sale.

gage, even to prevent foreclosure saie.

4. LIFE ESTATES — 16 — MORTGAGES — PAYMENT BY LIFE TENANT.

When a life tenant pays an incumbrance with her money, she may call on the remaindermen for contribution, and has a lien on the property for the amount of the principal, but she must personally pay the interest, at least to the extent of the income or rental value of the property. the property.

LIFE ESTATES \$\infty\$ 16 — Mortgages — Pay-MENT BY LIFE TENANT.

Where a life tenant paid the principal of a mortgage out of her individual estate, the remaindermen should not be required to pay interest on the mortgage, since the payment of the interest tended to reduce their estate.

Department 2. Appeal from Circuit Court, Marion County; William Galloway, Judge.

Action by Mrs. Louisa Forstner against John Bier, his wife and others, wherein, on the death of plaintiff, Paul F. Tyler and others were substituted as plaintiffs. Judgment for plaintiffs in part, and defendants appeal. Judgment modified and affirmed.

This is a suit to quiet title to certain real property. The record for our examination consists of the findings of fact, conclusions of law, and decree. No record of the evidence is brought up. In so far as any fact is controverted we are governed by the findings made by the lower court. From the brief of plaintiffs we take the following statement of the case: During his lifetime Benjamin Forstner owned a fractional part of lots 2 and 3 in block 49 in the city of Salem. Or., located on the west side of Commercial street between Court and Chemeketa streets. He died on February 27, 1897, leaving a widow, Louisa Forstner. Sophia Bier and Rosa Keil are his other heirs at law. In April, 1896, Benjamin Forstner made a will, the substance of which is as follows:

"I, Benjamin Forstner, of the city of Salem, being of sound mind and memory, do by these presents make this my last will and testament, amount of \$3,500, together with interest there-

and give and bequeath all my estate, real and personal, of which I may die seised and possessed, after paying my funeral expenses and just debts, to my wife Louisa Forstner, and hereby appoint her executrix of this my last will and testament, without bonds.

"Provided, however, at her death one half of all property, real and personal, shall go to her relatives and half to mine.
"In testimony whereof I have hereunto sub-

"In testimony whereof, I have hereunto subscribed by name and affixed my seal this 23d scribed by name day of April, 1896.
"[Signed] Ben Forstner."

Soon after his death his will was regularly probated in Marion county. His wife had charge of the administration as executrix in accordance with its provisions. After the completion of the administration, which was about August, 1899, Mrs. Forstner continued in the possession of the property, renting the major portion of it, and for at least a portion of the time her home was established in one of its apartments. At the time of her husband's death this property was incumbered by a mortgage amounting to about \$3.500. Mrs. Forstner understood that the property was hers under the provisions of her husband's will, and presumed that she had a right to incumber it or to dispose of it and convey a satisfactory title. Acting upon this understanding, she paid off the mortgage mentioned, borrowed from Ladd & Bush, bankers, about the same amount, and secured her note by a mortgage upon this property. This mortgage was paid off by Mrs. Forstner. In the early part of 1916 she concluded that she would dispose of this property if a satisfactory price could be obtained, and place the money at interest, as her health was rapidly failing her and the responsibility of caring for the property was too great. Then for the first time she was brought to the realization that her title to the property was possibly only a life estate. Thinking that a suit to quiet title might remedy any objection which otherwise could be urged, she instituted such proceedings in February, 1916. The heirs of Benjamin Forstner, who are the appellants herein, and the heirs of Mrs. Forstner, were made parties defendant. Default was had as to her heirs. The defendants Sophia Bier and Rosa Keil here alone appeared. They claim an interest in the property under the provisions of Benjamin Forstner's will. The plaintiff Mrs. Forstner insisted upon a lien on the interest of Sophia Bier and Rosa Keil because she paid the mortgage which was on the property at her husband's death. The decree appealed from determined Mrs. Forstner to be the owner in fee simple of a onehalf interest in the real premises described in the complaint, and defendants Sophia Bier and Rosa Keil the owners in fee simple of one-half of the real premises, subject to the life estate of plaintiff Louisa Forstner, and subject to a lien in her favor for the

on at the rate of 6 per cent. per annum from personal, during her life and enjoy the use October 14, 1899. On November 11, 1917, Mrs. Louisa Forstner died, and the parties now appearing as respondents were substituted at the request of the executor of Louisa Forstner's estate.

George W. Denman and Arthur Clarke. both of Corvallis (McFadden & Clarke, of Corvallis, on the brief), for appellants. Guy O. Smith, of Salem (Smith & Shields, of Salem, on the brief), for respondents.

BEAN, J. (after stating the facts as above). Sophia Bier and Rosa Keil appeal from that portion of the decree impressing a lien upon their share of the real estate for the amount of the mortgage and interest by reason of Mrs. Forstner, now deceased, having paid the same, and contend: (1) That according to the terms of the will Mrs. Forstner as the life tenant should have paid all the debts against the estate of the testator, Benjamin Forstner, before she would have been entitled to the real property; and (2) that in any event they should pay only onehalf of the principal of the mortgage debt, and that the interest should be deemed to have been liquidated from the rents and profits of the premises. Plaintiffs concede that their share of the real property should bear one-half of the burden of the principal debt, but submit that the record does not authorize a finding that there was an income from the property with which the life tenant could pay the interest on the mortgage.

[1] After hearing all the evidence, a record of which it is stated by counsel was not preserved so as to enable defendants to present the same to this court, the trial court found as to the first proposition submitted by defendants that at the time of the death of Benjamin Forstner there was an incumbrance against the real premises in the way of a mortgage in favor of Mary Payton in the amount of \$3,500 and subsequent to his death, to wit, on October 14, 1899, plaintiff herein, through her own efforts and with her own funds, released, paid, and discharged the said mortgage. As the record comes to us it must be assumed that there was evidence supporting the finding, and that the mortgage debt was not liquidated with other funds belonging to the estate of Benjamin Forstner, deceased, as claimed by plaintiffs.

[2-4] It is an undisputed rule that in the construction of a will the purpose is to discover the intention of the testator. Kaser v. Kaser, 68 Or. 153, 137 Pac. 187; Roelf's Cousins v. White, 75 Or. 549, 551, 147 Pac. 753. While the will in question is couched in very general terms it clearly appears therefrom that the testator desired that his widow should hold the property, both real and CAMANT, JJ., concur. 172 P.-8

thereof for her maintenance. Any question in regard to her power to alienate any part thereof is eliminated by her death. It does not appear that Mr. Forstner willed that his wife should be required to pay any incumbrance on the real estate from her separate estate or by her own efforts. If she did so from the other funds or property of the estate, under the terms of the will ordinarily it would only change the form of the property, and would not affect the reversioners or remaindermen. We therefore hold that according to the will it was not compulsory for Mrs. Forstner to satisfy the mortgage. Being a life tenant, she was under no obligation to pay off the principal of the incumbrance even to prevent a foreclosure sale. When she did so with her own money she was entitled to call upon the remaindermen or reversioners for contribution, and to a lien on the property for the amount of the principal so paid. 16 Cyc. 635, 636; Moore v. Simonson, 27 Or. 117, 127, 39 Pac. 1105; Tindall v. Peterson, 71 Neb. 160, 98 N. W. 688. There are exceptions to such a rule, but they are not applicable to the present case. It is the duty of such a life tenant. however, to pay the interest on the incumbrance, at least to the extent of the income or rental value of the property, and of the remainderman to pay the principal. 16 Cyc. 634 (12); Moore v. Simonson, supra; Damm v. Damm, 109 Mich. 619, 67 N. W. 984, 63 Am. St. Rep. 601.

[5] It appears that the real property is situate in the business portion of the capital city, and the greater part of it was leased by Mrs. Forstner, who received the rents. This is not controverted in plaintiff's briefs. The payment of the interest would tend to decrease the amount of property to be left to the remaindermen under the terms of the will. In equity the interest on the principal of the mortgage debt, during the incumbency of the premises by the life tenant, Mrs. Forstner, should not now be paid by either set of remaindermen. The decree of the trial court will therefore be modified so that the share of defendants Sophia Bier and Rosa Keil will be subjected to a lien thereon for one-half of the principal of the mortgage debt, or \$1,750, with interest thereon at the rate of 6 per cent. per annum from November 11, 1917, the date of Mrs. Forstner's death. In other respects the decree is affirmed. The plaintiffs and defendants will be required to pay their own costs; it being for the mutual benefit of all the parties to this suit that the questions involved be determined.

McBRIDE, C. J., and MOORE and Mc-

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OREGON HOME BUILDERS V. EISMAN et al. \*

(Supreme Court of Oregon. April 23, 1918.)

1. Boundaries €== 10 - Description - Re-CORDED PLAT-AFFIDAVIT AND CERTIFICATE. A surveyor's affidavit and certificate attached to and made a part of a plat of a city addition when filed for record should be regarded as incorporated in the description of outboundaries in the tract platted.

2. BOUNDABIES \$\infty 48(2)\$—Description—Recorded Plat—Monuments.

A recorded plat of a city addition which makes the boundary lines of lots therein coincident with the surveyed line of railroad right of way recognizes the way as a monument determining the lot lines contiguous thereto.

. 3. Pleading == 214(2, 4)-Admission by De-MURRER.

demurrer admits all averments of fact well pleaded, and any reasonable and proper in-ference deducible therefrom.

4. BOUNDARIES &3(3)—DESCRIPTION—LOTS
ADJOINING RAILROAD—MISTAKE IN SURVEY.
Since, by L. O. L. § 878, subd. 2, and otherwise, the rule is that monuments govern measurements, where a survey of a plat of a city addition adjoining a railroad overlapped the line of the railroad's right of way by reason of a surveyor's mistake in assuming that the track occupied the center line of the original survey of the right of way, the surveyor's notations on the map must yield to the boundary of the railroad company's easement, and lots conveyed in road company's easement, and lots conveyed in such addition adjoining the railroad right of way will be bounded accordingly in construing

In banc. Appeal from Circuit Court, Multnomah County; John P. Kavanaugh, Judge. Action by the Oregon Home Builders against George P. Eisman and others. From a judgment for defendants on sustaining demurrers to the complaint, plaintiff appeals. Affirmed.

This as an action to recover damages for an alleged breach of the covenants of seisin and of warranty in a conveyance of real property. The complaint substantially al-

That the plaintiff, the Oregon Home Builders, and the defendant the Co-operative Realty Company, are and at all the times stated were respectively Oregon corporations. That on March 17, 1909, a plat of Rullman's addition to the city of Portland was duly made and recorded. That the grantors and grantee in a deed hereinafter mentioned relied upon such plat and the surveyor's certificate which was a part thereof, as being in all respects accurate. That the map and attestation are incorrect in that they represent the main track of the Oregon-Washington Railway & Navigation Company to be in the center of the right of way of that company, adjoining the real property described in such deed, whereas the middle line of such track, as laid in the year 1909, opposite the easterly boundary of lot 6 of that addition is 2.58 feet south of the center of such right of way, thence following a curved line from the easterly

ary of lot No. 1 in that addition, to a point which is 4.22 feet south of the center of such right of way, giving also the respective distances from the easterly boundaries of lots Nos. 2, 3, 4, and 5 to-the middle of such rights of way. That on April 23, 1915, the defendants George P. Eisman, Louise C., his wife, and the Co-operative Realty Company, being the owners in fee of the real property in Multnomah county, Or., hereinafter specified. executed a deed wherein the premises were described as follows:

"Lots one (1), two (2), three (3), four (4), five (5), and six (6) of Rullman's addition to the city of Portland, in said county and state, together with all and singular the tenements, beardless with a singular than the county and appurture angles therough the county and appurture angles thereof hereditaments and appurtenances thereunto belonging or in any wise appertaining."

This conveyance contained covenants to the effect that the grantors were lawfully seised in fee simple of the premises, and had a valid right to convey the same. That the lots were free and clear of all incumbrances, except a specified mortgage and liens for public improvements, which liabilities the grantee assumed and agreed to pay, and that the grantors, their heirs, assigns, etc., would warrant and forever defend such premises against the lawful claims of all persons whomsoever, except those claiming under such liens. That at the time the deed was executed, the defendants were seized in fee of only parts of such lots which are indicated upon the plat, Exhibit C, as follows:

"Beginning at the initial point described in said Exhibit C, thence east, tracing the south line of Broadway street, 290.37 feet; thence south, at right angles to said line last described, south, at right angles to said line last described, 32.52 feet to a point on the north line of the O. W. R. & N. Company's right of way (the said O. W. R. & N. Co. being the successor to the said Oregon Railway & Navigation Company), said point being 50 feet northerly from the center of the main railroad track of the said right of way as the same was staked, located and laid upon the ground on and prior to the year 1885 or thereabouts; thence westerly on a curve at all points 50 feet distant from the center of the said railroad track as the same was staked, located and laid upon the ground about 1885, as aforesaid, to a point on the east line of East Thirty-Third street, 76.18 feet south of the beginning point; thence north, tracing the east line of East Thirty-Third tracing the east line of East Thirty-T street, 76.18 feet to the place of beginning.

That on April 23, 1914, the defendants were not, nor was either of them, the owner of all the real property described in their deed, nor have they or either of them since acquired the title to any part of the land, in addition to the premises last hereinbefore described. and that neither of them was then or thereafter seised in fee or otherwise of that part of such lots described as follows:

"Beginning at a point on the easterly line of said lot 6, fifty feet distant from and north of the center of the main track of said railroad as the same was staked, located and laid upon the ground on and prior to the year 1885, or thereabouts; thence westerly on a curve parallel to said center of said track at all points 50 feet distant therefrom to the east line of East boundary of that lot to the westerly bound- Thirty-Third street; thence south approximately 4.22 feet; thence easterly on a curve parallel to the center of the main track of said railroad as the same was located and laid upon the ground during 1909, and at all points 50 feet distant therefrom to a point south of and opposite to the place of beginning; thence north approximately 2.58 feet to the place of beginning."

That since the year 1881 the Oregon-Washington Railway & Navigation Company, and its predecessors, but not the defendants nor either of them, has been and the railway company is now seised in fee of the strip of land last hereinbefore described, and the title of such company has been and now is paramount to that of the defendants in and to the That the approximate area of the same. tract of land so pretended to be conveyed by the defendants to the plaintiff is 14,300 square feet, and the number of square feet in the overlapping strip so owned by the railway company is 1,200, whereby the plaintiff failed to secure the title to 8.39 per cent. of the land described in the deed. That the plaintiff is still the owner of the real property, and of the whole thereof actually conveyed. That it paid the defendants therefor the sum of \$10,000, stating the items constituting the consideration, and by reason of the failure to obtain the title to the entire tract so described in its deed, the plaintiff has been damaged in the sum of \$839.

For a second cause of action, the averments of the first cause are substantially repeated, and it is alleged that the plaintiff has been evicted by the railway company from the strip of land last hereinbefore particularly described, which the company claimed under a paramount title. Judgment was demanded for the sum of \$839, with interest from April 23, 1915, and for the costs and disbursements herein. Demurrers to each of the separate matters thus set forth, interposed on the ground inter alia that the complaint did state facts sufficient to constitute a cause of action, were sustained, and the plaintiff declining to amend the initiatory pleading, the action was dismissed, and it appeals.

W. B. Shively, of Portland, for appellant. G. E. Hamaker, of Portland, for respondents.

MOORE, J. (after stating the facts as above). A blueprint of that part of the plat of Rullman's addition to the city of Portland, Or., which is involved herein, was made a part of the complaint in this action. This map delineates a checkered curved line, extending easterly from that city and marked "Oregon Railway and Navigation Co." Parallel therewith are two other lines, the northerly one being designated as "North Line Right of Way." East Thirty-Third street is represented as extending north and south. the east line of which is coincident with the west line of lot No. 1 in that addition. Lots numbered consecutively from 1 to 10 are portrayed on the blueprint. Immediately north

"Broadway." At the northwest corner of lot No. 1, as specified on the map, are the words "Iron Pipe, Initial Point." The north boundary of that lot is represented as being 40.37 feet wide, while the north lines of the other lots from 2 to 6, inclusive, are each indicated as being 50 feet. The west boundary of lot No. 1 from Broadway street to the "North Line Right of Way" is marked 90.40 feet; the west line of lot No. 2 is 67.31 feet: No. 3, 54.27; No. 4, 45.15; No. 5, 39.04; No. 6, 35.59; and the east border of the latter lot is 35.10 feet. The complaint alleges that the west boundary of lot No. 1, as indicated upon the plat, extends upon and south of the north border of the right of way 4.22 feet, and the eastern boundary thereof 3.33 feet, and that the east boundary of the other lots extends south of the north line of the right of way as follows: Lot No. 2, 3.10 feet; No. 3, 2.78; No. 4, 2.87; No. 5, 2.69; and No. 6, 2.58 feet. This action involves alleged breaches of seisin and of warranty of the title to a strip of land, bounded on the north and south by curved lines, which are separated from each other, and asserted to involve the right of way at the east end 2.58 feet, at the west 4.22 feet, and at intervening points, as hereinbefore indicated.

The affidavit and certificate of the person making the plat, who measured and subdivided the tract into lots, a part of which were conveyed by the defendants to the plaintiff, shows that the initial point mentioned is located 470.10 feet north and 30 feet east of the quarter post between sections 25 and 36 in township 1 north, range 1 east of the Willamette meridian. Assuming the quarter post so referred to can readily be found, no difficulty would be encountered in extending upon the ground the lines of Rullman's addition, as indicated upon the plat thereof. There is also attached to the initiatory pleading the surveyor's affidavit, appended to the original plat, which sworn statement gives the initial point as stated. and contains a clause which reads:

"The description of the outboundaries of the "The description of the outboundaries of the tract platted is as follows: Beginning at the above-mentioned initial point, thence east tracing the south line of Broadway (street) 490.37 feet to a point; thence south at right angles to said south line 62.28 feet to a point on the north line of the O. R. & N. R. R. right of way; thence westerly tracing said north line of right of way to a point on the east line of East Thirty-Third street, 80.40 feet south of the beginning point; thence north tracing the east line of East Thirty-Third street 80.40 feet to the place of beginning."

[1, 2] The surveyor's affidavit and certificate, which were attached and made a part of the plat when it was filed for record, should be regarded as incorporated in the description thus set forth. 9 C. J. 220. Interpreting such attestation and sworn statement in the manner indicated, the southerly boundary of lots 1 to 6, inclusive, is thereby of these lots is depicted a street marked | made coincident with the northerly line of the earlier survey of the right of way, thus recognizing such adjoining land as a monument which determines the measurement of the east and west lines of the several lots extending from Broadway street south to the railway company's real property. Pickman v. Trinity Church, 123 Mass. 1, 5, 25 Am. Rep. 1, In that case Mr. Justice Colt, referring to a similar conveyance, observes:

"The defendant chose to bound the estate conveyed by it on the line of Thorndike's land. By the terms of the deed, his line was made a monument which controls the distances given and the quantity of land stated."

To the same effect is the case of Percival v. Chase, 182 Mass. 371, 377, 65 N. E. 800, 803, where Mr. Justice Loring remarks:

"A monument governs measurements, and the land of an adjoining proprietor is a monument within that rule."

In Couch v. Texas & P. Ry. Co., 99 Tex. 464, 90 S. W. 860, it was ruled that a call in a deed for a railroad right of way would, if unexplained, be treated as a call for another tract of land, thereby controlling conflicting calls for distance. See, also, upon this subject, the extended notes to the case of Matheny v. Allen, 63 W. Va. 443, 60 S. E. 407, 129 Am. St. Rep. 984, 1005. Our statute, prescribing the rules for construing the description of real property, declares:

"When permanent and visible or ascertained boundaries or monuments are inconsistent with the measurement, either of lines, angles, or surfaces, the boundaries or monuments are paramount." L. O. L. § 878, subd. 2.

[3, 4] The demurrers admit all the averments of fact set forth in the complaint that are well pleaded, and of any reasonable and proper inference deducible therefrom. Wills v. Nehalem Coal Co., 52 Or. 70, 96 Pac. 528. Construing the initiatory pleading in connection with the plat and the surveyor's certificate, it would appear that in measuring the land, the surveyor made mistakes in running the east and west boundaries of the several lots in Rullman's addition too far south, thereby encroaching upon and extending such lines south of the northerly boundary of the right of way at such places. From an examination of the averments of the complaint it would seem that about the year 1885 the railroad was constructed along the center line of the right of way, which fronted upon the tract of land that was subsequently platted as Rullman's addition; that about the year 1909 the track was moved southerly at the east line of East Thirty-Third street 4.22 feet, and at the east side of lot 6, 2.58 feet; that without knowing such change had been made, the surveyor assumed that the track then occupied the center line of the original survey, and extended the side lines of the lots described in the plaintiff's deed to points 50 feet from the middle of the track as he then found it, thereby overlapping the north boundary of the right of way to the

extent indicated. But, however this may be, as the plat which was of record when the plaintiff secured its deed conclusively shows that the lots purchased extended only from Broadway street south to the north boundary of the right of way, of which fact the grantee had notice, the surveyor's notations made upon the map to indicate the distances of the east and west lines of such lots must necessarily yield to the north boundary of the survey of the railway company's easement.

Considering the averments of the complaint, the delineations of the plat, and the statements made in the surveyor's certificate and affidavit, it is evident that the defendants intended to convey and the plaintiff to acquire the legal title to only so much of the real property described in the deed as is situate between Broadway street and the northerly limit of the right of way, and this being so, no error was committed in sustaining the denurrer.

The judgment is therefore affirmed.

ROBINSON v. KNIGHTS AND LADIES OF SECURITY.\*

(Supreme Court of Oregon. April 16, 1918.)

1. INSURANCE \$\iftimes 789(1) -- Fraternal Beneficiary Insurance-Proof of Death-Estoppel.

The widow of a deceased, who was ignorantly induced to assent to a physician's certificate of death as the result of the use of chloroform, could be bound only by an estoppel.

2. ESTOPPEL \$\infty\$110-PLEADING.

An estoppel must be pleaded in order to be available.

3. Insurance \$\iff 815(2)\$ — Fraternal Beneficiary Insurance — Insurer's Plea of Tender of Dues Paid—Sufficiency.

In an action upon a beneficiary certificate,

In an action upon a beneficiary certificate, the insurer's plea that, upon being informed of facts, which, if true, would have avoided the certificate, it tendered to plaintiff and she accepted all dues which deceased had paid in, without alleging an acceptance in satisfaction of her demand or an acceptance as an accord and satisfaction, was insufficient.

Insurance \$\iff 815(2)\$ — Fraternal Beneficiary Insurance—Acceptance of Tender—Waiver.

Where plaintiff in an action on a benefit certificate accepted the insurer's tender of dues which deceased had paid in without accepting it in satisfaction of her demand or as an accord and satisfaction, she did not waive her demand.

5. Insurance \$\iff \$315(2)\$ — Fraternal Beneficiary Insurance—Waiver of Insured's Demand—Pleading.

A waiver must be pleaded with the same particularity as an estoppel.

6. APPEAL AND ERBOR = 1170(9)—HARMLESS ERROR—CONSTITUTIONAL PROVISIONS.

In an action upon a benefit certificate, an instruction as to the reinstatement of insured, after default in payment of dues notwithstanding his physical condition, abstractly correct though partly without support in the evidence, and apparently not misleading, in view of Const. Amend. art. 7, § 3, authorizing the disregard of technical errors, would not require a reversal.

Department 1. Appeal from Circuit Court, Multnomah County; George R. Bagley, Judge.

Action by Alice M. Robinson against the Knights and Ladies of Security. Judgment for plaintiff, and defendant appeals. Affirmed.

This is an action brought by the plaintiff upon a beneficiary certificate issued by the defendant on January 18, 1915, to Joseph A. Robinson, who died October 14, 1915. The plaintiff, who was the wife of deceased, was named as beneficiary in said certificate and seeks to recover from the defendant \$631, the amount due by the terms of said certificate. The complaint alleged that deceased in his lifetime complied with all the conditions of said certificate and the by-laws of the order, that he did not come to his death through any of the causes excepted in said certificate or the by-laws of the order, and that he was a member in good standing at the time of his death. The defendant answered setting up that deceased, at the time of his death, was not a member in good standing but was delinquent in the payment of his assessments and was, according to the rules of said order, a suspended member; that the assessment for May, 1915, was not paid until June 4, 1915; that the assessment for June was not paid until July 2, 1915; that the assessment for July was not paid until August 13, 1915; that the assessment for August was not paid until September 10, 1915; that the assessment for September was not paid until October 19, 1915; that at the dates of all of these delinquencies deceased was suffering from heart trouble and heart disease superinduced by the use of chloroform, was being treated by a physician for that ailment, and with a full knowledge of his condition he made the payments after he became suspended; that at the time he made said payments he was intemperate in the use of alcoholic drink, and addicted to the use of chloroform to such an extent as to become intoxicated; that at the time of such payments the defendant had no knowledge of the condition or habits of deceased with reference to the use of drugs; and that defendant had returned to the beneficiary all dues paid by deceased and the same were accepted by her. A further defense alleged that deceased, on account of his use of drugs and intoxicating liquor at the time of the payments of the delinquent assessments, was, under the laws of the order, a suspended member, and that thereby said beneficiary certificate became null and void. Another defense alleged that the death of decedent was directly caused by the use of chloroform and liquor drank and imbibed by him, and that prior thereto defendant had no knowledge that decedent was using drugs, liquors. or chloroform to excess, or at all.

The answer also sets forth certain laws and rules of the order too long for insertion here, but in substance as follows:

By section 112 of the by-laws the financier of each subordinate council is required to keep a book showing the date when assessments are paid. All assessments become due and payable on the first day of each month. The certificate of each member who has not paid his assessments and dues on or before the last day of the month is automatically suspended without notice, and his rights thereunder forfeited until re-establishment.

Section 114 provides that any beneficiary member suspended by reason of nonpayment of an assessment or dues may, within 60 days, reinstate himself by payment of all arrearages and charges which may have accrued during his suspension; such payment to be a warranty that he is in good health at the time of such reinstatement. If in fact he is not in good health or engaged in a prohibited occupation, such payment does not have the effect to reinstate him or entitle him or his beneficiaries to any rights under his benefit certificate.

Section 117 provides that the subordinate may pay the assessments of any member not already suspended by a majority vote to that effect, it appearing of record on the minutes, but such payment must be made before the expiration of the month in which the assessment becomes due.

Section 120 provides that the national council is not bound by the acceptance or receipting for an assessment from a member not entitled to reinstatement, by an officer of a subordinate council. The failure of the financier to report to the national council as suspended any suspended member of his council shall not operate in any case as a waiver of the forfeiture occurring on account of suspension.

By section 120a, no officer of any subordinate council is permitted to waive any provision of the by-laws which relates to the contract between the member and the society. nor is notice to such officer or council imputable to the national council or the officer thereof. Section 82 provides that no person who is or shall become intemperate in the use of intoxicating liquors, drugs, or narcotics can be received into or retained as a member of the society. If any member offends against this provision, or if his death shall result from his intemperate use of intoxicating liquors, drugs, or narcotics, his beneficiary certificate is thereby rendered void and all payments made thereon forfeited. There are other provisions, substantially however, to the same effect.

The affirmative allegations of the answer having been put at issue by a reply, there was a trial by jury and a verdict for plaintiff, from which defendant appeals.

Q. L. Matthews, of Portland (Christopherson & Matthews, of Portland, on the brief) for appellant. G. E. Hamaker, of Portland (A. L. Dundas, of Portland, on the brief), for respondent.

McBRIDE, C. J. (after stating the facts as above). The basic issues raised by the defense are: That the deceased, by reason of his having habitually failed to pay his dues before the last day of the current month, stood suspended; that his payments within 60 days did not reinstate him by reason of the fact that he was at the time of such payments an habitual chloroform tippler; that plaintiff cannot contradict the medical certificate and proof of death furnished to the head office, by showing that deceased was not in fact addicted to the use of drugs; and that such certificate and proof were founded upon a mistaken idea as to the facts, or the result of inadvertence. We will consider these in the order named, and thereafter consider certain objections to instructions of the court, which are not set forth in the foregoing statement.

[1, 2] The evidence of decedent having been a chloroform tippler was contradictory; that of the plaintiff tending strongly to negative the practice by him of any such injurious habit, and indicating that he was a sober and industrious citizen. In fact, we may say that such was probably the effect of the weight of the evidence, although there was some evidence to the contrary; that he had been using chloroform on the evening before his death is indicated by the testimony of his physician, but there was no autopsy and little to indicate that the use of chloroform was a fixed habit. No one ever saw him use chloroform or knew that he used it. The fact that the physician detected the odor of chloroform in the matter vomited by deceased on the evening before his death, and that he had some of the drug in his possession, only indicated a single use of the drug, which he might have taken as a remedy for some ailment he was suddenly stricken with, and a diagnosis of the cause of his death as the result of chloroform tippling was ridiculous in the extreme. That a physician who had never seen the deceased before being called upon to attend him and who knew nothing of the history of the case, who never saw him alone but twice in his life should fill out such a certificate and induce the stricken wife of deceased to ignorantly assent to it, is little to his credit. Is the plaintiff bound by the certificate and proof of death? She can be bound only in one way, and that is by estoppel; and no estoppel is pleaded. The answer nowhere refers to the death certificate, or the affidavit furnished by the beneficiary. An estoppel must be pleaded in order to be available, so this defense may be laid out of the case. If the deceased was not a chloroform tippler, his payment of dues within 60 days reinstated him, and he was a member in good standing when he died.

[3-5] The plea of tender is insufficient. It is alleged in the answer that the defendant, upplaintiff all dues which deceased had paid in, and that she accepted them. It is not alleged that the sum was tendered or accepted in satisfaction of plaintiff's demand, or that she accepted it as an accord and satisfaction. Under the circumstances pleaded, the acceptance of the sum tendered did not constitute a waiver by plaintiff of her demand, and in this state a waiver must be pleaded with the same particularity as an estoppel, to which it is closely akin.

[6] Error is predicated upon the following instruction:

"Yet if he was in bad health or if he was addicted to the use of alcoholic drinks, narcotics, or drugs, and the head officers of the defendant society or its national council at the time of the payment of assessments actually knew or had actual notice of his condition and it (his dues) was paid by Robinson and accepted by them, with that notice or knowledge, he would be reinstated notwithstanding his physical

condition. \* \* \*

"But if they did not, your verdict must be for the defendant."

The excerpt quoted, which formed part of a larger paragraph, correctly states the law in the abstract. We find no evidence that the defendant and head officer knew anything about deceased's condition; therefore the instruction should not have been given. In view, however, of the very fact that there was an utter absence of evidence upon this point, and the whole testimony was so brief that any juryman of ordinary capacity would readily retain the whole of it in his memory, we do not believe they were misled by it. We might add that the evidence of his having been in ill health or addicted to the use of drugs was so slight it is difficult to believe that any jury would have found with the defendant upon this issue. Section 3, art. 7, of our amended Constitution, authorizes us to disregard technical errors of this character and give judgment according to the justice of the case.

Therefore the judgment of the circuit court is affirmed.

BURNETT, BENSON, and HARRIS, JJ., concur.

MONTANA COAL & IRON CO. v. HOSKINS et ux.\*

(Supreme Court of Oregon. April 16, 1918.) 1. Judgment ===683 - Conclusiveness of DECREE-PARTIES CONCLUDED.

In suit by attorney against clients and latters' assignees of corporate stock to recover for services and to enforce a lien against the stock, such clients and assignors were concluded by the decree, where they had timely notice of the pendency of the suit, although they failed tomake defense therein.

2. JUDGMENT \$= 955 - NOTICE OF PENDENCY OF SUIT-EVIDENCE.

In action by an attorney against clients, husband and wife, and their assignees of corporate stock, to foreclose a lien for services upon such stock, evidence of another attorney that on being informed of the facts, tendered to the he notified the husband by telegram of the pendency of the suit, and took the wife's deposition for use therein, held to warrant a finding that both husband and wife had notice of the pendency of the suit, so as to be bound by the decree therein against the assignees.

3. HUSBAND AND WIFE \$== 154-LIABILITY OF WIFE ON IMPLIED INDEMNITY.

Where an attorney had rendered services for a husband and wife in a suit to recover corporate stock, and such cause of action was subsequently assigned by the plaintiffs to one who had no notice of the attorney's lien, the wife was jointly liable with her husband to the assigned to indemnify him for payments made by was jointly hand with her nusband to the assignee to indemnify him for payments made by him to discharge the lien, and for costs and expenses of suit by attorney to enforce the same.

4. TRIAL 4 141 — INSTRUCTIONS INVADING PROVINCE OF JURY.

Where there is no conflict in the evidence as to an issue, the court is justified in charging the jury to find as alleged in the pleadings of one of the parties.

ATTORNEY AND CLIENT @== 166(3)-FEES-

REASONABLENESS.

In an action for attorney's fees paid for services rendered on behalf of plaintiff corporation in defending a suit to foreclose an attorney's lien, for which defendants were liable, a charge of \$775 held, under the evidence, not ex-

Department 2. Appeal from Circuit Court, Lane County; John S. Coke, Judge.

Action by the Montana Coal & Iron Company against Omar Hoskins and wife. Judgment for plaintiff, and defendants appeal.

This is an action by the Montana Coal & Iron Company against Omar Hoskins and Maggie, his wife, to recover money. complaint alleges in effect: (1) That the plaintiff is a Montana corporation; (2) that James A. Walsh is a duly licensed attorney of that state; (3) that about September 1, 1907, he commenced in the district court of Carbon county, Mont., a suit for Mr. Hoskins against the Montana Coal & Iron Company and others to set aside 16,478 shares of its capital stock on the ground that it had been issued without consideration, to cancel an indebtedness of \$99,134.58, asserted to have been contracted by the corporation without authority, and to compel two defendants in that suit to convey 640 acres of land to that company, whereby 444 shares of its capital stock, which was then owned by Mr. Hoskins. would be rendered more valuable; (4) that about February 1, 1910, at the request of Mr. and Mrs. Hoskins, Walsh commenced in the district court of Yellowstone county, Mont., a suit for her against the Montana Coal & Iron Company and Elijah Smith to compel the delivery to her of 250 shares of the capital stock of the corporation in payment for lands which she had conveyed to it; (5) that on June 24, 1910, the defendants herein entered into a written contract with Preston B. Moss, whereby they transferred to him the 444 shares of stock so held by Mr. Hoskins, and the several causes of suit which had been instituted by him and his wife against

Moss gave them \$3,000, and promised to pay within 60 days the further sum of \$20,000. whereupon such transfers were deposited in escrow with the Farmers' & Traders' State Bank of Billings, Mont., and the remainder of the consideration was to have been deposited with that bank to the credit of Mr. and Mrs. Hoskins, the same to be divided by them; that by reason of the services so rendered by Walsh for them they became indebted to him in the sum of \$3,000, which they, without segregation as to the amount due in either suit, promised to pay him, and on June 24, 1910, they gave him \$2,000, but failed to pay any part of the remainder, though demand therefor was made upon them by Walsh; (7) that Moss assigned such stock and causes of suit to Elijah Smith, who transferred them to the plaintiff herein: that the sum of \$23,000 was paid to Mr. and Mrs. Hoskins, but the last two installments of \$5,000 each were given to them at Portland, Or.; that such stock and causes of suit were assigned by Moss to Smith, and by the latter to the plaintiff, without notice or knowledge of Walsh's claim against Mr. and Mrs. Hoskins to any remainder due him, or of any lien against such stock or causes of suit, and the final payments were made to Mr. and Mrs. Hoskins in ignorance of any such claim or lien: (8) that about December 19, 1911, Walsh commenced in the district court of Yellowstone county, Mont., a suit against Mr. and Mrs. Hoskins, Elijah Smith, the Montana Coal & Iron Company, and the Farmers' & Traders' State Bank of Billings, Mont., to recover \$1,000, the remainder of his attorney's fees, with interest from June 20, 1910, to enforce a lien upon the 444 shares of stock and the two causes of suit so assigned and deposited with that bank, and to secure a sale of such property and an application of the proceeds arising therefrom to the satisfaction of the remainder due Walsh; (9) that the statute of Montana provides that in such suit service of a summons by publication may be made upon a defendant who is not found within or who resides without that state; that service of process in that suit was made in such manner upon Mr. and Mrs. Hoskins who had notice and knowledge of the institution and pendency of that suit, and they were requested by the plaintiff herein to appear and defend therein; that their testimony was taken by depositions which were received in evidence at the trial of that suit, but each otherwise failed, neglected, and refused to appear or plead therein, or to protect their own interests or those of this plaintiff; (10) that such suit was tried and upon appeal from the decree rendered therein the Supreme Court of Montana finally awarded Walsh \$1,000, the remainder due him, with interest as demanded, and the costs and disbursements, amounting to \$1,746.51, decreed the corporation, in consideration for which that such sum was a lien in favor of the attorney upon the 444 shares of stock and the | Mrs. Hoskins they promised to pay him two causes of suit so assigned; (11) that on March 14, 1917, the plaintiff herein was compelled to and did pay that amount in order to discharge the lien; and (12) that the plaintiff was also obliged to pay out \$896.25 as expenses incurred in defending the suit so instituted by Walsh against it, setting forth an itemized statement thereof. Judgment was demanded for \$2.642.76. Separate demurrers to the complaint on the ground inter alia. that it did not state facts sufficient to constitute a cause of suit, were interposed by Mr. and Mrs. Hoskins and overruled. Thereupon each filed a separate answer denying the material averments of the complaint and alleging new matters as separate defenses. The latter averments were put in issue by replies. The cause was tried, resulting in a verdict and judgment in plaintiff's favor for the sum of \$2,596.46, and Mr. and Mrs. Hoskins separately appeal.

John M. Williams, of Eugene (Williams & Bean, of Eugene, on the brief), for appellants. Charles A. Hardy and O. H. Foster, both of Eugene, for respondent.

MOORE, J. (after stating the facts as above). It is contended by defendants' counsel that the complaint herein does not state facts sufficient to constitute a cause of action against Mrs. Hoskins, in that it fails to show any primary liability on her part from which an implied indemnity in favor of the plaintiff in this action could arise, and this being so an error was committed in overruling the demurrer, which she interposed. It is argued that the 444 shares of capital stock upon which Walsh claimed a lien never belonged to Mrs. Hoskins; that any sum of money that she might have owed him on account of attorney's fees could not bind that stock; nor did the Supreme Court of Montana hold that he had a lien upon such stock for any debt due or owing from her. The decisions thus referred to were rendered in the suit of Walsh v. Hoskins, 46 Mont. 356, 128 Pac. 589; and the same case, 162 Pac. 960. copy of the complaint in that suit was received in evidence at the trial of this action. It was alleged in that pleading in effect that before the contract was concluded with Preston B. Moss for the assignment of the 444 shares of stock and of the causes of suit instituted by Mr. and Mrs. Hoskins respectively, they inquired of Walsh what his charges were as attorney's fees for the services he had performed, and were informed by him that his demand therefor was \$3,000, "and said sum was for the aggregate of work done in said actions and settlement without any settlement or division as to the work performed in each action." It will be remembered that the complaint herein substantially avers that without segregation as to the amount due as attorney's fees in either suit instituted in Montana by Walsh for Mr. and

\$3,000 for the services which he had rendered for them, and on June 24, 1910, they gave him \$2,000 thereof.

[1] The averments of the complaint in the suit instituted by Walsh to establish and enforce a lien upon the shares of stock and causes of suit which had been assigned and deposited with the bank substantially set forth a joint obligation on the part of Mr. and Mrs. Hoskins, whereby they unitedly promised to pay the amount of his attorney's fees. Neither of these defendants appeared in that suit, but as they are in privity with other parties thereto, they are concluded by the decree rendered therein, if they had timely notice of the pendency of that suit, though each failed to make any defense therein. Carroll v. Nodine, 41 Or. 412, 69 Pac. 51, 93 Am. St. Rep. 743; Astoria v. Astoria & Col. R. R. Co., 67 Or. 538, 136 Pac. 645, 49 L. R. A. (N. S.) 404; Davis v. Smith, 79 Me. 351, 10 Atl. 55.

[2] The deposition of O. F. Goddard, of Billings, Mont., was received in evidence, and shows that he is a duly licensed attorney of that state, and as such appeared for the Montana Coal & Iron Company in the suit instituted against it, and others; that as attorney for that company he notified Mr. Hoskins at Eugene, Or., by a telegram, of the pendency of that suit. There are attached to his deposition a copy of that message, the original letters received from Mr. Hoskins relating to that suit, and copies of letters written by the deponent in answer thereto. Mr. Goddard stated upon oath that he visited Mr. and Mrs. Hoskins at their home in Eugene, Or., and talked with each about that suit, saying, "Mrs. Hoskins had knowledge of the pendency of the suit before the trial, and was a witness by deposition in the suit." It is believed this testimony is sufficient to show that Mrs. Hoskins had timely knowledge of the institution of the Walsh suit, thereby substantiating the averments of the complaint, which are sufficient to constitute a cause of action.

[3] Walsh had a lien upon the cause of suit which she assigned to Moss, and as she is jointly liable with her husband for the payment of the attorney's fee, the lien for the remainder thereof attached to such assignment and other papers in her suit, rendering her liable for the remainder found to be due by the Supreme Court of Montana. No error was committed in overruling the demurrer.

[4] Paragraph 12 of the complaint herein

"The plaintiff further alleges that it was compelled to and did pay out and expend in defend-ing the said action \* \* \* (Walsh v. Montana ing the said action Coal & Iron Co. et al.) in the said district court of the state of Montana and in the Supreme or the state of Montana and in the Supreme Court of the state of Montana, for attorney's fees, witnesses, printing, filing fees, notary, stenographic work and traveling expenses, the sum of \$896.25, and an itemized statement of

which is hereto attached and marked Exhibit A and made a part of this complaint, and which said sums and each of them this plaintiff alleges was a reasonable sum and amount for such expenses and required to be paid in the defense of said action, and that each and all of said sums were paid on or before the 14th day of March, 1917, and together with the sum of \$1,746.51 paid to satisfy the said judgment and lien, amount in the aggregate to the sum of \$2,642.76, no part of which has been paid by defendants to plaintiff."

Of these items, the charges made by O. F. Goddard against the plaintiff herein for attorney's fees in the Walsh Case are: To conducting the first trial in the district court \$50; to preparing brief for first appeal \$50; to arguing first appeal \$100; to services rendered at the second trial in the district court \$250; to arguing second appeal \$100. charges of Johnson & Coleman against the same party are: To attorney's fees at the second trial in the district court \$100; to preparing a brief for second appeal \$125. Total, \$775.

The deposition of Mr. Goddard, which was received in evidence at the trial of this action, states, in effect, that he and Messrs. Johnson & Coleman, who are attorneys at law and practice their profession at Billings, Mont., appeared for the Montana Coal & Iron Company in the suit brought against it and others by Walsh; that the deponent was familiar with the fees demanded by attorneys in Yellowstone county in that state; and that the same so charged by Johnson & Coleman and himself were reasonable for the services thus rendered.

The deposition of H. J. Coleman, one of the attorneys mentioned by Mr. Goddard, states that he is familiar with the costs and expenses of litigation in Montana, and that a reasonable attorney's fee for the defense which was made for the plaintiff herein in the Walsh suit would be from \$750 to \$1,000. Mr. Coleman further deposed:

"I know of my own knowledge that the Montana Coal & Iron Company, individually and by its attorneys, made every possible effort to de-feat said suit; that said suit was fairly and honestly defended; and that no legitimate effort was omitted in the defense of the Walsh suit against the Montana Coal & Iron Company."

The deposition of Harry L. Wilson states that he is an attorney and engaged in the practice of law at Billings, Mont., and in answer to questions detailing the services rendered in the defense of the Walsh Case, for which charges were made, as hereinbefore stated, the deponent testified that an attorney's fee therefor of from \$750 to \$1,000 would be reasonable. The defendants herein offered no testimony tending in any manner to contradict the sworn statements thus made in relation to the reasonableness of the attorney's fees. Based upon this evidence the jury were charged as follows:

The court instructs you that if you shall find in favor of the plaintiff, then your verdict should

necessarily paid in satisfying the judgment and decree in the Montana suit, namely, \$1,746.51, plus \$896.25, expended in the defense of that suit by the plaintiff in this action."

An exception having been taken to the language thus employed, it is contended by defendants' counsel that an error was thereby committed. Where, as in this instance, there is no conflict in the evidence as to an issue, the court is justified in charging the jury to find as alleged in the pleadings of one of the parties. Briscoe v. Jones, 10 Or. 63; Montour v. Grand Lodge, 38 Or. 47, 62 Pac. 524. No error was committed in this respect. Many other errors are assigned. They relate chiefly to questions which were necessarily involved in and determined by the decree that was rendered in the Walsh suit. Mr. Hoskins unquestionably received timely Mr. Goddard's deposition notice thereof. shows that he visited the defendants herein at their home in Eugene, Or., and states, as it will be remembered, that:

Mrs. Hoskins had knowledge of the pendency of the suit before the trial, and was a witness by deposition in the suit."

In Davis v. Smith, 79 Me. 351, 356, 10 Atl. 55, Mr. Justice Foster, in referring to the liability of an indemnitor who had received knowledge of the pendency of an action against him, remarks:

"When notice is thus given, the judgment, if obtained without fraud or collusion, will be conclusive against him, whether he appeared or

That the Walsh suit was ably defended is evidenced by the fact that the counsel for the Montana Coal & Iron Company, one of the defendants therein, won twice in the trial court, but the decrees thus given were twice reversed. That such final determinations were reached without fraud or collusion is manifest from the depositions given by Mr. and Mrs. Hoskins on behalf of the Montana Coal & Iron Company, and received in evidence at the trials thereon.

[5] The charge of \$775 as attorney's fees, in view of the extent of the professional services which were performed, is not, in the absence of any evidence to the contrary, so excessive as to be unreasonable or to demand a reduction thereof. Lockhart v. Ferrey, 59 Or. 179, 115 Pac. 431; Stephens v. Oregon Nut & Fruit Co., 79 Or. 618, 154 Pac. 577.

A verdict was rendered for the plaintiff for the amount stated in the instruction quoted, but upon examination it was found that items included in the exhibit which was made part of the complaint, amounting to \$46.30, had not been substantiated by the evidence, whereupon a remission of that sum was ordered by the court and acceded to by plaintiff's counsel, thereby reducing the judgment to \$2,596.46.

Believing that the errors assigned and not considered are unimportant, and invoking be for the amount which the plaintiff alleges it section 3, art. 7, of the Constitution, the

judgment rendered herein should be affirmed, and it is so ordered.

McBRIDE, C. J., and McCAMANT and BEAN, JJ., concur.

CURTIS et al. v. TILLAMOOK CITY.

(Supreme Court of Oregon. April 23, 1918.)

1. MUNICIPAL CORPORATIONS 6=108-INITIA-

TIVE AND REFERENDUM.

Const. art. 4, § 1a, providing that "cities and towns may provide for the manner of exercising the initiative and referendum powers as to their municipal legislation." is automatically written into and is a component part of the charter of each city and town in the state.

2. MUNICIPAL CORPORATIONS \$== 108-INITIA-

2. MUNICIPAL CORPORATIONS \$\iffsize 108-INITIATIVE AND REFERENDUM.

Until a city provides a method of its own
for the exercise of its initiative and referendum
powers, it may follow the method prescribed by
L. O. L. \\$\frac{2}{3} 3470-3483, enacted under authority
conferred by Const. art. 4, \\$\frac{1}{3} 1a; but. where
such city has enacted an ordinance providing a
method of exercising its initiative and referendum powers, such method is substituted for the
method prescribed by the Legislature.

2. MUNICIPAL CORPORATIONS \(\frac{1}{2} \) \(\frac{1} \) \(\frac{1}{2} \) \(\f

3. MUNICIPAL CORPORÁTIONS \$== 108-INITIA

TIVE AND REFERENDUM.

Since Const. art. 4, § 1a, providing that "cities and towns may provide for the manner of exercising the initiative and referendum powers as to their municipal legislation," by its own force amended the charter of every city and town in the state, a city ordinance, enact-ed pursuant to the power conferred by such coned pursuant to the power conferred by such constitutional provision, superseded not only L. O. L. §§ 3470-3483, prescribing a method for the exercise of such powers, but also an amendment to the charter of such city, enacted prior to such constitutional provision, conferring on the voters of the city authority to exercise the initiative and referendum powers as to by-laws, ordinances, and amendments thereto.

4. Municipal Corporations 4-108-Initia

Tive AND REFERENDUM.
Ordinance No. 235, to enable the voters of a city to amend the city charter so that street improvements could be made and the cost asimprovements count be made and the cost assessed to abutting owners, was adopted by the council March 29, and approved April 1, 1912. Ordinance No. 233. providing the manner of exercising the initiative and referendum powexercising the initiative and referendum powers conferred on cities and towns by Const. art. 4, \$ 1a, was adopted by the council March 25, and approved April 4. 1912, becoming effective on that date. Ordinance No. 240, providing for the submission of Ordinance No. 235 at a special election to be held April 12, 1912, was adopted by the council April 2, and approved April 4, 1912, on which date it became effective. The election was held April 12th, and Ordinance No. 235 approved by the voters. Held, that Ordinance No. 235 was legally adopted; all the steps prescribed by Ordinance No. 233 having been followed.

Department 1. Appeal from Circuit Court. Tillamook County; George R. Bagley, Judge. On petition for rehearing. Denied.

For former opinion, see 171 Pac. 574.

C. W. Talmage and E. J. Claussen, both of Tillamook, and William Marx, of Casper, Wyo., for appellants. H. T. Botts, of Tillamook, for respondent.

HARRIS, J. The plaintiffs petition for a rehearing and insist that the charter amendment, upon which the defendant relies, was not legally adopted. The amendment in question arose out of Ordinance No. 235. The purpose of this ordinance was to enable the voters of Tillamook City to amend their municipal charter so that street improvements could be made and the cost assessed to abutting property.

Ordinance No. 235, proposing the charter amendment, was adopted by the council on March 29, 1912, and was approved by the mayor on April 1, 1912. Ordinance No. 233. providing the manner of exercising the initiative and referendum powers, reserved by the Constitution to cities and towns, was adopted by the council on March 25, 1912, and approved by the mayor on April 4, 1912. Ordinance No. 240, adopted by the council on April 2, and signed by the mayor on April 4, 1912, provided for the submission of Ordinance No. 235 and other designated ordinances to the legal voters at a special election to be held on April 12, 1912. Both Ordinance No. 233 and Ordinance No. 240 contained an emergency clause, and, since both were approved by the mayor on April 4th, both became effective on that day. The election was held as directed by Ordinance No. 240. A majority of the voters cast their ballots in favor of the adoption of Ordinance No. 235, and the mayor subsequently issued a proclamation declaring that the charter had been amended. It is conceded that all the steps required by Ordinance No. 233 were taken before holding the election on April 12th, and hence, if Ordinance No. 233 was controlling, Ordinance No. 235 was legally incorporated into and became a part of the city charter when approved by a majority of the voters.

[1] Article 4, § 1a, and article 11, § 2, of the state Constitution, adopted in 1906, set the whole sum of intramural authority at large so that the legal voters of cities and towns may exercise all of it or only such part of it as they may choose. State v. Port of Astoria, 79 Or. 1, 18, 154 Pac. 399. But no city or town can exercise any authority until it is first written into a charter. Robertson v. Portland, 77 Or. 121, 128, 149 Pac. 545; Rose v. Port of Portland, 82 Or. 541, 554, 162 Pac. 498; Hall v. Dunn, 52 Or. 475, 490, 97 Pac. 811, 25 L. R. A. (N. S.) 193. However, article 4, § 1a, of the state Constitution, contains a specific grant of one particularized power, for it is there declared that the manner of exercising the initiative and referendum powers shall be prescribed by general laws, "except that cities and towns may provide for the manner of exercising the initiative and referendum powers as to their municipal legislation." This specific grant of this particularized and defined power is by force of the

organic law automatically written into and is lative act of 1903 prescribed the manner in a component part of the charter of every city and town in the state, and therefore when the council adopted and the mayor approved Ordinance No. 233 they were exercising a power conferred by the charter; and this is the legal principle which underlies and supports the conclusion reached, upon the subject now under discussion, in the following precedents: State ex rel. v. Kelsey, 66 Or. 70, 133 Pac. 806; Duncan v. Dryer, 71 Or. 548, 143 Pac. 644; State v. Bozorth, 84 Or. 371, 164 Pac. 958; and Colby v. Medford, 85 Or. 485, 512, 167 Pac. 487. charter vests the legislative power of Tillamook City in the common council, although the legal voters are also vested with legislative power. Special Laws 1903, p. 385.

[2] Pursuant to the authority conferred by article 4. § 1a, the Legislature enacted a general law prescribing a method for the exercise of the initiative and referendum powers. Chapter 226, Laws 1907, codified in sections 3470 to 3483, L. O. L., inclusive. Until Tillamook City provided a method of its own, it was permitted to follow the method prescribed by the Legislature; but when Ordinance No. 233 was enacted the city substituted, as it had a right to do, its own method for the one prescribed by the Legislature. Colby v. Medford, 85 Or. 485, 512, 167 Pac. 487.

In 1903, three years before the adoption of article 4, § 1a, of the state Constitution, the Legislature amended the charter of Tillamook City so as to confer upon the legal voters of the municipality authority to exercise the initiative and referendum powers as to "by-laws, ordinances and amendments thereto." This amendment did not authorize the legal voters to amend their charter, but it merely authorized them to vote upon by-laws, ordinances, and amendments to such by-laws and ordinances as might be initiated by them or referred to them; provided, however, that such by-laws, ordinances, and amendments were encompassed by the charter and could be predicated upon a power granted by the charter. Special Laws 1903, p. 385. If it can be said that the charter amendment of 1903 prescribes a method for exercising the initiative and referendum powers, it does not follow that this method necessarily applies to the exercise of the initiative and referendum powers when the voters amend their charter for the reason that the act of 1903 purports to apply only to bylaws and ordinances, as distinguished from charter amendments. The amendment of 1903 was written with reference to the then provisions of the Constitution, and it must be remembered that it was not until 1906 that cities and towns were authorized to amend their own charters.

[3] It may be assumed, however, for the

which the initiative and referendum powers should be exercised both in passing ordinances and in amending the charter. If the charter did so provide, it was by force of an act of the Legislature; but, when the state Constitution was amended in 1906, this amendment to the Constitution by its own force amended the charter of every city and town in the state so as to enable all cities and towns to prescribe their own method for exercising the initiative and referendum powers. When Ordinance No. 233 was enacted, it was adopted pursuant to a power that had been written into the charter in 1906. and consequently Ordinance No. 233 not only superseded chapter 226, Laws 1907, but it also supplanted the method fixed by the Legislature in 1903.

[4] It is true that Ordinance No. 235 was signed by the mayor on April 1st, and that neither Ordinance No. 233 nor Ordinance No. 240 was approved by the mayor until April 4th; but it is also true that between April 1st and April 4th nothing further had been done with Ordinance No. 235. The city council has authority to call a special election and submit\_designated ordinances to the legal voters. Ordinance No. 233, prescribing the manner of exercising the initiative and referendum powers, and Ordinance No. 240, calling a special election, became effective on the same day, and hence Ordinance No. 233 would govern the manner in which the measures designated in Ordinance No. 240 should be submitted. In brief, Ordinance No. 233 fixed the method for submitting Ordinance No. 235 to the voters, and. since all the steps prescribed by Ordinance No. 233 were taken, it follows that Ordinance No. 235 was legally adopted.

After examining all the suggestions concerning the several questions discussed in the petition for a rehearing, we come to the same conclusions announced in the original opinion, and the petition is therefore denied.

McBRIDE, C. J., and BURNETT and BENSON, JJ., concur.

## VOGT v. MARSHALL-WELLS HARD-WARE CO. et al.

(Supreme Court of Oregon. April 23, 1918.) Fraudulent Conveyances == 271(2) -

In a suit to quiet title, a claim that plaintiff's apparent legal title is void because the property was conveyed in fraud of creditors places defendant in the position of a plaintiff in a creditor's bill, and defendant has the burden of proof to establish the fraudulent character of the conveyance. BURDEN OF PROOF.

CONVEYANCES == 278(2) 2. FRAUDULENT WIFE - PRESUMPTION HUSBAND TO FRAUD.

Conveyances from a husband to a wife, he purposes of the instant case, that the legis-being at the time greatly indebted, will be subjected to the strictest scrutiny by a court of equity; but it is going too far to say that such a conveyance creates a legal presumption of fraud.

3. Fraudulent Conveyances €=299(12) —
Husband to Wife—Evidence—Presump-

Whatever presumption or inference, either of law or fact, may be drawn from the circumstance that grantee is the wife of her grantor, is overcome by evidence indicating that through her natural wifely confidence in her husband a great portion of her inheritance has been wested

4. Fraudulent Conveyances ← 159(2) — Husband to Wife—Notice of Embabrassed Condition.

As affecting the validity of a deed by a husband to his wife of property which in fact belonged to her, it is immaterial whether or not she had notice of his embarrassed condition.

5. Fraudulent Conveyances 4 101 - Relationship Between Parties Effect.

The fact of relationship is merely circumstance to be scrutinized with other circumstances in determining the good or bad faith of a conveyance to mere relatives or close friends, and, good faith and adequate consideration being shown, the circumstance loses its value.

6. ESTOPPEL \$\infty\$110-PLEADING-NECESSITY. It is an invariable rule in this state that an estoppel cannot be taken advantage of without pleading it, if there is an opportunity to do so.

Department 2. Appeal from Circuit Court, Marion County; Wm. Galloway, Judge.

Suit to quiet title by Katie A. Vogt against the Marshall-Wells Hardware Company and another. From a decree in favor of plaintiff, defendants appeal. Affirmed.

This is a suit to quiet title to 60 acres of real estate situated in Marion county, and to certain town lots situated in the town of Pratum in the same county. The controversy arises from the following circumstances: On April 8, 1916, the defendant Marshall-Wells Hardware Company recovered a judgment against the Abaqua Lumber Company, J. F. Hertzler, and D. A. Vogt, the husband of plaintiff, for the sum of \$1,568.83, with an attorney's fee of \$150 and costs of action, and caused the property described in the complaint to be levied upon by the defendant Esch, who was sheriff of Marion County, and thereafter caused said property to be advertised for sale in satisfaction of said judgment, whereupon the plaintiff, who held the record title to the property, brought this suit. The defendants answered justifying under the judgment and alleging that D. A. Vogt was the owner of the property and that the alleged conveyance of the same to the plaintiff was made fraudulently and with intent to hinder, delay, and defraud creditors of D. A. Vogt.

The plaintiff by way of reply denied the allegations as to the fraudulent character of the conveyance and set up substantially the following facts: That in the year 1899 plaintiff inherited from the estate of her father a farm in the state of Kansas, which she subsequently sold for \$12.500: that in 1902

she inherited from the estate of her mother certain personal property, which she subsequently converted into money and received therefrom the sum of \$4,500; that in 1908 plaintiff and her husband moved from Kansas to Oregon and settled near Pratum in Marion county; that plaintiff at all times intrusted the management of her business affairs to her husband; that he conducted and managed the same and invested and reinvested the property so inherited by plaintiff and the income therefrom; that for the 14 years she owned the farm plaintiff received about \$500 per year rent from the same, and all of said moneys were paid to, collected, and received by plaintiff's husband on her account; that after coming to the state of Oregon plaintiff entered into a contract with her brother V. J. Krehbiel for the purchase of the 60 acres of land described in the complaint, at the price of \$9,000, and subsequently made improvements thereon of the value of \$4,000, but by inadvertence and mistake the conveyance of said tract from V. J. Krehbiel was made to D. A. Vogt as grantee, whereas in truth and in fact it should have been made in the name of plaintiff as grantee; that in the year 1913 plaintiff purchased said lots 1, 2, 3, 7, and 8, block 3 of Pratum, Or., at the agreed price of \$6,000, and afterwards purchased lot 5 in block 1 in the town of Pratum at the agreed price of \$1,000, but by inadvertence and mistake the deeds to all of said lots were made to D. A. Vogt as grantee, whereas the same should have been made to plaintiff as grantee; that plaintiff had absolute confidence in her husband, and did not inquire and had no occasion to inquire of her husband or her brother or any one concerning the title to said lands and premises, and did not know that the title had been taken in the name of her husband until the autumn of 1915, when her husband informed her that he had in the manner aforesaid accepted and received the deeds of conveyance conveying title to himself as aforesaid, and at plaintiff's request promised and agreed to convey immediately the same to her, and thereafter on February 3, 1916, did so convey the same; that since said conveyance plaintiff has been the owner of the legal title thereto, and at all times since the year 1910 when the 60-acre tract was purchased from her brother, and at all times since 1913 when she purchased the lots aforesaid, she has been the equitable owner and in possession thereof; that the whole of said real property was purchased with plaintiff's money and from her private means, and the improvements also have been paid for from plaintiff's money, and D. A. Vogt did not pay any part thereof. Then follow the usual allegations of good faith and a denial of any knowledge that Vogt intended to delay or defraud his creditors.

a farm in the state of Kansas, which she There was a trial in the circuit court and subsequently sold for \$12,500; that in 1902 findings and a decree for plaintiff, the find-

ings in regard to the bona fides of plaintiff being wholly in accord with the matter set up in plaintiff's reply.

Hall S. Lusk, of Portland (Emmons & Webster, of Portland, and W. C. Winslow, of Salem, on the brief), for appellants. James G. Heltzel and John A. Carson, both of Salem, for respondent.

McBRIDE, C. J. (after stating the facts as above). After a careful consideration of the testimony, we agree with the circuit court in finding that the lands in question were purchased with plaintiff's money, and the fact that the conveyances were made to the husband was not the result of any desire or direction on her part to that end, but was through inadvertence, the consequences of which she sought to have corrected as soon as she became aware that the conveyances placed the legal title in the name of her husband. Upon this branch of the case we think the evidence well-nigh conclusive. The reply set forth with great particularity the sources from which plaintiff received the money she claims she invested in the property. The persons from whom she inherited the lands and securities in Kansas, which she subsequently converted into the money that went into the property in question, are mentioned and data given which would have enabled defendants to contradict material portions of plaintiff's testimony, had it been false.

[1, 2] The case stands thus: Plaintiff, at the time of the levy of execution, had the clear legal title to the property. Defendant claims that the apparent legal title is void because the property was conveyed in fraud of creditors. This places defendant in the position of a plaintiff in a creditor's bill, the burden of proof being upon it to establish the fraudulent character of the conveyance. It is a well-established rule of law in cases of this nature that conveyances from a husband to a wife, he being at the time greatly indebted, will be subjected to the strictest scrutiny by a court of equity. Some authorities go so far as to intimate that such a conveyance is prima facie fraudulent. Bigelow on Fraudulent Conveyances, 214, and cases there cited. But it is going too far to say that such a conveyance creates a legal presumption of fraud. Mr. Bigelow well observes:

"At most, the relationship is but a circumstance to be taken into consideration with other facts, if there be such, and that, too, for or against the conveyance according to the situation; but standing alone it is a false quantity. Even if it could be said that relationship might raise a presumption that the conveyance was voluntary, it would not follow that the presumption could not be met by evidence which would be sufficient in any other case, unless, indeed, the position should be taken that the presumption was stronger than ordinary presumptions, a position not likely to be taken." Bigelow, Fraud. Conveyances, 222, 223.

See, also, pages 220, 221; Schroeder v. Walsh, 120 III. 403, 11 N. E. 70; Davis v. Zimmerman, 40 Mich. 24.

[3, 4] We are of the opinion that whatever presumption or inference either of law or fact might be drawn from the circumstances that plaintiff was the wife of her grantor is overcome by the evidence in the case which indicates that through her natural wifely confidence in her husband a great portion of her inheritance has been wasted. The enlightened legislation of this age recognizes the right of a wife to acquire and hold property, and does not penalize the marriage relation by discriminating between a creditor wife and any other creditor in the method of securing bona fide claims. No one would question the right of another person not related to Mr. Vogt to secure and reduce to legal ownership property taken as Vogt took this property. The evidence is ample here to have justified a court in declaring a resulting trust in favor of plaintiff as to the property, even if she had not seasonably demanded and received a deed. Whether or not she had notice of her husband's embarrassed condition is immaterial. Even if the property had been his own and he had been indebted to her, she would have had the same right to take property in payment of her debt as any other creditor would have had.

[5] It is true that debtors seeking to defraud their creditors most frequently make conveyances to near relatives or close friends, but the fact of relationship is merely a circumstance to be scrutinized with other circumstances in determining the good or bad faith of the transaction. Good faith and adequate consideration being shown, the circumstance of relationship loses its value.

[6] It is also argued that plaintiff ought to be estopped from asserting her ownership in the property, by reason of the fact that she permitted her husband to manage her property in his own name and to obtain credit upon the faith of it to the injury of his creditors, and particularly of the defendants, and that the case comes therefore within the rule announced in Marks v. Crow, 14 Or. 382, 13 Pac. 55; Bank of Colfax v. Richardson, 34 Or. 518, 54 Pac. 359, 75 Am. St. Rep. 664; Barger v. Barger, 30 Or. 268, 47 Pac. 702. We will consider the condition of the pleadings as they relate to the right of defendants to urge the estoppel contended for by them.

A first and conclusive negative of the right of defendant to urge this defense is that it has not been pleaded. It is an invariable rule in this state that an estoppel cannot be taken advantage of without pleading it if there is an opportunity to do so. Rugh v. Ottenheimer, 6 Or. 231, 25 Am. Rep. 513; Remillard v. Prescott, 8 Or. 37; Bays v. Trulson, 25 Or. 109, 35 Pac. 26; Nickum v. Burckhardt, 30 Or. 464, 47 Pac. 888, 48 Pac. 474, 60 Am. 8t. Rep. 822; First Nat. Bank v. McDonald, 42 Or. 257, 70 Pac. 901; Christian v. Eugene, 49 Or. 170, 89 Pac. 419; Tieman v.

Sachs, 52 Or. 560, 98 Pac. 163; Gladstone: Laws 1913, p. 251, for retention of the money Lbr. Co. v. Kelly, 64 Or. 163, 129 Pac. 763; Lane v. Myers, 70 Or. 376, 141 Pac. 1022, fault, until claims for labor and material were Ann. Cas. 1915D, 649.

The opinion of Justice Burnett in the case last cited is instructive, dealing as it does with facts very similar to those in the case at bar. Here defendant had ample opportunity to plead the estoppel in its answer and failed to do so, and it follows that that defense cannot be here considered. Even upon the facts it is not shown that plaintiff knew that the conveyances in question had been taken in her husband's name, or that he had represented himself to be the owner of the property, or knew that he was so greatly indebted as to be in peril of insolvency, so that in any view of the case this defense fails.

We are of the opinion the decree of the circuit court is in accordance with the law and the facts, and it is therefore affirmed.

McCAMANT, BEAN, and BENSON, JJ., concur.

## WASCO COUNTY v. NEW ENGLAND EQUI-TABLE INS. CO. et al.

(Supreme Court of Oregon. April 23, 1918.)

SUBROGATION #===1-NATURE OF RIGHT

WHEN NOT ENFORCED.

Subrogation is not a matter of strict right, nor does it necessarily rest on contract, but is purely equitable in its nature; and, since it is a creature of equity, it will not be enforced where it will work injustice to the rights of those having equal equities.

2. Subrogation &== 8-Right to Benefits

SURETY FOR PUBLIC CONTRACTOR.

As between a contractor's surety, the contractor, and a county employing a contractor, the surety paying claims against the contrac-tor in default may claim the benefits of sub-rogation, because it has paid debts due to third persons acting on compulsion and not as a mere volunteer.

3. Subrogation @==6-Paid Subety-Right TO SUBBOGATION.

A paid surety may claim benefits of subrogation.

A written order by a contractor to a county to pay a bank money due on a monthly estimate of work done and "all retained percentage" was an "equitable assignment" of the designated

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Equitable Assignment.]

5. Subrogation \$\infty\$ 7(2)—Subety of Public Contract—Priority over Assignment.

Money due on a contract, but retained by a county until completion and acceptance of work, was by written order assigned by the contractor to a bank in consideration of money loaned the contractor and used by him to pay for labor and material which he was bound by his contract to pay for. The contractor's bond, his contract to pay for. as required by law, obliged the surety to pay for labor and material and also to complete the The contract provided, as required by and he was subsequently adjudged a bankwork.

paid, the county's right to the fund assigned was superior to that of the assignee bank, and that when the contractor's surety paid for labor and material as required, it was entitled to be subrogated, as against the bank, to the rights of the county as of the date of its contract, and hence the surety's right to the fund was superior to the assignment to the bank, which was bound to know, when it voluntarily loaned its money, of the surety's equity in the funds reserved.

Department 1. Appeal from Circuit Court, Wasco County; W. L. Bradshaw, Judge.

Action by the County of Wasco against the New England Equitable Insurance Company and others, wherein the named defendant and the French & Co. Bank were interpleaded. From a decree in favor of the bank, the named defendant appeals. Reversed, and decree directed for the Insurance Company.

Vasco county brought this suit in interpleader so that the court could decide whether the sum of \$920 held by the county should be paid to the New England Equitable Insurance Company, a corporation, hereinafter called the insurance company, or to the French & Company Bank, a corporation, hereinafter referred to as the bank.

On June 14, 1915, Henry Cromer entered into a contract to construct a certain highway for the county. A bond, signed by the contractor as principal and the insurance company as surety, was delivered to the county, as required by chapter 142, Laws 1913, and was filed in the office of the county clerk on June 17, 1915. The contract obligated the contractor, as required by statute, to pay all persons supplying labor or material for the prosecution of the work. Chapter 61, Laws 1913. The written contract also provided that " \* \* the partial payments under this contract and the final payment thereon shall be as provided by" chapter 142, Laws 1913. The bond was given to secure the performance of the contract and payment to all persons supplying labor or material for the prosecution of the work provided for in the contract. Cromer entered upon the performance of the contract and constructed a portion of the highway. Monthly estimates were made of the work done by Cromer, and the county paid him 75 per cent. of the amount earned, as shown by such estimates, and retained the remaining 25 per cent., as stipulated by the written contract between Cromer and the county and as required by chapter 142, Laws 1913, then in force. Cromer continued in the performance of his contract until about September 10, 1915, when he was obliged to quit because his equipment had been attached by creditors. A voluntary petition in bankruptcy was filed by Cromer on October 7, 1915,

rupt. Negotiations between the county and the insurance company resulted in an agreement, on October 25, 1915, terminating the contract with Cromer and releasing the insurance company from its obligation to complete the highway upon payment by it of all the outstanding labor and material claims against the contractor. The insurance company paid claims made against Cromer, and approved by him, totaling \$3,907.22.

On August 5, 1915, the bank loaned \$200 to Cromer and took his promissory note for that amount, and at the same time Cromer signed and delivered to the bank an order, directing the county to "\* \* pay to French & Co., bankers, all money due on August estimate for work done on the J. T. Harper road contract. Please also pay all retained percentage upon completion of contract." The order was presented to the county and filed in the office of the county clerk on August 6, 1915. Cromer borrowed an additional \$800 from the bank on August 11, 1915, upon his note for that amount. Cromer "got this money from French & Co. on the representations that it was to pay bills for labor and material for the construction of the road." The money loaned to the contractor upon the two notes was placed to his credit in the bank, and was checked out by him for labor performed upon and material furnished for the road. When the \$200 note was given, it was understood between the bank and Cromer that he was "to have \$800 more"; and the order upon the county "was given to reimburse them [the bank] for the money gotten on both of these notes." When Cromer discontinued work the county had in its hands the sum of \$920 which it had retained out of the monthly estimates made during the progress of the work. The complaint filed by the county was accompanied with a tender of \$920 to the clerk of the court. The insurance company and the bank each answered, and each asserted the right to receive the money. The decree of the court was for the bank and the insurance company appealed.

Charles A. Hart, of Portland (Carey & Kerr, of Portland, on the brief), for appellant. W. A. Bell and Francis V. Galloway, both of The Dalles, for complainant. W. H. Wilson, of The Dalles, for respondent. Carlton L. Pepper, of The Dalles, for defendant J. L. Harper, trustee.

HARRIS, J. (after stating the facts as above). A representative of the insurance company testified that the surety disbursed \$3.907.22 in settlement of labor and material claims, and that "all bills for labor and material were O. K.'d by Mr. Cromer before we paid them." Cromer testified that the moneys paid by the insurance company "covered material and labor and supplies," and that "about \$1,200 was labor." Although it may in Sandford v. McLean, 3 Paige (N. Y.) 122, be assumed, without deciding, that neither 23 Am. Dec. 773, that:

the bill of Buskuhl Brothers for \$405.94 nor the claim of T. C. Murray for \$308.99 embraced labor or material for which the insurance company was liable on its bond, nevertheless the evidence clearly and convincingly shows that the insurance company paid out more than \$920 on account of labor and material claims for which it was liable.

[1] The question for decision is whether the insurance company or the bank is entitled to receive the \$920 which the county had reserved from the monthly estimates. The insurance company resorts to the doctrine of subrogation to support its claim, while the bank contends that countervailing equities preclude the application of the rule of sub-Subrogation is not a matter of strict right, nor does it necessarily rest on contract, but it is purely equitable in its na-. ture; and, since it is a creature of equity, it will not be enforced where it will work injustice to the rights of those having equal equities. First National Bank v. City Trust. Safe Deposit & Surety Company, 114 Fed. 529, 533, 52 C. C. A. 313; Portland Flouring Mill Company v. Portland & Asiatic S. S. Company (D. C.) 145 Fed. 687, 691; National Surety Company v. State Saving Bank, 156 Fed. 21, 84 C. C. A. 187, 14 L. R. A. (N. S.) 155, 162, 13 Ann. Cas. 421; 37 Cyc. 363; Stearns on Suretyship, § 463. In Spencer on Suretyship, § 133, the author says:

"The right of subrogation may be generally described as the equity by which a person who is secondarily liable for a debt and has paid the same is put in the place of the creditor so as to entitle him to make use of all the securities and remedies possessed by the creditor, in order to enforce the right of exoneration or indemnification as against the principal debtor."

· A clear enunciation of the nature of subrogation appears in the much-quoted opinion delivered by Chancellor Johnson in Gadsden v. Brown, Speers' Eq. (S. C.) 37, where it is said that:

"The doctrine of subrogation is a pure unmixed equity, having its foundation in the prin-ciples of natural justice, and from its very nature never could have been intended for the relief of those who were in a condition in which they were at liberty to elect whether they would or would not be bound; and, as far as I have been enabled to learn its history, it never has been so applied. If one with the perfect knowledge of the facts will part with his monenowledge of the facts will part with his money, or bind himself by his contract, in a sufficient consideration, any rule of law which would restore him his money or absolve him from his contract, would subvert the rules of social order. It has been directed in its application exclusively to the relief of those that were already bound, who could not but choose to abide the results. Superies for example to abide the penalty. Sureties, for example, who have before become bound are amongst the especial objects of its care. Thus, if a surety pays the debt of his principal, he is entitled to stand in the place of the creditor, and to have the benefit of all securities, funds, liens, and equities, to which the creditor was enti-tled."

Chancellor Walworth has tersely stated

"It is only in cases where the person advancing money to pay the debt of a third party stands in the situation of a surety, or is compelled to pay it to protect his own rights, that a court of equity substitutes him in the place of the creditor, as a matter of course, without any agreement to that effect."

[2] While in some of its phases the doctrine of subrogation seems to have been expanded in recent years, it is not now necessary, nor would it be proper in the instant case, to attempt to fix the exact limits of its application, but it is sufficient to say that, as between the insurance company, the contractor, and the county, the surety is in a position to claim the benefits of subrogation because it has paid debts due to third persons, and when paying such debts it acted on compulsion and not as a mere volunteer. In re Fowble (D. C.) 213 Fed. 676, 680; Sheldon on Subrogation (2d Ed.) 4.

[3] The fact that the insurance company is a compensated surety does not affect its right to claim the benefits of subrogation. It is true that the rule of strictissimi juris. which is generally available to those who are sureties without compensation, is usually relaxed when applied to a paid surety. In this jurisdiction the rule is that a hired surety must show that his rights have been injuriously affected before he can defeat his contract of suretyship. Neilson v. Title Guaranty & Surety Company, 81 Or. 422, 427, 159 Pac. 1151. A court of equity grants the right of subrogation because the surety has paid the debt of the principal, and the right of subrogation is not dependent upon whether the surety was or was not paid to sign the bond. It is enough that the surety was obliged to pay and did pay the debt. Lewis' Adm'r v. United States Fidelity & Guaranty Company, 144 Ky. 425, 138 S. W. 305, Ann. Cas. 1913A, 564; National Surety Company v. Berggren, 126 Minn. 188, 148 N. W. 55.

[4, 5] The bank relies upon the rule that subrogation will not be allowed where it will work injustice to the rights of those having equal equities. First National Bank v. City Trust, Safe Deposit & Surety Company, 114 Fed. 529, 533, 52 C. C. A. 313. The bank contends that the written order signed by Cromer, directing the county to pay to the bank all money due on the August estimate and "all retained percentage," operated as an equitable assignment of the fund, and entitles the bank to be paid in full out of the fund to the exclusion of the surety and all general creditors of the contractor. written order may be regarded as an equitable assignment of the designated moneys: McDaniel v. Maxwell, 21 Or. 202, 27 Pac. 952, 28 Am. St. Rep. 740; Willard v. Bullen, 41 Or. 25, 33, 67 Pac. 924, 68 Pac. 422; Wakefield, Fries & Co. v. Parkhurst, 84 Or. 483, 486, 165 Pac. 578. The money which Cromer borrowed from the bank was actually used to pay for labor and material furnished dur-

ing the prosecution of the work; and the bank contends that the surety received the benefit of the bank's money, and that therefore it would be inequitable to permit the surety to be subrogated to the rights of the county, and thus permit the surety to reap where the bank has sown. All parties would probably concede that the insurance company would be entitled to claim the benefits of subrogation in the absence of the bank, and hence the question for decision is whether the written order, plus the fact that the money which was loaned upon the faith of the written order was actually used to pay for labor performed upon and material furnished for the work, wrought such an equitable assignment of the fund as to preclude the surety from claiming the benefits of subrogation. The inquiry naturally involves an examination of the relative rights of the parties to the fund and a consideration of the fundamental reasons upon which those rights are based.

By his written contract Cromer agreed to pay all claims for labor and material furnished during the prosecution of the work, and also to complete the road. By its bond the surety obligated itself to pay all labor and material claims not paid by Cromer, and to complete the contract if Cromer did not. The law required this bond to be given, and directed that it should contain these provisions. The written contract also provided for monthly estimates of the work, and that 75 per cent. of the amount earned each month should be paid to Cromer, while the remaining 25 per cent. should be retained by the county "until the completion and acceptance of said work"; and the law also required this provision to be written into the contract. Chapter 142, Laws 1913. Since the bank was bound to know the law, it is deemed to have known that the contract with Cromer provided that 25 per cent. of each monthly estimate should be reserved by the county, that a bond was given, and that the bond obligated the surety to pay all claims for labor and material. Moreover, the bank did in truth know that the county had retained, and would continue to retain, a percentage of each monthly estimate because the very language of the written order imports such knowledge. It must be remembered, too, that the money in controversy includes nothing but the 25 per cent. reserved out of the monthly estimates.

The percentage reserved by the county out of each monthly estimate served to secure the county against any loss it might sustain on account of the nonperformance of the contract; and when Cromer abandoned his contract the county had a right to hold this fund to secure itself against any damages that might have resulted from a nonperformance of the contract by Cromer. First National Bank v. O'Neil Engineering Company

(Tex. Civ. App.) 176 S. W. 74; First National Bank v. City Trust, Safe Deposit & Surety Company, 114 Fed. 529, 531, 52 C. C. A. 313; Prairie State Bank v. United States, 164 U. S. 227, 232, 17 Sup. Ct. 142, 41 L. Ed. 412; O'Neill v. Title Guaranty & Trust Company, 191 Fed. 570, 573, 113 C. C. A. 211; In re Scofield Company, 215 Fed. 45, 50, 131 C. C. A. 353. The right of the county to retain a specified percentage dates from the time the contract was entered into, and it must be conceded that, until the claims for labor and material are paid, the county's right to the fund is superior to that of the bank, claiming by an equitable assignment from the contractor.

When the insurance company fulfilled its obligations and paid the debts incurred by Cromer for labor and material, it was entitled to call upon a court of equity and be subrogated to the rights which the county could have asserted against the fund. (Derby v. United States Fidelity & Guaranty Company, 169 Pac. 500; Prairie State Bank v. United States, 164 U.S. 227, 232, 17 Sup. Ct. 142, 41 L. Ed. 412; Reid v. Pauly, 121 Fed. 652, 657, 58 C. C. A. 152), and the right of subrogation dates back to the time when the insurance company entered into the contract of suretyship (Derby v. United States Fidelity & Guaranty Company, 169 Pac. 500, 503: Prairie State Bank v. United States, 164 U. S. 227, 17 Sup. Ct. 142, 41 L. Ed. 412; Henningsen v. United States Fidelity & Guaranty Company, 143 Fed. 810, 814, 74 C. C. A. 484; Henningsen v. United States Fidelity & Guaranty Company, 208 U.S. 404, 411, 28 Sup. Ct. 389, 52 L. Ed. 547; First National Bank v. City Trust, Safe Deposit & Surety Company, 114 Fed. 529, 532, 52 C. C. A. 313; National Surety Company v. Berggren, 126 Minn. 188, 148 N. W. 55. 57; In re Scofield Company, 215 Fed. 45, 50, 131 C. C. A. 353; In re P. McGarry & Son, 240 Fed. 400, 402, 153 C. C. A. 326). If the right of the county to hold and to apply the moneys is superior to the claim of the bank, and if by paying the claims for labor and material the surety is subrogated to the right of the county, as of the date of the contract of suretyship, it necessarily and inevitably follows that the right asserted by the surety is superior to the claim made by the bank. The rule established by this court in Derby v. United States Fidelity & Guaranty Company, 169 Pac. 500, and approved by the overwhelming weight of authority, entitles the surety to assert the benefits of subrogation as against all moneys which the person named as obligee in the bond owes the contractor at the time the latter abandons performance of his contract; but the right of subrogation is particularly applicable to such funds as by the terms of the contract are reserved and retained until complete performance and acceptance of the work. The re-entitled to be subrogated to the right of the

served fund is as much for the indemnity of the surety as it is for the security of the owner for whom the work is to be performed, and an equity in such reserved fund is raised in behalf of the surety. First National Bank v. City Trust, Safe Deposit & Surety Company, 114 Fed. 529, 531, 52 C. C. A. 313; O'Neill v. Title Guaranty & Trust Company, 191 Fed. 570, 573; In re Scofield Company, 215 Fed. 45, 50, 131 C. C. A. 353. The nature of the right which the surety has in the reserved fund is illustrated and emphasized by the general rule, applicable to hired as well as to other sureties, that the surety is discharged from the bond if the owner for whom the work is being performed fails to retain the percentage fixed by the terms of the contract. Neilson v. Title Guaranty & Surety Company, 81 Or. 422, 428, 159 Pac. 1151; O'Neill v. Title Guaranty & Trust Company, 191 Fed. 570, 573, 113 C. C. A. 211; Prairie State Bank v. United States, 164 U. S. 227, 233, 17 Sup. Ct. 142, 41 L. Ed. 412; Stearns on Suretyship, § 274; 1 Brandt on Suretyship (3d Ed.) § 439. The equity which the surety has in such funds as are retained, under the agreement with the contractor, has its inception at the time when the surety enters into the contract of suretyship, and hence the contractor can neither supplant this equity nor strip it of its priority by borrowing money from some person not obliged to lend, and assigning the funds to secure the loan.

When the bank loaned its money it knew that before Cromer entered upon the performance of his contract he had given a bond signed by a surety, and that the law required the county to reserve 25 per cent. of each monthly estimate. From the date of the contract of suretyship the bank was bound to know that the insurance company had an equity in the funds to be reserved; and when the bank loaned its money it did something that it was not obliged to do, and it must be deemed to have acted with a full knowledge of the right of the surety. The contractor and the bank could not create a lien in favor of the bank upon the reserved fund and make it paramount to a prior and then existing lien of the surety. First National Bank v. City Trust, Safe Deposit & Surety Company, 114 Fed. 529, 532, 52 C. C. A. 313; Hardaway & Prowell v. National Surety Company, 150 Fed. 465, 473, 80 C. C. A. 283; affirmed in 211 U.S. 552, 561, 29 Sup. Ct. 202, 53 L. Ed. 321; Title Guaranty & Surety Company v. Dutcher (D. C.) 203 Fed. 167, 169; Illinois Surety Company v. City of Galion (D. C.) 211 Fed. 161, 163; In re P. McGarry & Son, 240 Fed. 400, 402, 153 C. C. A. 326: Columbia Digger Company v. Sparks, 227 Fed. 780, 784, 142 C. C. A. 304; Stearns on Suretyship, § 482.

It follows that the insurance company is

county. The decree of the circuit court is reversed, and a decree will be entered, awarding the \$920 to the insurance company.

McBRIDE, C. J., and BENSON and BUR-NETT, JJ., concur.

STATE ex rel. KELLY, Atty. Gen., v. FARM-ERS' STATE BANK OF BRIDGER. (No. 3885.)

(Supreme Court of Montana. March 30, 1918.)

1. Confusion of Goods \$\iff 8\$— Moneys in Hands of Agent — Privies — Burden of

The owner of property intrusted to one who occupies a fiduciary relation, such as an agent, may follow and retake it from the agent or his privy, not a bona fide holder for value, whether it remains in its original form or in different or substituted form, provided it can be identified as the same property or the product or proceeds, and includes moneys as well as other property, even though it appears prima facie that they have been mingled with the private moneys of the agent, or his privy, who has knowledge of the source from which they have been obtained; the hunder height on the agent or the private money. the burden being on the agent, or the privy, to rebut the prima facie case made by the owner, or to separate and distinguish his own moneys. 2. Banks and Banking €==167—Insolvency
—Preferred Claims—Paper on Hand for

Collection. Where a bank took a certificate of deposit for collection, to be credited to depositor when collected, and unknown to depositor immediately credited the amount to him, and later, payment of certificate being refused because not due, in-formed depositor that it had been charged back against him, the bank having in fact discounted the note with another bank, the depositor could follow the certificate and recover it, but, hav-ing proceeded against the first bank which had gone into the hands of a receiver, it was only entitled to a preference for a balance left in the second bank, the remainder of the amount having been applied by the second bank on an indebtedness due it from the first bank, although the first bank had not in fact charged back the amount of the certificate against the depositor's account.

positor's account.

Appeal from District Court, Carbon County; Geo. W. Pierson, Judge.

Proceeding by the State, on the relation of D. M. Kelly, Attorney General, to have the Farmers' State Bank of Bridger, a corporation, declared insolvent and to have a receiver appointed. Petition by James S. Tebbs and C. W. Taggart, doing business as copartners under the firm name of Tebbs & Taggart, to have an indebtedness to them declared a preferred claim. From an order denying the relief demanded, and on order denying a motion for a new trial, petitioners appeal. Reversed and remanded, with directions.

F. B. Reynolds, of Billings, for appellants. Nichols & Wilson, of Billings, for respondent,

BRANTLY, C. J. On March 26, 1915, the action in which this proceeding is entitled was brought by the Attorney General of the state in the district court of Carbon county to have the Farmers' State Bank at Bridger (hereafter referred to as the bank) declared insolvent and to obtain the appointment of a receiver to take charge of its assets and wind up its affairs. H. B. Miller, the respondent herein, was appointed receiver and has been acting as such until the present time. On November 15, 1915, James S. Tebbs and C. W. Taggart, the appellants herein, doing business as copartners under the firm name of Tebbs & Taggart filed their petition in the action, asking that the receiver be required to recognize as a preferred claim the sum of \$3,000, in which amount the bank was indebted to them, and to obtain an order directing him to pay the same in full out of the assets of the bank, together with accrued interest. The receiver joined issue by answer upon the allegations of the petition. A hearing by the court resulted in an order denying the relief demanded and directing the receiver to recognize the debt due the appellants as a general claim and to make payment thereof accordingly. The proceeding comes before this court on appeals from this order and also from an order denying appellants' motion for a new trial.

It is open to question whether the method of procedure adopted by the appellants to secure the relief sought was not in some respects inappropriate. There is grave doubt whether the district court could entertain a motion for a new trial and whether an appeal lies from the order disposing of the motion. Counsel for the respondent having by their silence assumed that the procedure was in all respects appropriate and that both appeals are properly before this court, we refrain from considering and deciding any question in this behalf, and proceed at once to answer the single inquiry presented, viz.: Are the appellants entitled to the relief demanded?

There is no substantial controversy as to the facts. During the year 1915 the appellants kept moneys on deposit with the bank subject to their check. They also borrowed moneys from the bank from time to time, as the exigencies of their business required. On November 12th they mailed to the bank a certificate of deposit for \$3,000, issued by the Central State Bank, at White Sulphur Springs, Mont., on March 6th, due four months after date, in favor of E. J. Anderson, and indorsed by him to the appellants, with these instructions: "If you can collect same, credit our account with the \$3,000 and oblige." Mr. Trumbo, the cashier, at once acknowledged receipt of the certificate, stating that it had been "entered for collection." In fact, appellants' checking account had been credited with the amount of the certificate as cash. Of this appellants knew nothing until they received a letter from Mr. Trumbo on March 22d, in which he wrote them as follows:

"We are in receipt of advice from our correspondent that certificate for \$3,000 payment was refused on as not being due, and your account has been charged with that amount. We could give you credit on your note for the amount of the certificate. Awaiting your early reply regarding this matter, we remain,

On March 13th Mr. Trumbo had forwarded the certificate for collection to the Union Bank & Trust Company, at Helena (hereafter referred to as the Helena bank). On March 20th the Helena bank wrote Mr. Trumbo as follows.

"We received from you the other day a certificate of \$3,000, issued by the Central State Bank of White Sulphur Springs, dated March 6th and due four months after date. This has now been returned to us from White Sulphur Springs, as they refuse to pay it until maturity and we have accordingly charged the amount back to your account. It occurs to us that possibly you would prefer to have us carry this for you on an 8 per cent. basis and if so, we will be glad to do this, otherwise will return it to you." to you.

In response to this letter, Mr. Trumbo wrote on March 22d:

"We are in receipt of yours of March 20th relative to certificate of deposit for \$8,000. We will be glad to let you have this at the rate of 8 per cent. mentioned in your letter. Trusting to receive immediate credit for same, we remain." etc.

On the following day the Helena bank wrote to Mr. Trumbo:

"As requested in yours of the 22d, we have credited your account \$3,000 for the White Sulphur Springs certificate and have charged your account for the discount on same at 4 per cent. for three months and a half, \$35.00."

The record does not disclose the fact, but we may presume from the form in which the offer by the Helena bank was made, and the result of the negotiations, that the certificate bore interest at the rate of 4 per cent. On March 24th, after the appellants had received from Mr. Trumbo the letter of March 22d Mr. Taggart went to Bridger intending to obtain the certificate. He was told by Mr. Trumbo that the bank's correspondent, at Helena, had kept it there until it should be advised by the bank what disposition to make of it. There was some conversation between them in regard to a loan by the bank to appellants, and also a proposal by the bank to credit appellants' note then held by it; but this conversation resulted in nothing definite. The note referred to was in the sum of \$2,000. At the time this conversation occurred, it had been negotiated by the bank and was in the hands of the Helena bank. This the appellants did not ascertain until they were called upon by the | 1051, 1097; Yellowstone County v. First T. Helena bank to make payment. Mr. Tag- & S. Bank, supra. gart at that time signified his intention to [2, 3] Looking to the instructions which

take up the matter of the loan with Mr. Tebbs upon his return home and inform Mr. Trumbo by telephone later what the appellants would do, but nothing further was done before the bank closed. The appellants did not know until after the bank had closed that the amount of the certificate had not been charged back to their account, nor did they know that the certificate had been discounted by the Helena bank. When the receiver took charge of the bank, he found cash on hand and on deposit in correspondent banks amounting to between \$3,000 and \$3,600. The amount in the bank was \$1,200. There was on deposit in the Helena bank a balance of about \$900. The balance of the total was on deposit in other correspondent banks. What the exact amount of this balance was cannot be stated, because the accounts of the bank with the Helena bank were in confusion, and at the time of the hearing of the petition the receiver had not been able to reach a final adjustment of them. When the Helena bank discounted the certificate, it gave the bank credit for the proceeds, \$2,965. The bank was at that time indebted to the Helena bank. This accounts for the comparatively small balance due it from the Helena bank. There were no other transactions between the two banks before the receiver took charge.

[1] It is the rule, recognized by the courts generally, that the owner of property intrusted to one who occupies a fiduciary relation with him, such as his agent, may follow and retake it from the agent or any one in privity with him, not a bona fide holder for value, whether it remains in its original form or in a different or substituted form. provided it can be identified as the same property or the product or proceeds of it. The rule extends to and includes moneys as well as other property, even though it appears prima facie that they have been mingled with the private moneys of the agent. or his privy, who has knowledge of the source from which they have been obtained. In such cases the entire fund in the hands of the agent, or his privy, is impressed with a trust in favor of the owner to the extent to which the moneys have become a part of it; and the burden is upon the agent, or the privy, to rebut the prima facie case made by the owner, or to separate and distinguish his own moneys from those composing the entire fund. Yellowstone County v. First T. & S. Bank, 46 Mont. 439, 128 Pac. 596. This court has heretofore declared the right of a creditor of an insolvent bank in the hands of a receiver, to have preference over the general creditors in the payment of his claim; the facts disclosing that the bank bore to him the relation of agent or bailee in the transaction out of which the claim grew. Guignon v. First Natl. Bank, 22 Mont. 140, 55 Pac.

were transmitted by appellants to the bank ceiver to recognize appellants' right to prefwith the certificate, the bank became, in the erential payment to the amount of the balfirst instance, merely their agent to collect, with the authority to change this relation to that of debtor on the express condition, however, that collection should be made of the amount called for by it. Since the certificate was not due, they could not expect, nor did they intend, to be credited with its value as cash until it had been paid. Hence the authority to credit them was made conditional until payment should be made. It could not have occupied any other relation to appellants than as their agent until the condition was fulfilled. Upon its failure to collect, its conditional authority lapsed and it became a bailee of the appellants, without any authority other than to return the certificate to them. The entry of the credit upon the books of the bank without the authority or assent of the appellants could not make them its creditors; nor could the omission to charge the account after failure to collect, so as to wipe out the apparent credit, have a like result. The bank therefore had no authority to discount the certificate to the Helena bank. In doing so it became guilty of a willful conversion of it to its own use. It is clear, then, that the appellants, never having become creditors of the bank, were entitled to follow and retake the certificate or its proceeds, so long as they could find the one or identify the other. Instead of pursuing the certificate and recovering it or its full value from the Helena bank by appropriate action, which, upon the facts disclosed in this record, they had a perfect right to do, they chose to pursue and take the proceeds. They must, therefore, in this proceeding, be limited in their preferential right to the amount of the proceeds shown to have found its way into the hands of the respondent. Upon the question whether they may still bring their action against the Helena bank, we express no opinion, because it does not arise in this proceeding. The balance in the Helena bank was undoubtedly a part of the proceeds of the certificate, for, since it does not appear that any other transactions took place between the bank and the Helena bank after March 22d, and the credit given to the bank on that date by the Helena bank was for the proceeds of the certificate only, the balance is fully identified as a part of these proceeds. Appellants are entitled to preferential payment in this amount. They are not entitled to preferential payment, however, out of the other balances, as they do not appear to have been derived in any measure from the proceeds of the certificate. They belong to the general assets of the bank, to be distributed among the general creditors.

The orders appealed from are set aside, and the proceeding is remanded to the district court, with directions to order the re- to support either; that is to say, the evi-

ance received by him from the Helena bank.

Reversed and remanded.

SANNER and HOLLOWAY, JJ., concur.

HERZIG v. SANDBERG et ux. (No. 3889.) (Supreme Court of Montana. April 6, 1918.)

1. Highways €==173(2)-Injuries to Pedes-TRIANS-WARNING-NECESSITY.

Where a pedestrian saw an approaching automobile 10 or 15 minutes before it struck him and knew that it was continuously approaching, failure to give warning was not the proximate cause of his injury.

2. Evidence \$\sim 502\text{-Intoxication.}

In action for injuries to a pedestrian when struck by an automobile, evidence that he was intoxicated was admissible in cross-examination after he had testified as to the speed of the au-tomobile, since intoxication reflects on capacity for accurate observation, such cross-examination being admissible under Rev. Codes, § 8021,

speed of the automobile.

4. HIGHWAYS = 184(2)—INJURIES TO PEDES-TRIANS — EVIDENCE—CONTRIBUTORY NEGLI-TRIANS — EVIDENCE—C GENCE—INTOXICATION.

In action for injuries to pedestrian on high-way when struck by automobile, evidence that he was intoxicated was admissible in support of the defense of contributory negligence, although intoxication alone does not necessarily bar recovery.

PROOF.

The rule requiring an offer of proof does not apply to cross-examination, nor to direct examination where the questions themselves indicate clearly the evidence intended to be elicited.

Appeal from District Court, Silver Bow County: Jno. B. McClernan, Judge.

Action by A. J. Herzig against A. C. Sandberg and wife. From judgment for plaintiff and order denying new trial, defendants appeal. Reversed and remanded.

James M. Brinson, of Butte, for appellants. Jos. H. Griffin, of Butte, for respondent.

HOLLOWAY, J. Plaintiff was injured by being struck by an automobile. He charges the defendants with negligence in the following particulars: (A) Failing to keep a lookout; (B) running the car at unreasonable speed; (C) violating the law of the road; (D) failing to give warning of the approach of the car. Issues were joined, and the cause tried, resulting in a judgment for plaintiff. Defendants appealed from the judgment and from an order denying them a new trial.

[1] The charges of negligence A and D should have been withdrawn from the jury's consideration, as there was not any evidence



dence is uncontradicted that defendants, their driver and two other occupants of the car, all saw plaintiff when the car was 100 feet or more from him, while the testimony of the plaintiff himself is that he saw the car approaching 10 or 15 minutes before he was struck, and during that time appreciated the fact that it was drawing nearer and nearer. He had all the notice that any warning could give, and if there was a failure to give warning, it could not have been a proximate cause of his injury.

[2] In support of the other charges plaintiff testified that in his opinion the car was driven at the rate of 40 miles per hour at the time of the accident: that he was walking near the right-hand side of the road, going north; that the driver of the car undertook to pass to his right instead of to his left; that the intervening space was not sufficiently wide for the purpose; and that by reason of this violation of the law of the road the collision occurred. On cross-examination counsel for defendants sought to show that at the time of the accident plaintiff was intoxicated. Upon objection the court refused to permit the investigation, and when defendants attempted to prove the same fact in their case in chief, they were met by the same ruling. In each instance the court

1. The evidence was proper as a part of plaintiff's cross-examination. It is always permissible on cross-examination of a witness to test the accuracy of his knowledge or the completeness or distinctness of his recollection: to ascertain the source of his information, his opportunity for accurate observation, and his general acquaintanceship with the subject to which his direct examination relates. If he has made an estimate or given an opinion, he may be cross-examined for the purpose of shedding light upon the reasonableness of his estimate or the basis of his opinion. 1 Greenleaf on Evidence, \$ 446. These rules are elementary (40 Cyc. 2675) are fully comprehended within the terms of section 8021, Revised Codes, and should be invoked liberally, rather than restricted. Kipp v. Silverman, 25 Mont. 296, 64 Pac. 884; State v. Biggs, 45 Mont. 400, 123 Pac. 410; Cuerth v. Arbogast, 48 Mont. 209, 136 Pac.

It is too well settled to be open to controversy that intoxication deadens the sensibilities, and therefore evidence that a witness was intoxicated at the time to which his testimony relates reflects upon his capacity for accurate observation, correct memory, and unbiased judgment. 17 Cyc. 787: 40 Cyc. 2574. It is no objection to say that the evidence, if produced, would have tended to make out defendants' special defense. If the question was within the legitimate range of cross-examination, it was none the less so that it was also proper in support of defendants' case.

[3] 2. The evidence was admissible under the general denials of the answer. could have been shown that at the time of the accident plaintiff was intoxicated to such a degree that his opinion as to the rate the car was running was worthless, and that his condition was such that he could not have known or appreciated what actually occurred, the prima facie case made out by his direct testimony, would have been overcome. It would be a singular rule of law which would deny to defendants the right to challenge the credibility of the plaintiff. To illustrate: If at the time of the accident plaintiff was asleep or unconscious, and therefore unable to know the facts to which he testified, it would certainly be competent to show it, and for the same reason it was proper to show that he was intoxicated, if such was the fact. 2 Wigmore on Evidence, § 933; Joyce v. Parkhurst, 150 Mass. 243, 22 N. E. 899; Schneider v. Great N. Ry. Co., 47 Wash. 45, 91 Pac. 565; Green v. State, 53 Tex. Cr. R. 490, 110 S. W. 920, 22 L. R. A. (N. S.) 708; Pollock v. State, 136 Wis. 136, 116 N. W. 851; Railroad Co. v. O'Connor, 171 Ind. 686, 85 N. E. 969.

[4] 3. The evidence was also admissible in support of the defense of contributory negligence pleaded in the answer. If the plaintiff was intoxicated, that fact did not operate to relieve him from the necessity of exercising the ordinary care for his own safety which the law imposes upon a sober man. While his intoxication alone would not necessarily bar his right of recovery, it was a circumstance to be considered in determining whether he was guilty of contributory negligence. 29 Cyc. 534, 620.

[5] It is insisted, however, that defendants may not avail themselves of these erroneous rulings, because they failed to make an offer of proof. The rule which requires that an offer of proof be made has no application to cross-examination. State v. Wakely, 43 Mont. 427, 117 Pac. 95; Cunningham v. Railway Co., 88 Tex. 534, 31 S. W. 629; Martin v. Elden, 32 Ohio St. 282. Neither has it any application to direct examination where the questions themselves indicate clearly the evidence intended to be elicited. First Nat. Bank v. Carroll, 35 Mont. 302, 88 Pac. 1012; Buckstaff v. Russell, 151 U. S. 626, 14 Sup. Ct. 448, 38 L. Ed. 292.

This case emphasizes the distinction between an erroneous ruling admitting incompetent evidence and a like error excluding competent evidence. In the first instance we might be able to say that the error was harmless, but no one can say what effect material evidence excluded might have had if before the jury for consideration.

The judgment and order are reversed, and the cause is remanded for a new trial.

Reversed and remanded.

BRANTLY, C. J., and SANNER, J., concur.

STATE ex rel. O'BRIEN v. MAYOR OF BUTTE et al. (No. 3878.)

(Supreme Court of Montana. April 6, 1918.)

1. MUNICIPAL CORPORATIONS \$\infty\$=185(7)\text{\text{\$--}P0-}\ \text{LICE OFFICERS} \text{\$--REMOVAL} \text{\$--TRIAL BEFORE}\ \text{BOARD-SUFFICIENCY OF ACCUSATION.}

In a proceeding before the examining and trial board of the police department under Rev. Codes, § 3309, an accusation against a police captain, alleging a series of offenses, each tending toward the ultimate inquiry as to the fitness of the accused for his office, is not to be tested under the rigid rules of criminal procedure, and that some of the specifications considered as a basis for criminal prosecution may be barred by limitations cannot affect sufficiency of accusation.

2. MUNICIPAL CORPORATIONS \$\infty\$=185(12)—ReMOVAL OF POLICE—SUFFICIENCY OF EVIDENCE TO SUPPORT FINDINGS—POLICE
BOARD.

Where, in an accusation against a police captain, three out of five specifications of conduct unbecoming an officer stand undisputed, being violations of law and at least one of them a crime, their quality and consequence were for the board to determine.

3. MUNICIPAL CORPORATIONS \$\iffine 185(1)\$—"Of-FICEB" -POLICE CAPTAIN—TRAFFICKING IN WARRANTS.

A police captain is an officer within the meaning of Rev. Codes, §§ 371, 372, making it a crime punishable by disqualification from holding office for officers to buy and sell city warrants, and the application of these sections cannot be avoided by a plea of accommodation to a brother officer.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Officer.]

Appeal from District Court, Silver Bow County; J. J. Lynch, Judge.

John F. O'Brien, as police captain, was accused of conduct unbecoming an officer, and tried before the Police Board, where the charges were found proved and the Mayor ordered his discharge from the police force, after which, upon application by the State, on the relation of John F. O'Brien, against the Mayor of Butte and the Examining and Trial Board of the Police Department for the City of Butte, a writ of review to the district court was obtained, where a judgment quashing the writ was entered, from which relator appeals. Affirmed.

W. E. Carroll, of Butte, for appellant. Geo. D. Toole and John T. Andrews, both of Butte, for respondents.

SANNER, J. Until his removal as hereinafter mentioned, John F. O'Brien was a police captain of the city of Butte. An accusation was filed against him under the Metropolitan Police Law, which, upon his trial before the police board, was found to be proven, and as the result he was ordered by the mayor to be discharged from the force. He thereupon procured from the district court of Silver Bow county a writ of review, and the proceedings of the board being certified up to the district court, a motion to quash was interposed, the motion

was granted, and final judgment entered dismissing the proceedings, thus in effect upholding the action of the board and of the mayor. This appeal is from that judgment.

The theory of the appellant in instituting the proceedings in the court below was that the accusation before the board stated no charge upon which he was triable by the board, and the evidence taken to sustain the accusation was too unsubstantial to warrant his removal; hence there was no justification to make the order complained of. Whether, in view of the provisions of section 3308, Revised Codes, this theory is sufficient to justify the use of the writ of review we need not determine, because no question is raised upon the method pursued, and because we are compelled to say that there was a sufficient accusation and sufficient evidence to justify the result.

[1] 1. The accusation charges: (a) That O'Brien falsely stated to the board upon his examination for a position on the police force that he had never been convicted of a crime, whereas he had prior thereto been convicted of petit larceny; (b) that he had failed for over three years after his appointment to file an official bond as required by law and the ordinances of the city of Butte; (c) that on June 5, 1913, contrary to law he purchased a warrant of the city of Butte issued to J. J. Barry, and on April 16, 1915, collected the face thereof with accrued interest; (d) that in June, 1915, he publicly associated with a drunken woman, and asked the proprietor of a lodging house in Butte to violate a city ordinance by lodging said woman there without registering; (e) that from lack of ability, judgment, courage, and addiction to intoxicants he is not, and never was, competent to properly discharge the duties of a police officer. It may be that, tested by the rigid rules of criminal procedure, this accusation would be found defective; but it is not to be so tested. Bailey v. Examining & Trial Board, 45 Mont. 197, 122 Pac. 572. In every such proceeding the ultimate inquiry is the fitness of the accused to hold his position, and such inquiry is raised by the specific questions whether he is incompetent or has been guilty of neglect of duty or misconduct in office or conduct unbecoming an officer. Section 3309, Rev. Codes. That the accusation is sufficient on its face to present these questions is clear; and its sufficiency in that respect cannot be defeated by the fact that some of the specifications, considered as a basis for criminal prosecution, may be barred by the statute of limitations.

by the mayor to be discharged from the force. He thereupon procured from the district court of Silver Bow county a writ of review, and the proceedings of the board being certified up to the district court, a motion to quash was interposed, the motion [2, 3] 2. Out of the five specifications three stand undisputed. The appellant contesting three stand undisputed are upon his application that he had never been convicted of crime, when the truth was that he had pleaded motion to quash was interposed, the motion is application to the district court, and the proceedings of the standard process three standard process

ment of fine therefor. It is not for us to 3. Principal and Agent == 193 - Action say that upon the evidence disclosed, this FOR PRINCIPAL—QUESTION FOR JURY. could have been regarded as a peccadillo; the fact is established, and its quality as well as its consequences were for the board. So, too, it is unquestioned that he had for over three years failed and neglected to file his official bond, thus displaying, if the board so chose to regard his action, a neglect of duty and an indifference to the provisions of the law in that behalf. Finally, he did purchase and realize upon the city warrant referred to in the charge, and this, because it is a crime punishable by disqualification from holding office (Rev. Codes, §§ 371, 372), is a manifestation almost conclusive of that negligence and indifference to official propriety which the examining and trial board was in duty bound to notice. The contention is made that O'Brien was not an officer within the meaning of these sections, and that the circumstances of his act removed it from any purpose which the sections were intended to serve; but neither position is tenable. O'Brien was an officer (State ex rel. Quintin v. Edwards, 38 Mont. 250, 99 Pac. 940; Peterson v. City of Butte, 44 Mont. 401, 409, 120 Pac. 483, Ann. Cas. 1913B, 538); and application of the sections cannot be avoided by any plea of accommodation to a brother offlcer, particularly where the accommodator did not disdain to accept the interest accrued when the warrant was collected.

Of the other specifications we say nothing, because the record affords room for divergence of opinion. We should hesitate to impute immorality or cowardice to Mr. O'Brien upon what is before us; but there is nothing to show that the board did so, and as the evidence suffices in other respects, we think the district court was correct in its refusal to interfere. The judgment appealed from is affirmed.

Affirmed.

BRANTLY, C. J., and HOLLOWAY, J.,

FARR v. STEIN. (No. 3890.)

(Supreme Court of Montana. April 6, 1918.)

1. PRINCIPAL AND AGENT \$== 136(1)-LIABIL-

THE AND AGENT 4 100(1)—LIABIL-THY OF AGENT—CONTRACT.

An agent is not personally hable on a con-tract made by him on behalf of his principal if he disclosed the identity of his principal and made the engagement for him.

2. PRINCIPAL AND AGENT \$\infty\$ 193 — ACTION FOR PRINCIPAL—QUESTION FOR JURY.

When the evidence of what was said and done at the time of a particular transaction by an agent in the light of attendant circumstance. es is equivocal and furnishes the basis for dif-ferent inferences as to what the intention of the parties was, the question whether the agent acted for himself or for his principal is for determination by the jury.

In an action by an attorney for the value of professional services relative to a note held by defendant, whether defendant acted for him-self, or as agent of the apparent owner of the note, held for the jury.

Appeal from District Court, Custer County; D. S. O'Hern, Judge.

Action by George W. Farr against Henry Stein. From a judgment for plaintiff and an order denying new trial, defendant appeals.

Henry Stein, pro se. Geo. W. Farr, of Miles City, for respondent.

BRANTLY, C. J. This action was brought by plaintiff in a justice's court of Miles City township, in Custer county, to recover the reasonable value of professional services performed by him for defendant as an attorney at law. The complaint alleges, in substance, that the plaintiff at the special instance and request of defendant rendered him professional services and gave him professional advice relative to the payment of interest on a promissory note for the sum of \$70, executed by Mrs. Cora Hoppe to one Sol Miness and the foreclosure of a chattel mortgage given by the former to the latter to secure the payment of the note. For his defense the defendant relied on a general denial. Plaintiff recovered judgment in the justice's court. A trial on appeal in the district court also resulted in a judgment for the plaintiff. Defendant has appealed from the judgment and an order denying his motion for a new trial. He appeared in this court and filed a brief in his own behalf.

[1,2] His principal contention is that the court erred in denying his motion for a new trial on the ground that the evidence is insufficient to justify the verdict. While tacitly admitting that services of the value alleged were rendered by plaintiff at his special instance and request, he argues that the evidence discloses that in employing plaintiff he was acting, not for himself, but in a representative capacity as agent of Miness, the apparent owner of the note and mortgage, and hence that he did not become personally liable to plaintiff. To fortify his argument he cites many cases which declare the rule that an agent is not personally liable on a contract entered into by him on behalf of his principal if it appears, in point of fact, that he disclosed the identity of his principal and made the engagement for him. There is no doubt as to the correctness of Though expressed in varying this rule. terms, it is recognized by the courts and text-writers generally. Anderson v. Timberlake, 114 Ala. 377, 22 South. 431, 62 Am. St. Rep. 105; Hewitt v. Wheeler, 22 Conn. 557; Wheeler v. Reed, 36 Ill. 81: Murphy v. Helmrich, 66 Cal. 69, 4 Pac. 958; Argersinger v. McNaughton, 114 N. Y. 535, 21 N. E. 1022, 11 Am. St. Rep. 687; Neely v. State, 60 Ark. 66, 28 S. W. 800, 27 L. R. A. 503, 46 Am. St. Rep. 148; Whitney v. Wyman, 101 U. S. 392, 25 L. Ed. 1050; 2 Kent's Com. 630, 631; 31 Cyc. 1555; 1 Mechem on Agency (2d Ed.) 1169, 1179; Story on Agency, § 267. Section 5453 of the Revised Codes, embodies in principle the same rule. It provides:

"One who assumes to act as an agent is responsible to third persons as a principal for his acts in the course of his agency, in any of the following cases, and in no other: (1) When, with his consent, credit is given to him personally in a transaction. \* \* \* \*" ally in a transaction.

Obviously, the assumption by one to act as agent for another must of necessity require this fact to be declared by him in appropriate terms, as well as the name of the principal for whom he is acting. Obviously. also, when the evidence of what was said and done at the time of the particular transaction, in the light of the attendant circumstances, is equivocal and furnishes the basis for different inferences as to what the intention of the parties was, the question whether defendant acted for himself is for determination by a jury.

[3] The evidence embodied in the record here presents such a question. It would serve no useful purpose to set it forth and analyze it in detail. The following summary of it will be sufficient to exemplify this: The plaintiff and defendant both reside in Miles City, Custer county. At the time the services over which this controversy arose were rendered, Mr. Herrick, an attorney at law, was in the employ of the plaintiff. A question had arisen between defendant and Mrs. Hoppe as to whether defendant had not exacted and collected interest on the note at a rate in excess of that stipulated for therein (Laws 1913, p. 51), and had become liable to the forfeiture prescribed by the statute. Defendant sought the advice of Mr. Herrick in this connection, and also his services in the foreclosure of the mortgage, if this should become necessary. Mr. Herrick, aided by plaintiff, took up the question of interest and later advised defendant that there was nothing in the way of a foreclosure, but that this would not be necessary, as Mrs. Hoppe was willing to make a settlement of the matter. In fact, a settlement was pending at that time and later was effected either on the basis then proposed or upon a different basis. When Mr. Herrick and the plaintiff were informed of the terms proposed by the defendant and were requested to put them in writing, they refused to act further for the defendant, because they became satisfied that the terms proposed by him were not fair and just to Mrs. Hoppe. The evidence does not disclose how the settlement was finally made. At no time during the several visits by defendant to plaintiff's office time on appeal or in the motion for new trial.

was any mention made of the relation the defendant bore to Miness, the ostensible payee of the note; nor was anything said as to the ownership of either it or the mortgage, the plaintiff assuming that the defendant was the owner and had caused them to be executed by Mrs. Hoppe to Miness, a fictitious person, ostensibly a resident of New York City. to avoid the payment of taxes in Montana. While there is no direct evidence tending to establish this fact, there are circumstances which furnish some basis for an inference that it was the fact, or, to say the least. which leave a reasonable mind in doubt on the subject. This condition of the evidence required a submission of the issues to the jury; and, as its conclusion thereon was approved by the trial judge in denying the motion for a new trial, this court must accept it as final.

A second contention is that the court erred in refusing to direct the jury to return a verdict for the defendant and in submitting certain instructions requested by the plaintiff. We have already shown that the evidence called for a finding by the jury. The court therefore properly refused to direct a verdict. The objection to the instructions submitted did not question their correctness in point of law, but merely questioned the propriety of submitting the case to the jury at all. Defendant's contention in this behalf is without merit.

Finally, it is contended that the court erred in admitting and excluding evidence. Technically some of the rulings in this behalf were erroneous. Some of the evidence admitted was immaterial; but it is not pointed out that it prejudiced the defendant, nor, by a careful examination of the entire record, have we been able to ascertain that it did. The evidence excluded was wholly immaterial and did not relate to any issue in The rulings in this connection the case. were correct.

The judgment and order are affirmed.

SANNER and HOLLOWAY, JJ., concur.

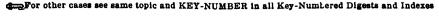
HOGLAN v. GEDDES. (No. 890.)

(Supreme Court of Wyoming. April 22, 1918.)

1. Judges \$== 19-Objections to Substitute JUDGE.

Where a district judge presides at a trial in another district upon an order of the judge of the district wherein cause is pending, under Const. art. 5, § 11, and Comp. St. 1910, § 912, he is at least a de facto judge, and where no objection to his authority is made before or during the trial, all objection to such authority is

APPEAL AND EBROB 4 185(3)—JUDGES 4 19—OBJECTIONS TO SUBSTITUTE JUDGE. Such objection cannot be made for the first



TUTE JUDGE.

Const. art. 5, § 11, providing that "the judges of the district courts may hold courts for each other," is self-executing, and confers authority on the judge of one district to call in the judge of another district without reference to statute and independent of request or reason for substitution.

4. JUDGES \$\instructure 15(1)\$ — SUBSTITUTE JUDGE — GROUNDS—"ANY CAUSE."

Comp. St. 1910, \\$ 912, providing that, "when from any cause" a district judge is unable to try a cause, he shall call upon a judge from another district to preside thereat, held to give a judge when it to call in another judge when yet he authority to call in another judge whenever he deems cause sufficient.

[Ed. Note.-For other definitions, see Words and Phrases, First and Second Series, Any.]

5. JUDGES 4=18-AUTHORITY OF SUBSTITUTE JUDGES.

An order, calling a district judge to try a case in another district, and giving as a reason that the regular judge thereof is otherwise occupied, held to confer authority upon judge so called upon, under Comp. St. 1910, § 912, providing that "when from any cause" a judge is unable to try a case, he may call in a judge from another district to preside thereat.

6. APPEAL AND ERROR \$\sim 536\text{-Bill of Exceptions-Matters Not in Record.}

Where no time had been granted within which to present a bill of exceptions, and the court so certifies when bill is presented to him for allowance, and in addition certifies as to contents of bill, but does not allow same, it cannot be considered as bill of exceptions; matters therein contained do not become a part of record.

7. Appeal and Erbor \$\iff 553(1) - Proceedings Not in Record-Bill of Exceptions.

Where objection is made to authority of substitute judge because regular judge was trying a case at same time, facts in support of objection, on writ of error, must appear from rec-ord of trial as shown by bill of exceptions, and statements in notice of motion and affidavits in support thereof are insufficient.

8. Judges 🖘 15(1) — Substitute Judge SEPARATE SESSIONS AT SAME TIME IN SAME DISTRICT.

Where a district judge presides at a trial in another district upon an order of regular judge thereof, the holding of court by the regular judge at the same time does not invalidate authority of the special judge, whatever effect it may have on the proceeding in which the regular judge is sitting.

Error to District Court, Sheridan County; E. C. Raymond, Judge.

Action by Laura G. Geddes against M. C. Hoglan. Judgment for plaintiff, and motion for new trial overruled, and defendant brings error. Affirmed.

F. Byrd, of Sheridan, for plaintiff in error. R. E. McNally, of Sheridan, for defendant in error.

POTTER, C. J. This case is here on error. The plaintiff in error was defendant in the court below, and upon a jury trial of the cause there was a verdict against him, and a judgment thereon for \$500 and costs. The proceeding in error is brought to reverse that

3. Constitutional Law @=31 - Self-Exe-in the district court in Sheridan county. That cuting Provisions - Special or Substi- county is one of the counties of the Fourth county is one of the counties of the Fourth judicial district, but Judge E. C. Raymond. judge of the Seventh judicial district, presided at the trial, ordered judgment on the verdict, and heard and overruled defendant's motion for a new trial, pursuant to an order of the judge of the Fourth district calling and assigning him to hear, try, and determine the case.

> [1, 2] It is contended as the only ground relied on for a reversal that Judge Raymond was without authority to preside at the trial or to hear and determine the cause. The contention is based on two grounds: First, that the order aforesaid of the regular judge of the district stated an insufficient reason for calling in another district judge; second, that while the trial of this case was proceeding before Judge Raymond in the courtroom of the courthouse in Sheridan county Judge Parmelee, judge of said Fourth district, was holding court and engaged in the trial of another case in another room of the courthouse. The order of Judge Parmelee calling upon Judge Raymond to hear and determine the case recited as the reasons therefor that Judge Raymond was in the district at the time; that the judge of the Fourth district was otherwise occupied, "and it appearing that it would better suit the convenience of the parties and the court." The Constitution provides:

"The judges of the district courts may hold courts for each other and shall do so when required by law." Article 5, § 11.

It is provided by statute (section 912, Comp. Stat. 1910) as follows:

"The judges of the several district courts shall hold courts for each other, when from any cause, any judge of a district court is unable to act or to hear, try or determine any cause, or to hold any term or portion of a term of any district court in his district; and in such event the judge so disqualified or unable to act shall call upon one of the other judges of the district court upon one of the other judges of the district court to hear, try and determine such cause, or to hold such term or portion of a term of court, and the said judge so called upon, shall try, hear or determine said cause, or hold such term or portion of a term, with all the jurisdiction, pow-er and authority possessed by the judge of the district court of the district whereto he is called to act as judge."

Thus the Constitution expressly authorizes a district judge to hold court for another, and declares it his duty to do so when required by law. And the statute so requires when he is called upon by the judge of another district who, from any cause, is unable to act, or to hear, try, or determine any cause, or to hold any term or portion of a term. Being qualified, as the judge of one district, to hold court for another district judge in his district under conditions authorizing it, and having assumed authority and jurisdiction to preside at the trial of this cause upon an order of the judge of the disjudgment. The action was brought and tried | trict wherein the cause was pending, Judge

Raymond was at least a de facto judge in the thority in the law for one district judge to trial and determination of the cause. And any objection to his acting on the ground that he was without authority or jurisdiction would be waived unless seasonably made. That is the general rule as to special or substitute judges where there is authority by Constitution or statute for their selection. The rule is stated in 23 Cyc. at page 616, as follows:

"Objections to the authority of a special or substitute judge may be waived by act or omission of the party, and ordinarily such objections are waived where they are not promptly made. The objection should be made at or before the trial, and cannot be made for the first time on appeal.

And, in a note to the case of Tillman v. State, 58 Fla. 113, 50 South. 675, 138 Am. St. Rep. 100, 19 Ann. Cas. 91, on page 94, preceding the citation of a large number of cases in support of the rule, it is stated as follows:

"The general rule is that an objection to the jurisdiction of a special or substitute de facto judge may be waived, either by consent of the parties, or by proceeding in the cause, before such judge, without making objection to his jurisdiction.

See, also, 15 R. C. L. 516; Whitesell v. Strickler, 167 Ind. 602, 78 N. E. 845, 119 Am. St. Rep. 524; State v. Van Wye, 136 Mo. 227, 37 S. W. 938, 58 Am. St. Rep. 627; Barden v. State, 98 Neb. 180, 152 N. W. 330; City of Oakland v. Hart, 129 Cal. 98, 61 Pac. 779; Lillie v. Trentman, 130 Ind. 16, 29 N. E. 405.

[3] The record here does not show that any objection was made to the authority or jurisdiction of Judge Raymond when the order aforesaid was made, or at the trial, nor until the filing of the motion for a new trial, which was too late. And, further, the objection made by the motion for new trial by alleging therein that said judge was without authority, as will later appear, is not before us, for the reason that said motion is not in the record by proper bill of exceptions. need not rest our conclusion as to Judge Raymond's authority or jurisdiction entirely upon a waiver of the objection. The objection would not have been good at any time. The argument here in support of the objection that Judge Raymond was improperly called in is that the fact that the judge of the Fourth district was otherwise occupied was insufficient to authorize calling in a judge of another district. And it seems to be the thought and contention of counsel for plaintiff in error, relying upon the statute aforesaid, that unless the regular judge of a district is disqualified to hear a cause, or is or will be unable to hear it because of sickness or absence from the state or district, the calling of another district judge is unauthorized. Counsel's theory is that under said statute, providing that the district judges shall hold court for each other when from any cause a judge is unable to act, the cause must be one which disqualifies the judge or renders him physically unable to act. However the stathold court for another. The Constitution, as above shown, expressly provides that the judges of the district courts may hold courts for each other, and further declares that they shall do so when required by law. We do not understand that the first or permissive part of that provision, the part declaring that district judges may hold courts for each other, requires any legislation to make it effective, but it is unquestionably in our opinion, self-executing. And as a self-executing provision of the Constitution it confers all the authority necessary to uphold the jurisdiction of the judge who tried this cause.

A very similar provision in the Constitution of the state of Washington was held selfexecuting by the Supreme Court of that state. State v. Holmes, 12 Wash. 169, 40 Pac. 735. 41 Pac. 887; see, also, Hindman v. Boyd, 42 Wash. 17, 84 Pac. 609; Bigcraft v. People, 30 Colo. 298, 70 Pac. 417. The Washington Constitution provides that:

"The judge of any superior court may hold a superior court in any county at the request of the judge of the superior court thereof, and upon the request of the Governor it shall be his duty to do so."

The court, in State v. Holmes, said:

"We are of the opinion that the provision of the Constitution empowering the judge of any superior court to hold court at the request of the superior judge of any county, is self-executing. This provision not being a limitation, but being in the nature of a legislative enactment, it follows that, if the enactment could be sustained and made self-executing if it had been a statutory enactment, it is self-executing as a consti-tutional enactment."

A district judge is not required to hold court for another except when called upon as provided by the statute. But he may do so without reference to the statute, by virtue of the constitutional provision so declaring. We do not suppose that a judge would assume to act for another without a request that he do so, but such a request is not made a condition of the authority conferred by the Constitution unless by implication, and we are inclined to the opinion that, if necessary, a request might be presumed.

[4, 5] The latter part of the constitutional provision, making it the duty of district judges to hold courts for each other when required by law, would not be effective in the absence of legislation placing that duty upon the district judges, either generally or under prescribed conditions. And we think it would not be difficult, if necessary to be decided in this case, to find sufficient authority in the statute for the order calling upon Judge Raymond to hear, try, and determine the cause. The statute was evidently enacted to render effective the provision of the Constitution aforesaid, declaring it the duty of a district judge to hold court for another when required by law. The provision of the statute is that "when from any cause" any district judge is unable to act, or hear, try, or deute might be construed, it is not the sole au- termine any cause, the judges of the several

district courts shall hold courts for each ing time to present a bill for allowance, for other. And the same language is used with reference to the holding of a term or a portion of a term. "Any cause" is a comprehensive term, and in this statute it is not preceded by any words of limited meaning which might narrow or control its interpretation. But as found in the statute it is unlimited and unqualified. And it is not clear at least that the statute might not reasonably be construed as requiring a district judge to hold court for another when, from any cause deemed sufficient by the judge of the other district, he calls upon another judge to hold court for him. Nor is it clear that if a judge, though not disqualified or physically unable to act, is so occupied with other matters which may properly demand his attention at the time, without interfering with a hearing or trial of a case in his court by another judge, that may not be considered a cause rendering him unable to act, strictly within the meaning and purpose of the stat-

The point that Judge Parmelee of the Fourth district was holding court in another room of the courthouse and engaged in the trial of another cause during part of the time that Judge Raymond was presiding in the trial of the case at bar in the courtroom is not raised by the record here. The fact is not otherwise stated, except in the motion for new trial and an affidavit in support thereof, which we find among the original papers and also as a part of what is entitled "Bill of Exceptions." As frequently held by this court, a motion for new trial does not become a part of the record unless incorporated in a bill of exceptions. And the socalled bill in this case does not appear to have been allowed or ordered to be made a part of the record as such. Nor does it appear that any time was granted when the motion for new trial was overruled, or at any other time, for reducing the exceptions to

[6] The motion for new trial appears to have been heard and overruled April 10, 1916, and the bill of exceptions appears to have been presented to the trial judge on May 29, 1916. The certificate of the judge to that bill recites that the bill was presented on May 29, 1916, and he certifies that it contains the order of the judge of the Fourth district, assigning the cause to him for trial, a copy of the judgment and verdict of the jury, the motion for a new trial, the affidavits in support thereof and in opposition thereto, and the order overruling the motion and fixing the amount of bond for stay of execution. And he further certifies "that no other order fixing the time within which to present a bill of exceptions was made in said cause." will be noticed that in this certificate the judge does not state that the bill was allowed, or that it was ordered to be made a part of the record as a bill of exceptions. And it

it is stated in the certificate that no other order was made fixing a time for presenting a bill, and neither in the order overruling the motion for new trial nor elsewhere in the bill or record proper is it shown that such time was asked for or granted. The judge evidently did all that he felt authorized to do by certifying that the several papers contained in the bill as presented were what they purported to be, and that he intended no more than that by signing the presented bill is apparent, we think, from the fact that it is stated in the first part of the so-called bill that on the date of the overruling of the motion for new trial plaintiff in error was given until the first day of the next term of the court to prepare and file his bill of exceptions, and that the judge does not certify to the truth of that statement, but confines his certificate to stating that the bill as presented contains certain papers, adding thereto that no order, except as shown by those papers, was made fixing a time within which to present a bill, and his certificate omits a statement or order allowing the bill. Upon these facts as to the presented bill we think it cannot be considered as a bill of exceptions making the motion for new trial a part of the record. That it is necessary, when exceptions are not reduced to writing and tendered at the trial, that time be asked and granted therefor, and that the record must show that time was granted, was recently held by this court in International Harvester Co. v. Jackson Lumber Co., 170 Pac. 6.

[7] But if the motion was a part of the record, the statement in the motion and supporting affidavit of the fact that the judge of the Fourth district was engaged in the trial of a cause or holding court at the time that the case at bar was being tried would not be sufficient. Van Horn v. State, 5 Wyo, 501, 40 Pac. 964; Painter & Co. v. Stahley Bros., 15 Wyo. 510, 90 Pac. 375; Jenkins v. State (on petition for rehearing) 22 Wyo. 34, 134 Pac. 260, 135 Pac. 749. In the case last cited this court said in the opinion:

"The court or judge in signing a bill of exceptions certifies that the statements contained in the bill are true, and that the objections, rulings, and exceptions therein stated occurred on the trial; but he does not certify that the state-ments contained in an affidavit attached to a motion for a new trial are true, or that the mat-ters therein stated occurred on the trial. What occurred on the trial must appear by the bill and not by ex parte affidavits.'

And this is particularly applicable to this case for, aside from stating in the motion that the regular judge was holding court in another room at the time of the trial of this case, the fact appears only by an affidavit of the defendant filed with and in support of the motion. In Oklahoma, where such fact was asserted only in a motion for new trial and in a subsequent motion for arrest of judgment, it was held insufficient, and that clearly shows that no order was made grant- there should be record evidence of the fact to overcome the presumption of the regularity of proceedings in a court of record. Johnson v. State, 1 Okl. Cr. 321, 97 Pac. 1059, 18 Ann. Cas. 300.

[8] Again, if it had been shown by the record that the regular judge of the district was holding court as alleged, that fact would not affect the jurisdiction of the judge who presided in the trial of this case, even if it be assumed that it would have been illegal or improper for both judges to separately hold court in the same county at the same time. The irregularity, if any, in such case, would affect only the case heard before the judge of the Fourth district. 15 R. C. L. 517; List v. Jockheck, 59 Kan. 143, 52 Pac. 420; Johnson v. State, supra; State v. Riley, 26 N. D. 236, 144 N. W. 107. In List v. Jockheck, where it was claimed that while a cause was being tried before a special judge, court was being held in an adjacent room and other cases being tried by the regular judge, and that the special judge was therefore without jurisdiction, it was said:

"If the record showed that the plaintiff had objected to this division of judicial authority, it would present a serious question, but it does not appear that such objection was made; besides, the question may well arise as to which of these judges was rightfully in the exercise of the authority to hold court. It would seem that, if the proceedings of either one should be declared void or even erroneous, it would be the proceedings before the regular judge."

And in Johnson v. State, supra, it was said that if it had been shown that the regular judge was holding court in the same county at the time of the trial before the other judge, and that objection had been made in apt time, it would not have affected the powers of the special judge, and the above-quoted language of the Kansas court in List v. Jockheck was approved. But attention was called to a provision of the Oklahoma Constitution (article 7, § 9) that "two or more district judges may sit in any district separately at the same time," and upon that provision it was held that the regular judge and as many special judges as may have been appointed or selected may sit separately in the same district at the same time.

We are not to be understood as intimating that the judge of the Fourth district would have been without authority to hold court or hear another cause in another room of the courthouse while this case was on trial before the judge of the Seventh district. We express no opinion upon that question, for it is not before us. But it may not be improper to say that, while there is authority to the contrary (see Baisley v. Baisley, 15 Or. 183, 13 Pac, 888), there are a number of decisions to the effect that the regular and substitute judge may hold court at the same time, presiding in the trial of different cases. Dial v. Comm., 142 Ky. 32, 133 S. W. 976; Pike v. City of Chicago, 155 Ill. 656, 40 N. E. 567:

Wisner v. People, 156 Ill. 180, 40 N. E. 574; Wells v. People, 156 Ill. 616, 41 N. E. 161; Beach v. People, 157 Ill. 659, 41 N. E. 1117; Oliver v. State, 70 Tex. Cr. R. 140, 159 S. W. 235; Courtney v. State, 5 Ind. App. 356, 32 N. E. 335; and see Bigcraft v. People, 30 Colo. 298, 70 Pac. 417, and Ross v. State, 8 Wyo. 351, 57 Pac. 924. In the case last cited, Mr. Justice Corn, delivering the opinion for this court, said:

"We think it is very probably true that two courts, or two terms of the district court, could not legally be in session in the same county at the same time. \* \* \* There is nothing in the record to show that the judge of that district was disposing of other business of the term while this trial was in progress, though there would seem to be no obstacle in the way of his doing so, other than some inconvenience that might arise in obtaining juries under the statute in cases where juries might be required."

In the Colorado case cited a statute seems to have authorized a district judge, when the accumulation of judicial business demands it, to request the assistance of the judge of another district to hold court for him, and the holding of sessions by the two judges in different rooms at the same time. And it was held that such statute was not in violation of a constitutional provision identical with section 11 of article 5 of the Constitution of this state. We do not suppose there can be any doubt about the right of a district judge in a county of his district, where a cause is on trial before a judge of another district, to transact any business that may rightfully be performed out of court. The question sought to be presented here is whether he can separately hold court in the same county while a case is being tried before another judge, in the absence of a statute so providing. That question we do not decide.

The judgment will be affirmed.

BEARD and BLYDENBURGH, JJ., concur.

In re FRIEDMAN'S ESTATE.

HEBREW HOME FOR AGED DISABLED

et al. v. FRIEDMAN et al.

(S. F. 7796.)

(Supreme Court of California. March 25, 1918.)

1. EVIDENCE \$\pi 313\text{-Declarations-Pedi-gree.}

Declarations of deceased members of the family or alleged family of a decedent testified to by depositions on written interrogatories through an interpreter, while properly admissible, are extremely unsatisfactory, for the witnesses testify without any fear of incurring the penalties of perjury.

2. WITNESSES &=317(3) — MATERIAL FALSE TESTIMONY—REJECTION OF WHOLE TESTIMONY—STATUTE.

Comm., 142 Ky. 32, 133 S. W. 976; Pike v. Under Code Civ. Proc. § 2061, subd. 3, procity of Chicago, 155 Ill. 656, 40 N. E. 567; testimony is to be distrusted in others, the

court, if a witness willfully swears falsely to a | deposition on the ground that it had not been material fact, is justified in rejecting his whole

3. Appeal and Error -717 - Opinion of Trial Court-Review.

The Supreme Court, on appeal, cannot consider a complaint of parts of the opinion of the trial court.

APPEAL AND ERROR \$\infty 877(2) - PARTIES ENTITLED TO ALLEGE ERROR-INTEREST.

Where claimants against an estate seeking distribution to them as heirs or next of kin were properly found not to be next kin to the deceased, testate, they had no interest in the other questions involved in the decree, and could not urge error in the decree in favor of other claimants or as to the evidence in support

5. DESCENT AND DISTRIBUTION \$= 71(4)

HEIRS-PRESUMPTION.

There is a very strong presumption that a decedent left heirs, which is merely a recognition of that expressed in Code Civ. Proc. § 1963, subd. 28, that things have happened according to the ordinary course of nature.

6. TRIAL 5-75 - EVIDENCE - RIGHT TO AS-

SIGN ERROR.

Appellants, claiming that a decedent was a member of their family, could not object to his declarations on the ground that they were inadmissible because he was not a member of their family.

7. EVIDENCE = 291 - DECLARATION - RELA-

TIONSHIP

TIONSHIP.
Under Code Civ. Proc. § 1870, subd. 4, providing that the act or declaration, verbal or written, of a deceased person in respect to the relationship or death of any person related by blood or marriage to such deceased person, may be given in evidence, declarations of a decedent that he had no surviving relative were in fact declarations that each and every member of his family to whom he was "related by blood or marriage" was dead, and were admissible; the fact that they might be erroneous not affecting their admissibility, but going only to their weight. weight.

APPEAL AND EBROR \$\infty 1046(1)\$—HARMLESS EBROR—PROCEEDING TO DETERMINE RIGHTS

of Heirs—Participation of Executions.

In such proceeding under Code Civ. Proc.

1664, to determine rights of persons claiming
to be heirs or entitled to distribution, in which
the executors are parties, their active participation in the trial by offering evidence and objecting to evidence was not so far erroneous or prej-udicial as to authorize a reversal of the judg-ment, as that question would depend upon the evidence offered by them or objected to by them.

9. Appeal and Erbor & 973—Descent and Distribution & 71(7) — Statutory Pro-

CEEDING-NONSUIT.

In such proceeding where the plaintiff, a charitable organization, had introduced the will and its probate, but failed to show that testator left no heirs, there was no such failure to establish its right to the entire residue so as to require a nonsuit, as parties claiming as heirs or next of kin were, in effect, plaintiffs, so far as their own claims were concerned, and were not injured because some other claimant failed, especially where the charity was a beneficiary under the will to the property over and above that claimed for the heirs, and as the real effect of the denial of the motion to nonsuit was to regulate the order of procedure within the discretion of the trial court under Code Civ.

10. Depositions == 83(4)—Motion to Surpress Evidence—Opposing Depositions.

Where a witness testified by deposition in 1903 and a motion was made to suppress the

fairly taken, the depositions of those present at the taking of the earlier deposition, including the interpreter, the commissioner, and the nephew of the witness and the deponent herself, tak-en in 1905, were admissible as going to the weight of the earlier deposition, as the circumstances under which testimony is given, such as assistance in giving names and dates, etc., always affect its weight.

11. Descent and Distribution \$\infty 71(1) - STATUTORY PROCEEDING - JURISDICTION OF

COURT.

In a proceeding under Code Civ. Proc. § 1664, to determine the rights of all persons claiming to be heirs or entitled to distribution and requiring such petition to be filed within one year after the issuing of letters testamentary, the question as to whether such letters were properly issued is not a jurisdictional question. tion.

12. Appeal and Erbob \$== 185(1)—Statutory Proceeding — Jurisdiction — Failure to

In such proceeding where a devisee, acting plaintiff, alleged that the order admitting the will to probate was duly made and that letters testamentary were issued and the alleged heirs or next of kin did not in their pleadings deny or next of kin (not in their pleadings deny such allegations, and appeared and submitted to the jurisdiction and attempted to establish their claims, they waived right to object to the trial court's jurisdiction.

13. New Trial \$\infty\$ 17 - Irregularities - "Bias" or "Prejudice" of Judge.

While the course of conduct alleged in affidavits used on motion for change of judge on the ground of bias or prejudice under Code Civ. Proc. § 170, subd. 4, can be used as evidence of irregularities in motion for new trial under of irregularities in motion for new trial under section 657, subd. 1, the question of bias or prejudice cannot be raised upon the motion for new trial. "Bias" or "prejudice" of a judge is not an irregularity, but a condition of mind to be taken advantage of in the manner prescribed by section 170, subd. 4.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Bias;

Prejudice.]

14. APPEAL AND EBBOR \$\$\iiiis 874(5)\$ — DENIAL OF CHANGE OF JUDGES—REVIEW.

On an appeal from an order on motion for a new trial, the Supreme Court can review the propriety of an order denying a motion for a change of judges, which may also be reviewed on direct anneal. on direct appeal.

15. New Trial &=140(2)—Irregularities— Denial of Bias or Prejudice.

On a motion for a new trial under Code Civ. Proc. § 657, subd. 1, on the ground of irregularities preventing a fair trial, it is immaterial whether they result from bias or prejudice of the judge, and hence it is unnecessary for the judge to file a counter affdavit denying bias and prejudice on a hearing of such motion for a new trial.

16. DESCENT AND DISTRIBUTION & 71(7) — STATUTORY PROCEEDING—FINDINGS.

In a proceeding under Code Civ. Proc. § 1664, to determine the rights of persons claiming to be heirs or next of kin of a deceased, the state of finding that claiments were not related. mg to be heirs or next of kin of a deceased, testate, a finding that claimants were not related to deceased in any degree was a finding of the ultimate fact in issue which rendered unnecessary detailed findings upon the degree of relationship alleged.

In Bank. Appeal from Superior Court, City and County of San Francisco; Thos. F. Graham, Judge.

Statutory proceeding by the Hebrew Home

for Aged and Disabled and others to determine the rights of all persons claiming to be heirs or entitled to distribution in the estate of Julius Friedman, deceased, testate, against Liebe Friedman and others, and Edward J. Lynch, administrator, etc., and others. From a decree in favor of the Hebrew Home for Aged and Disabled and others and against all the other claimants, Edward J. Lynch, administrator, etc., and others appeal. Affirmed.

See, also, 171 Cal. 431, 153 Pac. 918; 173 Cal. 411, 160 Pac. 237; 168 Pac. 21.

Houghton & Houghton, of San Francisco (Sullivan & Sullivan and Theo. J. Roche, of San Francisco, of counsel), for appellants. Charles W. Slack, Marshall B. Woodworth, Edmund Tauszky, D. Freidenrich, Edgar D. Peixotto, Marcus Rosenthal, A. A. Sanderson, Cullinan & Hickey, and Chickering & Gregory, all of San Francisco (Lucius L. Solomons, of San Francisco, of counsel), for respondents.

WILBUR, J. This is an appeal from a decree in a proceeding under section 1664 of the Code of Civil Procedure, determining the rights of all persons claiming to be heirs, or entitled to distribution. For convenience, appellants now before this court are designated as the "Kagan claimants."

The deceased left the bulk of his property by will to respondent, the Hebrew Home for Aged Disabled, a charitable corporation (hereinafter called the Hebrew Home). Such disposition was invalid as to the bulk thereof, if the testator left "legal heirs" (there being no noncharitable residuary legatee or devisee), and all the property of the testator devised or bequeathed to charitable purposes in excess of one-third of the entire estate would, in that event, descend to "the next of kin, or heirs, according to law." Section 1313, Civ. Code. The appellants claimed to be such legal heirs, and that the property, therefore, goes to them by the law of succession. Numerous other claimants were before the court in this proceeding and introduced evidence in support of their respective claims; but the court found that none of the parties was a legal heir of the deceased or his next of kin, and that the deceased died leaving no legal heirs nor next of kin, and therefore that the will was valid as to its charitable bequests and devises. The main question upon this appeal is whether or not the evidence before the trial court was sufficient to justify the findings that the deceased died without legal heirs and that the appellants are not next of kin or legal heirs of the deceased. Appellants claim that they are cousins of the decedent. This claim is based upon the allegation that their aunt, Rasche Kagan, was the mother of Julius Friedman, the deceased. By this chain of evidence they claim to be relatives in the fourth degree.

The next claim of appellants is that Julius Friedman and the Kagan claimants are all the descendants of David Friedman, who, it is alleged, was the grandfather of Solomon Elias Friedman, the father of the deceased, and of Marcus Kagan, the father of one group of Kagan claimants, and of a David Kagan, the father of the other group of Kagan claimants. This claim is entirely independent of the question of who was the mother of the deceased. It is alleged that the Kagan claimants are all the grandchildren of Jossel Kagan, but that they are related in different degrees of kinship to deceased. For it is claimed that Jossel first married Malke Friedman, a daughter of the decedent's great-grandfather, David Friedman, by whom he had a son Marcus, the father of one group of the Kagan claimants, who are thus related to the decedent in the sixth degree; and that after Malke's death he married Hinde Friedman, a niece of his deceased wife, a granddaughter of said David Friedman, and by her had a son, David Kagan (thus a half-brother of Marcus Kagan), whose children constitute the other group of the Kagan claimants, and are thus related to the decedent in the seventh degree. In other words, it is claimed that Jossel Kagan first married a great-aunt of the deceased on his father's side, and upon her death in 1800 married a second cousin of the deceased on his father's side.

[1] The evidence relied upon to establish these claims is both oral and documentary, the oral consisting, in part, of declarations of deceased members of the family, or alleged family of the decedent, testified to by deposition on written interrogatories through an interpreter. Such pedigree declarations so elicited, while properly admissible in evidence, are extremely unsatisfactory, for the witness testifies without any fear of incurring the penalties of perjury. 2 Moore on Facts, 1150, 1156, 1166; Estate of Emerson, 167 Pac. 149; People v. Ah Yute, 56 Cal. 119; People v. Jan John, 137 Cal. 220, 69 Pac. 1063. The Kagan claimants produced evidence tending to show that Rasche Kagan, a daughter of their grandfather Jossel Kagan, married Solomon Elias Friedman of Mitau, Russia, whom the deceased declared in his will to be his father. There is no record evidence showing who was the wife of Solomon Elias Friedman other than the census records of the town of Mitau, Russia, in which it is stated that the wife of Solomon Elias Friedman was Rossel (maiden name not given). For the purposes of this discussion we will assume that the Solomon Elias Friedman of Mitau, the husband of "Rossel," was the father of the decedent, and that "Rossel" was his mother. The first difficulty in appellants' claim of relationship through decedent's mother is that the name of the wife of Solomon Elias Friedman is given as "Rossel," not "Rasche." Chaie Rasche Rosen



and her niece Helena Goldberg both testify | court decided the testimony to be willfully that "Rossel" and "Rasche" were the same person and that she was a daughter of Jossel Kagan and a sister of Marcus Kagan. and half-sister of David Kagan, the father of one branch of the Kagan claimants. If this testimony was given full weight and was uncontradicted, it was sufficient to establish the relationship of all the Kagan claimants in the fourth degree (first cousins). The testimony of Chaie Rasche Rosen, as to her personal knowledge and as to the pedigree declarations, was also mainly relied upon to establish the above-mentioned claims of relationship in the sixth and seventh degrees. Was there contradictory evidence, or evidence going to the weight of this testimony that justified the trial court in finding the fact to be contrary to this evidence?

[2] If it can fairly be said that these witnesses willfully swore falsely as to any material fact, the court was justified in rejecting their whole testimony. Section 2061, subd. 3, Code Civ. Proc. Respondents point out one item of material evidence as to which appellants admit that both Chaie Rasche Rosen and Helena Goldberg testified to a fact that was not true. If this testimony was willfully false and material, or if the trial court was justified in arriving at the conclusion that it was willfully false, then the testimony of these witnesses might have been entirely disregarded, and we are not required to consider whether or not the court had the power arbitrarily to reject the testimony of a witness. In order to present the significance and effect of this testimony it will be necessary to elaborate the relationship involved in this controversy. The untrue statement was that Hirsch Friedman, a brother of the decedent, died in Alt Sagar, a town in Russia near Schavli, not far distant from Mitau, in the year 1830; whereas, it is admitted and proved beyond question by appellants that Henry Friedman, the brother of the decedent, died 51 years later (1881) in New York City, as a result of a street car accident. It is claimed by appellants that "Hirsch" and "Henry" are one and the same person. It was a material essential part of the proof of heirship by all the Kagan claimants to show that all the brothers and sisters of the decedent were dead, without issue surviving them. The witness . Chaie Rasche Rosen testified that Henry's mother, Rasche Friedman, as she claimed, who died before 1871, told her that Henry (or Hirsch) had died of the cholera in 1830, as above stated. Appellants argue that this was an honest mistake of the witness, due to misinformation. Respondents argue that it was willfully false. The question as to which of these contentions is correct was exclusively for the trial court, and justified that court in wholly rejecting the testimony of Chaie

false. There were certain parties to this proceeding, among others, known as the Grunwaldt claimants, the Bernstein claimants. and the Liebe Friedman claimants. As we said in dismissing their appeals from the decree:

"Each of these groups claims by an asserted kinship to the decedent, wholly distinct from, independent of, and antagonistic to the claims of each and all of the other groups." Estate of Friedman, 173 Cal. 411, 160 Pac. 237.

The evidence introduced by the Grunwaldt, the Liebe Friedman, and the Jacobson claimants tended to prove that the mother of Julius Friedman was not Rasche Kagan, the aunt of the Kagan claimants, and therefore to contradict the claims of the Kagans to relationship to decedent in the fourth degree. There are many declarations of the decedent in evidence inconsistent with both their claims of heirship. After the death of his brother Nathaniel (1895), he frequently said that he had no relatives left. In the will (from which statement the word "not" is evidently omitted by inadvertence) he declared, "I am (not) aware of any kin," etc. Although he did not state who his mother was, he made declarations to many witnesses concerning his relationship to the Grunwaldt claimants, through his mother, entirely inconsistent with the claim that she was Even if it were proper for Rasche Kagan. us to do so, it would be impossible, within the reasonable limits of an opinion, to discuss the weight and credibility of the evidence before the trial court. The trial occupied nearly 2 years (246 days of actual trial). The case was under submission to the trial court for over a year. The reporter's transcript of the evidence taken on the trial contained 6,000 pages, with 3,000 pages more of documentary evidence; the printed transcript on appeal, on bill of exceptions, 1,895 pages, containing 754,000 words (as indicated by folio numbers), and the briefs of nearly 1.600 pages about 640,000 words, present for our consideration 1,394,000 words, not to mention oral argument and diagrams, and we are admonished that an opinion should contain about 2,333 words. It is sufficient for us to say that, after a careful consideration of the evidence and arguments in relation thereto, we hold that the finding that the Kagan claimants are not of kin to the deceased is supported by substantial evidence.

[3, 4] The appellants complain of portions of the opinion of the trial court, but we cannot consider this matter. Goldner v. Spencer, 163 Cal. 317, 320, 125 Pac. 347. Holding as we do that the Kagan claimants were properly found not to be of kin to the deceased, many of the questions raised by appellants become immaterial, for if they are not entitled to inherit they are not interested in the other questions involved in the decree Rasche Rosen and Helena Goldberg, if that and cannot be heard to urge error in the

decree in favor of other claimants or the evidence in support thereof. Blythe v. Ayres, 102 Cal. 254, 257, 258, 36 Pac. 522; Estate of Walker, 148 Cal. 162, 166, 82 Pac. 770; Estate of Fleming, 162 Cal. 530, 123 Pac. 284.

[5] This consideration disposes of all claims of error based on the very strong presumption that decedent did leave heirs. People v. Roach, 76 Cal. 294, 297, 18 Pac. 407; State v. Miller, 149 Cal. 209, 211, 85 Pac. 609. There was no presumption of law that appellants were such heirs. The presumption is merely a recognition of the "ordinary course of nature." Section 1963, subd. 28, Code Civ. Proc. For the same reason it is unnecessary to consider the effect of this presumption upon the interpretation of section 1313, Civil Code, supra. This consideration also disposes of the point that the complaint of the Hebrew Home was improperly brought in its individual capacity and not as trustee, and also of the claims that the decree in favor of the Home was not in accordance with the will, as appellants, if not heirs, are not entitled to complain of such error, of any was committed.

[8,7] Appellants rely upon some of the declarations of the deceased concerning his family, such as the declaration that he was a son of Solomon Elias Friedman of Mitau. Russia, contained in his will, and his numerous declarations concerning his relationship to his brothers, David, Henry, and Nathaniel; that he had a sister named Esther, who had four children, Morris, Helena, David, and Rosetta Gottleib; but appellants object to the admissibility of statements made by the deceased after the death of his brother Nathaniel (the other relatives just mentioned having theretofore died) that he had no relatives. The basis of such objection is that, until it is shown that the deceased was a member of the family of the Kagan claimants, his declarations in that regard are inadmissible, and that, where the declaration itself is offered for the purpose of showing that there was no such relationship it is inadmissible. It would seem absurd for the appellants, claiming that the decedent is a member of their family, to object to his declarations on the ground that they are inadmissible because he was not a member of the family, were it not for the fact that such contention finds support in Estate of James, 124 Cal. 653, 57 Pac. 578, 1008, wherein it was held that the declaration of the deceased that he was a widower was inadmissible against a woman who claimed that she was his widow. Section 1870, subd. 4, of the Code of Civil Procedure of this state, provides that "the act or declaration, verbal or written, of a deceased person in respect to the relationship, birth, marriage, or death of any person related by blood or marriage to such deceased person" may be given in evidence. The other declara-

tions of the decedent that he had no surviving relative, that all his relatives were gone. that he had no one left, were in effect declarations that each and every member of his family, to whom he was "related by blood or marriage, was dead" and were admissible for that reason. See Estate of Hartman, 157 Cal. 206, 107 Pac. 105, 36 L. R. A. (N. S.) 530. 21 Ann. Cas. 1302, on general subject. The fact that the effect of this testimony would be to rebut evidence tending to show that the Kagan claimants were "relatives by blood or marriage" does not affect its admissibility. They were declarations concerning the members of his family. The fact that they were erroneous, if it be a fact, would not affect their admissibility, but only their weight. As to the declarations being ante litem motam, it will be observed that the declarations covered a period from 1895 on. We think the declaration in the will was not of that class. But even if it were, no objection was offered to its admission in evidence. See 1 Wharton on Evidence, §§ 193, 213; Chamberlayne's Best on Evidence (3d Am. Ed.) p. 458a.

[8] The appellants complain that the executors actively participated in the trial, offered evidence, and objected to testimony offered by others. They were parties to the proceeding (section 1664, Code Civ. Proc.), and, while we have held (Estate of Friedman. 168 Pac. 21) that they had no duties to perform as executors for or against any of the claimants in the proceeding, it does not follow that their participation was so far erroneous or prejudicial as to authorize the reversal of the judgment. That question would depend upon the evidence produced by them and objected to by them. From an examination of the case we are satisfied that the Kagan claimants were in no wise prejudiced by such conduct of the executors. The appellants have no just cause of complaint that witnesses were introduced by the executors if their testimony was relevant and competent, and if they in effect acted, as it is claimed, as attorneys for the Hebrew Home, appellants are no more affected prejudicially than they would have been had the Hebrew Home employed them.

[9] It is urged that the Hebrew Home, acting as plaintiffs, having introduced the will and its probate, only should have been nonsuited for a failure to prove that decedent left no heirs, and hence a failure to establish their right to the entire residue. There are several answers to that proposition. As has been said, unless appellants establish their claim of heirship, they are not aggrieved by the ruling of the court on the claims of others. Appellants were, in effect. plaintiffs, so far as their own claims were concerned. They were not injured because some other claimant failed. It may also be said that the Hebrew Home was a beneficiary under the will to property over and above the two-thirds claimed by the heirs, claims of the parties to this proceeding for and that therefore, if for no other reason, the motion for nonsult should have been denied. The only real effect of the denial of the motion was to regulate the order of procedure, which was within the discretion of the court. Section 607, Code Civ. Proc.

[10] The witness Chaie Rasche Rosen having testified by deposition in 1903, a motion was made to suppress the deposition upon the ground that it had not been fairly taken, and the depositions of those present at the taking of the deposition of 1903, including the interpreter, the commissioner, a nephew of the witness. Dr. Goldberg, and the witness herself, were taken in 1905 and were read in evidence at the trial on the motion to suppress, which motion was denied. Counsel discuss at considerable length the question of whether or not these depositions can properly be considered by this court and were properly before the trial court upon the question of heirship, or whether their proper consideration was confined to the admissibility of the deposition. We do not think the court was bound to ignore these depositions in weighing the value of the deposition of 1903. The proof may not have been sufficient to have excluded the deposition, but affect the nevertheless might seriously weight of that deposition.

The court was entitled to take these depositions into consideration for that purpose. The circumstances under which testimony is given always affect its weight. If a witness testifying before the court is being assisted in giving names and dates, there being a great number of each, such fact would be considered in the determination of the value to be given to the evidence, and if this condition is disclosed in any proper manner. where the witness has been examined outside the presence of the court, we see no reason why it is not equally to be considered. We are satisfied therefore that these depositions were properly before the trial court in determining the appellants' claims. From the record we do not know, however, whether or not the trial court considered them in reaching a conclusion and we do not find it necessary to do so. A comparison of these two depositions, however, is very persuasive of what seems almost self-evident without it, that the witness had some assistance, either in or out of court, in giving names and dates, as the interpreter testifies.

[11, 12] Section 1664 of the Code of Civil Procedure provides that:

"In all estates now being administered or that may hereafter be administered, any person claiming to be heir to the deceased, or entitled to distribution in whole or in part of said estate, may, at any time after the expiration of one year from the issuing of letters testamentary or of administration upon such estate, file a petition," etc.

It is claimed that the trial court was with- in evidence. Appellants claim that, in reout jurisdiction to hear and determine the viewing the order denying the motion for

the reason that the notice of the hearing of the proof of the will was defectively published, in that it was not published on Sundays during the period of publication; the publication being in a daily paper. An order admitting the will to probate was made and letters testamentary were in fact issued, and we do not think the question as to whether or not such letters were properly issued is a jurisdictional question in this proceeding, but appellants are in no condition to raise this question for two reasons: First, the Hebrew Home, acting as plaintiff, alleged that the order admitting the will to probate was duly given and made and that letters testamentary were issued, and the appellants did not in their pleadings deny that allegation; second, they appeared and submitted to the jurisdiction of the court and attempted to establish in the lower court, as they do here, their claims of heirship. Under such circumstances they waived all objections to the jurisdiction of the trial court.

[13-15] Appellants gave notice of intention to move for a new trial, alleging as one of the grounds of such motion irregularity in the proceedings of the court by which the appellants were prevented from having a fair trial (section 657, subd. 1, Code Civ. Proc.), and on July 3, 1913, served affidavits in support of such claim, for use upon the motion. Appellants subsequently, before the hearing of the motion for a new trial, made a motion under the provisions of section 170, subd. 4, Code of Civil Procedure, on the ground of alleged bias and prejudice, to prevent the judge from hearing the motion for a new trial. Upon this motion, the affidavits served July 3, 1913, and supplementary affidavits, were offered by appellants, counter affidavits were filed, including one by the judge denying any bias or prejudice, and the motion was denied. An appeal was taken from the order and the order was affirmed by this court. Estate of Friedman, 171 Cal. 431, 153 Pac. 918. Reference to the opinion upon that appeal is made for a discussion of the showing made by said affidavits. We there said:

"\* \* \* The foundations of the charge itself are so unsubstantial that it would have been a failure of duty on the part of the judge to have made any other order. \* \* \* "

Mr. Justice Shaw, in his concurring opinion, said: "The charge of bias and prejudice scarcely deserves serious consideration, even if there were no denial." While that appeal was pending, the motion for new trial came on for hearing, and upon such motion the same affidavits presented by appellants upon the previous motion were offered in support of the charge of irregularity in the proceedings of the court; but the counter affidavit of the judge himself was not again offered in evidence. Appellants claim that, in reviewing the order denying the motion for

new trial, the record is thus different from that involved upon the previous appeal from the order denying the motion under section 170, subd. 4, Code of Civil Procedure, and that the failure of the judge to file another affidavit denying bias and prejudice, or of the attorneys to offer the one already on file, requires a reversal of the order denying a new trial. While it is true that the course of conduct alleged in the affidavits used on the first motion could also be used as evidence of irregularities, the question of bias or prejudice cannot be raised in this way. Bias or prejudice is not an irregularity. It is a condition of mind. The statute provides the method by which that condition may be taken advantage of. Section 170, subd. 4, Code Civ. Proc. It is true that on an appeal from an order on motion for new trial this court can review the propriety of an order denying the motion for a change of judges (Keating v. Keating, 169 Cal. 754, 147 Pac. 974), or it can be reviewed on direct appeal (Estate of Friedman, 171 Cal. 431, 153 Pac. 918, supra). On a motion for a new trial, upon the ground of irregularities in the proceedings of the court, we are dealing with those irregularities, and it is immaterial whether they result from bias and prejudice or not. Hence it was unnecessary for the judge to file a counter affidavit denying bias and prejudice upon the hearing of the motion for new trial. Upon the question as to whether or not the affidavits of appellants show any irregularities in the conduct of the court, we hold that they do not, and find it unnecessary to add anything to the discussion on that subject in the opinion above referred to. Estate of Friedman, 171 Cal. 431, 153 Pac. 918.

[16] Appellants complain of the failure to find upon the second claim of heirship, by which it is sought to establish their relationship to the deceased in the sixth and seventh degrees, by reason of their being descendants from the great-grandfather of the deceased. The ultimate fact in issue between the parties in this case is as to whether or not they were related to the deceased, and, if so, their degree of kinship. The finding that they are not related to the deceased in any degree is a finding of this ultimate fact and renders unnecessary findings in detail upon the claim of relationship set up by the appellants.

We find no merit in the other claims of irregularities.

There are no other matters in the record meriting discussion.

Judgment affirmed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; MELVIN, J.; SHAW, J.; RICHARDS, Judge pro tem.; VICTOR E. SHAW, Judge pro tem.

CALIFORNIA GAS & ELECTRIC CORP. et al. v. UNION TRUST CO. OF SAN FRANCISCO. (S. F. 7518.)

(Supreme Court of California. April 1, 1918.)

1. CORPORATIONS 4= 486-MORTGAGE-SINK-ING FUND.

The unifying and refunding mortgage of a gas and electric company subject to earlier "underlying" mortgages provided that the mortgagor should maintain a sinking fund to be specially applied to the purchase, redemption, and payment of the underlying bonds, and for such purpose should pay to the trustee a certain sum annually, reserving "the right to deduct from any such annual payment to be made by it on account of the sinking fund herein provided all sums paid by it during the year next preceding the date when such sinking fund payment is payable on account of the sinking fund payment is payable on account of the sinking fund payment is payable on account of the sinking funder the respective mortgages securing the payment of the underlying bonds." One of the underlying mortgages required the mortgagor therein to call in each year or to provide the trustee with funds to purchase 20 of the bonds secured thereby, payment to be made either by calling the bonds wanted and paying for them a 3 per cent. premium plus accrued interest or by advertising for and buying the proper quota of bonds at a sum not to exceed 103 per cent. Held, that the amounts paid by the mortgagor for the purchase and cancellation of the bonds under the provisions of the underlying mortgage could not be applied in reduction of the sum to be paid into the sinking fund of the refunding mortgage, since the provisions therein referred to sinking funds so called, and in terms required to be maintained.

2. Corporations \$\sim 486\text{-Mortgage}\text{-Sink-ing Fund.}

Interest paid by the mortgagor under such refunding mortgage to the trustee pursuant to a provision in the underlying mortgages allowing him to apply money in the sinking fund thereunder to the redemption of bonds secured thereby, "but that bonds so acquired should be deemed to be outstanding and continue to bear interest," which interest was to become part of the sinking fund, could not be applied as credits on the payment into the sinking fund in the refunding mortgage; the obligation to pay interest on underlying bonds being specially provided for therein.

3. Corporations \$\infty 486-Mortgages-Sinking Fund.

Interest paid by the mortgagor on the bonds of corporations, the obligations of which it had assumed subsequent to the execution of such refunding mortgage, could not be credited in reduction of the payments on account of the sinking fund in the refunding mortgage, notwithstanding the trustee in the underlying mortgages had invested part of the sinking fund in such bonds; such payments being made in pursuance of the mortgagor's independent obligation.

4. Corposations \$\iff 486\text{-Mostgages}\text{-Sink-ing Fund.}

Profits realized by the trustee under such refunding mortgage arising from the redemption by the mortgagor at more than par and accrued interest of bonds held under the sinking funds of the underlying mortgages could not be credited as payments on account of the sinking fund under the refunding mortgage, such bonds not being underlying bonds, and the redemption thereof not being made under the provisions of the refunding mortgage.

In Bank. Appeal from Superior Court, City and County of San Francisco; James M. Seawell, Judge.

Suit by the California Gas & Electric Corporation and another against the Union Trust Company of San Francisco. From an adverse decree, plaintiffs appeal. Affirmed.

Wm. B. Bosley, of San Francisco, for appellants. Heller, Powers & Ehrman, of San Francisco (James L. Robison, of San Francisco. of counsel), for respondent.

MELVIN, J. Plaintiffs sued under the provisions of section 1050, Code of Civil Procedure, to obtain a decree determining certain adverse claims made by defendant as trustee so created by the provisions of a certain "unifying and refunding mortgage." Dissatisfied with the amount of the defendant's recovery under the terms of the judgment, plaintiffs appeal, asking for a modification of the said judgment. The appeal is upon the judgment roll alone, and all of the questions involved in the controversy pertain to and involve an interpretation of the "sinking fund" provisions of the "unifying and refunding mortgage."

In 1908 California Gas & Electric Corporation executed to defendant as trustee its "unifying and refunding mortgage" supporting a bond issue of \$45,000,000. This mortgage was subordinate to and subject to the lien of a prior mortgage executed by the California Gas & Electric Corporation and 17 other earlier mortgages given respectively by predecessors in estate of the California Gas & Electric Corporation to secure the payment of bonds, the face value of which outstanding and unmatured then amounted to more than \$30,000,000. In the briefs these prior mortgages and bonds are respectively designated by the adjective "underlying," and we shall employ that term in this opinion.

In section 1 of article 9 of the unifying and refunding mortgage the California Gas & Electric Corporation agrees, among other things:

That it "will create and maintain a sinking fund, to be specially applied to the purchase, redemption, and payment of the underlying bonds and of the bonds issued under this Indenture on or before their maturity, and for that purpose will pay to the trustee on the 1st day of November, 1912, and on the same day in each and every year thereafter to and in-cluding 1916, the sum of \$450,000."

There is, however, the following proviso in article 9, most important in view of the fact that all of the questions involved in this litigation arise from disagreements as to its proper interpretation:

"The California Corporation shall have the right to deduct from any such annual payment to be made by it on account of the sinking fund herein provided all sums paid by it during the year next preceding the date when such sink-ing fund payment is payable, on account of the sinking funds required to be created and maintained under the respective mortgages securing years the Pacific Company paid \$450,000 to

the payment of the underlying bonds, upon filing with the trustee satisfactory receipts or other evidence showing the making of such payments."

The unifylng and refunding mortgage also contained a separate and distinct covenant that the California Gas & Electric Corporation would pay all underlying bonds and the interest thereon.

At the time of the execution of the unifying and refunding mortgage there were eight of the underlying mortgages containing explicit and undoubted requirements for the creation and maintenance of sinking funds. Of these eight, two have been satisfied and released. Two of the remaining six mortgages containing unequivocal provisions for sinking funds were so treated with reference thereto that no controversy arises over them. In each of the four remaining underlying mortgages were provisions by which the mortgagor covenanted that it would make an annual payment of a specified amount into a sinking fund; that money in this fund might be applied by the trustee to the redemption of bonds secured by the mortgage; that bonds so acquired should be deemed to be outstanding and continue to bear interest; that such interest should become part of the sinking fund; that the trustee might, upon certain conditions, invest the sinking funds in securities other than those covered by the mortgage; and that the income derived from such investments in outside securities should become a part of the sinking fund.

The first mortgage of the Sacramento Electric Gas & Railway Company (one of the underlying mortgages) contained a provision that required the mortgagor during a period of years, including that covered by the controversy herein, to call in each year or to provide the trustee with funds to purchase 20 of the bonds of the par value of \$1,000 each. These were to be immediately canceled. One of the controversies here involved is the assertion of appellants and the denial of respondent that this provision really amounted to a requirement for the creation and maintenance of a sinking fund. None of the other underlying mortgages contains any provision for a sinking fund. The trustee named in all of the underlying mortgages with which we are concerned here was the Mercantile Trust Company of San Francisco.

On or about January 28, 1908, California Gas & Electric Corporation conveyed to its coplaintiff herein, Pacific Gas & Electric Company, all of its property, and the latter assumed all of the former's obligations. Hereafter in this opinion we shall refer to the latter corporation as "Pacific Company," and will omit the qualification, understood in each instance, that it was acting as successor of its grantor.

This litigation is confined to transactions during the two years from November 1, 1911, to October 31, 1913. During each of these defendant under the terms of its trust, and this action was for credits against said payments on account of alleged payments into sinking funds of trustees administering underlying mortgages. During the first of these years the Pacific Company paid large sums as interest on underlying bonds to the Mercantile Trust Company, including \$79,515 interest upon bonds held in the sinking funds created pursuant to four of the mortgages which we have described above. And in the following year the amount of interest paid by the Pacific Company on bonds held in these sinking funds was \$87.075. It is asserted by the Pacific Company and denied by respondent that these were payments "on account of sinking funds." Respondent insists that they were mere payments of interest under that part of the unifying and refunding mortgage requiring the Pacific Company's predecessor to pay interest on all bonds included within the purview of the underlying mortgages. During each of said years the Pacific Company paid \$20,000 to the trustee, Mercantile Trust Company, for the redemption and cancellation of bonds of the Sacramento Electric Gas & Railway Company. It is asserted by appellants and denied by respondent that these were likewise payments "on account of a sinking fund.'

Another point of dispute arose as follows: After the execution of the unifying and refunding mortgage the Pacific Company acquired and assumed all the obligations of four other companies-San Francisco Gas & Electric Company, Pacific Gas Improvement Company, Mutual Electric Company, and Suburban Light & Power Company. These four corporations had executed mortgages, and the trustee of some other underlying mortgages had invested part of their sinking funds in some of the bonds secured by the four mortgages. In paying the interest on the bonds of its acquired corporations the Pacific Company expended \$8,842.50 the first year and \$12,277,50 the second year in interest on bonds thus held in sinking funds provided for in underlying mortgages. These sums were claimed as a credit "on account of the sinking funds" required to be created and maintained in accordance with the underlying mortgages, but the respondent successfully maintained in the court below the proposition that the Pacific Company paid this interest solely in compliance with its later independent contract; that the transaction could have no possible connection with the unifying and refunding mortgage; and that no part was payment on account of the sinking funds of any of the underlying mortgages merely because some of the bonds of these newly acquired corporations had been taken into those sinking funds by way of investment.

During the year 1913 the Mercantile Trust

of the underlying mortgages certain bonds of the San Francisco Gas & Electric Company, one of the four newly acquired corporations, said bonds having been purchased at a price below par. The Pacific Company. which had become liable for the full amount of these bonds and interest, redeemed them at a premium, paying the accrued interest also. In this way the trustee made a profit of \$3,295.50 for the sinking funds, and appellants assert that they have a right to a credit of this sum "on account of" payments for the sinking funds of the underlying mortgages. In this contention they were also unsuccessful in the court below.

[1] Counsel for the Pacific Company, with admirable conciseness, has reduced the matters at issue to four questions or propositions. and we will follow his arrangement in discussing the law which we deem applicable to the problems involved in this appeal. The first of these questions is substantially as follows: Does article 11 of the first mortgage of the Sacramento Electric Gas & Railway Company, quoted in full in the findings, when given its true legal meaning, require the mortgagor to create and maintain a sinking fund? It is asserted that, if this question be answered in the affirmative, such reply will compel a deduction from the amount found due to the respondent of the \$40,000 paid during the two years for purchase and cancellation of bonds of the Sacramento Company.

Without quoting at length from said article 11, it is sufficient to say that under it the electric company was required under a schedule covering many years to cause certain varying numbers of bonds to be paid off and canceled yearly by one of two methodseither by calling the bonds wanted and paying for them 103 per cent. (that is to say, a 3 per cent. premium), plus accrued interest, or by advertising for and buying the proper quota of bonds at a sum not to exceed 103 per cent. This, says counsel for appellants, amounts to a requirement that the mortgagor create and maintain a sinking fund. It is contended that the term "sinking fund" applies to any fund "created for extinguishing or paying a funded debt," citing Chicago & Iowa Railroad Co. v. Pyne (C. C.) 30 Fed. 86; Ketchum v. City of Buffalo & Austin, 14 N. Y. 356; Bouvier's Law Dictionary. While this definition is rather more circumscribed than the ordinary conception of the scope of the expression "sinking fund," even if we adopt it, we cannot see how the provision for gradual retirement of fixed numbers of bonds paid for, not from a separate fund, but by stated yearly purchases made from the general assets of the corporation, amounts to the creation and maintenance of a sinking fund. The very idea of a "fund" involves a concept of a sum of money maintained in existence for some purpose—a supply hoarded Company held in the sinking funds of two and kept to be called on when needed. For example, we might cite the definition of a ment and discharge or acquisition and de"fund" contained in the Century Dictionary posit with the trustee. This covenant, which and quoted by respondent as follows:

| is now binding upon the other plaintiff, makes

"A stock or accumulation of money or other forms of wealth devoted to or available for some purpose, as for the carrying on of some business or enterprise, or for the support and maintenance of an institution, a family or a person, as a sinking fund, the funds of a bank or corporation, the widows' and orphans' fund," etc.

But we need not enter into a lengthy discussion of the shades of meaning attributed by various lexicographers to the words "sinking fund," because it is clear that the qualifying language of section 1 of article 9 of the unifying and refunding mortgage, describing the sinking funds "to be created and maintained under the respective mortgages securing the payment of the underlying bonds," had reference to sinking funds so called in the said mortgages and in terms required to be maintained. If the purchase of so many bonds a year during given years, required under the terms of the mortgage of the electric company, may be called a "sinking fund," it is not one required to be maintained, because as soon as money to buy the bonds is appropriated it may be spent at once. There is no provision for holding the bonds for the accumulation of interest nor for reselling and reinvesting the proceeds by the trustee. Cancellation is the one fate for the bonds acquired, and cancellation is not "maintaining" a fund. The learned judge of the superior court correctly decided that appellants were not entitled to credit against their trustee for the \$40,000 expended in the purchase of bonds of the Sacramento Electric Gas & Railway Company.

[2] The next point in controversy is in substantial effect as follows: Are appellants entitled, against their payments to defendant of \$450,000 annually, to credit for interest paid Mercantile Trust Company on underlying bonds held in sinking funds created and maintained in obedience to the provisions of underlying mortgages? It is undisputed that during the two years involved herein payments aggregating \$166,590 were thus made. It is the belief of plaintiffs that these payments should not be considered as interest at all, but by way of performance of the obligations created by the sinking funds required to be maintained.

In this connection it is to be remembered that the California Gas & Electric Corporation had covenanted to pay punctually "or cause to be paid the interest on all such underlying bonds not acquired and deposited hereunder as and when such interest shall become due and payable, until all underlying bonds shall have been fully paid and discharged or shall have been acquired and deposited hereunder." This language is as direct, emphatic and understandable as it could well be made. Under its terms, at least, the only excuses for omitting to pay interest on underlying bonds would be either full pay-

ment and discharge or acquisition and deposit with the trustee. This covenant, which is now binding upon the other plaintiff, makes no provision for escaping payments of interest upon bonds held in sinking funds created because of the terms of underlying mortgages, and it seems highly probable that, if the parties to this contract had intended other credits for interest payments, they would have expressed such intention in the unifying and refunding mortgage itself.

The immediate predecessor of the unifying and refunding mortgage was the California Gas & Electric Corporation's general and collateral trust mortgage. The Mercantile Trust Company was trustee under this mortgage, and occupied a similar function with reference to the mortgages underlying it. general and collateral trust mortgage contained a provision requiring the California Gas & Electric Corporation to pay annually into the sinking fund, during the years here involved, \$200,000. This fund was to be applied by the trustee (not by the mortgagor) to the redemption of the bonds of certain named corporations. The trustee was "authorized to apply said sinking fund to the redemption of said bonds and to make the necessary payments out of said sinking fund." There was the further provision in the general and collateral trust mortgage that:

"All moneys in said sinking fund not so used shall be invested by said Mercantile Trust Company in the purchase of bonds [of the specified companies] and the bonds of the party of the first part [California Gas & Electric Corporation] issued under this deed of trust."

Then followed the sentence:

"All interest or other income derived under this investment shall in like manner be invested as part of said sinking fund in accordance with the above conditions."

The provision regarding the status of the bonds, immediately following the last quotation, is as follows:

tion, is as follows:

"All bonds so purchased and acquired by said Mercantile Trust Company of San Francisco as provided in this article, together with the coupons thereto attached, shall continue to be negotiable, and said bonds shall be deemed outstanding hereunder, and shall not be canceled, and shall continue to bear interest, and the Mercantile Trust Company of San Francisco shall collect and receive the proceeds of the coupons paid thereon and add the same to the sinking fund, and said bonds shall be held as existing obligations for the security of the outstanding bonds thereby secured."

In accordance with the mandate of the above-quoted provisions the trustee, the Mercantile Trust Company, as the court duly found, had purchased and placed in its sinking fund a part of the bonds issued under the same mortgage and a part of the bond issues of some of the companies mentioned in the general and collateral trust mortgage.

The court found with reference to the year 1911-12 (and the same is true except as to amount for the following year) that the Pacific Company paid to the Mercantile Trust Company "all the interest coupons apper-

taining to said underlying bonds which became due during that year, including the coupons appertaining to all the underlying bonds held in said sinking funds as well as all the coupons appertaining to all others of said outstanding underlying bonds." As respondent's counsel in their brief emphasize the fact to be, the Pacific Company did not pay the trustee specifically the interest on the underlying bonds held in the sinking fund, but paid the said trustee all the coupon interest on the whole outstanding issue. That such payments were not, as to any part of them, "on account of sinking funds" required to be created under the general and collateral trust mortgage, is, we think, very clear. In virtually all of the mortgages herein involved in which trust funds were required to be kept up there were the two sources of income to the trustee, namely, direct payments of money into the trust funds and the interest on the purchased bonds. That these two sources were not to be mingled by any sort of bookkeeping which would credit the mortgagor as having paid for one purpose when in reality it had expended the money for the other is emphasized by the circumstance that the trustee was given great latitude not only in the investment, but in the sale of securities and reinvestment of the proceeds. It was expressly provided that the purchased bonds should "continue to be negotiable," should be "deemed outstanding," should "not be canceled," and that they should "continue to bear interest." The trustee was required to collect the proceeds "of the coupons paid thereon" and "add the same to the sinking fund." And such bonds were to be "held as existing obligations for the security of the outstanding bonds." The intent to require payment of interest on bonds held in the sinking fund, as interest, and not as part of the other money payments directly into the fund, seems to us very clear from the whole structure of the sinking fund requirement.

And, if that be true of the California corporation's own bonds, it is even more evident in the case of the bonds of the other corporations held in the sinking fund for the general and collateral trust mortgage. Take, for example, the bonds of the Valley Counties Power Company. The Mercantile Trust Company was the trustee under the mortgage of the said Valley Counties Power Company. It had been administrating the office of such trustee when the general and collateral trust mortgage was executed; therefore the California corporation could not, if it had wished to do so, confer upon the Mercantile Trust Company as trustee of the general and collateral trust mortgage power to cancel any of the bonds of the Valley Counties Power Company. As trustee of the California corporation, it was authorized to purchase, and it did acquire for the sinking fund, bonds of the Valley Counties Power Company, but

obligations bearing interest until redeemed or paid, without regard to any covenant in the unifying and refunding mortgage. If the Valley Counties Power Company itself had paid the interest on these, its own obligations, it could not have been said that the corporation was paying such interest on account of the sinking fund of the California corporation. We can see no escape from the proposition advanced by respondent that the payment of this interest by the Pacific Company bore no relation to and had no connection with the fact that the bonds on which the interest was paid were held in the sinking fund of the California corporation. The interest was paid under an obligation to pay interest on all the underlying bonds, no matter where they might be found.

It is contended that bonds held in the various sinking funds are "redeemed" in contemplation of law, and that therefore, when it is provided that they shall be deemed to be outstanding, and that the trustee shall collect the interest coupons for the sinking fund, the mortgagor's obligation to pay the sums specified in the interest coupons exists solely by reason of the maker's covenant contained in the sinking fund provisions of the mortgage, and not by reason of the mortgagor's covenant to pay interest on the debt evidenced by its bonds. But by the very terms of the mortgage the bonds are not to be regarded as redeemed. They are mere investment bonds, and bear, so far as the payment of interest is concerned, the same relation to the corporation for which the sinking fund is maintained as the bonds of an entirely alien corporation bought for the sinking fund would bear to the persons or corporations bound to pay interest on Bonds of any of those companies them. are no more redeemed, so far as the necessity for the payment of interest is concerned, by the fact that the trustee purchased them for the sinking fund than would United States government bonds be considered as redeemed when bought for like purpose.

In support of his contentions counsel for appellants cites Bank for Savings in the City of New York v. William R. Grace, Mayor, 102 N. Y. 313, 7 N. E. 162, Brooke v. City of Philadelphia, 162 Pa. 123, 29 Atl. 387, 24 L. R. A. 781, and Wilds v. St. Louis, Alton & Terre Haute R. R. Co., 102 N. Y. 410, 7 N. E. 290. In the first of these cases it was held that "city stock" of the city of New York held by the commissioners of the sinking fund is not an indebtedness of the city within the meaning of the Constitution, prohibiting such a city whose present indebtedness exceeds 10 per cent. of the assessed valuation of its real estate subject to taxation from becoming indebted to any further amount. It was decided, in short, that the city stock so held was not a debt which the municipality could be called upon to pay. But it was held that such stock was subject to payment of these remained in its custody as outstanding interest which the commissioners were to add

to the sinking fund. In the Brooke Case a question precisely similar was decided. In the other New York case the court was considering a sinking fund into which the railroad company was to pay \$12,500 twice a year out of its net earnings. With such money and the interest accumulations thereon the trustees were to buy first mortgage bonds so long as they could be purchased for not exceeding 10 per cent. beyond par, the bonds so purchased to remain in force and interest thereon to be paid by the company. In case of inability to buy bonds below the prescribed rate the money was to "remain at interest until bonds can be purchased at public or private sale, at such rate; and no further payments shall be payable to the said sinking fund till the money so remaining in the said fund can be used in purchasing said bonds at such rate or under, when such payments of \$12,500 semiannually shall be resumed." The bonds went above 110 per cent., and the semiannual payments were thereupon discontinued, but, the company intending to continue to pay interest upon bonds held by the trustees in the sinking fund, a holder of preferred stock objected to that course and brought the suit. The court held that the action might not be maintained, and that the duty of payment of interest on bonds in the sinking fund must continue until the maturity of the mortgage. We cannot see that the citations support the position of appellants.

[3] The next argument advanced by appellants is that sums aggregating \$8,842.50 in one year and \$12,277.50 in the other, which were paid by Pacific Gas & Electric Company to Mercantile Trust Company as interest on bonds of San Francisco Gas & Electric Company, Mutual Electric Light Company, Pacific Gas Improvement Company, and Suburban Light & Power Company held in the sinking funds provided for in certain underlying mortgages, were in fact and in legal effect made "on account of the sinking funds required to be created and maintained under the respective mortgages securing the payment of the underlying bonds."

It appears from the findings that Mercantile Trust Company, as trustee under the mortgages of the Valley Counties Power Company and California Central Gas & Electric Company, held in the sinking funds certain bonds of San Francisco Gas & Electric Company, Mutual Electric Light Company, Pacific Gas Improvement Company, and Suburban Light & Power Company which were not underlying bonds, but which Pacific Gas & Electric Company, as successor of the makers thereof, had assumed and agreed to pay. The last-named corporation did pay interest on such bonds which was added by the Mercantile Trust Company to the sinking funds provided for in the mortgages of the Valley Counties Power Company and the California Central Gas & Electric Company. It is contended that the payment of this inter-

Pacific Gas & Electric Company on account of the sinking funds maintained under the mortgages of Valley Counties Power Company and California Central Gas & Electric Company, which were included in the mortgages securing the payment of underlying With this contention we cannot bonds agree. It is to be remembered that the Pacific Company had covenanted directly with the makers of the four mortgages to assume the payment of the bonds and interest thereon. By the four mortgages we mean those of the San Francisco Gas & Electric Company, Mutual Electric Light Company, Pacific Gas Improvement Company, and Suburban Light & Power Company. The other plaintiff, California Gas & Electric Corporation, had not covenanted to pay the bonds of any of the four companies. If the several makers of these bonds had paid the interest, as it became due, to the Mercantile Trust Company, they would have paid it without any care whether or not the bonds were held in the sinking funds of the Valley Counties Power Company or the California Central Gas & Electric Company. Their payments would have been to the purchaser of the bonds. Therefore the payments made by the Pacific Company were made in the liquidation of obligations assumed on its own account, and not as a successor of its coplaintiff, the California corporation. These payments were made in pursuance of an obligation assumed long subsequent to the execution of the unifying and refunding mortgage. We can see nothing in the opinion in Union Pacific Railroad Co. v. United States. 99 U. S. 700, 25 L. Ed. 496, cited by appellants, which contradicts in any way our conclusion upon this branch of the case.

[4] By their final contention appellants insist that profits realized by Mercantile Trust Company from the redemption by Pacific Company, one of the plaintiffs herein, of certain bonds of San Francisco Gas & Electric Company then held under the sinking funds of the mortgages of Valley Counties Power Company and Central Gas & Electric Company, and which had been purchased for those sinking funds at less than par and accrued interest, were, in legal effect, payments "on account of sinking funds required to be created and maintained under the respective mortgages securing the payment of the underlying bonds."

The argument is that the legal effect of the transactions whereby these bonds were redeemed for more than par was as if the profits in the first instance had been made by the Pacific Company and paid to the Mercantile Trust Company on account of the sinking funds. But the bonds purchased at a premium were not underlying bonds. The obligation of plaintiff Pacific Company regarding their payment arose subsequently to the execution of the unifying and refunding mortgage and bore no relation thereto. In reest was, in legal effect, a payment made by deeming these bonds the Pacific Company did

not act as a successor of its coplaintiff. We can see no logical reason for deducting the amount of this profit from the payments required to be made to the defendant herein, as trustee, for the maintenance of the sinking fund which defendant was required to maintain by the unifying and refunding 9. CRIMINAL LAW \$=363 - EVIDENCE - RES mortgage.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; WIL-BUR, J.; VICTOR E. SHAW, Judge pro tem.; RICHARDS, Judge pro tem.

## PEOPLE v. BEGGS. (Cr. 2128.)

(Supreme Court of California. April 2, 1918. Rehearing Denied May 2, 1918.)

1. THREATS \$\infty\$=1(1)—Accusing Thief—Good Faith—"Extortion."

Threatening a thief with accusation, and prosecution based thereon, unless he pays the value of property stolen, and which he pays by reason of fear induced by the threats, is, without reference to good faith in exacting the amount justly due, "extortion," within Pen. Code, § 518, defining the offense as obtaining of property from another with his consent, induced by a wrongful use of force or fear, etc.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Extor-

tion.

2. Criminal Law €==507(1)—"Accomplice"— Victim of Extortion.

The victim of extortion is not an "accomplice.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Accom-

3. THREATS 🖘 7 TO PROVE FEAR. €==7-EVIDENCE-ADMISSIBILITY

In a prosecution of an attorney for extortion, by threatening to accuse and prosecute a thief, inducing fear, by reason of which he paid money, testimony as to the value of certain articles, theft of which he admitted, was material, as tending to prove fear, without which extortion would not be established.

4. CRIMINAL LAW \$\infty\$1170\foralle{1}\_2(5)\to Harmless Error-Exclusion of Evidence.

Defendant was not prejudiced by error in excluding a question, asked the prosecuting witness on cross-examination, as to whether, threatened or not, he would have been willing, to get out of trouble, to pay \$2,000, the amount claimed to have been extorted; it being substantially and fully covered by subsequent like questions negatively answered.

5. Criminal Law 6=696(1)-Striking Out

EVIDENCE.
Where evidence of conversations was admitted on the statement that a conspiracy would be shown, and no proof of a conspiracy was made, the court should have granted a motion to strike it out.

6. EXTORTION 5-7-FEAR AS OPERATING CAUSE.

To constitute extortion, the wrongful use

of fear must be the operating cause producing consent.

CONVERSATIONS.

In a prosecution of an attorney for extortion, conversations between the prosecuting witness and his father and between the latter and and Franklin A. Griffin, Acting Judge.

another, so far as they related to the propriety of the witness consulting an attorney, were in-competent, and should not have been admitted. B. CRIMINAL LAW \$==1169(1) -- APPEAL -- HARMLESS ERBOR-EVIDENCE.

The admission thereof, however, could not

have been prejudicial.

GESTÆ.

GESTÆ.

In a prosecution of an attorney for extortion, a conversation between the prosecuting witness and a police officer, in defendant's absence, and before paying money claimed to have been extorted through fear of a threatened prosecution for theft, was admitted, showing that the witness complained about taking his hardearned money that way, and inquired if he thought it was right, and the officer replied that it was all right, that they knew what they were doing, and that when the witness said he had no witnesses, and asked what they could do, and if they could send him to prison, the officer replied they would "fix everything over there," but without saying where. Held competent, as part of the res gestæ, to show fear.

10. CRIMINAL LAW \$==722(2)-TRIAL-ARGU-

10. CRIMINAL LAW \$\inspec\$ 722(2)—TRIAL—ABGUMENT OF COUNSEL.

In a prosecution for extortion by an attorney, to whom the prosecuting witness claimed he paid money through fear of threatened prosecution for theft, the district attorney, after discussing the comparative personalities of defendant and the witness, picturing the latter as a weak, crippled boy, frightened and crying after a night in jail, and defendant as an astute lawyer of experience, said defendant must be experienced in this class of shakedown, and knew to a nicety just how far he could go, and, on objection being interposed, remarked that there was a proper, sound, logical, inference from defendant's conduct to say that he was experiwas a proper, sound, logical, inference from defendant's conduct to say that he was experienced, as before stated. Held, that he did not assert as a fact that defendant had committed like offenses, but that it was a fair inference from his conduct that he was experienced in collecting money by similar methods, designated as a "shakedown," and the language used was legitimate argument. gitimate argument.

11. Criminal Law €==1144(16) — Appeal — Presumption on Review.

It must be presumed on appeal that the jury followed an instruction to disregard statements of counsel, not made as witnesses under oath.

12. Criminal Law €==713 - Trial - Abgu-

MENT OF COUNSEL.

Remarks of a district attorney as to how the law protected defendant, and how unprotected the district attorney was against improper instructions and unfair argument for accused, was improper, as calculated to induce the jury to place a light estimate on their duties, and as not a proper subject for consideration in reaching a verdict.

18. CRIMINAL LAW & 730(1)—APPEAL—AB-GUMENT OF COUNSEL—ACTION OF COURT.

It cannot be said that defendant was prejudiced by the improper remarks, in view of an instruction to disregard statements by counsel, not made as witnesses under oath, or not supported by evidence.

14. CRIMINAL LAW \$\infty\$=1037(2)—APPEAL—ABGUMENT OF COUNSEL—OBJECTIONS BELOW.

The possibility of injury from improper statement in argument, not properly assigned as misconduct, nor any request made for an instruction to disregard it, cannot be considered on appeal.

In Bank. Appeal from Superior Court, Santa Clara County; W. A. Beasly, Judge, tortion, and he appeals. Affirmed.

James P. Sex, of San Jose, R. P. Henshall, of San Francisco, R. C. McComish, of San Jose, and A. H. Jarman, of San Francisco, for appellant. U.S. Webb and John H. Riordan, both of San Francisco, and Arthur M. Free and Archer Bowden, both of San Jose, for the People.

VICTOR E. SHAW, Judge pro tem. Defendant, who is an attorney at law, appeals from the judgment pronounced upon the verdict of a jury finding him guilty of the crime of extortion, as defined in section 518 of the Penal Code. The verdict was based upon facts which the evidence tended to establish, as follows:

Joseph Steining was the proprietor of a store from which goods had from time to time been stolen. Acting upon information which pointed to Joseph N. Da Rosa, an employé of the store, as the one guilty of the thefts, Steining caused him to be arrested by a detective and taken to the police station, where, in the absence of a complaint filed, he was "booked" as charged with the crime of petit larceny. At the time of his arrest Da Rosa admitted that he was guilty of purloining certain articles, including two suits of clothes, the value of all of which did not exceed \$50, which sum he then offered to pay Steining. On the following morning Mr. and Mrs. Steining, accompanied by defendant, who meanwhile had been employed by them as an attorney in the matter, went to the police station, where, in response to a request made by defendant, he was permitted to see Da Rosa, who was brought into a private office, and, in the interview had, defendant learned that Da Rosa had about \$2,500 on deposit in two banks. Accompanied by a police officer, Da Rosa was taken by defendant to the house of his sister, where he said he kept the bank books, and after a prolonged search one of them was found, and either taken by or turned over to defendant, who, with the officer, accompanied by Da Rosa, went to the office of defendant, where, leaving the officer in an outer room, he took Da Rosa alone into his private office, where he impressed upon him the gravity of his offense, stating that he could be sent to San Quentin, and that unless he immediately paid defendant \$2,000, for the purpose of settling with Steining, he would be sent to prison for 7 or 10 years. As a result of what defendant said, and by reason of the fear induced by such threats, Da Rosa went with defendant to the banks where his money was deposited, and, as directed by Beggs, signed receipts upon which \$2,000 was drawn and delivered to defendant in payment of what he claimed to be due Steining on account of the thefts committed by Da Rosa, \$900 of which sum defendant paid to Steining. It is unnecessary for our purpose to quote further from the testimony. Suffice it to say that it ap- section 518, clearly show that the use of fear

William M. Beggs was convicted of ex- | pears therefrom that Da Rosa stole certain articles from Steining, who, after having him lodged in jail upon a charge of petit larceny, and without at any time filing a complaint against him, employed defendant as his attorney, who, by means of threats that he would send him to state prison for 7 to 10 years, induced him to pay \$2,000, the purpose of which payment, as claimed by defendant, was to compensate Steining for loss due to thefts committed by Da Rosa.

[1] Several alleged errors in the trial are asserted as grounds for reversal, chief of which in importance is the claim that the court erred in refusing, at defendant's request, to give certain instructions to the jury, among which were the following:

"The effort on the part of a creditor to collect a debt by threat to accuse the debtor of the crime out of which the debt arose does not constitute extortion, nor does it cover the case of an owner who demands from an employé compensation for property which he has stolen or embezzled. The threat of one to prosecute for the theft of his property unless settlement is made does not constitute extortion. In order to constitute extortion, there must exist in the person making the threats an intent to gain unlawfully.'

Other instructions of like import were requested and refused. While refusing the instruction so requested, the court instructed the jury that:

"The law does not permit the collection of money by the use of fear induced by means of threats to accuse the debtor of crime. no difference whether Da Rosa stole any goods from Steining, nor how much he stole

"It is your duty to convict the defendant, even though you should also find that he believed that Da Rosa was guilty of the theft of Steining's goods in an amount either less than, equal to, or greater than any sum of money obtained from Da Rosa."

Other like instructions were given, the effect of which was to withdraw from the consideration of the jury all questions as to the good faith with which defendant acted in thus enforcing payment of the money alleged to be due to Steining.

Section 518 of the Penal Code provides that:

"Extortion is the obtaining of property from another with his consent, induced by a wrong-ful use of force or fear, or under color of of-ficial right."

The consent of the injured party in surrendering his property must, in the language of the statute, be "induced by the wrongful use of fear." This implies there may be a rightful use of fear. What meaning is to be ascribed to the word "wrongful"? wrongful for A., from whom B. has stolen goods, to threaten the latter with prosecution unless he pay the value thereof, and thus, by means of the fear induced by such threat, obtain from B. that which is justly due to A.? In our opinion, the answer is found in provisions of the Code other than section 518, which, read in connection with

induced by such threats, as a means of collecting a debt, is wrongful. Thus section 519 of the Penal Code provides:

"Fear, such as will constitute extortion, may be induced by a threat either: 1. To do an unlawful injury to the person \* \* \* of the individual threatened. \* \* \* 2. To accuse him \* \* \* of any order. of any crime."

And section 523. Penal Code, provides that one who, with intent to extort money from another by means of a letter containing-"any threat such as is specified in section 519, is punishable in the same manner as if such money \* \* \* was actually obtained by means of such threat."

Section 650, Penal Code, makes it a misdemeanor for one by letter to threaten another with the accusation of a crime. These provisions, all adopted at the same time and relating to the same subject-matter, clearly indicate that the Legislature, in denouncing the wrongful use of fear as a means of obtaining property from another, had in mind threats to do the acts specified in section 519, the making of which for the purpose stated is declared to be a wrongful use of fear induced thereby. The first subdivision of section 519 provides that fear, such as will constitute extortion, may be induced by a threat to do an unlawful injury, thus excluding fear induced by threat to do a lawful injury. People v. Schmitz, 7 Cal. App. 330, 94 Pac. 407, 419, 15 L. R. A. (N. S.) 717. No such qualifying words are used in other subdivisions of the section. Subdivision 2 thereof, under which the prosecution in the instant case was had, in effect declares that fear as a means of extortion may be induced by a threat to accuse one of crime. The absence of any qualifying words, such as are found in subdivision 1 of the section, is significant. In reading section 518 with sections 519, 523, and 650, we cannot escape the conclusion that, assuming Da Rosa had in fact stolen goods of the value of \$2,000 from Steining, the threats made by defendant to prosecute Da Rosa therefor unless he paid the value of said goods, which sum of \$2,000 the latter, by reason of fear induced by such threat, paid, constitutes the crime of extortion. It is the means employed which the law denounces, and, though the purpose may be to collect a just indebtedness arising from and created by the criminal act for which the threat is to prosecute the wrongdoer, it is nevertheless within the statutory inhibition. The law does not contemplate the use of criminal process as a means of collecting a debt. To invoke such process for the purpose named is, as held by all authorities, contrary to public policy. Hence good faith, or the fact that the end accomplished by such means is rightful, cannot avail one as a defense in such prosecution. any more than such facts would constitute a defense where one compels payment of a just debt by the threat to do an unlawful injury to the person of his debtor.

the case of Morrill v. Nightingale, 93 Cal. 452, 28 Pac. 1068, 27 Am. St. Rep. 207. There the party, by reason of fear induced by a threat to prosecute him for embezzlement, gave a note secured by mortgage in settlement of the debt created by the embezzlement. In an action to foreclose the mortgage he pleaded as a defense the facts under which the execution of the mortgage was procured. The defense pleaded was sustained; the court in its discussion saying:

"It certainly would be no defense to the accusation of extortion that the charges or publications threatened to be made by the defendant and by which he obtained valuable property were true. The truth or falsity of these matters form no element in establishing the guilt or in-nocence of a defendant charged with extortion."

Conceding this language unnecessary to the decision in that case, it is deemed applicable to the facts involved in the case now under consideration. If, instead of paying the \$2,000, Da Rosa, under the circumstances shown to exist, had given his note and a mortgage securing the same, then, under the authority of the case cited, payment thereof could not have been enforced; the reason therefor being that execution of the security was procured by the wrongful use of fear induced by the threat to prosecute him for the crime out of which the indebtedness arose. If it be a wrongful use of fear in the one case, is it not likewise an equally wrongful use of fear in the instant case?

Our interpretation of the statute finds full support in an able and exhaustive opinion of the Supreme Court of South Dakota in a case entitled In re Sherin, 27 S. D. 232, 130 N. W. 761, 40 L. R. A. (N. S.) 801, Ann. Cas. 1913D, 446, where the court, having under consideration code provisions identical with sections 518, 519, and 523 of our Penal Code. : hies

"The word 'wrongful,' as' used in the statute, has no reference whatever to the question of the justness of the ultimate result sought, but re-lates solely to the methods used to obtain such results.'

In State v. Bruce, 24 Me. 71, it is said:

"A person whose property has been stolen cannot claim the right to punish the thief himself without process of law, and to make him com-pensate him for the loss of his property by ma-liciously threatening to accuse him of the offense.

In the case of People v. Eichler, 75 Hun, 26, 26 N. Y. Supp. 998, it is said:

"The moral turpitude of threatening, for the "The moral turpitude of threatening, for the purpose of obtaining money, to accuse a guilty person of the crime which he has committed, is as great as it is to threaten, for a like purpose, an innocent person of having committed a crime. The intent is the same in both cases—to acquire money without legal right by threatening a criminal prosecution.

Appellant's contention that an honest effort on the part of a creditor to collect a just debt, by accusing or threatening to accuse the debtor of the crime out of which the debt arose or with which it is connected, does not come within the purview of the In line with this view is the opinion in statute, finds apparent support in a number of cases. Such, indeed, is the conclusion of by such threat, did he pay \$2,000 in liquidathe court in the case of People v. Griffin, 2 Barb. (N. Y.) 427, followed by State v. Hammond, 80 Ind. 80, and Mann v. State, 47 Ohio St. 556, 26 N. E. 226, 11 L. R. A. 656. all of which cases, however, appear to have been based upon statutes materially different from the provisions under consideration.

The plain import of the language of our Code is that to threaten a thief with an accusation and prosecution based thereon, unless he pays the value of property stolen, and which by reason of fear induced by such threat he does pay, is extortion, within the meaning of section 518 of the Penal Code; and this without reference to the exercise of good faith in exacting the amount justly due. In effect, the jury were so instructed. There was no error in the rulings of the court as to instructions given and requested.

[2] There is no merit in the contention that Da Rosa was an accomplice of defendant. It is the act of defendant that constituted the crime, and in this act Da Rosa had no part other than as his will was coerced by the wrongful threats which induced the fear that in the absence of consent he would be sent to state prison. In People v. Coffey, 161 Cal. 432, 446, 119 Pac. 901, 906 (39 L. R. A. [N. S.] 704), in discussing the point, the court by way of illustration said:

"To the crime of seduction two parties are necessary, but the co-operation of the seduced is not criminal. She is a victim, and she is not therefore an accomplice of the seducer."

So here Da Rosa was a victim in the same sense as though Steining, to whom he was admittedly indebted, had at the point of a gun enforced collection by a threat to inflict bodily injury upon him. Cases of bribery and kindred crimes cited by appellant have no application, for they involve a willing cooperation in the commission of the offense. In reaching this conclusion reference is had to section 1111, Penal Code, as it stood prior to the amendment thereof in 1915, when the crime was committed. Assuming there was, as claimed, an implied agreement on the part of Steining not to prosecute if the money was paid, nevertheless, as we have seen, there was no voluntary assent by Da Rosa, without which it cannot be said that he was a party to an agreement for the compounding of a felony. Moreover, defendant is not being prosecuted for the compounding of a felony, but for extortion, wherein Da Rosa was the victim of his wrongful acts.

[3] Error is predicated upon the fact that the court, over defendant's objection, permitted the prosecuting witness to testify to the value of certain articles, the theft of which he admitted. A necessary element of the crime was fear induced by the threat. The making of the threat being established. did it incite fear which operated upon the mind of Da Rosa in parting with his money? If the value of the goods stolen did not exceed \$50, why, except for the fear induced be upheld upon the theory that there was

tion of a liability, recovery for which in a civil action could not exceed the former sum? . While, under our interpretation of the statute, defendant's guilt did not depend upon the value of the goods stolen, the testimony was nevertheless material as tending to prove the existence of fear, which he claimed was induced by the defendant, and without which the offense would not be established.

[4] Neither was defendant prejudiced by reason of the court sustaining an objection to a question asked the prosecuting witness on cross-examination, as follows:

"And you would have been willing to pay \$2,000 to get out of trouble, whether they threatened you or not?"

The question was proper, in that it was sought thereby to ascertain whether the fear induced by the threat was the cause which prompted him to pay the money. The statute can only mean that the wrongful use of force or fear must be the operating or controlling cause which produced the consent, and hence, if some other cause were the primary and controlling one in inducing the consent, there would be no extortion. People v. Williams, 127 Cal. 212, 59 Pac. 581. Conceding it to be error, it is nevertheless apparent that no prejudice resulted therefrom, for the reason that it was substantially and fully covered by subsequent like questions asked of the witness, to all of which he gave negative answers.

[5] The admission of evidence as to conversations had with other persons by Da Rosa at which defendant was not present is assigned as prejudicial error. When the evidence was offered, defendant objected to its introduction upon the ground that the conversations were hearsay and not had in the presence of the defendant. Thereupon the district attorney stated that he would show that a conspiracy existed between defendant. Tevis, and Police Officer Condron. Upon such representation the court, in the absence of any evidence tending to establish a conspiracy, admitted the evidence. No proof that a conspiracy existed was offered, and at the close of the people's case defendant moved the court to strike from the record all evidence touching the conversations so had without defendant's presence. In response to the motion, the court said:

"The thing is, the testimony is in now, and I don't see how you are going to strike it out of the minds of the jurors, even if the court would grant the motion to strike out the testimony from the record.

The record discloses no evidence tending even in a remote degree to establish that Condron, Tevis, and Da Rosa's father, or either of them, participated in the commission of the crime with which defendant was charged. Hence the admission of the testimony, and ruling of the court in denying defendant's motion to strike it out, cannot evidence of the existence of a conspiracy. We are of the opinion, however, that in so far as the evidence could have had any influence upon the minds of the jury in arriving at a conclusion it was admissible as part of the res gestæ.

[6-9] To constitute extortion, the wrongful use of fear must be the operating cause which produces the consent. As said in People v. Williams, supra:

"If some other cause were the primary and controlling one in inducing the consent, then there would be no extortion."

As shown by the record, the chief direct proof of the making of the alleged threats by defendant is the testimony of Da Rosa as to what defendant did and said when they were alone in the latter's private office. Da Rosa's testimony as to these occurrences is flatly contradicted by defendant, whose story of the transaction is, in effect, that no threats whatever were made, and that Da Rosa, when he met him at the jail the morning after his arrest, expressed a desire to make amends for his misdeeds, and, when told that Steining claimed to have lost by theft goods of the value of \$2,000 during the preceding nine months, voluntarily said he was willing to pay said sum; hence the existence or nonexistence of the chief element of the offense depended for its determination upon whether the jury believed the testimony of Da Rosa or that of defendant. The evidence complained of relates to three conversations, one of which was between Philip Da Rosa, father of the prosecuting witness, and Tevis, who, as a friend of the father, went with him to see his son the morning after the arrest. As to this conversation, Da Rosa's father testified that while at the city hall, in company with Tevis, waiting to see his son, and before defendant had seen him:

"I told Mr. Tevis better go and see Mr. John S. Williams, and Mr. Tevis told me he don't need it; anything you need, I am just as good." "He said you don't have to go to see Mr. Williams, because I understand the law myself. I am here. If you need anything, I am here to help you out. I know something about the law."

This conversation so had between the father and Tevis had reference solely and alone to the propriety of employing an attorney for his son. It had no bearing whatever upon the guilt or innocence of the defendant. While thus clearly immaterial, it is nevertheless impossible to conceive any theory upon which the substantial rights of the defendant could have been prejudiced by reason of the testimony.

As stated, defendant, in his interview with Da Rosa in the jail, learned that he had money on deposit in two banks. He was also told that the books evidencing such deposits were at the house of Da Rosa's sister, Mrs. Dutra. For the purpose of securing these bank books, the presentation of which was a necessary requirement in withdrawing the money, the defendant took Da Rosa

with Officer Condron, having custody of him, to Mrs. Dutra's house, from which place, having found one of the books only, they went to defendant's office. As they were leaving the office to make a search for the other bank book, after the making of the threats and before payment of the money, Da Rosa saw his father and Tevis on the sidewalk near defendant's automobile, which they were using, and, as he testified:

"I did rush up a little faster to speak to my father, and I told him to go to J. S. Williams, because they were taking my money away. Somebody robbed my money."

This statement to his father was in Portuguese, language with which defendant was unacquainted. In substance, the testimony as to what Da Rosa said to his father was corroborated by the evidence of the latter, who was permitted to testify that, owing to the fact that he did not fully understand his son, he asked Mr. Tevis:

"My son talk about Williams; maybe he wants to see Mr. Williams. Mr. Tevis reply: 'Oh, he don't need to go to see Williams at all. He don't have to go and see Mr. Williams, because the boy is going to pay a little bit, small amount, and don't have to see Mr. Williams then.' It will be all right."

The conversation had by Da Rosa with Condron, the officer in whose custody he had been placed while permitted to accompany defendant, occurred in the private office of defendant, while he was absent from the room, after the making of the threats, and before the money was paid. As stated by Da Rosa, he asked Condron who he was, when he—

"lifted his coat and show me a star and said: "I am sheriff, Police Detective Condron." And I complained to him about taking my money that way, if he thought it was right, and been working so hard for it in canneries, etc., and save every cent possible for my next operation, and he said: "Well, that is all right; they know what they are doing." I said: "But I haven't got no witnesses here. What can they do? Can they send me to San Quentin?" He said: "They fix everything over there." He didn't say where at all."

This, in substance, covers all the evidence of conversations had without the presence of defendant. Like the discussion first referred to, had between the father and Tevis as to the propriety of consulting an attorney, that part of the second conversation as to what Tevis said to the father is immaterial. and therefore should not have been admitted. Nevertheless, we are unable to perceive how it could have had any prejudicial effect upon the rights of the defendant in the deliberations of the jury. The declarations of Da Rosa to his father with reference to employing Mr. Williams, an attorney, assigning as a reason therefor that they were taking his money, and the statement to Officer Condron while in his custody in defendant's office, were spontaneous utterances, made during the transaction, under the immediate influence of the acts constituting the offense, and which as a natural result provoked

but competent evidence tending to establish the fact that the boy was then laboring under fear induced by the alleged threats. Moreover, what the prosecuting witness said to both his father and Condron was, in effect, nothing more than a repetition of his testimony, namely, that defendant threatened him with prosecution and imprisonment in the state prison unless he made the payment demanded. While, as hereinbefore stated, the record fails to disclose even prima facie evidence of the existence of a conspiracy, nevertheless, in so far as the evidence admitted was prejudicial to the substantial rights of the defendant, it was competent and proper as part of the res gestæ in establishing that at the time and immediately following the making of the threats he was laboring under fear induced by such threats.

[10.11] Appellant insists that his substantial Tights were prejudiced by gross misconduct of the district attorney in his argument of the case to the jury. The contention is based upon the fact that in discussing the comparative personalities of defendant and Da Rosa the district attorney, after picturing the latter as a weak crippled boy, frightened and crying after a night spent in jail, and the defendant as an astute lawyer of experience, said:

"Now, the defendant certainly must be experienced in this class of shakedown, as the phrase goes. He knows to a nicety just how far he can go."

And after an objection interposed by defendant he continued:

"I tell you, gentlemen, there is a proper, sound, logical, inference from Beggs' conduct to say he must be experienced in this class of shakedown."

In his statements the district attorney did not assert as a fact that defendant had committed like offenses with that for which he was being tried, but did claim that from the manner in which he dealt with Da Rosa it was a fair inference deducible from his conduct that he was experienced in collecting money by similar methods designated as a "shakedown." The manner in which a crime is committed, such as the opening of a safe or forgery of another's signature, may indicate a degree of skill from which experience in such line of work may be fairly inferred. In our opinion, the circumstances were such that it cannot be said the language used transgressed the rules of legitimate argument which the district attorney had the right to make. However this may be, we must assume that the jury recognized its oath-bound duty and followed the instruction of the court wherein it was said:

"The court has had occasion several times during this trial to instruct you as to what is to be taken into consideration by you in determining this case. \* \* In order that there may be no misunderstanding upon this point, the court again instructs you that statements and declarations made either on behalf of the prosecution \* \* or counsel for the defendant, and not

made as witnesses under oath, are not evidence, and are not to be taken or considered as evidence, either for or against the defendant.

\* \* Statements in argument, not supported by the evidence, \* \* are not evidence, and should be disregarded by you."

[12-14] Further misconduct is predicated upon the fact that in the course of his argument the district attorney, in referring to restrictions imposed by law upon the people's right to have alleged errors, as compared with that of defendant, reviewed on appeal,

"The law is such that if the defendant proposes an instruction that is the law, and that the judge does not give, it is reversible error, and the case comes back for retrial; on the other hand, the district attorney has no appeal. The defense can do anything in this courtroom, and I cannot object beyond what I say in the courtroom here. I cannot so to another court, and in exchanges between Mr. Sex and myself he can say anything here, and I have no protection other than what I get at the hands of Judge Griffin on the bench."

The statement was highly improper. In effect, it was calculated to induce the jury to place a lighter estimate on their duties than they would otherwise have done. The right, or want thereof, in either party to appeal, or extent of review granted by law to either party on appeal, is not a subject for consideration by a jury in reaching its verdict. McDonald v. People, 126 Ill. 150, 18 N. E. 817, 9 Am. St. Rep. 547; Brazell v. State, 33 Tex. Cr. R. 333, 26 S. W. 723. Nevertheless, in view of the instruction given, it cannot be said that defendant was prejudiced by reason thereof. Moreover, the statement so made was not properly assigned as misconduct, nor any request made that the court instruct the jury to disregard it, without which the possibility of injury resulting to defendant cannot be considered on appeal. People v. Walker, 15 Cal. App. 400, 114 Pac. 1009; People v. Mancuso, 23 Cal. App. 146, 137 Pac. 278; State v. Biggerstaff, 17 Mont. 510, 43 Pac. 709.

There is no merit in appellant's contention that the court erred in denying his peremptory challenges to prospective jurors. People v. Schafer, 161 Cal. 573, 119 Pac. 920; People v. Ochoa, 142 Cal. 268, 75 Pac. 847; People v. Martinez, 31 Cal. App. 413, 160 Pac. 868

The ruling of the court in denying defendant's motion for a change of venue upon the ground that a fair and impartial trial could not be had in the county is fully supported by what is said in People v. Kromphold, 172 Cal. 512, 157 Pac. 599, where the discussion was addressed to a like motion made upon similar grounds, in support of which, however, there was an absence of the sharp conflict in evidence disclosed by the record in the instant case.

In the light of defendant's lengthy briefs and oral argument, we have examined the voluminous record with care. We find no error therein which, in our opinion, can be said to have been prejudicial to the substantial

was deprived of a fair and impartial trial by a jury, whose reluctance in finding him guilty is shown by the fact that they incorporated in their verdict a recommendation to the mercy of the court.

The judgment and order are affirmed.

We concur: ANGELLOTTI, C. J.: WIL-BUR, J.; SLOSS, J.; MELVIN, J.

## PEOPLE v. LEE. (Cr. 424.)

(District Court of Appeal, Third District, California. Feb. 20, 1918.)

1. CRIMINAL LAW 433-EVIDENCE-LETTER WRITTEN TO DEFENDANT IN NAME OF AN-OTHER.

In a prosecution for murder, a letter headed "Dear Charley" and signed "Billy," addressed "Dear Charley" and signed "Billy," addressed to defendant's brother-in-law, whose name was not Charley, and opened by defendant's mother-in-law, was improperly admitted in evidence as a letter meant for defendant where, though defendant's name was Charles, the evidence did not connect letter with defendant, and did not show identity of sender or that defendant knew of the existence of the letter before the trial.

2. Criminal Law \$\infty 719(1) - Conduct of Counsel.

Where a love letter was not addressed to defendant and there was no evidence that it was meant for defendant, statements, by prosecuting attorney in a prosecution for murder, during his opening statement and closing address to the jury, that the letter was from a woman and intended for defendant, and his conduct in reading and repeatedly commenting on letter and his interpretation of mysterious phrases thereof as intended for a married man with domestic trouble, held improper.

3. Criminal Law \$\infty\$1186(4)\topPrejudicial

In prosecution for murder of a married man with children, improper admission of a love letter not written by defendant's wife and containing mysterious phrases interpreted by prosecutor as intended for a married man with domestic trouble held prejudicial error not avoided by Const., art. 6, § 4½.

4. CRIMINAL LAW \$== 991(3)—SENTENCE.

4. CRIMINAL LAW \$\ightharpoonup \text{991}(3)\$—SENTENCE.

Under Pen. Code, \$ 1168, added by St. 1917, p. 665, providing for indeterminate sentence, not greater than maximum nor less than minimum of the term fixed for the particular offense, a sentence of one convicted of manslaughter to from one to ten years' imprisonment is erroneous in view of section 193, fixing a maximum imprisonment for manslaughter of ten years, but fiving no minimum term but fixing no minimum term.

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Charles Lee was convicted of manslaughter, and from judgment and from order denying new trial he appeals. Reversed and remanded.

See, also, 171 Pac. 958.

W. D. L. Held, of Ukiah, for appellant. U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

HART, J. By an information filed by the

rights of defendant, or by reason whereof he | fendant was charged with the crime of murder, committed on the 16th day of May, 1917; the deceased being his sister, Mary Long. The jury returned a verdict of manslaughter, and the judgment of the court was that the defendant "be punished by imprisonment in the state prison of the state of California for the term of from one to ten years." The defendant appeals from an order denying his motion for a new trial and from the judgment.

Briefly but generally stated, the facts leading up to the commission of the homicide are as follows: Defendant and his wife were living in the town of Willits in Mendocino county. On May 14, 1917, Mrs. Ed. Gravier, who lived in Round Valley, accompaned by her daughter, Hazel, went to Willits for the purpose of visiting Mrs. Lee, the wife of defendant, who was also a daughter of Mrs. Gravier. The visitors were met at the train by Mrs. Lee, and the three parties started for the defendant's house. On the way they stopped at the post office and Mrs. Lee went in to inquire for mail. When she came out she handed to Mrs. Gravier a letter addressed to Arlow Gravier, a son of Mrs. Gravier, who at the time was of the age of about 19 years. The envelope, by the dating stamp, showed that it had been mailed at "Dos R." (an abbreviation for Dos Rios) on May 12, 1917. Mrs. Gravier opened and read the letter. It commenced with the words "Dear Charley," showed a considerable degree of friendship existing between the writer and the one for whom it was intended, and was signed "Sincerely yours, Billy."

On the next morning, May 15th, there was some conversation between Mrs. Gravier and defendant about the receipt by the latter of "love letters"; defendant stating that he never received any, and Mrs. Gravier replying, "Don't be too sure." She stated that the conversation was "just in a joking way" and that she did not show defendant the letter above referred to, which was in her possession at the time, nor did she tell him that she had such a letter.

During the night of May 15th defendant was with several men in a saloon at Willits. Frank Hall, one of these men, testified that defendant told him that his wife "had got a letter that some person had wrote to him and he never got," that his mother-in-law was making trouble between him and his wife, and "he would make trouble if they didn't leave him alone." Defendant started for his home between 2 and 3 o'clock in the morning. He stopped at the home of Mr. and Mrs. Long, who were in bed, and, according to the testimony of Mr. Long, said:

"That he would go home and show that damned old mother-in-law of his how to interfere with his business."

Defendant went out, and, shortly afterdistrict attorney of Mendocino county, de wards, Mrs. Gravier and her daughter, Hazel, went to the Long house. Mrs. Gravier there said that:

"Charlie had the gun and was going to do ome killing over there, going to kill the 80me family."

Mrs. Long partially dressed herself and went to the defendant's house. Ten or fifteen minutes later, somewhere between 4 and 5 o'clock in the morning. Mr. Long heard shots at the Lee residence.

Mrs. Daisy Moore, who was in a house across the street from the Lee residence, heard screaming and saw two women and two children running from the house. She said that Mrs. Long came out of her house and said, "I am going over there and put a stop to that right now," and went to Mr. Lee's. Mrs. Moore testified:

"Before ever I heard the shooting, I heard "Before ever I heard the shooting, I heard a man's voice say, 'You will open my letters, will you?' Q. And could you recognize the voice? A. Well, it sounded very much like Mr. Lee's voice. I had heard his voice before, and it sounded very much like Mr. Lee's voice. I am quite sure it was his."

Other witnesses, neighbors of the Lees, testified that they heard some one of the children cry out several times, "Don't shoot, Papa."

1. The point mainly relied upon by the defendant is that the letter referred to was erroneously admitted in evidence; that, while the district attorney, in his opening statement to the jury, stated that the letter came to defendant from a Mrs. Spencil, there is no evidence in the record as to who wrote it or that it was intended for the defendant; that, if the jury believed the letter to have been intended for defendant, and sent by a woman not his wife, its contents were highly prejudicial to defendant's case; and that the district attorney read and re-read to the jury the contents of the letter and drew "every sinister conclusion from its contents that might work to the detriment of defendant."

In view of section 41/2 of article 6 of the Constitution, which authorizes the excuse of errors in the trial of cases where, after a review and consideration of the entire record of the case in hand, it cannot be said that a miscarriage of justice has resulted from any error so committed, it is requisite that the testimony should be examined and considered to determine whether the letter referred to was prejudicial, assuming for the present that it was inadmissible.

As to what occurred in the house immediately after the defendant entered it on the morning of the shooting, the testimony of Mrs. Gravier, Mrs. Lee, and Miss Hazel Gravier. who afterwards became and was at the time of the trial the wife of one Hart, shows these facts: That the defendant, upon entering the house, first went into the room occupied by Mrs. Gravier and her daughter, Hazel, and, lighting a lamp, remarked to them that he thought it was time for them to arise. He then went into the room occupied by his wife suggestion to them. He then took down a revolver which was hanging from the wall in the room. Mrs. Lee, addressing him, asked him in rather a loud tone of voice to give the weapon to her. Whether he voluntarily delivered the weapon to her, or she by force got it from his possession, does not clearly appear from the evidence; but at all events she obtained possession of the weapon. Lee then left the room and went to the home of his sister, Mrs. Long, the deceased. In the meantime, one Packard, who had been out all the night before with Lee, and on the morning of the shooting accompanied the latter to his home, entered the room of Mrs. Upon observing Packard in the room, Mrs. Lee screamed and ordered Packard to leave the room. The defendant shortly thereafter returned, entered the house, and in the kitchen procured a rifle which was kept there and with it went into his wife's room. Mrs. Lee then hastily left the house. Mrs. Gravier stepped from her room into the sitting room and saw the barrel of the rifle pointing towards her through the curtains from Mrs. Lee's room. She could not then see the defendant. She and her daughter, Hazel, thereupon left the house, went to Mrs. Long's residence, and Mr. Long testified, as we have seen, she told the Longs that Lee "was going to kill the whole family." Mrs. Gravier, however, testified that what she said to the Longs was that Lee had taken the gun from the wall and that she (Mrs. Gravier) was afraid that he was going to commit

We have already shown that Mrs. Long, immediately upon being told by Mrs. Gravier of the trouble at the Lee home, went to the latter place. The defendant, his daughters, Annie and Frances, the former 13 and the latter about 5 years of age, one Louis Muir, and Mrs. Long were then the only persons in the house. Annie did not appear to know how the shooting occurred, and her testimony as to that circumstance seems to have been of an evasive character, due, probably, to a desire to shield her father as much as possible at the trial, or pernaps it may have been the result of poor memory, as she intimated was the fact. At any rate, she said she saw no scuffling between her father and Mrs. Long prior to the discharge of the rifle. She said that her aunt and baby sister were standing near the door leading into the room, and her father held the rifle so that the muzzle pointed towards the floor, and that while so holding the weapon it was discharged.

Muir testified that he had, before the defendant entered the house, asked the latter for the loan of a pistol. He was waiting on the outside for the return of Lee when he heard some noise in the house and met Mrs. Lee as she was leaving the house. The latter said to him: "Look out! Charlie (referring to the defendant) has gone crazyand one of the children and made a similar going to shoot somebody." Thereupon Muir entered the house and went into the room where Lee and Mrs. Long were, he said, wrestling with a rifle; each apparently endeavoring to take the weapon from the other. During the scuffle the rifle was discharged, he said, and Mrs. Long fell to the floor. Lee, addressing Mrs. Long, asked: "My God! Have I shot you?" And she replied that he had, whereupon, addressing Mur, Lee said: "My God, Louie! I have shot my sister. Go and get a doctor." Muir immediately started out to find a physician.

Lee testified that his purpose in getting the pistol was to loan it to Muir; that, when he took it from the wall, his wife requested him to give it to her and that he did so; that thereafter he told Muir that his wife refused to let him have the pistol and that Muir said that he desired the weapon for the purpose of shooting some wild animals infesting that section and insisted upon Lee loaning him a weapon; that he (Lee) then returned to the house and procured the rifle, which was then unloaded. and went into his wife's room to procure some cartridges which he kept in a bureau drawer in that room; that his sister, Mrs. Long, then came in the house and into the room where he was and, taking hold of the gun and addressing Lee, said: "Oh, Charlie! Don't do that."

"And," continued Lee, "I did not know what she meant by the remark she made, and I says, 'Do what, Mary?' I says, 'I ain't going to hurt nobody,' and she let loose of the gun; these cartridges—then I had took out ten cartridges out of the box and put the rest back in the bureau drawer, and so when she came in and grabbed hold of me with the gun my baby then grabbed me by the leg and she hollered, or something; I don't know what she did say. So I seen she was excited, and I picked her up and walked over and put her down on the bed; and my sister let loose of the gun. She was as calm as any one was then. She cooled off right away, and we set there and talked a few minutes—I guess three or four minutes. I was playing with the baby, and I got up and went back over, and Louie Muir was standing in the door, and I picked up these cartridges, and I pulled back the breech block to that gun and put in five cartridges. My sister was over at the bed and the baby when I left there. When I put those cartridges in, I just turned around and let this breech block down, and when I did it went off. My sister and baby must have moved over next to the door during the time my back was turned, because I never did see them until that shot was fired. When the shot went off, my sister says, 'Oh, Charlie,' and she kind of slid down the wall, and my baby run out to one side and exclaimed, 'Oh, papa.' \* \* I dropped this gun against the wall and went over and grabbed my sister before she fell to the floor. She was kind of sliding down the wall, and so Louie Muir was there, and I says: 'My God! I have shot my sister. Run for a doctor.' And so he left. \* \* After Muir left, my sister asked for water, said she felt sick, and I ran out to the kitchen and procured and brought to her some water."

With the assistance of Packard, above spoken of, who was in an outhouse on the Lee premises when the shot was fired, the defendant placed Mrs. Long on a bed.

As to the conversation with his companions with whom he was drinking and carousing before going to his home, the defendant denied that therein he made any threat against either his mother-in-law or his wife, or that he referred to any particular letter. One of his companions testified that, while he inferred from his conversation that the defendant was referring to his mother-in-law when speaking of his letters being tampered with, he did not mention that lady's name. The same witness testified that, in said conversation, the defendant referred only to a letter which he claimed his wife had surreptitiously "taken from his clothes."

With respect to the letter admitted in evidence, the defendant testified that he had never heard of or seen it until it was produced at the trial. Mrs. Gravier testified that she had never shown him the letter or referred to it in his presence except in the general and jocular way above referred to.

There was no testimony presented showing, or tending to show, that the defendant and Mrs. Long had ever had any differences, or that the defendant had ever threatened to inflict injury upon her. To the contrary, the defendant testified that there had always been the best of feeling existing between them.

It should be stated that two flesh wounds were produced by the cartridge from the rifle upon the left lower limb of Mrs. Long, one in the thigh and the other in the calf of the leg; that the wounds were temporarily treated by a local physician, after which she was removed to the county hospital, at Ukiah, where she received treatment by the county physician; that her death was due to an infection which developed in the wounds and caused decomposition to set in.

Mrs. Long, shortly after being shot, stated to several persons that she believed she would not recover, and on the day she was removed to Uklah declared that she never would return alive. On all these occasions she declared that the shooting was purely accidental, and a few days before her death, after stating that she knew she was going to die, she signed the following paper, which was read to her, one of the witnesses testified, and which she herself read, so another witness declared:

"Mrs. Mary Long, being first duly sworn, deposes and says that she resides at Willits in the county of Mendocino, Cal.; that she knows Charles Lee and has known him at all the times herein mentioned; that on Wednesday morning, May 16 1917, at about the hour of about 15 to 5 o'clock she was present at the home of said Charles Lee in said Willits and said Lee at said time had in his hand a gun and threatened to commit suicide; that affiant endeavored to 'dissuade him from his express purpose, and she grabbed said weapon and a struggle ensued between herself and said Lee; that in said struggle said gun was discharged twice striking affiant in the leg above the knee: that at said time Frankie Lee the daughter of said Charles Lee was hanging about the knee

of affiant and said weapon discharged one or more bullets in the body of said child and of affiant. That the discharge of said weapon was wholly and entirely accidental and without any intention so far as was apparent to affiant on the part of said Lee to discharge the same.

[Signed] Mrs. Mary E. Long, Affiant."

We have thus reproduced herein a brief synoptical statement of the testimony given both for and against the defendant, and it will not be denied that, upon the facts, the case is a very close one. In fact, so far as may be judged from the face value of the testimony, a verdict of acquittal would have been equally with the verdict returned consistent and reasonable. The testimony tending to show the ugly state of mind in which the defendant was prior to returning home, and that tending to establish that he had threatened to do physical violence to his mother-in-law, together with the testimony of the neighbors that they heard loud noises and other disturbances at the home of the defendant after he had returned thereto in the early morning, and the testimony that upon entering the house he procured a weapon, which was taken from him, and then procured the weapon with which the shooting was done and loaded it with cartridges, and other circumstances of a more or less incriminating character, might justly be held to be sufficient to sustain the verdict.

On the other hand, it is very plain from the testimony that, had he desired to inflict any injury upon his wife or his mother-inlaw, he could have done so, for the opportunity for such violence was present. His wife appeared to have little difficulty in getting the pistol from his possession, and his mother-in-law was still in the house when he had possession of the rifle. There is absolutely no testimony in the record, except the mere fact of the discharge of the rifle, from which it can be inferred that he intended to shoot or injure Mrs. Long. There is, indeed, no testimony except his explanatory of how the rifle came to be discharged, and he did not seem to know precisely how it occurred. It is therefore impossible to say from the record that the shooting was the result of criminal negligence, which would constitute the offense that of manslaughter, and there is no evidence to support the theory, which was advanced by the district attorney in his opening statement to the jury, that the shooting of Mrs. Long, while not intended as to her, was the result of an attempt and an intent deliberately to shoot some other person.

Of course, the object of the foregoing discussion of the testimony is not to show that the verdict, so far as the evidence is concerned, could not be upheld. Thus we have considered and briefly analyzed the proofs only to show that, as before stated, the verdict has exceedingly frail support, and that the ruling admitting the letter above referred to in evidence must be considered in

To the consideration of said ruling we are now brought.

[1] The letter in question is here given in

"May 11th 17

"Dear Charley"
"Just a few lines to let you know I haven't forgotten My Little Papa. I am just able to be up today & feel very weak. So please excuse this scrawl. How is every little thing & what is the latest news. How is Son? Remember me is the latest news. How is Hydrant. they Kindly Your Rival is here with Hydrant. they Kindly Your Rival is here with Hydrant. they are getting Hogs so you know I am in no condition for Company & do not Care to be bothered. But I had to get up just the same. They had to sleep out in the Tent & thought it a crime. Well I can not help it. I have only a small Cabin built for 2; Certain ones only are welcome. Well I hope this finds you O. K. & take good of yourself & don't hit the jug too much & you will feel better. Hope you answer much & you will feel better. Hope you answer this so I will know if it reached you without trouble. As you have had enough. And I don't want to cause you any more. Can't write you much as I am too weak Must go back to much as I am too wenn much So I must close with lots of love 'Billy.'

bed. So I must close with lots of love
"Sincerely Yours "Billy."
"Address % 'Idlewylde Ranch'
"Haven't seen Road house since Tuesday.
Have a lot to tell U. Write soon.
"Do you know of any one has a good collie Puppy to give away. Just heard you had split the blankets. Is that true?"

We think that there was absolutely no legal foundation whatever laid for the admission of that letter in evidence. We search the record in vain to find that it was in any measure or degree connected with the defendant, or that the defendant was connected with it. There is no evidence showing who wrote the letter, or whether the writer of it was a male or female, and, if the latter, whether it was written by the party named by the district attorney as its author in his opening statement. It is true that, whereas the envelope containing the letter was addressed to "Arlow Gravier," the writer in the letter itself addressed the party for whom it was intended as "Charley." the first name of the defendant, and that Mrs. Gravier testified that her son, Arlow, was not known, or, so far as she knew, ever addressed as "Charley." It is also true that the defendant stated, on cross-examination, that he thought he recognized the handwriting of the letter, although declaring in the same connection that he knew no person known as or calling him or herself "Billy." But these circumstances fall far short of showing that the letter was intended for the defendant. It is not at all improbable, so far as the record goes, that the author of the letter and Arlow Gravier might have had an understanding between themselves that thus he or she, as the case is, should address his or her letters to him, or, so far as the record throws light upon the matter, it would not be an improbable theory that the writer of the letter was accustomed to addressing him as "Charley." In any event, there is not, as stated, any testimony of any character in the record showing that the letter view of that situation as to the testimony. I was intended for the defendant. There might

have been a suspicion in the minds of Mrs. not have been intended for Arlow Gravier. Gravier and Mrs. Lee that the letter was intended for the defendant. There probably was, as we infer from what Mrs. Gravier said to the defendant after receiving the letter when jokingly speaking of whether he (defendant) had ever received love letters, she having testified that, while she had the letter in her pocket, he said he had never received love letters, and she replied, jokingly, "not to be too sure about that." even this does not connect the defendant with this particular letter. Furthermore, as has been shown, there is no testimony tending to show that the defendant had any knowledge of the existence of the letter in question until it was produced at the trial. On the contrary, the testimony of both Mrs. Gravier and himself shows that he had no such knowledge until the trial, and theirs is the only testimony in the record upon that proposition.

[2] It follows that the letter was clearly inadmissible, and that it was highly prejudicial there can be little, if any, doubt.

Readily can it be understood how a jury of laymen-generally made up of the most intelligent and respectable citizens of a county-would bitterly resent the conduct of a man of family in maintaining such relations with a female not his wife, as the language of the letter in question as interpreted in his argument by the district attorney very clearly indicates existed between the writer of said letter and the person for whom it was intended. We think that it can be laid down as a proposition hardly admitting of dispute that, in a close case upon the facts, such a letter, where, as here, the defendant was a married man and has a family of young children, would move the scales against him. And that the jury in this case regarded the letter as having been written by a female and intended for the defendant is undoubtedly true, since it was admitted in evidence avowedly upon that theory, and since, furthermore, the district attorney, both in his opening statement and closing argument, declared that the letter was written by some woman and intended for the defendant; and that the district attorney regarded the letter as a singularly important circumstance strongly supporting the theory of guilt is also an unquestionable proposition, for he not only repeatedly referred to and laid emphasis upon the fact in his closing argument. but read and analyzed the language of the letter before the jury and so interpreted certain rather mysterious or ambiguous phrases thereof as to show that the letter was intended not for an unmarried but for a married man having domestic trouble, and drew the inference from the language as he interpreted it and declared that the letter could NETT, J.

an unmarried youth, but for the defendant,

[3] The argument and the inferences referred to were, in our opinion, wholly unwarranted, and were so because, as before stated, there was no testimony, except such as might only have generated a mere suspicion, showing that the defendant was the party for whom the letter was intended.

Moreover, as the purpose of the introduction in evidence of any such letter was to show motive for the alleged crime of the accused, the letter in question was wholly out of place in this record, inasmuch as it was not shown that the defendant knew of its existence until the trial.

[4] Our conclusion is that the error considered is beyond the saving grace of section 41/2 of article 6 of the Constitution, and that for said error the cause must be reversed. But, in view of a probable retrial of the case, the following suggestions should be made: The judgment pronounced in this case is imprisonment in the state prison for from one to ten years. This judgment was undoubtedly pronounced in purported obedience to section 1168 of the Penal Code, added to said Code by the Legislature of 1917 (Stats. 1917, p. 665). Said section expressly provides that the court, in imposing sentence, where the imprisonment is to be in any reformatory or state prison of the state, shall not fix the term or duration of the period of imprisonment, "provided, that the period of such confinement shall not exceed the maximum or be less than the minimum term of imprisonment provided by law for the public offense of which such person was convicted."

The penalty for manslaughter, of which the defendant was convicted, is "imprisonment in the state prison not exceeding ten years." Pen. Code, § 193. It will be observed that the punishment may be for any term less than ten years; it may be for a month or even one day. The judgment in this case, therefore, although in our opinion not void, is nevertheless erroneous, inasmuch as it fixes a minimum penalty. Although not necessary to be decided here, it would seem from the language of the section that it was contemplated that a judgment of sentence should merely be that the defendant be confined in one of the state prisons, without fixing or naming either the minimum or maximum penalty for the offense of which he was con-Of course, these observations are victed. ventured upon the assumption that the new section in question is consistent in all respects with the provisions of the Constitution having a bearing upon the matter of penal punishment.

Judgment and order reversed and cause remanded.

We concur: CHIPMAN, P. J.; BUR- DUNCAN v. TOM POSTE, Inc., et al. (Civ. 2126.)

(District Court of Appeal, Second District, California. Feb. 23, 1918.)

1. LANDLORD AND TENANT \$==231(6)-RENT-ASSIGNMENT SUFFICIENCY OF EVIDENCE.

In an assignee's action for delinquent rent due on a lease of realty, evidence held sufficient to support a finding that the assignment of the rent had been made to plaintiff.

2. Costs == 260(1) - Frivolous Appeal DAMAGES.

It appearing that the appeal is without merit, and was made for delay, judgment will be affirmed, and a sum as damages will be assessed.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by Boaz Duncan against Tom Poste, Incorporated, a corporation, and Tom Poste, John Poste, and M. Carrie Hieronymus, as trustees of John Poste, Incorporated. From a judgment for plaintiff, defendants appeal. Affirmed.

Fred W. Heatherly, of Los Angeles, for appellants. Valentine & Newby, of Los Angeles, for respondent.

PER CURIAM. The defendants were indebted to the plaintiff's assignors for delinquent rent due upon a lease of real property. The complaint alleged an assignment of said claim to the plaintiff, and this allegation was not denied by the answer; nevertheless the plaintiff at the trial introduced evidence of such assignment.

[1] The only point urged in support of the appeal is under a specification of insufficiency of the evidence to support a finding in favor of the plaintiff based upon this evidence. Appellant insists that as the plaintiff at the trial assumed that evidence of the assignment was necessary, the defendants thereby became entitled to have the case tried as if the assignment had been denied. Assuming for the purposes of the argument that the question was at issue, we nevertheless find in the record ample evidence to support the finding. It is true that the plaintiff, who had lost the written assignment, testified that the words thereof were: "For value, I hereby assign to Boaz Duncan all my right, title and interest to the within lease." Plaintiff's assignors were partners, and the assignment was made by one of the partners, L. M. Holman, who testified that before the commencement of this action he assigned in writing on the back of the lease all of the claims of himself and his partner to all of the rent due from the defendant corporation. The defendants other than the corporation were its directors, and have become its trustees after the forfeiture of its charter.

[2] It appearing to the court that the appeal is without merit and was made for delay, the judgment is affirmed, and there is added the sum of \$50 damages, together with the costs.

MORRIS v. JUDKINS et al. (Civ. 2313.) (District Court of Appeal, First District, California. Feb. 28, 1918.)

1. Action \$\iflus 48(1)\$—Joinder of Causes — Quieting Title—Mandamus.

Under Code Civ. Proc. \$ 427, subd. 8, as to joinder of causes arising out of the same transaction, the purchaser at a commissioner's sale may join his causes to quiet title to the land and to compel the commissioner to make a new deed conveying all of the land which the original dead failed to do since both causes arose. inal deed failed to do, since both causes arose out of the same transaction.

2. Quieting Title \$\infty 30(3) - Necessary PARTIES.

In suit to quiet title and to require commissioner to make new deed conveying entire interest purchased by plaintiff at commissioner's sale, the commissioner was not a necessary party to the title quieting branch of the case, so that if he was merely named as an individual there was no defect of parties.

8. Quieting Title @==15-Defenses. Under complaint alleging that plaintiff purchased at commissioner's sale and received a commissioner's deed conveying only part of the property, the fact that plaintiff was the legal owner of the land actually conveyed entitled him to maintain an action to quiet title against the former owners, and they could not raise any defenses existing in favor of the commissioner as to that branch of the case seeking to compel him to make a new deed conveying all the land.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by W. B. Morris against T. C. Judkins and others. Judgment for defendants, and plaintiff appeals. Reversed.

Ernest K. Little, of San Francisco, for appellant. S. W. Molkenbuhr and Thos. W. Firby, both of San Francisco, for respond-

BEASLY, Judge pro tem. The plaintiff purchased the property involved herein at a commissioner's sale under a judgment foreclosing certain mechanics' liens thereon. The defendant Lanktree, being the commissioner appointed by the court to convey the property to the plaintiff as purchaser at the sale, delivered a certificate of sale to him describing the whole property, and, no redemption having been effected. Lanktree subsequently executed a commissioner's deed to Morris in which, however, only a part of the land sold to him was described or conveyed, and Lanktree has refused and neglected to include the remainder of the property in his Judkins and Saxton, the other defendants here, were the defendants in the foreclosure suit and the former owners of the property. In this action Lanktree is not named in the title as commissioner, but individually; that is to say, he is denominated simply "J. B. Lanktree." In the body of the complaint, however, it is alleged that Lanktree "as commissioner" sold the property and executed the certificate of sale and the deed to the part of the property hereinbefore mentioned. The complaint also alleges:

"That the defendants Judkins and Saxton claim to be the owners of said premises and are in possession thereof, and have heretofore refused and still refuse to deliver the possession thereof to the plaintiff."

The relief asked against Judkins and Saxton is the usual relief demanded in an action to quiet title, including an injunction forbidding them to assert any claim to the property adverse to plaintiff, and that the plaintiff recover possession of the property and the amount of certain rents; and as against Lanktree that he be compelled "as commissioner as aforesaid" to execute a deed conveying the entire property to plaintiff.

These are in condensed form all the allegations of the complaint in this action.

Elaborate separate demurrers, identical, however, in form and substance, were filed to this complaint by Judkins and Saxton raising many questions. These demurrers were sustained without the ground on which they were sustained being stated, and, plaintiff failing to amend, judgment was entered against him in favor of Judkins and Saxton. Lanktree did not appear, and the judgment does not mention him. Three only of the numerous grounds of demurrer relied upon in the lower court are insisted upon in the respondents' brief.

[1] The first of these is that several causes of action were improperly united in the complaint, namely, a proceeding in mandamus against an officer of the court with an alleged cause of action to quiet title. Conceding, as counsel for the respondents contend. that the cause of action attempted to be stated against Lanktree is mandamus, it is not improperly united in this case with the action to quiet title against Judkins and Saxton. The plaintiff may unite several causes of action in the same complaint where they are all predicated upon claims arising out of the same transaction, or transactions connected with the same subject of action. Code Civ. Proc. § 427, subd. 8. The claim of plaintiff to have his title quieted against Judkins and Saxton, and to have a writ of mandate against Lanktree to compel the execution of a deed to the entire property, however lamely alleged in the complaint, arises out of transactions connected with the same subject of action, namely, the same real estate. The real estate is the subject-matter concerning which both claims are asserted. As illustrating this proposition, see McArthur v. Moffett, 143 Wis. 564, 128 N. W. 445, 33 L. R. A. (N. S.) 264. The connection between Lanktree on the one hand, and Judkins and Saxton on the other, is very close. Lanktree was the commissioner appointed by the court to convey the title of Judkins and Saxton to the plaintiff. The policy of courts of equity to adjudicate in one action so far as possible all claims between the same parties concerning one subject-matter authorized this joinder, and this is one feature of equity jurisprudence that is embodied in the | with advantage have been observed.

section of the Code of Civil Procedure above

[2] The second ground of demurrer insisted upon is that there is a defect of parties defendant, in that Lanktree as commissioner has not been joined as defendant. Conceding that Lanktree is not sufficiently charged as commissioner, and that he was not therefore strictly speaking joined as commissioner in this action, and that he was a proper party defendant as such, still he was not a necessary party. Plaintiff might have proceeded without him to have his title quieted as to the part of the property to which he held title, namely, that portion described in the deed already made by Lanktree as commissioner. Indeed, it does not clearly appear why the relief sought against Lanktree might not have been obtained by a simple motion or citation in the original foreclosure case directed to having him ordered by the court to execute a proper deed if the one already executed by him is not in accordance with the judgment of the court in that case. Therefore there is no defect of parties in this respect.

[3] The third ground of demurrer urged by the respondents in support of the judgment is that the amended complaint fails to state a cause of action against any of the defendants, and especially against the respondents Judkins and Saxton, and in this behalf it is contended that the plaintiff cannot quiet title against the respondents until he has a deed to the entire property; in other words, that he, being an equitable owner only, cannot quiet this title against Judkins and Saxton, who, it is claimed, are still the legal But conceding this proposition as owners. a general statement of the law (but not so deciding), it does not apply here because the plaintiff Morris is the legal owner of that portion of the property described in the deed executed by the commissioner, and so far as that portion of the property is concerned at least a cause of action is stated in this complaint against the defendants Judkins and Saxton. And objections to the sufficiency of the complaint as against Lanktree cannot be raised by his codefendants; in this particular case, at least, those objections can only be taken advantage of by Lanktree himself.

These are the only essential points made by respondents in support of the action of the trial court in sustaining their demurrer, and, our conclusion being adverse to their contentions, the judgment must be reversed. We are constrained to add that the trial court was probably misled in this matter by a failure of counsel for plaintiff to observe certain obvious conventions of pleading which, while not, as it happens, absolutely necessary in this case to the statement of his cause of action, have for so long been generally followed by pleaders that they might ment is reversed.

We concur: LENNON, P. J.; KERRI-GAN, J.

GEORGE J. BIRKEL CO. v. CURTET et al. (Civ. 2092.)

(District Court of Appeal, Second District, California. Feb. 26, 1918.)

EVIDENCE \$\infty 441(9)\to Parol EVIDENCE VARY-WRITING-ADMISSIBILITY.

Where an agent represented a musical instrument to have certain qualities, but the written contract contained no such representations, and a separate clause separately signed stated that the seller would not be bound by any representations or agreement not appearing in the contract, parol evidence of the agent's representations was not admissible.

Appeal from Superior Court, Los Angeles County: Fred H. Taft. Judge.

Action by the George J. Birkel Company against L. Curtet and another. Judgment for plaintiff, and Curtet appeals. Affirmed.

F. McD. Spencer and Thomson & Spencer. all of Los Angeles, for appellant. E. S. Williams, of Los Angeles, for respondent.

JAMES, J. Appeal from a judgment entered in favor of plaintiff and against the appellant Curtet. Plaintiff sued to recover a sum of money alleged in its complaint to be a balance due on a contract for the sale of a musical instrument. The contract was expressed in writing, the main portions of which set forth the terms of sale and a description of the instrument. Attached to this contract, and as a separate paragraph thereof, was the following:

"I have read the foregoing contract and fully understand that George J. Birkel Company, or its assigns, will not be bound by any representation or agreement other than appears herein."

The signatures of appellant and the other defendant were attached both to this paragraph and to the main contract. Execution of the contract was admitted, the appellant resting his defense upon two grounds, to wit: First, that there was an antecedent warranty as to the condition of the instrument sold and as to the manner in which it would operate; second, that the consent of the defendants to the execution of the contract was induced by representations made by plaintiff's agent that the instrument would produce satisfactory music and was in good condition of repair. The facts constituting the alleged warranty and those relied upon to sustain the defense of fraud are the same. It was further alleged in the answer that in November, 1914, which was more than one year after the making of the contract and the delivery of the instrument to the defendants, defendants rescinded the contract on the alleged ground of fraud, by re- fect of such a condition, signed separately an

For the reasons above set forth, the judg-storing the instrument to the plaintiff and giving notice of rescission. As excusing the delay in making the alleged rescission, it was further alleged that defendants had seasonably notified the plaintiff of the failure of the instrument to operate in the manner as represented and warranted, and that the plaintiff undertook to repair the same and assured the defendants that the defects could be remedied. The case came on for trial; whereupon the plaintiff made proof of the condition of the account which it held against the defendants and the amount due thereon, and rested. Appellant then offered evidence to sustain the defenses of alleged warranty and fraud; whereupon the plaintiff objected to any such evidence being received, upon the ground that the contract had been reduced to writing and was presumed to contain all the terms agreed upon. This objection was sustained, as was objection also to the testimony offered in defense to show what had become of the instrument. It may be here noted, for consideration in connection with the latter offer, that it was not pleaded by the defendants that acquiescence had been made by the plaintiff in the attempted rescission of sale. As opposed to any such situation, the plaintiff showed from the files in this case that an attachment had been levied upon the instrument at plaintiff's demand, and that the sheriff had taken the same into possession under the writ.

We think the court was right in sustaining the objection to the testimony offered by the appellant. The plaintiff not only by its written contract did not make any warranty as to the condition of or the manner in which the instrument which was the subject of the sale, would perform, but expressly obtained the written assent of appellant to a waiver of all representations and agreements other than those appearing in the contract. This condition was not merely a general one obscured by the verbiage of descriptive terms, but was pointed and special and attached as a distinct clause after the main body of the contract. While attached to, it was separate from the general terms of the contract and was separately signed by both defendants who were the vendees under the contract. In the alleged defense of fraud no ground is alleged tending to show that the appellant did not sign this added condition with full knowledge of its force and effect. The situation would then be this: The defendants believing that the instrument was of such a character and condition as might have been represented to them, signed the main contract. Up to that point we might say, if sufficient facts were shown, that they would be entitled to rescind for alleged fraudulent representations. However, they, with full knowledge, as we must presume, of the efany misrepresentations which they now insist were made. To our minds, the case is so plain that no authorities need be cited to show that the defenses alleged in this case. under the admitted conditions of the contract, cannot be maintained. In our opinion, the trial judge properly sustained the objections to the offered testimony and the judgment entered is without error.

The judgment is affirmed.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

## PARTRIDGE v. CITY OF RICHMOND. (Civ. 2296.)

(District Court of Appeal, First District, California. Feb. 25, 1918. Rehearing Denied by Supreme Court April 25, 1918.)

1. MUNICIPAL CORPORATIONS ⇒385 (4) CHANGING GRADE OF STREET—DAMAGES TO ABUTTING OWNER—LIABILITY.

The owner of a lot, fronting on a street for which an official grade is established, to which the street is graded to the lot owner's damage, is entitled to recover damages against the cit though when her grantor dedicated the street he knew that its natural grade was so steep as to render it impractical and inaccessible to teams and vehicles, since neither the city nor plain-tiff's grantor could have known at the time of dedication, nor could plaintiff have known at the time of her purchase and the erection of her house, what grading would be necessary to make the street reasonably fit for its intended public use.

2. Dedication 4=31-Streets-Acceptance. A city was not compelled to accept dedication of a street by a private owner, and, if it did so, it took the advantages yoked with the burdens, and is liable to pay damages to an abutting owner injured by establishment of an official grade.

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Action by Martha Partridge, against the City of Richmond, a municipal corporation. From a judgment for plaintiff, defendant apeals. Affirmed.

D. J. Hall, of Richmond, for appellant. Donald Horne and Dunn, White & Aiken, all of Oakland, for respondent.

BEASLY, Judge pro tem. The plaintiff owned a lot fronting on Montana street in the city of Richmond. Her grantor had dedicated Montana street in front of this lot as a public street, and the dedication had been accepted by the city of Richmond. At the time of the dedication no official grade had been established on this street. After the plaintiff had acquired the lot and built a house thereon, the city of Richmond established an official grade and graded the street to it, and, as the jury found, this resulted in damage to plaintiff's said property in the sum of \$500.

The grade established being unquestionably

express waiver of all right to complain of available for the purpose for which it was dedicated, it is contended that the plaintiff is not entitled to recover damages for the bringing of the street to the first official grade.

> [1,2] The point is decided in Eachus v. City of Los Angeles, 130 Cal. 492, 62 Pac. 829, 80 Am. St. Rep. 147, and Eachus v. Los Angeles Railway Co., 103 Cal. 614, 37 Pac. 750, 42 Am. St. Rep. 149, unless the plaintiff is estopped from claiming damages by reason of the fact that her grantor dedicated the street. The appellant argues that respondent's grantor made this dedication knowing that the natural grade of Montana street was by reason of steepness, impracticable and inaccessible to teams and vehicles, and that plaintiff and her grantor knew at all times before the actual grading was ordered that it was necessary to grade the street to the official grade in order to make it accessible for the purpose for which it was dedicated. But this is not so, for neither the city nor plaintiff's grantor could know at the time of the dedication of the street, nor could the plaintiff know at the time of her purchase and the erection of her house what grading would be necessary to make the street reasonably fit for the public use for which it was intended. In these days of changing methods of constructing and grading streets no one may forecast the future grade of a public street, or the amount of injury which will be done to property by the establishment of the first official grade thereon. The city was not compelled to accept the dedication of this street; and, if it did so, it took the advantages yoked with the burdens.

> There is nothing contrary to this view in Bancroft v. City of San Diego, 120 Cal. 432, 52 Pac. 712.

> The evidence sustains the finding of \$500 damages.

The judgment is affirmed.

We concur: LENNON, P. J.; KERRI-GAN, J.

HUNTINGTON v. VAVRA. (Civ. 1973.) (District Court of Appeal, Second District, California. Feb. 21, 1918.)

TRIAL \$391-FINDINGS OF FACT-WHEN NECESSARY.

Where the issue whether plaintiff, riding motorcycle, was contributorily negligent in collision with defendant's automobile was presented by evidence both pro and con, the court was required to make a distinct finding on such is-

TRIAL \$\infty\$ 404(1) \cdot \text{WHEN NECESSARY.} 404(1) - Findings of Fact-

In action for injuries in collision between motorcycle and automobile, finding that plaintiff was unable to avoid the collision, and that defendant's acts were the proximate cause of the injuries, does not inferentially determine the question of plaintiff's contributory negligence. 3. Appeal and Error == 1071(6)-Prejudi-CIAL ERBOB.

The right to have a material issue presented reasonable and necessary to make the street by the pleadings in a cause determined by a

finding of the court is one important to the par-ties to a suit, and the failure to make such a finding results in prejudicial error, entitling the complaining suitor to reversal.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by J. M. Huntington against A. Stephen Vavra. Judgment for plaintiff, and defendant appeals. Reversed.

Edward G. Kuster, Gilbert A. McElroy, Guy E. Maurice, and Clarence E. Fleming, all of Los Angeles, for appellant. A. Spill, of Pasadena, for respondent.

JAMES, J. Defendant appeals from a judgment entered against him. Recovery was had in the lower court upon a cause of action charging that defendant had negligently operated an automobile on a public highway, and thereby caused a collision to occur between the automobile and a motorcycle upon which plaintiff was riding. the answer filed the negligent acts charged against the defendant were specifically denied, and the affirmative defense was made that the accident was proximately caused by the plaintiff's own negligence. This defense of contributory negligence was alleged first in general terms, and it was then speci-

"That one of said acts of negligence aforesaid on the part of plaintiff is that plaintiff at said time and place drove said motorcycle at a high and unlawful rate of speed, to wit, between 35 and 40 miles per hour."

Lincoln avenue in the city of Pasadena is a street having a clear roadway width of about 55 feet. Its direction is generally north and south. Entering the westerly side of this street and at an angle bearing to the north is Canada avenue, a street 30 feet in width. At the time of the accident, it being after nightfall, the defendant, operating an automobile, was traveling northerly along Lincoln avenue below the point where Canada avenue enters Lincoln. the same time plaintiff, riding on a motorcycle, was traveling southerly on Lincoln avenue on the right-hand side of that street and north of the point where Canada avenue enters the first-named thoroughfare. In other words, the automobile and motorcycle were traveling in opposite directions, each in its lawful place on the right-hand side of the street and both approaching the intersection of Lincoln avenue with Canada avenue. Defendant resided at a point on Canada avenue westerly of Lincoln, and when he reached the point of intersection of the two streets made the turn to enter Canada avenue westerly. The motorcycle of the plaintiff traveling, as before noted, south on the westerly side of Lincoln avenue, failed to clear the automobile when the same had advanced across the westerly side of Lincoln avenue, with the result that a collision occurred by reason of which the

tiff suffered some physical injuries. Nο point seems to be seriously advanced that there was not sufficient evidence to warrant the court in finding, as it did, that the defendant negligently and without warning turned his automobile across the roadway in front of the motorcycle of the plaintiff, as charged in the complaint. The chief point made by appellant is that the court committed prejudicial error in failing to find upon a material issue proposed by the answer, to wit, as to the contributory negligence charged against the plaintiff. Appellant has set forth in the brief sufficient of the testimony to show that there was evidence before the court respecting the rate of speed at which plaintiff was traveling at the time he sufferer his injuries, indicating that he was traveling at a speed in excess of the maximum rate provided by law. Motor Vehicle Act of 1913 (St. 1913, p. 649), § 22, subd. "b." There was also evidence to the contrary. Hence it appears that the case is not one where, assuming an absence of finding upon the question, the court either will presume that there was no evidence to support the issue, or that the evidence without conflict negatived the plea of contributory negligence, such as was held in Roberts v. Hall, 147 Cal. 434, 82 Pac. 66; Callahan v. James, 141 Cal. 291, 74 Pac. 853; Klokke v. Escailler, 124 Cal. 297, 56 Pac. 1113.

[1] There being a material issue presented and evidence both pro and con affecting the facts concerned in the issue, the court was required to make a distinct finding upon the matter. Tucker v. United Railroads et al., 171 Cal. 702, 154 Pac. 835.

[2] Counsel for respondent argues that, while no specific finding is made as to the issue of contributory negligence, the facts in the findings made by the court are inferentially determined adversely to the defendant's plea. We have examined with much care the findings as made by the court and are not prepared to agree that the facts are determined as to the issue of contributory negligence at all. The findings generally recite the specifications made by the complaint affecting the negligent conduct of the defendant. In the last paragraph of the findings it is stated by the court "that the plaintiff was unable to avoid said collision," and "that the acts of the defendant aforesaid were the direct and proximate cause of the said injuries and damage and all of them. \* \* \*" These are the two chief clauses to be found in the findings and to which our attention is urged by respondent as inferentially determining the issues referred to. The fact that the plaintiff may have been unable to avoid the collision would be wholly consistent with the fact also that he may have been traveling on his motorcycle at an unlawful and negligent rate of speed, and so caused himself to be placed in such a situation that he was "unmotorcycle was badly damaged and plain- able to avoid the collision." As to the finding that the acts of the defendant were the "direct and proximate cause of the said injuries and damage and all of them," it may well have been that the plaintiff was guilty of acts which contributed proximately to cause the injurious consequences which resulted.

[3] The right to have a material issue presented by the pleadings in a cause determined by a finding of the court is one important to the parties to a suit, and the failure to make such a finding results in prejudicial error, entitling the complaining suitor to reversal.

For the reasons given, the judgment appealed from is reversed.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

GREENE v. LOCKE-PADDON CO. et al. (Civ. 2315.)

(District Court of Appeal, First District, California. Feb. 23, 1918. Rehearing Denied by Supreme Court April 24, 1918.)

1. Contracts \$\infty 270(1) — Rescission Laches.

One having a right to rescind a contract must make the offer promptly upon discovering the facts entitling him to rescind, if he is free from duress, menace, undue influence, or disability, and is aware of his right to rescind under Civ. Code, § 1691.

2. CONTRACTS \$\oplus 270(1) - RESCISSION - KNOWLEDGE OF FACTS-LACHES.

In such case, notice of facts and circumstances which would put an ordinarily prudent and intelligent man on inquiry is equivalent to knowledge of all the facts which a reasonably diligent inquiry would disclose.

3. VENDOR AND PURCHASER \$== 119-RESCISSION-LACHES.

Where the purchaser of land was told a number of times by his tenants as to character of soil and continued to make payments for 20 months, and, after an examination by himself, attempted for a month to sell before offering to rescind, he was guilty of laches.

4. EVIDENCE \$\iiins 317(10)\to Hearsay.

Testimony of a purchaser of land attempting to rescind, as to what a soil expert told him concerning the land, was hearsay.

Appeal from Superior Court, Alameda County; N. D. Arnot, Judge.

Action by George A. Greene against the Locke-Paddon Company and others. Judgment for plaintiff, and defendants appeal. Reversed.

Norman A. Eisner, of San Francisco, for appellants. J. C. Murray and H. H. Mc-Pike, both of San Francisco, for respondent.

KERRIGAN, J. This is an appeal by defendants in an action brought by the plaintiff to rescind a contract of purchase of real property on the ground of fraudulent misrepresentations.

At and prior to the month of January, 1913, the Locke-Paddon Company was a corporation engaged in the real estate business in Alameda, Solano, and other counties. During that month, according to the findings of the trial court, the Locke-Paddon Company, through one of its agents, fraudulently induced the plaintiff to purchase the land described in the complaint. This finding being conclusive here, we are at once led to a consideration of the main point in the case, namely, whether the plaintiff's right of action was barred by laches.

As before stated, plaintiff and the Locke-Paddon Company entered into a contract for the sale and purchase of certain land in the month of January, 1913. Notice of rescission of this contract was given by the plaintiff in September, 1914, one year and eight months after the execution of the contract, during which time the plaintiff was in possession of the land. A consideration of the evidence in this case constrains us to hold that the plaintiff's right of rescission was barred by his laches.

According to his own testimony, within two months after the purchase his brother. who investigated the land for him at his request, reported that he had purchased "a gravel pit." About the time of this report by his brother, the plaintiff learned from a man with whom he had agreed to farm the land in question on shares (it having been purchased as agricultural land of good quality) that it was too hard to cultivate, and that he had "plowed around it once and had to give it up." Although plaintiff was an experienced farmer and familiar with the occurrence of hardpan in soil, still he made no inquiries concerning the reason of the failure of his associate to proceed with the cultivation of the land, concluding, he stated, that following a dry winter the land was too hard to plow. The next rainy season having arrived, the plaintiff succeeded in effecting an arrangement to have the land farmed on shares; but the result was unsatisfactory, the crop taken off of the 13 acres being but 1 ton of hay and 16 sacks of barley. In June of 1914, the plaintiff for the first time personally examined the land, although he lived within less than half a day's journey of it by railroad, which he could have taken at an expense of \$3. In the following month the plaintiff wrote to Locke-Paddon Company, asking that company to sell the land for him for \$1,000, and saying that he was not in a position to live on the land and work it himself, and that he was therefore willing to incur the loss which he would sustain by selling it at that price, provided a quick sale could be made. No sale of the land having been effected under this invitation, he caused a further examination of it to be made; and then learning, as he stated, that the land was worth but \$50, and not \$170, per acre, as claimed by the vendor at the time of the rale,

and that it was not fit for the purposes represented, he attempted to rescind the contract.

[1, 2] One having a right to rescind a contract must make the offer promptly upon discovering the facts which entitle him to rescind, if he is free from duress, menace, undue influence, or disability, and is aware of his right to rescind. Civ. Code, § 1691. And notice of facts and circumstances which would put an ordinarily prudent and intelligent man on inquiry is, in the eye of the law, equivalent to knowledge of all of the facts which a reasonably diligent inquiry would disclose. Garstang v. Skinner, 165 Cal. 721, 134 Pac. 329; Lady Washington C. Co. v. Wood, 113 Cal. 482, 45 Pac. 809.

[3] As shown by our references to the evidence in the case, the plaintiff was repeatedly put upon notice as to the inferior character of the land, yet for nearly two years made no attempt to rescind. The land was at all times open and accessible to inspection, and although often warned as shown by his own testimony, concerning the nature of the soil he took no steps to assert his rights, but, on the contrary, farmed and rented and tried to sell the land, and during a period of about two years continued to make the periodical payments provided for in his contract of purchase; and in July, a month after he personally inspected the land, it appears that he affirmed the contract by trying to sell the farm. Applying the rule of law as established by the Code and the authorities on the subject of the right of rescission and the necessity for its prompt exercise, we think, upon a review of the evidence, that it results from it that the plaintiff had lost his right to rescind the contract by his delay in pursuing with reasonable diligence a proper inquiry into the character of the land bought by him, after having been, as we conceive he was, put upon inquiry, and by his delay in asserting his right after obtaining the knowledge which his tardy investigation led to.

[4] The testimony of plaintiff as to what the soil expert told him concerning the character of the land was material, but hearsay, and clearly inadmissible.

The conclusion we have reached on the main point in the case renders unnecessary a discussion of other points made in the briefs, although, as the case must be reversed and remanded for a new trial, it may not be amiss to say that we do not quite understand, in view of the present condition of the record, how the court was able to find in favor of the plaintiff as against the defendants W. L. Adamski and Mary Adamski, purchasers of the land from the Locke-Paddon Company after the contract with the plaintiff was made.

The judgment is reversed.

We concur: LENNON, P. J.; BEASLY, Judge pro tem.

| INGLE MFG. CO. v. SCALES. (Civ. 2105.) | (District Court of Appeal, Second District, California. Feb. 28, 1918.)

1. Assignments == 119—Collection—Right to Sue.

A mere assignment for collection, when sufficient in form to vest the legal title in the assignee, authorizes him to prosecute the action.

2. Assignments —119—Rights of Action—

Where a claim has been assigned for the purpose of having it included in a suit to be brought by the assignee upon other demands, and so avoid the trouble and expense of a separate action, the title passes to the transferee, and he may maintain the action.

8. Assignments & 126—Rights of Action—Validity—Defenses.

The plea of ultra vires, as applied to plaintiff's right to receive an assignment of the assignor's interest in the contract sued upon, is not available to the defendant, who owes the debt.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by the Ingle Manufacturing Company against J. H. Scales. From a portion of the judgment for plaintiff, defendant appeals. Affirmed.

Joel W. West, of San Diego, and J. C. Needham, of Modesto, for appellant. Hendee, Rodabaugh & Mark, of San Diego, for respondent.

CONREY, P. J. The defendant appeals from that part of the judgment which was based upon the third cause of action set out in the complaint. This cause of action was based upon a contract of the defendant to pay to one Robert Devo a commission for services rendered in procuring an exchange of real property between defendant Scales and another person. As to this cause of action plaintiff sued as assignee of Deyo. Appellant contends that the evidence was not sufficient to prove an assignment of Deyo's right to the commission, that no consideration for the assignment was proved, and that the plaintiff had no right to receive the assignment.

The third point is based upon the limitations contained in plaintiff's articles of incorporation expressing the purposes of its creation, which purposes did not include the business of agency for transfers of real property or the business of collecting claims for other persons. The instrument of assignment signed by Deyo purported to transfer to plaintiff "all my right, title, and interest in and to a certain agreement for the exchange of real property, executed on the 28th day of May, 1915, by W. A. Bolton, and accepted on the 29th day of June, 1915, by J. H. Scales, in which said agreement I am named as the agent for each of said parties for the exchange of the properties described in said agreement." The exchange agreement between Bolton and Scales bore the dates May 20, 1915, and June 4, 1915. The

dates in the contract are thus shown to be different from the dates in the assignment. It was, however, shown by the testimony of Deyo that at the time of the assignment the said contract was the only written agreement or contract that he had with Scales. By the terms of that contract Scales agreed that on the making of the exchange he would pay to Deyo, "as per separate agreement, commission for such services," etc. amount of this commission was proven by No objection is urged that the evidence determining this amount was only in parol. At least the agent was entitled, under the writing alone, to a reasonable compensation for his services. Muncy v. Thompson, 26 Cal. App. 634, 147 Pac. 1178. Appellant does not rely upon any contention that the amount of the commission as allowed was not proved to be reasonable, and there is evidence tending to show that it was a fair and reasonable amount for the services

[1, 2] There is some evidence tending to show a valuable consideration for the assignment of the claim here in question. Moreover, a mere assignment for collection, when sufficient in form to vest the legal title in the assignee, authorizes him to prosecute the action. Where a claim has been assigned for the purpose of having it included in a suit to be brought by the assignee upon other demands, and so avoid the trouble and expense of a separate action, the title passes to the transferee, and he may maintain the action. Hopkins v. Contra Costa County, 106 Cal. 566, 572, 39 Pac. 933; Kelley v. Hampton, 22 Cal. App. 68, 133 Pac. 339. That was the case here.

[3] The plea of ultra vires, as applied to plaintiff's right to receive an assignment of the assignor's interest in the contract sued upon, is not available to the defendant, who owes the debt. In Savings Bank of San Diego v. Barrett, 126 Cal. 413, 58 Pac. 914, the plaintiff was prosecuting the action to foreclose a mortgage made to it by the defendant. The sole consideration for that mortgage was the surrender and delivery to him by the plaintiff of another note and mortgage, which had been executed by the defendant to another person, and which had been transferred to the plaintiff. The defendant attempted to resist foreclosure upon the ground that the plaintiff was incapable of purchasing or becoming the owner of the former note and mortgage; that, notwithstanding the transfer of said note and mortgage to plaintiff, they were worthless in its hands. It was held that:

with the title thereto, and with the right to enforce their obligation against the defendant.

See, also, Union Water Co. v. Murphy's Flat Fluming Co., 22 Cal. 622.

The judgment is affirmed.

We concur: JAMES, J.; WORKS, Judge pro tem.

NATHAN v. PORTER et al. (Civ. 2321.) (District Court of Appeal, First District, California. Feb. 21, 1918. Rehearing Denied March 22, 1918; Denied by Supreme Court April 22, 1918.)

1. APPEAL AND ERROR #===2-STATUTES-Mo-TION FOR NEW TRIAL.

Though plaintiff had initiated his motion for new trial prior to the adoption and operation of St. 1915, p. 209, amending Code Civ. Proc. § 963, limiting the right to appeal from the judgment only, the law in effect at the time of the entry of the order denying motion for new trial must control, so that the purported appeal therefore was in said of itself of no appeal therefrom was in and of itself of no avail.

2. Appeal and Error &= 873(3) - Appeal FROM JUDGMENT—REVIEW OF MOTION FOR NEW TRIAL—STATUTE.

By direct provision of Code Civ. Proc. § 956, as amended by St. 1915, p. 328, on an appeal from a judgment, the appellate court, among other things, may review an order or motion for new trial.

3. APPEAL AND EBBOE & 620—APPEAL BE-FORE DETERMINATION OF MOTION FOR NEW TRIAL—RECORD—STATUTES.

TRIAL—RECORD—STATUTES.

Under Code Civ. Proc. § 963, as amended by St. 1915, p. 209, in effect August 8, 1915, which discontinued the right to appeal from an order denying new trial, Code Civ. Proc. § 956, as amended by St. 1915, p. 328, in effect August 18, 1915, relating to the scope of an appeal from a judgment, and Code Civ. Proc. § 650 et seq., as amended by St. 1915, p. 207, relating to the form and requirements of the record on which a motion for new trial may be based, where judgment was made and entered based, where judgment was made and entered January 27, 1914, notice of appeal therefrom was served and filed May 1st, and on April 14th and 15th plaintiff served and filed his notice of intention to move for new trial which speci-fied such motion would be made on a bill of exceptions to be thereafter prepared, and November 17, 1915, the court below entered an order denying defendant's motion for new trial, and on December 17th and 18th plaintiff gave and filed his notice of appeal from such order, under Supreme Court rule 2 (119 Pac. ix), the appeal from the judgment, though taken before determination of the motion for new trial, did not need to be accompanied by a record showing the evidence and rulings until after determination of the motion when the bill of exceptions used on hearing of the motion could be transmitted to the appellate court and in connection with the judgment roll be considered the record in support of the appeal from the judgment.

4. Appeal and Ebrob &= 873(3)—Review— Motion for New Trial—Second Appeal— STATUTE.

hands. It was held that:

"Whether the purchase of the mortgage in question was 'such as the purposes of the corporation required' was to be determined by its board of directors, \* \* \* and is not open to investigation at the instance of the defendant. The plaintiff, therefore, by its purchase of the Hamilton note and mortgage, became vested is not necessary, to bring the morits of the

motion for new trial before the appellate court, that he file second appeal from the judgment. 5. APPEAL AND ERROR 6 13-RIGHT TO AP-PEAL-PENDING APPEAL.

Having filed a valid appeal from the judg-ment against him, plaintiff was precluded from taking a second appeal while the first was pending and undetermined.

6. APPEAL AND ERROR \$==625 -- LACK OF PROCEDURE-ADOPTION-STATUTE.

Under Code Civ. Proc. § 187, though apparently no procedure is provided for transmitting to the appellate court the record used as basis for motion for new trial in case where appeal from judgment had been rightfully taken in advance of determination of motion, it is permissible, to permit case to be disposed of on merits, to adopt any suitable procedure, which, conformably to the Code, would achieve the

7. APPEAL AND ERBOR \$= 873(3)-REVIEW-RECORD.

Where the bill of exceptions used on hearing of plaintiff's motion for new trial, duly authenticated, is included in the transcript, which, by stipulation, constitutes the record on appeal from the judgment, plaintiff having rightfully appealed from the judgment which involves re-view of the merits of the motion for new trial, on the record the appellate court may discuss and decide an error of law occurring at the trial which plaintiff urges was prejudicial and sufficient to warrant reversal.

8. Contracts 4=153 — Construction—Stat-UTE.

Considering and construing a contract in the light of Civ. Code, § 1641, providing that the whole of a contract is to be taken togeth-er so as to give effect to every part, if reaer so as to give effect to every part, if reasonably practicable, some reasonable effect, if possible, must be given not only to the contract as a whole, but as to the meaning and effect of a modifying clause. effect of a modifying clause.

9. Mines and Minerals @=79(3)—Oil Lease
—Construction—"Net Proceeds."

Where an oil lease indicated that net profits were to be determined by deducting from the gross income only the royalty and operating expenses, as distinguished from capital expenses, the words "net proceeds," as used in a modifying clause, providing that after the first four years at least half of a certain 15 per cent. of the net proceeds derived from the business should be paid to the first party, meant net profits.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Net Proceeds.1

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell,

Action by Louis Nathan against Jessie G. Porter, as executrix, etc., O. Scribner, and the Arica Oil Company. From a judgment for defendants, plaintiff appeals. Reversed, and cause remanded for new trial.

Louis H. Brownstone, of San Francisco, and Alton M. Cates, of Los Angeles, for appellant. Edmund Tauszky, of San Francisco, for respondents.

LENNON, P. J. Viewing the appeal as one only from the judgment and conceding the correctness of the contention that we are foreclosed, because of a technical imperering the sufficiency of the evidence to support the trial court's findings of fact, nevertheless we are of the opinion that that record, consisting of the judgment roll and the bill of exceptions prepared and presented in support of the purported appeal from an order denying a new trial, will, when considered as a single record supporting the appeal from the judgment, suffice to warrant and enable a discussion and decision of the correctness of the trial court's order denying the plaintiff a new trial.

The record shows that the judgment was made and entered on the 27th day of January, 1914; that notice of appeal therefrom was served and filed on May 1, 1914; that respectively on April 14 and 15, 1914, the plaintiff served and filed his notice of intention to move for a new trial, which specified that such motion would "be made upon a bill of exceptions to be thereafter prepared" and designated as the grounds of the motion (1) the insufficiency of the evidence to justify the decision, (2) that the decision was against law, and (3) errors of law occurring at the trial; that on November 17, 1915, the court below entered an order denying the plaintiff's motion for a new trial; and that respectively on December 17 and 18, 1915, the plaintiff gave and filed his notice of appeal from the said order.

[1] Admittedly the amendment to section 963 of the Code of Civil Procedure, which discontinued the right to appeal from an order denying a new trial save in certain excepted cases of which the present case is not one, was in operation at the time when the order denying a new trial was entered and at the time when the plaintiff purported to appeal therefrom. Stats. 1915, p. 209, in effect August 8, 1915. Therefore it must be held that, even though the plaintiff had initiated his motion for a new trial prior to the adoption and operation of the law limiting his right to appeal from the judgment only, the law in effect at the time of the entry of the order denying the motion for a new trial must control, and, as a consequence, the purported appeal therefrom was, in and of itself, of no avail. Woodruff v. Colyear, 172 Cal. 440, 156 Pac. 475.

[2] Of course, that appeal cannot be considered, and, in strictness, should be dismissed; but it does not follow that a review of the merits of the motion for a new trial must fall with the attempted appeal from the order denying a new trial. The statute, section 956 of the Code of Civil Procedure, relating to the scope of an appeal from a judgment as amended contemporaneously with the amendment to the law abolishing the right to an appeal from the order denying a new trial, provides that, upon an appeal from a judgment, this court may, among other fection of the record before us, from consid- things review "any order on motion for a new

trial." 18, 1915,

Although the record shows that the bill of exceptions, upon which the motion for a new trial was made and heard, was not filed as engrossed until August 30, 1915, still the record also shows that the bill of exceptions was prepared by counsel for plaintiff in the month of April, 1915, and settled, allowed, and approved by the trial judge on August 7, 1915, just one day in advance of the taking effect of the amendment abolishing appeals from an order denying a new trial.

[3] As we read sections 650 et seq. of the Code of Civil Procedure which were likewise contemporaneously amended (St. 1915, p. 207) and which relate to the form and requirements of the record upon which a motion for a new trial may be based, we do not understand that the right to resort to a bill of exceptions in support of a motion for a new trial grounded upon errors of law occurring during the trial has been abrogated. But however that may be, the law at the time the plaintiff gave his notice of intention to move for a new trial gave him the right to rely upon a bill of exceptions to be subsequently prepared in support of the motion, and therefore, regardless of his right to appeal from the order denying the motion, the motion itself necessarily must have been heard upon the record prepared and noticed for the hearing.

Apparently the appeal from the judgment and the purported appeal from the order were taken pursuant to the provisions of the old method of appeal and may, for the purposes of this discussion, be considered as having been taken only under that method. Having been taken under that method, doubtless counsel for plaintiff assumed, as he was justified in doing, that, under rule 2 of the Supreme Court (119 Pac. ix), his appeal from the judgment, even though taken in advance of the determination of his motion for a new trial, need not be accompanied by a record showing the evidence and the rulings of the trial court until after a hearing and determination of the motion for a new trial. when, if he saw fit, the bill of exceptions used upon the hearing of the motion would be transmitted to the higher court, and there, in conjunction with the judgment roll, be considered the record in support of the appeal from the judgment.

[4, 5] Manifestly the plaintiff was not required to wait until his motion for a new trial was determined before taking an appeal from the judgment. He might take that appeal separately at any time within the time prescribed by the statute, and it will not do to say, as has been suggested, that, the law having deprived him of the right to appeal from the order denying the new trial but giving him thirty days after the denial of the

Stats. 1915, p. 328, in effect August | Civ. Proc. § 939), he should, in order to bring the merits of the motion for a new trial before this court, have filed a second appeal from the judgment. Having filed, in the first instance, a valid appeal from the judgment. the plaintiff was precluded from taking a second appeal while the first was pending and undetermined. Hill v. Finnigan, 54 Cal. 311; Brown v. Plummer, 70 Cal. 337, 11 Pac. 631; Tompkins v. Montgomery, 116 Cal. 121. 47 Pac. 1006.

[6] While it is true that the law as now written apparently provides no procedure for transmitting to the appellate court the record used as the basis for a motion for a new trial in a case where an appeal from a judgment has been rightfully taken in advance of the hearing and determination of the motion, nevertheless, in the absence of such provision, it would be permissible, for the purpose of permitting the case to be disposed of on its merits rather than upon a technicality, to adopt any suitable procedure which, conformable to the spirit of the Code, would achieve the desired result. Code Civ. Proc. § 187.

[7] Thus, if in the present case the bill of exceptions used upon the hearing of the motion did not appear duly authenticated in the record before us, we would be privileged to bring it here upon a proper showing in response to a suggested diminution of the record. The bill of exceptions, however, duly authenticated by the trial judge, is included in the transcript which, by stipulation of respective counsel, constitutes the record upon appeal from the judgment. This being so and the plaintiff having rightfully appealed from the judgment which involves a review of the merits of the motion for a new trial. we have no doubt but that, upon the record before us, we may at least discuss and decide an error of law occurring at the trial which the plaintiff urges was prejudicial and therefore sufficient to warrant a reversal of the judgment.

In this connection the record shows that the trial court, over objection of plaintiff, permitted the defendants to show the expenditures of every kind and character which were made by the defendants in the operation of the oil company from the time operations commenced under the lease from the railroad company up to and including January 31, 1909. This ruling of the trial court, which in effect was a holding that any evidence of "capital expenses" incurred subsequent to the year 1906 was material, evidently was made upon the theory that the third and concluding clause of the contract in suit was meaningless and therefore could not be considered as a part of the contract. That clause is as follows:

"It is understood and agreed by and between the parties hereto that after the first four motion to appeal from the judgment (Code | years of the first term of said lease at least onehalf of the said fifteen per cent. of the net proceeds derived from said business shall be paid to said first party hereto. The foregoing clause is intended to modify clauses with which it is in conflict.

The date of the original lease was December 18, 1902. The date of the contract in suit was September 8, 1903, and the suit was filed February 26, 1912. Necessarily therefore the question of the correctness of the trial court's ruling involves a construction of the contract.

[8] Section 1641 of the Civil Code provides that:

"The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."

Considering and construing the contract in the light of that Code requirement, some reasonable effect must, if possible, be given not only to the contract as a whole but as to the meaning and effect of the modifying clause as well.

[9] This may be done, we think, in keeping with what may be fairly said to be the intent of the parties, by interpreting the words "net proceeds" as used in the modifying clause to mean net profits which, as the contract sufficiently indicates, were to be determined by deducting from the gross income only the royalty and operating expenses, as distinguished and considered apart from "capital expenses." This, it is true, might or might not have resulted in the plaintiff's receiving under the 71/2 per cent. allotted to him by the modifying clause as large a portion of the proceeds as he would have received under the 15 per cent. clause; but in any event the 71/2 per cent. would not be dependent at all upon the costs of capitalization, but only upon the sum total of royalty and operating expenses. To hold then, as the court below did, that even after the first four years of the lease plaintiff was entitled to nothing unless not only operating expenses but also capital expenses were deducted, would nullify the purpose and intent of the modifying clause. This being so, there is, it seems to us, no escape from the conclusion that the ruling complained of was erroneous and prejudicial.

This conclusion is fortified by a reference to the defendants' answer to the original complaint wherein it was admitted that there was \$1,488.48 due to the plaintiff and the method of arriving at this result, as shown by the testimony of defendants' accountant, was by deducting from the net income (that is, the amount of oil produced less the royalty to the railroad) the operating expenses (as distinguished from capital expenses) and taking 71/2 per cent. of the net gain so found.

The judgment is reversed, and cause remanded for a new trial.

We concur: KERRIGAN, J.; BEASLY, Judge pro tem.

AMUNDSON v. SHAFER. (Civ. 2060.)

(District Court of Appeal, Second District, California. Feb. 27, 1918. Rehearing Denied April 1, 1918. Rehearing Denied by Supreme Court April 25, 1918.)

1. APPEAL AND ERROR @== 1040(10) -- HARM-LESS ERROR-OVERRULING DEMURRER.

an action for unlawful detainer, plaintiff's complaint was uncertain as to whether rent alleged to be due was due to plaintiff doing business under a fictitious name or to the company, the uncertainty not relating to sub-stantial or material matter, did not affect or prejudice defendant, whose demurrer for un-certainty was overruled, since a compliance with Civ. Code, §§ 2466, 2468, requiring the fil-ing of a certificate as a prerequisite to the right of a person doing business under a ficti-tious name to maintain an action concerning the tious name to maintain an action concerning the affairs of the business, need not appear on the face of the complaint.

2. APPEAL AND ERROB \$\infty\$=1040(10)\to Harm-less Errob\to Overbuling of Demurrer,

A judgment will not be reversed on appeal because the trial court erroneously overruled a demurrer to the complaint on the ground of un-certainty, where the substantial rights of de-fendant have not been prejudiced and the cause has been tried on the merits.

8. Trial \$395(8)—Findings—Signature —

DIRECTORY STATUTES.

Code Civ. Proc. § 634, providing that the court, where it directs a party to prepare findings, shall not sign the same prior to expiration of 5 days from service of a copy thereof on all parties, is directory only, and trial court may, whenever compliance would work injustice, disregard provision.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge Passing on Demurrer, and G. W. Nicol, Judge Trying

Action by Victoria C. Amundson against George W. Shafer. Judgment for plaintiff, and defendant appeals. Affirmed.

S. C. Schaefer, of San Pedro, for appel-Courtney Lacey, of Los Angeles, for respondent.

WORKS, Judge pro tem. [1, 2] This is an action of unlawful detainer, in which the defendant appeals from a judgment in favor of the plaintiff. The amended complaint alleges, among other things, that the plaintiff is a married woman, but that "the matters alleged in this complaint" concern her sole and separate estate; that "the plaintiff herein is, and was during all the times herein mentioned, the sole owner and proprietress of that certain business carried on under the name of the Amundson Drug Company," in the city of Los Angeles; that the defendant has been in possession of a certain portion of a storeroom in Los Angeles "under an agreement with plaintiff for the renting thereof from month to month"; and that on August 30, 1915, "the plaintiff" notified the defendant, in writing, that from and after October 1, 1915, the terms of defendant's lease would be changed so that there would be due from him for rent upon the premises, have presented, or refrained from presentoccupied by him the sum of \$100 per month. A copy of the notice was attached to the pleading as an exhibit, and it was signed, "Amundson Drug Company, by Victoria C. Amundson." The amended complaint also alleges that the defendant remained in possession of the premises occupied by him from the time of service of the notice until the commencement of the action; that, on October 5, 1915, "the plaintiff" made of defendant a demand in writing for the "payment of said rent"; and that a copy of the demand is attached to the pleading as an exhibit. The demand is signed "Amundson Drug Company, by Victoria C. Amundson." It is also alleged in the amended complaint that defendant neglected and refused to comply with the demand, and that he held over after default in the payment of rent. A demurrer. both general and special, was interposed to the amended complaint. The special grounds of demurrer were, in part, that the amended complaint was uncertain because it could not be ascertained from it whether the agreement for renting was made by plaintiff in her individual capacity or in the name of the Amundson Drug Company, or whether the rent alleged to be due was due to plaintiff or to the Amundson Drug Company. The assaulted pleading is uncertain in the respects mentioned, but the uncertainty is not related to substantial or material matters. The argument of the appellant upon the question of uncertainty has behind it the contention that an individual doing business under a fictitious name must affirmatively show, in a complaint based upon a right affecting or which is the property of the business, that he has complied with the provisions of sections 2466 and 2468 of the Civil Code. Those sections require the filing and publication of a certain certificate as a prerequisite to the right to maintain actions concerning the affairs of such a business. But a compliance with their provisions need not appear upon the face of a complaint. If the fact be that the person maintaining such an action has not complied with the sections mentioned, the point may be presented as a defense by way of plea in abatement. Holden v. Mensinger, 165 Pac. 950. That being so, the appellant was not prejudiced, nor was any substantial right of his affected, by the uncertainties of the amended complaint. If he had any defense upon the merits, it could have been pleaded in his answer in the same manner, whether he regarded the amended complaint as setting up a cause of action belonging to Victoria C. Amundson, or to the Amundson Drug Company. Looking at the pleading as based upon a cause of action owned by the drug company, the appellant could have ascertained by an examination of

ing, his plea in abatement, as the showing of record might allow. He made no such defense, although he filed an answer which raised various other issues. amended complaint and upon this answer the parties went to trial on the merits. It has been decided in many cases that a judgment will not be reversed on appeal because the trial court has erroneously overruled a demurrer to the complaint on the ground of uncertainty, where the substantial rights of the defendant have not be prejudiced by the ruling and the cause has been tried on the mer-Jager v. California Bridge Co., 104 Cal. 542, 38 Pac. 413; Brown v. Ratliff, 21 Cal. App. 282, 131 Pac. 769. These authorities. and others which might be cited, control the point now under consideration. Section 634 of the Code of Civil Procedure provides:

"In all cases where the court directs a party to prepare findings, a copy \* \* \* shall be served upon all the parties \* \* at least five days before findings shall be signed, \* \* \* and the court shall not sign any findings therein prior to the expiration of such five days.

In this case the trial court gave a specific direction to the counsel for plaintiff to prepare the findings, a copy of the proposed findings was served upon counsel for the defendant, but the trial judge signed the findings less than five days after the service.

[3] The appellant contends that it was error, from which a reversal of the judgment must follow, for the judge to have signed the findings within the time limited by the statute. Section 634 was enacted in 1913 in its present form, but the particular question now presented by appellant has never been passed upon by the Supreme Court or Courts of Appeal, although it is mentioned in Hoffman v. Guy M. Rush Co., 27 Cal. App. 167. 149 Pac. 177. The section was adopted for the purpose of aiding the courts in the making of proper findings of fact, but for that purpose only. It could have had no higher or greater purpose. All that a party can require or expect, as to this point, in any litigation, is that the court shall make, in his case, a proper set of findings. If findings are insufficient, or are unsupported by evidence. or are defective in any other particular under the law, the injured party will be relieved, on appeal, from the effects of the error thus made manifest. So far his interest goes and no further. Section 634 is directory only. So construed it is a salutary statute. If it were to be construed as mandatory, it would often operate to work injustice. There are many cases in which a delay in the signing of findings would so operate, and perhaps chief among them are cases like the present, cases of forcible or of unlawful detainer. Trial courts are justified in disrepublic records whether the certificate requir- garding the direction contained in that part ed by law had been filed, and could either of section 634 which we have quoted, whenever a compliance with it would work injus- | not sustain that claim, and the point involved tice to the rights of a litigant.

There are several findings which the appellant assails as not being supported by the evidence, but the contention is groundless as to all such findings.

The judgment is affirmed.

We concur: CONREY, P. J.: JAMES, J.

SOUZA v. FIRST NAT. BANK OF HAN-FORD et al. (Civ. 2250.)

(District Court of Appeal, Second District, California. Feb. 25, 1918.)

1. Trusts \$==43(1) -- Personalty -- Estab-LUSHMENT BY PAROL.

A trust in personalty may be established

by parol.

2. Trusts \$\infty 44(1) - Parol Trust - Suffi-CIENCY OF EVIDENCE.

In an action by administratrix of estate of her deceased husband to recover money which was on deposit in defendant bank at the time of the husband's death, in which action it was asserted as a defense that the money was transferred to deceased's brother, also defendant, in trust for three minor children of deceased and plaintiff, evidence held insufficient to show creation of a valid parel trust in money: the creation of a valid parol trust in money; the proportion which children were to have in the fund and the duration of the trust not being sufficiently definite.

Appeal from Superior Court, Kings County; M. L. Short, Judge.

Action by Belle Souza, as administratrix of the estate of Jose A. Souza, deceased, against the First National Bank of Hanford and another. Judgment for defendants, and plaintiff appeals. Reversed.

Frank B. Graves, of Hanford, for appellant. H. Scott Jacobs, of Hanford, for respondents.

JAMES, J. This action was brought by Belle Souza as administratrix of the estate of her deceased husband, Jose A. Souza, to recover for the estate represented by her, money which was on deposit with the defendant bank at the time of Souza's death. At that time the money was in a savings account, and from the bank records appeared to have been payable either to Jose A. Souza, the deceased, or to John A. Souza, his broth-Defendant John A. Souza asserted in defense, and in this defense he was joined by the bank, that the money represented by the deposit had been transferred to him by his brother for the benefit of three minor children of the deceased and this plaintiff. In brief, it was asserted that a trust had been created as to the fund on deposit in the bank, with John A. Souza as trustee, for the benefit of the three minor children who were all living at the time of the death of Jose. The plaintiff asserted in her complaint that the money was a part of the community estate of herself and husband, but the evidence did

as to that issue is not here for consideration. The real question is as to whether a valid trust was created under which John A. Souza was entitled to take and hold the money, which had been the separate property of deceased, for the benefit of the minor children referred to. The evidence showed that for a number of years prior to his marriage with the plaintiff, deceased had lived with the latter, and one of the three children numbered among the minors mentioned herein was born during the time that the two persons occupied the relation of husband and wife without the sanction of a marriage ceremony. The last two children were born after the parties had entered into a legal marriage, and at the time of the death of Jose the minors were aged. respectively, 4 years, 21/2 years, and 1 year. A part of the money constituting the deposit had been paid to deceased by plaintiff for work which the deceased did for her on her own property. This money, however, was paid prior to the time the marriage ceremony was performed. In about the year 1910 Jose made the deposit of about \$1,200 with the defendant bank on savings account, and at the time of his death accumulated interest had augmented the original sum until the total was about \$1,400. In January, 1915, Jose became very ill and was confined in a hospital at Hanford, Cal. John Souza testified that while in the hospital his brother sent for him and made a request regarding the handling of the money represented in the account which he had with the defendant bank. We will state all of the testimony referring to the matter of the creation of the alleged trust. John Souza testified that when he went to the hospital at Hanford he saw his brother and had a talk with him. When asked to state what was said by his brother Joe at that time, he replied:

"Why, Joe was telling me that he had some money in the First National Bank; he said all the money he had he was going to give it to me to pay his bills and give it to his children; he told Bob he had some money in the Bank of Lemoore; he said he was going to fix it the same; he said he was going to turn it to me for me to pay his bills and keep the balance for the children; that's about all I remember about it."

The person referred to as "Bob" was R. V. Hall, an assistant cashier of defendant bank. Mr. Hall testified that at the suggestion of John Souza he went to the hospital to see the sick man, Joe; that Joe Souza was a Portuguese and understood little English, and that John Souza, apparently interpreting the language of Joe to witness, said that Joe was going to Oakland to consult a doctor there; that he had certain money in the First National Bank; that he wanted it fixed, if he never got back, that John was to have the money, and that the witness had replied that he would fix the deposit entries on the books of the bank so that the request could be carried out. He added that he did in fact make . the change so that the money might be drawn upon the check of either Jose or John. The court made this inquiry of the witness Hall:

"Q. Did he [Jose] say for what purpose he wanted it to go to John A. Souza? A. I can only answer that—John A. Souza told me that his brother wanted him to have the use of this money in case of his death for the support of money in case or his death for the support of two children or his direct heirs; his children; that the wife of Joe Souza had some other chil-dren, and he was afraid that the wife would spend this money on the other children, and he wanted his own children to have the use and benefit of this money; I then turned and asked

The witness John A. Souza, being further examined as to what was said to him by Joe at the Hanford Hospital, replied:

"I asked Joe what he give me his money for; he said, I give you my money for you to pay the doctor bills and hospital bills, and keep the balance for the keep of my children, when they need it; that's all I remember."

Antone Souza, another brother of deceased.

That in the hospital in Oakland he heard Joe Souza tell John, the brother, "to hold the money; to take the money, part of the money, and pay the bills, and hold the balance for his children."

It may be noted that Hall testified that Joe referred to two children only. Not only did the testimony of the plaintiff show that there were three minor children, as we have before stated, but the answer of both defendants specifically set forth the names and agea of three minor children of deceased. court found that a trust had been created as to the fund here in controversy, and that the money was no part of the estate of Jose Souza, deceased. The judgment determined that John A. Souza was entitled to the possession of the money, conditioned upon his executing a bond to the state of California in the sum of \$2,800 to insure the faithful execution of the trust. That part of the judgment determining the trust and the character and purpose of it is as follows:

"That defendant John A. Souza do have and That detendant John A. Souza do have and recover judgment against plaintiff and against defendant First National Bank of Hanford, adjudging and decreeing that said defendant John A. Souza is the owner and entitled to the possession of all the money mentioned in the complaint and findings in said action, amounting to \$1,398.38, in trust for the use and benefit of the minor children of Jose A. Souza, deceased to wit Edward Souza Mary A Souza. deceased, to wit, Edward Souza, Mary A. Souza and Josephine E. L. Souza.

[1] Appellant very earnestly contends that the evidence was insufficient to show the creation of a valid trust as to this money. That a trust as to personal property may be established by parol is well settled. Roach v. Caraffa, 85 Cal. 436, 25 Pac. 22; Silvey et al v. Hodgdon et al., 52 Cal. 363; Cahlan v. Bank of Lassen County, 11 Cal. App. 533, 105 Pac. 765; Hellman v. McWilliams, 70 Cal. 449, 11 Pac. 659; Booth et al. v. Oakland Bank of Savings et al., 122 Cal. 19, 54 Pac. 370. The case last cited and the case of Hellman v. McWilliams, supra, are also au- | being considered, the court said:

thority to the point that where the trustor retains the right to check against a deposit which is made the subject of a trust agreement, the transfer may, nevertheless, be effectual as to the trustee. The real difficulty we encounter in this case is to find that the particular purpose, the proportion of interest which the minors were to have in the trust fund, and the duration of the trust, were made sufficiently definite by the expressions of the trustor. The evidence as to the declarations made by Jose Souza shows that nothing was said by the latter as to how long the brother John was to retain the fund, nor as to how it should be applied on behalf of the minors. We have already noted that, according to the testimony of Hall. only two children were mentioned by Jose as being those whom he wished to have the benefit of the money; but we may well assume that the court was correct in concluding that the intention was that the money should be held for the benefit of the three minor children who were shown to be in existence at the death of Jose and at the time of the creation of the alleged trust. It may be that the intention of Jose was that the fund should be used for the benefit of the children during their minority, and any residue that remained should be divided equally between them upon the youngest becoming of age; it may be that his intention was that the minors should have the right to the money immediately upon his death, through the medium of his brother John in some sort of guardian capacity. The very fact that these speculations suggest themselves as defining the possible intent that Jose Souza had in mind at the time he gave his directions to John at once illustrates the uncertainty which would attend the administration of the alleged trust. In Wittfield v. Forster, 124 Cal. 418, 57 Pac. 219, our Supreme Court was considering the question of the validity of an alleged trust which was attempted to be created, where the trustor executed a document in writing, stating that he conveyed to one Foster, "as trustee in trust for San Diego Lodge No. 35, Free and Accepted Masons, of the State of California, all the property I now own, both real and personal. • •" In determining that the trust so attempted to be created was void for uncertainty, the court first quoted from Pomeroy's Equity Jurisprudence as follows:

"The declaration of trust, whether written or oral, must be reasonably certain in its material terms; and this requisite of certainty includes the subject-matter of property embraced within the trust, the beneficiaries or persons in whose behalf it is created, the nature and quantity of interest which they are to have, and the manner in which the trust is to be performed. If the language is so vague, general, or equivocal that any of these necessary elements of the trust is left in real uncertainty, then the trust must fail." must fail."

And applying the rule of essentials, as stated by the text-writer, to the trust there

"The duration of the estate attempted to be granted to the trustee, the nature and quantity of interest which the beneficiaries are to have, and the manner in which the trust is to be performed, are all left undeclared and without any reasonable certainty. uncertainty also makes the attempted trust as to the personal property void."

We also cite, as in part applicable, the decision in the case of Barker v. Hurley, 132 Cal. 21, 63 Pac. 1071, 64 Pac. 480.

[2] In our opinion, the evidence was insufficient to show the creation of a valid trust as to the money in controversy.

The judgment is therefore reversed.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

BENTON v. HUNT, County Treasurer (LYONS, Intervener). (Civ. 2485.)

(District Court of Appeal, Second District, California. Feb. 27, 1918. Rehearing Denied by Supreme Court April 25, 1918.)

Officers \$\infty 55(1) -- Vacancies -- Absence from State-"Incumbent."

Where judgment was against one who was appointed to and qualified for office, in an action to remove another from such office, and the former took an appeal which was decided in his favor, he was not an "incumbent" of such of favor, he was not an "incumbent" of such of-fice pending the appeal within Pol. Code, \$ 996, subd. 6, providing that absence of incum-bent from the state shall render the office vacant; the other being the incumbent under such ict, as well as under section 936 as to compensation during proceedings to contest title to office.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Incum-

hent.l

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by R. P. Benton to enjoin John N. Hunt, as County Treasurer of the County of Los Angeles, State of California, from paying a warrant issued to David B. Lyons for salary as county registrar of voters. David B. Lyons intervened and asked for a peremptory writ of mandate requiring the treasurer to pay. Judgment for the intervener, and the plaintiff and defendant appeal. Affirmed.

A. J. Hill, County Counsel, and Robert B. Murphey, Deputy County Counsel, both of Los Angeles, for appellant Hunt. George L. Greer, of Los Angeles, for appellant Benton. J. Wiseman Macdonald and John Beardsley, both of Los Angeles, for respondent Lyons.

CONREY, P. J. This action was commenced by R. P. Benton, a resident citizen and taxpayer of the county of Los Angeles, to enjoin the defendant, county treasurer, from paying a certain warrant issued to David B. Lyons purporting to be drawn on account of salary due to Lyons as county registrar of voters for a portion of the month of May, 1917. Lyons intervened in this action and asked for a peremptory writ of section 4313 of that County reads as follows:

"A county or township officer shall in no case absent himself from the state for a period of more than sixty days in any one year, and for no period without the consent of the board of supervisors of the county, except when on business for the state: Provided, that in case of illness or urgent necessity, the board of supervisors may, on a proper showing of such illness or urgent necessity, extend the time herein limited, for the absence of any such officer, not to exceed six months." menced by R. P. Benton, a resident citizen

mandate requiring Hunt to pay the amount called for by the warrant: The plaintiff and the defendant have appealed from the judgment, which was in favor of the intervener. The appeals present substantially one and the same question of law, and the facts are admitted to be those set forth in the findings of fact made by the court below.

On August 10, 1915, intervener was duly appointed registrar of voters of Los Angeles county, and on August 11, 1915, he duly qualified by taking his oath of office according to law. For some time prior thereto and until that time, one Thomas McAleer was the registrar of voters of said county. After qualifying, as above stated, intervener demanded possession of the office from McAleer, which demand was refused. Thereupon proceedings in quo warranto were commenced against McAleer by the people on the relation of Lyons to oust McAleer from the office. On January 20, 1916, by judgment of the superior court, it was determined that Lyons was not entitled to said office, and that McAleer was entitled thereto. An appeal was taken to this court from that judgment. On March 1, 1917, the judgment was reversed, and on March 31, 1917, the judgment of this court became final. People v. McAleer, 33 Cal. App. 135, 164 Pac. 425. Thereafter, on May 3, 1917, judgment was entered in the superior court in favor of Lyons who, on the following day, was let into possession of the office and he held the same and performed the duties thereof during the month of May. 1917, and thereafter. From May 21, 1916, to March 21, 1917, Lyons absented himself from the state of California without obtaining the consent of the board of supervisors of the county of Los Angeles or of the Legislature of the state of California, and his absence was not upon business of his office, nor upon business for the state of California, nor for the county of Los Angeles. It is contended by appellants that by reason of such absence of Lyons from the state, being for a period of more than 60 days, the office became vacant, and that therefore he is not entitled to said warrant, and is not entitled to payment

Section 996 of the Political Code declares that an office becomes vacant on the happening of either one of certain stated events; one of which is the absence of the incumbent from the state without permission of the Legislature beyond the period allowed by law. Section 4313 of that Code reads as follows:

Section 936 of the same Code reads as fol-

"When the title of the incumbent of any office in this state is contested by proceedings instituted in any court for that purpose, no warrant can thereafter be drawn or paid for any part of his salary until such proceedings have been finally determined: Provided, however, that this section shall not be construed to apply to any party to a contest or proceeding now pending or hereafter instituted who holds the certificate of election or commission of office and discharges the duties of the office; but such party shall receive the salary of such office, the same as if no such contest or proceeding was pending.

In construing some of the subdivisions of section 996 it has been held that the incumbent of the office, within the meaning of those subdivisions, is not necessarily a person who has actually entered into possession of the office. Illustrations are found in cases where one elected to the office died before the beginning of the term for which he was elected; or where he neglected to file his official oath or bond within the time prescribed by law. There are other cases where vacancy of the office has been declared and enforced on account of the absence of the office holder from the state without legal permission, beyond the period allowed by law. The latter, however, are only instances in which the absentee was both the de jure and the actual incumbent of the office. The precise question presented in the present action is without precedent in any case of which we are aware.

As was said by the Supreme Court in Bannerman v. Boyle, 160 Cal. 197, 116 Pac. 732: "In construing an ambiguous statute, the evil to be cured and the object to be accomplished are proper matters for consideration, and often point clearly to the true meaning and applica-tion of the act."

Manifestly the object of the statute which vacates an office because of the incumbent's absence from the state without the consent required and beyond the period provided by law is that the duties of the office shall be performed by the incumbent, and shall not be neglected by reason of his unlawful absence. The proviso set forth in section 936 was added thereto by amendment in the year 1891. Prior thereto an incumbent of the office was not entitled to the payment of any part of his salary during the pendency of proceedings of contest directed against his title to the office. Apparently being of the opinion that the public interest would be better protected by a different rule, the Legislature then made the amendment under which any party to a contest of such office "who holds the certificate of election or commission of office and discharges the duties of the office" is not prohibited from receiving the salary thereof during the pendency of the contest proceedings. While the quo warranto proceedings against McAleer was pending, he was the party entitled to the salary because he came within the description stated in sec- is barred by the intervention of the public in-

tion 936, and he was "the incumbent" of the office within the meaning of that section.

To arrive at the true meaning of subdivision 6 of section 996, as applied to the facts of this case, it must be read together with section 936. Notwithstanding the final determination that McAleer was not entitled to the office, he remained in a qualified sense the incumbent thereof under section 936, and was so far recognized as the occupant of the office that he was lawfully permitted to collect the salary thereof so long as he discharged the duties of the office, but not beyond the period of pendency of that litigation.

The superior court had determined that Lyons was not entitled to the office, but he was prosecuting his appeal from that judgment, and did not at any time abandon his claim to the office. As found by the court below, intervener during his absence kept in constant communication with his attorneys, and held himself in readiness to return to Los Angeles whenever he should be notified of a decision of the appeal, or that his presence in Los Angeles was necessary; and he would not have left the state of California had not the superior court decided that he had no title to the office of registrar of voters. He actually did return to Los Angeles county before any judgment in the quo warranto proceedings was entered in his favor in the superior court, and before the final determination of his appeal. It is our opinion that the absence of Lyons from the state of California for the time and under the circumstances shown in this case was not the absence of an incumbent within the meaning of the law, and did not cause the office to become vacant.

The judgment is affirmed.

We concur: JAMES, J.; WORKS, Judge pro tem.

HOLMES v. SNOW MOUNTAIN WATER & POWER CO. (Civ. 1812.)

(District Court of Appeal, First District, California. Feb. 26, 1918. Rehearing Denied by Supreme Court April 25, 1918.)

1. APPEAL AND ERBOR 4 1171(6)-REVERSAL -Geounds

A case will not be reversed for mere failure to leave to the jury the bringing in of a ver-dict for nominal damages.

2. ESTOPPEL \$\circ\$93(7) — Injunction—Laches —Diversion of Water.

—DIVERSION OF WATER.

Where plaintiff's predecessor stood by while defendant water and power company expended over a million dollars in the erection of its dam, tunnel and plant, and even assisted in some ways in the work by furnishing commodities which defendant needed in the prosecution of its enterprise and sold part of the land to defendant for a dam site, all of which plaintiff knew when he purchased the land while defendant was in the midst of building the dam to die.

terests; plaintiff having waited four years after the public use began, and until thousands of people have become dependent on it for light and power and necessary water for irrigation.

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by S. O. Holmes against the Snow Mountain Water & Power Company. Judgment for defendant, and plaintiff appeals. Affirmed.

R. M. F. Soto, of San Francisco, for appellant. Thomas & Thomas, of Ukiah, and Pillsbury, Madison & Sutro, of San Francisco, for respondent.

BEASLY, Judge pro tem. In the year 1908 the Snow Mountain Water & Power Company completed a dam on Eel river. in Mendocino county, by which it impounded and diverted a large part of the stream through a tunnel from the watershed of the Eel river to that of Russian river; none of the water being ever permitted to return to the Eel river watershed. The plaintiff, Holmes, owns land on both sides of Eel river about 200 feet below defendant's dam. The bluffs of the river on plaintiff's land are from 40 to 60 feet high; the land itself is broken, and while some acres of it were cultivated to crops, and some other parts of it set to fruit trees, and other portions were capable of being cleared, cultivated, and also irrigated, none of the water of Eel river had ever been used at any time to irrigate any part of plaintiff's land, nor does plaintiff appear to have been at any time previous to the trial in a position to use the river water for irrigation. About four years after the completion of the defendant's dam and the beginning of the diversion of water, plaintiff began this action, in which he asks that the company be enjoined from continuing to divert the water of Eel river, and also asks damages in the sum of \$5,000 which he claims to have already suffered on account of the diversion of the water, and \$25,000 which he claims he will suffer in the future if the diversion is continued.

By the answer of the defendant it appears that the latter is a public service corporation; that the impounded water is used to generate electricity, which is sold to people in Mendocino and Sonoma counties, and is also, after being run through defendant's power plant, used for irrigation in various portions of the upper Russian river valley. These facts do not appear in plaintiff's complaint, the plaintiff proceeding by that instrument against the defendant as if the latter was simply a private corporation trespassing upon his property rights by diverting the water from the river which flows through his property.

The plaintiff in his brief abandons, if he ever asserted, any right to either damages irrigation, and could not possibly use more or injunction by reason of the diversion of than that supplied by the two second feet the flood waters of the stream, saying therein still permitted to run, and that there is no

that he is not claiming the flood waters of the Eel river. This narrows considerably the questions involved in this case. The evidence shows that of the 240 cubic feet per second of water which the defendant diverts all but 10 cubic feet per second is impounded winter flood water; that the winter flow of the river is about 50,000 cubic feet per second, which the dam accumulates in a twomile reservoir for use in the dry season; that the natural flow during the dry season is but 10 cubic feet per second, thus reducing the amount of water impounded after subtracting the impounded flood water.

The decree which the court entered secured to plaintiff two second feet thereof, leaving to the defendant the right to impound eight second feet of the ten-the normal flow of the river at times when not in flood. The evidence showed, and the court found, that these two second feet were ample for all purposes of plaintiff; and, indeed, it is plain that this amount was a superabundance for his needs; and it is also found that the remaining eight second feet as well as the flood waters were waste waters; that no part of the water of Eel river is ever used for irrigation; that the defendant has never diverted any of the water of Eel river other than the waste waters thereof, and only such of the waste waters as had been at all times in the past and ever will be at all times in the future incapable of any reasonable or practical use in connection with the lands of plaintiff described in the complaint, or any part thereof; and that the plaintiff has never been and never will be damaged in any way by reason of any of the acts of the defendant complained of.

At the beginning of the trial the court impaneled a jury, and when the plaintiff rested his case discharged this jury from further consideration of the case. The only purpose for which the jury could have been impaneled was for the assessment of plaintiff's damages. The plaintiff contends that the dismissal of the jury practically amounted to a nonsuit; and that, as he had established his claim for damages, the case should be reversed for this reason.

[1] The evidence introduced by plaintiff to support his claim for damages consisted in the statements of five different witnesses to the effect that the arable land of plaintiff without irrigation was worth from \$5 to \$10 an acre, and that with irrigation it would be worth from \$75 to \$150 an acre; but the strength of this testimony vanishes when considered in the light of the foregoing facts, namely, that the amount of water left by defendant in the river was ample for plaintiff's uses, that plaintiff had never at any time used any of the water of Eel river for irrigation, and could not possibly use more than that supplied by the two second feet still permitted to run, and that there is no

evidence that the plaintiff had been injured Northern Cal. Power Co., 160 Cal. 699, 117 in any way by the diversion of the water through destruction of his crops or failure to grow crops. Under the facts of this case, no injury could be done plaintiff by the diversion of that portion of the water of this stream which he could not possibly use, leaving to him a sufficient flow of the stream for all his possible present and future needs. Miller v. Bay Cities Water Co., 157 Cal. 256, 107 Pac. 115, 21 L. R. A. (N. S.) 772; Cohen v. La Canada W. Co., 151 Cal. 680, 91 Pac. 584, 11 L. R. A. (N. S.) 752; San Joaquin v. Fresno Flume Co., 158 Cal. 626, 112 Pac. 182, 35 L. R. A. (N. S.) 832; Stratton v. Mt. Hermon, etc., 216 Mass. 83, 103 N. E. 87, 49 L. R. A. (N. S.) 57, Ann. Cas. 1915A, 768. We infer that the plaintiff recognizes this situation, although he does not expressly say so, for the reason that he argues very earnestly that in the condition of the record he was entitled to at least nominal damages under his case made in chief, and that it was error on the part of the court to dismiss the jury. But conceding that it is so, this court would not reverse this case for a mere failure to leave it to the jury to bring in a verdict for nominal damages.

[2] The plaintiff's predecessor in interest stood by while \$1,300,000 of the defendant's money was being expended in the erection of its dam, tunnel and plant. He even assisted in some ways in the work by furnishing commodities which the defendant needed in the prosecution of its enterprise, and he sold part of his land to the defendant for a dam All this the plaintiff knew when he purchased the land, which he did while the defendant was in the midst of its work of building the dam and preparing to divert the waters of the river. It is impossible that he did not know that the purpose of this enterprise was for a public use, that the defendant was about to inaugurate a public service, and that the waters of the river when diverted would be used for the purposes to which it was afterwards put. In view of these facts, and of the fact that he waited four years after the public use began, and until thousands of people had become dependent upon it for light and power and necessary water for irrigation, his right to an injunction is barred by this intervening of the public interest. 1 Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35; Miller & Lux y, Enterprise Co., 169 Cal. 415, 147 Pac. 567 Fresno, etc., Co. v. Southern Pacific Co., 135 Cal. 202, 67 Pac. 773; Southern Cal. Ry. Co. v. Slauson, 138 Cal. 342, 71 Pac. 352, 94 Am. St. Rep. 58; Crescent Canal Co. v. Montgomery, 143 Cal. 248, 76 Pac. 1032, 65 L. R. A. 940; Newport v. Temescal Water Co., 149 Cal. 531, 87 Pac. 372; Barton v. Riverside

Pac. 906, 36 L. R. A. (N. S.) 185; Burr v. Maclay, etc., Co., 160 Cal. 268, 116 Pac. 715.

This disposes of the case, and it will not be necessary therefore to notice numerous other points made by the defendant in support of his judgment.

The order denying the motion for a new trial is affirmed.

We concur: LENNON, P. J.; KERRI-GAN, J.

KEIPER v. PACIFIC GAS & ELECTRIC CO. et al. (Civ. 1784.)

(District Court of Appeal, Third District, California. Feb. 22, 1918. Rehearing Denied by Supreme Court April 22, 1918.)

1. MUNICIPAL COBPORATIONS \$\infty 705(11) - PROXIMATE CAUSE-INDEPENDENT CONCUB-BENT CAUSES.

Where an owner negligently left his automobile unattended on street car tracks and a street car was negligently run into it, catapulting it against one working at the curb of the street, the owner of the automobile was liable for the injuries.

2. Negligence \$3-Last Clear Chance.
Where there is no contributory negligence,
the doctrine of last clear chance does not arise.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Action by Jacob Keiper against the Pacific Gas & Electric Company, a corporation, and Albert Elkus. Judgment for plaintiff against the last-named defendant, and such defendant appeals. Affirmed.

James Alva Watt, of San Francisco, for appellant Elkus. L. T. Hatfield, of Sacramento, and Stanley Moore and John P. Coghlan, both of San Francisco, for defendants Pacific Gas & Electric Co. C. E. McLaughlin, of San Francisco, and Frank J. O'Brien, of Sacramento, for respondent.

HART, J. This is an action for damages for personal injuries. The jury returned a verdict in favor of plaintiff for \$3,500 against the defendant Elkus, but not against the defendant Pacific Gas & Electric Company. Judgment was entered accordingly, from which defendant Elkus appeals.

The evidence discloses that the accident and the injury complained of occurred substantially as set forth in the complaint, as follows:

"That about the hour of 9 o'clock a. m. on said 6th day of December, 1913, said defendant Albert Elkus, without any cause or reason for so doing, other than his desire to step across the street into a garage on K street in the city of Sacramento, left an automobile, owned and operated by him, standing unoccupied and unattended upon and across car lines owned and operated by said defendant corporation on K. street, at a point about 150 feet east of the intersection of K and Thirteenth streets in said city; that said automobile was so left standing unoccupied and unattended without first locking or making it Co., 155 Cal. 509, 101 Pac. 790; Gurnsey v. fast, or effectively setting the brakes thereon

and stopping the motor thereof; that no emergency caused the said Elkus to leave said automobile so standing unoccupied and unattended, nor was said automobile stopped and left unat-tended and unoccupied for the purpose of al-lowing another vehicle, or pedestrian, to cross its path. That said automobile was a largeits path. That said automobile was a large-Lozier, five-passenger car, the day was bright and clear, and any person approaching the place where it was standing, from any direction on K street, could, by using ordinary care and diligence, have easily seen said car so left standing on said K street as aforesaid. That standing on said K street as aforesaid. That while said automobile was so standing upon K street as aforesaid, plaintiff was at work near the curb line in front of his home at No. 1316 K street, and a street car owned, operated and controlled by the defendant Pacific Gas & Eleccontrolled by the defendant Pacinc Gas & Electric Company, a corporation, was proceeding easterly on car tracks on said K street across which said automobile was standing, and the agents and employés of said defendant corporation controlling and operating said street car could with reasonable diligence have seen said automobile standing upon said K street and across said tracks upon which said street car was running. That the said defendant Pacific Gas & Electric Company, a corporation, its Gas & Electric Company, a corporation, its agents, servants, and employes, so negligently and carelessly operated and ran said street car, proceeding easterly on said K street as aforesaid, that they failed to stop said street car or avoid a collision with said automobile, and said street car continued on its course with great speed until it ran into and struck said automobile with such force that said automobile was driven and forced from the point where it was standing to the point where aid plaintiff was standing to the point where said plaintiff was at work, and said automobile, so driven and forced, struck plaintiff with great violence, throwing plaintiff against an iron electrolier post, and by means thereof plaintiff was greatly injured. \* \* \*"

The appellant demurred to the complaint on the general ground of insufficiency of facts, and on the further ground that there is a misjoinder of parties defendant. The demurrer was overruled, and the principal question submitted by this appeal arises upon the action of the court in thus disposing of the demurrer and in denying the appellant's motion for a nonsuit, the claim being that neither the complaint nor the proofs disclosed that the appellant's negligence was the proximate cause of the accident and injury complained of.

As stated, the evidence shows that the accident occurred substantially as alleged in the portion of the complaint above quoted herein, and if, therefore, the complaint states a cause of action for negligence against the appellant, then, of course the motion for a nonsuit was properly disallowed. As the consideration of the ruling on the demurrer necessarily involves a consideration of the action of the court in denying the motion for a nonsuit, it is not deemed out of place to present here a brief outline of the facts as they were established by the evidence. This may the more conveniently be done by quoting from the appellant's opening brief, which contains an accurate statement of the evidential facts, as follows:

K street, in the city of Sacramento, and after crossing Thirteenth street, brought his machine to a full stop upon and across the east-bound to a full stop upon and across the east-bound car tracks of the defendant Pacific Gas & Electric Company, at a point just in front of the tire store of the Fisk Rubber Company, about 150 feet east of the intersection of K and Thirteenth streets. Expecting to be but a moment about his business, he left his automobile standing where it was, and went into the Fisk store to leave orders regarding some tires and tubes. While Elkus was in the store a street car operated by the defendant Pacific Gas & Electric Company approached the intersection of K and Company approached the intersection of K and Thirteenth streets in an easterly direction and at a good rate of speed crossed the intersecting street without stopping, crashed into the machine of defendant Elkus, catapulting it in a diagonal direction from 50 to 70 feet towards the curbing where the plaintiff Keiper was cleaning the sidewalk in front of his home. Keiper was caught between the machine and an electrolier near which he was working, and was badly crushed and bruised, sustaining a severe fracture of the right leg."

The appellant concedes that he was guilty of negligence in his act of placing his automobile upon the street car tracks and permitting it to remain standing thereon, but contends that such negligence on his part ceased the instant that the street car of his codefendant carelessly and negligently ran into and against his automobile; that his negligence was broken by the electric company's negligence, which was an independent, intervening, and the proximate cause of the damage, wholly unconnected with him. Counsel for the appellant, in their brief, declare and argue that, so far as the facts alleged in the complaint show, the automobile "would have stood upon the car tracks in the place where Mr. Elkus left it until its gasoline tank went dry and its tires rotted upon their rims, without harm or injury to the innocent bystander, unless some other cause, wholly unconnected with the defendant Elkus had intervened to cause the harm," and then, after referring to the allegations of the complaint describing the manner in which the street car jammed into and collided with the automobile, and to the allegation that the day "was bright and clear," and asserting that the defendant electric company "could with reasonable diligence have seen the automobile standing upon K street and across the tracks upon which said street car was running, concluded:

"It thus conclusively appears that without the active intervening negligence of the \* \* \* electric company no accident or injury could have occurred to the plaintiff. The automobile was inert and harmless in the position where it stood, and was incapable of producing, or even contributing, to the happening of the accident to the plaintiff."

[1] The position of the appellant as it is thus stated is wholly devoid of merit. We are unable to reconcile with a rational view of the facts pleaded and proved the position of the appellant that, although it was negli-"The accident occurred at about 9 a. m. on December 6, 1913. Defendant Elkus was driving on the street car tracks, such negligence ing his automobile in an easterly direction on ceased when the street car jammed into the gence on his part to leave his machine stand

We cannot conceive how the proposition can logically be worked out. If it was negligence to leave and allow the automobile to remain standing on the street car tracks in the first instance, upon what logical hypothesis may it be said that that negligence did not continue until the accident and injury which the collision of the car with the automobile produced? It is true that "the automobile was inert in the position where it stood," and was itself, as it stood on the tracks, "incapable of producing, or even contributing, to the happening of the accident to the plaintiff," as counsel assert; but, with no design to be facetious, we remark that that argument implies that we are dealing here with the machine itself. and not with the act of the appellant in placing it where he had no right to place it and allowing it to remain standing, and where, as so standing, it was in a position to do harm. Indeed, one of the difficulties with which appellant is beset in this case, and which he was required to overcome if he would show himself legally immune from responsibility for the damage, lay in the very fact that the machine was allowed by him to remain inert and unattended by a driver or any other person capable of removing it from the position of danger in which it had been carelessly placed and left by the appellant. It is, of course, obviously true, as counsel declare, that but for the negligence of the defendant electric company the accident and its disastrous result would not have happened. But it is equally obvious that the damage suffered by the plaintiff would not have been produced but for the negligence of the appellant. Thus it is clear that the case as presented is essentially and peculiarly one where the injury complained of was produced by the concurrence of two separate, distinct and independent acts of negligence on the part of two separate and different persons. In other words, it is a case where the injury could not and would not have been produced by the act only of one of the two tort-feasors. In fact, quite obviously, the act of the electric company could not have occurred but for the previous act of negligence of the appellant. It required the two separate and distinct acts, operating simultaneously and concurrently, to produce the damage. Hence it cannot logicaly be said that the negligence of the appellant was not "an active, continuous, contributing cause, and therefore at least a necessary element of the proximate cause of the injury." Spear v. United Railroads, 16 Cal. App. 659, 117 Pac. 956.

In such a case both parties through whose direct joint agency the injury has been sustained are joint tort-feasors and may be sued either jointly or separately.

The rule applicable to such a case as is v. Los Angeles G. & E. Co., 158 Cal. 499, 111 disclosed by this record was applied in Pastene v. Adams, 49 Cal. 87, 90, a case quite Rep. 134; Williams v. S. F., etc., Ry. Co., 6

similar in its general features to the one at bar. That case answers the contention of the appellant that his negligence became passive and was overlapped by that of the electric company when its car collided with his automobile. There the defendant, a lumber company, had piled three tiers of timbers, about 12 inches square, between gangways leading to the street on which the business of the company was maintained. The piling of the timber was so carelessly done that a wagon passing through one of the gangways came in contact with one of the projecting timbers, causing the pile to fall upon the plaintiff, who was at the defendant's office to purchase lumber, with the result that his leg was severely injured. The argument was that if, as was contended was true in that case, "a subsequent and distinct cause, intervening after that for which the defendant is responsible, had ceased to act, has been productive of injury, and but for that no injury would have occurred, the defendant is not responsible." The Supreme Court, denying the soundness of that doctrine as applied to the facts of that case,

"If the timbers were negligently piled by the defendant, the negligence continued until they were thrown down and (concurring with the action of Randall) was a direct and proximate cause of the injury sustained by the plaintiff."

In Tompkins v. Clay Street Railway Company, 66 Cal. 163, 4 Pac. 1165, two cars, owned by two different companies, collided at the corner of Clay and Polk streets, in the city of San Francisco. The court, replying to the contention that there was no joint liability, says:

"In Pennsylvania, it seems to have been held that when a passenger on a carrier vehicle is injured by a collision resulting from the mutual negligence of those in charge of it and another party, the carrier alone must answer for the injury. \* \* \* But the weight of authority is otherwise, and is to the effect that, if the negligence of the managers of both vehicles contributes to the injury, the party injured may recover from the proprietors of either or both. Wharton on Negligence, p. 395, and cases cited. Where both are sued, the plaintiff may ordinarily dismiss as to either; and, if it turn out at the trial that one was not guilty of negligence, he may, on sufficient evidence, take a verdict against the other."

But it is unnecessary to multiply herein authorities, of which there are many in this and other jurisdictions, upon a proposition so thoroughly settled in California. It is sufficient to cite the following in addition to those above considered: Barrett v. S. P. Co., 91 Cal. 303, 27 Pac. 666, 25 Am. St. Rep. 186; Doeg v. Cook, 126 Cal. 218, 58 Pac. 707, 77 Am. St. Rep. 171; Horgan v. Jones, 131 Cal. 521, 63 Pac. 835; Kimic v. S. J. & L. G., etc., Ry. Co., 156 Cal. 379, 104 Pac. 986; Muller v. Hale, 138 Cal. 165, 71 Pac. 81; Heath v. Manson, 147 Cal. 694, 82 Pac. 331; Merrill v. Los Angeles G. & E. Co., 158 Cal. 499, 111 Pac. 534, 31 L. B. A. (N. S.) 559, 139 Am. St. Rep. 134; Williams v. S. F., etc., Ry. Co., 6

Railroads, 16 Cal. App. 659, 117 Pac. 956; and many other cases and authorities unnecessary to name. But we do not understand counsel for the appellant to contend that there is not joint liability where joint or concurring separate and independent acts of negligence constitute the proximate cause of the damage. Their position is, as seen, that the negligence of the appellant was not an active contributing cause of the injury. We have, however, already shown the utter fallacy of this position, and, as further showing that that theory is wholly unsupportable, we call special attention to the case, already cited, of Spear v. United Railroads, which bears a marked similarity in all essential particulars to the case here. The case of Williams v. S. F. & N. W. Ry., cited above, is, as to the general nature of the facts, also noticeably similar to this case. In that case, the plaintiff's wife was driving an excitable horse along a public highway upon a portion of which the defendant had placed, and for a long time previously to the accident had maintained, and at the time of the accident still maintained, a woodpile. The horse became frightened at the noise made by a passing lecomotive traveling over the defendant's railroad track, situated near and running parallel with the highway, and started to run. The deceased was unable to control or manage the animal, and while the horse was running at a lively rate of speed the vehicle to which the horse was attached and in which the deceased was riding collided with said woodpile, the result of the force of the impact being to throw her with such violence to the ground that she sustained fatal injuries. It was argued in that case that the placing of the obstruction in the public highway was not the proximate cause of the damage. The court said:

"The defendant was primarily at fault in maintaining the obstruction upon the highway.

\* \* "There is always \* \* \* ground for apprehending accidents from obstructions upon highways, and any person who wrongfully places them there or aids in so doing must be held responsible for such accidents as may occur by resson of their presence." \* \* The rule is reason of their presence.' \* \* The rule is that the defendant is answerable in law for negligence proximate in causal relation to the damage; or, in order words, it is liable if the obstruction for the existence of which it is responsible was the direct cause of the accident, with its resulting damages.'

So here. The appellant was confessedly primarily at fault in placing and leaving his machine in a place where it would necessarily operate as an obstruction to the passage of the cars of the electric company over and along its track; and, as above declared, the negligence involved in that wrongful act necessarily continued so long as the obstruction remained and until it had contributed to the damage which could not have occurred but for said obstruction.

Cal. App. 718, 93 Pac. 122; Spear v. United; and that therefore the motorman of the street car could, by the exercise of ordinary diligence, have seen the automobile on the car tracks in time to have avoided the collision, is a proposition which involves the doctrine of the last clear chance or opportunity. But, while counsel for the appellant undertook to invoke that doctrine in their opening brief, they expressly abandoned that position at the oral argument, and conceded that that doctrine has no application to this case. Of course, as has often been pointed out by the cases, and as is plainly true from the very reason of the rule, the doctrine of the last clear chance necessarily implies contributory negligence in the plaintiff or the Cordiner v. Los Angeles injured party. Traction Co., 5 Cal. App. 400, 91 Pac. 436; Spear v. United Railroads, 16 Cal. App. 655, 117 Pac. 956. There is no pretense, nor could such a claim well be advanced in this case, that the plaintiff here was guilty of contributory or any negligence.

> The irresistible conclusion from the facts of this case as they are alleged in the complaint, and as the appellant admits that the evidence shows them to be, is that the appellant's act was one of the procuring, active. proximate causes of the injury complained of: and that the said act involved a high degree of negligence, there can be no question, since the appellant himself testified that he was at all times aware of the fact that street cars passed over the tracks upon which he left his automobile standing at frequent intervals during the day.

> It follows from the foregoing considerations that the complaint states a cause of action for negligence against the appellant, that the demurrer was therefore properly overruled, and that the disallowance of appellant's motion for a nonsuit was proper.

> The court charged the jury in accordance with the theory that the appellant's negligence was an active, continuing, and contributing proximate cause of the injury. The charge in this respect is criticized and declared by the appellant to be erroneous. The above discussion and conclusion dispose of this assignment.

> There are no other questions in the case requiring notice.

The judgment is affirmed.

CHIPMAN, P. J.; BUR-We concur: NETT, J.

JESUS MARIA RANCHO V. SOUTHERN PAC. CO. (Civ. 2030.)

(District Court of Appeal, Second District, California. Feb. 25, 1918.)

1. RAILBOADS @== 443(6) - KILLING CATTLE CONDITION OF FENCE - NOTICE - SUFFI-CIENCY OF EVIDENCE.

it for said obstruction.

In an action against a railroad for killing
[2] The suggestion that the day was clear, cattle on its track at a point where wind-drifted

sand had covered the right of way fence so that ! the cattle were enabled to go from plaintiff's tand upon the railroad's right of way, evidence as to whether the railroad had such actual or constructive notice of the condition of the fence at the point of entry that it was chargeable with negligence for not having restored it to proper condition held insufficient to sustain finding for plaintiff.

2. RAILBOADS &= 412(1) - KILLING LIVE STOCK-MAINTENANCE OF FENCES-REASON-ABLE DILIGENCE.

A railroad is bound to use reasonable diligence in keeping its right of way fences in re-pair, and it need not resort to extraordinary means, such as the maintenance of a special pa-trol, to insure that its fences will not be broken or that they will be promptly repaired if broken.

3. Railboads €==412(4) - Injubies to Live STOCK-DUTY TO FENCE-PERFORMANCE.

Where a railroad's right of way traversed plaintiff's property where the winds shifted sand about and sometimes covered the right of way fences, permitting the passage of cattle, the ex-ercise of reasonable diligence by the railroad to properly maintain its fences through plaintiff's property did not require resort to unusual means, the building of abnormally high fences, for instance, because of the unusual and shifting character of the surface; there being long periods of time during each year when the sand was not disturbed nor much moved

4. RAILBOADS \$== 443(6) - KILLING CATTLE NEGLIGENCE-SUFFICIENCY OF EVIDENCE.

In an action against a railroad for killing cow, and consequently starving her calf, which cow passed over the railroad's right of way fence by means of wind-drifted sand, evidence held sufficient to justify the trial court's finding that the cow was killed through the railroad's negligence.

5. Railroads 43(2) — Killing Cattle — Proximate Cause — Sufficiency of Evi-DENCE.

In such action, evidence held to justify finding in effect that the loss of the calf was the proximate result of the railroad's negligence which resulted in death of the cow.

6. RAILBOADS \$\infty 443(6) - KILLING CATTLE -NEGLIGENCE-SUFFICIENCY OF EVIDENCE.
In an action against a railroad for killing a

heifer on its right of way, which heifer came there by passing over the right of way fence by means of a sand dune, evidence held sufficient to support finding of the railroad's negligence,

7. RAILROADS 4=412(4) - DUTY TO FENCE BLOWN SAND-STATUTE.

BLOWN SAND—STATUTE.

The duty of a railroad to maintain through plaintiff's property such fences as will keep cattle from entry upon the right of way is absolute under Civ. Code, § 485, requiring railroads to maintain good and sufficient fences, although the sand on plaintiff's property is freely blown shout by the wind even to the roint of covering about by the wind, even to the point of covering the fences, a condition which might be put an and to by plaintiff's setting out certain plants which grow in sand.

9. RAILBOADS 4=443(6) — KILLING CATTLE
—NEGLIGENCE—SUFFICIENCY OF EVIDENCE.
In an action against a railroad for killing
four cows on its right of way, which cows entered the right of way through a breach in the fence caused by the throwing down of the gate and of part of the fence proper, evidence held insufficient to support the finding of negligence on the part of the railroad, indicating rather that the accident resulted through giving way of part of the fence under the pressure of many cattle, though not unsuited for the task imposed upon it under ordinary conditions.

Appeal from Superior Court, Santa Barbara County; Robert M. Clarke, Judge.

Action by the Jesus Maria Rancho, a corporation, against the Southern Pacific Company, a corporation. From judgment for plaintiff, and an order denying defendant's motion for new trial, the latter appeals. Affirmed in part and reversed in part.

H. P. Starbuck and Canfield & Starbuck. all of Santa Barbara, for appellant. C. Kelley Hardenbrook, of Lompoc, for respondent.

WORKS, Judge pro tem. This is an action for damages for the loss of cattle killed by the appellant's railroad trains. The complaint sets up four causes of action. The first of these seeks to recover for the loss of two cows on January 25, 1912; the second for the loss of four cows on September 6. 1912; the third for the loss of a cow and calf on April 2, 1913; and the fourth for loss of a yearling heifer on April 28, 1913. Judgment was rendered in favor of respondent on all of the causes of action, and the appeal is from the judgment and from an order denying appellant's motion for a new trial.

While all four causes of action are based upon the alleged negligence of appellant in failing to maintain proper fences along its right of way, three of them, the first, third, and fourth, give rise to certain novel questions and, in a measure, may be considered together. The points presented under the second cause of action will be reserved for separate treatment in a later portion of the opinion.

The cattle were all killed near the Pacific Ocean, at a place where the country is composed of sand, which shifts and changes into banks and dunes at different points with the blowing of the winds. There is much evidence in the record as to the nature of these recurring mutations in the surface of the sand; suffice it to say that the changes are practically always in progress at the times when the winds blow with any great degree of force, and that they are amazingly sudden in the days and seasons when the winds blow heavily. The fences along the appellant's right of way are frequently buried by the dunes, but the points at which they are covered may change from time to time, as the winds are strong enough to bring about the change. Thus a part of the fence which is invisible on one day may be entirely freed from its covering a few days later by the prevalence of a strong wind. The three causes of action which are now under consideration arose through the claim of respondent that the cattle in question in them procured access to appellant's right of way over its fences at points where they were covered by the sand, it being asserted in the evidence that an entrance was effected in

this manner from the adjoining property of the respondent, which owns the lands on either side of appellant's tracks through the country we have described.

The first contention of the appellant is that the evidence is insufficient to show negligence on its part in the matter of its duty. under section 485 of the Civil Code, to maintain fences along its right of way, no claim being made that the cattle were not actually killed by appellant's trains. There are two questions involved in this contention. The first is. Did the cattle enter the right of way in the manner claimed by the respondent? If they did, the second question is, Did the appellant have such notice, either actual or constructive, of the condition of the fence at the points of entry that it is chargeable with negligence for not having restored it to a proper condition? In determining these questions, each of the three causes of action must be considered separately.

The first cause of action arose out of an occurrence of about January 25, 1912, and involved the loss of two cows. The witness Graham testified to having found the carcasses of the cows on the right of way and to having traced their tracks backward to a point at which they passed over the fence on the surface of the sand from the west side of the appellant s railroad track. This evidence clearly disposes of the question as to the manner in which the cattle entered the right of way, but the question of notice to the appellant of the condition of the fence at the point of entry is in a very different situation. Graham began to work for respondent on January 15, 1912, ten days before the cows were killed. He testified that "in January" the fence was covered with sand at a point about 1,000 feet south of a certain crossing fence, which point he fixes as the place of entry of the cattle: but the slight effect of his very general statement as to time is entirely nullified by his testimony on cross-examination, when he is addressing himself to the same subject, "I don't know that I had seen that fence at all previous to January 25, 1912." The only other witness for plaintiff was one Walker, who resided on respondent's property from October, 1911, to the end of 1913. He testifies on this subject:

"I particularly noticed the fence when I went there being in a very poor condition at this one particular spot about 1,000 feet south of this crossing, one-third of a mile or one-fifth of a mile, \* \* \* covered with sand in some places. The fence was in very poor condition all the way from the point south one-fifth of a mile. \* \* It was down in some places; the wire was all rusted and broken in places; the wire was all rusted and broken in places; the wire was all rusted and broken in places; the wire was all rusted and broken in places; the was covered over with sand in places, not in many places. One particular place was covered for quite awhile. \* \* I would see this fence two or three times a week; sometimes I wouldn't see it for probably two months. \* \* \* On an average I would see it \* \* \* once a month, \* \* \* and the condition of the fence was the same each time I saw it up to the time they built the new fence."

One of appellant's witnesses testified that no new fence was built before 1913.

[1-3] Notwithstanding the testimony of both Graham and Walker, it is quite pessible that the pile of sand by means of which the two cows crossed over the fence had been deposited by the wind but a few hours before their entry into the right of way. Graham had been on the ranch only ten days, and could not say that he had ever seen the place in question until the moment when, after finding the dead cattle, he back-tracked their course to the place of entry over the heapedup sand. Walker's testimony is quite as far afield. The point at which he says the fence was covered may not have been the same point at which the cattle crossed it. He says it was 1,000 feet, a third of a mile, a fifth of a mile—that is, 1,000 feet, 1,760 feet, 1,056 feet-south of the crossing. Moreover, sometimes he did not see even the place he had in mind oftener than once in two months. Therefore he may not have seen it for a period of two months next preceding January 25th. It is to be noted, also, that the only statement of Walker which could possibly bear upon the present question was this:

"The condition of the fence was the same each time I saw it up to the time they built the new fence."

It is quite certain, however, that he refers to the condition of repair of the fence itself by this language, and not to its being covered with sand. This seems to be true for two reasons: First, most of his testimony preceding the statement has to do with the bad state of the fence itself, not with the matter of sand; second, he had already said, as to sand, "The fence was covered over with sand in places, not in many places. One particular place was covered for quite a while." If the rules of law in such an action as the present are the same as in the ordinary action for damages caused by negligence in not maintaining right of way fences, then the finding of negligence under the first cause of action is unsupported by the evidence, for the reasons stated. But the respondent contends that they are not the same. In all such cases, a railroad company is bound to use reasonable diligence in keeping its right of way fences in repair, and it need not resort to extraordinary means, such as the maintenance of a special patrol, to insure that its fences will not be broken, or that they are promptly repaired, if broken. Johnson v. Southern Pacific Co., 11 Cal. App. 278, 104 Pac. 713; Wills v. Southern Pacific Co., 31 Cal. App. 723, 161 Pac. 501. The respondent contends that the exercise of reasonable diligence by the appellant for the purpose of properly maintaining its fences through the property of respondent requires a resort to unusual means because of the unusual and shifting character of the country at that place. In other words, respondent contends

that what is reasonable diligence in any case of this character depends upon the conditions present in the case. This latter statement is undoubtedly correct. It is readily perceived that conduct which might answer the call for reasonable diligence in one case, could be entirely inadequate in another. The respondent does not say that the appellant should have maintained a constant patrol, or that it should have built its fences higher, where its road passes through respondent's ranch, but the contention amounts to something like that. We might possibly agree with this position if the evidence showed that the shifting of the sands in a material degree occurred daily, or weekly, or even after intervals of longer duration: but we do not understand the evidence as going to any of those extremes. Taking the entire showing made by the record, there may be periods of long duration, during each year, when the surface of the sands is not disturbed or moved to such a degree as to render the country different, in the respects material to this controversy, from an ordinary tract of land. Under all the evidence, we must hold that the reasonable diligence required of appellant was of a similar character to that required in what we have called the ordinary fence case, and that there is no showing that the appellant did not exercise such diligence. There should have been no recovery on the first cause of action.

[4] The third cause of action was for the value of a cow and her calf. The cow was killed on or about April 2, 1913. The claim of respondent is that the calf was starved because of the loss of the cow, which was suckling it at the time, and that the appellant is therefore liable for its loss, along with that of the mother. The testimony of Graham plainly shows that the cow entered the right of way by means of a sand heap which covered the fence at a point about a thousand feet south of the crossing fence mentioned in his testimony in support of the first cause of action. He also testified:

"To my knowledge this fence at this point had been covered with sand more or less all the time from January 25, 1912, up to April 2, 1913. By more or less I mean the sand drifts with the wind. It would be covered up sometimes deeper than it would at others. Portions of it was covered at all times."

It is true that on cross-examination he said it might have been nearly as much as 30 days before April 2d that he had last seen the sand at the point in question; but this did not entirely break down the effect of the statement above quoted from his direct examination, which showed a practically constant condition at the very point where the cow entered the right of way. His testimony was much more satisfactory upon the point than was the testimony of Walker in support of the first cause of action. The evidence was sufficient to justify the finding of

the trial court that the cow was killed through the negligence of the appellant.

[5] There is a contention made by appellant as to the loss of the calf. It is asserted that the respondent should have nourished the little animal by artificial means after the death of the mother. On this point Graham testified:

"The calf wandered away and starved and disappeared. We couldn't feed wild calves; we don't try to because a calf at that age won't eat. They are wild and afraid of everything. It was too young. It's mother's milk was what it needed."

As we have already determined, under the evidence, that the death of the mother resulted from the negligence of the appellant, this testimony of Graham is sufficient to justify the finding, in effect, that the loss of the calf was the proximate result of that negligence.

[6] The fourth cause of action was based upon the loss of a yearling heifer on or about April 28, 1913. The testimony of Graham shows that the animal crossed the fence by means of a sand dune which covered it. Speaking of the point at which the entry into the right of way was effected, Graham says:

"The fence at that point a little previous to that time had been repaired slightly with boards and wires, but the wind had drifted the sand over the fence as before in two or three places, and it was in such a condition that cattle could pass in and out."

A little later, speaking of the point at which the heifer had entered the right of way, he said:

"That is where I describe the fence as being covered with sand."

Some of his testimony as to the fencesand question which we have mentioned in our treatment of the third cause of action also bore upon the fourth. The finding of negligence as to the latter cause of action is supported by the evidence.

[7] The appellant insists that the respondent has at all times had in its own hands the power to protect itself from losses such as those upon which the first, third, and fourth causes of action are based. It is asserted that we will take judicial notice of the fact that certain plants, which grow in sand, will prevent sand drifts as a result of wind action; and, as the appellant has no right to enter upon the lands of the respondent for the purpose of setting out such plants or for the purpose of preventing in any manner the sand from being cast toward its right of way, we are asked to decide that it was incumbent upon the respondent itself to set out the plants mentioned, under a doctrine quoted from Salmond on Torts, section 9, pp. 31, 33, as follows:

cow entered the right of way. His testimony was much more satisfactory upon the point than was the testimony of Walker in support of the first cause of action. The evidence was sufficient to justify the finding of of themselves instead of trusting to the vigilance

of others, and to secure this end the law de- were huddled against the gate and the fence prives them of any remedy for accidents which they might have avoided with due care. From motives of public policy the law refuses to help those who might have helped themselves."

The principle stated can have no application here. Section 485 of the Civil Code provides that:

"Railroad corporations must make and maintain a good and sufficient fence on both sides of their track and property

-and they are made liable in damages, by the same section, for a failure to make or maintain such fences. For us to hold that the appellant is discharged from the operation of this statute under the facts of the present case would be for us to legislate on this subject, for such a determination would amount to a repeal of the statute pro tanto. We can relieve the appellant of the hardship of the present situation in no such manner especially as to do so, we should be compelled to shift to the respondent the burden which the statute, by its very general terms, imposes upon the appellant. The danger from these fleeting sands exists only because of the presence of the railroad through the respondent's property, and the duty of the appellant to maintain such fences, through that property, as will keep respondent's cattle from entry upon the right of way, is within both the letter and spirit of section 485, notwithstanding the migratory character of the sand.

[8] We come now to a consideration of the second cause of action, which was based upon the loss of four cows. The animals entered upon appellant's right of way through a breach in its fence caused by the throwing down of a gate and of a part of the fence proper. The question presented is whether the gate and fence gave way because of defects in the gate, or in the posts from which it opened, or whether, being in proper condition, it was thrown down by the crowding of a great number of cattle against it. The loss of the four cows occurred at night. During the day preceding, the gate, which was on a rather steep hillside, had been used for the purpose of "crossing" a band of 500 cattle from one side of the railroad track to the other. Two calves belonging to cows in the herd were left behind, and there were also cattle in pasture on the other side of the railroad tracks after the crossing of the herd. The crossed herd made a great noise bellowing, in the neighborhood of the gate, during the night, and the assumption is that they were restive and were anxious to get across the tracks to the calves or to the cattle on the other side. No one saw the cows get upon the right of way, but it is not disputed that they entered at or near the gateway. The evidence does show, however, that, on the evening before, the crossed cattle

adjacent to it. The gate did not open by means of hinges, but it was suspended at the end opposite the latch end, upon crosspieces which connected two posts standing side by side. It had been closed the night before, upon the conclusion of the work of crossing the cattle.

The witness Graham testified to certain defects in the gate itself. It hung, at the latch end, in such a way that, if a slight pressure were exerted against it, it would sag open to the extent that cattle might pass through at the sagged end. There is nothing in the evidence to indicate that either of the posts at the opposite end of the gate was defective in any way, or was too small to answer the purpose of its installation. In short, the evidence contains nothing as to the condition of either of these posts at any time before the loss of the cattle. Considering Graham's testimony as to the tendency of the latch end of the gate to sag open under pressure, the situation after the cattle had been killed was most peculiar. The gate was on the ground, but the latch was unbroken, although it was "pulled out" of the fence proper. Along with the gate, the panel of fence at the end of the gate opposite its latch end was also down and one of the two posts which supported the gate at that end by means of crosspieces was broken down. It seems apparent, from this description of the condition of the fence and gate, that the entry of the cattle into the right of way was caused by the breaking of the post. Whether it was broken through the crowding of the cattle, whether that crowding was caused by a desire to recross the railroad tracks for the purpose of rejoining the calves or cattle on the other side, or whether the post gave way because of the exertion of some force upon it by a power unknown, makes very little, if any, difference. The entire catastrophe seems to have resulted through the giving way of a part of the fence which was neither defective nor unfitted for any other reason for the task imposed upon it under ordinary conditions. The appellant is not liable for damages arising in such a manner. The finding of negligence under the second cause of action is not supported by the evidence.

The total amount of the judgment was \$415. It is affirmed in the amount of \$115, that being the portion of the judgment arising from the third and fourth causes of action; and it is reversed as to the remainder, the sum of \$300, that sum being the amount of the judgment arising from the first and second causes of action. It is also reversed as to the judgment for costs in the sum of \$71.80.

We concur: CONREY, P. J.; JAMES, J.

## GRADI et al. v. BACHECHI et al. (No. 2104.)

(Supreme Court of New Mexico. Feb. 23, 1918.)

(Syllabus by the Court.)

1. APPEAL AND ERROR \$\infty 704(2)\$—Record on APPEAL—FINDINGS.

Where the record on appeal does not contain the transcript of evidence, the findings of the trial court are conclusive.

2. APPEAL AND ERROR \$\infty\$=\frac{527(2)}{-Record on APPEAL} - Requested Findings and Conclusions.

Requested findings of fact and conclusions of law are not part of the record proper, unless ordered to be filed by the court.

Appeal from District Court, Bernalillo County; Raynolds, Judge.

Suit by Lorenzo Gradi and others against Arthur O. Bachechi and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

H. C. Miller, of El Paso, Tex., for appellants. Neill B. Field, of Albuquerque, for appellees.

PARKER, J. This is an appeal from the district court for Bernalillo county. Lorenzo Gradi and others brought suit against Arthur O. Bachechi, Ettore Franchini, Ovidió Franchini, and Leo Bonaguidi, to enjoin them from selling keg beer not the product of the W. J. Lemp Brewing Company; from further using certain bar fixtures furnished to them by appellees; for an accounting of profits lost by appellees on account of appellants' breach of contract, and to recover the balance due on a certain promissory note executed by appellants and delivered to ap-From a judgment entered against pellees. them appellants have perfected this appeal.

[1] 1. The record on appeal does not contain the transcript of the evidence taken at the trial. The findings are therefore conclusive. Jahren v. Butler, 20 N. M. 119, 127, 147 Pac. 280.

[2] 2. We have no way of ascertaining what questions were presented by appellants to the trial court for decision, because of the state of the record. Included in the record proper is a paper purporting to be findings of fact and conclusions of law, requested by appellants, but refused by the trial court. That is the only paper in the record which even intimates what questions were presented to the trial court. That paper is not a part of the record proper under section 4491, Code 1915. As none of the questions argued by appellants are jurisdictional, there is nothing for us to review.

The judgment of the trial court will therefore be affirmed; and it is so ordered.

HANNA, C. J., and ROBERTS, J., concur.

STATE v. FLOYD. (No. 2172.)

(Supreme Court of New Mexico. April 3, 1918.)

(Syllabus by the Court.)

RECEIVING STOLEN GOODS &== 3 -- ELEMENTS OF OFFENSE-Knowledge.

In order to constitute the crime of buying or receiving stolen goods, under section 1538, Code 1915, it is essential that the accused should have knowledge that the same had been stolen.

Appeal from District Court, Grant County; Ryan, Judge.

J. A. Floyd was convicted of receiving stolen goods, and he appeals. Reversed and remanded, with instructions.

Geo. S. Kelley, of Hillsboro, for appellant. C. A. Hatch, Asst. Atty. Gen., for the State.

HANNA, C. J. Appellant was convicted under the second count of an indictment which charged him with unlawfully and feloniously receiving and having, from some person to the grand jurors unknown, 1,050 pounds of brass, the person from whom the brass was obtained "not having the legal right to dispose of the same." The indictment was drawn under section 1538, Code 1915, which provides as follows:

"Every person who shall buy, receive or aid in the concealment of stolen money, goods or property, knowing the same to have been stolen, shall be punished as provided in section 1529."

Appellant demurred to this count of the indictment on the ground that it did not state facts sufficient to constitute an offense, in that it failed to charge that the defendant knew the articles therein charged to be had and received by him had been theretofore stolen, taken, or carried away; and, further, that said count failed to charge that defendant received such articles, knowing the same to have been stolen. The demurrer was overruled.

The Attorney General concedes that the count in the indictment is defective and that the case should be reversed.

The count in the indictment was fatally defective, and the court should have sustained the demurrer. In order to constitute the crime of buying or receiving stolen goods, under section 1538, Code 1915, it is essential that the accused should have knowledge that the same had been stolen. Territory v. Graves, 17 N. M. 241, 125 Pac. 604; 34 Cyc. 520; People v. Hartwell, 166 N. Y. 361, 59 N. E. 929.

For the reasons stated, the cause will be reversed and remanded to the district court, with instructions to sustain the demurrer to the second count of the indictment. It is so ordered.

PARKER and ROBERTS, JJ., concur.

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STATE v. DUCKETT. (No. 2064.) (Supreme Court of New Mexico. April 8, 1918.)

### (Syllabus by the Court.)

RAPE \$\sim 53(4)-"Assault with Intent to Rape"-Peoof.

In order to convict a man of "assault with ent to rape," the state must establish by the intent to rape, intent to rape," the state must establish by the evidence, to the satisfaction of the jury and beyond a reasonable doubt, that the accused intended to have intercourse with the female by force and against her will, and that he not only used force where an assault is charged, but used such force with the intention at the time to have sexual intercourse with her in defiance of, and notwithstanding, any resistance she might make. might make.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Assault with Intent to Commit Rape.]

from District Court. Chaves County; McClure, Judge.

Robert L. Duckett was convicted of assault with intent to rape, and he appeals. Reversed and remanded.

Bujac & Brice, of Roswell, for appellant. H. L. Patton, Atty. Gen., for the State.

PARKER, J. Appellant was tried and convicted in the district court of Chaves county of assault with intent to rape one Mary Booth. The principal ground relied upon for reversal in this court is that the verdict of the jury was not warranted by the evidence, in that there was no evidence tending to show that the accused intended to have intercourse with the prosecutrix by force and against her will. The law is well settled that in order to convict a man of assault with intent to rape, the state must establish by the evidence, to the satisfaction of the jury and beyond a reasonable doubt, that the accused intended to have intercourse with the female by force and against her will, and that he not only used force where an assault is charged, but used such force with the intention at the time to have sexual intercourse with her in defiance of, and notwithstanding, any resistance she might make. 33 Cyc. 1432.

We will not undertake to set forth the evidence of the prosecutrix, upon which alone appellant was convicted. It is sufficient to say that it failed to establish that the appellant intended to have intercourse with her by force and against her will. was not as convincing as the proof in the cases of Eiley v. State, 55 Tex. Cr. R. 1, 114 S. W. 793; Marthall v. State, 34 Tex. Cr. R. 22, 36 S. W. 1062; State v. Donovan, 61 Iowa, 369, 16 N. W. 130; Steinke v. State, 33 Tex. Cr. R. 65, 24 S. W. 909, 25 S. W. 287; Mathews v. State, 34 Tex. Cr. R. 479, 31 S. W. 381; State v. Owsley, 102 Mo. 678, 15 S. W. 137; State v. Priestley, 74 Mo. 24 -held in each instance to be insufficient.

For the reason stated the judgment will be reversed, with instructions to grant appellant a new trial; and it is so ordered.

HANNA, C. J., and ROBERTS, J., concur.

STATE v. JOHNSON. (No. 2148.) (Supreme Court of New Mexico. April 3, 1918.)

(Syllabus by the Court.)

1. Homicide 6-163(2) - Evidence - Good

CHARACTER OF DECEASED.

The good character of the deceased is not a subject of proof in a prosecution against another for killing him, where his character had not been attacked by the defense.

2. Criminal Law \$\infty 599 -- Continuance --REFUSAL.

It is not error to refuse a continuance on the ground of surprise at the introduction of evi-dence, when the defendant should, from the nature of the case, naturally expect or antici-pate the evidence, or when by law he is charge-able with knowledge that such evidence would be properly competent.

Appeal from District Court, Union County: Leib, Judge.

Grover C. Johnson was convicted of murder in the second degree, and he appeals. Affirmed.

The appellant, Grover C. Johnson, was indicted charged with the murder of one Noble A. Hypes, the trial resulting in a conviction of murder in the second degree.

It appears from the record that the deceased on the 21st day of July, 1916, went to the home of the defendant during his absence and at a late hour in the evening. As to what took place on the occasion in question is not clear from the record, though the wife of the defendant testified that the deceased insulted her. Upon her husband's return to the house, on being informed of the alleged remarks of the deceased, he set out in search of Mr. Hypes, and upon finding him assaulted him in an aggressive manner. As a result of this assault, the deceased died the following day. The court sentenced the defendant to a term of from 12 to 15 years in the penitentiary, from which judgment this appeal is prayed.

C. A. Spiess, of East Las Vegas, and H. B. Woodward, of Clayton, for appellant. C. A. Hatch, Asst. Atty. Gen., for the State.

HANNA, C. J. (after stating the facts as above). [1] The first and only important quèstion raised is that the court committed error in permitting the state to prove the general reputation of the deceased for morality and decency. The state was permitted to introduce a number of witnesses in rebuttal who testified to the good reputation of the deceased in this respect. Objection was interposed to the introduction of this evidence upon the ground that it was not proper rebuttal. The gist of the theory advanced by the defendant was that the deceased had insulted his wife, as a result of which he had committed the assault in question. The theory of the state was that the deceased did not make the insulting remarks and was not the kind of a man to make such remarks. The record discloses that the wife of the defendant gave testimony tending to bring into question the reputation of the deceased when she testified concerning the conversation which she had overheard between her sister and a Mrs. Lambert to the effect that the deceased had on a former occasion run Mrs. Lambert away from her home. Counsel agree that:

"The good character of the deceased is not a subject of proof in a prosecution against another for killing him, where his character had not been attacked by the defense."

The rule is thus stated in Wharton on Homicide (3d Ed.) § 269. See, also, 3 Bishop's New Criminal Procedure, § 612.

The appellant contends that the testimony of Mrs. Johnson is but incidental comment of the witness relating to the conversation overheard by her as to the conduct of the deceased on a particular occasion. We cannot agree, however, with appellant in his contention in this respect. The testimony of the witness would apparently tend to prove that the deceased was in the habit of running women away from their homes or making improper proposals to them, and was clearly an attack upon the character of the deceased. This attack made it necessary for the state to show the reputation of the deceased in the community in which he lived. We cannot conceive of a rule of evidence which would preclude its doing so. In the case of Bryant v. State, 95 Ark. 239, 129 S. W. 295, a similar question arose: the court saying:

"In this case the evidence adduced by the defendant on cross-examination tended to prove that the deceased was aggressive, quick to take offense, and resent it with force unnecessarily. The evidence adduced by the state was admissible to remove such impression."

In State v. Woodward, 191 Mo. 617, 90 S. W. 90, the court said:

"The record in this cause discloses that the defendant, upon cross-examination of witness Charles Johnson, for the state, did undertake to elicit testimony which reflected upon the good reputation of the deceased. Defendant having opened up the subject of the good reputation of the deceased, it was not error to permit the state to rebut any testimony offered by the defendant upon that subject."

Numerous cases might be cited to the same effect; but we deem it unnecessary to refer to them in this opinion, as the rule is well settled that, where the reputation of the deceased in a case of this character has once been put in issue by the defendant, the state may offer testimony in rebuttal upon that subject, and the examination of this record, we believe, clearly discloses that the reputation of the deceased was put in issue by the defendant.

[2] Appellant next contends that, when the state introduced evidence showing the reputation of the deceased, they should have been permitted an adjournment in order to find time to secure testimony to refute the evidence on the subject of the reputation offered by the state, and they contend that, because the court refused their request for an adjournment, it committed error. This contention is sufficiently answered by the following announcement of the law as appears in 9 Cyc. p. 190:

"\* \* It is not error to refuse a continuance on the ground of surprise at the introduction of evidence, when the defendant should, from the nature of the case, naturally expect or anticipate the evidence, or when by law he is chargeable with knowledge that such evidence would be properly competent."

Appellant further complains that the court committed error in admitting in evidence the clothing worn by the deceased at the time of his injury which resulted in his death. This objection is sufficiently disposed of by reference to the record which discloses that the defendant did not object to the introduction of the clothing in evidence at the time that it was offered in evidence. After the introduction of the clothing in evidence in connection with the examination of a witness at a later time, an objection on the ground that the evidence was prejudicial was made; but this objection was not pressed, and no motion was interposed to take the evidence from the jury. We therefore conclude that the objection was not timely.

Finding no error in the record, the judgment of the trial court is affirmed, and it is so ordered.

PARKER and ROBERTS, JJ., concur.

Ex parte HAMM. (No. 2226.) (Supreme Court of New Mexico. April 4, 1918.)

(Syllabus by the Court.)

1. Gaming \$\infty 75(1) - Prohibitions - Statutes.

Chapter 110, Laws 1917, hold to prohibit the conducting or operating of a game of chance for money or anything of value, but not to prohibit the playing of a game of chance.

2. CRIMINAL LAW \$\infty\$=1001 — SUSPENSION OF SENTENCE—"GOOD BEHAVIOR."

The words "good behavior," as used in an

The words "good behavior," as used in an order suspending sentence upon a defendant during good behavior, are defined as conduct conformable to law, and to require no higher standard of conduct than the law demands.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Good Behavior.]

(Additional Syllabus by Editorial Staff.)

3. CRIMINAL LAW \$\infty\$1001 - Suspension of Sentence-Order.

If restrictions are to be imposed upon the conduct of a person under sentence suspended by virtue of Code 1915, § 5075, they must be specified in the order of suspension.

Hanna, C. J., dissenting.

Original application for writ of habeas corpus by Elmer E. Hamm. Petitioner discharged.

Frank J. Lavan, of Santa Fé, and O. P. Easterwood, of Clayton, for petitioner. H. L. Patton, Atty. Gen., for respondent.

PARKER. J. At the September, 1917, term of the district court of Union county, the petitioner pleaded guilty to a charge of conducting and operating a game of chance, to wit, stud poker, which game was then and there played for money. The court sentenced the petitioner to imprisonment in the county jail for three months, and thereupon suspended sentence during the good behavior of the petitioner. On March 23, 1918, an order to show cause why said sentence should not be put into operation and effect was issued against the petitioner, which order to show cause alleged that it had come to the attention of the court through the district attorney's office, and by an indictment returned by the grand jury at the March, 1918, term, that the petitioner had violated the terms and conditions upon which the said sentence had been suspended. A hearing was had upon the order to show cause, and thereupon the court revoked the suspension of the former sentence, and ordered the sentence to be put into operation and effect. Petitioner has thereupon filed a petition for a writ of habeas corpus, alleging that he has not violated any of the terms upon which the said sentence was suspended. Upon the hearing on the order to show cause it appeared that the petitioner engaged with four other persons in a game of poker in the Clayton Hotel, in Clayton, N. M. The game was not run as a banking game, but there was what the gamblers call a "take-off," which in this case was used for the purpose of paying for the cards and to buy the drinks for the players. So far as appears, there was no profit to any one from the "take-off," the same being used for the cards and the refreshment of the players.

[1] 1. The first question presented is as to whether the action of the petitioner was a violation of any law of the state. It will be unnecessary to trace the history of the anti-gambling legislation of the state with any degree of detail. It will be sufficient to say that from time to time such legislation has varied, and at times the offense has consisted in the running of games and at other times it has consisted in the playing of Immediately prior to the act of 1917 (chapter 24, Laws 1913), compiled as sections 1757-1759, Code 1915, was in effect. That act made it an offense to play any game of chance for money or other thing of value, and also an offense to conduct or operate any such game, or to knowingly permit any such game to be played upon the premises owned, leased, or occupied by any person. The Legislature of 1917 de-|court might mean a very high standard of

parted radically from these provisions. chapter 110, Laws 1917, it is provided:

"That any person who for money or anything of value, conducts or operates any game of chance, by whatsoever name known or howso-ever played, or who knowingly permits any such game to be so conducted or operated upon premises of which he is the owner, lessee or occupant, upon conviction thereof shall be punished by a fine of not more than five hundred dollars. lars, or by imprisonment for not more than six months, or both such fine and imprisonment.

Section 2 of the act expressly repeals sections 1757 and 1758, Code 1915. It will be seen from an examination of this section that the offense now consists in conducting a game of chance for money or anything of value. The playing of a game of chance is no longer an offense under the laws of this state. The playing of bridge whist for prizes is no longer prohibited by law, as, possibly it was under the former statute. The playing of poker is no longer an offense, as it undoubtedly was under the former statute. Under these provisions the acts of the petitioner, as shown by the testimony on the order to show cause, were not a violation of this statute. The petitioner made no money or anything of value out of the "take-off" of the game, so far as appears from the evidence, and he violated no law when he played poker for money.

[2] 2. The suspension of the sentence pronounced upon petitioner was ordered under the provisions of section 5075, Code 1915, which provides:

"That the court may, in its discretion, suspend any sentence imposed upon such terms and conditions as it shall deem proper, and such sentence shall go into effect upon order of the court upon a breach of any of such terms or conditions by the person convicted.

This section gives the district court very broad power to determine for themselves in each particular case the terms upon which sentence shall be suspended. The provision was designed as a reformatory measure. and the discretion of the court is without limitation as to the terms upon which the sentence will be suspended.

In this case the court suspended the sentence "during good behavior." The determination of this case turns upon the proper definition of these words as used in the connection and the circumstances under which they were used. It was suggested by the Attorney General upon argument that, as the court might suspend the sentence upon any terms which he deemed advisable, he might determine for himself at any time what he considered good behavior within the meaning of the terms used. The effect of such a proposition would be to leave resting within the breast of the court an arbitrary power to determine for himself what he considered good behavior or misbehavior as applied to each individual defendant. The judge might require more in one case and less in another. Good behavior in one district

standard would be a measure to be applied. Such arbitrary power does not inhere in any judicial or other officer. Good behavior must be a legal good behavior, applicable alike in all instances, as otherwise people dealing with courts will ever be at the mercy of the whim, the caprice, or the peculiar views of the particular judge presiding over The court, under our statute, the court. has power to make any terms and conditions upon the suspension of a sentence, and, if it is desired to retain in the breast of the court the power to determine at any time whether the sentence shall be enforced, the order of suspension shall so specify.

In United States v. Hrasky, 240 Ill. 560, 88 N. E. 1031, 130 Am. St. Rep. 288, 16 Ann. Cas. 279, the question was whether an alien was entitled to naturalization, under the provisions of the naturalization act of June 29, 1906, c. 3592, 34 Stat. 596. That act provided, among other things, that the applicant should during his five years' previous residence have behaved himself as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same. It appeared that the applicant had been in the saloon business, and that he was familiar with the state law requiring the closing of saloons on Sunday and had known of its requirements for over two years; that in spite of that fact he had kept the back door of his saloon open on Sunday regularly; that he manifested a disposition to continue to violate the laws of the state. The applicant was refused citizenship upon the ground that he was not "well disposed to the good order" of this country, when he knowingly and habitually violated the laws of the state in which he resided. The holding, in effect, is that good behavior means conducting oneself conformably to law, and various definitions from law dictionaries are quoted to that effect.

The Attorney General, on argument, cited State v. Everitt, 164 N. C. 399, 79 S. E. 274, 47 L. R. A. (N. S.) 848. In that case the defendant had pleaded guilty to unlawfully selling liquor. He was not sentenced, but an order was made that the judgment be suspended on the payment of costs, and, further, that the defendant should enter into a bond for his appearance at such criminal term for two years to show that he had demeaned himself as a good and law-abiding citizen. The defendant during the two years again violated the law by selling liquor unlawfully, and the court heard testimony and found as a fact that the defendant had committed the offense, and thereupon sentenced the defendant to nine months in the county jail upon his former plea of guilty. In this case the court suspended judgment instead of suspending sentence under the judgment. The court quotes from State v. Crook, 115

conduct, while in another a much lower N. C. 760, 20 S. E. 513, 29 L. R. A. 260, to the effect that it is within the power of the court to suspend judgment, and to require the defendant to appear from term to term for a reasonable time and offer testimony to show good faith in some promise of reformation or continued obedience to the law. We do not understand this case to be authority for the argument suggested by the Attorney General that the court may retain in his breast, without expressing it in the judgment of suspension, a measure which he will arbitrarily apply to a defendant as he may elect. In this case the defendant was guilty of a violation of the law, and the court was authorized, under the circumstances, to pass sentence upon him. See. also, Hyser v. Comm., 116 Ky. 410, 76 S. W.

> We deem the only safe definition of good behavior, when the same is not restricted or modified by accompanying language, to be conducted in conformity to law. This is a "government of laws and not of man." If a man keeps within the law, he is without the control of courts, unless, in a case of this kind, some reformatory measure is applied by the court, and a restriction is put upon the conduct of a defendant not demanded by the law. In such a case sucn restriction must be expressed by the court when sentence is suspended. The district court evidently had something of this kind in mind when he made the order enforcing this sentence. There appears in the examination of the petitioner the following colloguy between him and the court:

> "By the Court: Q. Do you remember, Mr. Hamm, when you were before me once before on a similar charge, at that time you told me you would get out of town and stay on your ranch and quit playing poker? A. No, sir; I don't remember anything like that. Q. But you had your daughter come to me and she made similar representations? A. I did not have her come to you. O. She came. You knew she came to you. Q. She came. You knew she came to me? A. I knew it after she came; yes, sir. Q. And you never made any such representations as that? A. No, sir; I don't think, like that.

> The district court evidently believed that the petitioner when the sentence was suspended promised him that he would quit gambling, but the order of suspension contains no such restriction upon the petitioner's conduct. The court speaks only through its record, and this record is what this court must act upon. If the district court desired to enforce this restriction as one of the conditions of the suspension of the sentence. the order should have so specified.

> [3] It should be observed in this connection that no fine distinctions are to be drawn for the purpose of curtailing the discretion and powers of the district courts in these matters. All that we hold is that, if restrictions upon the conduct of a defendant are to be imposed, they must be specified in the order of suspension.

We have, then, a case of a man sentenced

to imprisonment for a violation of the gambling law, and the sentence suspended by the court during good behavior. "Good behavior" is to be defined in this connection as conduct conforming to the law. The petitioner is not shown in this case to have violated the conditions upon which his sentence was suspended. It follows, therefore, that the judgment of the district court was beyond its powers, and that the prisoner should be discharged from custody, and it is so ordered.

ROBERTS, J., concurs.

HANNA, C. J. (dissenting). The statute (section 5075, Code 1915) authorizing the court in its discretion to suspend any sentence, upon such conditions as it may impose, is a salutary one, evidently designed to enable trial courts to use this coercive measure to effect reformation, and I consider the rule announced in the majority opinion one which will go far to destroy the purpose or object sought to be accomplished by this law. As I construe the majority opinion, it will be necessary in all cases of suspended sentence, at least where the sentence is suspended during good behavior, for the court to undertake to establish that the defendant has committed a violation of some law, and, in my judgment, this construction is contrary to the general principle which has been held to apply in cases of suspended sentences, where, as a rule, the defendant is called upon to show cause why the sentence should not be invoked against him by reason of his breach of the condition imposed upon him at the time the sentence was suspended. In this particular case the defendant pleaded guilty, and was sentenced for violation of the gambling statute. He was subsequently indicted violation of the same statute, and is cited to show cause why the former sentence should not be imposed upon him.

It is my opinion that the record is clear that he was not only engaged in the gambling game which was being conducted for money, but that he was, at least for a portion of the time, occupying the position of aealer and having charge of the take-off. It may be that because it does not clearly appear that he was making a profit by reason of his position in this respect, that a violation of the gambling law was not shown. This construction, however, gives to him the benefit of presumptions which I do not consider he is entitled to under the circumstances. Such contention, moreover, would seem to call for a trial and conviction, of more or less former character, upon the second charge.

We said in the case of Ex parte Bates, 20 N. M. 5+2, 151 Pac. 698, L. R. A. 1916A, 1985

"It is our conclusion, however, that the district court was not determining, by its inquiry, whether or not the second offense had been committed, for the purpose of a trial as to that offense within the purview of legal procedure; but the inquiry was solely for the purpose of determining whether or not the condition im-

posed as a part of the first judgment had, as a matter of fact, been breached, and the commitment clearly indicates that its issuance was directed as a result of the breach of the condition of the judgment formerly entered. We do not consider that any new power was vested in the courts of this state by the statute in question, or that any of the established rules of criminal procedure have been abolished, and, having held that it was within the power of the district court to make the order of suspension under the conditions and circumstances pointed out, it must necessarily follow that the court, having the power to make the order, necessarily possessed the power, upon a violation of the order, to set aside the same and commit the defendant."

In the Bates Case we were passing upon the statute in question, and, in my opinion, we were laying down a salutary rule which should be applied in this case. I believe that the court having the power to make the order of suspension, necessarily possesses the power, upon a violation of that order, to set the same aside without being required to establish a violation of any other criminal statute by the defendant; and that the definition of "good behavior," as announced in the majority opinion, is therefore limiting the rule unnecessarily to the destruction of the beneficial object sought to be accomplished by the statute authorizing the court to suspend sentence upon conditions imposed. am not prepared to assume, as it would seem to me the majority opinion does assume, that the rights of convicted persons must be safeguarded by a definition of the term "good behavior," announced by this court. I believe that the trial courts can be safely trusted to exercise a wise and beneficent discretion in its conduct of affairs of this kind; and, while we must rely upon a government of law, we must depend upon men, as judges, to exercise reasonable discretion in the enforcement of the law.

In the case of State v. Everitt, 164 N. C. 399, 79 S. E. 274, 47 L. R. A. (N. S.) 848, the Supreme Court of North Carolina, in passing upon a similar question, said:

"It must be clear that the defendant was not entitled to a jury trial to determine whether or not he had violated the conditions upon which the judgment had been suspended. He was not on trial for any new offense, nor for any offense whatever. When the judgment was suspended the defendant assumed the obligation of showing to the satisfaction of the court, from time to time, that he had demeaned himself as a good citizen and was worthy of judicial clemency. Whether or not he had so demeaned himself was not an issue of fact to be submitted to a jury, but a question of law to be passed upon by the court. It was a matter to be determined by the sound discretion of the court, and the exercise of that discretion, in the absence of gross abuse, cannot be reviewed here."

It is my opinion that the discretion re'erred to by the Supreme Court of North Carolina is sufficient protection of the defendant, and, believing that in the case at bar there is no evidence of abuse of discretion on the part of the trial court, I believe that the majority opinion is erroneous, and therefore dissent therefrom.

ELLIOTT v. RICH. (No. 2077.)

(Supreme Court of New Mexico. April 8, 1918.)

(Syllabus by the Court.)

1. Public Lands \$==55-State Lieu Lands

—INTEREST—INJUNCTION.

Upon the allowance of a lieu selection of public land by the local land officers, the state and its lessee acquire such an interest in the land as authorizes injunction to prevent waste thereon.

2. Injunction €=39-State Lieu Lands-

INJUNCTION TO PREVENT WASTE.

Notwithstanding the title to land covered
by lieu selection by the state is in litigation before the Land Department of the government, the state, and through it its lessee, may maintain an injunction to prevent waste pending a final determination of the rights of the parties by the Land Department.

Appeal from District Court, Roosevelt County; McClure, Judge.

Suit by William Elliott against Everett Rich. Decree for defendant, and plaintiff appeals. Reversed and remanded, with directions.

Keith Edwards, of Ft. Sumner, and G. L. Reese, of Portales, for appellant: J. E. Pardue, of Ft. Sumner, for appellee.

PARKER, J. The appellant filed his complaint in the district court of Roosevelt county against the appellee, alleging that the appellant was the lessee of certain lands from the state of New Mexico; that the appellee on a day certain and at divers other times entered upon and broke and plowed up the soil of a portion of said premises; that said premises were valuable for grazing purposes, and were leased by the appellant for said purposes only; that said breaking and plowing of the soil completely destroyed the grass on said premises and irreparably injured it for grazing purposes; that the appellee was about to commit further trespasses of a similar nature; and prayed for an injunction against any further trespass or injuries to the said premises. Afterwards an amended complaint was filed, adding the further allegation that the state of New Mexico, the lessor of appellant, had filed application in the United States land office at Ft. Sumner, N. M., for the selection, as indemnity lieu lands, of the said lands, and that on the 5th day of April, 1915, the said selections were duly allowed by the officers of the said land of-The appellee answered the amended complaint, denying that the said selections were allowed by the officers of the said land office and the lands segregated from all form of entry. He admitted that he plowed up the land, but alleged that he did so in pursuance of his right as a bona fide settler upon the said land, alleging settlement made prior to the selection by the state and continued to the date of the answer. He also admitted that the lands were valuable for grazing grazing purposes.

purposes, and that the breaking up and plowing of the same completely destroyed the grass and injured the land for grazing purposes, but he denied that he plowed any lands except those embraced within his alleged homestead settlement. By way of new matter, appellee further alleged in his answer that the state of New Mexico had no interest in and to the lands at the time of the purported lease to the appellant; that appellee was a prior settler; that he had an application pending in the Department of the Interior to enter the land as a homestead; that the selection of the state was not filed until after his settlement had been initiated; that the selection had not been approved by the Secretary of the Interior. and until such approval the state had no interest in the lands subject to lease. A reply was filed by the appellant denying each and every allegation contained in the answer.

Upon final hearing, the court made findings of fact and conclusions of law to the following effect: That the appellee had settled upon and was occupying, and with his family was residing upon and occupying, the land in question as a homestead at the time the state of New Mexico filed its selection of said land under the provisions of the Enabling Act, which said land he has at all times claimed as a settler and homesteader since the date of said settlement. The court found that the appellant's right and title and interest in and to the premises in question was extremely doubtful and uncertain, and so extremely doubtful and uncertain that the court deemed it insufficient to entitle the appellant to permanent injunctive relief, and thereupon dissolved the preliminary injunction theretofore issued. A decree was entered accordingly, from which appellant appeals.

It appears in the testimony that the state filed its lieu selection list covering the lands in controversy on the 23d day of October, 1914, which selection was allowed by the local land office. On the following day, October 24, 1914, the appellee filed a homestead application in the same land office covering the land in controversy. This application was rejected by the local land office on the same day that the lieu selection by the state was allowed. Afterwards the appellee filed a contest against the state's selection, which contest was undisposed of at the time of the hearing before the court. It further appears that the appellee plowed up and broke out some 20 acres of the land involved, and threatened to continue said plowing and breaking, and that the premises were valuable chiefly for grazing and were leased by the appellant for that purpose, and that the plowing of the soil completely destroyed the grass thereon and irreparably injured it for

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[1] 1. The proposition advanced by appellee that the state had no power to lease the lands in question until after the approval by the Secretary of the Interior is disposed of by our recent holding in the case of Makemson v. Dillon et al., 171 Pac. 673 (not yet officially reported), in which we held that, upon the approval by the local land office of a lieu selection by the state, the state acquired such an interest in the land as entitled it to lease the same, and that the lessee might maintain an injunction to prevent trespasses thereon.

[2] 2. The court evidently fell into error in refusing the injunction in this case. It based its judgment upon the fact that there was a contest pending in the land office touching the respective rights of the parties, and that therefore the rights of appellant were too uncertain to warrant injunction. fact furnished no basis for denying the relief sought. The state had secured an allowance of its selection prior to the initiation in the land office of any claim on the part of appellee. Until the appellee had secured favorable action by the Land Department and a cancellation of the selection by the state, he had no such right in the premises as would entitle him to plow up the land and destroy the grasses thereon to the detriment of the appellant. It was within the power and it was the duty of the court, under the circumstances, to preserve the estate until final disposition of the rights of the respective parties had been made by the Land Department of the government.

Thus in Olive Land & Development Co. v. Olmstead et al. (C. C.) 103 Fed. 568, the owner of patented land within a forest reserve. under the act of Congress of June 4, 1897, c. 2, 30 Stat. 11, 35, 36 (U. S. Comp. St. 1916, \$\$ 5126-5134), surrendered his land to the government and made a selection of lieu land as provided for in said act. Subsequently certain persons made a placer location upon the land embraced within the lieu selection upon the theory that it was mineral land. and contained petroleum in commercial quantities, and gave out and proposed that they would sink wells and extract the petroleum from said land. The owners of the lieu selection brought suit for an injunction against the owners of the placer location, and their suit was maintained by the court upon the theory that, notwithstanding the question of the ultimate title to the land was pending in the Land Department, nevertheless the plaintiff was entitled to injunctive relief to preserve the estate from waste, pending final action by the Land Department. Many cases are cited and quoted from the Supreme Court of the United States announcing the more modern doctrine that the mere fact that the ultimate title or right is in litigation in no way militates against the right to in-

waste pending the determination of the rights of the parties.

In Northern Pacific Ry. Co. v. Soderberg (C. C.) 86 Fed. 49, an injunction was granted to prevent the mining of building stone upon lands within the place limits of the grant to the Northern Pacific Railroad, pending the determination of the mineral or nonmineral character of the land by the Land Department of the government, although the lands at the time were unsurveyed.

In Humbird v. Avery (C. C.) 110 Fed. 465, the Circuit Court for the District of Minnesota refused an injunction for the reason that the damage had already been done, in that the timber upon the land had been already cut off; but the court recognizes the right and duty to preserve the estate by injunction pending the decision of the rights of the parties by the Land Department of the government.

In Wallula Pacific Ry. Co. v. Portland & S. Ry. Co. (C. C.) 154 Fed. 902, there was a contest between two railroad companies as to a right of way, and one brought a bill for injunction against the other to prohibit it from trespassing upon the right of way. The relief was denied in that case for the reason that the building of a railroad upon the right of way did not constitute waste, and there were no allegations in the complaint bringing the plaintiff within the rule. The rule, however, that injunction will lie to prevent waste pending the decision of the right to land by the Land Department of the government is recognized.

In Cosmos Co. v. Gray Eagle Co., 190 U. S. 315, 24 Sup. Ct. 860, 47 L. Ed. 1064, the same principle was recognized, although in that case the relief was denied, the court saying:

"The bill is not based upon any alleged power of the court to prevent the taking out of mineral from the lam, pending the decision of the Land Department upon the rights of the complainant, and the court has not been asked by any averments in the bill or any prayer for relief to consider that question."

In an earlier case (Erhardt v. Boaro, 113 U. S. 538, 5 Sup. Ct. 566, 28 L. Ed. 1116) is to be found a statement of the position of the Supreme Court of the United States that the former equitable doctrine that a party should be left to his remedy at law in regard to the possession of real estate had been greatly modified in modern times, so that the equitable jurisdiction now exists to prevent waste, notwithstanding the title to the premises be in litigation.

Many other federal and state cases might be cited, but the above would seem to be sufficient.

cases are cited and quoted from the Supreme
Court of the United States announcing the
more modern doctrine that the mere fact
that the ultimate title or right is in litigation
in no way militates against the right to injunctive relief to protect the estate from

It appears, therefore, as has been heretofore stated, that it was the duty of the
court to preserve the estate in controversy
from waste, pending a decision of the rights
of the respective parties by the Land Department of the government. The state had ac-

quired such an interest by the allowance of the selection, and the appellant under the lease by the state to him, that injunction as prayed in the complaint was a proper remedy. The state's entry had been allowed, and the appellee's entry had been disallowed and his contest of the state's selection was pending in the Land Department. The right to the ultimate title to the land was in litigation before that department. Pending the determination of that litigation, a court of equity should preserve the estate from waste.

The judgment of the court below will therefore be reversed, and the cause remanded, with directions to award an injunction against the appellee as prayed by the appellant, with the provision, however, to the effect that should the Land Department of the government at any time, prior to the clear listing of the land to the state, determine that the land was not subject to such selection on account of the prior settlement and rights of the appellee, the operation of the decree will thereupon cease, and it is so ordered.

HANNA, C. J., and ROBERTS, J., concur.

#### STATE v. BALLES. (No. 2124.)

(Supreme Court of New Mexico. April 8, 1918.)

### (Syllabus by the Court.)

1. CRIMINAL LAW \$== 106 - VENUE - "DIS-

TRICT'-STATUTE.

The word "district," as used in section 14, art. 2, state Constitution, is descriptive of the territory which in legal contemplation comprises the visne over which the jurisdiction of the court for the purpose of prosecutions for crimes and misdemeanors extends.

[Ed. Note.-For other definitions, see Words and Phrases, First and Second Series, District.] 2. CRIMINAL LAW \$\infty 145 - Venue - Objec-

TION.

Where the venue in a criminal case is changed at the instance of the accused, he will not be heard to question its regularity, after selecting for himself the place of trial.

3. CRIMINAL LAW \$\infty\$1090(11)\to APPEAL\to RecORD\to REMARKS OF TRIAL COURT.

Alleged remarks of the trial court supposed to have been made to the jury in another case will not be considered when the same has not been authenticated by having been made a part of the record by bill of exceptions or otherwise. 4. Criminal Law \$\infty\$=1159(2) - Verdict

REVIEW.

Where there is substantial evidence to support the verdict of a jury, the same will not be disturbed on appeal.

Appeal from District Court, Bernalillo County: Raynolds, Judge.

Domingo Balles was convicted of burglary, and he appeals. Affirmed.

O. A. Larrazolo, of Las Vegas, and Elfego Baca, of Socorro, for appellant. C. A. Hatch, Asst. Atty. Gen., for the State.

For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

PARKER. J. The appellant, Domingo Balles, was indicted for burglary in the district court for the county of Valencia. He was found guilty of that crime in the district court for the county of Bernalillo, and has perfected this appeal.

The evidence on the part of the state tended to disclose that the appellant and two companions went to the home of Romulo Romero in the early evening and brutally assaulted him. They tied him hand and foot, placed a rope around his neck, choked him. stuck him with a dagger, threatened his life by hanging him, and committed other brutal and cruel acts upon him and his wife, for the purpose of obtaining possession of a considerable sum of money which Romero was supposed to have concealed in his home. These facts were not disputed: the appellant's defense consisting of an alibi.

[1] 1. The appellant in the district court for Valencia county filed a motion for a change of venue. The motion was supported by affidavits. Before the same came on to be heard, the district attorney of the Seventh judicial district, Valencia county being one of the counties within that district, and counsel for the appellant entered into a written stipulation, by the terms of which it was agreed that this cause be tried in the district court of the Second judicial district, sitting in and for the county of Bernalillo, the stipulation reciting, among other things, the following:

"\* \* \* It being agreed between said respective counsel that it would be inconvenient and inexpedient to send said causes to either of the two remaining counties of the Seventh judicial district, they have therefore agreed that, if the judge shall consent, which they respectfully request him to do, the venue in all of said causes may be changed to the county of Bernalillo on the filing of this agreement and the consent of the judge."

Thereupon the venue of this cause was changed from Valencia county, in the Seventh judicial district, to Bernalillo county, in the Second judicial district. Trial was had in the latter county, without any objection whatever on the part of the appellant as to the right of that court to hear and determine the case until after verdict was returned finding appellant guilty. A motion in arrest of judgment was then made, wherein it was contended that the court trying the case was without jurisdiction, and that is the first question presented here. The appellant contends that the territorial jurisdiction of the several district courts of the state is defined by the Constitution, and that section 14 of article 2 of the state Constitution confers on accused persons the absolute right to a trial in the jurisdiction wherein the crime is alleged to have occurred. It is also argued by appellant's counsel that the fact that appellant consented to be tried in a court in another district is immaterial, because juris-

diction cannot be conferred by consent. Reference 4s also made to sections 5570 and 5575, the first providing, in effect, that all criminal offenses shall be tried in the county in which they were committed, the county in which they were committed, the second providing that, where change of venue is granted upon grounds other than those relating to the judge, the case shall be removed to some other county free from exception within the same judicial district.

While there is some conflict of authority as to the doctrines we shall announce under this first proposition, an examination of the cases convinces the court that the word "district" in section 14 of article 2 of the state Constitution does not mean "judicial district," but simply means territory over which a court may have jurisdiction; that the right of a jury trial, as granted therein, constitutes a right or privilege which, in so far as the place of trial is concerned, may be waived by an accused person in a number of ways, and that, when he goes to trial in another judicial district, without objection on his part, he has waived the privilege, and cannot be heard to say that the court trying him was without jurisdiction. Thus in State v. Miller, 15 Minn. 344 (Gil. 277), the place of trial was changed from one county in one district to a county in a different district at the request of the state. The constitutional provision involved was the same as ours; the word "district" being used. The court followed State v. Gut. 13 Minn. 343 (Gil. 315), holding that the Constitution was not violated by trial in another district; "district" being held to mean "trial district." most satisfactory case on the subject is that of Weyrich v. People, 89 Ill. 90. The court said:

"It is argued on behalf of plaintiff in error that the venue should have been changed either that the venue should have been changed either to Peoria, Marshall, Stark, or Putnam counties, which are in the same judicial circuit with Tazewell, and that changing to Logan county, which is in a different judicial circuit, was in violation of section 9, art. 2, of the Constitution, which provides that in all criminal prosecutions the accused shall have the right to \* \* \* a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed. The objection is, in our opinion, based upon a misapprehension of our opinion, based upon a misapprehension of the meaning of the word 'district' as here used. The plain object of this clause of the Constitu-tion is to secure to the defendant the commonlaw right of trial by a jury of the visne or neighborhood where the offense is alleged to have been committed, and to protect him against prosecution elsewhere. \* \* \* A party is no more subject to be indicted and tried for the alleged commission of an offense in a different county in the same circuit than in a county in a different circuit. The creation of judicial circuit. different circuit. The creation of judicial circuits has not the slightest reference to the enforcement of this clause of the Constitution, but forcement or this clause of the Constitution, out is solely for convenience in providing the requisite judicial force to administer the law throughout the state. The word 'district' is convertible with that of 'county,' and is descriptive of the territory which, in legal contemplation, comprises the visne over which the jurisdiction of the court for the purpose of prosecution for the commission of crimes and misdemeanors ex-

In Olive v. State, 11 Neb. 1, 7 N. W. 444, the court said:

"In its ordinary meaning the word 'district' is commonly and properly used to designate any one of the various divisions or subdivisions in which the state is divided for political or other purposes, and may refer either to a congressional, judicial, senatorial, representative, school, or road district, depending always upon the con-nection in which it is used. In the clause quoted very clearly it refers to neither of these, and, although not synonymous with the word 'county,' yet, by its connection with it, the in-tention evidently was that they should be taken tention evidently was that they should be taken in a similar sense, and as designating the precise portion of territory or division of the state over which a court, at any particular sitting, may exercise power in criminal matters. And such division, by whatsoever name it may be known in legislation, is coextensive with and practically limited by this constitutional provision to that from which a jury \* \* \* may legally be drawn. And this is in entire accord with our constitutional system of district courts. legally be drawn. And this is in entire accord with our constitutional system of district courts, by which one is designed for each organized county, having criminal jurisdiction coextensive therewith, and assisted by jurors drawn in the manner now provided by law from the whole body of the people thereof."

To the same effect is State v. Knapp, 40 Kan. 148, 19 Pac. 728; In re Nelson, 19 S. D. 214, 102 N. W. 885, 887; State v. Stewart, 60 Wis. 587, 19 N. W. 429, 50 Am. Rep. 388,

We agree with those courts holding that the word "district" cannot be considered as superfluous, and that, being used in conjunction with the word "county," it means trial district. In this state trial districts of our district courts embrace the territory within a county only, and until a different division is made the clause in question only means that the accused shall be tried by a jury of the county wherein the offense is alleged to have been committed, and does not mean that an accused has any particular right to a trial by a jury from the judicial district wherein the crime was committed. Consequently the appellant was not vested with any right other than that of being tried by a jury from the county wherein the offense was alleged to have been committed, and, a fair and impartial jury not being procurable there, so far as the Constitution is concerned, he might be tried in some other county free from exception.

(2) 2. This would dispose of appellant's contention were it not for the fact that section 5575, Code 1915, provides that, where change of venue is granted upon grounds other than those relating to the judge, the cause shall be removed to some county free from exception within the same judicial district; whenever the change is granted upon any ground relating to the judge, the case shall be removed to the next nearest district or some county thereof. The record

in the case at bar indicates that the change of venue was granted upon the grounds that a fair trial could not be had on account of the prejudice of the inhabitants of the county and for the convenience of all concerned. Because the change was not made on account of any disqualification of the judge of the Seventh judicial district, the cause should have been removed under the statute to some county in that district, rather than to a county in a different district. But appellant is in no position to urge that matter with success here: he having prevailed upon the trial court to take the action, and having made no objection thereto until after verdict. In Lightfoot v. Commonwealth, 80 Ky. 516, it was held that after a party accused of crime had selected his place of trial he could not be heard to complain, even though the place of trial was in a county not specified by statute. The court said:

"By the statute the change of venue shall be to some adjacent county, if objections are not taken and sustained to all the adjoining counties; and, if so, the change to be made to the nearest county to which there is no valid ob-jection. While the defense might object to the removal of the cause in any other manner than that provided by the statute, we perceive no objection to the jurisdiction of the court to try the case in a county selected by the defense, and to which the attorney for the commonwealth consents. This class of cases is embraced within the jurisdiction of the circuit court. The judge of the district, upon hearing the objections pro and con. \* \* \* can determine, from all pro and con, \* \* \* can determine, from all the proof before him, to which of the adjacent counties the case is to be sent, and whether the objections to these counties, if made, are suffi-cient to send it to some other adjacent county, can determine, from all and surely, when the accused desires to be tried in a particular county in the district, and no objection is made by the attorney for the state, there can be no question made as to the jurisdiction. The affidavits showing the necessity for a change of venue are not jurisdictional facts, and where a change of venue is granted, and the accused submits himself to the jurisdiction of accused submits in insert to the jurisdiction of the court to which it is sent, that is, goes into a trial without any objection, in either the court in which the indictment was found or the court to which the venue was changed, it is too late, after verdict, to raise the question for the first time.

\* \* \* Consent cannot give jurisdiction; but the purpose of the statute height to see time. \* \* Consent cannot give jurisdiction; but the purpose of the statute being to secure an impartial trial, and authorizing a removal of the cause by the accused from the vicinage, the spirit, if not the letter, of the statute will sustain a verdict of guilty or of an acquittal, where the accused selects the county in which he is to be tried, although it may not be in a county adjacent to that in which the offense was committed."

In Territory v. Taylor, 11 N. M. 588, 596, 71 Pac. 489, 491, the court said:

"It comes with poor grace from the one who secured the change of venue to now assert that the court to which the change was granted at his request had no power to try the case. The district courts both of Chaves and Eddy counties are courts of general jurisdiction; they are in the same judge; besides, independent of the statute allowing a change of venue, it is the rule that one 'who has applied for and obtained a change of venue cannot question the regularity of the proceedings." 4 Enc. P. & P. 489."

To the same general effect are Oborn v. State, 143 Wis. 249, 126 N. W. 737, 741, 31 L. R. A. (N. S.) 966; State v. Pancoast, 5 N. D. 516, 67 N. W. 1052, 1054, 35 L. R. A. 518; Hourigan v. Commonwealth, 94 Ky. 520, 23 S. W. 355. A case to the contrary, which practically stands alone on the subject, is Taylor v. State (Tex.) 197 S. W. 196.

[3] 3. Attached to the motion for a new trial appears a statement supposed to have been made by the district judge to the jury in the trial of the case of State v. John O. Peck, and appellant contends that the statement reproached the 12 jurors in that case for their failure to find Peck guilty of the crime for which he was then being tried, and that such statement must have had its effect upon the minds of the jury in this case. The statement is in no manner authenticated as the record in this case; it is simply contained in appellant's motion for a new trial. We have no way of ascertaining whether it is true or not. It should have been settled as a part of the bills of exceptions. Nor is it shown that any of the jurors who sat in the case at bar were in the courtroom or had even been impaneled when the remarks were supposed to have been delivered by the court, or that they ever had any knowledge thereof. Under such circumstances we shall not further consider the assignment.

[4] 4. The last assignment constitutes an attack upon the sufficiency of the evidence. There is an abundance of substantial evidence to suport the verdict, and consequently the same will not be disturbed on appeal.

For the reasons stated, the judgment of the trial court will be affirmed; and it is so ordered.

HANNA, C. J., and ROBERTS, J., concur.

STATE v. MOSS. (No. 2142.)

(Supreme Court of New Mexico. April 8, 1918.)

# (Syllabus by the Court.)

1. Criminal Law \$\infty 814(3)\text{—Instructions-} \text{"Mutual Combat."}

Mutual combat is one into which the parties willingly, and an instruction on mutual combat is properly refused where the evidence does not warrant the same. (Quoting Words and Phrases, Mutual Combat.)

Homicide ←340(4) — Review—Harmless

ERROR.

A verdict of guilty of murder in the second degree will not be set aside because the court erroneously instructed the jury on the subject of involuntary manslaughter.

3. Criminal Law 554, 811(6)—Evidence-

WEIGHT-INSTRUCTIONS.

The jury in a criminal case is not bound to believe the evidence of a defendant, and may properly take the fact that he is the defendant into consideration, and give his evidence such weight as, under all the circumstances, it may think him entitled to, and an instruction that does no more than call the attention of the jury to this rule is not erroneous.

4. Homicide @== 290-Instructions-Deadly

WEAPONS.

It is not error for the court to define a deadly weapon in the terms of the statute.

5. CRIMINAL LAW \$\iiint 785(3)\$—Instructions—CREDIBILITY OF WITNESSES.

Instruction given by the court, as to credi-

bility of witnesses, approved.

6. CRIMINAL LAW 5799-INSTRUCTIONS-REMARKS OF COUNSEL. It is proper for the court to instruct the jury that the remarks of counsel are not to be regarded as evidence, and that their verdict must be founded solely upon the evidence and the law as given it by the court.

HOMICIDE 6=116(1) - ARMING FOR SELF-

DEFENSE—ANTICIPATION OF ATTACK.

The court properly refused to instruct the jury that, if a person has reason to expect an unlawful attack, he has a legal right to arm himself to resist such attack.

Appeal from District Court, Chaves County; Richardson, Judge.

George B. Moss was convicted of murder in the second degree, and he appeals. Affirmed.

O. O. Askren, of Roswell, and A. W. Hockenhull, of Clovis, for appellant. H. L. Patton, Atty. Gen., and C. A. Hatch, Asst. Atty. Gen., for the State.

ROBERTS, J. On change of venue from Curry county appellant was tried and found guilty of murder in the second degree by a jury in the district court of Chaves county. From the judgment imposing sentence he appeals.

[1] The first ground upon which he relies for a reversal in this court is alleged error in the refusal by the trial court to give his requested instructions numbered 6 and 7 on the subject of mutual combat. There was no error in refusing to give the requested instructions, because they were not justified by the evidence. "A mutual combat is one into

Words and Phrases, p. 4648); or "is the mutual intent to fight" (Tate v. State, 46 Ga. 148).

The evidence in this case on the part of the state shows an unprovoked and malicious assault upon the deceased by appellant; that he was attacked and stabbed in the side by appellant while he was bending over a barrel, rolling it into the saloon. On the part of the appellant his testimony was to the effect that as he started to enter the saloon the deceased was standing inside the door and struck him a violent blow on the head with his fist, felling him to the floor; that deceased thereupon pounced upon him and began beating him, and told him that he intended to cut his heart out, or words to that effect: whereupon appellant succeeded in getting his knife out of his pocket and stabbed the deceased. Thus it will be seen that there was no evidence of mutual combat, and the instructions were properly refused.

[2] Appellant complains of the court's charge relative to involuntary manslaughter, and says there was no evidence whatsoever to support such instruction. Appellant's counsel admit that they are familiar with the general rule that it is not error to charge upon a lower degree of homicide than the one upon which the appellant is convicted. In avoidance of this general rule, appellant contends that the instruction as to involuntary manslaughter depreciated from that of voluntary manslaughter, and the jury was confused thereby to the prejudice of the appellant. They do not point out how this instruction could have depreciated that of voluntary manslaughter, and we are unable to see how it could have been misleading to the jury. Under the instructions given regarding voluntary manslaughter, the jury could have found the defendant guilty in this degree of homicide had it deemed the facts warranted it. It is well settled that instructions favorable to the accused are never ground for reversal of a verdict for conviction; hence one who has been convicted of a superior grade of culpable homicide can have no benefit from the fact that the court gave the jury a charge in respect to an inferior grade. A verdict of guilty of murder in the second degree will not be set aside because the trial court erroneously instructed the jury on the subject of involuntary manslaughter. 13 R. C. L. (Homicide) 238. For this reason appellant cannot complain of the instruction.

The sixteenth instruction given by the court was as follows:

"You are instructed that the defendant is a competent witness in his own behalf, and when he offered himself as a witness in this case he became as any other witness, and his credibility is to be tested by and subject to the same tests as are applied to any other witness. In which the parties enter willingly" (Vol. 5 determining the degree of credibility that should

be given to the testimony of the defendant, the jury have a right to take into consideration the fact that he is interested in the result of the prosecution, as well as his demeanor and conduct on the witness stand, and you may take into consideration all the facts and circumstances proved in the case tending to corroborate or contradict the testimony given by the defendant."

[3] Appellant says that this instruction was prejudicial in that it singled him out and called the jury's special attention to his interest in the case. 'The jury in a criminal case is not bound to believe the evidence of a defendant, and may properly take the fact that he is the defendant into consideration, and give his evidence such weight as, under all the circumstances, it may think him entitled to, and an instruction that does no more than call the attention of the jury to this rule is not erroneous. Doyle v. People, 147 Ill. 394, 35 N. E. 372; Lemen v. People, 133 Ill. App. 295. An instruction similar to the one in question was upheld by the territorial Supreme Court in the case of Territory v. Taylor, 11 N. M. 588, 71 Pac. 489, and is supported by the cases of Territory v. Gonzales. 11 N. M. 301, 68 Pac. 925; Faulkner v. Territory, 6 N. M. 464, 30 Pac. 905; and Territory v. Romine, 2 N. M. 114. Appended to the case of State v. Bartlett, 50 Or. 440, 93 Pac. 243, 19 L. R. A. (N. S.) 802, 126 Am. St. Rep. 751, will be found an interesting note on this question. The great weight of authority upholds the giving of such an instruction. We see no reason for departing from the wellestablished rule in this jurisdiction, and therefore hold that the instruction in question was proper.

[4] Complaint is made of the action of the court in giving instruction numbered 25, in which the court defined a deadly weapon in the terms of the statute. In the case of State v. Dickens, 165 Pac. 850, a similar question was presented, and we held that it was not error for the court in instructing the jury to define a deadly weapon in the terms of the statute. We see no reason for departing from the rule there announced.

[5] The court's instruction numbered 29 was as follows:

"You are instructed that it is for you to determine what part of the evidence is true and what part of it, if any, is false. In case you find a conflict in the evidence to such an extent that you cannot believe it all, you should believe such evidence as you are satisfied is true, and reject such as you believe to be false. If you believe that any witness in this case has testified knowingly and willfully falsely as to any material matter in issue in this case, you have a right to disregard all or any portion of the testimony of such witness, unless you further believe the testimony of such witness to be corroborated by other credible evidence in the case which you believe to be true."

Appellant says that the giving of this instruction was error in that it was an erroneous statement of the law as to the weight and credit of the evidence in the case to be given by the jury, and was an erroneous statement

of the law as to the extent the jury should believe the evidence; that it invaded the province of the jury, in that it was a comment to the jury on the weight of the credibility of a witness, in this: that the jury was told in the last paragraph of said instruction that, even though it might believe a witness in the case had testified knowingly and willfully falsely as to any material matter in issue in the case, it had a right to disregard all or any portion of the testimony of such witness unless it further believed the testimony of such witness was corroborated by other credible evidence in the case which it believed to be true: A careful reading of the above instruction will show that the court simply told the jury, if it believed a witness had testified falsely to any material issue, it could disregard all or any portion of his testimony unless it further believed such testimony was corroborated by credible evidence, which it believed to be true. In other words, the jury was told if it believed a witness had testified falsely to some material fact, yet if other parts of his testimony is corroborated by evidence it believed to be true, it need not, because of his false testimony in the one instance, disbelieve the rest of his testimony. The court did not instruct the jury in any sense, nor did it tell it to believe false testimony. This form of instruction has been approved by the various courts. In the case of Territory v. Garcia, 12 N. M. 87, 75 Pac. 34, the following instruction was approved by the territorial court:

"The court instructs you that you are the sole judges of the weight of the evidence and of the credibility of the witnesses; and, if you believe from the evidence that any witness has willfully sworn falsely as to any material fact in this case, you may, unless the same is corroborated by other credible evidence, or facts and circumstances in evidence, disregard the whole or any part of the testimony of such witness; and in passing on the credibility of any witness, or the weight to be given to his testimony, you may consider his manner and conduct upon the stand, his means of knowledge, the relationship of the parties, if any, and the interest that he may have in the result of the case."

In the case of State v. Goff, 71 Or. 352, 142 `Pac. 564, the question was fully discussed and the giving of a similar instruction approved. We see no error in the giving of this instruction.

[6] The next point relied upon is that the court was in error in giving instruction numbered 13, reading as follows:

"The arguments of counsel are not evidence in the case, and you are to depend for the evidence upon your own memories and not upon statements of counsel. Nor are their statements of the law to be taken as correct if in conflict with that given you by the court. In deciding this case you should not consider as evidence the statements of counsel made in your presence nor the testimony which may have been ruled out or withdrawn from your consideration by the court, nor should you conjecture what would have been the answers to questions which the court may have ruled could not be answered."



A similar instruction was approved by the territorial Supreme Court in the case of Miera v. Territory, 13 N. W. 192, 81 Pac. 586. It is proper for the court to instruct the jury that the remarks of counsel are not to be regarded as evidence, and that its verdict must be founded solely on the evidence and the law as given by the court.

[7] It is next urged that the court erred in refusing to give requested instruction numbered 10, to the effect that, if a person has reason to expect an unlawful attack, he has a legal right to arm himself to resist such attack. This instruction was properly refused, as it does not state the law correctly. One does not have the right to arm himself with a deadly weapon for the purpose of resisting an attack, unless he has just grounds to believe that the anticipated attack will be of such a character as to endanger life.

Appellant lastly urges that because the court refused to give his requested instruction numbered 8, to the effect that the burden of proof never shifted, he was thereby required to prove excuse or justification, and the burden of proof shifted. Several authorities are cited to the effect that the burden of proof is upon the state to establish the guilt of the defendant beyond a reasonable doubt. There is no question but that the state is required to prove the defendant guilty beyond a reasonable doubt. But we have carefully examined the court's instructions, and fail to find a single one which indicated in the slightest degree that the burden was placed upon the defendant. Paragraph 4 of the court's general charge is as follows:

"If you believe that each and all of the material allegations of the indictment, as just outlined to you, have been established by the eviined to you, have been established by the evidence to your satisfaction and beyond a reasonable doubt, then you should find the defendant guilty as charged in the indictment.

"If, on the other hand, you have a reasonable doubt as to the truth of any one or all the material allegations of the indictment, as just outlined to you they are the reasonable that we have a reasonable that the reasonable that we have a reasonable that the reasonable

lined to you, then and in that case you will find the defendant not guilty.

Paragraph numbered 14 of the court's general charge is as follows:

"The law presumes that any person charged with a crime is innocent until his guilt is established by the evidence beyond a reasonable doubt; to the benefit of this presumption the defendant is entitled to and it stands as his sufficient protection until it has been removed by facts establishing his guilt beyond a reason-

In numerous places throughout the charge the term of "reasonable doubt" is used. Paragraph number 24 of the general charge given the jury is that you cannot find the defendant guilty unless from all the evidence you believe him guilty beyond a reasonable doubt. We see nothing in the charge anywhere to justify the statement that defendant was required to prove excuse or justificadefense, was fully and correctly explained to the jury. Taking the charge as a whole, it cannot be said that there is anything which led the jury to believe that it could convict on any evidence less than was sufficient to establish the defendant's guilt in their minds beyond a reasonable doubt. In view of the court's general charge and the instructions referred to, we conclude the requested instruction was fully covered by the court's charge, and defendant had the benefit of everything that he requested in such instruction. We therefore think the court committed no error in refusing this instruction.

For the reasons stated, the judgment must be affirmed, and it is so ordered.

HANNA, C. J., and PARKER, J., concur.

HOPKINS et ux. v. CRAIB et ux. (No. 14363.)

(Supreme Court of Washington. April 23, 1918.)

1. Partnership \$\infty 327(6)\$—Action for Share of Profits—Pleading and Proof—Vari-ANCE.

It was not a fatal variance that in an action by a partner for a share of the profits of a business the complaint alleged a partnership in the entire business and a partnership in only a part was proved.

PARTNERSHIP \$\sim 75-Action for Share of . PROFITS-ALLOWANCE OF INTEREST.

In an action by a partner for a share of profits, a partner should not be allowed interest on the amount of capital he invested in the business, where interest on withdrawals would completely offset the interest which would otherwise be due.

3. Reference -94-Report-Transcribing

EVIDENCE.
Where evidence is voluminous and it would cost a large sum to transcribe it, a referee is not required to do so by Rem. Code 1915, § 375, providing the referee shall file with his report the evidence received, and a statement by a referee in such a case that evidence of the chief witnesses could be found in the "reports, statements, schedules, reconciliation sheets, etc.," and that he fairly stated the testimony of other witnesses, was sufficient under the statute.

APPEAL AND ERROR ©=936(1)—RECORD—
REVIEW—COMPENSATION OF WITNESSES.
It will be assumed on appeal, in absence of

anything in the record to the contrary, that witnesses who appeared or were examined on the trial before a referee were entitled to compensation.

Department 2. Appeal from Superior Court, King County; J. T. Ronald, Judge.

Action by Eugene L. Hopkins and wife against John L. Craib and wife. From a judgment for plaintiffs, defendants appeal. Affirmed.

Byers & Byers, of Seattle, for appellants. Morris & Shipley and E. P. Dole, all of Seattle, for respondents.

MOUNT, J. This action was brought to recover from the defendants one-half of the tion. His purported defense, that of self-accrued profits in a partnership business

alleged to have existed between the plaintiff ! E. L. Hopkins and the defendant John L. Craib, from April 1. 1905, until November 1. The defendants answered the complaint, denying any partnership relation. This issue was tried to the lower court, and upon such trial the court found that a partnership existed between those dates between the parties, in a hay business which was conducted by the partnership, but that the partnership did not include other branches of the business conducted in the name of the defendant John L. Craib. The court thereupon ordered a reference for an accounting between the parties. A referee was appointed to take the testimony and make findings and conclusions thereon and report the same to the court. Thereafter the referee heard the evidence for a period of 20 days. The evidence was taken down in shorthand by a stenographer. After considering all the evidence and numerous exhibits, the referee concluded that there was a final balance in favor of the plaintiffs in the sum of \$7.805.87, upon which they were entitled to interest, from November 1, 1912, at the rate of 6 per cent. per annum. The referee filed a lengthy report, stating the substance of the evidence, but the shorthand notes of the reporter were not transcribed, and were not filed with the referee's report. The referee stated as follows:

"The hearing in this accounting took at least 20 days in the actual taking of testimony. The evidence is very voluminous. To make a transcript of the evidence would cost a large sum of money, and I do not consider the same necessary, for the reason that the testimony of the chief witnesses, Hopkins, Butler, and Coburn for the plaintiff, and Craib, Johnstone and Anderson for the defendant, is shown on numerous reports, statements, schedules, reconciliation sheets, etc., introduced as evidence. Said papers have been tied up in two bundles, and each marked 'Special Accounting Data' and deposited with the clerk of the court, together with the other exhibits in the case. These papers make explicit reference to the original books and records introduced as exhibits in the hearing before me. I have endeavored in my findings to fairly state the testimony of the other witnesses who testified. I believe that the court can intelligently review my findings from an examination of this data and the exhibits without a transcript of the evidence. I feel that neither party should be put to this expense."

Upon the filing of the report of the referee, exceptions were taken thereto by the defendants. A motion was made, by the plaintiffs, for a confirmation of the report. Upon a hearing of these exceptions and the motion, the court confirmed the report of the referee and entered a judgment accordingly. The defendants have appealed from that judgment.

[1] They argue, first, that there is a variance between the pleading and the proof, by reason of the fact that the complaint alleged a partnership in the entire business, while the court found that the partnership consisted only in the hay business, which was a part only of the whole business. Appellants

argue that a partnership is a contract which necessarily involves a meeting of the minds of the parties, and that, since there was no meeting of the minds of the parties upon the whole business conducted, there was a fatal variance between the pleading and the proof. We think there is no merit in this contention. The mere fact that the respondents alleged a partnership in the whole business did not prevent them from proving, or the court from finding, that the partnership consisted in a part of the business only. We think it cannot reasonably be said that respondents failed in the proof because they failed to establish the exact allegation of the complaint.

[2] In the order of reference the court directed the referee to find the capital invested and used continuously in the business of the partnership, and to allow interest thereon if the same was furnished by the appel-The referee found that \$10,000 was furnished by the appellants and used continuously in the business, but also found that the appellants had withdrawn large sums of money from the partnership business, and that the interest on the withdrawwould completely offset the interest which would otherwise be due them on the \$10,000 capital. The appellants argue that they are entitled to interest upon this \$10,-000, but we think it is apparent that if they withdrew large sums of money from the partnership funds—as the referee foundand the interest on these withdrawals would offset the interest on the invested capital, in justice and equity they should not be allowed interest on the \$10,000 of capital.

The appellants argue that the court erred in allowing a large number of items which are referred to in the briefs. We have carefully read the report of the referee with reference to these, and we are satisfied that the referee found correctly upon all these items. It would be useless to extend this opinion by referring to each one of them separately.

[3] The appellants next complain that the court erred in refusing to require the referee to have transcribed and to file all the evidence taken before him because the order of reference and the statute (section 375. Rem. Code) provide that the referee shall file with his report the evidence received upon the trial. Appellants argue that, because the statute so provides, it is mandatory upon the court to require the referee to have the reporter's notes transcribed and to file all the evidence received upon the trial. As shown by the report of the referee in the paragraph hereinbefore quoted, the evidence was very voluminous, and to make a transcript thereof would cost a large sum of money. There is no showing in the record that the appellants offered to advance the money necessary to obtain a transcript of the evidence, and we are of the opinion that only in cases where the means are provided by a complaining party to transcribe shorthand notes taken as in this case: and that, where there was no showing to the effect that the party complaining had paid or offered to pay the costs of making such transcript, it was not obligatory upon the court to order the referee to have the notes transcribed and filed in the case. Furthermore, we think the statement of the referee, to the effect that the evidence of the chief witnesses could be found in the "reports, statements, schedules, reconciliation sheets, etc.," and that he fairly stated the testimony of the other witnesses, was sufficient under the statute. We are of the opinion, therefore, that it was not error for the court to refuse to require the shorthand notes to be transcribed and filed in the case.

[4] It is next argued that the court erred in not striking certain items from the cost bill. It is contended that it was the duty of the witnesses to report their attendance at the close of each day's session, and that, since this was not done, certain witnesses were not entitled to witness fees. We find nothing in the record to indicate that the witnesses did not report their attendance on each day. It will be assumed, in the absence of a record to the contrary, that the witnesses who appeared, or were examined, upn the trial before the referee were entitled to compensation as witnesses. We have examined the record quite carefully and are satisfied that the trial before the referee was fairly conducted, and that he exercised more than ordinary care in considering the evidence of the witnesses and in preparing and filing his report, and that the trial court properly confirmed the same.

We find nothing in the record to justify a reversal. The judgment is therefore affirmed.

ELLIS, C. J., and HOLCOMB, J., concur.

SIEGLEY v. KELLEY et ux. Appeal of NAKATA. (No. 14361.)

(Supreme Court of Washington. 1918.) April 10,

1. APPEAL AND ERROR 564(3)—STATEMENT OF FACTS—TIME FOR FILING—EXTENSION— EX PARTE APPLICATION.

An order, extending the time for filing the statement of facts, obtained on ex parte application, is void.

cation, is void.

2. APPEAL AND ERROR & APPEAL AND ERROR FILING—"NOTICE" OF APPLICATION FOR EXTENSION—ESTOPPEL.

Affidavit of one of appellant's attorneys that, shortly before procuring order of extension of time for filing statement of facts, he orally advised respondents' attorney that the extension would be applied for, and that respondents' attorney assured affiant he would interpose no objection, sets out no facts meeting interpose no objection, sets out no facts meeting the requirement of notice under Rem. Code 1915. § 393, or estopping respondents from as-

serting their right to such notice, since the statutory requirement of "notice" means written notice.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Notice.]

APPEAL AND ERROR \$\infty\$=564(3)—Time for Filing Statement of Facts—Application for Extension—Stipulation Not to Con-TEST.

Oral stipulation between the attorneys that appellant's application for extension of time for filing statement of facts would not be contested was not legally binding on respondents.

JUDGMENT 5-584 — PAYMENT — SUIT ON STAY BOND—DISMISSAL WITH PREJUDICE. Where suit against a defendant and a surety company on bond given to stay execution of a judgment was dismissed with prejudice, though the surety was released from all further liability to pay the judgment, defendant, whose liabil-ity for the judgment was not traceable to the bond, but existed anterior to and independently of it, was not released, the judgment not hav-ing been fully paid, and being only collaterally involved, though, had the suit been successful, involved, though, had the suit been successful, the measure of recovery would have been the full amount of the judgment, in accordance with the covenant of the bond, and though a payment in full of such a judgment on the bond would have operated as a satisfaction of the judgment execution of which the bond was given to stay, and the most that defendant can claim is that the money paid for the discharge of the bond should be credited on the judgment.

JUDGMENT \$\infty 675(1) — BINDING FORCE - PRIVY TO LITTIGATION.

A defendant who was a privy though not a formal party to the whole of a course of litigation is bound by the decree in one of the suits adjudging that certain property was the separate property of another defendant, a married woman.

Department 2. Appeal from Superior Court, King County; Kenneth Mackintosh, Judge.

Action by E. E. Siegley against H. G. Kelley and Anita Ford Kelley, his wife, and T. Nakata, wherein defendants Kelley and Nakata filed cross-complaints against one another. From decree for defendants Kelley, defendant Nakata appeals. Cause remanded, with directions to modify the decree in accordance with the opinion.

Robert D. Hamlin and Walter A. Keene, both of Seattle, for appellant. R. B. Brown, of Seattle, for respondents.

ELLIS, C. J. The plaintiff in this action is not concerned in this appeal. The validity of his claim against the real estate in question is not denied by any of the defendants. The contest in the court below was waged between defendants Kelley and wife on the one hand, and defendant Nakata on the other, upon issues raised by their respective cross-complaints seeking to quiet title as against each other and their respective answers to such cross-complaints. claimed title through a sheriff's deed made to him as purchaser at sheriff's sale under an execution issued upon a judgment rendered in the superior court for King county and affirmed by this court in the case of Sakai v. Keeley, 66 Wash. 172, 119 Pac. 190.

tion was the separate property of Mrs. Kelley and had been so adjudged in another action to which Nakata was privy, hence was not subject to sale on execution under the Sakai judgment against her husband. They further claimed that in any event the Sakai judgment had been paid and should be satisfied of record. The trial court held with defendants Kelley on both of these contentions and entered a decree quieting the title in Mrs. Kelley, directing that the Sakai judgment be satisfied of record, and declaring the execution sale and sheriff's deed thereunder null and void. Defendant Nakata prosecutes this appeal.

Respondents move to strike the statement of facts, on the ground that it was not filed within the time limited by law, and ask that the decree be affirmed. The findings of fact and conclusions of law were signed and filed and the decree was entered on February 28, 1917. On March 29, 1917, appellant procured, on ex parte application, an order extending the time for filing the statement of facts for a period of 30 days from and after March 30, 1917. Appellant's proposed statement of facts was filed on April 5, 1917. On September 24, 1917, appellant filed in the trial court, and brings here by supplemental transcript, an affidavit of one of his attorneys to the effect that, shortly before procuring the order of extension, he orally advised respondents' attorney that the extension would be applied for, and that respondents' attorney then assured the affiant that he would interpose no objection to such application. It is conceded that no formal notice of the application for extension as required by Rem. Code, § 393, was given. That a copy of the order was subsequently served we regard as immaterial.

[1] We have repeatedly held that an order extending the time for filing the statement of facts obtained on ex parte application is void. Michaelson v. Overmeyer, 77 Wash. 110, 137 Pac. 332; Austin v. Petrovitsky, 82 Wash, 343, 144 Pac. 26.

[2, 3] Unless, therefore, the facts set out in the affidavit above mentioned meet the statutory requirement of notice, or estop respondents from asserting their right to such notice, the statement of facts must be strick-We are clear that they do neither of these things. The statutory requirement of notice means written notice. It cannot be assumed that the Legislature intended that the evidence of this jurisdictional step to the procurement of the extension might rest in parol often to be determined on conflicting testimony. That no estoppel arises follows as a corollary. The most that can be said for the facts set out in the affidavit is that they tend to establish an oral stipulation that the application would not be contested. As such it would legally bind no one. Humes v. Hillman, 39 Wash. 107, 80 Pac. 1104. In

Kelleys claimed that the real estate in ques-1 any event, it cannot be construed as a waiver of the statutory notice. To so hold would be to make the whole question of notice and waiver of notice rest in the uncertain memories of the parties or of their attorneys as to what was said and what was intended in every case. It would lead to needless uncertainty, endless confusion, and exasperating controversies. As said in Humes v. Hillman, supra, "There must be a record here upon which the court can act." The statement of facts must be stricken, and it is so ordered.

> But an affirmance of the decree does not necessarily follow. The question remains: Do the findings of fact sustain the decree? The findings are extremely complicated and voluminous. We shall attempt no more than the following outline: On February 26, 1910, a judgment was entered by default against H. G. Kelley in the case of Sakai v. Keeley. An execution was issued thereon and levied upon lots 11 and 12 in block 14. Hillman City. division 6, the land here involved. Kelley brought an action against Sakai and the sheriff to restrain the sale and to vacate the judgment. Nakata intervened in that action. claiming to own the Sakai judgment as assignee of Sakai, and contested the action to vacate in the trial court and on Kelley's appeal to this court. Kelley, in order to stay the execution, filed in the action to vacate a stay bond with National Surety Company as surety conditioned that he as principal and the Surety Company as surety would pay the Sakai judgment if Kelley failed to have it set aside. Kelley failed in his action to vacate which was dismissed with \$20 costs to defendants therein. That judgment was on appeal affirmed by this court. See Kelley v. Sakai et al., 72 Wash. 364, 130 Pac. 503.

> While the action to vacate was pending in the Supreme Court, an execution was issued, without notice or knowledge on Kelley's part, on the judgment for \$20 costs, and levy was made upon the real estate here involved which was thereafter sold by the sheriff to one Hall for and on behalf of Hamlin and Meier, then attorneys for Nakata. Hall and wife on June 20, 1914, assigned the certificate of sale to Robert D. Hamlin, who in due time procured a sheriff's deed conveying to him the land here in question. Hamlin then brought an action in the superior court of King county to quiet title against Kelley and They defended on the ground that wife. the lots in question were the separate property of Mrs. Kelley, and the court after a hearing on the evidence so found and entered a decree quieting the title in Mrs. Kelley as her separate property, directing, however, that Kelley pay to Hamlin the \$20 and costs amounting in all to \$54.20, which sum was paid by Kelley and accepted by Hamlin. That decree was never appealed from and is still in full force and effect.

Thereafter Nakata brought an action in

the superior court of King county against H. | G. Kelley and National Surety Company on the bond given in Kelley's action to vacate the Sakai judgment, which bond was conditioned to pay that judgment in case of his failure to vacate it, and demanded judgment for the full amount of the Sakai judgment and costs. Issue was joined, and the court, after hearing the evidence, found against Nakata, and on May 5, 1914, dismissed the action with costs against Nakata. Nakata gave notice of appeal from the order of dismissal, but thereafter the parties through their respective attorneys stipulated that the judgment of May 5, 1914, be set aside and that the action on the bond be dismissed "with prejudice and without costs to either party. \$150 being paid as full satisfaction herein." Thereupon the defendants in that action paid to Nakata through Hamlin and Meier, his attorneys, the sum of \$150, and the judgment of dismissal and for costs was set aside, and the cause was dismissed "with prejudice, and without costs to either party.'

The trial court specifically found that from the time Nakata intervened in Kelley's action to vacate the Sakai judgment, up to January 10, 1915, Nakata "was represented in all had and determined between himself and the defendants H. G. Kelley and Anita Ford Kelley, his wife, by Hamlin and Meier and ever since said time by the said Robert D. Hamlin, who was or claimed to represent him in the said several causes."

After the filing of the stipulation and entry of the order of dismissal above mentioned, Nakata through his attorneys caused to be issued on the Sakai judgment an execution, and caused the sheriff of King county to levy upon the lots here involved and to sell the same on October 10, 1914, at which sale Nakata was purchaser and received a sheriff's certificate of purchase. On May 15, 1916, that sale was confirmed by the court, and the sheriff executed to Nakata a sheriff's deed of the lots, which deed constitutes Nakata's only claim of title thereto.

As matters of law, the court concluded that, at the time of the issuance of the last-mentioned execution, the Sakai judgment had been fully paid; that the execution was wrongfully issued; that the Sakai judgment should be satisfied of record; that the sheriff's sale and deed are null and void and the Kelleys are entitled to have the same canceled, vacated, and set aside; that Anita Ford Kelley is entitled to a decree quieting title in her as against Nakata and all persons claiming through or under him; and that the Kelleys are entitled to their costs. Decree went accordingly.

[4] Appellant, Nakata, contends that the court's conclusion that the Sakai judgment had been fully paid is erroneous. This contention must be sustained. That conclusion was evidently based upon the order dismissions with prejudice the suit against Kelley ment for costs in appellant's favor rendered in Kelley's suit to vacate, it can hardly be conceived that, had Hamlin's suit to quiet title been successful, he would not have admittedly held title to the lots in trust for appellant, subject only to whatever was due

and the National Surety Company upon the stay bond. That suit, however, was a suit upon the bond and upon its covenants. The Sakai judgment was only collaterally involved. True, had that suit been successful the measure of Nakata's recovery would have been the full amount of the Sakai judgment. Such was the covenant of the bond. True, also, a payment in full of such a judgment on the bond would have operated as a satisfaction of the Sakai judgment. But no such judgment was rendered or paid. The stipulation for dismissal and the order entered thereon mean nothing more than a dismissal with prejudice of the suit on the bond. This. of course, released the surety from all further liability to pay the Sakai judgment simply because it was a mere surety. But it did not release Kelley. He was not a surety. His liability for that judgment was not traceable to the bond, but existed antecedently to and independently of the bond. Touching that liability, both the stipulation and the order of dismissal were silent. The validity of the Sakai judgment as against Kelley was not in issue in that suit. The very terms of the bond precluded that is-The most therefore that Kelley can claim is that the \$150 paid for the discharge of the bond should be credited upon the Sakai judgment.

[5] Appellant next contends that the court erred in his conclusion that the lots here involved were the separate property of respondent Anita Ford Kelley. This conclusion evidently rests upon the finding detailing the sheriff's sale to Hall on behalf of Hamlin and Meier under the execution on the judgment for costs in the action of Kelley v. Sakai to vacate the Sakai judgment. in which suit Nakata had intervened and was the real contesting defendant, and on the finding that Hamlin's title, referable to the sheriff's deed based on that sale, was defeated in his suit against the Kelleys, and that the title of the lots in question was by decree quieted in Anita Ford Kelley as her separate property. Appellant insists that the evidence shows that he had no knowledge of this suit, that it was not prosecuted in his interest but solely in the interest of Hamlin and to collect costs advanced for appellant, and that as to appellant it was res inter alios acta. But the evidence is not before us, and the trial judge found none of these things. On the contrary, he found in substance that, in all of this litigation subsequent to appellant's intervention in the action of Kelley v. Sakai, Hamlin was acting as attorney for appellant. Moreover, since the title claimed by Hamlin in his suit against the Kelleys was based upon the judgment for costs in appellant's favor rendered in Kelley's suit to vacate, it can hardly be conceived that, had Hamlin's suit to quiet title been successful, he would not have admittedly held title to the lots in trust for

him from appellant for costs and fees. But the court did not even find that there was any sum due from appellant to Hamlin. The findings of the trial court are capable of no other construction than that appellant was a privy, though not a formal party, to all of this litigation. As such he is bound by the decree in the case of Hamlin v. Kelley et ux., adjudging that the property in question was the separate property of Anita Ford Kelley.

We conclude that the Sakai judgment remains unsatisfied except in the sum of \$150, which should be credited thereon; that the execution was not wrongfully issued, but that it was wrongfully levied upon the separate property of Anita Ford Kelley; and that in other respects the trial court's conclusions and decree are supported by the findings.

The cause is remanded, with direction to modify the decree in accordance with this opinion.

MOUNT, CHADWICK, and HOLCOMB, JJ., concur.

# In re JONES' ESTATE.

(Supreme Court of Washington. April 15, 1918.)

1. WILLS \$\infty 302(1)\\_"ATTESTATION"\—SUFFI-CIENCY OF EVIDENCE.

Evidence held insufficient to show execution of a will, within Laws 1917, c. 156, § 25, requiring a will to be attested by "two" or more quiring a will to be attested by "two" or more competent witnesses subscribing their names in the presence of the testator" by his direction, or request; such law being practically identical with the prior law (Rem. Code 1915, § 1320). "Attestation" is the act of witnessing an instrument in writing at the request of the party making the same and subscribing it as a witness. witness.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Attes-

2. WILLS \$==119-ATTESTATION.

A witness must sign animo attestandi.

3. WILLS \$\insigma 123(5)\$—ATTESTATION.

The act of signify by a subscribing witness must be within the scope of testator's vision from his actual position.

Department 1. Appeal from Superior Court, King County; Kenneth Mackintosh,

In the matter of the settlement of the estate of M. F. Jones, deceased. From an order of the superior court, rejecting the probate of a writing purporting to be the last will and testament of deceased, Charles W. Brooks and another appeal. Aftirmed.

H. E. Foster, of Seattle, for appellants. Karr & Gregory and H. G. Sutton, all of Seattle, for respondent.

ELLIS, C. J. Appeal from an order rejecting probate of a writing purporting to be the last will and testament of M. F. Jones, except what his wife told him one evening

deceased. At the time of his death, October 8, 1917, decedent was a resident of King county, where he died. He left a widow Isabella Jones, but no children. The widow, producing a paper purporting to be a copy of his will, was by the court appointed special administratrix pending search for the original. On October 16, 1917, upon the petition of Charles W. Brooks and Marion Johnson. alleging that they were named in the will as executors, the court ordered that citation issue, commanding Isabella Jones to produce the will in court on October 18, 1917, submit to examination, and show cause why it should not be admitted to probate. At the time stated she produced a writing, dated December 13, 1915, purporting to be the last will and testament of decedent and a full hearing was had as to its execution.

Mrs. Jean Demar Snyder, whose name appeared as that of a witness, testified in substance that at some time in the fall or winter of 1915 Mr. Jones called at her home, produced the paper, told her it was his will, and asked her to sign it which she did; that no one else was present at the time; that Mr. Jones did not sign the instrument in her presence; that she did not know his signature, and could not say that it was on the paper when she signed it. A Mrs. Bassett, wife of William N. Bassett, whose name appears as that of the other attesting witness, testified that Mr. Jones came to the back door of the Bassett home and asked for Mr. Bassett: that she told him Mr. Bassett was not at home, and he said, "I have a paper here to sign;" that she asked him to wait for her husband's return, and he said, "No, I don't think I will wait; you sign it for Mr. Bassett in his name;" that she invited him into the house but he declined, remaining on the back porch while she passed through the kitchen into the dining room where she signed the paper as follows: "Mr. Wm. N. Bassett." She further testified that Mr. Jones did not and could not see her sign the paper, because he was on the back porch and the door between the kitchen and dining room was closed: that she did not know whether the name either of Mr. Jones or of Mrs. Snyder was on the paper at the time, as it "was not opened up"; that she did not know what the paper was until she returned it to Mr. Jones, when he told her it was his will. She further stated that she did not know his signature, and that he never asked her to sign the paper as an attesting witness. There was no one else present when she signed her husband's name. William N. Bassett, when shown the paper at the hearing, testifled that he had never seen it before: that, though his name appeared upon it, he did not sign it; that Mr. Jones never requested him to act as a witness to his will; and that he (Bassett) knew nothing about the matter,

on his returning home. There was other ties are uniform that the witness must sign evidence touching the mental capacity of the decedent, but we deem it immaterial.

This is not an action to contest a will. It is in substance an application for probate, presenting only the questions of execution and attestation. The trial court, being of the opinion that the instrument was not so attested as to entitle it to probate as a will, entered the order complained of. The petitioners, Brooks and Johnson, prosecute this appeal.

[1] The existing statute governing the execution of wills was in force at the date of the death of M. F. Jones. It is section 25, chapter 156, of the Laws of 1917. So far as here material it reads:

"Every will shall be in writing signed by the "Every will shall be in writing signed by the testator or the testatrix, or by some other person under his or her direction in his or her presence, and shall be attested by two or more competent witnesses, subscribing their names to the will in the presence of the testator by his direction or request."

It is in every material particular identical with the prior law (Rem. Code, § 1320): the only change being the addition of the words which we have italicized. The change is immaterial. Both require attestation by the witnesses, and "attestation" is "the act of witnessing an instrument in writing, at the request of the party making the same, and subscribing it as a witness." Bouvier's Law Dictionary, Rawle's 3d Revision; Black's Law Dictionary (2d Ed.). Attestation is not a mere form. It has a vital object. That object is to certify that the will was acknowledged in the presence of the witness and that the signature was genuine. Keely v. Moore, 196 U. S. 38, 25 Sup. Ct. 169, 49 L. Ed. 376.

[2] It requires no more than an adversion to the facts to show that neither of the purported witnesses attested the instrument here involved in the manner required by the statute. Though Mrs. Snyder signed in the presence of the decedent and at his request, she did not see him sign it; he did not acknowledge his signature to her; she did not know his signature; she could even not say that his name was on the paper when she sign-William N. Bassett, the only other person whose name appears as that of a witness, did not sign the instrument, was never requested to sign it, and had never even seen it prior to the hearing. Mrs. Bassett did not sign as a witness, did not intend to sign as a witness, and was never even requested to sign as a witness. She was requested to sign "for Mr. Bassett in his There are authorities which hold that a witness, intending to sign as such, may subscribe in any way intended to identify himself as a witness. In re Walker's Estate, 110 Cal. 387, 42 Pac. 815, 30 L. R. A.

animo attestandi. Keely v. Moore, supra; Burton v. Brown (Miss.) 25 South. 61; Peake v. Jenkins, 80 Va. 293; Boone v. Lewis, 103 N. C. 40, 9 S. E. 644, 14 Am. St. Rep. 783; Moale v. Cutting, 59 Md. 510.

[3] Moreover, respondent contends, and we think soundly, that Mrs. Bassett never signed even her husband's name in the presence of the testator within the meaning of the statute. The act was not within the scope of the testator's vision from his actual position. Reynolds v. Reynolds, 1 Speers (S. C.) 253, 40 Am. Dec. 599; Drury v. Connell, 177 III. 43, 52 N. E. 368; McKee v. McKee, 155 Ky. 738, 160 S. W. 261; International Trust Co. v. Anthony, 45 Colo. 474, 101 Pac. 781, 22 L. R. A. (N. S.) 1002, 16 Ann. Cas. 1087; Reed v. Roberts, 26 Ga. 294, 71 Am. Dec. 210; In re Downie's Will, 42 Wis. 66; Calkins v. Calkins, 216 Ill. 458, 75 N. E. 182, 1 L. R. A. (N. S.) 393, 108 Am. St. Rep. 233. Cases sustaining this view might be cited indefinitely; but, inasmuch as Mrs. Bassett did not sign as a witness at all, we shall not further pursue the subject.

There is some doubt as to the appealability of this order; but since all the evidence is here, and both sides have requested a decision on the merits, we have entertained the appeal, reserving that question.

Affirmed.

PARKER, WEBSTER, MAIN, and FUL-LERTON, JJ., concur.

McDERMOTT et al. v. TOLT LAND CO. et al. (No. 14400.)

(Supreme Court of Washington. April 15, 1918.)

BANKEUPTCY 6=350 PAYMENTS OF

CLAIMS—STATUTES—APPLICATION.

Rem. Code 1915, § 1153, providing that a receiver or assignee shall pay all claims for which a lien could be filed, does not apply to trustee in bankruptcy, and limits payment to assets other than operating expenses.

2. MECHANICS' LIENS 6 260(1) - TIME FOR

Bringing Action.

Filing a claim in bankruptcy proceedings does not constitute bringing of an action to foreclose a laborer's lien within Rem. Code 1915, \$ 1138, requiring actions to foreclose such liens to be brought within eight months.

3. LIMITATION OF ACTIONS \$== 110-Tolling STATUTE-PENDING BANKBUPTCY.

Bankruptcy proceedings do not toll the statute of limitations under Rem. Code 1915, § 172, providing that, when the commencement of an action is stayed by injunction or a statutory prohibition, the time of the continuance of such injunction or prohibition shall not be seen injunction or prohibition shall not be a part of the time limited for bringing of the action.

Department 2. Appeal from Superior Court, King County; Guy C. Alston, Judge. Action to foreclose laborers' liens by L. D. McDermott and others against the Tolt 460, 52 Am. St. Rep. 104; 30 Am. & Eng. Land Company, a corporation, National City Encyc. Law (2d Ed.) 601. But the authori-Bank of Seattle, a corporation, and the Carnation Lumber & Shingle Company. Judgment for defendants, and plaintiffs appeal. Provides that:

Affirmed. "No lien cre

H. E. Peck, of Seattle, for appellants. J. A. Coleman, of Everett, for respondents.

MOUNT, J. This action was brought to foreclose laborers' liens against the property of the defendants. Upon a trial of the case, the court denied the plaintiffs any relief, and they have appealed from that judgment.

The facts are as follows: The Fisher-Bird Lumber Company was a corporation engaged in the manufacture of lumber. The plaintiffs were employed by that company, and while they were so employed the name of the company was changed to the Fisher-Sorenson Lumber Company. On January 5, 1915, each of the plaintiffs filed in the office of the auditor of King county a notice of his claim of lien against the property of the company for the amount due for wages within the preceding six months, under the provisions of sections 1149 and 1150, Rem. & Bal. On February 25, 1915, the Fisher-Sorenson Lumber Company was adjudged a bankrupt. On March 30, 1915, a trustee in bankruptcy was appointed for the company. After the adjudication of bankruptcy. the plaintiffs filed with the referee their respective claims for wages due, and stated therein that said claims were secured by liens already filed. The several claims were allowed by the referee. No funds were available for the payment of the debts of the company, and on March 22, 1916, the mill and the land of the company were sold to the defendant Tolt Land Company, and the trustee was directed to execute to the latter company a conveyance of the real estate and personal property subject to all incumbrances except certain specified mortgages and vendors' liens. The liens of the plaintiffs were not excepted, and their claims have not been paid. The proceeds of the sale were all used to pay the specified incumbrances and the expenses of the bankruptcy proceedings. Thereafter, more than eight months after the filing of the notices of liens, this action was commenced to foreclose the liens. The court concluded from these facts: First, that the action was not commenced within the time limited by the statute; and, second, that the plaintiffs waived their liens by filing the claims with the referee, and elected thereby to have their claims satisfied from the assets of the bankrupt estate. If the court was correct in either of these conclusions, the judgment must be affirmed.

In view of our conclusion upon the first question presented, it will be unnecessary to discuss the second.

The statute provides, at section 1152, Rem. Code, that:

"Any such lien may be enforced within the same time and in the same manner as mechanics' liens are foreclosed."

Section 1138 of the mechanics' lien law provides that:

"No lien created by this chapter binds the property subject to the lien for a longer period than eight calendar months after the claim has been filed unless an action be commenced in the proper court within that time to enforce such lien.

In Peterson v. Dillon, 27 Wash. 78, 67 Pac. 397, in referring to this statute, we said:

"The mechanic's lien is altogether a creation of the statute, and is circumscribed by the terms of its own creation. It exists independent of any special contract. Where a contract is entered into by the parties, it is not the contract which creates the lien under the statute, but it is the use of the material furnished upon the premises, the putting of it into the building and attaching it to the freehold, which entitled the party furnishing the same to a lien upon the premises to the extent of its value.

\* \* The statute creates and limits the duration of the lien. When the limit fixed by the statute for the duration of the lien is passed, no lien exists, any more than if it had never been created. The statute gives jurisdiction to the court to foreclose a lien on certain conditions, the filing of a lien notice, and the commencement of the action within eight months after such notice is filed. If these things are not done, no jurisdiction exists in the court to foreclose the lien."

In Davis v. Bartz, 65 Wash. 395, 118 Pac. 334, we said:

"Since the lien expires by force of the statute unless action be commenced within the statutory time, it is necessary to the pleading and proof of a valid lien that the complaint allege and evidence show that the work was done or materials furnished within that time, or the action cannot be maintained. This necessarily results from the wording of the statute, as construed by this court in a number of decisions. Rees v. Wilson, 50 Wash. 339, 97 Pac. 245; Northwest Bridge Co. v. Tacoma Shipbuilding Co., 36 Wash. 333, 78 Pac. 996.

See, also, City Sash & Door Co. v. Bunn, 90 Wash. 669, 156 Pac. 854.

[1] The appellants seek to avoid this conclusion in this case because of section 1153, Rem. Code, which provides:

"Whenever a receiver or assignee is appointed for any person, company or corporation, the court shall require such receiver or assignee to pay all claims for which a lien could be filed under this chapter, before the payment of any other debts or claims, other than operating expenses."

This statute plainly refers to a receiver or assignee in the state court, and limits the payment of claims to assets other than operating expenses. There is nothing in the record before us to show that the funds of this company were not exhausted in operating expenses. The inference is that there was not enough property of the corporation to pay the operating expenses and prior claims.

[2, 3] The appellants also argue that the statute was tolled by reason of the bankruptcy proceedings, because the filing of the claims in bankruptcy was equivalent to the commencement of a suit to foreclose. Section 172, Rem. Code, provides:

"When the commencement of an action is stayed by injunction or a statutory prohibition.

the time of the continuance of the injunction or prohibition shall not be a part of the time limited for the commencement of the action."

In the case of City Sash & Door Co. v. Bunn, supra, we held that section 1138, requiring an action to foreclose a lien to be commenced within eight months, was not a statute of limitations. We there said:

"It 'limits the duration of the lien."

But if we were to concede that it is a statute of limitations, it is apparent that section 172, Rem. Code, above quoted, is not applicable to this case, because no injunction was issued, and there is no statutory prohibition against the maintenance of a foreclosure action after the bankruptcy proceedings have In Re Smith (D C.) 121 been instituted. Fed. 1014, the District Court of the United States for the Southern District of New York said:

"This is a motion for leave to sue a trustee. The petitioner proposes to bring an action to foreclose a mechanic's lien on property of the bankrupt, and desires to join the trustee as the owner of the equity of redemption. In my opinion, no leave is necessary to sue a trustee in bankruptcy."

And in Re San Gabriel Sanatorium Co., 111 Fed 892, 50 C. C. A. 56, the United States Circuit Court of Appeals of this district based its decision upon Bardes v. Bank, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175, and held that the District Court was right in granting leave to the mortgagee to make the trustee in bankruptcy a party defendant to foreclosure proceedings in the state court, and that the District Court was right in denying the petition of the trustee in bankruptcy for an injunction to restrain the foreclosure proceedings in the state court. It seems plain from these holdings that these appellants might have brought their action to foreclose their liens notwithstanding the bankruptcy proceeding. They elected not to do so, but permitted the time to expire within which, under the statute above quoted, their liens expired. We are satisfied for this reason that the trial court was right in holding that the action was not begun within the time limited by statute.

The judgment appealed from is therefore affirmed.

ELLIS, C. J., and HOLCOMB, and CHAD-WICK, JJ., concur.

ISLAND GUN CLUB v. NATIONAL SURE-TY CO. (No. 14580.)

(Supreme Court of Washington. April 16, 1918.)

contractor to furnish such labor and material at his own cost and expense, and bound him to protect the property against liens.

2. PRINCIPAL AND SURETY \$\infty\$ 76—LIABILITY OF SURETY — PERFORMANCE OF CONTRACT — PROTECTION AGAINST LIENS.

A construction contract, binding the contractor to protect property against liens, did not expressly provide for a bond to secure performance; but the contract and a bond securing formance; but the contract and a bond securing performance were executed simultaneously, and the bond referred to the contract and made it a part thereof "as fully as if written herein," and required the surety to pay out money which should be paid to it, instead of to the contractor on the contract price, "for the protection of all parties in interest." Held, that the surety was liable on its bond in at least a sum which was paid to it, instead of to the contractor pursuant to the bond, on its payment of such sum to the contractor and the subsequent foreclosure of the contractor and the subsequent foreclosure of a lien for a larger amount upon the property, which the owner was compelled to pay to free the property therefrom.

3. Receivers 4 4 95 - Authority - Assign-MENT.

General receivers of a surety company, by virtue of their office alone, were authorized to assign, to the owners of property to whom the assign, to the owhers of property to whom the company was liable on a contractor's bond, its right under an indemnity bond protecting it against liability on the contractor's bond, thereby relieving it of its liability on the contractor's bond.

4. Receivers 🖘 144 — Assignment—Execu-TION.

An assignment of the right of a surety company under an indemnity bond given to it referred to a bond given by it to secure performance of a contract with the assignee, to a payment by the latter of a certain sum to the surety company under its terms, to payment of that sum by its contract to the secure of the contract of the company under its terms, to payment of that sum by it to the contractor by the company on the ex-ecution of the indemnity bond to it, conditioned to repay it to the company, should it become necessary, and particularly to a claim against the contractor as being a claim which might require repayment of the money by the contrac-tor to the end that it might be applied on the tor, to the end that it might be applied on the claim, but mentioned no other possible claim by name. In the body of the assignment receivers of the company were named as assignors, followed by a recital that they are duly appointed and by these presents transfer, etc. Consideration for making the assignment was recited as the release of the company and its receivers from the bond to secure performance of the contract with the assignee. The assignment was signed by the individual names of the receivers. without official designation. Held, that the assignment was not defective in form, as not being in law an assignment by the receivers as such.

5. Trial \$\isim 105(4)\$—Objection to Evidence —Waiver.

Where, on general objection made to an offer in evidence of an assignment executed by re-ceivers, the court remarked, that the objection would be overruled, unless directed to authenti-cation of the assignment, and counsel made no further objection, necessity of proving the gen-uineness of the signatures of the receivers was waived.

6. Assignments 4 18 - Rights Under In-DEMNITY BOND.

1. CONTRACTS \$\infty\$=198(1) — CONSTRUCTION —
PROTECTION AGAINST LIENS.

A construction contract, by which the contractor was to "furnish all skill, labor, and material required for the complete performance of said improvement, in its each and every detail," and be paid a lump sum therefor, required the complete paid a lump sum therefor a lump sum

7. INDEMNITY \$==11-ACCBUAL OF CAUSE OF ACTION-LIABILITY ON BOND.

A cause of action on an indemnity bond to protect a surety company from liability on its bond to protect property against liens accrued not earlier than when a judgment and decree of foreclosure of a lien on the land was rendered, and is not barred within less than two years thereafter.

Department 1. Appeal from Superior Court, King County; Mitchell Gilliam, Judge. Action by the Island Gun Club against the National Surety Company and another. From a judgment for plaintiff, the named defendant appeals. Affirmed.

Roberts, Wilson & Skell, of Seattle, for appellant. E. H. Kohlhase, of Seattle, for respondent.

PARKER, J. This is an action upon an indemnity bond executed by L. C. Hall, doing business as L. C. Hall & Co., as principal, and the National Surety Company, as surety, and given to the United Surety Company to indemnify it against damages which it might suffer from the paving over to Hall of the sum of \$985.42, which sum was placed in its hands by the Island Gun Club in pursuance of the terms of an indemnity bond it had executed as surety, with Hall as principal, to secure the faithful performance of a contract wherein Hall agreed to construct for it certain dikes and drains. Recovery is sought by the Gun Club upon the theory that it has succeeded to the rights of the United Surety Company under the indemnity bond given to that company by the National Surety Company. Trial upon the merits in the superior court for King county, sitting without a jury, resulted in findings and judgment in favor of the Gun Club, and against L. C. Hall and the National Surety Company, in the sum of \$985.42, from which the National Surety Company has appealed to this court.

On May 5, 1910, L. C. Hall, doing business in the name of L. C. Hall & Co., entered into a contract with the Island Gun Club, by which he agreed to construct certain dikes and drains for it in Skagit county in accordance with certain plans and specifications, for which it agreed to pay him \$4,750. The contract contained, among other provisions, the following:

"Said party of the second part [Hall] shall furnish all skill, labor, and material required for the complete performance of said improvement, in its each and every detail."

The contract did not in terms provide for the giving of a bond by Hall as contractor to secure the faithful performance of the work. but on the same day, and manifestly in compliance with the understanding of the parties at the time of the signing of the contract, Hall executed, as principal, with the United Surety Company, as surety, and delivered

pelled to pay on such liability, are assignable to the Gun Club, a bond in the sum of \$4, such third party. 750 to secure the faithful performance of the contract This bond was conditioned as follows .

> "The conditions of the above obligation are such that whereas, the above bounden principal such that whereas, the above bounden principal has entered into an agreement with the abovenamed Island Gun Club for the construction and completion of a dike and box drains on section 25, township 33 N., range 3 E. W. M., near the town of Fir, Wash., according to the terms and conditions of a certain contract entered into the 5th day of May, 1910, which contract is hereby referred to and made a part hereof as fully as if written herein: Now, therefore, if any notice is served upon the obligae or if the any notice is served upon the obligee, or if the obligee shall have knowledge that the principal is not meeting its obligations for labor performed or material furnished, then and thereafter all payments made or to be made under the said contract shall be made through the surety for the protection of all parties in interest, and that if said principal shall faithfully perform said contract according to the terms, covenants, and conditions thereof, then this obligation shall be void: otherwise, to remain in full force and effect."

> Hall, we assume, completed the work, when there remained unpaid upon the contract price the sum of \$985.42. The Gun Club. having learned that Hall had not settled with the Everett Construction Company, which company had done work for him upon the contract, for which it had a lien upon the land, the Gun Club notified the United Surety Company thereof and paid over to it the balance of \$985.42 due upon the contract, to the end that the same might be held and paid out by it "for the protection of all parties in interest" as provided by the terms of the bond. Thereafter, on November 1, 1910. the United Surety Company paid this \$985 .-42 over to Hall upon his demand therefor, but before doing so it exacted of and received from him an indemnity bond in the sum of \$985.42, executed by him, as principal, and the National Surety Company, as surety, containing recitals and conditions as follows:

"Whereas, said principal, L. C. Hall & Co., did on the 5th day of May, 1910, enter into a certain contract with the Island Gun Club for certain contract with the Island Gun Club for the construction of a certain dike in section 25, township 33 north, range 3 east W. M., near the town of Fir, Wash., in Skagit county; and whereas, the said principal, L. C. Hall & Co., did on the 5th day of May, 1910, give, together with the said United Surety Company, a certain bond, wherein said L. C. Hall & Co. was principal and said United Surety Company was surety, said bond being conditioned that said L. C. Hall & Co. should faithfully perform said work according to the terms, covenants and conwork according to the terms, covenants and conditions thereof; and whereas, said bond contained a clause to the effect that 'if any notice is served upon the obligee, or if the obligee shall have knowledge that the principal is not meeting its obligations for labor performed or material furnished, then and thereafter all payments made or to be made under the said contract shall be made through the surety for the protection of be made through the surery for the protection or all parties in interest'; and whereas, the said obligee did heretofore give notice to the said United Surety Company that there was a cer-tain dispute between said L. C. Hall & Co. and the Everett Construction Company, a corpora-tion which had performed certain work for said L. C. Hall & Co. under said contract; and

whereas, it now appears that said Everett Construction Company has filed a lien against the property of the said Island Gun Club, said lien being based upon a claim for work and labor alleged to have been performed for said L. C. Hall & Co. under said contract; and whereas, according to the provisions of said bond between L. C. Hall & Co. and said United Surety Company given to the said Island Gun Club, the said Island Gun Club has paid over certain moneys to said United Surety Company, and said United Surety Company did have in its possession at the time of the execution of these presents the sum of nine hundred eighty-five and 42/100 dollars (\$985.42), being money paid it by said Island Gun Club under the condition hereinbefore set forth; and whereas, the said United Surety Company did pay said sum of nine hundred eighty-five and 42/100 dollars (\$985.42) to said L. C. Hall & Co.: Now, therefore, the condition of this instrument is such that if the said principals shall pay back to said United Surety Company said sum of nine hundred eighty-five and 42/100 dollars (\$985.42), or such portion thereof as may be necessary to satisfy any claim or judgment which may be established against said L. C. Hall & Co. under its contract aforesaid, either by said Everett Construction Company or any other person or claimant, then this obligation shall be void; otherwise, to remain in full force and effect."

Thereafter the lien of the Everett Construction Company against the land of the Gun Club was foreclosed in an action in the superior court for Skagit county, in which a decree of foreclosure was rendered accordingly, and on January 23, 1917, the Gun Club was compelled to and did pay the sum of \$2,117.40 in order to free its land from the lien of that judgment and decree. After the execution of the bond here sued upon the United Surety Company passed into liquidation, and into the hands of receivers appointed by the circuit court of Baltimore city, that being its home. Thereafter, on May 18, 1916, the receivers assigned to the Gun Club all their rights under the bond executed by Hall and the National Surety Company to the United Surety Company, and thereafter this action was commenced by the Gun Club upon that bond.

[1, 2] It is first contended in appellant's behalf that no default rendering it liable upon its bond is shown. The argument seems to be, since the contract did not in terms provide for the giving of a bond by Hall to secure its faithful performance, and since neither the contract nor the bond given by Hall and the United Surety Company, to secure faithful performance of the contract, provided in terms for the protection of the property of respondent against liens, that therefore Hall's failure to settle with the Everett Construction Company, resulting in its lien and the foreclosure thereof against respondent's land, was not a breach of the conditions of the bond given by the United Surety Company, and, there being no breach rendering that company liable upon its bond, it follows that appellant is not liable upon its bond given to the United Surety Company. We may concede that appellant would in no event be liable to respondent upon its bond given to the United Surety Company, in the in interest, as against appellant.

absence of liability of that company to respondent upon its bond. We have noticed that by the terms of the contract Hall was to "furnish all skill, labor, and material required for the complete performance of said improvement, in its each and every detail." and that he was to be paid a lump sum as compensation therefor. Manifestly this means that he was to furnish such labor and material at his own cost and expense, and that he was to see that the cost of such labor and material should not become a burden upon respondent or its property. This, it seems to us, was one of the things for him to do in the faithful performance of his contract, and which the bond was given to se-It is true that the contract did not in terms provide for the giving of the bond to secure its faithful performance; but the bond executed by Hall and the United Surety Company was given to secure the faithful performance of the contract on the same day the contract was signed, and the contract was referred to therein and made part thereof "as fully as if written herein."

We think we are warranted in proceeding upon the assumption that the signing of the contract and the furnishing of the bond in connection therewith was all one transaction. as between Hall and respondent. In addition, the bond required the United Surety Company to pay out money which should be paid to it, instead of to Hall, by respondent, upon the contract price, "for the protection of all parties in interest," manifestly meaning that such money should be held and paid out by the United Surety Company accordingly as the protection of respondent's rights under the contract required; that is, that the money so held by the United Surety Company should be paid out by it towards the satisfaction of claims that might become liens against the respondent's land. We conclude that the United Surety Company was rendered liable upon its bond to respondent in at least the sum of \$985.42, upon the payment by that company to Hall of that sum which had been paid to it by respondent and upon the foreclosure of the lien of the Everett Construction Company for a larger amount which respondent was compelled to pay to free its land from that lien. It seems to follow as a matter of course that appellant would be liable to the United Surety Company upon its bond here sued upon in the sum of \$985.42, since that bond was executed by appellant and given to the United Surety Company for the express purpose of securing the repayment to it of that sum from Hall, should it eventuate that he was not entitled to receive or retain that sum as against respondent's right to have it applied towards the satisfaction of the lien of the Everett Construction Company. This brings us to the question of the rights of the receivers of the United Surety Company and the rights of respondent as their successors

[3] It is contended by counsel for appellant that there is a failure of showing of authority on the part of the receivers of the United Surety Company to assign to respondent the right of that company under the bond given it by appellant. While it is true that the certified copy of the proceedings of the Baltimore court here in evidence do not show specific authority in the receivers to make the particular assignment here involved, or general authority on their part to sell the property of the United Surety Company, it seems to us, since the receivers are general receivers of that company and this bond was to secure the repayment of \$985.42 paid by it to Hall, to the end that respondent's land should be protected as against lien claims arising out of the performance of Hall's contract, that the assignment by the receivers is only a method of adjusting the reciprocal rights and liabilities of the United Surety Company growing out of its bond given to respondent to secure the faithful performance of Hall's contract and the bond given to it by appellant to secure the repayment to it of the \$985.42 paid to Hall, should it appear that Hall was not entitled to the money as against the claims of respondent to have it applied towards the satisfaction of the lien of the Everett Construction Company, or some other possible lien. This was not the selling of an asset of the United Surety Company, which might prejudice the rights of the general creditors or stockholders of that company, but simply a matter of relieving the United Surety Company from the obligations of its bond given to respondent by the assignment to respondent of the right of that company in the bond it had received from appellant for the very purpose of indemnifying itself against its liability upon the bond it had given to respondent. Instead of the United Surety Company's receivers retaining and themselves suing appellant upon the bond, as, manifestly, they could have done, since conditions had occurred entitling that company to have Hall repay the money to it, the receivers, by their assignment, were simply placing respondent in their shoes, to the end that he might look to the security which the United Surety Company had acquired for the purpose of enabling it to secure repayment of the \$985.42 from Hall for the benefit of respondent. We are of the opinion that the receivers, by virtue of their office as general receivers alone, had authority to make this assignment.

[4] It is contended that the assignment is so defective in form that it is not in law an assignment by the receivers as such. It contains a number of recitals, referring to the bond given by the United Surety Company to respondent to secure the faithful performance of Hall's contract, referring to the payment by respondent to the United Surety be drawn from the language of the assignment of that signment is made in a representative capactum to Hall by the United Surety Company ity, as when one executes an instrument

upon Hall's executing the bond, with appellant as surety, conditioned for the repayment of that sum to the United Surety Company should it become necessary, and referring particularly to the claim of the Everett Construction Company by name as being a claim which might require the repayment of the money by Hall, to the end that it might be applied upon such claim, but mentioning no other possible claim by name. In the body of the assignment the receivers are named as assignees as follows:

"Edwin W. Poe, Stuart S. Janney, Ernest J. Clark, and J. Kemp Bartlett, Receivers of the United Surety Company, duly appointed by order of the circuit court of Baltimore city, hereby and by these presents transfer. \* \* \*"

The consideration for the making of the assignment is recited as being the release of the United Surety Company and its receivers from all claim, liability, and demand for, or on account of, the execution of the bond which that company had executed as surety with Hall to secure the faithful performance of his contract with respondent. The assignment is signed by each of these receivers by their individual names, without official designation.

Counsel call our attention to a number of decisions wherein signers of money obligations have been held personally bound thereby, though the signers were described therein as directors, committees, etc., of some named association or corporation; there being no other language indicating that they were acting for the named association or corporation. An examination of these decisions, and the many others which might be cited as bearing upon the question of the capacity in which a person executing a writing acts, we think will disclose that each case is determinable largely upon its own particular facts; that is, the question becomes one of intent in the light of the language used in the particular writing. Where one signs a money obligation or other writing obligating him to do something, ordinarily the obligation will be deemed personal, though he may describe himself in the writing by indicating some position he occupies in some association or corporation, providing he goes no further, and does not put in the writing some recitals or statements indicating that he is not acting for himself, but for the named association or corporation. This seems to be the rule with reference to money or other obligations to be paid or performed. Now, when it comes to the assignment of a right which in no event can be considered other than as personal property by a person who concededly has no personal interest in such property, but holds the same in some representative capacity, it seems to us that it should not require as strong and convincing inference to be drawn from the language of the assignment to call for the conclusion that the assignment is made in a representative capac-

of some act to be performed in the future. It is plain from the recitals in this assignment that it would have been an idle thing for these receivers to have made it as a mere personal act on their part. As individuals they had absolutely nothing to assign, while as receivers they had all the rights of the United Surety Company in this bond to assign: and the recitals in their assignment. it seems to us, plainly evidence an intent to execute the same in their capacity as receivers and to transfer to respondent all the rights of the United Surety Company under the bond executed by appellant. If the assignment does not mean this, it manifestly means nothing. We conclude, therefore, that the receivers did assign in their representative capacity, although they did not expressly say they assigned as receivers, nor did they sign other than their individual names.

[5] It is also contended that the assignment was not proven by competent evidence, because the purported signatures thereto of the receivers were not proven to be the genuine signatures of the receivers. After the introduction in evidence by counsel for respondent of the Hall contract, the bond to secure its faithful performance executed by the United Surety Company, the bond executed by appellant to the United Surety Company to secure the repayment of the money which that company paid to Hall, and copy of the Baltimore court proceedings showing the appointment of the receivers, counsel for respondent offered in evidence the assignment of the receivers, purporting to be executed by them in the manner we have already noticed, when counsel for appellant addressed the court as follows: "I object to it as incompetent, irrelevant, and immaterial." To which the court replied: "Objection overruled, unless there is objection to the form in which it is authenticated"—the court manifestly referring to the assignment, and meaning the authentication of the assignment by acknowledgment or proof of the genuineness of the signatures of the receivers. Counsel for appellant now argue that this had reference to the authentication of the proceedings of the Baltimore city court, which had theretofore been received in evidence; but, clearly, we think this position is untenable, for at the time the court so ruled there was nothing for it to rule upon, except the question of the receiving in evidence of this assignment. It seems to us, in view of the court's remark to the effect that the objection would be overruled unless it be directed to the authentication of the assignment, and counsel for appellant making no further obfection, they cannot now be heard to say that the receiving of the assignment in evidence was error, for want of proof of the genuineness of the signatures of the receivers. Had they insisted upon an objection in that particular, manifestly counsel for respondent reached in harmony with this view.

for the payment of money or for the doing | would have insisted upon and been granted an opportunity to supply proof of the genuineness of the signatures. We think this was in effect a waiver of the necessity of such proof. Murray v. Seattle, 96 Wash. 646, 165 Pac. 895.

[6] It is further contended that the bond is not assignable. It is argued that this is so because it is in substance an insurance contract, and contains no words or recitals affirmatively showing that it was intended by the parties thereto to be assignable. Counsel invoke the general rule that contracts of insurance are not assignable, in the absence therein of language expressly or by plain implication indicating such to be the intent of the parties. We think, however, that the indemnity bond here sued upon, while, in a sense, an insurance contract, does not come within the rule invoked. This bond was given by appellant to United Surety Company for the express purpose of securing the repayment to it of the \$985.42 which it paid out to Hall while it was holding that money "for the protection of all parties interested," under the terms of the bond it had given to respondent, and, manifestly, while both appellant and the United Surety Company fully realized that, if the money was required to be repaid to the United Surety Company, it would be because of the foreclosure of the lien of the Everett Construction Company upon respondent's land, or because of some other possible claim of lien that might menace the title of respondent to its land. In other words, the bond was an asset of the United Surety Company, acquired by it for the express purpose of applying the proceeds thereof either to the payment of any liability it might incur on its bond to respondent or to the reimbursing of itself for any sums it might be compelled to pay on such liability. It may be that there was not such privity of contract between respondent and appellant as would entitle respondent to sue appellant upon the bond it gave to the United Surety Company, without an assignment. We think, however, that the rights of the United Surety Company under the bond given to it by appellant were assignable to respondent, in view of the purpose for which that bond was given. The assignment did not change the liability of appellant upon its bond in the least, nor did it impair appellant's ability or opportunity to defend any action which might be brought thereon by respondent. It is in no worse position in this regard than as if the receivers of the United Surety Company were themselves suing upon the bond. The question of the assignability of a bond obligation somewhat like that here involved was learnedly reviewed by the sixth federal Circuit Court of Appeals, in American Bonding & Trust Co. v. Balt., etc., Ry., Co., 124 Fed. 866, 60 C. C. A. 52, and a conclusion

appellant that the cause of action here sued upon is barred by the statute of limitations. The cause of action accrued not earlier than April, 1915, when the judgment and decree of foreclosure of the Everett Construction Company's lien upon respondent's land was rendered This action was commenced in February, 1917, within less than two years thereafter. This we think is a sufficient answer to the contention that the action was barred by the statute of limitations at the time of its commencement.

Some other contentions have been made in appellant's behalf. We have not overlooked them, but believe they are disposed of, in so far as they merit discussion, by what we have already said.

The judgment is affirmed.

ELLIS, C. J., and FULLERTON, MAIN, and WEBSTER, JJ., concur.

COLVIN et al. v. CLARK. (No. 13899.) (Supreme Court of Washington. April 15, 1918.)

1. Logs and Logging \$\sigma 3(11)\$—Contract—Construction.

Construction.

Where defendant agreed to pay for plaintiffs' timber \$2 per thousand feet, that the amount of timber on plaintiffs' land was 10,825,000 feet, that it should be paid for by defendant as cut and logged, that the mill scale should be taken to determine approximately the amount of timber logged each month, but that the amount to be taken and paid for was 10,825,000 feet, and that all timber logged each month should be settled and paid for by defendant on the 15th day of the following month, until the timber was fully paid for, defendant further agreeing to remove the timber and pay for it within five years, defendant had five years in which to remove the timber, making payments according to accurate mill scale kept by him as the timber was taken off, and, so long as he did so, was not in default.

2. Logs and Logging \$\infty\$ 3(7) — Contract—

2. Logs and Logging \$\iff 3(7)\$ — Contract—Right to Demand Right of Way.

If defendant had complied with his contract

to remove and pay for timber from plaintiffs' land, he was entitled to demand a right of way, as provided in the contract, and have it furnished according to the terms of the contract, and if it was not furnished he was entitled to deduct from the 10,000,000 odd feet of lumber he had agreed to purchase the 1,000,000 feet or more to which the right of way was not furnished.

3. APPEAL AND ERROR === 1176(1)-REVERSAL EXTENSION OF TIME.

Where judgment was rendered canceling defendant's contract to remove and pay for timber from plaintiffs' land, he was bound by the judg-ment until reversed, and had no right to go upon the land to take more timber, so that, the judgment being reversed on appeal, he should have an extension of time in which to perform his contract; that is, the difference between the date of the judgment and the date of the expiration of the contract period.

Thurston County; F. D. Wright, Judge.

For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

[7] Some contention is made in behalf of Colvin, his wife, and Tom Ismay, as guardian of their minor children, against Delbert Clark. From a judgment for plaintiffs, and a decree for them, defendant appeals. Reversed, and cause remanded, with directions. See, also, 83 Wash. 376, 145 Pac. 419; 96

Wash, 282, 165 Pac, 101. Davis & Neal, of Tacoma, for appellant.

Thomas M. Vance and Chas. D. King, both of Olympia, for respondents.

MOUNT, J. This appeal is prosecuted by the defendant from a judgment of the lower court in favor of the plaintiff for \$3,369 and also a decree canceling and setting aside a contract entered into between the parties. The facts are as follows:

In April, 1912, the parties to this action entered into a contract as follows:

"This agreement, made and entered into this 25th day of April, 1912, by and between Ambrose Fred Colvin, owner of the life estate and the real property hereinafter described, and Anna Colvin, his wife, and Tom Ismay, the duly appointed, qualified and acting guardian of the minor children of the said Ambrose Fred Colvin and Anna Colvin, parties of the first part, and and Anna Colvin, parties of the first part, and Delbert Clark, party of the second part. Wit-

nesseth:
"That in consideration of the covenants and agreements herein contained and the payments herein agreements herein contained and the payments have been made as hereinafter "That in consideration of the covenants and agreements herein contained and the payments made and agreed to be made as hereinafter specified, the said parties of the first part, subject to the requirements and orders of the superior court of the state of Washington for Thurston county, the parties of the first part hereby sell and convey to the party of the second part, his heirs and assigns, upon the terms and conditions hereinafter specified, all the merchantable fir timber situated and being on the east half of the northeast quarter of section thirty-four and the south half of the northwest quarter and the northwest quarter of the southeast quarter of sections thirty-five; also all the fir timber in sections twenty-five and twenty-six; also all the fir timber on the northwest quarter of the southeast quarter of section thirty-five—all in township sixteen north of range two west of W. M.

"Said party of the second part agrees to pay for the said timber the sum of two dollars per thousand feet in the manner hereinafter provided."

thousand feet in the manner hereinafter provided.

"It is agreed that the amount of timber on said land is 10,825,000 feet, said timber shall be paid for by the party of the second part as the same shall be cut and logged, the mill scale shall be taken for the purpose of determining approximately the amount of timber logged each month, but the amount of timber to be taken and paid for is agreed to be 10,825,000 feet, as aforesaid. All timber logged each month shall be settled and paid for by the party of the sec-ond part on the 15th day of the following month until said timber is fully paid for. The party of the second part, his successors and assigns, agree to take and remove said timber and pay for the same as above set forth within five years

"In consideration of the above obligations, the orders of the court and other good and sufficient s contract; that is, the difference between the te of the judgment and the date of the extration of the contract period.

En Banc. Appeal from Superior Court, hurston County; F. D. Wright, Judge.

Action by Ambrose Fred Colvin and Anna | 2 west, W. M., in Thurston county, Wash., com-

mencing on the east line of the northeast quarter of the northeast quarter of said section 25, ter of the northeast quarter of said section 2D, running thence in a westerly and southwesterly direction, same to cross Scatter creek at a point not less than 1,000 feet west of the present barn building now situated on the Ignatius Colvin D. L. C., with the right to build all necessary roads for the removal of any timber that might

roads for the removal of any timber that might be required by said second party, their successors and assigns, but no cultivated lands shall be crossed by said right of way except at that point where Scatter creek is crossed.

"The party of the second part, his successors or assigns, will pay for the use and occupancy of said right of way the sum of \$25 per month, beginning as of the date of the execution of this instrument. Said payments shall be made to said Ambrose Colvin during his lifetime if he shall live during the term of this contract, and in case of his death before the expiration of this contract, then to duly appointed representatives of said minors. The term for which said right of way is hereby granted shall be for a period of way is hereby granted shall be for a period of not less than five years, or longer at the op-tion of the party of the second part, his succes-

sors or assigns.

"The party of the second part, his successors or assigns, will put in and maintain sufficient cattle guards wherever said right of way crosses fences, wherever same are now or may hereafter And the party of the second part will pay for all stock or animals that may be killed pay for all stock or animals that may be killed or injured by the use of said right of way or as the result of any negligent act of the said second party, and will also put in suitable crossings wherever a road used for wagons crosses said right of way. It is further expressly covenanted and agreed that said first parties, their heirs, successors and assigns, shall not lease, sell or convey or grant any right of way for logging purposes, to any person, company correction. or convey or grant any right of way for logging purposes, to any person, company, corporation, over and across said sections 25, 26, 34 and 35, T. and R. aforesaid, for the period of the life of this contract. The sum of two thousand dollars shall be deposited by the party of the second part in the Capital National Bank of Olympia, to the credit of the guardian of the minor children of Ambrose Fred Colvin and Anna Colvin, upon the execution of this contract, and said two thousand dollars, cash, shall be credited to the party of the second part on the last one million feet of timber cut.

"And it is also agreed as a part of the consideration for entering into this contract and for

"And it is also agreed as a part of the consideration for entering into this contract and for the making of such conveyance and for the sale of such timber, that the second party shall cause to be burned, as provided by law, all slashings on logged off land logged by second party, having due regard for the destruction or damage to this property by fire and of the intention to burn such slashings. The party of the second part shall give to the parties of the first part notice when such slashings are to be burned. And it is further agreed that any damage ed. And it is further agreed that any damage done by the second party, such as the breaking of fences or the falling of trees in cultivated land, shall be repaired by the second party to

"Party of the second part in submitting his monthly scale of timber sawed into lumber shall segregate from timber sawed into lumber

that part that is now fallen.
"It is agreed that the parties of the first part shall secure a right of way for the removal of all timber on the northwest quarter of the south-east quarter of section 35, said township and range, and in the event of their failure so to do the party of the second part shall be under no obligations to take said timber on this particu-

lar forty-acre tract.
"In witness whereof we have hereunto set our hands this 25th day of April, 1912. \* \* \*"

After this contract was entered into the appellant proceeded to cut and log the timber said land is 10,825,000 feet, said timber shall be

kept at the mill, and on the 15th of the following month checks were forwarded to the respondents for the amount of logs cut, until the appellant had paid to the respondents \$12,319.55. In the summer of 1913, after the appellant had substantially finished cutting the logs upon what was called the north side of the tract mentioned in the contract, an action was brought by the respondents to cancel the contract, and for a money judgment for the difference between the amount of logs cut upon the north side and the amount of timber which was cruised upon that side. That action resulted in a judgment refusing to cancel the contract, but permitting a recovery of \$3,262.30 against the appellant. This appellant in that case appealed to this court, and the judgment was reversed because the court did not make findings of fact. Colvin v. Clark, 83 Wash, 376, 145 Pac. 419. That case is still pending. Thereafter, in July, 1916, this action was brought, the respondents alleging that the appellant had failed to make a proper accounting for the timber or make proper payments for the timber accounted for, and that no proper mill scale had been kept as required by the contract. The respondents further alleged that the appellant had abandoned the contract, but was threatening to go upon the premises and take timber therefrom; and the respondents prayed for a judgment in the sum of \$3,369, and that the contract be rescinded and the appellant restrained from entering upon the land or cutting any more timber. The appellant, in answer to the complaint, admitted the making of the contract, denied that he had abandoned the cutting of timber, or that he had refused to account for all the timber, and denied that he had failed to keep a proper mill scale, and alleged as an affirmative defense that, under the contract it was the duty of the respondents to procure a right of way across the southeast quarter of section 35; that he had demanded such right of way: that the respondents refused to furnish it, and for that reason he was not required to pay for the timber upon that quarter section of land. Upon these issues the case was tried to the jury, and a judgment resulted as first above stated.

It is contended by the appellant that the court erred in denying motions to make the complaint more definite and certain, and to strike certain portions thereof. It is unnecessary at this time to enter into a discussion of these points, because we are of the opinion that a construction of the contract itself, which we think is plain, determines the controversy between these parties. It will be noticed that the contract provides as follows:

"Said party of the second part agrees to pay for the said timber the sum of two dollars per thousand feet in the manner hereinafter pro-

therein described. A scale of the logs was paid for by the party of the second part as the

same shall be cut and logged, the mill scale shall be taken for the purpose of determining approximately the amount of timber logged each month, but the amount of timber to be taken and paid for is agreed to be 10,825,000 feet, as aforesaid. All timber logged each month shall be settled and paid for by the party of the second part on the 15th day of the following month until said timber is fully paid for. The party of the second part, his successors and assigns, agree to take and remove said timber and pay for the same as above set forth within five years from the date of this contract."

There can be no doubt that it was agreed here between the parties to this action that the amount of timber on the tracts mentioned was 10,825,000 feet. This timber was to be removed within five years from the date of the contract. The contract provided the method and time of payment, namely, "as the same shall be cut and logged." It provided that:

"The mill scale shall be taken for the purpose of determining approximately the amount of timber logged each month. \* \* \*"

[1] It is plain from these provisions that the appellant had five years in which to remove the timber. He was to pay for it as it was removed. A scale was to be made and each month, as the timber was cut, it was to be scaled at the mill, and on the 15th of the following month was to be paid for, until 10,825,000 feet was fully paid for. The evidence in the case shows that, before the contract was entered into, various cruises had been made of the standing timber. It was estimated that there was more than 10.825,000 feet, but the parties finally agreed upon that amount, which was to be taken and paid for. It is clear that the appellant could take this timber from the land at any time within the five years, because no other time was specified. It is also clear that he was required to pay for the timber at \$2 per thousand feet-whether he took it or not-at the end of the five-year period, except in one instance, where if a right of way was not furnished the amount of timber upon that quarter section should be deducted; otherwise the appellant was required to pay for the 10.825.000 feet.

Some contention is made by the appellant that there was a mutual mistake between the parties as to the amount of timber. There is nothing in this record which would justify this contention. The record is conclusive to the effect that there was a difference of opinion between the scalers who had scaled the standing timber for the parties as to the amount of timber before the contract was entered into; but the parties themselves, after this difference of opinion, agreed that there was 10.825,000 feet, and after that agreement was entered into the parties cannot now be heard to say that there was a mutual mistake.

We also think it is plain from the contract after that time the appellant was bound by that the appellant was to pay for the timber that judgment until it was reversed, and he each month as it was taken off. He was to had no right to go upon the land to take more keep a mill scale, which was for the purpose timber therefrom. In view of this fact, and

of determining approximately the amount of timber taken. He was required to make payments according to that scale. It is not disputed in this record that he made those payments, and that he kept an accurate mill scale. The evidence is conclusive upon that point. The only ground alleged in the complaint for terminating the contract was that the appellant had failed to keep an accurate mill scale of the timber and had failed to pay therefor: but there is no evidence in the record to sustain that allegation of the complaint. In fact the evidence on the part of the appellant is undisputed to the effect that an accurate mill scale was kept, and that payments were made promptly on the 15th of the following month for all the timber taken according to that scale; so that it is apparent that the respondents were not entitled to have the contract canceled, or to receive pay for the timber before the expiration of the five-year period. We are of the opinion, therefore, that the trial court erred in entering the judgment in favor of the respondents and against the appellant, and in canceling the contract before the expiration of the five-year period. The action was brought, as we have seen, a year before the expiration of the time in which the appellant had to remove the timber and to pay therefor. If, as we have seen, the appellant kept an accurate account of the mill scale and paid therefor at the contract price, he was not in default upon his contract, and the lower court was therefore without authority to render any judgment, especially one canceling the contract. But it is said by the respondents in their brief that the appellant had abandoned the contract. We find no evidence in the record to sustain this contention. It is true the appellant testified that upon the north side there was some timber which he did not intend to take away. It is true the appellant testified that there was more than 1,000,000 feet upon what is called the south side, which he did intend to take away, but that he had made demand for a right of way as provided in the contract, and that the right of way had not been furnished. It is true this demand was made after this action was begun, and the trial court was of the opinion that it was not made in good faith.

[2] But if the appellant had complied with his contract—and we think the evidence shows he had, up to that time—he was entitled to demand the right of way and have it furnished according to the terms of the contract; and if it was not furnished he was entitled to deduct the 1,000,000 feet or more from the 10,000,000 feet which he had agreed to purchase.

[3] It appears now that the five-year period has elapsed; but after the judgment was entered in this action the contract was canceled by the lower court, and it is plain that after that time the appellant was bound by that judgment until it was reversed, and he had no right to go upon the land to take more timber therefrom. In view of this fact, and

in view of the fact that the judgment of the trial court must be reversed for the reasons above stated, it is but just that the appellant should have an extension of time in which to fully perform his contract, which would be the difference between the date of the judgment in this case and the date of the expiration of the contract.

The judgment of the trial court is reversed, and the cause remanded, with directions to the lower court to deny the relief prayed for by the respondents, but to grant to the appellant an extension of time within which to complete his contract equal to the time between the date of the decree and the date of the expiration of the contract.

ELLIS, C. J., and PARKER, FULLER-TON, MAIN, WEBSTER, and HOLCOMB, JJ., concur.

STATE ex rel. MURPHY v. TAYLOR, Superior Court Judge. (No. 14680.)

(Supreme Court of Washington. April 16, 1918.)

1. Courts \$==207(5) - APPELLATE COURT -

1. COURTS \$\iflustriance 207(5) — APPELLATE COURT — ORIGINAL JUBISDICTION—PROHIBITION.

The Supreme Court can issue a writ of prohibition to restrain the exercise of unauthorized judicial or quasi judicial acts, although not issued in aid of its appellate or revisory jurisdiction, under Const. art. 4, \( \frac{2}{3} \) 4, granting to such court "power to issue writs of mandamus, review, prohibition, habeas corpus, certiorari, and all other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction." jurisdiction.

2. PROHIBITION \$\sim 5(1)\$—Magistrate.
Prohibition will lie from the Supreme Court against a judge of the superior court sitting as a magistrate, because the judge while acting as a magistrate is acting in the capacity of a judge of the superior court and not in his individual capacity.

3. Criminal Law == 207(4)-Magistrates Powers.

A committing magistrate under Rem. Code 1915, §§ 1949, 1955, cannot, over the objection of accused, inquire into a gross misdemeanor, or accused, inquire into a gross misdemeanor, since section 46 gives justices of the peace concurrent jurisdiction with the superior court; the word "exclusive," in section 1949, providing that a magistrate shall, when it appears an offense of which the superior court has exclusive jurisdiction has been committed, issue a warrant having a definite meaning and since having a definite meaning, and since warrant. section 1928 gives the accused the right to have a jury determine whether the penalties of a justice court are severe enough.

Department 1. Application by the State of Washington, on the relation of W. P. Murphy, for a writ prohibiting Harcourt M. Taylor, as judge of the Superior Court of the State of Washington in and for Yakima County, sitting as committing magistrate, from proceeding further in a cause wherein relator was charged with a gross misdemeanor. Writ granted.

Thos. H. Wilson and Harold B. Gilbert, both of North Yakima, for appellant.

FULLERTON, J. On February 2, 1918, one Arthur Garden appeared before the Hon. Harcourt M. Taylor, one of the judges of the superior court of Yakima county, and made complaint that a criminal offense had been committed by one W. P. Murphy. The judge, acting as a magistrate, examined on oath the complainant and the witnesses provided by him, reduced the complaint to writing, caused it to be subscribed by the complainant, and issued a warrant for the arrest of Murphy. The warrant as issued charged Murphy with the commission of an assault upon the person of Garden, an offense denominated and punishable as a gross misdemeanor under the statute. On being brought before the magistrate, Murphy, through his counsel, moved the court to dismiss the complaint and discharge the defendant, basing the motion on the ground that the judge, sitting as a magistrate, was without jurisdiction to inquire further into the offense after it had been determined that the offense committed was a gross misdemeanor. This motion was overruled, whereupon the defendant, specially reserving his motion to the jurisdiction of the magistrate, moved that the cause be transferred to the nearest justice of the peace for further proceedings, basing this motion on the ground that, since the complaint charged a gross misdemeanor, a police court had jurisdiction, and that he had the right under the statute to be put to trial for the alleged offense before such a justice, who alone had authority to transfer the cause to the superior court if it should be determined on the trial that the punishment which the justice court could impose would be inadequate for the offense. This motion was likewise overruled. The defendant thereupon applied to this court for a writ directed to the judge, prohibiting him from proceeding further in the cause, or in the alternative from proceeding further than to transfer the cause to the nearest justice of the peace for trial. To the application the magistrate demurred: First, for want of jurisdiction in this court to issue the writ demanded; and, second, for want of sufficient facts. The cause is now before us on the questions suggested by the application and the demurrer thereto.

[1] On the jurisdictional question, it is first urged that this court is without power to issue a writ of prohibition other than in aid of its appellate or revisory jurisdiction, and that this writ is not sought in aid of either. The power of this court to issue writs of prohibition is derived from the Constitution. Section 4 of article 4 of that instrument grants to this court "original jurisdiction in habeas corpus and quo warranto and mandamus as to all state officers," and "power to issue writs of mandamus, review, prohibition, habeas corpus, certiorari, and all other writs necessary and proper to the complete exercise of its appellate and revisory

jurisdiction." The power to issue writs of jection; but the question was noticed in prohibition must of course be found in the latter of these clauses. From that clause it might be concluded as a matter of first impression that the power was restricted to instances where the writ was found necessary in aid of the court's appellate and revisory jurisdiction, but we early held that such was not its meaning. In State ex rel. v. Superior Court, 15 Wash. 668, 47 Pac. 31, 37 L. R. A. 111, 55 Am. St. Rep. 907, the writ was sought to prohibit a superior court from proceeding in a matter thought to be without and in excess of its jurisdiction, and it was contended that the court was without power to issue the writ because of the reason here suggested. The court held, however, that the qualifying clause was not intended to restrict or limit its power to issue the writs specifically enumerated, but was intended rather to confer on the court power to issue writs other than those specifically enumerated which might be found necessary to a complete exercise of its appellate and revisory jurisdic-In the course of the opinion it was pointed out that to restrict the power as therein sought would leave the power of no practical value, as it is "difficult to conceive a case in which it would be necessary to issue the writ solely" in aid of a court's appellate or revisory jurisdiction. Subject to the restriction that writs of this sort will only be issued to restrain the exercise of an unauthorized judicial or quasi judicial act (State ex rel. Bennett v. Taylor, 54 Wash. 150, 102 Pac. 1029), the case has not been departed from, but, on the contrary, announces the principle upon which this court has issued the writ in the numerous instances found in our records where no question of aiding its appellate or revisory jurisdiction was involved.

[2] A second objection is that the writ will not lie against the judge of the superior court when sitting as a magistrate. argument is that the judge of the superior court when sitting as a magistrate acts in a special capacity, and is not an officer against whom an original writ will lie from this court. The precise question seems never to have been determined by us. The nearest approach to it is perhaps the case of State ex rel. Romano v. Yakey, 43 Wash. 15, 85 Pac. 990, 9 Ann. Cas. 1071, where a writ of mandamus was sought from this court to compel a judge of the superior court to entertain as a magistrate a complaint made before him charging the commission of a crime, jurisdiction over which he had declined. Among the objections urged against the issuance of the writ was that this court was without jurisdiction since a magistrate is not of the class of officers against whom it has original jurisdiction to issue the writ. The application for the writ was denied on other grounds urged, thus rendering it un-

the course of the opinion, the court saying that the jurisdiction might be questioned. Notwithstanding this seeming dissent from the view, we are constrained on further consideration to hold that the writ of prohibition will lie from this court when the officer sought to be prohibited is a judge of the superior court. The examination of a person charged with crime is something more than the exercise of a mere ministerial function. It includes an accusation, a warrant of arrest, an examination of witnesses, a finding of the probable guilt or innocence of the accused; and results in an order either discharging the accused or binding him over to the proper court to answer for the offense. The exercise of these functions is plainly the exercise of judicial functions. State ex rel. Long v. Keyes, 75 Wis. 288, 44 N. W. 13; Ex parte Gist, 26 Ala. 156; Beiser v. Scripps-McRae Pub. Co., 113 Ky. 383, 68 S. W. 457. And, being so, the acts are within the office of a writ of prohibition. State ex rel. Bennett v. Taylor, supra. The power to inquire into accusations of crime is, we think, an attribute of the office held by the officer empowered to so inquire, rather than an attribute of the individual who happens for the time being to be the occupant of the office. True, the statute conferring the power uses the terms "justice of the peace" and "judge of the superior court" in designating the officers vested with the power; but to say that the justice or the judge, when conducting the inquiry, acts in a capacity different from his capacity as a justice of the peace or judge of the superior court, is to say that the statute is nothing more than a convenient means of designating the individuals who may conduct the inquiry. We think the statute something more than this; we think it confers upon the office which they hold additional duties to be exercised by them in virtue of their powers as such officers. In other words, when a justice of the peace or a judge of the superior court conducts such an inquiry, he acts as such judge or justice of the peace, not in another and different capacity. Applying the rule to the specific case, it must follow that, when the judge of the superior court of Yakima county proceeded to inquire into the offense charged against the relator, he proceeded in his capacity as judge of such court, and is subject to be restrained by an original writ from this court as much so as he would be were he exercising any other of his judicial functions.

Perhaps the point can be made more clear by another consideration. It is not denied. of course, that a magistrate, acting as such, may not be restrained by a writ of prohibition when he acts in excess of or without jurisdiction; the contention is that he is not subject to the original jurisdiction of this court, but to the jurisdiction of the superior necessary to pass upon the particular ob- court. If this contention be sound, we would have the anomaly of a judge of the superior court while sitting in one capacity issuing a writ against himself while sitting in another, or the anomaly of a magistrate against whom no such writ would lie. Manifestly neither of these alternatives should be given effect unless the governing principles are such as to admit of no other construction. We cannot believe they are so.

[3] It remains to inquire whether the magistrate acted in excess of his jurisdiction when he denied the motions of the relator and proceeded to determine whether he was chargeable with an offense within the jurisdiction of the superior court. The question involves a construction of the statutes, and to an understanding of the position of the relator it is necessary to notice those we find to be pertinent. As we have stated, the offense charged against the relator was a gross misdemeanor. Such an offense is punishable, where no specific penalty is fixed by the statute, by imprisonment in the county jail for not more than one year, or by a fine of not more than \$1,000, or by both fine and imprisonment. Rem. Code § 2267. By section 46 of the Code (Rem.), justices of the peace are given concurrent jurisdiction with superior courts of all gross misdemeanors; with the limitation, however, that justices of the peace elected in cities of the first class shall in no event impose a greater punishment for such an offense than imprisonment in the county jail for six months or a fine not exceeding \$500, and that justices of the peace other than those elected in cities of the first class shall impose no greater punishment than imprisonment in the county jail for a period of 30 days or a fine not exceeding \$100. The statute relating to the procedure in justices' courts in cases of persons accused of crime provides (section 1925) that, whenever a complaint on oath in writing is filed with a justice of the peace charging any person with the commission of a crime or misdemeanor of which he has jurisdiction, the justice shall issue a warrant for the arrest of such person and cause such person to be brought forthwith before him for trial. By sections 1926 and 1927, it is provided that, in all trials for offenses within the jurisdiction of the justice, the defendant or the state, if either so desires, may demand a jury, and if the defendant is found guilty the jury or the justice, as the case may be, shall assess the punishment; "or [section 1928] if, in their opinion, the punishment they are authorized to assess is not adequate to the offense, they may so find, and in such a case the justice shall order such defendant to enter into a recognizance to appear in the superior court of the county, and shall recognize the witnesses, and proceed as in proceedings by a committing magistrate." Section 1949, relating to the examination of persons charged with crime, reads as follows:

"Upon complaint being made to any justice of the peace, or judge of the superior court, that a criminal offense has been committed, he shall examine on oath the complainant, and any witness provided by him, and shall reduce the complaint to writing, and shall cause the same to be subscribed by the complainant; and if it shall appear that any offense has been committed of which the superior court has exclusive jurisdiction, the magistrate shall issue a warrant reciting the substance of the accusation, and requiring the officer to whom it shall be directed forthwith to take the person accused and bring him before the person issuing the warrant, unless he shall be absent or unable to attend thereto, then before some other magistrate of the county, to be dealt with according to law, and in the same warrant may require the officer to summon such witnesses as shall be therein named, to appear and give evidence on the examination."

#### Section 1955 reads:

"If it shall appear that an offense has been committed of which a justice of the peace has jurisdiction, and one which would be sufficiently punished by a fine not exceeding one hundred dollars, if the magistrate having the complaint is a justice of the peace, he shall cause the complaint to be altered, and proceed as in like cases before a justice of the peace, \* \* \* and shall, by order, require the defendant and the witnesses to enter into recognizances, with sufficient sureties, to be approved by the magistrate, for their appearance before such justice at the time and place stated in the order; and such justice shall proceed to the trial of the action as if originally commenced before him."

Stating the substance of these statutes in a more succinct form, it is therein provided: (1) That justices of the peace have concurrent jurisdiction with the superior courts over all cases of gross misdemeanor; (2) that, when a complaint is made before a justice of the peace charging a person with a gross misdemeanor, it is the duty of the justice to issue a warrant for the arrest of the accused and cause the accused to be brought before him for trial; (3) that, when the accused is brought before the justice for trial for an offense within the concurrent jurisdiction of the superior court, he is entitled as of right to be tried by a jury, and entitled as of right to have the jury determine whether the acts constituting the offense of which he is accused can be sufficiently punished by the penalties the justices' court is empowered to inflict; (4) that a justice of the peace or judge of the superior court when acting as a magistrate is empowered to issue a warrant for the arrest and examination of a person charged with crime, only when the crime charged is within the exclusive jurisdiction of the superior court; and (5) that a magistrate is only empowered to transfer a cause for trial before a justice of the peace when the offense with which the accused is charged is within the exclusive jurisdiction of the superior court, and he finds during the course of the examination that the offense actually committed is one within the jurisdiction of a justice of the peace and one which would be sufficiently punished by the penalties a justice of the peace is empowered to inflict.

It must follow that the respondent acting

the objection of the relator, to inquire into the offense with which the relator is charged. As we have shown, the offense charged against the relator was an offense within the jurisdiction of the justice of the peace, and an offense for which the relator, before he could be bound to answer in the superior court, was entitled to the judgment of a jury whether it could be adequately punished by the penalties a justice's court was empowered to inflict. This remedy the magistrate could not afford him. Moreover, we think the term "exclusive," used in the section of the statute empowering a magistrate to enter upon the examination of persons accused of crime, has a definite meaning. We think it can be given no other meaning than that the offense must be without the jurisdiction, concurrent or otherwise, of a justice of the peace.

It is not here asserted, of course, that a grand jury may not indict for a gross misdemeanor without a trial before a justice of the peace, or that the prosecuting attorney may not file an information directly in the superior court for such an offense without such a trial; we hold only that the power of a magistrate to inquire into offenses is confined to offenses within the exclusive jurisdiction of the superior courts.

These considerations lead to the conclusion that the magistrate was in this instance acting in excess of his powers, and that this particular magistrate is subject to the writs of this court.

Let the writ issue.

ELLIS, C. J., and PARKER, MAIN, and WEBSTER, JJ., concur.

PETERS v. CASUALTY CO. OF AMERICA. (No. 14555.)

(Supreme Court of Washington. April 17, 1918.)

1. EVIDENCE 6-68-FAILURE TO REMOVE AUTOMOBILE LICENSE TAG-PRESUMPTION.

Where defendant, who had procured a license for the year 1916, under Laws 1915, p. 227 (Rem. Code 1915, § 5562—37 et seq.), to operate his automobile for hire in a city of the first class, failed to remove his number plates for such year when he sold the car, it will be conclusively presumed, as far as the rights of the public are concerned, that he was the owner and operator of the car, at least for such year, and that whoever was operating the car with said number was his agent, in view of Laws 1915, p. 391, § 13 (Rem. Code 1915, § 5562—13), providing that upon the sale of any motor vehicle delivery thereof shall not be deemed to have been made until the vendor shall have removed his number plates therefrom.

2. MUNICIPAL CORPORATIONS €==705(12) — NEGLIGENCE OF DEIVER OF JITNEY—L/IABIL-ITY OF SURETY.

Defendant being the owner of the car in so far as the rights of the public are concerned at the time plaintiff was injured, the surety The license number plates for the year 1916

as a magistrate was without authority, over on defendant's bond given pursuant to Laws the objection of the relator, to inquire into 1915, p. 227, is also liable for the negligence of the officer with which the relator is charged.

Department 1. Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Action by David Peters against one Schwartz and wife and the Casualty Company of America. Verdict and judgment against the Casualty Company, and it appeals. Affirmed.

Bradford, Allison & Egan and Henry S. Noon, all of Seattle, for appellant. Mac-Kinnon & Schooley, E. H. Guie, and J. A. Guie, all of Seattle, for respondent.

PARKER, J. This action was commenced by the plaintiff, Peters, against the defendants, Schwartz and wife and the Casualty Company, seeking recovery of damages claimed to have been suffered by him through the negligence of Schwartz, acting by his agent, in the operation of his automobile for hire in the city of Seattle. The Casualty Company was made a defendant because it had executed a bond as surety with Schwartz as principal in pursuance of chapter 57, Laws 1915 (section 5562-37 and following of Remington's Code), relating to motor vehicles as passenger carriers in cities of the first class, so that, in so far as the action is against the Casualty Company it is an action upon the bond. Trial in the superior court for King county sitting with a jury resulted in verdict and judgment against the Casualty Company in the sum of \$1,875, from which it has appealed to this court.

[1] It is contended in appellant's behalf that there was a failure of proof of ownership of the car in Schwartz at the time respondent was injured by its operation, and that appellant had been released from the obligation of its bond because Schwartz had then sold the car, which was then being operated by another person. The bond upon which recovery is sought was executed and filed in the office of the secretary of state on April 24, 1916, and thereupon a permit was issued under chapter 57, Laws 1915, to Schwartz to operate his car for hire in the city of Seattle. Schwartz had theretofore received his license for this car for the year 1916, the license number being 36388, which is the number specified in the bond as descriptive of the car. Thereafter, on May 25. 1916, Schwartz executed a contract of sale for the car, and thereafter other contracts were executed, all purporting to transfer the title of the car to other persons. While there are some circumstances shown in the record which suggest that Schwartz had at all times retained some interest in the car, we shall assume, for argument's sake, that as between him and subsequent purchasers under these contracts he parted with all interest in it.

issued to Schwartz and placed upon the car | by him were never removed by him or any other person during that year, and the automobile was continued to be operated for hire under that number. Indeed, it seems highly probable that the number plates were left on the car in pursuance of the understanding of all the parties to these contracts of sale. So that, in so far as the license number plates and the license and bond records of the state relating to the operation of automobiles for hire are concerned, the public was, in effect, advised that the car belonged to Schwartz and was being operated by him for hire. The car was being so operated for hire in the city of Seattle on June 27, 1916, when respondent was injured, as he claims, by the negligence of its driver, at the intersection of Spring street and Third avenue. Section 13, at page 391, c. 142, Laws 1915 (section 5562-13, Rem. Code) reads in part as follows:

"Upon the sale of any motor vehicle the de-livery thereof shall not be deemed to have been made until the vendor shall have removed his number plates therefrom. \* \* "

[2] This provision of the general motor vehicle law and the facts above noticed, we conclude, answers the contention made in appellant's behalf that there was no proof of the ownership of the car by Schwartz at the time respondent received his injury. seems to us that, Schwartz having failed to remove his license number plates in compliance with the mandatory provisions of this section, he must be conclusively presumed to be the owner and operator of the car, at least during the year 1916, and that it must be conclusively presumed as against him that whoever was in fact operating the car with the license number plates of Schwartz voluntarily left thereon by him was doing so as his agent. These acts, both passed at the 1915 session of the Legislature, were the law as it existed when the appellant executed the bond as security with Schwartz. We think it follows that, Schwartz being thus the owner of the car in so far as the rights of the public are concerned, at the time respondent was injured, appellant is also liable as surety upon the bond. Our recent decision in MacDonald v. Lawrence, 170 Pac. 576, contains observations made by Judge Fullerton, speaking for the court, quite in harmony with this conclusion.

Counsel for appellant cite and rely upon a number of decisions dealing with the question of the weight of presumptions as against evidence tending to overcome them. We think the rule as announced by such decisions is not applicable here, in view of the provisions of section 13, chapter 142, Laws 1915, as above quoted. In other words, we think the statutory rule there prescribed is in effect a conclusive presumption as against the owner of the car who voluntarily leaves his license number plates thereon when he sells it. That | Writ denied.

is, in so far as the rights of the public are concerned under the general motor vehicle statute and the statute under which the bond of appellant was given, such owner of the car is conclusively presumed to remain the owner. Counsel for appellant cite and rely upon our recent decision in Young v. Wilson, 168 Pac. 1137. That was a case where there was involved an attempted transfer of the license number from one machine to another owned by a different person, and not a case of an owner voluntarily leaving his license number plates upon his machine when he sold it. We think that decision is not controlling here.

It is contended in appellant's behalf that respondent was guilty of contributory negligence, and that it should be so decided as a matter of law. This question was presented to the trial court by appropriate motions. We have reviewed the evidence with care. looking to the proper determination of this question, and are thoroughly convinced that it was for the jury to decide, and that the court could not decide as a matter of law that the driver of the machine was not guilty of negligence, or that respondent was guilty

of contributory negligence.

It is finally contended in appellant's behalf that it is entitled to a new trial because of newly discovered evidence. This contention is presented to us in appellant's brief within the space of one-half page thereof; in fact, it is practically nothing but a claim of error rather than an argument in support thereof. We feel justified in disposing of it in an equally summary manner. We have, however, read the affidavits presented in support of and in opposition to the motion for new trial, and are quite convinced that they do not show any evidence which in law could be regarded as newly discovered, and, read as a whole, they seem to render it quite unlikely that a different verdict would be returned by a jury upon a new trial, even if the evidence so claimed to be newly discovered were presented to a jury.

The judgment is affirmed.

ELLIS, C. J., and MOUNT and HOLCOMB, JJ., concur.

STATE ex rel. FARMER v. BELL, Superior Court Judge. (No. 14725.)

(Supreme Court of Washington. April 15, 1918.)

JUDGES \$=51(2)—CHANGE OF JUDGE—PREJU-DICE.

By requesting that the case be tried to a jury a party submitted her cause to the judge, and could not, after the request was denied, avail herself of the statute, providing for a change of judge on the ground of prejudice.

En Banc. Original application for prohibition by the State, on the relation of Virginia I. Farmer, against Ralph C. Bell, Judge of the Superior Court for Snohomish County.

Winter S. Martin, of Seattle, O. T. Webb, of Everett, and Ray M. Wardall, of Seattle, for relator. Edw. H. Chavelle, of Seattle, for respondent.

WEBSTER, J. This is an original application for a writ of prohibition. The facts are these: On or about January 1, 1918, a petition entitled "In re the Welfare of Onaneta M. Farmer, Harry C. Farmer, and Richard J. Farmer" was filed in the superior court of Snohomish county, and on January 5, 1918, Hon, Ralph C. Bell, one of the judges of said court, made an order committing the care and custody of the minor children named to Eva Farmer, their grandmother, until the further order of the court, upon certain terms therein stated. On March 4, 1918, Virginia I. Farmer, relator herein, as the mother of the children, filed a petition in the same court, requiring Eva Farmer to appear and show cause why a rehearing upon the entire cause should not be had, and the order rendered on January 5, 1918, be canceled and set aside, for the reasons set forth in the petition. Thereupon the court entered an order requiring Eva Farmer to appear and show cause on March 11, 1918, why the cause should not be reopened and the matter set down for a jury trial upon the issues raised by relator's petition. Upon the return date fixed, counsel for relator appeared before Judge Bell, sitting as the presiding judge of the juvenile court, and requested that the cause be set down for trial before a jury in accordance with the written demand then on file in the case. Respondent, having denied relator's application for a jury trial, set the cause for hearing before himself on March 18, 1918. Whereupon relator filed an affidavit of prejudice pursuant to the statute, and requested that the cause be assigned to another judge for trial, which request was denied. This application is made for a writ prohibiting respondent from hearing and determining the cause.

To state the case is to decide it. Relator submitted her cause to Judge Bell by requesting that the case be tried to a jury. When this matter was determined adversely, she undertook to avail herself of the provisions of the statute relating to a change of judge, on the ground of prejudice. This application was not seasonably made. As was said by Judge Dunbar, in State ex rel. Lefebvre v. Clifford, 65 Wash. 313-316, 118 Pac. 40, 41:

"It is true these orders were not made upon "It is true these orders were not made upon the merits of the case; but the statute does not, by specific provision or by any intendment, limit the right to make the application at any time before the trial on the merits. If literally construed, the right would exist at any time prior to the entering of the judgment. But to place such a construction on the law is to charge the lawmaking power with an intention to cripple and handicap the courts, in their attempted enand handicap the courts, in their attempted en-forcement of the law, to an intolerable extent. Hence the necessity of construction; and, con-struing the law and attempting to ascertain its

meaning, we cannot conclude that it was intended by the act that a party could submit to the jurisdiction of the court by waiving his rights to object until by some ruling of the court in a case he becomes fearful that the judge is not favorable to his view of the case. In other words, he is not allowed to speculate upon what rulings the court will make on propositions that are involved in the case, and, if the rulings do not happen to be in his favor, to then for the first time raise the jurisdictional question.

See, also, Nance v. Woods et al., 79 Wash. 188, 140 Pac. 323; State ex rel. Stevens v. Sup. Court, 82 Wash. 420, 144 Pac. 539; State ex rel. Nixon v. Sup. Court, 87 Wash. 603, 152 Pac. 1; Fortson Shingle Co. v. Skagland, 77 Wash. 8, 137 Pac. 304.

The correctness of the court's ruling in denying a jury trial may be reviewed upon appeal, and therefore is not before us in this proceeding.

The writ will be denied.

ELLIS, C. J., and MOUNT, MAIN, PAR-KER, FULLERTON, HOLCOMB, and CHAD-WICK, JJ., concur.

HUBBARD v. TACOMA EASTERN R. CO. (No. 14133.)

(Supreme Court of Washington. April 16, 1918.)

1. MASTER AND SERVANT \$\infty\$ 129(6)—LIABILITY FOR INJURIES—DEFECTIVE APPLIANCES— PROXIMATE CAUSE.

Where an air hose on moving train bursts, locking train, breaking coupler between engine and first car, and causing brakeman on first car to be thrown forward between car and tender from which car had parted, the railroad is liable for brakeman's death if it can be shown that coupler was defective and that parting of train caused death; the defective coupler, although a contributing cause, being an efficient, and hence proximate, cause of injury.

hence proximate, cause of injury.

2. MASTER AND SERVANT \$\insigma 285 (\bar{7})\$—ACTIONS FOR INJURY—QUESTION FOR JURY.

In an action for death of brakeman thrown between moving car on which he was standing and tender, which parted from car by breaking of coupler, there being evidence that tender was well equipped with grabirons and only 2 or 2½ feet from car when coupled up, the question of whether brakeman would have been injured if train had not parted is for the jury. injured if train had not parted is for the jury.

In an action for death of brakeman claimed to be due to breaking of coupler and consequent parting of train, where evidence showed coupler was defective in having a broken pin, railroad's argument, upon appeal, that pin was intended only to hold coupler together when open, supporting no strain when closed, will not be considered, because presenting a question not in issue in lower court and on which plaintiff is entitled to present evidence.

Appeal from Superior Department 1. Court, Pierce County; W. O. Chapman, Judge.

Action by Vera Hubbard against the Tacoma Eastern Railroad Company. From a judgment for defendant, plaintiff appeals. Reversed, and cause remanded for a new trial.

of Tacoma, for appellant. Geo. Korte, of trial court was in error. The rule, as we Seattle, and Herbert S. Griggs, of Tacoma, for respondent.

FULLERTON, J. The appellant's husband was killed while in the employment of the respondent as a switch brakeman. The appellant, conceiving that his death was caused by the negligence of the respondent, brought this action to recover in damages therefor. On the trial she was nonsuited by the court. and appeals from the judgment entered.

On the night of October 13, 1915, the respondent started a train of empty rock and logging cars from its Tacoma yards having for its destination a place called Mineral, a station on its line of railway. On the way, at the various stations certain of the cars were sidetracked and others taken on, so that as the train approached the station of Kapowsin it consisted of the engine and tender, a caboose, and 59 cars. The train was equipped with air brakes and automatic couplers. As the train approached the station last named on a downgrade of about one per centum, the air hose controlling the brakes burst, causing the brakes to set and lock the train, further causing the coupler between the engine and the first car to part, letting the engine and tender move on and away from the cars. The car next the tender was a flat car, and on this the brakeman killed was standing at the time of the bursting of the air hose. The sudden slackening of the speed of the train caused him to fall forward from the car down onto the tracks between the car and the tender which had moved forward faster than the train approached. He was unable to extricate himself, and the wheels of the car passed over his legs, crushing them, from the effects of which he died in a hospital two days later.

In her complaint the appellant charged the respondent with negligence in using both a defective air hose and a defective coupler. At the trial, however, she offered no evidence showing or tending to show that the air hose was defective, but in effect conceded that it was not uncommon for such hose to burst even with the best of equipment. As to the coupler, her evidence tended to show that it was defective, in that a broken pin had been used on one side of the coupler, being too short to reach through and catch the lower eye thereof, and that the strain put upon it by the sudden locking of the air brakes caused it to split out the only eye by which it was held, thus permitting the engine and tender to part from the train.

[1] The trial court rested its decision on the ground that the proximate cause of the accident was the bursting of the air hose, and, as this was not shown to be defective, no recovery could be had even though the coupler was defective, since that was a con-

G. C. Nolte and Gordon & Easterday, all; accident. In so concluding we think the have held it to be, is that, where one or more causes combine to produce an injury, any one of them may be termed the proximate cause if it appears to have been the efficient cause. In other words, the rule is that the employer is liable if any one of the co-operating causes of the injury is a culpable act or omission for which the master is responsible. And the rule holds good whether the other causes were defaults for which the master is responsible or were due to some event or condition for which he is not required to answer. Cole v. Gerrick. 62 Wash. 226, 113 Pac. 565; Goe v. Northern Pacific R. Co., 30 Wash. 654, 71 Pac. 182; Hanson v. Columbia & Puget Sound R. Co., 75 Wash. 342, 134 Pac. 1058; Howe v. Northern Pac. R. Co., 30 Wash. 569, 70 Pac. 1100, 60 L. R. A. 949; Ralph v. American Bridge Co., 30 Wash. 500, 70 Pac. 1098. If therefore the defective pin was the cause of the parting of the train, and the parting of the train was the cause of the death of the brakeman, the respondent is liable to answer therefor.

[2] The respondent argues that there was no evidence tending to support the latter contention, and that no such evidence is available; that at most it can be claimed that it is possible the brakeman might not have been injured had the coupler held; and that a mere possibility is not sufficient to charge it with liability. On this branch of the case. the evidence tended to show that the engine tender when coupled to the train was some 2 or 21/2 feet distant therefrom; that the back of the tender was about 6 feet higher than the top of the flat car on which the injured brakeman was standing; that there is a ladder running up the back of the tender and grabirons on each of its sides, and also a pin lever running from one side to the other. While it is possible, of course, that one falling from the end of the car towards the back of the tender might have fallen between the end of the tender and the car, yet it cannot be denied that the tender in place equipped as it was would have been a great factor of safety in preventing the accident; such a factor, indeed, that it seems to us it was for the jury, not the court, to say whether it would or would not in fact have prevented it. Matters of this sort are to be measured by their reasonable probabilities; and if, in the light of all of the circumstances, it is more reasonable to say that the accident would not have happened had the train not parted, than it is to say that it would have happened in any event, the question is one for the jury to determine.

The case of Parmelee v. C., M. & St. P. R. Co., 92 Wash, 185, 158 Pac. 977, cited and relied upon by the respondent, is not contrary to this conclusion. There the evidence tended to show nothing more than that a defect in the car existed near the place at tributing and not the proximate cause of the which the brakeman killed fell off the car;

nothing to show what caused his fall, much Pierce county for the general taxes thereon less that the defect caused it. Here there was for the year 1915. The trial of the cause a fixed material protection against the happening of such an accident as did happen, which was taken away by the negligent act of the company in using a defective coupling pin. Clearly the cases are not parallel.

[3] In this court, on the argument at bar, the respondent produced a model of the coupler and sought thereby to demonstrate that the pin was intended only to hold the coupler together when open, supporting no strain when properly closed, and argues therefrom that the pin in no manner tended to prevent the engine separating from the train. But aside from the fact conceded to be shown that a strain was put upon the pin sufficient to tear it out from a very considerable piece of iron, the coupler is not in evidence and its mechanism cannot be now considered. It may be that the jury will find with the contention when presented to it, but the appellant is entitled to meet it by other evidence. We are not authorized to consider it as a factor in the case.

The judgment is reversed, and the cause remanded for a new trial.

ELLIS, C. J., and PARKER and MAIN, JJ., concur.

HUGHES v. CARR, County Treasurer, et al. (No. 14248.)

(Supreme Court of Washington. April 15,

1. TAXATION \$\infty\$613 - Sale of Personal Property-"Dissipated."

The moving of assessed saloon fixtures from the storeroom to a warehouse when the prohibi-tion law went into effect was not a "dissipation" of such property, within Rem. Code 1915, § 9249, and distrainment and sale of such property entitled taxpayer to damages.

2. Taxation \$==581-Distress in Case of

DISSIPATION OF PERSONAL PROPERTY.

Rem. Code 1915, § 9249, reposes a large discretion in county treasurer to determine when assessed property is dissipated or about to be dissipated, and his judgment cannot be disturbed, unless a clear showing of abuse is shown.

Parker, J., dissenting.

Department 1. Appeal from Superior Court, Pierce County.

Action by W. E. Hughes against Calvin J. Carr, as Treasurer of Pierce County, and Robert Longmire, as Sheriff of Pierce County, and the County of Pierce. Judgment for defendants, and plaintiff appeals. Reversed.

Wesley Lloyd and Belcher & Gordon, all of Tacoma, for appellant. Fred G. Remann, A. B. Bell, and Harry E. Phelps, all of Tacoma, for respondents.

MAIN, J. The purpose of this action was to recover the value of certain personal property claimed to have been wrongfully dis- of business, prior to the 1st day of July,

For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

before the court, without a jury, resulted in a judgment that the plaintiff take nothing by the action, and that the defendants have their costs and disbursements. From this judgment the plaintiff appeals.

No statement of facts has been brought to this court, and consequently the facts must be conceded to be as recited in the findings of fact made and entered by the trial court. The controlling facts may be summarized as follows: On March 1, 1915, the appellant was the owner of personal property, including mirrors, bars, glassware, and other articles incidental to the saloon business, which was assessed on April 1, as of March 1, 1915, for general taxes. On March 1st the appellant was possessed of about \$25 worth of liquors and cigars, constituting his stock in trade. The saloon fixtures consisted of one bar, one back bar, one large mirror, two small mirrors, one steam table, one large painting, and other articles incidental to the business. Owing to the passage of the prohibitory law, which was to take effect on and after the 1st day of January, 1916, and on account of the expiration of the appellant's liquor license, which expiration occurred on or about the 1st day of July, 1915, he was unable to continue his business as a retail liquor merchant after the 1st day of July, 1915. On the 9th day of July, 1915, he closed his place of business and caused the property above mentioned, except the stock of liquors and cigars, to be placed in a storage warehouse. The liquors and cigars had been disposed of in the regular course of business prior to the 1st day of July. On September 30, 1915, the county treasurer, believing that the property was being or was about to be, dissipated. caused the same to be distrained for the taxes levied for that year. Thereafter the property was sold and, as the findings recite. the proceeds of the sale were applied in payment of the taxes for the year 1915 and the costs of the distraint, and "said property was sold at said sale for a sum not greater than the amount of said taxes and costs." The property sold, on the date of the sale, was found to be "of the reasonable and market value of \$100." The amount of the taxes was \$18.75.

[1] The controlling question is whether the property was by the owner being dissipated or about to be dissipated. If it was either being dissipated or was about to be dissipated, the judgment of the trial court must be affirmed. On the other hand, if it was not being dissipated, or was not about to be dissipated, the judgment of the trial court cannot be sustained. We do not understand that it is contended that the sale of the stock of liquors and cigars in the regular course trained and sold by the county treasurer of 1915, when the liquor license expired, was a

dissipation within the meaning of the stat- | could no longer be legally used in the saloon ute. Rem. Code, § 9249, provides that:

"Whenever in the judgment of the \* county treasurer personal property is being \* \* \* dissipated or about to be dissipated, the treasurer shall immediately distrain sufficient of said property to pay the taxes upon all the property \* \* being dissipated or about to be dissipated together with " to be dissipated, together with all accruing costs with interest.

The question is finally reduced to this: Was the property dissipated, or was it about to be dissipated, because of the fact that it was removed from the storeroom, in which it was at the time it was assessed, and placed in a storage warehouse. The liquor license having expired on the 1st day of July, and the prohibition law going into effect on the 1st day of January following, the appellant was no longer able to use the property in the business in which it was being used at the time the assessment was made. Instead of removing the property to the warehouse, if it had been permitted to remain unused in the storeroom where it was located at the time of the assessment, it would hardly be contended that it was either dissipated or about to be dissipated within the meaning of the statute. It is difticult to see how its removal to a storage warehouse, when the business could no longer be conducted, would be either a dissipation or a contemplated dissipation of the property. According to Webster's International Dictionary, "dissipate" means:

"1. To scatter completely; to disperse and cause to disappear—used esp. of the dispersion of things that can never again be collected or restored."

The placing of the property in the warehouse did not disperse and cause it to disappear. Neither did it place it in a position where it could not again be collected or re-Under the common and accepted meaning of the word "dissipate," the removal of the property from the storeroom to the storage warehouse, with no other fact showing either dissipation or an intent to dissipate, is not sufficient to justify the distraining of the property under the claim that it was either being dissipated or was about to be dissipated.

[2] The section of the statute above quoted undoubtedly reposes in the county treasurer a large discretion to determine when property is either dissipated or about to be dissipated, and, if the facts were susceptible of a construction that the property was either being dissipated or was about to be dissipated, it would require a clear showing of abuse of this discretion before the court would be justified in disturbing the judgment of the treasurer. In our opinion, the facts stated in the findings cannot be construed as showing that the property was either being dissipated or was about to be diswas placed in a storage warehouse when it Judge.

business.

The judgment will be reversed, and the cause remanded, with direction to the superior court to enter a judgment in favor of the appellant.

ELLIS, C. J., and FULLERTON and WEBSTER, JJ., concur.

PARKER, J. (dissenting). If this were an action wherein it was sought to enjoin the county treasurer from selling the property in question to satisfy taxes charged against it, I would be inclined upon the facts shown, to concur in the view that the treasurer should he restrained from so doing. But to hold that the treasurer is liable in damages for so doing. as the opinion in effect holds, is, I think, going too far. Such a holding is, as I view it, in principle but little short of the holding of a judge of a court liable in damages because he has decided a case erroneously. treasurer was deciding a matter which the law compelled him to decide. He may have been sufficiently in error to warrant our deciding that his decision was wrong, but that is far short of any sound reason for holding him liable in damages for making such wrong decision. The courts were open to respondent to have the treasurer's decision reviewed before the sale by the simplest kind of suit in equity.

There is no finding of malice or bad faith on the part of the treasurer, in deciding that there was statutory cause for the seizure and sale of respondent's property. I think that there is abundant authority showing that the treasurer is not liable in damages, though his decision be erroneous. See 29 Cyc. 1444. and cases therein cited. The decision of the majority is even more plainly erroneous as to the liability of the sheriff, who, of course, was entitled to rely on the treasurer's decision as to the cause for the seizure and sale of respondent's property. Manifestly, it was not the duty of the sheriff to act other than upon the decision of the treasurer.

For these reasons, I dissent.

STATE v. WHEELER. (No. 14505.) (Supreme Court of Washington. April 22, 1918.)

False Pretenses == 14(2)-Intent.

A borrower who gave as security for a loan a chattel mortgage on personal property not be-longing to him, though he intended to repay, violated Rem. Code 1915, § 2601, providing that one who with intent to deprive or defraud the owner shall obtain from the owner or another the possession of or title to any property by color or aid of any false and fraudulent representation steals such property.

Department 1. Appeal from Superior sipated by reason of the fact alone that it Court, Yakima County; Geo. B. Holden,

J. D. Wheeler, alias J. M. Wheeler, convicted of larceny committed by color or aid of false and fraudulent representations, appeals. Affirmed.

Chas. F. Bolin, of Toppenish, for appellant. O. R. Schumann and J. Lenox Ward, both of North Yakima, for the State.

MAIN, J. The defendant was charged by information with the crime of larceny, committed by color or aid of fraudulent and false representations. The trial resulted in a verdict of guilty as charged. A motion for new trial being made and overruled, the defendant appeals.

The facts may be briefly summarized as follows: On the 29th day of August, 1916, the appellant, together with his family, was residing on a ranch in Yakima county, and on this date the appellant obtained from E. C. Young, the agent of John W. Morken, a loan of \$75, and, as security therefor, gave a chattel mortgage on certain personal property. The personal property covered by the mortgage, with the exception of one cow, was not owned by the appellant, but was the property of the owner of the ranch upon which he then resided. Some time thereafter, the mortgagee or his agent, having learned that the property covered by the mortgage was not that of the appellant, caused his arrest; and, after he had been formally charged with the crime of grand larceny, he was convicted, as already stated.

The appellant's principal contention is that the evidence failed to show that the \$75 was obtained with criminal intent, and that therefore the trial court erred in not directing a verdict of acquittal. The statute (Rem. Code, § 2601) provides that:

"Every person who, with intent to deprive or defraud the owner thereof— \* \* \* (2) Shall obtain from the owner or another the possession of or title to any property, \* \* \* by color or aid of any fraudulent or false repre-sentation. \* \* steals such propersteals such propersentation,

The appellant, if we understand his contention, claims that he intended to repay the money at some subsequent time, and that therefore it was not obtained with criminal intent. The money, however, was obtained from the agent of the owner by color or aid of fraudulent or false represen-The owner was deprived or defrauded thereof. The statute, as already indicated, makes one guilty of larceny who, with intent to deprive or defraud the owner thereof, shall obtain from such owner, or another, the possession of or title to any property by color or aid of any fraudulent or false representation. The evidence shows beyond controversy that the money was obtained by aid of fraudulent and false representations. Had it not been for the representations of the appellant that he was the

chattel mortgage, the loan would not have been made. It seems plain that the court did not err in submitting the question to the jury, and the evidence is ample to sustain the verdict.

There are some other assignments of error which relate to an instruction given and requests refused, and also as to certain evidence received. These assignments, however, are not argued in the appellant's brief, and, while they have been considered, it seems unnecessary to review them here.

We find no error in the record, and the judgment will be affirmed.

ELLIS, C. J., and PARKER, FULLER-TON, and WEBSTER, JJ., concur.

## MOLLER et ux. v. GRAHAM et al. (No. 14401.)

(Supreme Court of Washington. April 22, 1918.)

1. Taxation & 642—Fobeclosure of Lien— Description in Summons—Statute.

Under Rem. & Bal. Code, § 9257, requiring the summons on tax foreclosure by a municipalthe summons on tax foreclosure by a municipality to describe the property as it is described on the tax rolls, where realty against which the county brought action to foreclose a tax lien was described on the tax rolls for the year as "the W. ½ of lot 6, block 30, Bowman's Central Ship Harbor water front plat of the city of Anacortes, Washington, and the E. 27 feet of lot 7, block 30, Bowman's Central Ship Harbor water front plat of the city of Anacortes, Washington," but the published summons described it as "the W. ½, lot 6, block 30, Bowman's plat, Anacortes," the description of the property in the published summons was fatally defective and void as varying from the description on the and void as varying from the description on the tax rolls.

2. Taxation \$\ist\$ 800(1) — Foreclosure Lien—Relief—Condition Precedent.

One attacking a county's proceeding for the foreclosure of a tax lien is required, as a condition precedent to relief, to tender the purchaser the amount he paid for the property at the tax sale, with interest to date of tender.

3. TAXATION \$\infty 789(2) - Foreclosure of

3. TAXATION \$\iff \text{2}\] — FORECLOSURE OF LIEN—ESTOPPEL TO OBJECT—STATUTE.

Rem. & Bal. Code, \\$ 9267, providing that any judgment for deed to realty sold for delinquent taxes shall estop all parties from raising any objections thereto, or a tax title based thereon, which existed at or before rendition of such judgment, and could have been presented as a defense to the application for it, etc., is not applicable to a case of foreclosure of tax. not applicable to a case of foreclosure of tax lien wherein the published summons was void as describing the land differently from the description on the assessment rolls, since, the court never having acquired jurisdiction of the tax foreclosure proceeding, the judgment was void.

Department 1. Appeal from Superior Court, Skagit County; Augustus Brawley, Judge.

Action by Henry and Anna Moller, husband and wife, against M. A. Graham and the Skagit County Mortgage & Investment Company, a corporation. From judgment of owner of all the property covered by the dismissal, plaintiffs appeal. Reversed, and

cause remanded, with direction to overrule | convey the same by deed to respondent Skag-demurrers to the complaint.

Joiner & English, of Anacortes, for appellants. Ben Driftmier and Norvell & Norvell, all of Anacortes, for respondents.

WEBSTER, J. This action was brought by appellants to set aside a certain tax deed executed by the county treasurer of Skagit county, Wash., to respondent Graham, and a certain deed thereafter executed by Graham to respondent Skagit County Mortgage & Investment Company, for and to quiet the title of appellants in and to the W. ½ of lot 6, and the E. 27 feet of lot 7, block 30, Bowman's Central Ship Harbor water front plat of the city of Anacortes, Wash.

Appellants allege ownership of the premises by virtue of conveyance from Sarah Louise Dobbins and Richard Dobbins, her husband, who were the owners of the lands at the time of the assessment and subsequent tax foreclosure proceedings hereinafter referred to; appellant Henry Moller having been the holder of a mortgage thereon during the pendency of such foreclosure proceedings and prior to his obtaining the deed from the Dobbins.

It was further alleged in the complaint that in the year 1916, Skagit county brought an action in the superior court for the purpose of foreclosing a tax lien levied for the year 1910 upon the premises, and in such action a summons was served by publication in one general notice with other real estate; that in the published summons the property in question was not described as it was described upon the tax rolls of Skagit county, but the published notice contained the description as, "the W. 1/2, lot 6, block 30, Bowman's plat, Anacortes; E. 27 ft. lot 7, block 30, Bowman's plat, Anacortes;" whereas the property was described on the tax rolls for the year 1910 as "the W. 1/2 of lot 6, block 30, Bowman's Central Ship Harbor water front plat of the city of Anacortes, Wash., and the E. 27 feet of lot 7, block 30. Bowman's Central Ship Harbor water front plat of the city of Anacortes, Washington," the description upon the tax rolls being the correct description of the property; that no further or other summons was issued, served, or published in the tax foreclosure proceeding, and thereafter a decree of foreclosure. based thereon, was made and entered therein; that subsequent to the entry of such decree the county treasurer of Skagit county sold the premises to respondent Graham for the amount of the taxes for the year 1910, and subsequent years, including interest and penalties, amounting in all to the sum of \$204.92, and that on October 28, 1916, pursuant to such foreclosure decree and sale, and in consideration of the sum mentioned, the county treasurer executed and delivered to respondent Graham a deed for the premconvey the same by deed to respondent Skagit County Mortgage & Investment Company, which corporation now claims to be the owner thereof.

The complaint attacks the tax foreclosure proceedings upon three grounds: First, that the summons was void because the property was not described in the summons as it was described on the tax rolls; second, that the treasurer of Skagit county failed and neglected to notify the record owner of the real estate of the pendency of the foreclosure sale; third, that the real estate was not assessed in the name of the true owner for the year 1910.

It was further alleged that neither the plaintiffs nor their grantors had any notice or knowledge of the pendency of the tax foreclosure proceedings, and that prior to the commencement of this action, the plaintiffs had tendered to defendant Skagit County Mortgage & Investment Company the sum of \$213.25, being the amount of the taxes, penalties, interest, and costs paid by defendant Graham at the tax sale of the premises, together with interest thereon to date of tender, which amount was refused by the defendant company, and thereafter by the plaintiffs paid into the registry of the court for said defendant.

Relief was sought by decree setting aside the tax foreclosure proceedings, and the conveyances to the defendants based thereon, together with the quieting of title to the premises in the plaintiffs. Demurrers to the complaint were sustained, and, the plaintiffs refusing to plead further, the action was dismissed, from which judgment the plaintiffs have appealed.

[1] As we view the case the complaint states a cause of action for relief from the tax foreclosure proceedings upon the ground that the summons issued and published therein was void; the description of the property contained in the summons being fatally defective. It will not be necessary, therefore, to consider the other questions presented. The requirements of the statute with reference to the contents of the summons in tax foreclosures by municipalities, in this respect, are:

"Provided, that summons may be served or notice given exclusively by publication in one general notice, describing the property as the same is described on the tax rolls." 2 Rem. & Bal. Code, § 9257.

in; that subsequent to the entry of such decree the county treasurer of Skagit county sold the premises to respondent Graham for the amount of the taxes for the year 1910, and subsequent years, including interest and penalties, amounting in all to the sum of \$204.92, and that on October 28, 1916, pursuant to such foreclosure decree and sale, and in consideration of the sum mentioned, the county treasurer executed and delivered to respondent Graham a deed for the premises; that Graham thereafter attempted to

ing a description of a large amount of property under the heading "Seattle Old Limits" was the following description of the property in question: "Syndicate Add.—P. Welch, lot 5 block 7." While the description of the property as it appeared on the tax rolls does not appear from the opinion in that case, these observations made by the court are pertinent to the facts of this case:

"A tax foreclosure proceeding of this character is in the nature of a proceeding in rem, and, under the rule governing such, the property sought to be affected must be described with reasonable accuracy. The owners of this property appear to have paid their taxes regularly for many years. Why the matter was overlooked with reference to the taxes for which this foreclosure was brought we do not know. Doubtless it was a mistake or oversight of some character. The owners were living in the state during all of that time. To take respondents' property from them in payment of these old and evidently overlooked taxes would be a hardship which should not be visited upon them, unless the jurisdictional requirements in the foreclosure proceeding were shown to have been fully complied with. The description of a single lot among a vast number of descriptions might easily escape an owner's notice, even if correct. If incorrect, the more easily could it be overlooked, even if the owner's attention was called to the list without suspecting that he had property mentioned therein. It is evident that the description under which this property was proceeded against was not the correct description of the property sought to be subjected to the tax lien, and we cannot say that this defect, considered together with the obscure place and form in which it appeared in the notice, was not sufficient to, or may not, have misled the respondents or him under whom they claim, and cannot say that it was published in a form and possessed that accuracy and definiteness which can be said, as a matter of law, to have been sufficient to bind them with notice."

And in the case of Miller v. Henderson, 50 Wash. 200, 96 Pac. 1052, where the provisions of the statute requiring the certificate of delinquency to be filed with the clerk prior to the commencement of the foreclosure proceeding were held not jurisdictional, we said:

"The appellants argue that as the proceedings for the foreclosure of tax liens are special and statutory, and not according to the course of the common law, they must be construed strictly, and hence any failure on the part of the tax collectors to take the steps provided by the statute in the order in which they are therein provided must result fatally to any proceeding where the final result is to deprive a citizen of his property. Unquestionably this is in accord with the great weight of judicial authority; in fact, so uniform and so strict has been the application of the rule in most jurisdictions that the very term 'tax title' has become a synonym for worthlessness. But this court has not followed this rule in all of its strictness. It has seemed to us that the levy and collection of taxes is not a special proceeding in all of its aspects. Certainly the power to do so is something more than a mere statutory right. The power lies at the very foundation of government itself. It is a power that must be exercised in one form or another, else the government will cease to exist for want of means to sustain itself. Hence we have felt that statutory provisions relating to taxation were rather regulations upon the power than the source from which the power is derived, and, being regulations, that they were to be regarded by the court as regulations are usually regarded when the

proceedings had under them are attacked collaterally; that is to say, departures from the strict rule prescribed are to be regarded as fatal only where the departure affects some substantial right of the complaining party—where he is denied some substantial right which would have been granted him had the regulation been pursued according to its terms—but to deny relief where the departure complained of does not affect the complaining party either one way or the other. In the present case the delinquency thought to be fatal is of the latter sort. This omission to file the certificate of delinquency in the office of the county clerk prior to the issuance and service of the summons could in no manner affect the rights of the appellants. Nor was the thing itself in any way necessary to constitute due process of law, as the proceeding prescribed by the statute would have been as valid and obligatory without this requirement as with it. It being therefore neither essential to the rights of the landowners nor to the legality of the statute, we think the omission of the clerk to comply with it at the time contemplated by the framers of the act did not so far deprive the court of jurisdiction as to require us to hold the sale invalid."

In Wick v. Rea, 54 Wash. 424, 103 Pac. 462, it is said:

"While the argument is forceful and is supported by respectable authority, this court is committed to the doctrine that a summons in tax forcelosure proceedings must comply with the statutes. Otherwise the court acts without jurisdiction. The rule, as stated in 17 Ency. Plead. & Prac. 45, "The right to serve process by publication being of purely statutory creation and in derogation of the common law, the statutes authorizing such service must be strictly pursued in order to confer jurisdiction upon the court,' was adopted in Thompson v. Robbins, 32 Wash. 149, 72 Pac. 1043, and has been followed in the following cases: Smith v. White, 32 Wash. 414, 73 Pac. 480; Dolan v. Jones, 37 Wash. 176, 79 Pac. 640; Woodham v. Anderson, 32 Wash. 500, 73 Pac. 536; Williams v. Pittock, 35 Wash. 648, 80 Pac. 810; Owen v. Owen, 41 Wash. 642, 84 Pac. 606; Bartels v. Christenson, 46 Wash. 478, 90 Pac. 658; Bauer v. Windholm, 49 Wash. 310, 95 Pac. 277; Gould v. Knox, 53 Wash. 248, 101 Pac. 886; Hays v. Peavy, ante [54 Wash. 363] 103 Pac. 459; Gould v. White, ante [54 Wash. 363] 103 Pac. 459; Gould v. White, ante [54 Wash. 384] 103 Pac. 460."

The statute having required that the property shall be "described in the summons the same as described on the tax rolls," it necessarily follows that there must be at least a substantial compliance with such provision, since it is by virtue of the summons that the court acquires jurisdiction to hear and determine the cause. True the proceeding is one in rem, yet it is essential that jurisdiction of the res be acquired in the method prescribed by the statute, otherwise the owner is deprived of his property without due process of law.

[2] The difference in the two descriptions here in question is so marked that we are not prepared to say that they are substantially the same. To hold otherwise would open the door to other and further departures from the statute, even to the extent where the somewhat limited right guaranteed by the statute might not only be qualified, but eventually destroyed. Before the court is justified in saying that two descriptions are sub-

stantially the same, it should manifestly appear that they are so. Such rule imposes no hardship upon the tax-collecting officers. They have in their possession the original entry of that which the statute says shall be inserted in the summons. To meet the requirement involves no unusual effort. The county treasurer need only refer to his records, the notice being sufficient if it follows the description embodied in the tax rolls. Nor does it work any injury to the purchaser at the tax sale, the party attacking the proceeding being required, as a condition precedent to the relief sought, to tender the purchaser the amount paid for the property at such sale, with interest to the date of the tender.

The principal cases relied upon by respondents in support of the judgment of the lower court are Konnerup v. Milspaugh, 70 Wash. 415, 126 Pac. 939; Ontario Land Co. v. Yordy. 44 Wash, 239, 87 Pac. 257; Continental Distributing Co. v. Smith, 74 Wash. 10, 132 Pac. 631, and Noble v. Aune, 50 Wash, 73, 96 Pac. 688. A brief analysis of these cases is therefore pertinent.

The Konnerup Case did not involve the question of the sufficiency of a description of property contained in a summons published in a tax foreclosure proceeding. The question there presented was the sufficiency of a description contained in a sheriff's deed made pursuant to execution sale, the court applying the rule that a description in an instrument affecting title to real estate is sufficient if it affords an intelligent means for identifying the property and is not misleading; also holding that extrinsic evidence in aid of the description was admissible for the purpose of identification.

In Ontario Land Co. v. Yordy, supra, the question presented was the sufficiency of the description appearing upon the assessment rolls, and not whether the property was described in the summons "the same as it was on the tax rolls"; moreover, no tender of the delinquent taxes, as required by the statute, had been made.

In Noble v. Aune, supra, it was insisted that the tax foreclosure proceeding was invalid for the reason that the name of the owner was given as "Henry Acenie" instead of "Henry Aune," as it appeared in the tax roll for some of the years for which the taxes were delinquent. The court refused to sustain this contention, holding that it is immaterial what name or names are used in the summons, or whether any are used; it being sufficient if the summons contains a proper description of the property.

In Continental Distributing Co. v. Smith, supra, it appears that the description of the property contained in the summons was identical with that contained on the tax rolls, the question raised being a discrepancy between summons and on the tax rolls, and the insufficiency of the description appearing on the tax rolls. Without further discussion it is apparent that the cases are not apposite.

[3] Counsel for respondent cite and rely upon the following provisions of section 9267. Rem. & Bal. Code:

"And any judgment for the deed to real estate sold for delinquent taxes rendered after the pas-sage of this act, except as otherwise provided in this section, shall estop all parties from raising any objections thereto, or to a tax title based thereon, which existed at or before the rendition of such judgment, and could have been presented as a defense to the application for such judgment in the court wherein the same was rendered, and as to all such questions the judgment itself shall be conclusive evidence of its regularity and validity in all collateral proceedings, except in cases where the tax or as-sessments have been paid, or the real estate was not liable to the tax or assessment."

This statute is not applicable here, for the reason that the judgment was void; the court having never acquired jurisdiction of the tax foreclosure proceeding.

The judgment is reversed, and the cause remanded with direction to overrule the demurrers to the complaint.

ELLIS, C. J., and FULLERTON, MAIN, and PARKER, JJ., concur.

CUSHING et al. v. WHITE, Pros. Atty., et al. (No. 14455.)

(Supreme Court of Washington, 1918.) April 16.

1. Carriers \$\infty 3 - Who are "Carriers" -

CLASSIFICATION.
"Carriers" may be defined as persons or corporations who undertake to transport or convey goods, property, or persons from one place to another gratuitously or for hire, and are classified as private or special carriers and common or public carriers; the class to which a particular carrier is to be assigned depending upon the nature of his business, the character in which he holds himself out to the public, the terms of his contract, and his relations generally to the parties with whom he deals and the public.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Carrier.] 2. CARRIERS & 4 - "COMMON CARRIER" AND "PRIVATE CARRIER" DEFINED AND DISTIN-GUISHED.

A "common carrier" is one whose occupa-tion is transportation of persons or things from place to place for hire or reward, and who holds himself out to the world as ready and willing to serve the public indifferently in the particular line or department in which he is engaged, the true test being whether the given undertaking is a part of the business engaged in by the carrier, which he has held out to the general public as his occupation, rather than the quantity or extent of the business actually transacted, or the number and character of the conveyances used in the employment; but if the undertaking be a single transaction, not a part of the general business or occupation engaged in, as advertised and held out to the general public, then the individual or company furnishing such service is a "private" and not a common carrier, and in the name of the owner as it appeared in the either case the question must be determined by

the character of the business actually carried facts the trial court concluded that the busi-on, and not by any secret intention or mental ness conducted by the several appellants reservation entertained or asserted when charging of the act and is ed with duties and obligations which the law im-

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Common Carrier: Private Carrier.1

3. CARRIERS 235-REGULATION-CARRIAGE OF PASSENGERS-"COMMON CARRIER.

A carrier engaged in the automobile rent business, who owns and operates a motor-pro-pelled vehicle for hire, either at a charge of so much per trip or so much per hour, who has a fixed stand or place where his car is available to nxed stand or place where his car is available to prospective customers during many hours of the day and night, and who transports passengers from place to place, although he has no fixed schedule of charges and does not operate over definite routes, and does not on all occasions load his car to its full capacity, and reserves the right to refuse to transport passengers whether his vehicle is engaged or not, is a "common carrier" within Laws 1915, p. 227, regulating common carriers of passengers on public streets, roads, and highways, providing for the issuance, of permits, etc.

Department 1. Appeal from Superior Court, Spokane County.

Suit by Frank Cushing and others against John B. White, Prosecuting Attorney of Spokane County, and others. From a judgment Affirmed. for defendants, plaintiffs appeal.

McCarthy & Edge, of Spokane, for appellants. John B. White and Wm. C. Meyer, both of Spokane, for respondents.

WEBSTER, J. This action was brought by appellants to enjoin respondents from enforcing as against them the provisions of chapter 57, Laws 1915, entitled:

"An act relating to and regulating common carriers of passengers upon public streets, roads and highways, providing for the issuance of permits; prescribing penalties for violations, and providing when this act shall take effect.

The trial court found the following facts: That appellants are engaged in what is known as the automobile rent business; that each of them is the owner of an automobile which he drives for hire, either at a charge of so much per trip or so much per hour; that each of them has a fixed stand where, when not engaged with customers, or not otherwise using the car, they are available to prospective customers during many hours of the day and night: that none of them has a fixed route or routes over which they operate their motorcars; that they do not, when engaged by one person for a trip or trips, ever carry any passenger or passengers other than those directed by the original hirer, whether their automobile capacity is exhausted or not: that none of them has or maintains any fixed schedule of rates for the transportation of passengers, either for a single trip or by the hour; and that each of them "do now and have always reserved the right to transport passengers or refuse to transport them whether they are occupied or not occupied with other engagements."

falls within the provisions of the act and is subject to its regulations. A decree was entered accordingly, from which this appeal is prosecuted.

Appellants insist that, under the facts found by the court, they are not common carriers of passengers, hence not within the purview of the act. For the purpose of this opinion it will be assumed that the statute applies only to common carriers of passengers in motor-propelled vehicles. State v. Ferry Line Auto Bus Co., 93 Wash. 614, 161 Pac. 467. The sole inquiry therefore is whether, under the facts set forth, appellants are such carriers. The precise question thus presented is of first impression in this court, and its importance seems to justify an extended discussion of the authorities.

[1] "Carriers" may be defined as persons or corporations who undertake to transport or convey goods, property, or persons, from one place to another, gratuitously or for hire, and are classified as private or special carriers, and common or public carriers; the class to which a particular carrier is to be assigned depending upon the nature of his business, the character in which he holds himself out to the public, the terms of his contract, and his relations generally to the parties with whom he deals and the public. 1 Moore on Carriers (2d Ed.) §§ 1 and 2. The books abound with definitions of both common and private carriers from which the distinguishing features may be gathered. Judge Thompson submits the following:

"A common carrier of passengers is one who undertakes for hire, to carry all persons indif-ferently who may apply for passage. To consti-tute one a common carrier it is necessary that he should hold himself out as such. This may be done not only by advertising, but by actually engaging in the business and pursuing the occu-pation as an employment." Thompson on Carriers of Passengers, p. 26, note 1.

## Redfield in his treatise says:

"It is generally considered that where the carrier undertakes to carry only for the particular occasion, pro hac vice, as it is called, he cannot be held responsible as a common carrier. So, also, if the carrier be employed in carrying for one or a definite number of persons, by way of special undertaking, he is only a private carof special undertaking, he is only a private carrier. To constitute one a common carrier he must make that a regular and constant business, or at all events, he must, for the time, hold himself ready to carry for all persons, indifferently, who choose to employ him." Redfield on Carriers and Bailees, § 19.

In Dobie on Bailments and Carriers, at sections 106 and 107, the author says:

"The private carrier is one who, without engaging in such business as a public employment, undertakes by special contract to transport goods in particular instances from one place to another.

The common carrier of goods is one who holds himself out, in the exercise of a public or not occu-Upon these may employ him."

For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

This author at section 164 states:

"The same considerations that distinguish the common from the private carrier of goods apply to set apart the common and private carrier of passengers."

Hutchinson announces the rule in this language:

"Private carriers for hire are such as make no public profession that they will carry for all who apply, but who occasionally or upon the particular occasion undertake for compensation to carry the goods of others upon such terms as may be agreed upon. They are not common carmay be agreed upon. They are not common carriers because they do not make the carriage of goods for others a business, and do not hold themselves out to the public as ready and willing to carry indifferently for all persons any particular class of goods or goods of any kind whatever." 1 Hutchinson on Carriers (3d Ed.) § 35.

Judge Story observes:

"To bring a person within the description of a common carrier he must exercise it as a pub-lic employment; he must undertake to carry goods for persons generally, and he must hold himself out as ready to engage in the transportation of goods for hire, as a business, not as a casual occupation pro hac vice. A common carrier has therefore been defined to be one who undertakes for hire or reward to transport the goods of such as choose to employ him, from place to place." Story on Bailments, § 495.

Chancellor Kent says:

"Common carriers undertake generally, and ot as a casual occupation, and for all people indifferently, to convey goods and deliver them at a place appointed, for hire, as a business, and with or without a special agreement as to price." 2 Kent's Commentaries, 598.

In volume 1, at page 3, Mitchie on Carriers, it is said:

"A common carrier of passengers is one who undertakes, for hire, to carry all persons indifferently who may apply for passage."

In volume 1, Moore on Carriers, at section 4, the author says:

"A private carrier is one who agrees, by special agreement or contract, to transport percan agreement or contract, to transport persons or property from one place to another, either gratuitously or for hire; one who undertakes for the transportation in a particular instance only, not making it a vocation, nor holding himself out to the public ready to act for all who desire his services. Common carriers, however, hold themselves out to carry for all persons indiscriminately."

In volume 10, Corpus Juris, at section 1, we find:

"A carrier is one that undertakes the transportation of persons or movable property, and the authorities, both elementary and judicial, recognize two kinds or classes of carriers, namely, private carriers and common carriers. private carrier is one who without being engaged in such business as a public employment, un-dertakes to deliver goods in a particular case for hire or reward. While a common carrier has been defined as one that holds itself out to the public to carry persons or freight for hire.

Passing from the definitions given by the

dertake as a common employment to carry goods for hire, from one town to another; the masters and owners of ships, vessels. steamboats, barge owners, canal boatmen, and ferrymen, employed in the like business -are all "common carriers"; the test applied being:

"A common carrier is one who undertakes and exercises, as a public employment, the transporexercises, as a public employment, the transpor-tation or carriage of goods for persons generally, from place to place, whether by land or by wa-ter, and to deliver them at the place appointed, for hire or reward, and with or without a spe-cial agreement as to price."

In Fish v. Chapman, 2 Ga. 349, 46 Am. Dec. 393, it was held:

"To render one a common carrier, his under-taking must be general and for all people in-differently. The undertaking may be evidenced differently. by the carrier's own notice or practically by a series of acts, by his known habitual continu-ance in this line of business. He must assume ance in this line of business. He must assume to be the servant of the public; he must undertake for all people. A special undertaking for one man does not render a person a common carrier. One who follows carrying for a livelihood or who gives out to the world in any intelligible way that he will take goods or other things for transportation from place to place whether for a year, a season, or less time, is a common carrier, and subject to all the liabilities of such."

In Varble v. Bigley, 14 Bush (Ky.) 698, 29 Am. Rep. 435, it is said:

"When a person has assumed the character "When a person has assumed the character of a common carrier, either by expressly offering his services to all who will hire him, or by so conducting his business as to justify the belief on the part of the public that he means to become the servant of the public, and to carry for all, he may be safely presumed to have intended to assume the liabilities of a common carrier, for he was bound to know that the law would so charge him, and knowing, must have intended it."

In Parmelee v. Lowitz, 74 Ill. 116, 24 Am. Rep. 276, the proprietor of a line of omnibuses and baggage wagons, engaged in carrying for hire, passengers and baggage for all persons choosing to hire, from, to, and between depots, hotels, and different parts of the city of Chicago, was held to be a common carrier. The doctrine of this case is expressly reaffirmed in the recent case of Hinchliffe v. Wenig Teaming Co., 274 Ill. 417, 113 N. E. 707.

In McGregor v. Gill, 114 Tenn. 521, 86 S. W. 318, 108 Am. St. Rep. 919, where it was held that a livery stable keeper who had hired a team and conveyance to a customer for a special occasion was not a common carrier, the distinction between the two classes is aptly stated in this language:

text-writers to a few of the pertinent cases, we find the following in which the distinguishing features are applied:

In McHenry v. Railroad Co., 4 Har. (Del.) 448, it was held that the owners of stage wagons, stagecoaches, and railroad cars, who carry goods, as well as passengers, for hire; wagoners, teamsters, and cartmen, who un-"The present case bears no likeness to that of

In that case the court approved this definition of a "common carrier":

"A common carrier of passengers is one who undertakes for hire to carry all persons indifferently who may apply for passage. \* \* \* To constitute one a common carrier it is necessary that he should hold himself out to the community as such."

In Robertson v. Kennedy, 2 Dana (Ky.) 430, 26 Am. Dec. 466, the Court of Appeals of Kentucky had before it this state of facts: The defendant had been in the habit of hauling for hire, in the town of Brandenburgh, for every one who applied to him, with an ox team, driven by his slave. He undertook to haul for plaintiffs a hogshead of sugar, and in the course of transporting it the slide slipped into the river, whereby the sugar was spoiled. In an action to recover against the defendant upon the theory that he was a common carrier, the court held:

"Every one who pursues the business of transporting goods for hire, for the public generally, is a common carrier. According to the most approved definition, a common carrier is one who undertakes, for hire or reward, to transport the goods of all such as choose to employ him, from place to place. Draymen, cartmen, and porters, who undertake to carry goods for hire, as a common employment, from one part of a town to anther, come within the definition. So, also, does the driver of a slide with an ox team. The mode of transporting is immaterial."

The case of Lloyd v. Haugh, 223 Pa. 148, 72 Atl. 516, 21 L. R. A. (N. S.) 188, is peculiarly applicable here, for the reason that its facts are strikingly similar to those found by the trial court. From the opinion it appears:

"The defendant, an incorporated company, though chartered to do a general warehouse and storage business, does not confine itself strictly to the particular business for which it was char-tered, but engages as well in the business of moving household goods in the city of Pittsburgh and vicinity. The president of the company, speaking to this point, says in his testimony that general hauling of household goods is one of the particular lines of business in which the company engages, and that it solicits business of this kind by public advertisements in various ways, by signs upon its wagons, upon fences, when that is allowed, by cards intended for general distribution, and by the bills and tags used in the course of the business. These advertisements speak for themselves, and unquestionably establish the fact, independent of everything else in the case, that the defendant does hold itself out to the public as engaged in the moving of out to the public as engaged in the moving of household goods, thereby inviting employment along this line. None of these advertisements contain a suggestion of limited liability, or that the company will render such service only as it may select its patrons. Notwithstanding this public committal of the company to a general and indiscriminating service, it is argued that the company of the wight to see inasmuch as the company claims the right to select those whom it will serve, and because its custom has been and is to discriminate, accepting some and rejecting others, as it may choose, this circumstance makes it a private as distinguished from a common carrier, and exempts it from the obligations and liability which the law from the obligations and liability which the law imposes on the latter relation. \* \* \* Conceding, however, that such a duty (to carry indiscriminately at established prices) rests upon a common carrier, to claim that one is not a common carrier because he has persistently disregarded this duty and has arbitrarily chosen

whom he would serve, notwithstanding he has invited the public generally to apply, is to make a public duty determinable by the pleasure of the individual and not by principle or law. We express a doctrine universally sanctioned when we say that any one who holds himself out to the public as ready to undertake for hire or reward the transportation of goods from place to place, and so invites custom of the public, is in the estimation of the law a common carrier.

\* \* \* We are dealing with a case where the carrier made the transportation of household goods part of its regular business, advertised that business in a way to solicit custom from the general public. An unavoidable implication arises that it holds itself in readiness to engage with any one who might apply."

In Vandalia R. Co. v. Stevens (Ind. App.) 114 N. E. 1001, the Appellate Court of Indiana observed:

"On the other hand, we cannot agree with the appellant's contention that the common carrier may, by the words of its contract, convert itself into a private carrier, where the transportation undertaken and the duties and responsibilities incident thereto are such as are ordinarily incident to a common carrier."

In Bank of Kentucky v. Adams Express Co., 93 U. S. 174, 23 L. Ed. 872, Mr. Justice Strong said:

"We have already remarked the defendants were common carriers. They were not the less such because they had stipulated for a more restricted liability than would have been theirs had their receipt contained only a contract to carry and deliver. What they were is to be determined by the nature of their business, not by the contract they made respecting the liabilities which should attend it. Having taken up the occupation, its fixed legal character could not be thrown off by any declaration or stipulation that they should not be considered such carriers."

In volume 1, Michie on Carriers, at page 3, the author says:

"Persons carrying on a transportation business under circumstances which, in law, constitute them common carriers, cannot divest themselves of that character, nor secure an exemption from its liabilities, by declaring in their bills of lading, etc., that they are not to be deemed common carriers. What they are is to be determined by the nature of their business."

[2] Authorities to the same effect may be cited indefinitely; but from the foregoing it is manifest that a "common carrier" is one whose occupation is the transportation of persons or things from place to place for hire or reward, and who holds himself out to the world as ready and willing to serve the public indifferently in the particular line or department in which he is engaged; the true test being whether the given undertaking is a part of the business engaged in by the carrier which he has held out to the general public as his occupation, rather than the quantity or extent of the business actually transacted, or the number and character of the conveyances used in the employment. On the other hand, if the undertaking be a single transaction, not a part of the general business or occupation engaged in, as advertised and held out to the general public, then the individual or company furnishing such service is a private and not a common carrier. In either case the question must be determined by the character of the business; actually carried on by the carrier, and not by any secret intention or mental reservation it may entertain or assert when charged with thé duties and obligations which the law im-

[3] An analysis of the findings of the lower court discloses that appellants' calling is characterized by the following features: (a) They are engaged in what is known as the automobile rent business; (b) each of them owns and operates a motor-propelled vehicle for hire, either at a charge of so much a trip or so much per hour; (c) each has a fixed stand or place where his car is available to prospective customers during many hours of the day and night; and (d) they transport passengers from place to place. Here we have carriers engaged in transporting persons for hire as a business or occupation, and impliedly and practically holding themselves out to the public as ready and willing to serve indiscriminately all who may desire the use of their facilities. The fact that they have no fixed schedule of charges, do not operate over definite routes, do not upon all occasions load the car to its full capacity, and reserve the right to refuse to transport passengers whether their automobile is engaged or not, is wholly immaterial; their character is determined by their public profession, not by undisclosed reservations or secret intentions.

The advent of the automobile as a mode of conveyance has in no wise marked a departure from or modification of the principles of the law of carriers as theretofore defined and applied by the courts. The automobile is but a modern method of transportation to which the settled rules have been extended. Babbitt, in his work the Law Applied to Motor Vehicles, at section 620, observes:

"The motor vehicle is daily coming into increasing use in a commercial capacity. It is already found in nearly every line of business.

Associations and corporations have been organized with the motorcar as a means of transport-ing both passengers and property as common carriers. \* \* \* The distinction between such carriers and private carriers is that the former holds himself out to all persons who choose to employ him, as ready to carry for hire, while the latter agrees in some special case with some private individual to carry for hire. The common The common carrier employment is public, and he is bound to carry the goods and persons of all who demand carriage and who comply with his reasonable terms. \* \* The essence of the distinction terms. - - The essence of the distinction between the two classes of carriers is that in order to constitute one a 'common carrier' it is necessary that he hold himself out to the public as such. \* \* \* And one may hold himself out as a carrier not only by advertising, but by actually engaging in the business and pursuing the occupation as an employment."

Huddy on Automobiles (4th Ed.) § 39, says: "An automobile may be used as a common carrier, a private carrier, or a personal private con-

veyance. Public motor vehicles, such as sight-seeing cars, taxicabs, and others which are employed in carrying all persons applying for transportation, come within the definition that a common carrier of passengers is one who undertakes for hire to carry all persons who may apply for passage. But to constitute one a com-mon carrier it is necessary that he should hold himself out as one.'

A person or company engaged in the operation of a jitney bus is a common carrier. Desser v. Wichita, 96 Kan. 820, 153 Pac. 1194, L. R. A. 1916D, 246; Memphis v. State ex rel., 133 Tenn. 99, 179 S. W. 635, L. R. A. 1916B, 1143, Ann. Cas. 1917C, 1045; Berry on Automobiles (2d Ed.) § 874; Huddy on Automobiles (4th Ed.) § 372. A taxicab company, following the business of transporting persons for hire and holding itself out as ready to carry one and all indiscriminately, is a common carrier and subject to all the responsibilities of such a carrier. Public Service Com. v. Hurtgan, 91 Misc. Rep. 432, 154 N. Y. Supp. 897; Donnelly v. Philadelphia & Reading Ry., 53 Pa. Super. Ct. 78; Van Hoeffen v. Columbia Taxicab Co., 179 Mo. App. 591, 162 S. W. 694; Carlton et al. v. Boudar, 118 Va. 521, 88 S. E. 174; State v. Seattle Taxicab & Transfer Co., 90 Wash. 416, 156 Pac. 837; Berry on Automobiles (2d Ed.) § 887; Huddy on Automobiles (4th Ed.) § 303; Babbitt on Motor Vehicles, § 621.

There is no essential difference in the character of service furnished by the taxicab and that supplied by appellants. They afford similar accommodations, are operated in practically the same manner, and are necessarily governed by the same principles. We conclude that appellants come within the act in question and are subject to its provisions.

The judgment is affirmed.

ELLIS, C. J., and MOUNT, HOLCOMB, and CHADWICK, JJ., concur.

SPOKANE TAXICAB CO. v. WHITE, Pros. Atty., et al. (No. 14456.)

(Supreme Court of Washington. April 16, 1918.)

Department 1. Appeal from Superior Court, Spokane County; Henry J. Kennan, Judge. Suit by the Spokane Taxicab Company against John B. White, Prosecuting Attorney for Spokane County, and others. From a judgment for defendants, plaintiff appeals. Affirmed.

McCarthy & Edge, of Spokane, for appellant. John B. White and W. C. Meyer, both of Spokane, for respondents.

PER CURIAM. The question presented in this case has just been considered and decided in Cushing v. White et al., 172 Pac. 229. Upon the authority of that case, the judgment

is affirmed.

STATE v. SCOTT. (No. 14477.) (Supreme Court of Washington. April 17. 1918.).

1. CRIMINAL LAW \$\infty\$274-Plea of Guilty-Withdrawal-Time.

Application to withdraw a plea of guilty must be denied, unless made before judgment, under the express provisions of Rem. Code 1915,

2. CRIMINAL LAW \$\iiiists 974(2)\$—Motion in Arbest of Judgment—Time for Making.

Motions in arrest of judgment in criminal case must be denied, unless made before judgment, under Rem. Code 1915, § 2181.

3. CRIMINAL LAW \$==951(2) - MOTIONS FOR NEW TRIAL-TIME FOR MAKING.

Motions for new trial in criminal cases must be denied, unless made before judgment, under Rem. Code 1915, § 2181.

4. CRIMINAL LAW €=998 - VACATION OF JUDGMENTS.

A criminal judgment cannot be vacated under Rem. Code 1915, § 464 et seq., except upon a clear showing of irregularity or fraud in its procurement and a tender and adjudication of a prima facie defense on the merits.

5. CRIMINAL LAW \$\infty\$1112-Motion to Va-CATE JUDGMENT-REVIEW.

On appeal from refusal to vacate judgment the motion that court advised defendant as to his right to counsel, and that he refused counsel and voluntarily pleaded guilty, cannot be contradicted by affidavit of the clerk.

6. Criminal Law \$208 - Vacation of Judgment-Findings-Sufficiency of Ev-

IDENCE.

Recitals in order overruling motion to vacate criminal judgment that a plea of suilty was not procured by fraud, promises of leniency, force, duress, or any undue influence held amply supported by the evidence.

Department 2. Appeal from Superior Court, Stevens County; W. H. Jackson, Judge.

James H. Scott pleaded guilty to charge of assault in the second degree. From an order denying a motion to allow him to withdraw his plea, he appeals. Affirmed.

Carey & Johnson and L. C. Jesseph, all of Colville, for appellant. Howard W. Stull and H. Wade Bailey, both of Colville, for the State.

ELLIS, C. J. On August 23, 1915, defendant was by information charged with the crime of assault in the second degree. August 28, 1915, he was arraigned and entered a plea of guilty. The clerk's minutes of arraignment and plea are as follows:

"The defendant, being brought into court, was Scott was his true name, replied that James H. Scott was his true name. Court ordered that this change be made. On being asked by the court if he had employed counsel, replied that he had not. Court then asked if he was ready to plead to the charge. Defendant then attempted to explain to the court as to what he was willing to plead guilty to. Court ad-vised him in the premises. Defendant then said he would have to plead guilty, as that was what he had told the sheriff he wished to do. Court told defendant to be seated, and prosecuting at-torney then made statement to the court cover-

ing the alleged facts in the case. Court then asked the sheriff to state what he knew in connection with attempt of defendant to conceal himself. Court then advised the defendant that he could make a statement to the court. Court then asked defendant if he had anything further to say as to why judgment and sentence should not at this time be pronounced upon him, replied that he had in his statement to the court told the truth, and asked the mercy of the court.'

On the same day the court entered judgment and sentence as follows:

"On this 28th day of August, 1915, comes Howard W. Stull, prosecuting attorney in and for the county of Stevens and state of Washington, and the said defendant in this action is brought to the bar of the court here, without counsel, having declined the appointment of counsel for him, and having heretofore entered this plea of 'guilty' to the crime of assault in the second degree, and, being asked if he has any legal cause to show why judgment of the court should not be pronounced against him, says nothing, unless as he has before said; and, it appearing to the court by the said defendant's plea of guilty that the said defendant is guilty of the crime of assault in the second degree, whereupon, all and singular the premises being whereupon, all and singular the premises being seen and by the judge of the court here fully understood, it is ordered, adjudged, and decreed by the said court that the said defendant is guilty of the crime of assault in the second degree, and that he be punished therefor by imprisonment in the state penitentiary at Walla Walla, in Walla Walla county, in said state, at hard labor, for a period of not less than 3 years and not more than 10 years, and the defendant is hereby remanded to the custody of the sheriff of said county to be by him detained and by him to be delivered into the custody of and by him to be delivered into the custody of the proper officers for transportation to the said penitentiary."

On August 30, 1915, having in the meantime employed counsel, defendant moved the court for an order vacating the judgment and sentence, and permitting him to withdraw his plea of guilty and to enter a plea of not guilty. This motion was heard on affidavits and counter affidavits. Defendant made three affidavits. In the first he stated that he was ill at the time of his arrest and arraignment, was without counsel, and ignorant of his rights; that his plea of guilty was not voluntary; that the sheriff threatened him and told him that if he employed counsel and made a defense he would certainly be convicted, and would receive a longer sentence than if he entered a pleaof guilty; that when arraigned defendant told the court he was not guilty of the crime charged, but was told that he would not be permitted to detail the circumstances of the incident charged as constituting the crime until he had pleaded either guilty or not guilty. Soon afterwards he made a second affidavit, recanting the charges made in his first affidavit and stating that his plea of guilty was voluntary and without persuasion, intimidation, or coercion, and that he had no desire to withdraw it. A few days later he made the third affidavit, reiterating the things stated in his first affidavit and asserting that he had no recollection of making the second affidavit. The clerk of the the court entered an order denying defendcourt made an affidavit, setting out his minutes as above quoted, and further stating that defendant, when arraigned and asked if he desired to plead to the charge, said:

"I don't understand just what I am charged with, but I am not guilty of what that man has read (pointing to the prosecuting attorney)."

That defendant was informed by the court that he would have to plead guilty or not guilty to all of the information or none of it, whereupon he said:

"I told the sheriff that I was going to plead guilty rather than drag that girl into court, for her family and I have been friends for 6 years or lorger." or longer.

That defendant also stated to the court that he was 71 years old, had never been arrested before, was unfamiliar with court proceedings, and hardly knew what to do.

The attorney who secured the second affidavit from defendant made an affidavit that at that time defendant was in full possession of his mental faculties, was bright and intelligent, and fully understood the affidavit and its contents.

The prosecuting attorney and his deputy made affidavits to the effect that when defendant was arraigned the court asked him if he had counsel, and he replied that he had not; that the court then advised him that he had the right to have counsel, and defendant replied that he did not desire counsel; that the court then asked him if he was ready to plead to the information, and defendant began to relate the circumstances of the incident charged as the crime, when the court told him he must first enter his plea, whereupon he pleaded "guilty"; that he was then permitted to state fully his version of the incident, and added that he was sorry for what he had done, and desired to plead guilty rather than bring the girl into court. They also contradicted the affidavit of the clerk that defendant said he was not guilty of what the man had read.

Another attorney, who had known defendant for 6 years, made affidavit that he visited defendant in jail the day before he was arraigned and conversed with him for about two hours, advised him fully of his rights, and urged him to employ counsel, but defendant stated that he did not intend to employ counsel, and in substance expressed an intention to plead guilty.

The sheriff made affidavit, denying that he ever threatened defendant or in any manner attempted to induce him to plead guilty. This was corroborated by affidavits of several other persons.

Two physicians, who examined defendant some six days after his sentence, made affidavit that they found him in a weakened physical condition, but were not able to say whether he was sane or insane; that to determine that matter would require further examination and observation.

ant's motion, the order containing the following recitals:

"And it appearing to the court that prior to said arraignment the said defendant had advised with counsel and had been informed of his rights, and that at the time of said arraignment. ment he was fully advised by the court as to his rights to counsel, asked if he had counsel, and rights to counsel, asked if he had counsel, and asked if he desired counsel, and replied that he had no counsel and desired none; and it appearing to the court that the plea of guilty made by defendant was freely and voluntarily made, with full knowledge of his rights, and that said plea was not induced or procured by fraud, promises of leniency, force, duress, or any undue influence of any kind or nature by any officer or person; and it further appearing that at the time of entry of said plea and at this time the said defendant was and is in possession of his mental faculties and was and is endowed and nossessed of sane and normal understanding and possessed of sane and normal understanding and was and is competent to exercise intelligence and volition.'

Then follows the order from which defendant prosecuted this appeal.

An affidavit of one of appellant's counsel has been filed in this court, stating in substance that appellant, having been released on bail, has disappeared under circumstances tending to show that he has committed suicide. Counsel asks that the cause be abated. The facts stated in his affidavit are, however, so recent that we cannot assume short of positive proof that appellant is dead, or that he will not appear and surrender himself for a new trial or for execution of sentence when the order appealed from is disposed of in this court.

[1-3] Addressing ourselves to that order, a consideration of the facts which we have very fully set out makes it plain that we cannot disturb it. Though this court, in common with most others, has uniformly held that the application to withdraw a plea of guilty is addressed to the discretion of the trial court, and that that discretion should be liberally exercised, the application nevertheless must be made before judgment. The statute expressly so provides. Code, § 2111; State v. Cimini, 53 Wash. 268, 101 Pac. 891. The same is true of motions in arrest of judgment and for a new trial under the Criminal Code. These motions must be made before judgment. Rem. Code § 2181. Obviously, therefore, whether regarded as a motion to withdraw the plea of guilty, or as a motion in arrest of judgment, or as a motion for a new trial, or as a combination of all of these, the motion here involved came too late. The express terms of the two sections of the statute above referred to are conclusive of that question.

[4] If the motion can be entertained at all. it must be under the general statute authorizing the modification or vacation of judgments within 1 year after their final entry. Rem. Code, \$ 464 et seq. We have intimated in at least one case that that law may be invoked to modify or vacate judgments in criminal as well as in civil actions. State Upon considering these and other affidavits ex rel. Lundin v. Superior Court King Coun-

case this court, without referring to any statute, directed the trial court to entertain favorably an application to vacate a judgment entered upon a plea of guilty and to permit the plea to be withdrawn. State v. Allen, 41 Wash, 63, 82 Pac, 1036. Manifestly, in view of the explicit terms of sections 2111 and 2181 of the Criminal Code, that decision can rest only upon the authority of Rem. Code, \$ 464 et seq. This view is strengthened by the facts appearing in the opinion that the plea was improperly induced, that the defendant there was not permitted to communicate with his friends, and that he was not fully or sufficiently informed of his rights, so that we can see that the case might reasonably fall within subdivision 3 of section 464, "irregularity in obtaining the judgment," or subdivision 4 of the same section, "fraud practiced by the successful party in obtaining the judgment." But the same liberal exercise of discretion which is reposed in the trial court by sections 2111 and 2181, touching the permission to substitute pleas and the motion for a new trial before judgment in criminal cases, is not vested in any court where the application is made under section 464 et seq. to vacate a judgment. In such a case it is elementary that the judgment, unless absolutely void, is entitled to every reasonable intendment in its favor, and will not be set aside except upon a clear showing of irregularity or fraud in its procurement and a tender and adjudication of a prima facie defense on the merits. See Chehalis Coal Co. v. Laisure, 97 Wash. 422, 166 Pac. 1158, and authorities there cited.

[5, 6] Guided by these principles, let us examine the showing made on the motion here involved. The court in his order overruling the motion emphatically recites that appellant when arraigned was "fully advised by the court as to his rights to counsel, asked if he had counsel, and asked if he desired counsel, and replied that he had no counsel and desired none." The court further found, and his order so recites, that the plea of guilty made by appellant was freely and voluntarily made, with full knowledge of his rights, and that it "was not induced or procured by fraud, promises of leniency, force, duress, or any undue influence of any kind or nature by any officer or person." court finally found that appellant, at the time of entering the plea and when the motion was heard, was in full possession of his mental faculties, of sane and normal understanding, and competent to exercise intelligence and discretion. Substantially the same recitals, save that last above noticed, appear in the judgment of conviction and sentence. As pointed out by this court in State v. Cimini, supra, a case in which the motion was made before judgment, and therefore one in made before judgment, and therefore one in which the most liberal rule was applicable in tayor of the accused, "in so far as these and knowingly subscribing to "false papers" to

ty, 90 Wash. 299, 155 Pac. 1041. In another recitals relate to matters transpiring in the presence of the court they import absolute verity." The recital of the court that appellant was advised by the court as to his right to counsel and refused counsel and voluntarily pleaded guilty must therefore be taken as true, and the affidavit of the clerk tending to contradict those recitals cannot be considered. The other recitals, that the plea of guilty was not induced by fraud, promises of leniency, or undue influence of any kind by any officer or person, though based on extrinsic evidence, are amply supported by the affidavits of the sheriff and several other wholly disinterested We cannot say that the court's persons. findings in that regard are not supported by a fair preponderance of the evidence. As to the finding that appellant was, at the time of his plea and sentence and at the time of the hearing, perfectly sane and capable of intelligent volition, there is no substantial evidence to the contrary. The affidavits to that point tend to establish nothing more than that he was temporarily ill and physically weak. Neither of the physicians could or would say that he was not sane.

A most careful examination of the record and of all of the affidavits offered on the hearing of the motion convinces us that neither the law nor the facts warrant a reversal of the court's order. It is therefore affirmed.

MOUNT. PARKER, HOLCOMB, CHADWICK, JJ., concur.

STATE v. PIERSON. (No. 14394.) (Supreme Court of Washington, 1918.) April 28.

1. Banks and Banking \$\sim 20\to Officers \cdot Officers - \text{Officers of Variance} is \$\sim 0\$. PROOF.

An information, charging that accused knowingly subscribed to a false paper with intent to deceive the state bank examiner, charges an offense under that part of Rem. Code 1915, \$ an offense under that part of Rem. Code 1915, \$3314, defining the offense of willfully and knowingly subscribing to false papers with intent to deceive bank examiners, and not under portion defining the offense of making and publishing any false statement of the amount of assets and liabilities of a bank, etc., and hence accused tried and convicted of knowingly subscribing, etc., cannot maintain that he was charged with one offense and found guilty of another, on the theory that he was charged with latter offense. 2. CRIMINAL LAW \$== 1032(6)-APPEAL-OB-

JECTION NOT RAISED BELOW.

Objection to an information on the ground of duplicity cannot be raised for the first time on appeal.

INDICTMENT AND INFORMATION \$\infty\$196(7)—
DUPLICITY—TIME FOR OBJECTION.

Objection to an information on the ground of duplicity cannot be raised any time after entry of the plea of not guilty, unless such plea be withdrawn.

4. Banks and Banking €==20—Officers-Offenses—Deceiving Bank Examiners-"False Papers."

⇒For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

is forged or spurious, but to a paper duly subscribed by the person purporting to sign it, and containing an untrue statement in the body of the instrument.

5. BANKS AND BANKING \$==20-Officers-

OFFENSES—EVIDENCE—SUFFICIENCY.
Evidence held to support a conviction, under
Rem. Code 1915, § 3314, of knowingly subscribing to a false paper with intent to deceive the state bank examiner.

6. CRIMINAL LAW @== 1137(5)-TRIAL-ADMIS-SION OF TESTIMONY SAME AS TESTIMONY OF ACCUSED.

Assignment of error as to the admission of testimony as to a transaction, not materially different from the testimony of accused himself, is without merit.

7. Criminal Law &= 829(1)—Instructions-Requests—Refusal.

Error cannot be predicated on the refusal of requests for instructions, where issues were fully covered by instructions given.

8. CRIMINAL LAW \$= 823(1)-Instructions-READING STATUTES TO JURY.

Reading an entire statute to the jury can-not be held misleading, where an instruction thereafter clearly and specifically defined to the jury the subdivision defining the offense charged.

Department 1. Appeal from Superior Court, Pacific County; W. O. Chapman, Judge.

Elias Pierson was convicted of subscribing to a false paper to deceive the state bank examiner, and he appeals. Affirmed.

F. D. Couden, Geo. F. Vanderveer, and Lockerby & Wright, all of Seattle, for appellant. John I. O'Phelan, of Raymond, and M. M. Richardson, of Seattle, for the State.

MAIN, J. The defendant in this case was charged by amended information with the crime of subscribing to a false paper with intent to deceive the state bank examiner. To this amended information, which will hereafter be referred to as the information, a demurrer was interposed upon the ground that it did not state facts sufficient to constitute a crime. The demurrer being overruled, the cause in due time came on for trial, and resulted in a verdict finding the defendant guilty of the crime charged. A motion for a new trial being made and overruled, the defendant appeals.

The facts sufficient for an understanding of the questions presented may be briefly summarized as follows: For some time prior to the 23d day of June, 1915, the appellant was the cashier and managing officer of the First International Bank, located at South Bend, this state, and continued in that capacity until on or about the 19th day of July, 1915, when the bank was closed by direction of the state bank examiner. The state bank examiner, as he is authorized to do by law, called for a statement of the condition and affairs of the First International Bank at the close of business on the 23d day of June, 1915. Pursuant to this request, the appellant, on July 3, 1915, subscribed and verified a report to the state bank exam- not constitute a crime. It was not demurred

deceive bank examiners, refers not to one which iner of the affairs and condition of the bank at the close of business on the 23d day of June. This report was on a blank prepared and furnished by the state bank examiner, and opposite the item of "Loans and Discounts" appears in the appropriate column \$248.491.66. The information is too long to be here set out in full, but it charges that the appellant, as cashier of the First International Bank, made and subscribed to a false paper, pursuant to the lawful call of the state bank examiner; that the appellant knowingly and willfully set forth in the report, opposite the item of "Loans and Discounts," that the First International Bank, at the close of business on the 23d day of June, owned commercial paper amounting to \$248,491.66; that this statement of resources was false in this-that there was included therein as part thereof the sum of \$5,362, being the amount of two drafts, commonly called acceptances, of the face value of \$5,-477, upon one of which there had been paid \$115, that the bank was not then the owner of these two drafts, and that they were included in the report for the purpose of deceiving the state bank examiner.

> The information was drawn under section 3314, Rem. Code, this being one of the sections of the bank act. In this statute three crimes are defined: First, willfully and knowingly subscribing to or making or causing to be made any false statement or false entry in the books of any bank or corporation transacting a banking business; second, knowingly subscribing to or exhibiting false or fictitious papers or securities, with the intent to deceive any person or persons authorized to examine into the affairs of the bank; and, third, the making or publishing of any false statement of the amount of the assets or liabilities of a bank or corporation transacting a banking business. merical division of the statute does not appear in the act, but is made here for convenience of reference.

> [1-3] The appellant's first point is that he was charged with one offense and found guilty of another. In support of this contention it is argued that the information is drawn under the third division of the statute, and that the appellant was tried and convicted under the second. The information charges that the appellant knowingly subscribed to a false paper with the intent to deceive the state bank examiner. This is the crime defined in the second division of the statute, and for which the appellant was tried and convicted. We do not think that the information, even though there may be some surplusage in it, will bear the construction that it was founded upon the third division of the statute. In addition to this, the information was demurred to upon the sole ground that the facts therein stated did

to upon the ground that more than one crime inancial condition of the corporation.' was charged. Objections to the information because of duplicity cannot be raised for the first time on appeal, nor at any time after the entry of a plea of not guilty, unless such plea be withdrawn. Territory of Washington v. Heywood, 2 Wash. T. 180, 2 Pac. 189; State v. Snider, 32 Wash, 299, 73 Pac, 355; State v. McBride, 72 Wash. 390, 130 Pac. 486.

[4] Upon the oral argument, if we gathered it correctly, it was stated on behalf of the appellant that the controlling question upon this appeal is that the appellant was not shown to have signed such a paper as he was charged with having signed. In support of this contention it is argued that the false paper mentioned in the statute refers to one which is forged or spurious, and not to one which is duly subscribed to by the person purporting to sign it, and contains an untrue statement in the body of the instrument. If this were the meaning of the statute, the Legislature would hardly have used the word "subscribed," because a spurious or forged document could not well be subscribed by the person purporting to sign it. A case strikingly like this was before the Supreme Court of the state of New Jersey, in State v. Twining et al., 73 N. J. Law, 3, 62 Atl. 402. The defendants in that case were convicted of exhibiting to an examiner of the state banking department a certain false paper, knowing it to be false, with intent to deceive such officer as to the condition of a named bank or trust company, of which Twining was the president and the other defendant the treasurer. The false paper consisted of a typewritten copy of a minute of an alleged meeting of the board of directors of the bank or trust company, which meeting was in fact never held. The statute of the state of New Jersey provided that every director, officer, or agent of a trust company who willfully and knowingly should subscribe or exhibit any false paper with intent to deceive any person authorized to examine as to the condition of such trust company should be guilty of a crime. In the course of the opinion it is said:

"It was further argued that, conceding the statute under which this indictment is found to be valid, the document exhibited in this case cannot be said to be a false paper within the meaning of the act; the contention being that meaning of the act; the contention will be pa-knowingly subscribes or exhibits any false pa-per' means negotiable paper, or some paper of the sasets of the bank. We per' per means negotiable paper, or some paper which is a part of the assets of the bank. We are unable to give this narrow construction to these words, in the connection in which they stand in the statute. We think it means what it says, 'subscribes or exhibits any false paper, with intent to deceive the examiner.' Any other construction destroys all faces to the great deals. with intent to deceive the examiner.' Any other construction destroys all force to the word 'subscribes,' and any construction which sustains the theory that an offense exists by subscribing a false paper also upholds the construction that to exhibit such false paper to the examiner, with

W۵ agree with that view. We think, under the proof, that in exhibiting this paper it was the purpose of the defendants to deceive the examiner as to the financial condition of the bank."

[6] It is next contended that the verdict is contrary to the evidence. To this view we cannot subscribe. The evidence shows that the two drafts mentioned were included in the total amount of the loans and discounts reported; but it is said that there was accrued and unpaid interest due the bank and other resources, not included in the statement, which would equal or exceed the amount of the two drafts. This, however, does not meet the situation. The purpose of the report to the state bank examiner was to advise that officer as to the condition of the bank, and in this report it was not contemplated that accrued and unpaid interest. or notes which had been charged off the books of the bank, should be included.

[6] It is next contended that the court erred in permitting a deputy state bank examiner to testify in effect that accrued and uncollected interest and items charged off as losses on the books of the bank were not properly a part of the report to the state bank examiner under the item of "Loans and Discounts." The testimony of this witness upon this question was not materially different from that of the appellant himself. The assignment of error based thereon is not meritorious.

[7,8] Finally, it is contended that the court erred in the giving of certain instructions and in the refusing of requests proposed by the appellant; but we find no error in this regard. The issues in the case were fully covered by the instructions given. It is true that the court read in full as a part of the instructions the entire statute, or what we have designated the three divisions thereof; but in a subsequent instruction the crime covered by the second division was clearly and specifically defined to the jury. While it was unnecessary for the court to embody the entire statute in the instructions, the jury could not have been misled thereby, in view of the subsequent instruc-

The judgment will be affirmed.

ELLIS, C. J., and PARKER, FULLER-TON, and WEBSTER, JJ., concur.

ROSENBAUM v. NORTHERN PAC. RY. CO. (No. 14374.)

(Supreme Court of Washington. April 18, 1918.)

1. CARBIERS \$\infty 85\to ABRIVAL OF SHIPMENT-NOTICE TO CONSIGNEE.

One who delivers property to a carrier conintent to deceive, is within the statute. But it signed to himself at a place where he does not is further insisted that "the false paper must be reside and has no representatives or place of one that can deceive the examiner as to the business is bound to put himself in a position to receive notice, and, failing to do so, cannot be heard to complain that notice was not given.

2. CARRIERS \$= 85-ARRIVAL OF SHIPMENT

ACTUAL KNOWLEDGE OF AGENT.
Where consignor shipped a carload of apples Where consignor snipped a carload or applies to himself at C., with directions to stop for partial unloading at K., failure to notify consignor of arrival of shipment at K. would impose no liability, where the party with whom the consignor had made arrangements to care for apples at K. knew of their arrival and found the apples in good condition when he made in the apples in good condition when he made in-spection; such party being agent for purposes of receiving notice, making notice to consignor unnecessary.

#### 3. CARRIERS 4=140 - LIABILITY AS WARE-HOUSEMAN.

Where consignor shipped a carload of apples where consignor snipped a carioad or appies to himself at C., with directions to stop for partial unloading at K., and the party with whom the consignor had made arrangements to care for the apples at K. had actual knowledge of their arrival in good condition, carrier's duty thereafter was that of a warehouseman.

Department 1. Appeal from Superior Court, Franklin County; John Truax, Judge. Action by A. Rosenbaum against the Northern Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with direction.

Cannon & Ferris, of Spokane, and E. A. Davis, of Pasco, for appellant. C. W. Johnson, of Pasco, for respondent.

WEBSTER, J. On December 9, 1916, respondent brought this action, alleging in substance that on October 8, 1915, a carload of apples was delivered by C. A. Rosenbaum to the appellant at Monte, Wash., to be shipped to Crosby, N. D.; that the appellant accepted the shipment and charged the regular freight rate thereon; that it failed to deliver the same, and failed and neglected to properly care for the shipment, which consisted of perishable fruit, and by reason thereof the goods were lost to the shipper; that the value of the apples was \$795.20; and that the shipper's claim for such loss had been assigned to A. Rosenbaum, the plaintiff in the action. Judgment was prayed for in the sum of \$795.20, with interest from October 8, 1915. The appellant answered in substance that the shipment was received. denying all other material allegations of the complaint. As an affirmative defense, it further pleaded that the shipment was moved to Kenmare, N. D., where it arrived in good condition on October 15, 1915, billed to C. A. Rosenbaum; that said Rosenbaum did not, nor did any one else, accept delivery of the car or call to inspect the same, though the connecting carrier at that point used due and every endeavor to locate the consignee, the owner of the apples, or his agent; that on or about October 24, 1915, while the apples were in perfect condition, one G. S. Trimble, who then claimed to be the owner of the shipment, examined and inspected the same and found it in perfect condition, but hereinafter referred to; neither did he at

refused to take the car or dispose of the shipment; that on December 12, 1915, the connecting carrier was required to dispose of the car of apples to best advantage, receiving therefor the sum of \$650, which, after deducting freight charges and demurrage charges, left a balance of \$129.54, the amount tendered into court for the benefit of the shipper: and that the loss, if any, was due solely to the negligent acts and omissions of C. A. Rosenbaum and his agents, and not to any fault of the defendant or its connecting carrier. The reply traversed the allegations of the affirmative answer. The cause was tried to a jury. At the conclusion of the plaintiff's case, and at the conclusion of the entire case, the defendant's challenge to the sufficiency of the evidence and its motions for nonsuit and directed verdict in its favor were overruled by the court. Thereafter a verdict in plaintiff's favor for the full amount claimed was rendered, and from an order overruling a motion for a new trial, and from the judgment entered on the verdict, the defendant appeals.

Errors are assigned upon the rulings of the trial court in overruling the motions for nonsuit and for judgment in defendant's favor, in overruling its motion for new trial and entering judgment for plaintiff; also, in giving certain instructions to the jury. In view of the conclusion we have reached as to the disposition of the case, it will not be necessary to discuss the class of errors last mentioned.

The controlling facts which are not disputed are these: The apples were delivered to appellant at Monte, Wash., consigned to C. A. Rosenbaum, the shipper, at Crosby, N. D.; the bill of lading, however, containing the following notation, "Stop at Kenmare. N. D., for partial unloading." The shipment moved over the lines of appellant and its connecting carrier to Kenmare, N. D., arriving at that point on October 15, 1915. The consignor, through the Central Bank of Toppenish, Wash., forwarded the bill of lading, with sight draft attached in the sum of \$700, to the First National Bank of Kenmare, N. D., with instructions to deliver the bill of lading to G. S. Trimble upon the payment of the draft by him. Upon the arrival of the apples at Kenmare, the carrier's agent. not being acquainted with any C. A. Rosenbaum at that point, endeavored to locate such person, but was unable to do so. It is admitted that the consignor, who was also the consignee of the shipment, was not at Kenmare or Crosby between October 8, 1915. and December 14, 1915, to receive the apples. did not have any place of business at either point, and had made no arrangements with any one to accept or receive the same, other than the arrangement with G. S. Trimble

any time instruct the agent of the carrier at ! Kenmare to forward the shipment to its ultimate destination at Crosby, N. D. Prior to the shipment of the apples, the consignor had arranged with Trimble to be at Kenmare and receive the shipment. The record in this respect discloses:

"Q. Now, you heard the admission as to the condition of the apples and the value of them. They were shipped to the order of C. A. Rosenbaum. In the bill of lading there is a statement baum. In the bill of lading there is a statement that they were to stop at Kenmare, N. D., for partial unloading. Did you have any one at Kenmare that was planning on buying these apples and taking a part of them out at Kenmare? A. Yes, sir; there was a man there that was to take them there. Q. What arrangement did you make for payment for them ment did you make for payment for them, should he take them at Kenmare, N. D.? A. There was a draft attached to the bill of lading, and, if he paid the draft, the apples were to be his own."

The party referred to in this testimony was G. S. Trimble. Shortly after the arrival of the shipment at Kenmare, upon being unable to locate C. A. Rosenbaum at that point, the agent of the carrier, knowing that G. S. Trimble was receiving apples and disposing of them there, took up with him the matter of whether he was interested in the Rosenbaum shipment. In reply to the inquiry, Trimble said that he would take care of the car, and that there was a draft at the First National Bank of Kenmare with the bill of lading attached. On October 24, 1915, in company with the carrier's agent, Trimble inspected the car of apples, and, upon the subject of his arrangement with C. A. Rosenbaum, the record shows he testified as follows:

"Q. And the understanding was that he would bill it back to you, and you would take it up and dispose of it? A. Yes, sir; I told him I would try to."

Trimble made several attempts to sell the apples to merchants at Kenmare, and, not being able to dispose of them at that point, had the bank at Kenmare request permission of the shipper to divert the car to Thief River Falls, Minn., where Trimble expected to dispose of them. That the consignor had knowledge that the shipment had arrived at Kenmare, and was being held at that point by the carrier pending negotiations with Trimble with reference to its disposal, is conclusively established by the following correspondence:

"Seattle, Wn., Nov. 9-15. First Natl. Bank, Kenmare, N. D.—Gentlemen: Some time ago the Central Bank at Toppenish, Wn., sent you sight draft for \$700.00 with bill of lading attached. Draft to be paid by G. S. Trimble of Toppenish. Bill of lading for carload of apples. Un to date have not heard anything regard. Up to date have not heard anything regarding the covering of this draft. Has Mr. Trimble been at the bank to make arrangements for the same? Draft was sent about four weeks ago. Any information will be appreciated. Yours truly, C. A. Rosenbaum. Address 16 West truly, C. A. Rosenbaum. Add Mercer St., Seattle, Washington.

advise that I talked with Mr. Trimble this morning regarding the bill of lading of \$700.00 and he stated that he wanted permission to have this car transferred from here to Thief River Falls. He further stated that he would take same up very soon. Will you kindly advise if this will be satisfactory? Yours very truly,

"Seattle, Wn., Nov. 19—15. First Nat. Bank, Kenmare, N. D.—Gentlemen: Your letter at hand. In reply will say that when Mr. Trimble pays draft of \$700.00 attached to bill of lading, then the apples are his and he may ship-wherever he wishes. Hope this meets with ap-proval and that we have an early settlement. Yours truly, C. A. Rosenbaum. 16 W. Mercer St.

cer St.

"Seattle, Wash., Nov. 19—15. Frt. Agt., Toppenish, Wn.—Dear Sir: About Oct. 8—15 I had a carload of apples billed from Monte to Crosby, N. D. Car No. 95319 with sight draft attached to bill of lading. Clause also on bill for a stop at Kenmare, N. D. for partial unloading. Up to date have not heard from it. Would like to know if it has been accepted and unloaded. Yours very truly, C. A. Rosenbaum. Address 16 W. Mercer St., Seattle, Wn."

The shipment remained at Kenmare without further instructions from the consignor as to its disposition until about December 15, 1915, when it was sold by the carrier to prevent damage and loss from freezing.

Respondent predicates his right of recovery upon the failure of the carrier to notify him or his assignor of the arrival of theapples at Kenmare, and the failure to properly care for the shipment after its arrival.

[1] The law seems to be well settled that one who delivers property to a carrier, consigned to himself at a place where he does not reside and has no representatives or place of business, is bound to put himself in a position to receive the notice, and, failing to do so, cannot be heard to complain that notice was not given. St. Louis, I. M. & S. R. Co. v. Townes, 93 Ark. 430, 124 S. W. 1036, 26 L. R. A. (N. S.) 572; Pelton v. Renssalaer & Saratoga R. Co., 54 N. Y. 214, 13 Am. Rep. 568; Adams Exp. Co. v. Darnell, 31 Ind. 20, 99 Am. Dec. 582; Ala. & Tenn. Rivers R. Co. v. Kidd, 35 Ala. 209; Mobile & Girard R. Co. v. Prewitt, 46 Ala. 63, 7 Am. Rep. 586; Northrop v. Syracuse, etc., R. Co., 5 Abb. Prac. (N. S.) 425; Clendaniel v. Tuckerman, 17 Barb. (N. Y.) 184; 2 Hutchinson on Carriers (3d. Ed.) § 723; 1 Moore on Carriers (2d Ed.) § 10.

In St. Louis, etc., Co. v. Townes, supra, a case very similar to the one in hand, Chief Justice McCulloch, speaking for the Supreme Court of Arkansas, said:

"As the company was required by the terms of the contract to give him notice of the arrival of the cars at Texarkana, there was a correof the cars at Texarkana, there was a corresponding duty devolving on him to put himself in position to receive the notice, so that the same would be available. Any attempt to give him notice at Texarkana would have proved fruitless, for he was not there to receive it; and, before he can complain at the failure of the company to complain with the contract by the company to comply with the contract by giving him the notice, he must have first performed the contract impliedly imposed on him to put himself in position to receive the notice. He cannot complain when he has failed to perform his next of the contract for when he fail "First National Bank, Kenmare, North Da-kota, Nov. 16, 1915. Mr. C. A. Rosenbaum, 16 West Mercer St., Seattle, Wash.—Dear Sir: He cannot complain when he has failed to per-In reply to your letter of the 9th I beg to form his part of the contract, for, when he failed to make arrangements for the carrier to give him notice, he impliedly agreed for the latter to hold the goods until the bills of lading were presented by some one. This is what the law required the carrier to do, and he could expect nothing more. 'It is the duty of the consignee,' says Mr. Hutchinson, 'to be on hand and ready to receive the goods. He cannot absent himself. and thus put it out of the nower sent himself, and thus put it out of the power of the carrier to make a delivery to him, and of the carrier to make a delivery to him, and hold him during his absence to the extraordinary care of the goods required of the carrier. If therefore he be absent when the carrier is ready to deliver the goods, and has left no agent known to the carrier to whom delivery can be made for him, or to whom notice can be given of their arrival, the carrier becomes at once a mere warehouseman of the goods. 2 Hutchinger of Inmere warehouseman of the goods. 2 Hutchinson, Carr. § 723. The Supreme Court of Indiana, speaking on this subject, said: "The doctrine that the carrier's duty to deliver and the consignee's duty to receive are reciprothe consignee's duty to receive are recipro-cal, and that each must be maintained, is ap-proved by the plainest considerations of jus-tice, and is necessary to prevent wrong and im-position.' Adams Exp. Co. v. Darnell, 31 Ind. 20, 99 Am. Dec. 582. The above quotations are taken from discussions of the general question as to when liability as a carrier ceases and that of a warehouseman begins; but the principle is the same in determining the question of lia-bility of the carrier for failing to give notice where damages are alleged to have resulted from such delay."

In Normile v. Northern Pacific R. Co., 36 Wash. 30, 77 Pac. 1087, 67 L. R. A. 271, we held that, in the absence of information or instructions to the contrary, the agent of the carrier has the right to assume that notice addressed to the consignee at the point of destination would reach him in the due course of mail. It is apparent that a letter addressed to Rosenbaum either at Kenmare or Crosby would have served no purpose as he was not at either place. As said in the Townes Case, supra:

"Any attempt to give him notice at Texar-kana would have proved fruitless, for he was not there to receive it."

The failure therefore to mail such letter was wholly without significance.

[2] Moreover, in view of the arrangement between Rosenbaum and Trimble, the latter must be treated as the agent of the former for the purpose of receiving notice that the apples had arrived at Kenmare. baum knew that Trimble was to be at Kenmare to receive the apples, and this was the reason for indorsing on the bill of lading the notation, "Stop at Kenmare, N. D., for partial unloading." The bill of lading with draft attached was forwarded to the bank at Kenmare with instructions to deliver the bill of lading to Trimble upon the payment of the draft. Trimble had knowledge of the arrival of the apples, but failed to take up the draft. At the time of receiving this information the apples were in good condition, and it is not contended to the contrary. No claim is made that Trimble's failure to accept the apples was due to their damaged condition. Furthermore, it was not necessary for the carrier to notify the shipper of of an attorney thereon.

the arrival of the apples at Kenmare if he had actual knowledge of such fact. mile v. Northern Pacific R. Co., supra; 1 Moore on Carriers (2d Ed.) § 10, and cases cited.

[3] From the correspondence set forth at length herein, there is no room for difference in the minds of reasonable men that as early as November 19, 1915, at least, the consignee knew the car was at Kenmare and that Trimble was seeking his permission to divert it to Thief River Falls. With this information in his possession, Rosenbaum could easily have given the agent at Kenmare such instructions with reference tothe disposition of the apples as he saw fit; but, having failed to give any such directions. it would be unconscionable and unjust thereafter to hold the carrier to its extraordinary liability as an insurer of the merchandise. The carrier exercised reasonable care in protecting the fruit from loss or damage, which discharged the full measure of its duty as a warehouseman. It is not contended that it was not necessary for the carrier to dispose of the apples to prevent loss by freezing. nor that in so doing it failed in its duty tosecure the best price obtainable, plaintiff's case being based entirely upon the failure of the carrier to give notice to the consignee of the arrival of the goods at Kenmare. The defendant, having paid into the registry of the court the proceeds derived from the sale, less freight and demurrage charges, the plaintiff's recovery must be limited to that amount.

The judgment will be reversed, and the cause remanded, with direction to enter judgment in favor of the plaintiff for the sum of \$129.54, together with costs incurred in the superior court. Appellant will recover costs in this court.

ELLIS, C. J., and FULLERTON, MAIN, and PARKER, JJ., concur.

RHODES v. OWENS et al. (No. 14570.) (Supreme Court of Washington. April 23, 1918.)

1. EVIDENCE \$\infty\$-441(8), 444(4)—CONTRACT OF EXCHANGE—PAROL EVIDENCE.

Where contract for exchange of property unconditionally required defendant and son to execute a mortgage as part of the consideration, it was not permissible to show, by parol, a contemporaneous oral agreement that defendant was not to be personally bound, or that the mortgage was not to be paid until the plaintiff should pay off a mortgage on the land deeded to

A purchaser of land cannot claim that he relied on representations of the seller as to water rights, where he made extensive inquiries, examined the lands, and obtained the opinion

Department 2. Appeal from Superior Court, King County; Kenneth Mackintosh, Judge.

Action by Frank B. Rhodes against H. K. Owens and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Bogle, Graves, Merritt & Bogle, of Seattle, for appellants. Saunders & Nelson, of Seattle, for respondent.

MOUNT, J. This appeal is from a judgment upon a promissory note. The complaint of the plaintiff is the usual form upon a promissory note, dated March 30, 1914, due on the 12th of April, 1916, and executed by the defendants. The answer of the defendants admits the making and delivering of the note and alleges affirmatively, in substance, that, prior to the making of the note, the plaintiff and one H. Victor Owens, who was the son of the makers of the note, agreed by contract in writing that the plaintiff would deed to H. Victor Owens and his father, H. K. Owens, a farm in the state of Oregon known as the Gladmar farm; that in exchange therefor H. K. Owens and son agreed to deed to the plantiff a farm in Thurston county, Wash., known as the Jenks farm, and certain residence property in Seattle, and also to execute and deliver to the plaintiff a mortgage on the Gladmar farm in the sum of \$4,800, payable as provided in the promissory note described in the complaint; that pursuant to and in execution of said agreement plaintiff executed and delivered a deed to the Gladmar farm to H. K. Owens, and H. Victor Owens executed and delivered a deed to the plaintiff for the Jenks farm; that H. K. Owens and wife executed and delivered a deed to the residence in Seattle, and executed and delivered to the plaintiff the note sued upon, secured by a mortgage on the Gladmar farm, for \$4,800: that by mutual consent the deed to the Gladmar farm was taken in the name of H. K. Owens in trust for H. Victor Owens, and that the note was not to be the personal obligation of the defendants, but was signed as a part of the mortgage and to evidence the terms upon which the mortgage was to be payable, and it was mutually understood and agreed that the making of said note was without further and other consideration. It was further alleged that the Jenks farm, owned by H. Victor Owens, was conveyed subject to a mortgage of \$4,800, which was an incumbrance thereon, and the mortgage executed by defendants upon the Gladmar farm was to secure plaintiff for any payment he should make upon the mortgage upon the Jenks farm, and that there was no other consideration therefor; that plaintiff has not paid or discharged the mortgage upon the Jenks farm, or become personally liable thereon. and it was further alleged by the defendants that the note was signed without consideration, and that the consideration there-

for had wholly failed. The answer thereupon alleged a counterclaim, to the effect that the exchange of the properties was brought about by misrepresentations on the part of the plaintiff in regard to water rights which were fraudulently represented to be appurtenant to the Gladmar farm; that the defendants relied upon the fraudulent representations, and were induced to exchange properties thereby; that there were no water rights appurtenant to the Gladmar farm; and that the defendants had been damaged in the sum of \$12.500. In reply to these allegations, the plaintiff admitted the contract for the exchange of properties as alleged in the answer, but denied all the other allegations. Upon these issues the case went to trial. After the plaintiff had introduced the note in evidence and rested, the defendants offered to prove that the Jenks farm in this state was owned by H. Victor Owens, the son of the defendants; that there was a \$4,-800 mortgage upon this farm; and that the note and mortgage mentioned in the answer upon the Gladmar farm were given merely in exchange for the mortgage upon the Jenks farm; that the mortgage upon the Jenks farm of \$4,800 had not been paid by the plaintiff; and that there was no consideration for the note on that account. The trial court sustained the plaintiff's objection to this offer of proof, and the defendants now contend that this was error.

[1] The contract for the exchange of the properties was in writing. It provided that the plaintiff, Frank B. Rhodes, should convey the Gladmar farm in Oregon to the defendants for the Jenks farm and the residence property in Seattle, and that as a part of the consideration the defendants should execute a mortgage on the Gladmar farm to the plaintiff for \$4,800. The exchange of the properties was made pursuant to this contract, and the note sued upon was given to the plaintiff and secured by a mortgage upon the Gladmar farm. The written contract is explicit that this mortgage should be The note upon its face is a plain promissory note, and neither the note nor the contract expresses any conditions which might avoid either the note or the mortgage. The offer of proof made by the defendants clearly is an attempt, by oral evidence, to vary the terms of the note and the written contract by showing that the note sued upon was a note subject to be defeated by a condition subsequent. In the case of Post v. Tamm, 91 Wash, 504, 158 Pac. 91, we said:

"The rule is well settled that, in the absence of fraud or mistake, a contemporaneous oral agreement, limiting or exempting the maker of a note from liability, cannot be shown as a defense to an action upon the note. In Anderson v. Mitchell, 51 Wash. 265, 98 Pac. 751, it was said: 'It has been repeatedly held by this court that, in the absence of fraud or mistake, it is incompetent for one who signs a promissory note as principal to set up an independent collateral agreement limiting or exempting him from liability " (citing authorities). The rule

which permits oral testimony for the purpose of showing that a note had never been delivered, and was not intended to take effect until the happening of a certain event, is not here applicable. That rule relates to a condition precedent. In the absence of the condition being performed, there is no valid delivery of the note, and hence no obligation as between the parties. In this case the execution and delivery of the note is admitted and the obligation thereof recnote is admitted and the obligation thereof recognized; and, for the purpose of defeating it. reliance is placed upon a contemporaneous oral agreement by which a condition not precedent, but subsequent, was offered to defeat liability.

If a contemporaneous oral agreement providing for the surrender of the note upon the happen-ing of a condition subsequent could be used to defeat recovery upon a note, the rule which provides that a note or other written contract cannot be varied or modified by such an agree-ment would be abrogated."

We think it is plain that the rule in that case is applicable here, and the trial court was right in excluding the offered evidence. One of the cases upon which the appellants rely is Ware v. Allen, 128 U. S. 590, 9 Sup. Ct. 174, 32 L. Ed. 563. That was a case where there was a condition expressed in the note, which provided that if the condition was not complied with the note was void. In that kind of a case it is plain that oral evidence would be admissible to show that the note never became effective, and the court so held in that case. But in the case now before us there was no condition, either in the note or in the contract, that the note should not become effective at once; and the appellants now seek to show that there was an oral agreement outside of the note at the time the note was executed, and that it was given in lieu of another obligation which the holder of the note was required to pay, and which he has not paid. If the appellants may show this contemporaneous oral agreement, then they may, by oral evidence, vary the terms of the note and the written contract, which clearly cannot be done under the rule in Post v. Tamm, supra.

[2] The appellants further argue that the court was in error in dismissing their counterclaim upon the cross-complaint. The testimony offered on behalf of the appellants upon this cross-complaint shows, we think, that they did not rely upon the representations of the respondent in regard to the water rights upon the Gladmar farm. Even if the representations made by the respondent induced the trade of the farms, it is plain that the appellants did not rely upon those representations, because they made an independent investigation thereof. They went down to the farm, examined it, saw the condition of it, inquired of neighbors as to the water rights, consulted at least one lawyer, had his written opinion, and were advised as fully as was the respondent of the character of the water rights upon the land. In view of this independent investigation made by the appellants prior to the did not err in concluding that the appellants did not rely upon the representations of the respondent alleged to have been made with reference to the water rights.

We find no error, and the judgment must therefore be affirmed.

ELLIS, C. J., and HOLCOMB and CHAD-WICK, JJ., concur.

DOMRESE v. CITY OF ROSLYN. (No. 14639.)

(Supreme Court of Washington. April 24, 1918.)

1. EMINENT DOMAIN \$\$\\$84\$\$—\$84\$—Compensation—MUNICIPAL WATER SUPPLY.

Though under Rem. Code 1915, \$\$ 8005, 8010—8, a municipality may take the waters of a stream to supply its inhabitants for domestic and other uses, it must proceed by condemnation and compensate owners of riparian rights to the extent of the property taken.

2. LIMITATION OF ACTIONS \$2(1)-STATUTE APPLICABLE—RIPARIAN RIGHTS—PART OF THE LAND.

In applying the statute of limitations to an action for taking a riparian right to continue to take the flow of water lawfully appropriated, such right will be treated as so far incident to the land as to become a part of the estate therein.

Department 2. Appeal from Superior Court, Kittitas County; H. M. Taylor, Judge. Action by Minna Domrese against the City of Roslyn, a municipal corporation. From a judgment sustaining a demurrer to complaint, plaintiff appeals. Reversed and remanded with directions.

Kern & Henton, of Ellensburg, for appellant. Harry L. Brown, of Roslyn, and E. E. Wager, of Ellensburg, for respondent.

CHADWICK, J. The facts in this case are partially stated in our opinion in the case of Domrese v. Roslyn, 89 Wash. 106, 154 Pac. 140.

Plaintiff makes further allegation of fact that, before the waters of Cedar creek, or Domrese creek, as it is called in this case, were diverted, in whole or in part, plaintiff had put a part of her lands to crop, and had used the waters of the stream to irrigate them; that her lands were dry and arid; and that crops cannot be grown or matured thereon without the use of water. This action was brought to recover compensation for the diversion of the water and for right of way for the pipe line. The court held upon demurrer that the action was barred by the statute of limitations.

[1] A municipality has a right to take of the waters of a stream for the purpose of supplying its inhabitants with water for domestic and other uses. But, like any other public agency, it cannot do so without condemning and making compensation for the loss of the use of the appropriated waters trade, we think it is plain that the trial court or the extinguishment of the riparian rights.

Rem. Code, 8005, 8010-8.

[2] A right to continue to take water lawfully appropriated, or to have water follow its accustomed flow, the riparian right, is a valuable right of property, and is so far incident to the land that it has been held to be a part of the land itself. Rigney v. Tacoma Light & Water Co., 9 Wash. 576, 38 Pac. 147, 26 L. R. A. 425; Judson v. Tide Water Lumber Co., 51 Wash. 164, 98 Pac. 377; Still v. Palouse Irr. & Power Co., 64 Wash. 606, 117 Pac. 466. This being so, the case falls squarely within the rule of Aylmore v. Seattle, 171 Pac. 659. See, also, Jacobs v. Seattle, 171 Pac. 662.

Upon the authority of these cases the judgment of the lower court is reversed, and the cause remanded, with instructions to overrule the demurrer and have further proceedings.

ELLIS, C. J., and FULLERTON, MOUNT, and HOLCOMB, JJ., concur.

McDORMAN v. DUNN et al. (No. 14457.) (Supreme Court of Washington. April 15, 1918.)

1. TRIAL \$\infty\$253(4)-Instructions-Ignoring QUESTION OF PROXIMATE CAUSE.

In action for injuries to passenger on jitney In action for injuries to passenger on jitney bus, instructions authorizing recovery for negligence of the driver if "the accident resulted because of that fact," and "solely because of the negligence of the jitney driver," were not objectionable as permitting recovery if there was negligence regardless of whether it was the proximate cause of the injuries.

2. CARRIERS \$\infty 321(12) - JITNEY BUSSES - INJURIES TO PASSENGERS - INSTRUCTIONS.

In action for injuries to passenger in jitney bus, instruction that the bus had the right of way over the other automobile, but not the ex-clusive right to run at any speed desired, and that the driver was not excused from exercising the highest degree of care, and that if the driver saw the other vehicle approaching at a high and dangerous speed he should have used every reasonable precaution to prevent collision, was not so confused and involved as to be unintelligible.

3. TRIAL \$\infty\$ 296(3) — Instructions — Error Cured by Other Instructions.

In action for injuries to passenger in jitney in collision, instruction exacting highest degree of care from driver of jitney was not erroneous, where other instructions clearly require only the highest degree of care compatible with the practical operation of the jitney at the time and place of collision.

4. TRIAL \$\infty 295(2)\$\text{—Instruction Considered} AS A WHOLE.

Instructions must be considered as a whole, and, although a portion if alone is technically erroneous or misleading, it is not prejudicial if taken with other instructions the jury could not have been misled.

5. Carriers &=>318(7)—Jitneys—Injuries to Passengers—Evidence—Sufficiency.

Evidence held to warrant recovery against a jitney bus owner for injuries to a passenger in a collision.

6. WITNESSES \$\sim 397\text{--Impeachment--} That witnesses in police court testified contrary to their testimony in the civil suit went

in toto or pro tanto, of the affected owners. | to the weight and credibility, and not the competency, of their testimony.

petency, of their testimony.

7. Damages (2000) 131(3)—Excessive Damages. Verdict of \$2,500 for injuries in automobile collision to veterinary surgeon 64 years of age, who sustained a six-inch cut over his right eye, was rendered unconscious, suffered a broken collar bone, and partial loss of motion of his right arm, continuing to the time of the trial, three months after the accident, and suffered great pain, was nervous, sleepless and unable to dress himself without assistance was not avessive. himself without assistance, was not excessive.

Department 1. Appeal from Superior Court. Spokane County; W. A. Huneke, Judge.

Action by W. C. McDorman against C. Arthur Dunn, the Casualty Company of America, and C. E. Svensen and wife. Judgment for plaintiff, and defendants Dunn and the Casualty Company appeal. Affirmed.

O. C. Moore, of Spokane, and Henry S. Noon, of Seattle, for appellants. Plummer & Lavin, of Spokane, for respondent.

WEBSTER, J. On November 2, 1916, the plaintiff, while a passenger upon a jitney owned and operated by defendant Dunn, sustained injuries in a collision between the jitney and an automobile owned and operated by the defendants Svensen. The accident occurred at the intersection of Hamilton street, running north and south, and Mission avenue, running east and west, in the city of Spokane. The intersection of the thoroughfares, which was paved with asphalt, was wet and slippery because of recent rains. The scene of the collision is in a thickly settled residence portion of the city, but outside the fire limits. This action was brought by the plaintiff against the owner of the jitney, Casualty Company of America, as surety upon the bond executed pursuant to chapter 57. Laws 1915, and the owners of the automobile, charging that Dunn and the Svensens were jointly and concurrently guilty of negligence which caused the collision, in that both automobiles were operated in a careless and negligent manner and at an excessive and unlawful rate of speed, and in violation of the traffic ordinances of the city of Spokane restricting the rate of speed at the place of the accident to twenty miles per hour. As to the defendant Dunn, it was further charged that the jitney was not equipped with chains or other like devices for the purpose of enabling it to be properly controlled. The defendants Dunn and the casualty company, answering the complaint, admitted the negligence of the Svensens, but denied all allegations of negligence upon the part of the driver of the jitney; further pleading an ordinance of the city of Spokane providing that, at street intersections, vehicles traveling in a northerly or southerly direction shall have the right of way as against vehicles traveling in an easterly or westerly direction, and that the jitney, at the time of

the collision, was proceeding northerly on rectly charged that the negligence of Dunn, Hamilton street, while the automobile was being driven westerly upon Mission avenue; also, that the accident was wholly the result of the negligence and carelessness of the driver of the Svensen automobile, and was wholly unavoidable in so far as the driver of the jitney was concerned. The defendants Svensen and wife, for answer, denied all negligence on their part, but admitted the allegations of the complaint charging negligence of the owner and driver of the jitney. No claim of contributory negligence was made, the plaintiff being a passenger upon the jitney. Upon these issues the cause was tried to a jury, which returned a verdict in favor of the plaintiff for the sum of \$2,500 against Dunn and the casualty company, exonerating the defendants Svensen and wife from liability. After denying a motion for a new trial, judgment was entered upon the verdict, from which Dunn and the casualty company have appealed.

[1] It is first insisted that the jury was erroneously charged that negligence in the operation of the jitney would render its owner and the bonding company liable regardless of whether such negligence was the proximate cause of the accident. As we read the instructions, this assignment is without merit. Upon this subject the court charged the jury as follows:

"Instruction No. 5. It was the duty of the driver of the jitney towards the plaintiff, being a passenger upon the jitney, to exercise the highest degree of care compatible with the practical operation of the jitney at the time and place in question; and, if the driver of the jitney exercised that degree of care at the time and place in exercise the time the owner of the jitney would in question, then the owner of the jitney would not be negligent in its operation, and could not be held liable for the result of this collision. But, on the other hand, if the driver of the jitney did not exercise that degree of care and the accident resulted because of that fact, then the owner of the jitney would be guilty of negligence and would be liable to the plaintiff for any injuries sustained in the collision, regardless of whether the driver of the other automobile was register to r not."

negligent or not."
"Instruction No. 9. If, under the instructions I have given you, you find that the jitney only was operated in a careless and negligent manner, and that the collision occurred solely cause of the negligence of the jitney driver, then you will find a verdict in favor of plaintiff and against the defendant C. Arthur Dunn, and also against the defendant the Casualty Company America for the injuries sustained. But, if the verdict exceeds \$2,500, then as against the defendant Casualty Company of America your verdict will be limited to \$2,500. If, however, you find that the collision occurred through the negligence of the driver of the Svensen automo-bile alone, then your verdict will be in favor of plaintiff and against the defendants Svensen and wife alone. On the other hand, if you find that both the driver of the jitney and the driver of the Svensen automobile were negligent and the collision resulted in consequence, then your verdict will be against the defendant C. Arthur Dunn and the defendants Svensen and wife and the defendant the Casualty Company of Amer-

It is plain, from a reading of these instructions, that the jury was clearly and cor- the charge contained in instruction No. 5,

or the concurrent negligence of Dunn and the Svensens, must have caused the collision, before a verdict could be rendered against the appellants. That is to say, that such negligence and the resulting collision must stand in the relation of cause and effect. This embodies the essential element of proximate cause. If appellants desired a more technical definition of the doctrine, they should have so requested. The instructions complained of in this respect are commendable, in that they are couched in language which is plain, accurate, and readily understood by a jury of laymen. Hellan v. Supply Laundry Co., 94 Wash. 683, 163 Pac. 9.

Complaint is next made of the following instruction:

"Instruction No. 8. I charge you that the vehicle operated in a northerly and southerly dinicie operated in a northerly and solutierly direction has the right of way against a vehicle operated easterly and westerly, and while the operator of the jitney bus had, under the law, the right of way in crossing Mission avenue, while he was going in a northerly direction, as distinguished from the right of said Svensen and wife and their driver, this does not mean that the jitney bus driver had the exclusive right to operate said jitney at any rate of speed to operate said jitney at any rate of speed which said driver saw fit to operate it at, neither would said right of way excuse him from exercising the highest degree of care under the circumstances, and although the jitney bus had the right of way in crossing said intersection of said streets, going in a northerly direction, yet if the driver of said jitney bus saw the automobile running westerly on Mission avenue approaching the intersection at a high, unlawful, excessive, and dangerous rate of speed, that regardless of any negligence which the driver of the automobile owned by defendants Svensen and wife, was committing, the jitney bus driver, in the exercise of the highest degree of care, should have used every reasonable precaution to pre-vent said automobile from coming into collision with said jitney bus; in other words, a man cannot, under the law, deliberately run into threatened danger, simply because he has the right of way over a certain street when he is carrying passengers for hire, and is charged with the duty of exercising the highest degree of care." of care.

[2, 3] It is urged that this instruction was erroneous for the reasons: (1) That it imposed upon the jitney driver the unqualified duty of exercising the highest degree of care in the operation of the vehicle; that is to say, it did not contain the qualifying clause "consistent with the practical conduct of the business," or language of similar import. (2) That it is so confused and involved as to be unintelligible. As to the last proposition, the instruction, as its own commentary, refutes the criticism. It is sufficiently plain and unambiguous to advise a person of ordinary understanding with reference to the provisions of the right of way ordinance as applicable to the facts of this case, and is a clear and wholesome statement of the law upon the subject. As to the first proposition, if this instruction stood alone, it would be subject to the criticism made. But when taken in connection with other portions of

hereinbefore set out, we are convinced that the left and struck the Svensen automobile it was neither confusing nor erroneous. The expressions, "exercise of the highest degree of care" and "is charged with the duty of exercising the highest degree of care," plainly refer to the definition of the duty devolving upon the driver of the jitney embodied in instruction No. 5, where the court said:

"It was the duty of the driver of the jitney towards the plaintiff, being a passenger upon the jitney, to exercise the highest degree of care compatible with the practical operation of the jitney at the time and place in question."

[4] It is the settled law of this state that the instructions must be considered as a whole; that although a portion thereof, if standing alone, may be technically erroneous and have a tendency to confuse and mislead the jury, yet it will not constitute prejudicial error, if, when taken in connection with other instructions given, the jury could not have been misled as to the principles of law applicable to the issues. Farnandis v. Seattle, 95 Wash. 587, 164 Pac. 225; Olmstead v. Olympia, 59 Wash. 147, 109 Pac. 602; Sudden & Christenson v. Morse, 55 Wash. 372, 104 Pac. 645; St. John v. Cascade Lumber & Shingle Co., 53 Wash. 193, 101 Pac. 833; Manhattan Bldg. Co. v. Seattle, 52 Wash. 226, 100 Pac. 330; Gray v. Washington Water Power Co., 30 Wash. 665, 71 Pac. 206. In the case of Firemen's Fund Ins. Co v. Oregon-Washington R. Co., 96 Wash. 113, 164 Pac. 765, relied upon by appellants, the instructions were absolutely contradictory and inconsistent, in that in the one instance the jury was told that the defendant must exercise the "highest degree of care consistent with the practical conduct of its business," while in the other it was told that the defendant need only exercise "ordinary and reasonable care in the light of the attending circumstances and surroundings." That case has no relation to the principle involved in the present discussion. Here the court fixed the proper standard with reference to the duty devolving upon the jitney driver which was clearly and accurately defined in instruction No. 5. The degree of care referred to in instruction No. 8 plainly relates to the same degree of care defined in the former instruction, which it was not necessary-though perhaps proper-to repeat.

[5] It is next urged that the evidence is insufficient to sustain the verdict. In this connection it is only essential to say that the principal contest waged before the jury was between Dunn and Svensen, each endeavoring to absolve himself from liability by shifting the burden of the blame upon the other; that there was competent evidence tending to show that the jitney was not equipped with chains or other nonskidding devices; that it was being driven at a rate of speed variously estimated from 25 to 35 miles per hour, and immediately prior to the collision it swerved or turned toward and HOLCOMB, JJ., concur.

near the middle of the street intersection; that the force of the impact threw the jitney along and across the street a distance of 85 feet, and when stopped it was turned around facing the opposite direction, the automobile being thrown 75 feet to the opposite side of the street, with its rear wheels upon the curb: that the Svensen automobile was also being driven at a dangerous and reckless rate of speed, estimated at from 25 to 35 miles per hour; and that, when approaching the street intersection, neither vehicle slackened speed. Under such testimony, it would have been competent for the jury to fix liability upon either or both of the principal defendants. The fact that the Svensens were exonerated affords the appellants no just cause for complaint.

"There may be more than one proximate cause for the same injury. The negligence of differ-ent persons, though otherwise independent, may concur in producing the same injury. In such a case, all are liable. They may be held either jointly or severally. The negligence of one is no excuse for that of another." Hellan v. Supply Laundry Co., supra.

[6] Considerable space in the brief is devoted to a discussion of the fact that some of the witnesses had given testimony in the police court which contradicted their evidence in the superior court. Clearly, such circumstance affected the weight and credibility-not the competency-of the testimony, which presented a question within the peculiar province of the jury.

[7] Finally, it is insisted that the verdict is excessive. The record discloses that the plaintiff, a veterinary surgeon, was 64 years of age; that he sustained a cut five or six inches in length over the right eye, extending into the hair, requiring a number of stitches to close the wound; that he was rendered unconscious, the right collar bone being broken resulting in the partial loss of motion of the right arm; that at the time of the trial, which occurred more than three months after the accident, he could only elevate the right arm to a position at right angles with his body when standing erect: that from the date of the injury the plaintiff suffered great pain in his head, neck, and shoulders, was exceedingly nervous, suffered from sleeplessness, and was unable to dress himself without assistance. There was also competent expert evidence tending to show that the injury to the arm and shoulder was permanent. The trial court saw and observed the plaintiff, and heard all of the evidence relating to this subject, an thereafter refused to disturb the verdict. are not prepared to say that in so doing there was any abuse of discretion.

Finding no error, the judgment is affirmed.

ELLIS, C. J., and MOUNT, CHADWICK,



# In re BROWN'S ESTATE. Petition of STROM. (No. 14365.)

(Supreme Court of Washington, April 23, 1918.)

1. WILLS == 144. 259 - NUNCUPATIVE WILLS

-EXECUTION AND PROBATE.

A nuncupative will not offered for probate within six months as required by Rem. Code 1915, § 1331, or executed in presence of witnesses as required by section 1330, is invalid.

2. WILLS €==130 - HOLOGRAPHIC WILLS

VALIDITY.

The Legislature having enacted laws providing for the kind of wills which may be executed and the manner of execution, holographic wills good at common law, not being provided for, are not recognized as valid in this state.

Department 2. Appeal from Superior Court, Snohomish County; Ralph C. Bell,

In the matter of the estate of John A. Brown. From an order denying probate of his alleged will, Samuel Strom, petitioner for appointment as administrator c. t. a., appeals. Affirmed.

Frank L. Kuhn, of Seattle, for appellant.

MOUNT, J. This appeal is from an order of the lower court denying the probate of an alleged will. The will is as follows:

"Sam Strom's Homestead, 2-19-1904.

"I am sick to death, am 59 years old, have no clations. If I die I want my friend Sam Strom relations. relations. It I die I want my friend Sam Strom to have all my belongings, real and personal; my homestead down the river, my rifle, my books, clothes, dishes, and tools. And as a part of this will, it shall be the duty of Sam Strom to lay me to rest in Arlington Cemetery; and further, in case of Strom's failure to return or failure to take me to Arlington, this will is void, my property to go to the state of Wash-

ington.
"Sick and alone I here sign my name. God be my witness in the absence of others,
"[Signed] John A. Brown."

The trial court denied the petition for the reason that the will was not executed in accordance with the laws of this state. The statutes of this state recognize two kinds of wills: Written wills and nuncupative wills. Section 1320, Rem. Code, provides that:

"Every will shall be in writing, signed by the testator or testatrix, or by some other person under his or her direction in his presence, and shall be attested by two or more competent witnesses, subscribing their names to the will in the presence of the testator.'

Section 1330 of the same Code, in reference to nuncupative wills, provides that:

"No nuncupative will shall be good when the estate bequeathed exceeds the value of two hundred dollars, unless the same be proved by two witnesses who were present at the making thereof, and it be proven that the testator, at the time of pronouncing the same, did bid some person present to bear witness that such was his will, or to that effect, and such nuncupative will was made at the time of the last sickness and at the dwelling house of the deceased, or where he had been residing for the space of ten days or

from home and died before his return. ing herein contained shall prevent any mariner at sea or soldier in the military service from disposing of his wages or other personal property by nuncupative will."

Section 1331 provides that:

"No proof shall be received of any nuncupative will unless it be offered within six months after speaking the testamentary words, nor unless the words, or the substance thereof, be first committed to writing, and a citation issued to the widow or next of kin of the deceased, that they may contest the will if they think proper."

[1] If the will in this case is held to be a nuncupative will, it was not offered for probate within the six months, for it was made in February, 1904, and was not offered for probate until June, 1917. If it was offered as a written will, it was not executed in the manner required by section 1320, Rem. Code, supra. In either event the will was invalid.

[2] It is argued by the appellant that, inasmuch as our statute makes no provision for holographic wills, the common law prevails in this state, and therefore the will, being a holographic will, is valid and subject to probate. If it may be conceded that capacity to make a holographic will existed at common law and that the common law prevails in this state when not modified by statute, it is clear that the common law has been modified by statute in his state, because no provision was made for such wills. As stated above, the Legislature has defined wills and how they shall be executed and by whom, and no provision is made for holographic wills. In the case of Strand v. Stewart, 51 Wash, 685, 99 Pac. 1027, we said:

"The right to make a testamentary disposition of property is neither a natural nor a constitutional right. Such right is derived from and rests in positive law. A will is said to be ambulatory until the death of the testator, and until that event occurs the testamentary disposiuntil that event occurs the testamentary disposi-tion is subject to the will of the testator, and likewise to the will of the state as expressed in its public laws. The will speaks as of the date of the testator's death, and must conform to the laws in force at that time. These rules are ele-mentary and need no citation of authority in their support. While the Legislature may not interfere with or divert estates which have alinterfere with or divest estates which have already become vested through the death of the testator, its power over wills, the manner of their execution, and the mode of carrying out their provisions, is absolute and supreme until death occurs.

It follows therefore that, because the Legislature of this state has enacted laws providing for the kind of wills which may be executed and the manner of their execution, those forms of wills not provided for are not recognized. Appellant cites and relies upon the case of Eaton v. Brown, 193 U. S. 411, 24 Sup. Ct. 487, 48 L. Ed. 730. In that case a will similar to the one here was under consideration by the Supreme Court of the United States; but the only question raised or decided in that case was the proper construction of the will, not its validity. more, except where such person was taken sick while in this case the validity of the will itself is before us, and not the construction of the will. Of course, in those jurisdictions where holographic wills are valid, a will of the character of the one now under consideration would no doubt be a valid will if it complied with the statutes; but, as we have determined above, there is no provision in our statute which permits such a will to be probated. In the case of Brown v. State, 87 Wash. 44, 151 Pac. 81, Ann. Cas. 1917B, 604, we held that verbal instructions for a will or words spoken at the time of signing a writing intenued as a written will cannot be proved as a nuncupative will, upon its appearing that the written will was not properly executed.

We are satisfied, therefore, that the trial court properly denied the probate of this proposed will: First, because it was not properly executed as a written will; second, because it was not offered in time as a nuncupative will; and, third, because a holographic will is not recognized as a valid will in this state.

The judgment appealed from is therefore affirmed.

ELLIS, C. J., and HOLCOMB, CHADWICK, and MAIN, JJ., concur.

MILLS v. TITLE GUARANTY & SURETY CO. (No. 14322.)

(Supreme Court of Washington. April 16, 1918.)

1. PEINCIPAL AND SURETY 4 162(2)—SURETY COMPANIES—AUTHORITY OF AGENTS—QUESTION FOR COURT.

Where plaintiff brings action against the surety company for repudiating an unauthorized bond, claiming bond is valid because signed by agents of company with apparent authority, it is a question of law for court to decide whether agent and attorney in fact signing bond had apparent authority so to do.

PRINCIPAL AND SURETY 161 — SURETY COMPANIES—AUTHORITY OF AGENTS—EVIDENCE.

In an action against surety company for repudiating unauthorized bond, claimed by plaintiff to be valid because agents signing bond had apparent authority, evidence held to sustain decision of lower court that as a matter of law bond was executed without apparent authority.

3. Principal and Surety \$==55 — Surety Companies—Agents.

Where plaintiff sues surety company for repudiation of unauthorized bond and claims bond is valid because agent and attorney in fact signing it had apparent authority so to do, such authority must be shown by facts rendering it apparent to plaintiff, and not by other facts rendering it apparent to some one else.

4. Appeal and Error \$\sim 843(4) — Review Unnecessary.

Where an action is brought against a surety company and the clerk of court and sheriff for damages for repudiating a stay of execution bond, sustaining demurrers of clerk and sheriff will not be reviewed on appeal, after lower court's decision that bond was invalid has been sustained.

. Ellis, C. J., and Main, J., dissenting.

Department 1. Appeal from Superior Court, Asotin County; Chester F. Miller, Judge.

Action by E. F. Mills, against the Title Guaranty & Surety Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Fred E. Butler, of Lewiston, Idaho, and E. J. Doyle, of Clarkston, for appellant. F. W. Dewart, of Spokane, John C. Applewhite, of Asotin, and Will H. Fouts, of Dayton, for respondent.

PARKER, J. The plaintiff Mills seeks recovery of damages for injuries which he claims resulted to him from the repudiation by the defendant surety company of liability upon a bond purported to have been executed by its agent G. W. Fuller and its attorney in fact E. E. Halsey, residing at Clarkston in Asotin county, on May 24, 1911. The bond purported to be one to secure a stay of proceedings upon appeal from a judgment rendered against the plaintiff, Mills, in the superior court for Asotin county, and it is claimed by him to have failed to effect a stay of execution because of the surety company's wrongful repudiation of liability thereon. Trial in the superior court for Asotin county with a jury resulted in judgment rendered in favor of the surety company upon a verdict returned in its favor by direction of the court at the close of the plaintiff's evidence. From this disposition of the cause the plaintiff, Mills, has appealed to this court.

On December 12, 1910, there was rendered in the superior court for Asotin county a money judgment in favor of C. H. Baldwin and against E. F. Mills, this appellant. On April 25, 1911, Baldwin caused an execution to be issued upon that judgment, looking to the sale of the property of Mills in satisfaction thereof. The sheriff of Asotin county, acting under the execution, levied upon certain lands situated in that county belonging to Mills, and gave due notice of the sale thereof to be held on May 27, 1911. In the meantime Mills had appealed from that judgment to this court, but had not filed in the case any bond to stay proceedings thereon. On May 24, 1911, three days prior to the time set for the sale of the land of Mills, he applied to G. W. Fuller, the local agent of the surety company residing at Clarkston, for a bond to stay proceedings under the execution. On that day a bond was signed by G. W. Fuller as agent and E. E. Halsey as attorney in fact for the surety company, purporting upon its face to be a bond to secure stay of proceedings upon the judgment rendered against Mills. Upon the day following he filed the bond with the clerk of the superior court for Asotin county. No demand was ever made by Mills or any one for him that the clerk "issue to the sheriff

a certificate that proceedings have been stayed." as provided by section 1727, Rem. Code. for the recall of an execution upon the giving of a stay bond following an appeal. So the sheriff, having no official notice of any stay of proceedings, proceeded to and did sell the land of Mills under the execution on April 27, 1911, in pursuance of the notice theretofore given by him, and filed his return accordingly on that day. Mills did not, within the ten days prescribed by section 591. Rem. Code, nor at any other time, file any objections to the confirmation by the court of the sale so made, nor does the record before us indicate that the sale ever was confirmed by the court, but it at least inferentially suggests to the contrary. On December 20, 1911, this court reversed the judgment rendered against Mills in favor of Baldwin, and remanded the case to the superior court for Asotin county for a new 66 Wash. 302, 119 Pac. 816. March 8, 1912, Mills redeemed his land from the execution sale, paying to the sheriff therefor the sum of \$1.726, which he claims as the measure of damages he is entitled to recover in this action. On November 13, 1912, the superior court for Asotin county. as provided by section 1742, Rem. Code, entered a judgment and order of restitution in favor of Mills and against Baldwin, and directed execution to be issued thereon against Baldwin for the amount collected and realized by Baldwin from the execution sale of the land of Mills. Execution was accordingly issued upon that judgment and order and returned by the sheriff, who certified that he was unable to find any property belonging to Baldwin subject to execution.

[1,2] The only claim of error we find it necessary to here notice is that the trial court erred in directing a verdict in favor of the surety company. One of the grounds upon which this disposition of the cause was rested by the trial court was, in substance, that it must be decided as a matter of law that the paper signed by Fuller and Halsey as agent and attorney in fact for the surety company, purporting to be a stay bond, was signed without actual or apparent authority on their part, and did not become a binding obligation of the surety company so as to effect a stay of execution, and that therefore the repudiation of liability thereon by the surety company was in no sense a legal wrong rendering it liable in damages to Mills.

It is thus rendered necessary to review additional facts touching the question of the authority of Fuller and Halsey to execute such a bond, which facts may be summarized as follows: We have already seen that the trial court directed verdict to be rendered in favor of the surety company at the close of the evidence introduced in behalf nection that all of the evidence introduced upon the trial was in behalf of Mills, other than two or three papers erroneously admitted in connection with the cross-examination of Mills' witnesses, as claimed by counsel for Mills. These for present purposes we ignore. Fuller, the surety company's local agent at Clarkston, testifled, relative to Mills' applying for the bond and its execution on May 24, 1911, in part as follows:

"Mr. Mills came into the office and wanted to "Mr. Mills came into the office and wanted to know if I was handling surety bonds. I told him I was. He told me the kind of bond that he wanted. I told Mr. Mills that I didn't have the authority to write that class of a bond, but that I would have to take an application and it would have to go to Seattle to be approved. He then stated, he said, 'Well, I have got to have this within a day or two.' I don't exactly remember the exact time he had to have it in, but it would not give time for it to go to Seattle and back and wanted me to look up my instrucand back and wanted me to look up my instructions and see if I couldn't write it So then afterwards why then I finally made up my mind that I would try to furnish him the bond, and that I would try to furnish him the bond, and then Mr. Mills went back over to Lewiston, I presume to your office, and got a bond, and it was drawn up. I didn't draw up the bond.

\* \* \* Mr. Mills brought it over with the copy. \* \* \* And then I took it up with Mr. Halsey and asked Mr. Halsey to sign it as attorney in fact, and we signed the instrument, and then I went back to the office and gave Mr. Mills the original and forwarded the copy to the office in Seattle. At Mr. Mills' request to the office in Seattle. At Mr. Mills' request I sent a letter along at the time, at Mr. Mills' request, asking that I request the company to telegraph back to me immediately if the bond was accepted."

### Mills testified as follows:

"Q. You may go ahead and state, Mr. Mills, what was said by you and Mr. Fuller at the time you made application for this bond and what you did in order to secure the bond. We had partly two understandings. When I first went over there as to the bond he didn't seem to think he could get it under a few days—

\* \* You want to know how I finally got \* \* You want to know how I finally got the bond? Q. Yes. A. I don't remember saying anything at all about writing to the company. \* \* I asked Mr. Fuller for a bond, pany. \* \* \* I asked Mr. Fuller for a bond, and asked him if he could give a bond. Well, he could; he could give a bond in a few days. I said: 'In a few days won't do. I want it to go into effect right now, because my land is up to be sold.' Well, he didn't know; he said he would look and see, and got down some books and looked through them, and he finally concluded if I could give him a surety bond. \* \* \* He said if I could give him a good man on my bond he could do it. So I said I could give Mr. Barclay, and I went back to Lewiston, and in a short time I came back with Mr. Barclay and also with the bond, and he issued the bond. a short time I came back with all assued the bond.

\* \* He said the bond was good as long as he got it with Mr. Barclay's name to this other security.

\* \* I didn't ask him to write to Seattle whether they would accept it.

This is the substance of the whole of Mills' testimony given upon his direct examination. His cross-examination does not show anything further as to the apparent authority of Fuller and Halsey to execute the bond. Mark A. Reese, the assistant resident managing agent of the surety company for this state, at that time testified that the Clarkof Mills, the plaintiff. We note in this con- ston agency of the company was classed as a

agents who were furnished supplies, consisting of "envelopes, stationery, application forms, and such bond forms as they were authorized to write," also a ratebook and tin sign and a corporate seal, and that such agents had no power to execute a bond of this nature, though he admitted that they had power to execute judicial fidelity bonds to secure the faithful performance of the duties of receivers, trustees, administrators, guardians, etc. It is not claimed that Fuller and Halsey were furnished by the surety company with any forms of bond to secure stay of execution upon appeal, nor that there was any thought, either by Fuller, Halsey, or Mills, of executing this bond upon any such form. It is conclusively shown that this bond was prepared wholly in typewriting in the office of Mr. Butler, attorney for Mills, neither Fuller nor Halsey having anything whatever to do with its preparation, and that it was then presented to them for execution. The sign furnished to Fuller and Halsey by the surety company and displayed in the window of Fuller's office had upon it in large letters these words and none other:

We Issue Surety Bonds Fidelity Contract Judicial Official The Title Guaranty & Surety Company Home Office, Scranton, Penna. Capital and Surplus, Over \$1,000,000

Immediately upon being advised by Fuller that the bond had been executed, and upon the receipt of a copy thereof, the resident state manager of the surety company at Seattle notified both the clerk of the court and Halsey by telegraph that the bond was executed without authority so to do on the part of Fuller and Halsey, and that the surety company denied all liability thereon. This occurred not later than May 26th, the day before the execution sale took place. Soon thereafter the clerk surrendered the bond to the surety company. This was done evidently upon the assumption that the bond was void by reason of having been executed without authority.

It is plain from the evidence that, whatever authority Fuller and Halsey possessed, apart from their alleged apparent authority, was evidenced by a written power of attorney. We ignore the supposed copy of such power of attorney introduced in evidence which counsel for Mills insist was erroneously admitted. However, since counsel for Mills are relying only upon the apparent authority rather than the express authority of Fuller and Halsey, we need not here concern ourselves with the question of their power as actually defined in their written power of attorney. Besides, if Mills were relying upon a power so evidenced, the burden would be upon him to show it, or at least

local agency, and Fuller and Halsey as local; by demand or otherwise, that it would be compelled to furnish him the information enabling him to show it. The rule of law invoked by counsel for Mills is that stated in their quotation from the text of 2 C. J. 573, as follows:

> "The true limit of the agent's authority to bind the principal as between the principal and third persons is the apparent authority with which the agent is invested, and when a third person has ascertained the apparent authority with which the principal has clothed the agent. he is under no further obligation, in the absence of circumstances putting him on inquiry, to inquire into the agent's actual authority, as the presumption is that one known to be an agent is acting within the scope of his authority. The fact that the agent's apparent authority is different from the actual authority conferred does not relieve the principal of responsibility."

[3] We are quite unable to see that this rule can avail Mills, in the light of the facts above noticed appearing from evidence introduced in his behalf. The apparent authority of Fuller and Halsey, so far as our present inquiry is concerned, would seem as a matter of course to be only such as would be shown by facts which rendered their authority apparent to Mills, and not other facts which might render their authority apparent to some one else. But, even taking all of the facts here shown touching their apparent authority, the contentions made in behalf of Mills would have but little, if any, support in addition to that which they would have by confining our attention only to facts known to him. The only facts which could possibly lead Mills to believe that Fuller and Halsey had authority to execute this bond were: (1) Mills' knowledge in a general way, evidently the result of hearsay only, that Fuller was the local agent of the surety company; he apparently had no knowledge, even as the result of hearsay, that Halsey had anything to do with the surety company. (2) Mills being told by Fuller that he could furnish such a bond, but at first that it would take a few days to procure it, manifestly conveying to the mind of Mills that it could not be executed there. (3) Mills' seeing Fuller look at "his books," which "books," however, Mills did not see so as to learn of their contents or nature, merely assuming that they were books containing instructions. (4) Mills' seeing the sign above quoted from, displayed in the office of Fuller, but which sign did not evidence any authority on the part of any particular person or persons to execute this or any other kind of a bond for the surety company. (5) The impression of a seal of the surety company upon the bond at the time of its signing by Fuller and Halsey. The force of these facts as suggesting apparent authority on the part of Fuller and Halsey was bound to be viewed by Mills in the light of the following facts, of which he was manifestly to place the surety company in such position, | bound to take notice: (1) The necessity of

a written power of attorney possessed by Fuller and Halsey, and evidencing their authority to execute such a bond; aside from what might be termed "common knowledge" that agents of insurance and surety companies are given their authority by written appointment, the very manner in which this bond was signed would bring home to Mills the fact that whatever power Fuller and Halsey possessed must have been granted them by a written power of attorney; (2) the fact that Mills made no inquiry as to the written evidence of authority of either Fuller or Halsey; (3) the fact that neither Fuller nor Halsey had any bond forms for the execution of bonds of this nature; and (4) the fact that the bond which was executed was prepared by Mills' own attorney wholly in typewriting, and without either Fuller or Halsey having any part in its preparation.

We are of the opinion that the learned trial judge correctly decided, as a matter of law, that the bond purporting to be executed by Fuller and Halsey for the surety company was executed without either actual or apparent authority on their part, and that therefore it did not become a binding obligation upon the surety company. This being our conclusion, it of course follows that the surety company could not be held liable in damages for its denial or repudiation of liability upon the bond. Some other contentions are made in behalf of both Mills and the surety company, but in view of our conclusion upon the question of the authority of Fuller and Halsey to execute the bond, we need not notice them.

[4] The clerk of the superior court and also the sheriff were made defendants in the beginning of this action, but as to them a demurrer to the complaint was sustained, and the action dismissed by the trial court. This is claimed to have been erroneous on the part of the trial court; but, in view of our conclusion upon the question of the liability of the surety company, it is manifest that neither the clerk nor the sheriff could be held liable. It is therefore unnecessary to further notice this claim of error.

The judgment is affirmed.

FULLERTON and WEBSTER, JJ., concur.

MAIN, J. (dissenting). It seems to me that under the facts of this case the question whether the representatives of the local agency had apparent authority to write the bond is one of fact and not of law, and that the trial court erred in treating the question as one of law.

For this reason I am constrained to dissent from the majority opinion.

ELLIS, C. J., concurs in the view expressed by Judge MAIN.

UNION SAVINGS & TRUST CO. OF SEAT-TLE v. MANNEY et ux. (No. 14272.)

(Supreme Court of Washington. April 22, 1918.)

1. HUSBAND AND WIFE \$\inspece 264 \text{-Community Property-Evidence.}\$
In an action by plaintiff, a judgment creditor of defendants as a marital community, to set aside a deed given by defendant husband to defend the set of the se defendant wife at a time when plaintiff was an existing creditor of the community, and subject the property to the lien of the judgment, evidence held insufficient to show that the property involved was the separate property of the wife; it tending to establish nothing more than an unexecuted intention of the husband to give the land to his wife, making the belated deed futile.

2. HUSBAND AND WIFE \$== 262(2) -- SEPARATE

PROPERTY OF WIFE—BURDEN OF PROOF.
Since the property was not acquired by defendant wife through devise or descent, but durfendant wife through devise or descent, but during coverture, it was incumbent upon her to show that she acquired it by gift in view of Rem. Code 1915, § 5917, providing that property acquired by either spouse during the coverture otherwise than by gift, bequest, devise, or descent is presumptively community property.

3. Husband and Wife &= 269—Conveyance to Wife—Validity as to Existing Chedi-TOB.

A deed to property acquired during cover-ture from defendant husband to defendant wife, made at a time when plaintiff was an existing creditor of the community, was void unless it can be sustained as a ratification by the husband can be sustained as a ratineation by the husband of a prior parol gift of his community interest, in view of Rem. Code 1915, § 8766, providing that one spouse may give, grant, sell, or convey directly to the other, subject to any existing equity in favor of creditors of the grantor, his or her community right in all of their community

4. Husband and Wife ⇔248—Community Property—Changing Status.

Since the status of the property as community or separate property of defendant wife became fixed at the time of purchase, such status, unless divested by deed, due process of law, or the working of an estoppel, remained.

5. Husband and Wife \$\infty\$269 - Community Property-Conveyance to Wife.

If the attempted gift by defendant husband defendant wife of interest in community was void, an attempted ratification by deed would also be void, as to plaintiff, an existing credi-tor of the community at the time the deed was made.

6. FRAUDS, STATUTE OF \$\sim 56(7)\$—COMMUNITY REAL ESTATE—PAROL GIFT—VALIDITY.

An oral gift of community real estate from one spouse to another is void in view of Rem. Code 1915, \$ 8745, providing that all conveyances of the state of the s es of real estate or any interest therein shall be by deed.

by deed.

7. HUSBAND AND WIFE \$\iff=49\frac{1}{2}(8)\$—GIFT INTER VIVOS—SUFFICIENCY OF EVIDENCE.

In an action by plaintiff, a judgment creditor of defendants as a marital community, to set aside a deed given by defendant husband to defendant wife at a time when plaintiff was an existing creditor of the community, and subject the property to the lien of the judgment, evidence held insufficient to show that the money with which the property involved was nurchased. with which the property involved was purchased was given to the wife by her husband.

8. HUSBAND AND WIFE \$\infty 262(1)\\_\text{Title in Name of Wife\\_Presumption.}\
That the husband permitted title to be taken from third persons in the wife's name presumptively vested title in community.

Department 1. Appeal from Superior Court, King County; John S. Jurey, Judge. Action by the Union Savings & Trust Company of Seattle against Walter Manney and wife. Judgment for defendants, and plaintiff appeals. Reversed and remanded, with direction.

McClure & McClure and Walter S. Osborn, all of Seattle, for appellant. J. B. Murphy and H. E. Peck, both of Seattle, for respondents,

ELLIS, C. J. In this action plaintiff, a judgment creditor of defendants as a marital community, seeks to set aside a deed from defendant husband to defendant wife conveying block 1 and lots 4 to 9, both inclusive, in block 2 of Manney's addition to the city of Seattle, and to subject that property to the lien of the judgment.

The facts are these: Defendants were married in 1883. They came to Seattle some 27 years ago, at which time, the wife testifled, "We had just barely enough money to bring us here." In the fall of 1904 the partnership of W. F. Manney & Co. was formed, consisting of defendant Walter Manney and his two sons, W. F. Manney and Henry Manney. The firm was engaged in the business of street and highway contracting until the fall of 1914, when it became insolvent through heavy losses on three contracts. Frequent loans were secured from the plaintiff bank, and it appears that from February 20, 1907, up to the commencement of this action the firm was only twice free from debt to plaintiff-once from September 10th to October 9th in 1908, and again from August 5th to August 7th in 1912. Though the fact is disputed, we think the evidence fairly establishes that at the time of the failure defendant Walter Manney had overdrawn his account with the partnership to the extent of at least \$7,000.

On June 28, 1915, plaintiff recovered a judgment for \$4,770, and attorney's fees, against Walter, W. F., and Henry Manney, and against the three communities composed of these men and their wives. This judgment was based upon three notes of the partners for loans from plaintiff for \$1,500, \$1,-200, and \$2,000, respectively, and respectively dated August 17, 1914, August 24, 1914, and October 5, 1914. Upon this judgment an execution was issued and returned unsatisfied. On April 13, 1915, while the action on the notes was pending. Walter Manney executed to his wife a deed of the property here involved on an expressed consideration of love and affection, with a recital that the deed was given "in confirmation of my act of giving to my said wife all my community interest, if any, in the abovedescribed real property at the time said land was purchased and the instrument of conveyance taken in the name of Amelia Manney," and further reciting that it was their intention at the time of such purchase Tract 6 was later sold, and the other tracts

that the land should be and remain her separate property, for which purpose the deed was taken in her name, and payment was made from sale of property owned by her.

Defendants' version of the acquisition of this property is as follows: In the spring of 1901 they purchased 12 lots in Gilman Park addition to Seattle for a consideration of \$960, paying \$500 cash and giving a \$460 purchase-money mortgage. It was then agreed between them that the property was to be the wife's separate property as a gift from the husband. The initial \$500 was raised, \$95 from the sale of two cows which the wife testified had been given her by the husband, who added \$65, and they borrowed \$340 from W. F. Manney, who was to receive half of the profits in case of sale. Title was taken in the wife's name, and both defendants executed a mortgage upon the lots for the balance of \$460 to one Polhemus the seller. The husband was not willing to build a home on these lots, and in the fall of 1901 and summer of 1902 they were sold for about \$2,100. The money was collected, put in his own bank account, and disbursed by defendant Walter Manney. He paid the mortgage and gave one-half the profits to W. F. Manney. The money was mingled with his other funds which were checked against indiscriminately for these and his general business purposes. Both defendants testifled that when these lots were sold it was with the understanding that other property more suitable for a home would be purchased and given to the wife in her name for her "separate support against any loss he might sustain in business." Accordingly they looked at lots 3, 4, 5, 6, and 7 of Leary acre tracts, and on October 26, 1901, Walter Manney entered into a contract with Ferry-Leary Land Company for their purchase. This contract recited that the vendor will sell to W. Manney the tracts mentioned for a consideration of \$800, of which \$100 was to be paid in cash, and \$700, with interest, in deferred installments. On this contract seven payments were made as follows: October 26, 1901, initial payment \$100; January 29, 1902, \$100; May 12, 1902, \$120; August 30, 1902, \$200; April 13, 1903, \$180; November 24, 1905, \$100; April 17, 1907, \$74.50 -total, \$874.50. Touching these payments the husband testified that the first was made from proceeds of sale of the Gilman Park lots, that he did not know where he got the money with which he made the second, third. and fourth payments, and that he made the fifth from money paid to him for a homestead relinquishment. The last two payments were made by Mrs. Manney with checks drawn on the funds of W. F. Manney & Co. signed by her husband, or W. F. Manney. These payments matured the contract, and defendant Amelia Manney took the contract to the land company, and at her request the deed was made in her name.

were replatted as Manney's addition, both awarded costs to defendants. Plaintiff apof defendants joining in the dedication as owners, and both joining in the acknowledgment. The husband improved the property and constructed a house on lot 5, block 1, and has paid all taxes assessed against the lots since the purchase. W. F. Manney identified checks of the partnership aggregating over \$7,000, which checks he testified were given for labor and material which went into the construction of the house and for taxes and disbursements in connection with the property. Mrs. Manney estimated that the house cost only about \$3,000, but whatever its cost there is no question that it was paid for by her husband with community funds drawn from the partnership business. He testified that the money he paid for the lots, excepting the first \$100, and the money he afterwards expended for improvements and taxes, he considered as gifts to his wife, but it is not pretended that he ever actually gave her any of this money in specie. Over plaintiff's objection several witnesses were permitted to testify that at various times the husband had stated that the Gilman Park lots, and subsequently the lots here involved, belonged to his wife. W. F. Manney, son of the husband and stepson of the wife, though he had lived with defendants till 1909, testified that he never heard of any such arrangement between defendants; that he assumed the property was community property, and in September, 1911, listed this property as an asset in the sum of \$20,000, in a statement to the bank.

In June, 1908, defendants joined in the execution of a mortgage to one Siegley on lot 4 of the Leary tracts for a loan of \$1,-500. This money was turned into the firm and credited to Walter Manney's account. When lot 6 of the Leary tracts was sold to one Joslin the cash payment was treated in the same way. Afterwards the partnership purchased this tract from Joslin and took up a mortgage which he had given thereon to Amelia Manney as a part of the purchase price. This \$1,200 was credited by the firm to the account of Walter Manney. None of this money was turned over to Amelia Manney as owner of the property from which it was derived, nor was there any evidence tending to trace this specific money into the improvements on the property. It was evidently treated by all parties as community property of defendants, and was placed and remained in the husband's control. April 5, 1915, Amelia Manney filed a declaration of homestead on lot 5 in block 1 of Manney's addition. This is the lot on which the house stands, and is more than double the size of the other lots.

Without making findings of fact or conclusions of law, these being waived, the court decreed that the real estate in question was the separate property of Amelia Manney, and | Co. in the belief that this property was com-

peals.

[1, 2] Was the property here involved the separate property of Amelia Manney? This is the sole question presented for our determination. Property acquired by either spouse during the coverture otherwise than by gift, bequest, devise, or descent is presumptively community property. Rem. Code. § 5917. This property was not acquired by Amelia Manney through devise or descent. It was acquired during the coverture. It was therefore incumbent upon her to show by competent evidence that she acquired it by gift. The statute provides that one spouse may give, grant, sell, or convey directly to the other, subject to any existing equity in favor of creditors of the grantor, his or her community right in any or all of their community realty, and that a deed made from one spouse to the other of such property shall operate to vest the title in the grantee as separate property. The grantor shall sign, seal, execute, and acknowledge as a single person without joinder therein of the grantee. Rem. Code, § 8766. Another section provides that all conveyances of real estate or of any interest therein shall be by deed. Rem. Code, § 8745. This is the only method provided by statute for the voluntary vesting of the title of community real property in either spouse as his or her separate property during the coverture. The statute saves the rights of existing creditors.

[3, 4] The deed from Walter to Amelia Manney of April 13, 1915, was made at a time when the appellant was an existing creditor of the community. It requires, therefore, no argument to show that it was void as to the appellant, unless it can be sustained as a ratification by the husband of a prior parol gift of his community interest in the real estate to the wife. But the status of this property as community or separate property became fixed at the time it was purchased. Katterhagen v. Meister, 75 Wash. 112, 115, 134 Pac. 673. If it then became vested in the community as community property, it must so remain unless divested by deed, due process of law, or the working of an estoppel. In re Deschamps' Estate, 77 Wash. 514, 137 Pac. 1009.

[5, 6] It is not claimed that the property here involved ever lost its community character by operation of law, nor can it be claimed that such an effect has been produced through the operation of any estoppel as against appellant as a creditor. The evidence is, we think, conclusive that the appellant had no knowledge or notice, till shortly before the commencement of this action, of any claim that this property was the wife's separate property. It fairly appears that appellant extended credit and made the loans here involved to the firm of Manney & munity property. If, therefore, the property was community property when acquired by the Manneys, it so remains unless a parol gift of the community interest in real estate from a husband to wife be held valid in law. If the gift was not valid when made, the attempted ratification by the deed of April 13, 1915, was nugatory so far as appellant is concerned. An oral gift of community real estate from one spouse to the other is void. As said in Graves v. Graves, 48 Wash. 664, 94 Pac. 481:

"It was not claimed by the respondent that there was any written agreement, or that any of their property was passed by deed from one to the other, and it is conceded that the property in dispute was acquired and improved by community funds earned after marriage. The statute makes such property community property. Bal. Code, § 4490. \* \* \* An oral agreement that such property might be held as separate property by one of the spouses would be in the face of this statute, and also another statute which provides that all conveyances of real estate or any interest therein shall be by deed. Bal. Code, § 4517 (P. C. § 4435)."

See, also, Abbott v. Wetherby, 6 Wash. 507, 33 Pac. 1070, 36 Am. St. Rep. 176; Churchill v. Stephenson, 14 Wash. 620, 45 Pac. 28; Woodland Lumber Co. v. Link, 16 Wash. 72, 47 Pac. 222; Katterhagen v. Meister, supra.

[7,8] Respondents are thus finally driven to the contention that this property was purchased by the wife with her separate funds, the proceeds of the sale of the Gilman Park lots, which lots, it is urged, were purchased with her separate funds given her by the husband. This genesis of her title, as we view it, halts at each step. It is undoubtedly the law that a gift from one spouse to the other of money or other personal property may be proved by parol declaration of the donor if accompanied by delivery to the donee with a complete relinquishment of dominion by the donor. But the evidence in this case falls far short of establishing anything of that kind, save in the instance of the two cows. The husband never at any time gave the wife any money nor ever expressed to any one an intention to give her any money as such. His sole expressed intention was to buy land and to give her the land. But he did not give her the land in the only way permitted by law for gifts inter vivos of real estate from husband to wife, namely by his deed to her. True, he permitted the title to be taken from third persons in her name. But that presumptively vested the title in the community. Woodland Lumber Co. v. Link, 16 Wash. 72, 47 Pac. 222; Carpenter v. Brackett, 57 Wash. 460, 107 Pac. 359. All of the money which went into the Gilman Park lots save \$95 was community property. The husband contributed \$65. Of the balance the sum of \$340 was raised by a loan from W. F. Manney and \$460 by a mortgage to Polhemus. These debts were community debts. The proceeds

of these loans were community funds. Katterhagen v. Meister, supra.

The case of Graves v. Columbia Underwriters, 93 Wash. 196, 160 Pac. 436, is not controlling. There the loan was secured by the wife's separate property, admittedly such. Assuming, therefore, that the \$95 was a sufficient proportion of the purchase price to impress the property pro tanto with the character of separate property of the wife, and that we apply the rule of Heintz v. Brown, 46 Wash. 387, 90 Pac. 211, 123 Am. St. Rep. 937, rather than the rule of Worthington v. Crapser, 63 Wash. 380, 115 Pac. 849, still her separate interest in the Gilman Park lots was less than an undivided one-tenth. Had it been shown that all of the purchase price of the Leary tracts came from the proceeds of the sale of the Gilman Park lots, she could have claimed, as her separate property, no more than an undivided one-tenth interest in the Leary tracts. But this was not shown. On the contrary, only \$100 of the proceeds of the Gilman Park lots were ever traced into the Leary tracts. Demonstrably less than one-tenth of this \$100 was, in any view of the evidence, her separate property, an amount so small as clearly to invoke the rule de minimis as applied in the Worthington Case and followed in Re Deschamps, supra.

The evidence in this case, taken at its face and construing it most strongly in favor of respondents, tended to establish nothing more than an unexecuted intention on the husband's part to give this land to his wife. The belated attempt to carry out that intention by the deed of April 13, 1915, after appellant had become a bona fide creditor without notice of any such antecedent intention. must be held futile. To permit such a latent intention to prevail as against every outward appearance and against the plain terms of the statute would be to open the door to fraud in every case, make titles to real estate rest in parol, and strike a vital blow to all business credit.

The judgment is reversed, and the cause is remanded, with direction to enter judgment for plaintiff saving to Amelia Manney her claim of homestead exemption.

MAIN, PARKER, WEBSTER, and FUL-LERTON, JJ., concur.

STATE ex rel. HAVERCAMP et ux. v. SU-PERIOR COURT FOR KING COUN-TY et al. (No. 14569.)

(Supreme Court of Washington. April 18, 1918.)

1. EVIDENCE \$\implies 345(1) - Certified Copy - Requisites of Certificate.

In proceeding to determine necessity for appropriation of lands for county road, copy of record of proceedings before county commissioners certified by the deputy county auditor

was admissible, in view of Rem. Code 1915, 3925, as to appointment of deputy auditors and liability of the auditors for their acts, since the act of the deputy is the act of the auditor.

2. EVIDENCE \$\sim 333(5)\text{—Records of County} ENGINEER.

In proceeding to determine necessity for appropriation of lands for county road, a plat made by the deputy county engineer based on field notes of survey made under his own direction was admissible in view of Ren. Code 1915, § 3975, making the certificate of the county en gineer or his deputy presumptive evidence of the facts therein contained.

EMINENT DOMAIN @== 264 - FINDINGS OF

COUNTY COMMISSIONER—CERTIORARI.
County commissioners having, under Rem.
Code 1915, § 5623—1 et seq., general jurisdiction of the establishing of roads, their order on hearing after acquiring jurisdiction of the persons by notice as required by section 5833, finding that a petition for a road was signed by the required number of householders, and that a bond had been presented, could not be collateralattacked in certiorari to review an order adjudicating the public use and necessity for appropriation of land for the road.

4. Highways &=44(2) — Establishment — Powers of Commissioners — Change of ROUTE.

Under Rem. Code 1915, \$ 5627, empowering the county engineer to survey any other route than that described in the petition for a road, it is within the power of the county commissioners after petition for a road is filed to adopt a different route recommended by the county engineer after due notice and opportunity to be

5. HIGHWAYS \$\sim 29(1)\$—ESTABLISHMENT—NE-CESSITY OF PETITION.

In view of Rem. Code 1915, § 5623—2, empowering the county commissioners by unanimous vote to initiate proceedings to establish a road without any petition therefor, a petition for the establishment of the road is not juris-dictional where there is evidence that the commissioners acted unanimously.

Department 1. Certiorari by the State, on the relation of August Havercamp and wife, to review an order of the Superior Court of King County, and Walter M. French. Order affirmed, and stay of proceedings pending hearing vacated.

Vince H. Faben, of Seattle, for relators. Alfred H. Lundin, E. C. Ewing, and Wm. J. Steinert, all of Seattle, for respondents.

ELLIS, C. J. Proceeding in certiorari to review an order of the superior court of King county adjudicating the public use and necessity for the appropriation of lands of relators for a county road.

The petition for the road is not in the record, but there is in the record the original order of the board of county commissioners establishing the road, which order recites that on February 10, 1914, the required number of householders petitioned the board to establish a county road:

"Commencing at the northwest corner of the northeast quarter of the northwest quarter of said section 16, township 24 north, range 5 east, W. M., running thence due south as near as possible to intersect with the Newport-Issaquah Road."

The petition was accompanied by a bond as required by Rem. Code, §§ 5623-5 and Thereafter the county engineer examined the proposed route, and on August 15, 1916, filed his report, together with a map and field notes of his survey, recommending the establishment of the road as above described. A hearing was had on this report pursuant to notice to the property owners, and the board of county commissioners on October 9, 1916, entered an order establishing the road. On December 1, 1916, the county filed its petition in the superior court to condemn the land for a right of way on the route described. The relators herein and the other property owners whose lands were affected were made parties to that action. On February 26, 1917, an order was entered dismissing the condemnation proceeding as to the relators herein and another party with whom we are not concerned. As to the remaining landowners, the cause proceeded to trial, a verdict was returned, judgment rendered, and a decree of appropriation entered therein. By that proceeding the county acquired the right of way for the road from the initial point to a point on the northerly line of relators' land. On April 12, 1917, the county engineer, having recommended a revision in the alignment of the proposed road across relators' land, filed with the board amended field notes and an amended report upon that portion of the road. We find it unnecessary to set out the description of the road as so changed. It will suffice to say that it changed the course from the original survey across relators' land from an almost direct line making a connection with the Newport-Issaquah Road to a southeasterly course connecting with the Newport-Issaquah Road 300 or 400 feet easterly from the original proposed point of connection. On May 28, 1917, upon a hearing pursuant to notice to the relators, the board by order declared its decision that the road should be established as recommended in the amended report. The provisions of the statute relative to notice, awards for damages, etc., were all complied with. Thereafter the county filed a second petition in the superior court seeking to condemn the right of way so adopted across the land of relators. The matter came on before respondent Judge Walter M. French, sitting as visiting judge in King county, for preliminary hearing on November 12, 1917. The court entered an order adjudicating a public use and necessity for the appropriation of the land for a highway and set the cause for trial by jury on December 10, 1917, to determine the compensation for the land to be taken. Relators appeared at this preliminary hearing, asserting that their appearance was special for the purpose of objecting to the jurisdiction of the court. They participated in the hearing, however, introduced evidence, and crossexamined all of the witnesses for the other side. They excepted to the order, and moved for new trial, which was denied. Thereupon they instituted this proceeding in this court to review the action of the trial court.

[1, 2] Relators have made five assignments of error. One of these challenges the admissibility, as evidence, of a certified copy of the record of the proceedings before the board of county commissioners and of a plat made by the deputy county engineer. The first of these was objected to because it was certified by the deputy county auditor instead of the county auditor. We see no merit in this objection. The act of the deputy is the act of the auditor for which the auditor is responsible. Rem. Code, § 3925. The plat was also properly admitted. It was shown by the deputy county engineer that it was based upon the field notes of the survey made under his own direction. Rem. Code, \$ 3975.

[3] The other assignments of error are all directed to the main contention of the relators, which, if we have caught counsel's meaning, is this: That the jurisdiction of the board of county commissioners to establish a road can only be invoked by petition; that the revised alignment of the road across relators' land as contained in the engineer's amended report and adopted by the board upon the hearing of May 28, 1917, was insufficient to confer jurisdiction upon the board to adopt that alignment, in that no new petition was filed and the southerly terminus of the road was shifted; that therefore the court was without jurisdiction to entertain the preliminary proceedings in condemnation to determine the questions of public use and necessity.

There are two sufficient answers to this argument. In the first place, the county commissioners had, under the statute, jurisdiction of the general subject-matter, viz. the establishing of roads. Rem. Code, § 5623-1, et seq. The commissioners in the exercise of this jurisdiction by their original order of October 9, 1916, made upon a hearing after having acquired jurisdiction of the persons whose property would be affected, by notice as required by law (Rem. Code, § 5633), found that on February 10, 1914, a petition signed by the required number of householders had been presented, together with the bond required by law. The bond itself appears in the record. So far as the record shows, no proceeding of any kind was ever instituted to review this order. It cannot be attacked collaterally in this proceeding. State ex rel. Pagett v. Superior Court, Pierce County, 47 Wash, 11, 91 Pac. 241; State ex rel. Murhard v. Superior Court, Clarke County, 49 Wash. 392, 95 Pac. 488. On the record before us it must be taken as true. It is obvious therefore that, even upon relators' assumption that the petition is jurisdictional, the jurisdiction of the commissioners to establish the road was amply established.

[4] Relators' assertion that the commissioners had no jurisdiction to enter the order of May 28, 1917, in that no new petition was filed requesting the change, has no foundation in the present law. The statute (Rem. Code, § 5627) empowers the county engineer to survey any other route than that described in the petition, which will subserve the same purpose, and make a report thereon. He is not even required to observe the terminal points proposed in the petition. amended report was authorized by this sec-Notice of a hearing on this report was given to relators as required by section 5633, a hearing was had thereon, and the order adopting the change was entered in all respects as required by section 5634. The statute plainly gives to the commissioners a broad latitude to adopt, upon the recommendation of the engineer and on notice and a hearing, the most feasible route for the road which will subserve the same purpose as the route described in the petition, and this without any new petition so requesting. In proceedings under the law in force now and when these proceedings were had, contrary to those under the old territorial statute, the petition is not relied upon as notice to the landowners as to the exact route the road will finally take. Specific notice to the landowner is now given, and he is accorded a hearing by the board on that question. The reference in the petition to terminal points and course is no longer jurisdictional. Chelan County v. Navarre, 38 Wash, 684, 80 Pac. 845.

[5] In the second place, the petition is now in no sense jurisdictional. By the act of 1911 (Rem. Code, § 5623-2), the commissioners themselves are empowered by unanimous vote to initiate the proceedings to establish any road without any petition, and under section 5623-2 may after notice and a hearing adopt any route therefor found most practicable by the engineer. There was evidence that the commissioners were unanimous in the relocation of the road here involved. In every view of the matter, therefore, the commissioners were proceeding within their plain statutory powers when they established this road. We cannot review their proceedings in a search for mere irregularities in this case where they are only collaterally involved. State ex rel. Pagett v. Superior Court, supra; State ex rel. Murhard v. Superior Court, supra. The sole question here is that of public use, and it is elementary that use for a public highway is a The court had jurisdiction of public use. the subject-matter and acquired jurisdiction of the persons of relators by proper service.

The order under review is affirmed. The stay of proceedings pending this hearing, heretofore granted by this court, is vacated.

FULLERTON, PARKER, MAIN, and WEBSTER, JJ., concur.

STATE ex rel. MARTIN v. SUPERIOR COURT OF KING COUNTY et al. (No. 14658.)

(Supreme Court of Washington. April 10, 1918.)

1. Mandamus & 4(1)—Erroneous Dismissal —Remedy by "Appeal,"

Where a cause has been erroneously dismissed by an inferior court for want of jurisdiction, mandamus is the proper remedy to compel that court to assume jurisdiction; for judgment of dismissal under the mistaken belief that the court has no jurisdiction, being in no sense a judicial act, but resting upon a disclaimer of the judicial function, is not a judgment which ought to be reviewed on appeal, which is a remedy for the correction of judicial errors in the exercise of the court's functions, either of discretion or determination.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Appeal.] 2. Courts ==1-"Jurisdiction."

"Jurisdiction" is the power to hear and determine, being the power whereby courts take cognizance of and decide cases (quoting Words and Phrases, Jurisdiction).

RESTORATION TO SANITY—JURISDICTIONS—
RESTORATION TO SANITY—JURISDICTION.
Notwithstanding repeal by Probate Code of 1917 (Laws 1917, p. 642) of Rem. Code 1915, § 1671, giving superior court jurisdiction to discharge one committed as insene upon determinant of the control of th ing his sanity, and the enactment in 1915 of Rem. Code, \$ 5967, giving superintendent of any hospital for the insane power to discharge a any hospital for the insane power to discharge a patient on finding him sane, the inherent power of the superior court, as a court of equity, to discharge a person committed as insane, is not taken away, since it exists independently of statute; but it exists concurrently with the jurisdiction given insane hospital superintendents, and is peculiarly applicable where the patient is not confined in charge of such a superintend-ent, but is at large under parole by committing court.

4. Equity 437 — Power of Court — En-FORCEMENT OF DECREES.

A court of equity has power not only to debut to enforce its decrees in its own way, in the absence of a definite procedure.

Mount and Parker, JJ., dissenting.

Department 2. Original application for writ of mandate by the State of Washington, on the relation of Mary I. Martin, as next friend of Judge R. Andrews, against the Superior Court of King County, Wash., and John S. Jurey. Writ to issue.

Davis & Neal, of Tacoma, for appellant. Jas. B. Kinne, of Seattle, for respondents.

CHADWICK, J. This is an application for a writ of mandate to compel the respondent superior judge to take jurisdiction of, and hear, the petition of the relator, who appears as the next friend of Judge R. Andrews, who is under the parole of a superior judge of King county as an insane person. Relator filed his petition in the original proceeding, setting up the present sanity of Andrews, and asking the court to so declare by order or indgment.

The wife of Andrews, who had theretofore been appointed as his guardian, appeared by

matter coming on regularly to be heard, the court entertained a plea to the jurisdiction of the court to hear the petition, and held that the superior court was without jurisdiction to hear and determine. At the request of counsel a judgment of dismissal was withheld until application could be made to this court for a writ of mandate.

[1] Although counsel waives all question as to the propriety of granting the writ, we have not been able to overcome the objection sua sponte of at least one member of the department that the writ should not issue for the reason that relator has an adequate remedy by appeal. It is said that the writ cannot issue without overruling certain decisions of this court. It seems to the writer and his associates who join in this opinion that a writ may issue. But for the objection, we have thought that the right of a court to direct an inferior court to assume jurisdiction in a proper case, where jurisdiction had been denied, and to hear and determine, had never been questioned.

[2] Jurisdiction is the power to hear and determine. It is the power by which courts take cognizance of and decide cases.

"Jurisdiction is of two sorts—jurisdiction over the subject-matter, and jurisdiction over the party with reference to that subject-matter." Words and Phrases, vol. 4, p. 3884.

"It is settled beyond controversy that, where a court, acting on an erroneous view of the law declines jurisdiction of a cause, mandamus will lie to compel it to take Note Ann. Cas. 1915D, 199. cognizance thereof.

See, also, 26 Cyc. 190 et seq.

It was "one of the ancient offices of this writ

to compel action by lower judicial tribunals respecting matters properly before them
and within their jurisdiction. If such courts decline to exercise their judicature or to decide matters pending before them, mandamus has almatters pending before them, mandamis has always been regarded as the appropriate means by which to set in motion their jurisdictional power. It lies to compel the performance of whatever appertains to the duty of lower courts, where there has been for any reason a refusal to act. Its agency in cases of this class is confined to setting in motion the judicial activities so that a decision will be reached, but it does not that a decision will be reached, but it does not extend to any direction as to what that decision ought to be." Crocker v. Justices of Superior Court, 208 Mass. 162, 94 N. E. 369, 21 Ann. Cas. 1061.

It was so held in State ex rel. Shannon v. Hunter, 3 Wash. 92, 27 Pac. 1076, where the court, although admitting a doubt, which to us seems fanciful, held on authority that "the proper remedy where a cause has been erroneously dismissed for want of jurisdiction is mandamus." This case was followed in State ex rel. Maltby v. Superior Court, 7 Wash. 223, 34 Pac. 922. In this case the court says the rule rests in the highest authority. Of this there can be no question. It may be questioned whether any authority can be found to the contrary. See, also, State ex rel. Smith v. Parker, 12 Wash. 685, 42 Pac. 113; State ex rel. Smith v. McClinton. counsel and demurred to the petition. The 17 Wash. 45, 48 Pac. 740. Lack of space

permits the citation of but few of scores of cases. The rule is recognized by every textwriter, and may be found in every encyclopedia.

Says Mr. High in his Extraordinary Legal Remedies:

"The jurisdiction by writ of mandamus over inferior judicial tribunals, although closely guarded and jealously exercised by the courts, is too well established to admit of controversy, and forms one of the most salutary features of the general jurisdiction of the courts by mandamus. It is most frequently invoked for the purpose of setting inferior courts in motion, and to compel them to act when action has been either refused or delayed. The earlier remedy, adopted in England, for the refusal or neglect of justice on the part of the courts, was by writ of procedendo ad judicium. This was an original writ, issuing out of chancery, to the judges of any subordinate court, commanding them in the king's name to proceed to judgment, but without specifying any particular judgment. If this writ was disobeyed, or if the judges to whom it was addressed still neglected or refused to act, they were liable to punishment for contempt, or by an attachment returnable either in the king's bench or in the common pleas. The use of the writ of procedendo for the purpose of quickening the action of inferior courts, and preventing a delay of justice, has in modern times been superseded by the writ of mandamus. And the latter is now regarded as the proper, if not the only, remedy by which the sovereign power may compel the performance of official duty by inferior magistrates and officers of the law." High, Extraordinary Legal Remedies, §5 147, 148.

See Spelling on Injunction and Other Extraordinary Remedies (2d Ed.) § 171; Works on Courts and Their Jurisdiction, p. 620; Merrill on Mandamus, §§ 36 and 203; Tapping on Mandamus, § 154.

The theory advanced against the weight of authority is: If a court has no jurisdiction, it must be granted that it has jurisdiction to hold that it is without jurisdiction, and, this being so, a refusal of a court to take jurisdiction is no more than error, and, like any other error, is to be corrected on appeal. Of all the text-writers, Mr. Bailey in his work on Jurisdiction is the only one who seems to lend sanction to this theory. He says:

"Some courts make the distinction that, where the court entertains jurisdiction, then its decision cannot be controlled, but, where it refuses to exercise jurisdiction, it may be compelled. On first impression it would seem that, where the jurisdiction of the court is invoked by petition or other proceeding, and the court entertains the proceeding to the extent of acting upon it and determining its sufficiency or insufficiency, it has assumed jurisdiction, and, though its determination may have been erroneous, this is but an error of judgment, that it has exercised its judgment and discretion, which is not subject to review by mandamus, and that ordinarily such error may be corrected upon appeal or by writ of error. Where, however, such determination cannot be reviewed, then the writ might issue to prevent a failure of justice." Bailey on Jurisdiction, § 594.

This he advances without authority or color of authority. While citation of authority would not make it good law if it were bad, like many first impressions, it will not stand the test of reason. It will not go on

paper, and this, we suspect, is why it finds no mention in the books.

It is fundamental that a higher court will not control the judicial acts of an inferior court. It will not invade the realm. Its prime function is to review for error. The first consideration then must be to determine the character of the act of the inferior court. Is a judgment of dismissal based upon a denial of jurisdiction over a subject-matter a judicial act in the sense that it is a judgment which ought to be reviewed on appeal?

A dismissal under the mistaken belief that the court has no jurisdiction is in no sense a judicial act; for it rests upon a disclaimer of the judicial function. The court has neither heard nor determined. Neither the law nor the facts are affected in the slightest degree, and, appeals being for the correction of judicial errors, errors of discretion or of the judicial mind, it follows that one entitled should have resort to some method by which the court can be set in motion. The court has done nothing which is either judicial or discretionary. It has refused to do either. Its judgment is nullus fillius, a void thing, binding no one, a legal nonentity.

"Where an action is dismissed on the sole ground that the court has no jurisdiction of the subject-matter of the suit, \* \* \* this is, of course, no adjudication of the merits and no bar to another action for the same cause." Black on Judgments (2d Ed.) § 713.

In Cowan v. Fulton, 23 Grat. (Va.) 579, the court denied its jurisdiction upon the ground that the act relied on to sustain it was unconstitutional. It was held that a writ should issue, the court saying:

"But it is insisted that, conceding the law referred to to be constitutional, still the judgment of the circuit court dismissing the cause for want of jurisdiction and striking it from the docket is a final judgment in the cause; and, the term at which this supposed judgment was rendered having passed by, it is not competent to the appellate court, by mandamus, to compel in offer a wheating of the cause.

in effect a rehearing of the cause.

"If the premises were true, the conclusion might perhaps be conceded; for it certainly is not regular nor proper to use the writ of mandamus to review or rehear the judgments of a subordinate court; but the fallacy of the argument consists in the assumption that there was a judgment in the cause; whereas the court positively and unequivocally refused to pass on it at all, either 'to review, reverse, or affirm the judgment,' and merely directed 'that the cause be dismissed and stricken from the docket.' It was a simple refusal to hear and decide the case; and, this court having held that no appeal lies from such refusal, it is exactly the case to which the highly remedial writ of mandamus is most frequently applied, in order to prevent a defect or failure of justice.

lies from such refusal, it is exactly the case to which the highly remedial writ of mandamus is most frequently applied, in order to prevent a defect or failure of justice.

"Original jurisdiction to award writs of mandamus upon these principles of the common law has been conferred on this court by the Constitution and laws of the state; and in accordance therewith we say to the judge of the circuit court of Pulaski that he has the constitutional power to hear and finally dispose of the cause referred to, as by an appellate court; and that it is his duty so to do."

bad, like many first impressions, it will not every party has a right to a judgment of the

court, and that the writ will issue in a case where an inferior court has improperly dismissed a cause under a disclaimer of power to entertain jurisdiction of the subject-matter, and the case will be reinstated with instructions to try and determine. Ex parte Bradstreet, 7 Pet. 647, 8 L. Ed. 810. It is also held that a refusal of a court to take jurisdiction, it having jurisdiction, is not a final judgment in the sense which authorizes a writ of error, and the remedy is properly by way of mandamus. Railroad Co. v. Wiswall, 23 Wall. 507, 23 L. Ed. 103. This decision was afterwards overcome by a statute which gave a right of review by writ of error. A later statute took away both remedies and made the order final. The case nevertheless stands as an authority upon the principle involved. It is a judicial expression as distinguished from the later expressions of the legislative body.

In People v. Swift, 59 Mich, 529, 26 N. W. 694, the lower court had quashed certain indictments under the mistaken notion that it had no jurisdiction. It was contended that a writ of error was the proper remedy. Here that appeal is the proper remedy. So that we have the same case, for the office of the two remedies is the same, to reverse, modify, or affirm. The court said:

"Judgment on a writ of error in such a case would merely vacate the order to quash, and while, no doubt, the recorder's court would in such case proceed, yet the real purpose of this application is to speed the trial, and a mandamus seems more fitting than a writ of error where that duty would be inferred rather than expressed.

The dialogue between Lord Ellenborough and counsel reported in King v. Justices of Kent, 14 East, 395, is of interest:

"Lord Ellenborough, C. J. \* \* If the justices had rejected the application in the exercise of the discretion vested in them by Legislature, this court would not interfere; but if they had rejected it on the ground now stated, they had no power to grant it, the court would interfere so far as to set the jurisdiction of the

terfere so far as to set the jurisdiction of the magistrates in motion, by directing them to hear and determine upon the application. The court therefore granted a rule to shew cause, etc.

"Park, Taddy, and Berens now shewed cause against the rule, and first said that the justices in session had heard the application made by counsel on the part of the journeymen millers; but they also admitted that the counsel who opposed it had insisted that by the construction which had been put upon the act of Elizabeth the discretion of the magistrates in the assessment of wages was confined to laborers and servents. ment of wages was confined to laborers and servants in husbandry, and that the sessions had on that ground rejected the application. Upon which Lord Ellenborough, C. J., observed that it was evident that the magistrates had never exercised their discretion at all upon the question whether the application was fit to be granted or not, but appeared to have considered that they had no jurisdiction to hear it; therefore they could not be said to have already heard the application.

"We do not, however, by granting this mandamus, at all interfere with the exercise of that discretion which the Legislature meant to confide to the justices of the peace in sessions: we only say that they have a discretion to exercise."

tion: but, having heard it, it rests entirely with them to act or not upon it as they think fit."

It is clearly demonstrable that the law is settled by the great weight of authority that a court will supervise a lower court to the extent that it will compel it to take jurisdiction where it has erroneously denied its jurisdiction.

Coming now to our own decisions, in State ex rel. Martin v. Superior Court, 97 Wash. 358, 166 Pac. 630, L. R. A. 1917F, 905, we endeavored to show that in most of the cases where a writ had been denied it was because of the holding that appeal was an adequate remedy. And we think in all of them the jurisdiction of the court over the subject-matter was not questioned. It may be said that the genesis of all the subsequent confusion and conflict, or apparent conflict, in our own decisions is in the case of State ex rel. Townsend Gas & Electric Co. v. Superior Court, 20 Wash. 502, 55 Pac. 933. We have had resort to the original briefs, and can say, in addition to what we said of it in the Martin Case, that the question put by counsel to the court was not whether a court would compel an inferior court to take jurisdiction of a case where jurisdiction had been disclaimed, but whether the court would compel the satisfaction of a judgment through the process of a contempt proceeding pending an appeal upon the merits. The court was exercising an acknowledged jurisdiction: it had passed on the merits. Its judgment, if ill founded, rested in error, and the writ was properly denied. There is certainly nothing in the decision when read with the record in mind that makes it an authority against our holding. Upon the authority of that case, this court refused in two subsequent cases to compel the superior court to take jurisdic-State ex rel. Barbo v. Hadley, 20 Wash. 520, 56 Pac. 29; State ex rel. McIntyre v. Superior Court, 21 Wash. 108, 57 Pac. 852.

Next in order is State ex rel. Romano v. Yakey, 43 Wash. 15, 85 Pac. 990, 9 Ann. Cas. 1071. Application was made to a justice of the peace for the issuance of a criminal warrant. The justice denied the warrant upon the false assumption that he had no power to issue the warrant, maintaining under the statutes that his act would be an interference with the duties of the prosecuting attorney. Although the writ was denied because directed to a judge by name, and not to the court, this court said:

"Section 6695, Bal. Code (P. C. § 3114), permits any person to make complaint that a criminal offense has been committed, and if the mag-istrate to whom the complaint is made wrongfully refuses to act in the matter, we think the party applying for the warrant has a sufficient interest in the performance of the public duty

"Section 6695, supra, under which the applica-tion for the warrant in this case was made, provides that complaint may be made to a jus-tice of the peace or judge of the superior court. Had this application been made to the superior eise; and therefore they must hear the applica-| court of King county, we would find no obstacle

in the way of running a writ against that court."

The next case, and one which may be cited as an authority against us, is that of State ex rel. Piper v. Superior Court, 45 Wash. 196. 87 Pac. 1120. There the judge of the superior court refused to proceed with the trial of a case. A writ of mandamus was refused. But the case does not rest upon, nor does it do violence to, the broad principles which we are asserting. The judge refused to proceed because the service had been made by publication, when the law made no provision for such manner of service in that kind of a case. The court acted judicially. It adjudged a fact and construed a law. It determined from the record that the statutes providing for the service of the process of the court had not been complied with. This clearly was a matter resting in error, and was reviewable by appeal.

In the case of State ex rel. Murphy v. Superior Court, 73 Wash. 507, 131 Pac. 1136, the Piper Case was relied upon as authority. It was distinguished. This case, in our opinion, does not bear directly one way or the other upon the case we have at bar; for the mandamus was sought to compel the court to proceed with the trial of the case, or to enter a judgment of dismissal. The court had to a certain extent exercised its jurisdiction.

It is agreed by all text-writers, and has been affirmed by this court, that a writ of prohibition is the counterpart of the writ of mandate. The one is directed to compel action; the other to prohibit it.

In State ex rel. Wood v. Superior Court, 76 Wash. 27, 135 Pac. 494, the superior court was proceeding to hear and determine a will contest which had been begun after the time fixed by our statutes for the contest of a will. In other words, the court had no jurisdiction to hear and determine. Proceeding upon the theory that the question raised by the record rested in the definition of that term as a thing absolute, and not as resting in the determination of some fact, or whether the court had obtained jurisdiction of the person through a proper compliance with the statutes providing for the manner of bringing parties into court, or acquiring jurisdiction of a subject-matter admittedly within the jurisdiction of the court, we said:

"It is contended that there is a plain, speedy, and adequate remedy by appeal, and for that reason the writ in any event should not issue. But the law appears to be that, where the court is proceeding with a case without first having acquired jurisdiction, it presents a proper case for the invocation of the writ of prohibition. White v. Superior Court, 126 Cal. 245, 58 Pac. 450; State ex rel. Alladio v. Superior Court, 17 Wash. 54, 48 Pac. 733; State ex rel. Mackintosh v. Superior Court, 45 Wash. 248, 88 Pac. 207. In the case last cited, speaking of the proper function of the writ, it is said: "The function of a writ of prohibition is to arrest proceedings which are without, or in excess of, jurisdiction, and not to review errors in matters of procedure where jurisdiction exists."

But if after all it be said with any assurance that we have held to the contrary of our present position, it can be said with the same assurance that we have as often held the other way. We have not always differentiated between inherent power to hear and power to proceed. This has resulted in a confusion in our decisions. With this distinction preserved, the law is clear. there is a lack of inherent jurisdiction in the court itself, a writ of prohibition will lie to restrain it from further proceedings; or, where the court has erroneously decided that such inherent jurisdiction is lacking. mandamus will lie to compel it to entertain the cause and to hear and determine. Where, however, the question is whether the court, acting within the scope of its admitted jurisdiction, has acquired jurisdiction over the parties or the particular subject-matter, the writ will not issue. In such a case the court is exercising its judicial function in passing on the question, not whether it has inherent jurisdiction, but whether it has acquired jurisdiction or a right to proceed within the limit of an admitted jurisdiction. If in the exercise of its discretion or judgment, it commits error, the proper remedy is by appeal, and not by writ of prohibition or mandamus. Viewed in this light, the decision in the Piper Case is entirely consistent; for there the court did not hold that it lacked jurisdiction inherently, but simply that its jurisdiction had not been properly invoked.

[3] That the court has jurisdiction of the subject-matter of this case and ought to hear the petition of the relator, and enter a judgment upon the issues tendered by the answer of the guardian, we have no doubt. Counsel admits that prior to the enactment of the Probate Code of 1917 (Laws 1917, p. 642) the court, acting in probate, had jurisdiction to inquire into the sanity of a person who had been adjudged to be insane. Rem. Code, § 1671, which was repealed by the act of 1917, read as follows:

"Whenever the court shall receive information that such ward has recovered his reason, he shall immediately inquire into the facts, and if he finds that such ward is of sound mind, he shall forthwith discharge such person from care and custody; and the guardian shall immediately settle his accounts and restore to such person all things remaining in his hands belonging or appertaining to such ward."

The act of 1915 (Rem. Code, § 5967) providing for the commitment of insane persons provides:

"Whenever in the judgment of the superintendent of any hospital for the insane any person in his charge shall have so far recovered as to make it safe for such patient and for the public to allow him to be at large, the superintendent may parole such patient and allow him to leave such hospital, and whenever in the judgment of the superintendent any patient under his charge has become sane, mentally responsible and probably free from danger of relapse or recurrence of mental unsoundness, the superintendent shall discharge such patient from the hospital."

In the same section it is provided that a judge of the superior court may recommit any person who has been paroled by the superintendent of the hospital. The superior courts of this state are courts of general jurisdiction. They have power to hear and determine all matters, legal and equitable, and all special proceedings known to the common law, except in so far as these powers have been expressly denied. The power of the court to discharge a person committed as insane did not depend upon the statute which has been repealed. The court had inherent jurisdiction independent of statute. power of a court to discharge or commit an insane person is an inherent power of a court of equity. It is derived ex necessitate from the commonwealth. It rests in the sovereignty just as it rested in the king at common law, and is exercised now by a court of equity just as it was then exercised through the courts of chancery. If the power is bestowed upon another tribunal or person, it does not follow that the court is deprived of its jurisdiction. For the same reason of necessity it is held that the granted jurisdiction is cumulative and concurrent with that of a court of chancery. re Sall, 59 Wash. 539, 110 Pac. 32, 626, 140 Am. St. Rep. 885; 14 R. C. L. 554-556; 22 Cyc. 1120. That the superior court has such general powers has been held in the following cases: Moore v. Perrott, 2 Wash. 1, 25 Pac. 906; Krieschel v. Board of Com'rs, Snohomish County, 12 Wash. 428, 41 Pac. 186; Filley v. Murphy, 30 Wash. 1, 70 Pac. 107; Reformed Presbyterian Church v. McMillan, 31 Wash. 643, 72 Pac. 502; In re Sall, 59 Wash. 539, 110 Pac. 32, 626, 140 Am. St. Rep. 885: In re Ostlund's Estate, 57 Wash. 359, 106 Pac. 1116, 135 Am. St. Rep. 990; Sloan v. West, 63 Wash. 623, 116 Pac. 272; Alaska Banking & Safe Deposit Co. v. Noyes, 64 Wash. 672, 117 Pac. 492; State ex rel. Keasal v. Superior Court, 76 Wash. 291, 136 Pac. 147; In re Martin's Estate, 82 Wash. 226, 144 Pac, 42; Ritchie v. Trumbull, 89 Wash. 389, 154 Pac. 816. If this be so, it follows that the repeal of section 1671 did not in any way affect the jurisdiction of the court to inquire into the sanity of a person who may be committed or paroled.

[4] The power of the court to act independently of the statute is really confessed by counsel; for he grants that the court would have power to hear the issues tendered by the petitioner if he had brought a habeas corpus proceeding. If the court under its general equity powers has jurisdiction over insane persons, the remedy or procedure is a matter of secondary consideration; for a court of equity has power not only to decree, but to enforce its decrees in its own way in the absence of a definite procedure. We so held in Re Sall, supra, where we upheld the appointment of a guardian for the estate of a nonresident ward in the absence of any statute or procedure.

In the case at bar Andrews was not confined to the hospital, but was out on a parole granted by one of the judges of the superior court of King county; and although it might be held that, when an insane person is confined and in charge of the superintendent of a hospital, he might be required, in the interest of a more orderly procedure, to claim his exemption from restraint by first applying to the superintendent of the hospital, it should not be held when the petition shows that the patient is not so restrained, but is at large under a parole issued by the committing court.

No other question in the case was considered by respondent. We will not therefore anticipate them pending an appeal after a trial upon the merits.

The writ will issue.

ELLIS, C. J., and HOLCOMB, J., concur.

MOUNT, J. (dissenting). I cannot agree that this is a case for the issuance of the writ of mandate, Our statute provides, at section 1014, Rem. Code, that:

The writ "may be issued by any court, except a justice's or a police court, to any inferior tribunal, \* \* \* to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station. \* \* \* "

And at section 1015:

"The writ must be issued in all cases where there is not a plain, sneedy and adequate remedy in the ordinary course of law."

This court, in State ex rel. Miller v. Superior Court, 40 Wash. 555, 82 Pac. 877, 2 L. R. A. (N. S.) 395, 111 Am. St. Rep. 925, laid down the rule, in accordance with the statute, that these extraordinary writs would not issue in cases where there was a plain, speedy, and adequate remedy by appeal. We there said:

"We again announce the rule that the adequacy of the remedy by appeal, or in the ordinary course of law, is the test to be applied by this court in all applications for extraordinary writs, and not the mere question of jurisdiction or lack of jurisdiction, and that the adequacy of the remedy by appeal does not depend upon the mere question of delay or expense. There must be something in the nature of the action or proceeding that makes it apparent to this court that it will not be able to protect the rights of the litigants or afford them adequate redress, otherwise than through the exercise of this extraordinary jurisdiction.

"We desire to say in conclusion that the court is declaring no new rule at this time. The rule now adhered to has been the established one in this court since the decision in State ex rel. Townsend Gas, etc., Co. v. Superior Court [20 Wash. 502, 55 Pac. 933] supra, and ever since the announcement of that decision the court has uniformly treated the cases cited by the relator as overruled. To avoid further misunderstanding, the cases of State ex rel. Cummings v. Superior Court [5 Wash. 518, 32 Pac. 457, 771], State ex rel. Campbell v. Superior Court [7 Wash. 306, 34 Pac. 1103], State ex rel. Allen v. Superior Court [9 Wash. 668, 38 Pac. 206], and State ex rel. Stockman v. Superior Court [15 Wash. 366, 46 Pac. 395] supra, and all other decisions of this court which make the question of the jurisdiction of the court below the sole

test of jurisdiction in this court, on applications of this kind, are hereby overruled."

It was stated there, in language as apt as may be readily conceived, that these extraordinary writs will not be issued where there is a plain, speedy, or adequate remedy by appeal, and we have steadfastly, since that time, held to that rule, with the possible exception of cases where the court has erred in granting or refusing to grant a change of venue; and in those cases we have held that the remedy by appeal was inadequate, and for that reason alone have issued writs of mandamus and prohibition. It is not claimed in this case, and cannot reasonably be claimed, that the relator here does not have an adequate remedy by ap-As stated in the majority opinion, Mr. Andrews was adjudged to be insane. His wife was appointed guardian of his person and estate. Afterwards Mr. Andrews was paroled to the care of his daughter, who filed an application in the lower court, alleging that his reason had returned, and praying the court to adjudge him again sane and to order the guardian to turn his property over to him as a sane person. In answer to this petition Mrs. Andrews filed a demurrer, and upon the hearing of that demurrer the trial court construed a statute (Rem. Code, § 5967) to mean that the superior court did not have jurisdiction to determine whether the insane person was restored to sanity, and for that reason sustained the demurrer, and was about to dismiss the petition. If we may assume that the trial court erred in the construction of the statute referred to, and because of that error dismissed the application, or was about to do so, it is clear that the relator has as plain, speedy, and adequate a remedy by appeal as in any other case. Suppose that the simplest form of action is brought upon a promissory note. Suppose the defendant demurs to the complaint upon the ground that the court has no jurisdiction over the subject-matter. Suppose the court, in ruling upon the demurrer, construes a statute and sustains the demurrer to the complaint, and is about to dismiss the action. Can it be said that the plaintiff in such action has no plain, speedy, or adequate remedy by appeal, and therefore may review the error by mandamus? I think not. And yet the relator's remedy here is just as plain, just as speedy, and just as adequate as in the supposed case. In State ex rel. Langley v. Superior Court, 74 Wash. 556, 134 Pac. 173, where we referred to a former opinion in that same case, 73 Wash. 110, 131 Pac. 482, holding that certain orders could not be reviewed in advance of final judgment, we said:

"The basis of the majority opinion was that the relators had an adequate remedy by appeal. This, indeed, is the true test in all applications for extraordinary writs. State ex rel. Korsstrom v. Superior Court, 48 Wash. 671, 94 Pac. 472; State ex rel. Carrau v. Superior Court, may be a speedy and easy way of reviewing

30 Wash. 700, 71 Pac. 648; State ex rel. Egbert v. Blumberg, 46 Wash. 270, 89 Pac. 708; State ex rel. Gabe v. Main, 66 Wash. 381, 119 Pac. 844; State ex rel. Townsend Gas & Elec. Light Co. v. Superior Court, 20 Wash. 502, 55 Pac. 933. The authorities are unanimous to the effect that neither a writ of mandate nor other extraordinary writ can be used to perform the office of an ameal to review the judicial action of an inferior tribunal."

There is no showing in this record, and none was attempted upon the oral argument. that any emergency exists, or that there is any danger of any rights or any property being lost by whatever delay may occur upon an appeal, should one be taken; but the relator comes here insisting that the writ should issue nevertheless. If the writ may issue in this case, then it may issue in all cases where a general demurrer which goes to the jurisdiction either of the person or of the subject-matter is sustained to a complaint. The issuance of the writ in this case again opens the door to appeals by writs of mandamus, and not in the ordinary way. This is what we sought to avoid when we announced the rule in State ex rel. Miller v. Superior Court, supra. I agree that jurisdiction is the power to hear and determine causes. The trial court exercised that power. It decided the case upon a question of law. If that decision was erroneous, it may be reviewed by ordinary appeal. Tf the decision was right, it disposes of the case. I agree that the office of the writ of mandamus is to compel inferior tribupals to exercise their jurisdiction. The lower tribunal has acted in this case and exercised its jurisdiction. I agree that prior to State ex rel. Miller v. Superior Court, supra, this court had issued writs of mandamus where there was a remedy by appeal. But, as stated in that case, all those decisions were overruled where the question of jurisdiction of the court below was the sole test of jurisdiction in this court, and the quotation from the Langley Case, supra, shows that the rule has been adhered to where there was a remedy by appeal. The general rule in other states may be that errors of this kind may be reviewed by a writ of mandamus, but that is not the rule in this court, and we have frequently so held, because the statute of this state controls, and provides that such writs may be issued only where there is not a plain, speedy, and adequate remedy by appeal. In the cases referred to in the majority opinion, even in State ex rel. Martin v. Superior Court, 97 Wash. 358, 166 Pac. 630, L. R. A. 1917F, 905, which was a change of venue case, we concluded that there was no plain. speedy, and adequate remedy by appeal, and for that reason writs were issued. I would readily concede in this case that, if there was no adequate remedy by appeal, then it would be a proper case for the issuance of the writ. I agree, of course, that the extraordinary writ of prohibition or mandamus

until the majority opinion becomes the law and reads out of the statute section 1015, as it undoubtedly does, and overrules State ex rel. Miller v. Superior Court, supra, and numerous other cases holding to the same effect. I must withhold my concurrence in that practice.

PARKER. J. concurs with MOUNT. J.

McRAE v. ANGELES BREWING CO. et al. (No. 14228.)

(Supreme Court of Washington. April 22, 1918.)

1. Replevin 4=45-Duties of Levying Of-

Where sheriff held property under writ of replevin and no redelivery was ever given, it became his duty after three days, and on paynent of his costs, to turn the property over to the plaintiff in replevin.

2. INDEMNITY 6-14-REPLEVIN BOND-SHEB-IFF'S BONDSMAN-NOTICE TO DEFEND. Where brewing company brought replevin

brought replevin and obtained the property after the levy, as-signing it to its successor, and the replevin defendants obtained a judgment for the property against the sheriff, and also got judgment against the sheriff, and also got judgment against the surety on the replevin bond, which was paid, and the surety filed claim with the receiver for the brewing company, which was allowed, and the surety on the receiver's official bond paid the amount of the claim and sued the sheriff's bondsman, notice to the brewing company and the receiver's bondsmen of the action, with demand that they defend it, did not obligate them to pay the judgment therein unless they were liable over either by express contract or operation of law.

3. Indemnity 4-14-Replevin Bond-8 111'8 Bondsman-Defense of Action.

INF'S BONDSMAN—DEFENSE OF ACTION.
In such case, there being no express contract and no liability arising by operation of law because the sheriff at the request of the brewing company turned over the property in keeping with his duty, the brewing company and the receiver's bondsmen were not required to defend to defend.

Department 1. Appeal from Superior Court, King County; Walter M. French,

Action by Donald McRae against the Angeles Brewing Company and another. Judgment dismissing the action, and plaintiff ap-Affirmed.

Hathaway, Beebe & Hathaway, of Everett, for appellant. Edgar C. Snyder and Frank A. Steele, both of Seattle, for respondents.

MAIN, J. The plaintiff brought this action for the purpose of recovering the amount of a judgment and costs which had previously been rendered against him as sheriff of Snohomish county, which judgment, it is claimed, resulted from the levy of a writ of replevin upon certain personal property. When the cause came on for trial, the defendants demurred ore tenus to the complaint, and objected to the introduction of any evidence in

errors which occur in the trial court, but was stated. After argument, the position of the defendants was sustained. The plaintiff thereupon declined to plead further, and elected to stand upon the complaint; and a judgment was entered dismissing the action. From this judgment the plaintiff appeals.

The controlling facts in the complaint may be stated as follows: The Angeles Brewing & Malting Company was a corporation organized and existing under the laws of this state. On April 18, 1910, this company being financially embarrassed, one J. F. Janecke was appointed a receiver therefor. The surety on the receiver's official bond was the Fidelity & Deposit Company of Maryland. On the 26th day of March, 1913, the receiver commenced an action in the superior court of Snohomish county for the recovery of certain personal property which he claimed belonged to the Angeles Brewing & Malting Company. The defendants in this action were A. E. Kick and wife. When the action was instituted, the receiver gave a bond in replevin upon which the National Surety Company was surety. When the bond was filed, a writ of replevin was issued and delivered to the appellant as sheriff of Snohomish county, and he immediately took possession of the property in dispute in the action. While the replevin action was pending, the receiver for the Angeles Brewing & Malting Company sold and transferred the assets of that company to the Angeles Brewing Company, a corporation. A part of the property covered by this transfer was that in dispute in the replevin action. On June 30, 1913, E. C. Snyder, acting as the agent or attorney for the Angeles Brewing Company, requested the appellant to turn over to the latter company the property which he held under the writ of replevin. This was done. Subsequently the replevin action went to trial and resulted in a finding that Kick and wife were the owners of the property in dispute in the replevin action; and the judgment ordered the return thereof to them, and that in the event of failure to return the property judgment be entered for \$250 and the costs against the plaintiff in that action. The property was not returned, and the judgment was so entered. This judgment not being paid by the receiver, who was the plaintiff in the action, a judgment was obtained against the National Surety Company, the surety on the replevin bond, for \$297.92, which judgment was paid by the surety company. On the 26th day of August, 1914, the National Surety Company filed a claim for the amount of this judgment, and the costs which it had sustained, with the receiver for the Angeles Brewing & Malting Company. This claim was subsequently allowed by the receiver. Thereafter, the Fidelity & Deposit Company, the surety on the receiver's official bond, paid to the National Surety Company, support thereof because no cause of action the surety on the replevin bond, the amount

of the claim, and took an assignment thereof. On the 8th day of January, 1916, the Fidelity & Deposit Company of Maryland instituted an action against the appellant to recover the amount paid by it to the National Surety Company, and recovered a judgment against the appellant and the United States Fidelity & Guaranty Company, the surety on his official bond as sheriff. After this action had been begun, notice thereof was given to both of the respondents, coupled with the demand that they defend the action. This they did not do. Subsequently, and on the 8th day of May, 1916, judgment was rendered against the appellant and the surety on his bond in the sum of \$441.82. The present action was begun to recover from the respondents the amount of this judgment.

[1] The theory of the complaint, if we have correctly interpreted it, is that the property in dispute in the replevin action was wrongfully and fraudulently obtained by the Angeles Brewing Company while that action was pending. As we view it, however, the representations at the time the property was delivered to the Angeles Brewing Company are immaterial. At that time the appellant held the property under a writ of replevin and no redelivery was either theretofore or thereafter given. Consequently, it became his duty, upon the expiration of three days and the payment of his costs, to turn the property over to the plaintiff in the replevin action, the receiver for the Angeles Brewing & Malting Company.

[2] But the receiver had prior to this time sold and transferred the property to the Angeles Brewing Company. Therefore, when the property was turned over to the latter company, it passed to the grantee of the plaintiff in the replevin action. No redelivery bond having been given, the bond in replevin stood for the property. The respondents here were not parties to the action against appellant which resulted in the judgment which is the basis of the present action. Not being parties to that action, the notice to them of the pendency of the action and the demand that they defend the same would not obligate them to pay the judgment unless they were liable over either by express contract or by operation of law. National Surety Co. v. Fry'Co., 86 Wash. 118, 149 Pac. 637.

[3] Obviously, they were not liable by express contract, and it seems equally clear that a liability could not arise by operation of law by reason of the fact that the sheriff, at the request of the agent or attorney for the Angeles Brewing Company, did an act which it was his duty to do. There being no liability on the part of the respondents, either by express contract or by operation of law, they were not required, in response to the notice and demand, to appear and defend the action.

While the question is not before us, it may not be inappropriate to say that we do not understand upon what theory the judgment was rendered against the appellant as sheriff, and his bondsman, in the action brought by the Fidelity & Deposit Company of Maryland. The property of the Angeles Brewing & Malting Company had been sold by the receiver, and presumably at least he had received compensation therefor, which became a part of the funds in his hands.

The claim of the National Surety Company, the surety on the replevin bond, was filed with the receiver and allowed. There is no showing that the assets in the receiver's hands were not sufficient to pay this claim. The Fidelity & Deposit Company of Maryland, the surety on the receiver's official bond, was therefore a mere volunteer when it paid the amount of the claim of the National Surety Company, the surety on the replevin bond. But it is unnecessary to pursue this question, because no appeal has been prosecuted from that judgment.

The judgment will be affirmed.

ELMIS, C. J., and FULLERTON, PARKER, and WEBSTER, JJ., concur.

NATIONAL SURETY CO. v. AMERICAN SAVINGS BANK & TRUST CO. et al. (No. 14304.)

(Supreme Court of Washington. April 18, 1918.)

1. Appeal and Error \$\iffsigmo 962 -- Dismissal and Nonsuit \$\iffsigmo 90(1) -- Dismissal of Cross-Complaint-Want of Prosecution -- Discretion of Trial Court--Review.

Disposition of motion to dismiss a crosscomplaint for want of prosecution is within the discretion of the trial court, and its exercise of such discretion will not be disturbed except for abuse.

2. MUNICIPAL CORPORATIONS \$\infty 373(7)\to Assignment by Contractor to Bank\to Contractor with City\to Trust Fund.

Where contractor gave a bank an assignment of all moneys to become due under his contract with the city, which assignment provided it was not valid as against claims for labor, material, etc., the assignment did not make the 70 per cent. of the monthly estimates due from the city to the contractor a trust fund in the hands of the bank with which to pay labor and material claims accruing and filed with the city after the monthly estimates were earned and paid to the bank; the purpose of the assignment being to finance the work, and the contractor not being in default.

3. Assignments &==50(1)—Appropriation of Fund — Contractor's Assignment to Bank.

An assignment to a bank, by the contractor with a city for a street improvement, of all moneys which shall become due and payable to him under the contract, expressly subject to claims for labor and materials supplied in the prosecution of the work, is not an appropriation of the fund, which does not take place until actual payment to the bank, and then only protanto.

4. Assignments 4-74 — Contractor's Assignment to Bank — Appropriation of Moneys.

Where the contractor with a city for a street improvement to finance the work assigned to a bank the 70 per cent. which was to be paid him by the city on monthly estimates, making the assignments subject to claims for labor and material, and the city actually paid installments to the assignee bank without notice of labor or material claims, and before default of the contractor, the payments passed absolute title to the money to the bank under the assignment.

5. MUNICIPAL CORPORATIONS \$\sim 370\text{\text{CITY'S}}\$
CONTRACT FOR PUBLIC WORK\text{\text{\text{DISCRETION}}}

TO RETAIN MONEYS.

Where a contract with a city for a street improvement provides the city may withhold any and all payments under the contract until satisfied that all material and labor supplied has been paid for, such provision amounts to no more than a permission to the city to exercise a discretion, and creates no duty to any one on the city's part.

6. MUNICIPAL CORPORATIONS \$\iiii 353 \to Assignment by Contractor to Bank—Contractor for Public Work—Right of City to Pay

Where the statement in the assignment to a bank, by a contractor with a city for a street improvement, that the assignment was not to be valid as against claims for labor and material, was evidently placed beneath the contractor's signature as a recognition of the city's privilege to hold up in its discretion money to pay claims, and, before the contractor's default and without notice of claims, the city paid the assignee bank the 70 per cent. of monthly estimates due the contractor, it acted within its rights, and neither the city, labor or material claimants, or the contractor's surety, could recover the money.

 MUNICIPAL CORPORATIONS @==353-AGREE-MENT TO RELEASE FUNDS - LIABILITY OF CONTRACTOR'S SURETY.

CONTRACTOR'S SUBETY.

Where a bank, assignee of a contractor with a city for a street improvement, on request of the contractor's surety, which in writing agreed the bank was to forfeit no rights, released money paid to it by the city under the assignment, which money was its own, there arose an implied promise on the part of the surety company to repay such money, if the contractor did not, and the surety could not retain the benefit and deny the liability; this despite the fact that neither party was sure at the time as to just what the bank's rights were.

8. Interest 4 19(1)—Liquidated Amounts
—Claims for Money Loaned.

Claims of a bank, assignee of a contractor with a city for a street improvement, against the contractor's surety for amounts received by the bank from the city under the assignment and released to labor and material claimants on the surety's request, were liquidated, being in substance claims for money loaned, and interest was properly allowed on them in favor of the bank.

Department 2. Appeal from Superior Court, King County; John S. Jurey, Judge. Action of interpleader by the National Surety Company against the Bratnober Lumber Company and others, wherein the American Savings Bank & Trust Company filed cross-complaint setting up two causes of action. From a judgment in favor of the bank on its second cause of action, plaintiff surety company appeals. Affirmed.

C. B. White, of Seattle, for appellant. Farrell, Kane & Stratton, of Seattle, for respondent.

ELLIS, C. J. In December, 1909, one Paul Steenstrup entered into a contract with the city of Seattle for the improvement of Western avenue. He furnished the statutory bond conditioned as required by the act of 1909 (Laws 1909, p. 716, Rem. & Bal. Code, \$ 1159). with the National Surety Company as surety. To finance the work the contractor made an arrangement with American Savings Bank & Trust Company to advance the necessary money as the work progressed, giving to the bank an assignment of all moneys to become due under the contract. This assignment was on a city form, and at its foot beneath the contractor's signature was printed:

"This assignment is not valid as against any claims for labor, material, provisions and goods supplied and furnished in the prosecution of this contract."

This assignment was filed with the city. Under this arrangement, the bank advanced from time to time considerable sums, applying moneys received from the city on monthly estimates, in partial repayment. Before the completion of the work, numerous claims for labor and materials furnished to the contractor in the prosecution of the work were filed with the city as claims against the bond. After the work was completed in June, 1911, the National Surety, Company brought an action interpleading the various claimants to adjudicate and determine their claims. The American Savings Bank & Trust Company was made a party defendant as asserting some claim to the 30 per cent. of the contract price for the work, reserved by the city under the usual provision in the contract requiring such reservation to protect claimants for work, labor, and supplies furnished. Plaintiff prayed that any claim of the bank be adjudged inferior to all valid claims for labor and material.

The bank filed its original answer and cross-complaint, parts of which plaintiff moved to strike. Owing to the difference in the issues, the bank requested that the cause be continued as to it until the claims for labor and material had been finally determined. The postponement was granted upon a stipulation signed by the respective attorneys for plaintiff and the bank that it should be without prejudice or effect upon the rights or liabilities of either of the parties. case proceeded to judgment as to the other defendants, and on appeal was finally determined in this court in 1912. National Surety Co. v. Bratnober Lumber Co. et al., 67 Wash. 601, 122 Pac. 337. In January, 1915, plaintiff moved for a dismissal of defendant bank's cross-complaint for want of prosecution. The motion was denied.

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amended answer and cross-complaint setting up two causes of action. With the first of these we are not concerned. The court denied a recovery thereon, and the bank has not appealed. For its second cause of action the cross-complainant set up its assignment from the contractor, its reception of money from the city thereunder which it is alleged it had the right to apply upon the contractor's indebtedness to it, and avers that in November, 1910, the surety company agreed with the bank that, if it would allow the money to be placed in a joint account of the contractor and the surety company for use in finishing the contract, the surety company would protect the bank from loss there-It is then averred that, pursuant to such agreement, the bank placed to such account \$7,200, \$2,400, and \$1,000, of the monevs received by the bank from the city as proceeds of Steenstrup's contract with the city. Judgment for \$10,600 was demanded. These allegations were traversed by reply.

The evidence was voluminous. We shall indicate no more than its salient features. By November, 1910, the bank had advanced to the contractor over \$30,000, a large part of which was unpaid. It declined to make further advances. On the November estimate of work performed on the contract it received from the city under its assignment \$7,200. The surety company thereupon delivered to the bank a writing as follows:

"November 26, 1910. American Savings Bank & Trust Company, and Mr. James P. Gleason, Manager, Seattle, Washington: In the matter of the contract of Mr. Paul Steenstrup on Western avenue the National Surety Company hereby consents that you may pay and requests you to pay the money received on estimate either yesterday or to-day, amounting, as I understand it, to about \$7,200.00, to laborers or materialmen who have claims against Mr. Steenstrup, or allow Mr. Steenstrup to so make such payments, you to forfeit no rights hy allowing this money to be so used and applied. National Surety Company, by John Roberts, Resident Vice President."

The bank, in compliance with this request, refrained from applying this money on Steenstrup's notes, but placed it to Steenstrup's credit and allowed it to be checked out by Steenstrup under the supervision of the surety company in payment for labor and material supplied in further prosecution of the work. On the December, 1910, estimate the bank received from the city \$2,400. sum, in compliance with a like written request from the surety as before, was placed to Steenstrup's credit and used in the same way. There is no evidence that, when these estimates were paid by the city to the bank, any claims for labor or material had been filed with the city or that the city had any notice or knowledge of any unpaid claims if there were any.

By January, 1911, the \$9,600 turned over to fund in the hands of the bank with which to Steenstrup on these two requests had been pay such claims, though accruing and filed exhausted. More money being needed, the with the city after these estimates were

On January 27, 1916, the bank filed an surety company indorsed Steenstrup's notes needed answer and cross-complaint setting to two causes of action. With the first of ese we are not concerned. The court deed a recovery thereon, and the bank has appealed. For its second cause of action the cross-complainant set up its assignment from the contractor, its reception of oney from the city thereunder which it is leged it had the right to apply upon the

"February 14, 1911. American Savings Bank & Trust Company, J. P. Gleason, Manager, Seattle, Washington—Gentlemen: In the matter of contract of Paul Steenstrup on Western avenue. In the matter of the joint account of Paul Steenstrup and the National Surety Company in your bank, request is hereby made on you to allow an overdraft of not to exceed one thousand dollars (\$1,000.00) on checks signed as heretofore on said account, and when the next estimate is received from the city on the Western avenue contract for which said account is carried you are requested to place from said moneys allowed and paid on said estimate such amount as may be overdrawn to the credit of said account before amplying such estimate on the notes of Paul Steenstrup held by your bank. Yours very truly, National Surety Company, by John W. Roberts, Resident Vice President. Geo. W. Allen, Resident Assistant Secretary."

The overdraft to the amount of \$1,000 was permitted, and the bank's evidence tended to show that, instead of applying moneys thereafter received on estimates from the city to the payment of Steenstrup's unpaid notes, the bank, as requested in the above-quoted writing, gave the surety company credit for it, thus giving the debt created by the overdraft the same status as the money turned over on the other two orders. The court found in favor of defendant bank on its second cause of action and rendered judgment in its favor for \$10,600, and interest, in all \$14,428.60. Plaintiff appeals.

[1] It is first contended that the court erred in refusing to dismiss respondent's cross-complaint for want of prosecution. The motion to dismiss on this ground is a matter within the discretion of the trial court. The exercise of that discretion will not be disturbed except for abuse. Loving v. Maltble, 64 Wash. 536, 116 Pac. 1086. We have read and carefully considered the atidavits on both sides addressed to this motion. An extended discussion would serve no useful purpose. We are not convinced that there was any abuse of discretion in this case.

[2] On the merits, the crux of this controversy is this: Did the city have the right to pay to respondent bank the 70 per cent. of the monthly estimates here involved? The solution of this question depends upon the construction of the assignment in the light of its purpose and subject-matter. Appellant contends, in substance, that the assignment, by reason of its being subject to claims for labor and material, made this money a trust fund in the hands of the bank with which to pay such claims, though accruing and filed with the city after these estimates were

bank. We cannot accede to this view. The It was the last part of the 70 per cent. fund conceded purpose of the assignment was to enable the contractor to finance the work. It must be assumed therefore that the parties thereto intended that the assignment should authorize the city to pay to the bank and the bank to receive, on each estimate when it accrued, whatever the city in pursuance of its contract would have paid to Steenstrup on each such estimate in the absence of the assignment. This would have been the so-called contractor's 70 per cent. of each monthly estimate, if there were then no unpaid claims for labor or material filed with the city; the contractor not then being in default. Dowling v. Seattle, 22 Wash. 592, 61 Pac. 709; Maryland Cas. Co. v. Washington Nat. Bk., 92 Wash. 497, 159 Pac. 689; N. W. Nat. Bk. of Bellingham v. Guard. Cas. & Guar. Co., 93 Wash. 635, 161 Pac. 473; Title Guar. & Surety Co. v. First Nat. Bk., 94 Wash, 55, 162 Pac. 23; Van Doren, etc., Co. v. Guardian Casualty & Guaranty Co., 168 Pac. 1124.

[3] In the case of Northwestern National Bank of Bellingham v. Guardian Casualty & Guaranty Co., supra, upon the authority of Dowling v. Seattle, supra, and Maryland Casualty Co. v. Washington National Bank, supra, we held that an absolute and unqualified assignment by the contractor of any fund thereafter to become due to him, and not reserved by his contract for the protection of laborers and materialmen, the assignment having been accepted by the city prior to the contractor's default and prior to any notice of nonpayment for labor and material, was a valid appropriation of such fund prior and superior to any rights of laborers and materialmen in the fund, and hence superior to any right of subrogation in the surety on the contractor's bond. In such a case, a payment by the city to the assignee even after claims for labor and material had been filed would be valid as to all but the reserve fund. In that case, however, it is distinctly indicated that the assignment was not, as here, expressly subject to claims for labor and material supplied in the prosecution of the work. An assignment so qualified is not an appropriation of the fund. Under such an assignment, as pointed out in First National Bank v. Seattle, 71 Wash. 122, 127 Pac. 837, the appropriation of the fund does not take place until actual payment to the assignee, and then only pro tanto.

In the last-cited case, the assignment to the bank of the contractor's 70 per cent. fund was, as here, expressly subject to claims for labor and material supplied in the progress of the work. In that case, however, contrary to the case here, the money over which the contest was waged as between the surety

earned by the contractor and paid to the contractor was still in the hands of the city. which had been held up by the city evidently in anticipation of claims for labor and material under a provision of its contract with the contractor permitting the city, but not requiring it, to hold up any part of the contract price until satisfied that all claims for labor and material had been paid. In that case, marking a supposed distinction between that and the Dowling Case, we said:

> "Here the balance of this 70 per cent. fund has not been paid the contractor, and the city has knowledge of these liens for labor and ma-In that case we held that the holders of the bonds so issued were entitled to their proceeds because the payments, being justified when made, were not invalidated by the contractor's subsequent default. In that case the payment was made when due under the contract, without notice of adverse claims. In this case the payment has not been made, and there is notice of adverse claims such as, under the language of the contract and the assignment, are entitled to preference."

> This language clearly indicates that, had the money involved in the First National Bank Case been actually paid to the assignee bank by the city prior to the contractor's default and without knowledge or notice of any unpaid labor and material claims (which was actually done in the case before us), the payment would have been held valid and the bank would have been held entitled to retain the money as against subsequently filed claims notwithstanding the qualified nature of its assignment.

[4] If the above language from the case of First National Bank v. Seattle is still adhered to, the assignment must be held to be an assignment of each installment of the money to become due to the contractor under the contract as earned, subject only to any claims for labor or material then existing and of which the city has notice when such installment falls due and subject to the right of the city to hold up any such installment in anticipation of such claims. If therefore the city actually pays any such installment to the assignee without notice of labor or material claims and before default of the contractor, such payment must be held to pass an absolute title to the money under the assignment. The assignment was made for the very purpose of raising money with which to finance the performance of the contract. The contractor had the right to make an absolute assignment, unqualified by any reference to labor and material claims, of this 70 per cent. which was to be paid to him on monthly estimates. He made an assignment not absolute but subject to claims for labor and material. There were no such claims when this money was paid. In order to accomplish the purpose intended, viz. that of aiding the contractor to finance the contract, the assignment must be construed as passing an absolute title to any part of the company and the bank as assignee of the | 70 per cent. fund coming due to the contractor if actually paid to the assignee at a time when there were no claims for labor or material filed and when the contractor was not in default on his contract.

[5. 6] Appellant recognizes the force of our decision in the case of First National Bank v. Seattle, but asks: How did the bank get a better right to this money merely by getting actual possession of it? We have already answered this question in our construction of the assignment. The following considerations make that construction almost imperative: While the original contract between the contractor and the city is not in the record, it is recognized in the briefs on both sides that the contract contained the usual provision authorizing the city to pay to the contractor on monthly estimates 70 per cent, of the money earned each month as the work progressed, but required the city to withhold each month the other 30 per cent. as a fund to meet claims for labor and material which might thereafter be filed. Though it is not mentioned in the briefs, we assume that the contract or specifications therein referred to contained the other usual provision that the city might withhold any and all payments under the contract until satisfied that all labor and material supplied for the work had been paid for; at any rate, this assumption is the one most favorable to appellant. Such a provision, as pointed out in Dowling v. Seattle, supra, and again in Northwestern National Bank of Bellingham v. Guardian Casualty & Guaranty Co., supra, amounts to no more than a permission to the city to exercise a discretion in the premises. It creates no duty to any one on the city's part. The assignment from the contractor to the bank was made on a printed city blank. The statement that the assignment was not to be valid as against claims for labor and material appears underneath the contractor's signature and was evidently placed there as a recognition of the city's privilege to hold up any or all of the money in its discretion. When therefore the city, without notice of claims and before default of the contractor, paid to the assignee the 70 per cent. estimates, it acted within its rights and no one can complain. Neither the city nor labor or material claimants could then recover the money; a fortiori, the surety could not.

There is considerable controversy as to whether or not the contract was taken over and completed by the surety company in the contractor's name. But the view which we take of the assignment and the transaction between the surety company and the bank whereby, at the surety's request, the bank relinquished the money in its possession for use in further carrying on the work, makes it immaterial whether the work was actually completed by the surety or by the contractor.

In either case, the release operated to relieve the surety of the immediate necessity of furnishing money to carry on the work, and its agreements that the bank should forfeit no rights by so doing were made for no other purpose.

[7] Appellant argues that it made no promise to repay this money. But, as we have seen, it was at the time the bank's money. It is manifest that when the bank released it at the request of the surety company, which in writing agreed that the bank was to forfeit no rights by so doing, there arose an implied promise to repay it if Steenstrup, the contractor, did not. The surety cannot retain the benefit and deny the liability. Appellant insists that, when it made these written requests for the release of the money by the bank, it was evident that the bank had no rights that it could waive, and adds:

"The bank well realized that it could not demand that the surety company promise to repay this money which was, of course, going to potential and possible lien claimants."

It may be admitted that neither party was then certain as to the bank's rights. But the surety company in substance and effect agreed to protect the bank's right in the premises, whatever those rights might be. The fact that neither party seemed sure, at the time, as to just what those rights were, can make no difference in the final effect and result of the undertaking. The surety company cannot be heard to say that, because those rights were in law greater than it had supposed, therefore it is not bound by its agreement that they should be preserved.

Appellant frequently states that the \$1.-000 item was money never in the hands of the bank, but adds: "The overdraft was from the bank's own funds, not from the proceeds of the contract." It was certainly in the bank's hands before the overdraft was permitted and was a loan pure and simple to the surety company and Steenstrup. If it was ever paid, it was paid from money which, so far as the record shows, was money which the bank would have had the right to have applied on Steenstrup's old notes. and the trial court so found. In fact, that is exactly what the surety company requested should be done in its communication of February 14, 1911. The request was in itself a recognition of the bank's right to apply the estimates on the Steenstrup notes.

[6] Finally, appellant contends that no interest should have been allowed on these claims. But the amounts claimed were liquidated. They were in substance claims for money loaned. We know no legal reason for withholding interest.

The judgment is affirmed.

MOUNT, CHADWICK, and HOLCOMB, JJ., concur..

WALSH v. ALASKA S. S. CO. (No. 14558.) (Supreme Court of Washington. April 22, 1918.)

1. Territories 4=18-Employers' Liability ACT-APPLICATION.

Federal Employers' Liability Act June 11. 1906, c. 3073, 34 Stat. 232, applies to injuries to employes of carriers within the territories, although such carriers are engaged in interstate commerce.

2. STATUTES \$\infty\$ 159\text{-Repeal by Implication}

CONSTRUCTION.

Where two statutes cannot be harmonized, Where two statutes cannot be narmonized, the later act prevails, but repeals by implication are not favored, and, although two statutes treat in a general way on the same subject-matter, the former will not be repealed where it confers different powers to be exercised for different purposes, or where the earlier enactment may perform some office or function not controlled by the latter.

3. Territories -18-Employers' Liability

ACT-APPLICATION.

ACT—APPLICATION.
Federal Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. 1916, §§ 8657-8665), does not repeal that of June 11, 1906, so far as it relates to carriers within the District of Columbia or the terri-

4. MASTER AND SERVANT \$\infty 180(1)\$\to\$EMPLOY-

RS' LIABILITY ACT—APPLICATION. Federal Employers' Liability Act June 11, 1906, embraces common carriers from the states by water while unloading in Alaska, as well as all other common carriers in the District of Columbia and the territories.

5. STATUTES \$= 228-Construction-Saving CLAUSES.

Enumeration in a saving clause or construction section is made to save the enumerated things, not to destroy the things not enumerated, and should not be confused with a saving clause in a repealing section, where unenumerated things are destroyed.

6. MASTEE AND SERVANT \$\infty\$180(1)—EMPLOY-ERS' LIABILITY ACT—MARITIME LAW. Federal Employers' Liability Act June 11, 1906, although local in its effect, is valid and repeals or modifies any prior general admiralty or maritime laws inconsistent therewith.

Department 1. Appeal from Superior Court, King County; A. W. Frater, Judge. Action by Edward J. Walsh against the Alaska Steamship Company, a corporation. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

Robert G. Cauthorn and Walter S. Fulton, both of Seattle, for appellant. Graves, Merritt & Bogle, of Seattle, for respondent.

WEBSTER, J. This action was brought by appellant to recover damages from respondent on account of injuries received by him while employed as a seaman on one of respondent's vessels engaged in commerce within the territory of Alaska and between ports thereof and the state of Washington. The accident which caused the injury complained of occurred while the appellant was assisting in unloading cargo at the port of Cordova, in the territory of Alaska. The complaint pleaded in full the act of Congress solely to carriers while engaged in commerce

approved June 11, 1906, commonly known as the Employers' Liability Act, and alleged facts sufficient to bring the case within the provisions of the act. Upon the trial of the cause there was competent evidence tending to establish all of the material allegations of the complaint with this respect, sufficient to require the submission of the cause to the jury, assuming that the act of Congress referred to was in force and effect in the territory of Alaska at the time the injury was received. The trial court, however, at the close of the plaintiff's case, sustained the defendant's motion for nonsuit, and thereafter entered judgment dismissing the action. The plaintiff has appealed.

As we view the case, the only remaining questions to be determined upon this appeal are whether the Employers' Liability Act of June 11, 1906, became operative in the territory of Alaska; if so, have its provisions, as affecting the facts of this case, been repealed by the subsequent legislation of Con-

gress upon the subject.

As to the first proposition, it is not contended that the act was unconstitutional in so far as it was made applicable to common carriers and their employes engaged in commerce in the territory of Alaska. This subject is foreclosed by the holdings of the Supreme Court of the United States to the effect that the act, though void in so far as it attempted to regulate commerce within the states, and common carriers and their employés engaged in such commerce, still remained a valid regulation of the subject as applied to the District of Columbia and the territories. This because of the plenary power vested in Congress to legislate for the territories and the dependencies, unrestricted by the limitations placed by the Constitution upon its power to legislate for the states. Employers' Liability Cases, 207 U.S. 463. 28 Sup. Ct. 141, 52 L. Ed. 297; El Paso & N. E. Ry. v. Gutierrez, 215 U. S. 87, 30 Sup. Ct. 21, 54 L. Ed. 106; Philadelphia, B. & W. R. R. v. Schubert, 224 U. S. 603, 32 Sup. Ct. 589, 56 L. Ed. 911; Butts v. Merchants' Trans. Co., 230 U. S. 694, 33 Sup. Ct. 964, 57 L. Ed. 1422; Santa Fé Ry. Co. v. Friday, 232 U. S. 694, 34 Sup. Ct. 468, 58 L. Ed. 802; Wash, & Mt. Vernon Ry. v. Downey, 236 U. S. 190, 35 Sup. Ct. 406, 59 L. Ed. 533. To the same effect are the decisions of the Court of Appeals of the District of Columbia in Hyde v. Southern Ry. Co., 31 App. D. C. 466, and the District Court of the United States for the Eastern District of Michigan in The Pawnee (D. C.) 205 Fed. 333.

[1] Respondent suggests that even though the Employers' Liability Act of June 11, 1906. was valid as to the District of Columbia and the territories, nevertheless it merely had the force of a local statute applicable



within the District of Columbia and the ter- | pressly declares such repeal or not. In the ritories. While it may be assumed that the act was local in its character as so applied. it does not follow that an employer against whom the provisions of the act are sought to be enforced may not be engaged in commerce other than commerce within the territory in which the injury was received. It is sufficient if the act was in force at the place where the cause of action accrued. Washington & Mt. Vernon Ry. v. Downey, supra; Hyde v. Southern Ry., supra; El Paso & N. E. Ry. Co. v. Gutierrez, supra: The Pawnee, supra.

It is insisted, however, that the act in question has no application to this case for the reason that it was repealed by the subsequent legislation of Congress upon the subject embodied in what is generally known as the Employers' Liability Act, approved April 22, 1908; the appellant having sustained the injury complained of after the taking effect of the later statute. This contention is based: First, upon the assumption that the later statute treats of the same subjectmatter, and, being the last expression of the legislative will, necessarily repeals the former act by implication; furthermore, that it was the manifest intention of Congress in enacting this legislation, having in view the decision of the Supreme Court of the United States affecting the validity of the act of 1906, to treat of the whole subject-matter embraced in the former act except in so far as it related to commerce within the states. and, having so intended, that all provisions of the former act held to be in force in the territories are superseded by the later enactment: second, upon the assertion that the language of section 8 of the act of 1908, in saving to employes the right to prosecute "any pending proceeding or right of action" which had accrued under the act of 1906, works a repeal in its entirety of the former enactment, except as to pending proceedings and accrued causes of action which were saved by the express provisions of the later statute.

[2, 3] The Employers' Liability Act of 1908 contains no words expressly repealing any provision of the former act approved June 11. 1906. If a repeal is wrought, it is so because of the fact that the subsequent enactment repeals the former by implication. It is well settled that an implied repeal results from some enactment, the terms and necessary operation of which cannot be harmonized with the terms and necessary effect of an earlier act. In such case, the later law prevails as the last expression of the legislative will: therefore, the former law is constructively repealed, since it cannot be supposed that the lawmaking power intends to enact or continue in force laws which are contradic-Subsequent legislation repeals pre-

nature of things it would be so, not only on the theory of intention, but because contradictions cannot stand together. Sutherland, Stat. Const. (2d Ed.) \$ 247. Hence, if the terms and necessary operation of the act of 1908 are so inconsistent with the terms and necessary effect of the act of 1906 that the two enactments cannot be harmonized, then it may be said that the repeal operated in its entirety. On the other hand, if there were independent provisions of the former act in force and effect in the territories when the later statute was passedlegislation affecting a different class of employers or employés engaged in commerce therein which are not embraced within the scope and necessary operation of the act of 1908—then as to such employers and employes the provisions of the former statute are not inconsistent or inharmonious with the more recent enactment; in which event the act of 1906, though limited in its operation to the class of employers and employes not included within the scope of the act of 1908, yet remains a valid and subsisting law for the territory of Alaska.

The act approved June 11, 1906, is en-

"An act relating to liability of common carriers in the District of Columbia and territories and common carriers engaged in commerce between the states and between the states and foreign nations, to their employes." 34 Stat. at L. 232. c. 3073, U. S. Comp. St. 1901, Supp. 1907, p. 891.

As to the scope and extent of this act, Mr. Justice White, in the Employers' Liability Cases, supra, said:

"From the first section it is certain that the act extends to every individual or corporation who may engage in interstate commerce as a common carrier. Its all-embracing words leave no room for any other conclusion. It may include, for example, steam railroads, lines, telephone lines, the express business, vessels of every kind, whether steam or sail, ferries, bridges, wagon lines, carriages, trolley lines, etc. Now, the rule which the statute eslines, etc. Now, the rule which the statute establishes for the purpose of determining whether all the subjects to which it relates are to be controlled by its provisions is that any one who conducts such business be a 'common carrier engaged in trade or commerce in the District of Columbia, or in any territory of the United States or between the several states,'

[4] It is clear that this act embraced within its scope common carriers by water. Nor can it be seriously contended that it did not apply to all common carriers in the District of Columbia and the territories, irrespective of whether such common carriers were also engaged in commerce between the states. within the states, or between the states and the territories, or between the states or territories and foreign nations. Such is its plain import; such is the effect of the decision in the Employers' Liability Cases, supra. It was a regulation of the common carrier who vious inconsistent legislation, whether it ex- engaged in the business, rather than a regcarrier.

We have seen that the constitutionality of the act was sustained in so far as it applied to the District of Columbia and the territories; the effect of which was to adjudge the statute a valid and subsisting law relating to all common carriers while within the territorial limits of the District of Columbia or any of the territories of the United States.

The second Employers' Liability Act, approved April 22, 1908, is entitled:

"An act relating to the liability of common carriers by railroad to their employes in certain cases." 35 Stat. at L. c. 149, p. 65, U. S. Compiled Statutes 1901, Supp. 1909, p. 1171.

In comparing the scope of this act with that of the former statute, Mr. Justice Mc-Reynolds, for the court in Southern Pacific Co. v. Jensen, 244 U. S. 205-212, 37 Sup. Ct. 524, 527 (61 L. Ed. 1086, Ann. Cas. 1917E, 900), said:

"The first federal Employers' Liability Act (June 11, 1906 \* \* \*) extended in terms to all common carriers engaged in interstate or foreign commerce, and because it embraced subjects not within the constitutional authority of Congress was declared invalid. The Employers' Liability Cases, 207 U. S. 463 [28 Sup. Ct. 141, 52 L. Ed. 297], January 6, 1908. The later act is carefully limited, and provides that 'every common carrier by railroad while engaging in commerce between any of the several states. gaging in commerce between any of the several states or territories, or between any of the states and territories, or between the District of Columbia and any of the states and territories, or between the District of Columbia or any of the states and territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce.

\* \* Evidently the purpose was to prescribe a rule applicable where the parties are engaging in something having direct and substantial connection with railroad operations, and not with another kind of carriage recognized as separate and distinct from transportation on land and no mere adjunct thereto." land and no mere adjunct thereto.

The District Court of the United States for the Eastern District of Michigan, in the case of The Pawnee, supra, referring to the scope of the later enactment, said:

"It is clear that the act of April 22, 1908, is limited to common carriers by railroad. Such are its express terms. Where a vessel is part of a railroad system, and its crew are employes of the railroad, it would seem as if this act might include maritime injuries. The Passaic (D. C.) 190 Fed. 644, 649. But the Pawnee was not a part of a railroad or railroad system, nor a common carrier. She was not engaged in the carrying trade for the general public, nor held out to carry the goods of all persons indifferently who might apply. She carried only under special arrangements, for specific cargoes, with such parties as agreements might be made. She made no profession to carry for all, and was under no obligation to take whatever goods might be tendered. She ran on no particular schedule of time, nor between any particular places or termini. She selected such cargoes as she saw fit to carry and at such prices as might be agreed upon. She had the right to refuse any freight which she wished to A ship in the business in which the Pawnee was engaged is not a common carrier in the legal sense of the term, but in fact and in law a private carrier only. • • • This con. of the character of the commerce in which clusion would exclude her from the operation such carriers were engaged, or the means by

ulation of the business engaged in by such of the statute of 1906, if for any reason the provisions of that law could be otherwise held to be in force under the circumstances of this case, and no recovery can be had thereunder.

> From these observations, as well as from a consideration of the subject-matter of the two acts in question, it is apparent that the scope of the prior enactment was far more comprehensive than, and included in its terms, classes of carriers not embraced within or sought to be regulated by the subsequent enactment. Much of the subject-matter dealt with in the former, though significantly omitted from the latter, was a lawful exercise of the powers vested in Congress by the Constitution. Nor can it be gainsaid that Congress possessed the power, had it seen fit to exercise it, to extend the provisions of the act of 1908 to all classes of common carriers in the District of Columbia and the territories, and to all such carriers while engaging in commerce between the states, or between the states and foreign nations, or between the states and the District of Columbia or the territories, or between the District of Columbia or the territories and foreign nations; yet we are urged to hold that Congress, by expressly limiting the application of the later statute to common carriers by railroad, intended to repeal by implication the substantive provisions of its prior valid enactment in so far as they applied to common carriers other than by railroad.

> Moreover, it is insisted that we must so hold because of the circumstances which prefaced the enactment of the more recent legislation; that is to say, that when the Supreme Court, in the Employers' Liability Cases, held the act of 1908 unconstitutional, the President forthwith addressed Congress with this respect as follows:

> "As regards the Employers' Liability Law, I advocate its immediate re-enactment, limiting its scope so that it shall apply only to the class of cases as to which the court says it can constitutionally apply, but strengthening its provisions within this scope." Cong. Record, Cong. Record, 60th Congress, First Session, p. 1347.

> And that Congress having thereupon passed the act with unusual promptness, it must be assumed that in so doing the intention was to adopt the suggestion of the President by re-enacting the statute of 1906—making it apply only to the class of cases "as to which the court says it can constitutionally apply."

> Assuming that Congress enacted the legislation because of the President's suggestion. the fact yet remains that it did not re-enact the former statute; neither did it make the act of 1908 apply to the class of cases which the Supreme Court, in the Employers' Liability Cases, says it can constitutionally apply. On the contrary, it passed an act which only professed to apply to common carriers by railroad; whereas, the act which it is said they intended to repeal in its entirety applied to all common carriers, regardless of the character of the commerce in which

which the business was carried on. If Con- enumerated were intended to be affected. This gress had intended, by the later enactment, to adopt the views of the President and legislate upon the entire subject-matter embraced in the former act, so far as it had the power as defined in the Employers' Liability Cases. the purpose could have been easily accomplished simply by making the act apply to all common carriers, with the limitation which was carefully written into the act, "while engaging in commerce between," etc. It was this limitation that relieved the act of 1908 of the objectionable feature of attempted commerce regulation within the states which was fatal to the act of 1906not the fact that the later enactment was restricted in its application to common carriers by railroad.

The further contention of respondent's counsel that the language of section 8 of the act of 1908 clearly shows the intention of Congress to repeal in its entirety the act of June 11, 1906, is without merit. The language of the section is:

"That nothing in this act shall be held to limit the duty or liability of common carriers or to impair the rights of their employés under any other act or acts of Congress, or to affect the prosecution of any pending proceedings or right of action under the act of Congress en-titled 'An act relating to liability of common carriers in the District of Columbia and the territories, and to common carriers engaged in and forcommerce between the states \* eign nations, to their employes, approved June eleventh nineteen hundred and six."

In support of their position, counsel for respondent say:

"It will be noted that this section expressly provides that the act of 1908 shall not be held to limit the duty or liability of common carriers or to impair the rights of their employés under any other act or acts of Congress or to affect the prosecution of any pending claims arising under the act of 1906. By thus limiting the rights of employés to prosecute ponding claims ing under the act of 1906. By thus limiting the rights of employés to prosecute pending claims under the act of 1906, Congress has clearly indicated its intention of prohibiting the prosecution of any future claims under this act, and in effect has expressly repealed the act of 1906. The rights of employés under any other act of Congress, such as the Safety Appliance Act, are not in any wise affected."

[5] It seems to us that the argument of counsel for appellant in reply to this contention is so forceful and convincing that we have presumed to adopt it as a sufficient answer to the theory advanced by respondent's counsel:

"This section is not a repealing section and contains no words of repeal. On the contrary, it expressly sets out that the act of 1908 shall not be given the construction respondent is trying to put upon it. Respondent ignores the first part of the section which is, 'That nothing in this act shall be held to limit the duty or liability of common carriers or impair the rights of their employes under any other act or acts of Congress.' Respondent bases its whole arof Congress.' Respondent bases its whole argument upon the latter part of the section which is, "That nothing in this act shall be held \* \* \* to affect the prosecution of any pending proceedings or right of action under the act of \* \* \* 1906.' Because the section enumerates certain things that are not to be affected respondent infeared that all things not fected, respondent inferred that all things not employers and their employes engaged in

enumerated were intended to be anected. This at most is only an inference and laws are not repealed by inferences. But it is not the correct inference. Enumeration is made to save the enumerated things, not to destroy the things not enumerated. Only things in danger of destruction without enumeration are included in the things enumerated. \* \* Respondent's saving or construction section, with a repealing section containing a saving clause in a saving containing a saving clause. In both cases, the saving clause saves; it never destroys. But where there is an express repealstroys. But where there is an express repealing section, all things not enumerated in the saving clause are destroyed by the express provisions of the repealing portion of the section or by those parts of the later act which are in irreconcilable conflict with the earlier act. Hence, in such acts, the saving clause saves only what it embraces, and all not embraced are destroyed; but such destruction is wrought, not being included in the saving clause, but by not being included in the saving clause, but by virtue of the destructive force of the re-pealing portion of the act. The act of 1908 pealing portion of the act. The act of 1908 supplanted or repealed so much of the act of supplanted or repealed so much of the act of 1906 as pertained to common carriers by railroad. There was therefore danger of some court holding that the pending proceedings or rights of action against railroads, based on the act of 1906, and good in the territories and the District of Columbia, were destroyed by the repeal of that part of the act of 1906 upon which they were based. To save these cases against railroads, this saving clause was placed in the railroads, this saving clause was placed in the act. And that is all that clause does. It makes it certain that the pending cases and rights of action against railroads are not affected. But this saving clause of this railroad law no more affected laws pertaining to ships (not a part of a railroad event) then it ii. (not a part of a railroad system) than it did laws relating to the tariff or the army."

When we pause to consider that repeals by implication are not favored, that it is the duty of courts to so construe, if possible, two acts in seeming conflict, that both shall be operative—which duty is performed by permitting each to stand, where they confer different powers to be exercised for different purposes, or where the earlier enactment may perform some office or function not controlled by the latter, though both treat in a general way of the same subject-matter—we are constrained to hold that the Employers' Liability Act of April 22, 1908, did not repeal the provisions of the Act of June 11, 1906, in so far as the former applied to common carriers by water: and that the provisions of the earlier statute in that respect were in force and effect in the territory of Alaska on May 16, 1916, the date appellant sustained the injury upon which the right of action is based.

It is lastly contended by respondent's counsel that the act of 1906 does not apply to the facts of this case because of the provisions of the admiralty laws in force and effect at the time and place of the injury. The decisions of this court in State ex rel. Jarvis v. Daggett, 87 Wash. 253, 151 Pac. 648, L. R. A. 1916A, 446, and Shaughnessy v. Northland, etc., Co., 94 Wash. 325, 162 Pac. 546, are cited in support of this contention. We held in those cases that the provisions of the workmen's compensation laws of the state of Washington do not apply to

maritime service upon the waters of Puget Sound. We are not concerned in this case with the conflict of national and state laws. nor with the construction or application of a state statute. The act of 1906 is a federal, not a state, statute; hence the authorities cited are not in point.

[8] With reference to the doubt expressed by counsel for respondent, as to the power of Congress, by the act of 1906-treated as a local statute-to abrogate or modify the general maritime law of the United States so as to confer upon employés of common carriers while in the territory of Alaska rights of action unknown to the admiralty or maritime law, it is sufficient to say that the act of June 11. 1906, though restricted, in its operation by the decision in the Employers' Liability Cases, to the District of Columbia and the territories, is nevertheless a valid statute regulating the liability of common carriers other than by railroad, to their employes, in such territory. If it confers rights and creates liabilities within the limited field of its operations. which were not recognized by the admiralty or maritime laws, or the prior acts of Congress relating thereto, such general laws and prior acts are repealed or modified to the extent of the subject-matter lawfully embodied in this act.

Being of the opinion that the Employers' Liability Act of June 11, 1906, applies to the facts of this case, the judgment is reversed, and the cause remanded for a new trial not inconsistent with the views herein expressed.

ELLIS, C. J., and FULLERTON, MAIN, and PARKER, JJ., concur.

KEDDINGTON ▼. STATE. (No. 425.)

(Supreme Court of Arizona. April 18, 1918.)

1. CRIMINAL LAW \$==635 - PUBLIC TRIAL-

DISCRETION OF COURT.

Though Const. art. 2, § 24, guaranties a public trial, the court in a prosecution for contributing to the dependency of a girl, wherein it was obvious much indecent language and conduct would propose silv be reposted and described. duct would necessarily be repeated and described, and she would be subjected to a gruelling cross-examination, properly exercised its discre-tion in restricting public attendance to newspaper reporters.

CRIMINAL LAW \$\ightarrow 660 - Public Trial Waiver of Right by Accused.

Accused, by not objecting to an order clearing people from the courtroom after it was modified by allowing newspaper reporters to remain, waived any right of his involved in the order as modified.

Appeal from Superior Court, Maricopa County; R. C. Stanford, Judge.

Cyril Keddington was convicted of contributing to the dependency of a girl, and he appeals. Affirmed.

Baker & Drake, of Phœnix, for appellant. Wiley E. Jones, Atty. Gen., and W. P. Geary, George W. Harben, and L. B. Whitney, Asst. Attys. Gen., for the State.

ROSS, J. The information upon which appellant was convicted charged him and one Paul Stevens with contributing to the dependency of a girl of the age of 16 years by enticing her from her home to a public dance and assemblage, and by causing her to remain at and in the vicinity of said dance in the company of intoxicated men, who were permitted and encouraged to insult and mistreat said child by lewd and offensive conduct and speech, and by themselves becoming intoxicated, and in her presence engaging in disturbance, riot, obscene, indecent, and vulgar speech, and in refusing to permit her to be taken away from, or to escape from, the defendants.

Before the information was read or the opening statement made by the county attorney to the jury, the court, on its own motion, ordered that the courtroom be cleared of the people present, and that the public be excluded, except witnesses and relatives of the defendants, giving as a reason therefor "the nature of the case." The appellant objected that the order would deprive him of a public trial. On motion of the appellant. after the information had been read, the witnesses for both the prosecution and defendants were placed under the rule and ordered from the courtroom. The court then modified the order of exclusion by adding that newspaper reporters might remain at the trial. To the order as modified no exception was taken by appellant.

[1, 2] Appellant assigns as error, and it is the only complaint he makes, that the above order deprived him of his constitutional right of an open or public trial. The provision in that regard found in the federal Constitution, and which is common to most of the states of the Union, is that in all criminal causes the accused shall have the right to appear and defend in person and by counsel, and, among other things, "to have a speedy public trial." Section 24, article 2, Constitution. therefore, accused of crime may with confidence point to this constitutional guarantee and insist upon its rightful protection. He is entitled to, and must be given, a public trial, whatever that may mean. Formerly in this respect there were two kinds of trials, public and secret. Before they declared their independence in the Colonies and in England star chamber proceedings were of common occurrence, and it was to abolish and forbid secret or star chamber trials that called forth the provisions of the federal and state Constitutions requiring public trials. Arbitrary and secret deprivation of life, liberty, and property were no longer to be tolerated. 'The

rule of open administration of justice was thereafter to be followed. We'get some idea of the meaning of the words "public trial" when the history of the causes of their use in the fundamental law is recalled. It is the opposite of a secret trial or a trial in camera or at star chambers. In the very nature and necessity of things it was never contemplated that all of the public should be present or privileged to be present in order to constitute a public trial. Attendance was necessarily limited to the capacity of the courtroom accommodations, which, as is well known, is as often inadequate as otherwise. So, even the size of the courtroom sometimes may determine the extent of the publicity of the irial.

No court or law text-writer has undertaken to define what a public trial is, but they all agree that limitations and restrictions of the public attendance are not only necessary, but proper. Disagreement is upon the extent of these limitations and restrictions. No authority can be found that would sustain an order excluding everybody from attending a trial except the defendant, his counsel, the jury, the court, and the officers of the court. Some of the public not actually engaged in the trial must be privileged or allowed to attend the trial to constitute it public, but no irreducible minimum has ever been proposed or named as yet. Nor do we think that numbers are the test of a public trial. For instance, two or three newspaper reporters, with ears attune to catch everything that may be said in the course of a trial by the court, by counsel and witnesses, and carefully watching every movement and action likely to affect the trial, and the same day or, at the longest, the following day, presenting to the general public through the daily press all the salient facts, would tend more to constitute a public trial than a house full of idlers and curious courthouse loungers. Protection from oppression or arbitrariness of the courts, its officers, and the prosecuting officer, will be assured so long as trained and discriminating newspaper reporters are present at the trial, keeping close and critical watch of everything done and said, for the purpose of publication in the daily press. A larger public is made acquainted with the salient facts of the trial, even while it is progressing, through the press than it is possible to reach through the open doors of the courtroom.

In addition, under the law, in every criminal case tried in this state the whole proceedings, including the qualification of jurors, questions to witnesses and their answers, rulings of the court and remarks by counsel or court, are stenographically taken down, and if the defendant is not satisfied with the verdict and desires to have the proceedings reviewed on appeal, he is furnished with a full transcription of everything. Thus all those things that were hidden within the

rule of open administration of justice was walls of the courtroom and memories of the thereafter to be followed. We'get some idea or iminal triers before we had stenographers of the meaning of the words "public trial" are now made public records, open to the inwhen the history of the causes of their use

For reasons of public policy throughout this country there has ever been a common understanding that the general good demands less notoriety or publicity be given a trial involving sexual offenses-such as rape, abortion, seduction, and criminal conversation—than to other trials, especially so when the morals and chastity of children are involved, or when they are called upon to detail before a jury and court the bestial depravity they have unfortunately suffered or witnessed. The trial courts especially have ever kept these cases on the frontiers between the line that separates the distinctively public trial from the distinctively secret trial. Through a sense of propriety and decency, universal consent, we may say, has in this country ripened this custom into a part of our common law. In such cases the rule of excluding a good portion of the public from the courtroom has become so fixed that the people demand or at least expect its enforcement. Even before we had a state Constitution guaranteeing persons accused of crime a public trial the rule of protecting children of tender years from the prurient and morbid curiosity of the crowd was enforced in Arizona, and the words "public trial" became a part of our fundamental law with that meaning ingrafted upon them.

The reported cases, although not as numerous as the importance of the question would seem to require, almost invariably have grown out of efforts of courts to shield society as well as parties or witnesses (because of their youth or sex) from immoral and nauseating facts involved, and, while they have not in all cases, acknowledged the distinction we indicate, they have, we believe, with few exceptions, very properly given it more or less consideration.

Another very potent reason for restricting the public attendance on trials of this peculiar nature is that it more often operates to the benefit of the accused than otherwise. It is a well-known fact that the general body of mankind looks with no favor or complacency upon the despoiler of young womanhood, and their attendance en masse upon a trial of this kind is often taken by the jury as a mandate to convict the defendant, and thus, generally speaking, the psychology of courtroom crowd is against, rather than for, the accused, whether he be innocent or guilty. In this connection, we adopt the very apt and convincing phrasing used by Sanner, Justice, in his dissenting opinion in State v. Keeler, 52 Mont. 205, 220, 156 Pac. 1080-1084 (L. R. A. 1916E, 472, Ann. Cas. 1917E, 619):

"The essence of the matter, as I see it, is that courts charged with the administration of justice are engaged in moral conservation of the highest order and rest under no obligation whatever to become centers of moral infection in

order that the trial may be said to be public, any more than they rest under the obligation to make extraordinary efforts to take up the trial in order that it may be said to be speedy. This provision of our Constitution is simply a reiteration and application to this state of the like provision found in the sixth amendment to our national Constitution. It had its origin in an age when stenographers were unknown; when newspapers were few and under restrictions. The abuses of secret or 'star chamber' proceedings conducted for political ends caused its formulation, and its object is to prevent a recurrence of such abuses. It ought not to be made an avenue for the escape of obvious guilt in a case which bears no sort of resemblance to these conditions, where, protected by the stenographic record, the newspapers, and the presence of such persons as were permitted to remain, no change for secrecy was possible."

We have proceeded, thus far, upon the theory that the order of the court was observed throughout the trial, and that no one of the public was admitted except the relatives of the defendants and the newspaper reporters. The record does not show how many of these there were. They might have been a considerable portion of the public, so far as we can tell. Indeed, we think it reasonably appears that the appellant was satisfied with the modified order for, although he objected to the order as first made, he made no objection or protest after its modification allowing newspaper reporters to remain at the trial. One of the reasons for requiring a public trial is that the accused can have whatever protection it may afford him. It is, then, to a certain extent, for his personal benefit. If he expresses a desire to have the attendance of the public limited or entirely prohibited, or if he, by his conduct, leads the court to believe he is satisfied with the order in that regard and the court acts in good faith, and not arbitrarily, it would seem that, in all fairness and justice, he should be precluded, after conviction, from urging for reversal in order that he invited, or tacitly consented to, by remaining silent. Not having objected to the modified order, we conclude that it was satisfactory, and that his conduct constituted a waiver of any right of his involved in the order as modified. That this may be done has been determined by many courts. People v. Swafford, 65 Cal. 223, 3 Pac. 809; Dutton v. State, 123 Md. 373, 61 Atl. 417, Ann. Cas. 1916C, 89; Benedict v. People, 23 Colo. 126, 46 Pac. 637,; State v. Nyhus, 19 N. D. 326, 124 N. W. 71, 27 L. R. A. (N. S.) 487; Carter v. State, 99 Miss. 435, 54 South. 734,

We admit the courts are far apart as to what constitutes a public trial. There are a number of cases reported wherein the order of exclusion was not as restrictive as the order in the present case, and others where the order was almost identical, in which the courts have held the accused was deprived of a constitutional right. State v. Osborne, 54 Or. 289, 103 Pac. 62, 20 Ann. Cas. 627; State v. Hensley, 75 Ohio St. 255, 79 N. E. 462, 9 L. R. A. (N. S.) 277, 116 Am. St. Rep. 734; 9 Ann. Cas. 108; People v. Hartman,

103 Cal. 242, 37 Pac. 153, 42 Am. St. Rep. 108; Tilton v. State, 5 Ga. App. 59, 62 S. E. 651; People v. Murray, 89 Mich. 276, 50 N. W. 995, 14 L. R. A. 809, 28 Am. St. Rep. 294; State v. Keeler, supra. But there are some courts that have sustained orders as restrictive as the one we have under consideration, whose conclusions meet with our approval, even though their reasoning does not in all respects coincide with ours. State v. Johnson, 26 Idaho, 609, 144 Pac. 784; Reagan v. United States, 202 Fed. 488, 120 C. C. A. 627, 44 L. R. A. (N. S.) 583.

Whatever the reason be for restricting the attendance upon a trial, whether lack of courtroom accommodations (State v. Brooks, 92 Mo. 542, 5 S. W. 257, 330; Jackson v. Commonwealth, 100 Ky. 239, 38 S. W. 422, 1091, 66 Am. St. Rep. 336), or to preserve order and decorum (Grimmett v. State, 22 Tex. App. 36, 2 S. W. 631, 58 Am. Rep. 630; People v. Kerrigan, 73 Cal. 222, 14 Pac. 849; Lide v. State, 133 Ala. 63, 31 South. 953), or to exclude women because of the indecent character of the evidence (State v. McCool, 34 Kan. 617, 9 Pac. 745), or to exclude persons of a dangerous character (United States v. Buck, 4 Phila. 169, Fed. Cas. No. 14680), or where the public morals and public decency require the exclusion of the young (Cooley's Constitutional Limitations [7th Ed.] p. 441), it all results in just so much diminution of the public attendance, and the right being admitted for one reason goes far to establish the principle that its extension when reasonable infringes no constitutional right of the accused.

The prosecuting witness in this case was a girl of tender years, a mere child. It became her duty, under the law, to repeat language and describe conduct that any delicately reared and refined girl would blush and halt to repeat to her most intimate friends and associates. The state, however, was interested in having the story told for its protection and benefit. Her shame must be laid bare in strange and foreboding surroundings before a full bench of creening, gaping, staring, and unfamiliar faces, and in the presence of an imposing and solemn array of jurors, the court, its officers; and the attorneys. Appellant would have her, in this environment rather than the one created by the court's order, relate the vile and indecent, profane, and vulgar words she heard, and describe the unseemly things she saw, and undergo a gruelling crossexamination by astute counsel. The ordeal is trying enough without the jarring and disconcerting shock of a crowded and curious courtroom. If the provision for a public trial is for the benefit and protection of society, as well as for the benefit and protection of the accused, we can see no objection to a course of conduct in the trial that preserves the benefit to the one as fully as to the other.

The trial court must be the judge as to

the restrictions, if any, he would impose a medicine and that, as such, he sold it. Eviupon the attendance in the trial of each case as it arises, and as long as his discretion is wisely and soundly exercised, and it does not deprive the accused of the right to have present a reasonable portion of the public, this court will refuse to revise his judgments in that regard.

We can conceive of no good reason why the court should not, upon request of the accused, even in cases of the kind we are here considering, permit a limited number of his friends and acquaintances to be present during the trial, and if the appellant in this case had made such a request of the court, we have no doubt it would have been granted.

The judgment of the trial court is affirmed.

FRANKLIN, C. J., and CUNNINGHAM, J., concur.

COOPER v. STATE. (No. 448.)

(Supreme Court of Arizona. April 18, 1918.) 1. Intoxicating Liquors \$\infty 136 - Unlaw-FUL SALE-CONSTITUTIONAL PROVISION. Const. art. 23, forbidding the sale and dis-

Const. art. 23, forbidding the sale and distribution of intoxicating liquors of any kind to any person in the state, containing no exception as to that prescribed or sold for medicinal purposes, is not a regulatory provision, but one of suppression, and does not permit the sale of a compound of ardent spirits with other ingredients labeled Jamaica ginger and sometimes used for medicinal purposes.

2. Intoxicating Liquors 4-238(3) - Of-fenses-Question for Jury.

In a prosecution under Const. art. 23, forbidding the sale of intoxicating liquors, held on the evidence that the intoxicating quality of the Jamaica ginger sold by defendant was for the jury.

3. Intoxicating Liquors = 131-Offenses 3. INTOXICATING LIQUORS \$\insigma 131\to Offenses \\
-Criminal Intent or Guilty Knowledge. Under Const. art. 23, forbidding the sale of intoxicating liquors of any kind, the defendant's good faith in thinking that he might sell the essence of Jamaica ginger was no defense, as criminal intent or guilty knowledge is not a necessary element of the offense.

Appeal from Superior Court, Graham County; F. B. Laine, Judge.

E. F. Cooper was convicted of selling intoxicating liquor, and he appeals. Affirmed.

W. K. Dial, of Safford, for appellant. Wiley E. Jones, Atty. Gen., and R. W. Kramer, L. B. Whitney, and George Harben, Asst. Attys. Gen., for the State.

ROSS, J. [1, 2] The only question involved in this appeal is as to whether the essence of Jamaica ginger is an intoxicating liquor within the meaning of the constitutional provision prohibiting the sale, exchange, etc., of intoxicating liquors.

The appellant is a druggist carrying on a drug business in the town of Safford, Graham county, this state. He admitted the sale charged in the information, as well also others, in the regular course of his business as a druggist, but contended it was prepared as and makes the decision of arbitrators on appeal

dence was submitted showing that 91 per cent. of the contents of the Jamaica ginger was alcohol, and the label on the container represented the alcoholic content as 83 per cent. A witness testified that, by diluting and sweetening it, it could be drunk in quantitles sufficient to produce intoxication.

The Constitution forbids the sale and disposition of ardent spirits, ale, beer, and wine, and of intoxicating liquors of any kind to any person in the state of Arizona. Article 23, Constitution. It contains no exceptions, as that it may be prescribed and sold as a medicine, or for medicinal purposes. ther doctors nor druggists; nor any one else, may sell or dispose of any of the named or described liquors as such, or when compounded as a medicine. It is not a regulatory provision, but one of outlawry. It is one of suppression and not one of supervision. The fact that ardent spirits are mixed with other ingredients and, as thus compounded, labeled Jamaica ginger and sometimes used for medicinal purposes, does not change the situation, for as we said in Brown v. State, 17 Ariz. 314, 152 Pac. 578:

"Of course, the name by which it was called cannot affect its kind or quality. It is the stuff of which it is made, and not its name, that gives it place among the prohibited liquors named in the Constitution."

[3] That the appellant may have, in good faith, thought he had a right to sell the essence of Jamaica ginger, might be a proper consideration in fixing his punishment or for the pardoning power, but unavailing as a defense. Criminal intent or guilty knowledge is not a necessary element in this offense. Troutner v. State, 17 Ariz. 506, 154 Pac. 1048, L. R. A. 1916D, 262; Hall v. State, 19 Ariz. , 165 Pac. 300.

The question as to the intoxicating quality of the admixture sold, being one of fact, was properly submitted to the jury along with the generai issue.

Finding no error, the judgment is affirmed.

FRANKLIN. C. J., and CUNNINGHAM, J., concur.

YUMA COUNTY v. MARICOPA COUNTY. (No. 1453.)

April 18, 1918.) (Supreme Court of Arizona.

Counties &= 8-Boundaries-Determina-1. COUNTIES E-BOUNDARIES—DETERMINATION BY BOARD OF SUPERVISORS—EFFECT.

Civ. Code 1913, pars. 2373, 2380, fix the boundary line between Yuma and Maricopa counties upon meridian line 113 deg. 20 min. west longitude. Rev. St. 1887, par. 369, provided that whenever the boundary line of any county should be so indefinite as to make it impossible to determine where the lines are, and when a part of the territory by reason of such indefinite description is claimed by two county two county should be so indefinite description is claimed by two county should be so indefinite description is claimed by two county should be so indefinite description is claimed by two county should be so indefinite description is claimed by two county should be so indefinite description is claimed by two county should be so indefinite description in the should be so indefinite as to make it impossible to determine where the lines are, and when a part of the territory by reason of such indefinite description is claimed by two county should be so indefinite as to make it impossible to determine where the lines are, and when a part of the territory by reason of such indefinite as the should be so indefinite as to make it impossible to determine where the lines are, and when a part of the territory by reason of such indefinite as the should be so indefinite as the should be s indefinite description is claimed by two counties, the boards of supervisors of such counties may have a survey made to define the boundary,

final. Held that the boundary line was not in-definite and where the meridian line had not been surveyed and located on the ground, there was no tangible basis for a dispute, so that the act of county officials in 1889, in surveying and marking the line, could not have been taken under the act.

2. Counties &= 8-Boundaries-Proceeding TO ESTABLISH.

Under Civ. Code 1913, pars. 2373, 2380, and Laws 1889, No. 42, permitting the boards of supervisors of contiguous counties to define the supervisors of contiguous counties to define the county boundary line by having a joint survey thereof made, and by establishing posts thereon, the act of the respective county boards of supervisors in making a survey, and posting, without making or filing the record thereof as required by the act, in the absence of any provision making the survey final or declaring it to be the true boundary line, was binding until in the regular course of law the true boundary was located on the ground. on the ground.

3. Counties &= 8-Boundary Line-Deter-

MINATION BY COURT—STATUTE.

Civ. Code 1913, pars. 2373, 2380, define the boundary line between Yuma and Maricopa counties as meridian line 113 degs. 20 min. west longitude; Const. art. 6, § 4, gives the Supreme Court original and exclusive jurisdiction to determine disputed county boundary. tion to determine disputed county boundary; and Civ. Code 1913; pars. 2381-2385, provides that on any dispute as to location of a county boundary line, either county may commence an action in the Supreme Court to have the line determined, and requires the court to define the true boundary line and directs that it be marked. Held that, even though a boundary line other than the true one may have been adopted by the Legislature, it had the power to change it back to the true line fixed by statute, and that the court would define the true statutory boundary line.

4. COUNTIES \$\instructure 16(1) — ESTABLISHMENT OF BOUNDARY LINE—RECOVERY OF TAXES.

Where the county supervisors of Yuma and Maricopa counties in 1889 made a joint survey of the boundary, and mutually agreed upon it, and acted thereon in the collection of taxes, etc., until 1907, the boundary agreed upon was binding until the true boundary was lawfully established, so that, where a strip in which Maricopa county had collected taxes during that time was determined to belong to Yuma county, the latter county could not recover taxes so collected.

Original proceeding by Yuma against Maricopa county to settle boundary line and to recover taxes collected by defendant on the disputed strip of land, in which a referee reported his findings and conclusions. Judgment for plaintiff as to the boundary question, denying a recovery of taxes.

Clement H. Coleman, Co. Atty., and Thomas D. Molloy, both of Yuma, for plaintiff. Clyde M. Gandy, Co. Atty., and A. G. Baker and J. L. B. Alexander, all of Phoenix, for defendant.

ROSS, J. This is an original proceeding instituted by Yuma county against Maricopa county under the provisions of paragraphs 2381-2385, Civil Code 1913, which, among other things, authorize and empower this court to take jurisdiction of disputes arising "between two counties respecting the location of the boundary line between such counties,"

its judgment, to "define and designate the true boundary between the two counties."

It is alleged in the complaint that the boundary line between the two counties is fixed by law along 113 deg. 20 min. west longitude; that the defendant has extended its sovereignty and jurisdiction over a strip of land 4.215 miles east and west in width, and 103 miles in length north and south, to the west of and adjoining said meridian line, and has wrongfully exercised sovereignty and jurisdiction over such strip of land ever since 1890. For a second cause of action the plaintiff seeks to recover from the defendant county taxes that have been collected by defendant upon the property located in said disputed strip of land.

The answer admits that the true boundary line between the counties, as fixed by law, is 113 deg. and 20 min. west, but alleges that it was so indefinite as to make it impossible to determine where such line was upon the ground, and that by reason thereof a portion of said territory adjacent to said boundary was claimed by both counties; that in 1889, pursuant to paragraphs 369, 370, 371, Revised Statutes of 1887, and to Act No. 42, 15th Legislative Assembly, and acting thereunder, the boards of supervisors of Yuma county and Maricopa county, deeming it necessary that the boundary separating said counties should be defined so that it could be easily determined jointly by the supervisors of the two counties, caused the same to be surveyed its entire length and marked upon the ground with posts one mile apart. Thereafter, in 1889, the boards of supervisors of both counties approved said survey, and adopted, approved, and established the line so marked as the boundary line between the counties, and that both counties have ever since recognized and accepted said line as the boundary. Defendant also pleads estoppel and laches and limitation.

The plaintiff filed a reply to the answer, denying that in 1889 the true boundary line was so indefinite as to make it impossible to determine where such line was upon the ground, or that it was at all indefinite; also controverting the legality and regularity of the proceedings by the boards of supervisors, and alleging that they had acted without jurisdiction.

The pleadings were several times amended, and it is possible that they present other issues, but we do not deem it necessary that they be further stated in this opinion.

The Honorable John H. Campbell was appointed by the court referee to take testimony, with directions that he render findings of fact and conclusions of law. Upon the report of the referee being filed, the defendant moved for a judgment thereon. plaintiff moved to set aside the findings of fact and conclusions of law, and for a reand also make it the duty of the court, in hearing; also filed exceptions to the findings

the court upon these motions.

The substance of the findings of fact is that the statute fixes the boundary between the counties as meridian 113 deg. 20 min. west longitude; that prior to January 1, 1889, the boundary had not been marked on the ground or defined so that it might easily be determined: that during 1889 the boards of supervisors of said counties, acting together, caused the surveyors thereof to jointly survey such boundary line, and to mark the same its entire length, and that said boards of supervisors approved and adopted said survey as the boundary line between said counties; that the line so surveyed and marked is not the true line separating said counties as prescribed by statute, but is something more than four miles west of meridian line 113 deg. 20 min. west longitude; that from and after said survey was approved the officials of both countles, and the inhabitants thereof, acquiesced in and recognized the line so surveyed as the boundary, without protest, until 1907, when the board of supervisors of plaintiff advised the board of supervisors of defendant that the line as surveyed and marked was not the true line, and requested that another survey be made, and that similar requests have been made from time to time since 1907, all of which have been refused by the board of supervisors of defendant county; that no other action or proceeding has been taken by plaintiff, other than requests for another survey, until the institution of this suit; that defendant has, at all times since the approval of said survey, exercised jurisdiction over the territory lying between the true boundary line as defined by statute and the line as so surveyed and marked, and has levied and collected taxes upon the property there situated; that the lands in dispute have been arid and sparsely settled, and the board of supervisors or other officials of plaintiff did not discover that the true boundary line as defined by statute was not defined and marked by said survey until on or about the year 1907.

The referee's conclusion of law is that-"the plaintiff county should not recover in this action, for the reason that the county surveyors of the counties of Yuma and Maricopa, in making the survey and in marking the line as afore-said, were the agents of the Legislature of the territory of Arizona in determining the position on the surface of the earth of the meridian line 113 degrees 20 minutes west longitude, and having determined the same, though erroneously, the determination is binding upon said counties and relief may only be given by the Legislature."

We are to determine whether the legal conclusion by the learned referee is the law under the facts as found or not, there being no material dispute as to the facts.

[1] We will inquire, first, as to whether the determination of the board of supervisors of the boundary line in 1889 was binding and

and conclusions. The case was submitted to its judgment, to define and designate the true boundary dividing the counties.

Paragraph 2373, Civil Code 1913, describes the western boundary line of Maricopa county as coincident with the east boundary line of Yuma county, and defines it as meridian line 113 deg. 20 min. west longitude. Paragraph 2380, Id., describes the eastern boundary line of Yuma county as meridian line 113 deg. 20 min. west longitude, "along the western boundaries of Pima, Maricopa, and Yavapai counties." These sections have been carried forward in the different revisions of the statutes unchanged since February 14, 1871, the date Maricopa county was created. The true statutory dividing line between the counties, then, is 113 deg. 20 min. west longitude. The Legislature, the only authority in the sphere of creating counties and fixing their boundaries, has so said; and unless it has, in the exercise of that exclusive and supreme power, by some act of its own or by its authorized agent, changed the boundary, such meridian has always been and is now the true boundary between plaintiff and defendant. At the time (1889) when the supervisors of the two counties surveyed and marked the dividing line, the statutory law on the subject was contained in paragraphs 369, 370, and 371, Revised Statutes of 1887. and Act No. 42 of the Laws of 1889. The first of these provided that "whenever the boundary line of any county shall be so indefinite as to make it impossible to determine where such lines are, and when a portion of territory by reason of such indefinite description is claimed by two counties, the board of supervisors" of the counties may have a survey made "to define the boundary," and, in case either county is dissatisfied with the boundary line determined, it may appeal to arbitration, "from which arbitration there shall be no appeal and the decision shall be final." The action of the officials of the two counties in 1889 was not taken under this statute for two reasons: First, the jurisdictional fact of a claim of a "portion of territory" by the two counties because of "indefinite description" of the boundary line between them did not exist. The meridian line separating the counties had not been surveyed and located on the ground, and until that was done there was no tangible basis for dispute over the territory. The boundary being the meridian line, its description was not indefinite. Crook County v. Sheridan County, 17 Wyo. 424, 100 Pac. 659; Hinsdale County v. Mineral County, 9 Colo. App. 368, 48 Pac. 675. In the former case the court said:

"There was no uncertainty in the description of the western boundary line. The fact that a certain meridian of longitude was designated as the boundary did not render the descriptive line uncertain or make the statute ambiguous so as conclusive upon the counties; and, second, if to require construction through the aid of exso, whether the Legislature has notwith-standing made it the duty of the court, in nevertheless, when employed to define a bound-



ary line, it constitutes the true line to be fol-, 655, 21 S. W. 261; Jones v. Powers, 65 Tex. lowed in making a practical location.'

In the latter case it was held that a meridian boundary line was not an indefinite description of a dividing line, and the court

"It is only in case of a dispute arising out of an indefinite description that the statute can be invoked.

[2] The proceedings taken in 1889 show upon their face that they were had under Act No. 42. Laws of 1889. The initial step taken in that proceeding was a resolution passed by the board of supervisors of Yuma county, in which it is recited that the proposed survey should be "in accordance with an act of the 15th Legislative Assembly." giving the title of Act No. 42. This act makes provision for the boards of supervisors of contiguous counties, when deemed necessary by them, or either of them, to define the county boundary between them by having a joint survey thereof made, and by establishing posts thereon one mile apart, "so that it may easily be determined."

The respective boards regularly pursued the authority granted under the act as to the survey and posting, but the record thereof was not made and filed as required. The act made it the duty of the boards of supervisors to have made a map of the said survey, and also a map of the exterior boundaries of their counties, "which said maps should be filed with the clerk of the board of supervisors." No maps were made and filed, but this cannot affect the result or the jurisdiction of the board to act. The actual survey and marking upon the ground would control over the calls of the map in case of a conflict, even had maps been made. Jurisdiction under this act is not predicated on an indefinite description of the boundary line nor upon adverse claim to a portion of territory. If the board of supervisors deemed it necessary that the boundary be defined, it was authorized to make a survey for that purpose, providing the supervisors in the contiguous county joined in the survey. The act is silent as to the effect of the survey. It does not make the determination of the survey "final" and forbid "appeal," as in the previous law. Paragraph 370, supra. There was nothing in the act or the general laws of the territory affording relief from errors or mistakes, if any were later discovered, and this condition continued until 1913, when this court was given jurisdiction of disputed boundaries between counties.

The defendant lays down a proposition of law, identical with the referee's legal conclusion, to the effect that "when a county line has been run and marked on the ground in accordance with law by the agents designated by the Legislature it is conclusive and can only be changed by legislative enactment"; and cites in support thereof Kauf-

207: Trinity County v. Mendocino County. 151 Cal. 279, 90 Pac. 685; and Board v. Head, 3 Dana (33 Ky.) 489.

The two Texas cases approve the proposition as stated, and correctly so; for at the time of their rendition the statute of that state contained this provision, "The line so surveyed and marked shall thereafter be regarded as the true boundary line between the counties."

In the California case the court was compelled to announce the same rule or disregard the statute, which read: "The lines run out, marked and defined as required by this act are hereby declared to be the true boundary lines of the counties named herein.'

The Kentucky case arose between private parties, and the question involved was as to whether it could be shown that Head's dwelling and stable were in Hancock and not in Daviess county. The statute provided that the boundary line should be run "so as to leave William Head \* \* in the county of Daviess," and the line was so actually run. The court rejected the offer of evidence to show the line was not properly placed on the ground, and very correctly so, in view of the language of the statute.

So it would seem that the proposition of law made by defendant is of doubtful soundness, except where the Legislature declares the effect of such a location of the boundary line to be conclusive or that it shall be the true boundary line. We think a more reasonable and just construction, in the absence of a legislative declaration, as in California and Texas, would be that the Legislature intended the marking of the boundary line as binding, in the exercise of jurisdiction and sovereignty over the disputed territory, until. in the regular course of law, the true boundary line was located upon the ground.

[3] However that may be, we are constrained to the opinion that it is now the duty of this court to "define and designate the true boundary line between the two counties." While the provisions of the law heretofore discussed were carried forward into the Revised Statutes of 1901 as paragraphs 945-950, in the revision and compilation of the Laws of 1913 they were omitted, and in lieu thereof paragraphs 2381-2385, Civil Code 1913, were enacted. This last piece of legislation was in response to a provision contained in section 4, article 6, of the state Constitution, which vests in the Supreme Court "original and exclusive jurisdiction to hear and determine all causes between counties concerning disputed boundaries and surveys thereof."

Paragraph 2381 provides:

"Whenever any dispute arises between two counties respecting the location of the boundary line between such counties, \* \* either county may commence an action against the other in the Supreme Court of the state of Arisons for the purpose of hering such boundary line man County v. McGaughey, 3 Tex. Civ. App. line determined."

Paragraph 2382 provides that the court ifixed by statute, and the one we are enjoinmay order a survey of such disputed boundary, and that maps and drawings thereof be made; paragraph 2383 provides for the expenses of a survey, maps, and drawings; paragraph 2384 provides for additional surveys if deemed necessary; and paragraph 2385 provides for a form of judgment in these words:

"The judgment of the court shall define and designate the true boundary between the two counties, and shall direct that the same be suitdeem proper, and the cost of such marking shall be borne by the two counties equally, or in such proportions as the court may direct."

The defendant does not question the findings by the referee of the existence of the jurisdictional fact of a disputed boundary between the two counties. The board of supervisors of plaintiff county in 1907 officially tried, and from time to time since has endeavored, to get the board of supervisors of defendant county to join in the rectification of the boundary line between them by another survey thereof. Resolutions reciting that the 1889 survey was erroneous were passed and transmitted to the supervisors of the defendant county, with the request that another survey be had, to the end that the true boundary line separating them should be located upon the grounds, and these requests were all ignored or refused by the defendant. It was not only necessary that a disputed boundary be alleged in the complaint, but it was also essential that it be sustained by competent evidence. It is settled that the boundary was in dispute, and had been since 1907, when it was discovered by the board of supervisors and other officials of Yuma county "that the true boundary line as defined by statute was not defined and marked by said survey."

The finding is that the line surveyed and marked in 1889 "is not the true line separating said counties as prescribed by statute, but is something more than four miles west of the meridian line 113 deg. 20 min. west longitude." It is the contention of defendant that the line located in 1889 is the true boundary line notwithstanding, and that it should stand. This may not be for the reason that Act No. 42, Laws of 1889, does not declare that the line thereunder surveyed and marked shall be the true boundary between the countles. The only direct and positive declaration as to the true boundary line is that it is meridian line 113 deg. 20 min. west longitude, and we think, when the Legislature later made it the duty of this court to define and designate the true boundary, it meant the boundary line as prescribed by statute. Any other, however long rec-

ed by law to define and designate.

In view of the language of our statute (paragraph 2385), an observation of Shaw, J., in Trinity County v. Mendocino County, supra, 151 Cal. at page 288, 90 Pac. at page 688, may be quoted for light. He said:

"In any event, the location of the county lines is a political question, to be settled by the legislative power of the state, and subject to change from time to time as the legislative power may direct. If the line as fixed in accordance er may direct. If the line as fixed in accordance with its directions is inaccurately located by the person whom it has directed to make the survey and place the marks, the correction of the error lies with the Legislature and not with the courts, unless it has provided that the courts shall determine the true location, which it has not done. (Italics ours.)"

Our Legislature has provided that we shall define and designate the true boundary line. It has imposed a duty upon the Supreme Court which the Legislature of California did not impose on the courts of that state. Even though another boundary line than the true one may have been adopted by the Legislature through its agents, it possessed the power to change it back to the true boundary line as fixed by statute. It may change county boundaries as often and as much as it chooses, and, when it manifests its intent that the true boundary shall be determined regardless of any practical or working boundary that may have been adopted by the counties, there is nothing to do but to locate the true boundary.

The defendant acknowledges in its answer that the true boundary is the one fixed by the statute that created it in 1871, for it

"Answering plaintiff's first cause of action, defendant alleges that the true boundary between said counties is on 113 deg. 20 min. west longitude, as fixed by law."

It is the true boundary, and not some other, although recognized and acquiesced in. that the court must define and determine.

[4] We do not, however, believe that the plaintiff should be permitted to recover on its second cause of action. As heretofore said, the two counties, having made a joint survey of the boundary between them, to which they mutually agreed, and having, by and through their officials and agents, acted upon the line so located in the administration of the law ever since, the transactions pending the status thus invited and established should not be disturbed.

For the purposes of the administration of the law, both civil and criminal, as well as the levy and collection of taxes, the boundary agreed on should be binding at least until the true boundary is lawfully ascertained.

As was said in Board v. Head, supra:

"The boundary lines of counties are matters ognized or located, would not be the true boundary. It might be the practical or working boundary as long as acquiesced in or acted upon, and binding to that extent, but it would never be the true boundary, the one

in and of itself, affect their relations thereto, as the status could only be changed in pursuance of the law.

The rectification of the error in the survey of 1889 could have been provided for by the Legislature at an earlier date, and thus restored to plaintiff jurisdiction over the disputed territory. Whether, in the absence of legislation, other remedies were open to plaintiff, such as quo warranto or injunction, we do not deem it necessary to decide, as they were not resorted to or invoked by plaintiff.

Judgment should go against the plaintiff on the second cause of action. However, we think the plaintiff is entitled to judgment defining and designating the true boundary line between it and defendant county, but, before this can be done, it will be necessary to have made an official survey of meridian 113 deg. and 20 min. west longitude, the prescribed statutory line between the two counties, and, inasmuch as the law requires that the line so surveyed shall be suitably marked upon the ground, we will defer making the order for a survey for 20 days, pending which time counsel are invited and requested to submit suggestions as to the form and contents of the order, especially as to how and with what material the line shall be marked.

In the matter of disbursements and expenses, including the fees and expenses of the referee, and the expenses of surveying and marking boundary, we think it but fair and just that they be borne by the two counties equally, Yuma county to recover her costs in this court; and it is so ordered.

FRANKLIN, C. J., and CUNNINGHAM, J., concur.

ELLIS et al. v. FIRST NAT. BANK OF GLOBE. (No. 1551.)

(Supreme Court of Arizona. April 18, 1918.)

1. NEW TRIAL \$==117(2)-Time for Applica-

TION—CONSTRUCTION OF STATUTE.

Under Civ. Code 1913, par. 590, providing that motions for new trial shall be made after rendition of judgment, a motion before rendition of judgment was premature and ineffectual.

2. APPEAL AND EBBOB &=294(1)—REVIEW—
DEFENDANT ON MOTION FOR NEW TRIAL.
Civ. Code 1913, par. 1231, providing that
in an appeal from a final judgment in an action tried before a jury, the Supreme Court
shall not consider the sufficiency of evidence unless a motion for a new triel shall have been shall not consider the sumciency or evidence un-less a motion for a new trial shall have been made, held to preclude consideration of suffi-ciency of evidence, where motion was ineffectual because made before rendition of judgment, contrary to paragraph 590.

different position is given to it by the public authorities."

Nor should the fact that the plaintiff, in 1907, disputed the right of defendant to exercise jurisdiction over the strip involved, in and of itself, affect their relations thererule.

4. WITNESSES €== 269(15)-ORDER OF PROOF.

Cross-examination of plaintiff's witness to develop a matter of defense set up in the an-swer, and which defendant is required to bring out as a part of his own case, is properly excluded.

5. Banks and Banking \$\infty\$116(2) — Bona Fide Purchasers—Notice.

That the agent of a bank discounting a note knew that the payee of the note did not have sufficient money in bank to erect a building held insufficient to charge the bank with knowledge that collateral notes taken by the bank were obtained by such payee on fraudulent representations that it had sufficient funds for such purpose.

Trial  $\rightleftharpoons$ 296(1) — Instructions — Construction as a Whole. 6. TRIAL

An instruction that ignores the principle that notice to an agent is notice to the principle. pal held no error, where instructions as a whole airly and accurately presented the law applicable to the case.

7. TRIAL €==296(8)-Instructions-Weight

OF EVIDENCE.

Instruction that puffing statements, made by promoters or agents selling stock as to the by promoters or agents seeing score as to the value of the stock as an investment, would not constitute a defense held not on the weight of the evidence, in view of other instructions defining false and fraudulent representations.

8. Action \$\infty 59 - Consolidation - Judg-

MENT.

Where a bank brought separate actions on pledged notes against seven defendants, and upon motion of defendants, the issues being the same, the suits were consolidated, a single verdict and judgment is sufficient.

345-Verdict-Asceptainment 9. TRIAL

of Amount of Recovery.

Where in consolidated actions on notes transferred to plaintiff as collateral for another note larger in amount than any of the notes sued on, it being stipulated that, if plaintiff was any of the notes are the constitution of the notes and the constitution of the notes are the constitution. entitled to recover, the amount due should be shown by the face of the notes in suit, defendant's objection that the jury in its verdict for plaintiff failed to find the amount due on the collateral notes was untenable.

10. Bills and Notes €=339 - Bona Fide

PURCHASERS.

In view of Civ. Code 1913, pars. 4201, 4202 a purchaser of negotiable paper in good faith and without knowledge of infirmity or defects is not required to make original and independent investigation of the circumstances surrounding the issue of the paper and the relations of the parties thereto.

Appeal from Superior Court, Maricopa County: R. C. Stanford, Judge.

Consolidated actions by the First National Bank of Globe, a corporation, against William C. Ellis and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Struckmeyer & Jenckes, of Phœnix, for appellants. Alice M. Birdsall, of Phonix, and A. C. McKillop, of Globe (J. F. Goldsberry, on the brief), for appellee.

FRANKLIN, C. J. Felix Lamm and John Armer were each indebted to the Realty Se-

curities Company, a corporation, in the sum of \$5,000. This indebtedness was evidenced by the promissory note of each of said persons given to the corporation. The Realty Securities Company, wishing to realize upon the indebtedness, entered into negotiations with the appellee for the sale and purchase of said notes. The appellee agreed to purchase the notes, less the customary discount, provided the Realty Securities Company would furnish an acceptable indorser or collateral; the character of appellee as a national bank requiring this. The name of D. J. Peter was suggested as the indorser of the paper, which was agreeable to the appellee, but, upon being requested to indorse the notes, he refused. It was thereafter agreed that the Realty Securities Company should put up as collateral certain unmatured, negotiable promissory notes held by it, the same, however, first to be passed upon as to their sufficiency by Mr. Lloyd B. Christy of the Valley Bank of Phœnix. Mr. H. J. Brazee, the secretary of the Realty Securities Company, delivered the notes to the Valley Bank for and on account of the appellee, and, Mr. Christy, having examined them, reported favorably to the appellee as to the sufficiency of the collateral. Thereupon appellee paid to the Realty Securities Company the face value of the Armer and Lamm notes, less the current rate of interest at the time.

Among the notes so pledged to appellee as security for the payment of the Armer and Lamm notes were those of the seven defendants in the superior court, to wit, W. C. Ellis, W. W. Edwards, O. E. Plath, Peter Mohn, Joseph A. Lobit, H. A. Hammels, and Harry T. Duffy. These notes were all unmatured, negotiable paper at the time of the bank's purchase.

The Lamm note was paid in due course. A portion of the Armer indebtedness evidenced by his note to the Realty Securities Company, and which was purchased by appellee, was also paid, but, there remaining an unpaid balance thereof, the former note was taken up by Armer with his negotiable promissory note, evidencing the balance of his indebtedness in the sum of \$4,375, and as a renewal of the former note to the extent of the balance so due and unpaid. At the time of the trial there remained due and unpaid of the indebtedness evidenced by the renewal note of Armer the sum of \$2,722.22 as principal, and \$443.36, interest.

Seven suits were brought by appellee, one against each of the seven defendants, to recover on their several promissory notes so pledged as collateral to secure the unpaid balance due on the indebtedness evidenced by the Armer renewal note. On motion of the defendants, agreed to by plaintiff, these seven suits were consolidated for trial, the issues presented by the pleadings and the evidence offered in support thereof being precisely the same in each case except as to the state of the indebtedness of Armer to the

particular amount due and unpaid on each of the seven notes. The uncontradicted testimony left only the question raised by the answers of the respective defendants as to whether or not the appellee was the holder of the several notes in good faith, that is to say whether the Realty Securities Company obtained the notes of the seven defendants by false and fraudulent representations. and, if so, whether or not the appellee had actual knowledge of the infirmity or defect, or knowledge of such facts that its action in taking the notes amounted to bad faith.

The consolidated action was tried to a court and jury and a verdict found for the plaintiff below, which is the appellee here. There was but one form of the verdict rendered by the jury, which form, however, embraced and designated the particular names of the seven defendants and the numbers of the respective actions so consolidated for the trial. Upon the verdict of the jury, the judgment of the court was entered against each of the seven defendants for the amounts shown to be due and unpaid upon their respective notes. This appeal is prosecuted by the defendants Ellis, Edwards, Plath and Mohn. The other defendants do not appeal.

[1] On the record presented to this court, we are precluded from considering the sufficiency of the evidence to sustain the verdict and judgment, because the action was tried before a jury and the motion for a new trial was not made within the time fixed by the statute. The motion for a new trial in this case was made before the rendition of the judgment. Paragraph 590 of the Civil Code of 1913 provides:

"All motions for new trial, in arrest of judgment, or to set aside a judgment, shall be made within ten days after the rendition of judg-ment."

[2] This provision of the statute is mandatory. It is also provided in the Civil Code of 1913, paragraph 1231:

"Upon appeal from a final judgment the court shall review all orders and rulings made by the court below, which are assigned as error, whether a motion for a new trial is made or not. If er a motion for a new trial is made or not. It a motion for a new trial is made and denied, the court may, on appeal from the final judgment, review the action of the court below in denying the motion, though no appeal be taken from the order denying the motion for a new trial; provided, that on appeal from a final judgment, the Supreme Court shall not consider the sufficiency of the evidence to sustain a ver-dict or judgment in an action tried before a jury unless a motion for a new trial shall have been made."

In Gibson v. McLane, 17 Ariz. 61, 148 Pac. 288, we said:

"A motion for a new trial required by Civil Code of 1913, par. 590, to be made after rendition of judgment, being made before then, is ineffectual. The motion for new trial having been made premature, it is as though there had been none."

[3] It is urged that the trial court committed error in permitting oral proof of the appellee at the time he gave his renewal; notes as collateral to be put in escrow in note without requiring appellee to produce the original note or satisfactorily account for its nonproduction; that because of this the rule which requires the best evidence to be produced which the nature of the case demands was violated. The evidence discloses that the second note of Armer was not given in payment of the original indebtedness, but merely as a renewal for that portion of it unpaid at the time of the execution of the renewal note.

"A renewal note has the benefit of any security for the payment of the original indebtedness, and the holder may enforce it whether the renewal be for the whole or part of the original, in the absence of an agreement to the contrary." Daniel, Negotiable Instruments (6th Ed.) vol. 1, § 748.

It is, of course, universally recognized that the best evidence of which a thing to be proven is susceptible must be produced or its absence satisfactorily accounted for. This parol evidence did not vary or contradict any written instrument, but merely showed the state of the account or the amount of the indebtedness of Armer to appellee when he accepted the renewal note. The existence of this indebtedness was a fact in and of itself which depended upon the state of the account between the parties. The original note would not determine this. It was incumbent upon appellee to prove that the note sued upon was pledged to secure the present indebtedness of Armer, and, in addition to this, the production of the renewal note with parol testimony as to the amount of the original indebtedness remaining due and unpaid at the time of its execution is certainly all that should reasonably be required.

Under the facts of this case, it is not considered that the rule insisted upon should obtain to exclude parol evidence as incompetent to show the state of the account between Armer and the appellee. The present state of the indebtedness, together with the pledge of the notes in suit as security for the payment of that indebtedness, is the foundation of this action. The inquiry, therefore, as to the original indebtedness of Armer was but collateral to the main issue before the court, and we see no error in admitting the parol testimony of the witnesses who had personal knowledge of the facts to prove the state of that indebtedness. See Stein v. Local Board of Review, 135 Iowa, 539, 113 N. W. 339; Canadian Bank of Commerce v. John J. Sesnon Co. et al., 68 Wash. 434, 123 Pac. 602; Share v. Coats, 29 S. D. 603, 137 N. W. 402.

[4] According to the testimony, the authority given by appellee to Mr. Christy was limited to passing upon the sufficiency of the collateral and on the strength of which the bank was to purchase the Lamm and Armer notes. Mr. Christy testified for the appellee that he was asked by Mr. Greer, its president, over the telephone to select certain

the Valley Bank for certain notes that the appellee had purchased from the Realty Securities Company, and to pass upon the collateral notes as to their sufficiency.

At the time Mr. Christy received the notes in behalf of the First National Bank, he considered them A No. 1 commercial paper. At the time no defense entered his mind. The value of the name attached to the note was all. On his cross-examination the court excluded as not proper cross-examination the matter of the financial condition of the Realty Securities Company, at the time he passed upon the sufficiency of the collateral notes. There was no error in this respect. In the first place, it was sought to establish on cross-examination the new matter made an issue by the answer of defendants. This properly was to be brought forward in the development of their own case. This was afterwards done, and Mr. Christy fully interrogated about the matter, which, on crossexamination, had been excluded as not in proper order.

[5] It was the contention of the defendants and the effort of their cross-examination to show that the bank was not a holder of the paper in due course because Mr. Christy had knowledge of certain infirmities therein when passing upon the collateral, and which knowledge was chargeable to the bank. But we have seen that the authority of Mr. Christy was limited to passing upon the sufficiency of the security. "The value of the name attached to the note was all." In addition to this, the fact that Mr. Christy knew that the Realty Securities Company did not have sufficient funds at that time to erect a building, and, conceding that his knowledge was imputable to appellee, it would not destroy the status of appellee as a holder in good faith, even though an agent of the Realty Securities Company had obtained the notes by falsely and fraudulently representing such to be the fact, if Mr. Christy did not know that any such representation had been made to the makers thereof. As between the defendants and the Realty Securities Company, if the latter's agent had made representations to the former that such was a fact and it was false, and they believed it and relied upon it as true and were thereby induced to execute their notes on the faith of the representations that the company did have money in the bank sufficient to erect a building, the defense might prevail, but, as between the appellee and the defendants, it was not sufficient to show that the notes were obtained by the Realty Securities Company through false and fraudulent representations. It was necessary to go farther and show that appellee had actual knowledge thereof, or knowledge of such facts that its action in taking the instrument amounted to bad faith.

Mr. Christy testified that he did not follow

the actions of the Realty Securities Company, and did not know its financial condition at any time, other than knowledge of how much money it happened to have in its bank account; that when he examined the notes for appellee, he did not know what, if any, representations had been made to the makers thereof.

[6] One of the instructions is assailed because it is said to ignore the principle that notice to an agent is notice to the principal. It is impossible for a court to state in one sentence, or in one particular instruction, all the law applicable to the facts of a case. The instructions must be considered as a whole, and, when so considered, then if they fairly and accurately present the law applicable to the facts, this is all that may be required. The court did particularly instruct the jury on this principle of the law, and, in view of the limited authority given to Mr. Christy by the appellee, it was more favorable to defendants' contention than was justified by the facts.

[7] Error is assigned on the following ininstruction:

"You are instructed that 'puffing' statements made by promoters or agents selling stock of the Realty Securities Company as to the value of the stock as an investment, and other kindred statements, would not constitute a defense."

It is said that this instruction is bad because it is a comment upon the evidence, and also because the court did not point out the distinction between a "puffing" statement and a false representation. It is obvious the instruction does not comment upon the evidence. It is a general statement of the law applicable to the facts. When persons are compos mentis and deal at arm's length, the law does not regard mere "puffing" as to the value of stock as an investment the same as a false representation or the positive affirmation of a specific fact, but rather as a mere expression of opinion or "trade talk" which men of ordinary intelligence in their business dealings always receive cum grano salis. If defendants desired a charge covering the distinction here suggested, a proper instruction to that effect should have been requested. What is commonly called "puffing" or "trade talk" is always allowed, provided it is kept within reasonable limits. This instruction so confined it, and, when considered with other instructions defining false and fraudulent representations, could not have been misunderstood by the jury.

[8] Complaint is made because the court did not give seven different forms of verdict to the jury, and a verdict thereupon rendered against each defendant separately; also because the jury did not find the amount of the recovery in each separate case. When cases are consolidated, there is in effect but one suit, and a single verdict and judgment comprehending and settling all the issues involved is sufficient. The appellants them-

selves caused the consolidation to be made, and they are in no position to take this exception and now ask that the verdict and judgment be set aside because technically the cases are not such as under the law should have been consolidated. But beyond this the form of the verdict comprehended the style and number of each particular case so consolidated, and to hold that the verdict rendered should have been upon seven separate pieces of paper would be regarding mere form rather than substance.

"No special form of verdict is required, and where there has been substantial compliance with the law in rendering the verdict, the judgment shall not be arrested or reversed for mere want of form therein." Civil Code of 1913, par. 546.

[9] The objection that the jury did not find the amount of recovery in each case is alike untenable. The undisputed testimony shows that the indebtedness of Armer, which is the basis of this action, was greater than the amount of any of the notes in suit. It was stipulated that the amount due on each note should be the amount as shown by the face of the respective notes in suit. There was nothing, therefore, to be done, except make a mere arithmetical calculation of the amount, and it is not contended that any error occurred in the calculation as made. That the calculation being made by the court, under the circumstances, instead of the jury, calls for a reversal of the judgment is again inviting our attention to shadow, not substance. While the record does not call for a critical analysis of the evidence, nevertheless, the evidence has been carefully reviewed in its bearing upon other assignments of error, and it is convincing that nothing in the record would warrant a finding that the action of appellee in taking these notes amounted to bad faith. It may be conceded that the notes were obtained from appellants by false and fraudulent representations on the part of the Realty Securities Company, but this is not enough for them to prevail.

The method by which these appellants were inveigled into this investment, of which they now wish to be relieved, is an interesting study of human nature. Michael Angelo with paint and brush could not have pictured a thing more beautiful than the building drawn in words by the agents of the Realty Securities Company. The prospective profits to be derived from the tenants who were to inhabit this building were most alluring. From the cold record that we have, without the gesture and tone of voice that must have been potent to move the warm impulses of the heart, I can see in my mind's eye that majestical building rising to its due proportions of architectural perfection, furnished with every modern equipment and appliance that would appeal to the tastes of tenants the most fastidious. It was a thing altogether lovely. The appellants were even told that the dirt to be removed for its foundation

soon be flying, that the company had ample resources to make the dirt fly, and erect the building too. They were told that the execution of the notes was a mere formality. That before the notes became due immense revenues would be coming in from the building with which not only to take up the notes, but leave a large surplus profit to be shared in by the makers. Most any moth would have singed its wings in the bewilderment of such a light. In the enthusiasm of this study, the writer of this opinion almost feels a momentary regret that the opportunity to give such a note was not presented to him. Man, thou shalt earn thy bread by the sweat of thy brow. But when will men learn this lesson? It would prove but a vain and useless effort of the law to attempt the suppression of gullibility. The term "gullibility" is not used invidiously nor in the least disparagement to these appellants, but merely as a general observation of one of the fundamental traits in human nature. Since the father fell, every son of Adam is subject to the weakness in greater or lesser degree. The obvious remedy for this infirmity is the lesson of one's own experience which should in time, to those not wholly insensible to cause and effect, nor blind to an everyday experience in business matters, inculcate a wholesome and practical circumspection upon those occasions that present Mr. Wallingford as the orator of the day. But so long as an irresistible impulse exists among mankind to rub the Aladdin's Lamp and thereby obtain the rich stores of the world without other effort than some mysterious agency, just so long will Mr. Wallingford dine out of gold plate and ride in his coach and four. Had this been learned, this appeal had not been

[10] All men compos mentis and not suffering under some disability of the law are free to engage in business and invest their money at will. The freedom to contract is one of their most cherished and substantial rights, and it is only when fraud as defined in the law has been practiced upon them that the courts may interfere to set aside their obligations. Representative men of financial worth and standing must realize that in putting forth their unmatured, negotiable paper it is an invitation, sanctioned by the law, that all men may deal therewith upon the face value of it. In the market places men who deal in such paper are not, at their peril, compelled to make an original and inependent investigation of the circumstances surrounding the issue of every such instrument, or of the relations existing between the maker and payee thereof. It is enough if they give value and take the paper in good faith. Though the fraudulent payee may be enabled to realize upon a sale made to an

was not then flying, but that the dirt would soon be flying, that the company had ample resources to make the dirt fly, and erect the building too. They were told that the execution of the notes was a mere formality. That before the notes became due immense revenues would be coming in from the building firmity or defect, or knowledge of such facts with which not only to take up the notes, that his action in taking the instrument is newly a large surplus profit to be shared in by the makers. Most any moth would Civil Code of 1913.

The policy of the law is to let unmatured negotiable paper flow freely in trade, and any impediments placed upon its movement that are not dictated by a natural sense of justice would result in obstructing the arteries of commerce, and distract the business credit of commercial life, which is so largely dependent upon this character of credit, as a medium of exchange, to sustain it.

There is no reversible error. Affirmed.

ROSS and CUNNINGHAM, JJ., concur.

MAXEY v. BOARD OF SUPRS OF YUMA COUNTY et al. (No. 1578.)

(Supreme Court of Arizona. April 18, 1918.)

1. Counties \$\infty 182 - Bonds - Expenses - Statute-"Expenses in Incurring Bonded Indebtedness."

Under Civ. Code 1913, par. 5284, providing that the expenses of all proceedings in incurring a bonded indebtedness shall be borne by the county, and that if the bonds are sold such expenses shall be deducted from the proceeds, an amount paid to a broker for selling the bonds was not an expense of the proceeding, and hence could not be deducted from the proceeds of such bonds; but the items for advertising the sale of the bonds were a proper charge against the proceeds.

2. Mandamus 4 100 — Action of County Supervisors—County Funds.

In the absence of any law requiring the board of supervisors of any county to transfer from the road fund to the general fund of the county the amount paid out for advertising the sale of the road bonds, the court would not, by mandamus or otherwise, control the fiscal orders of the board so as to keep the different funds of the county intact for the specific uses intended by law, in view of the board's legal authority to dispose of the money for the specific purposes for which they are raised.

Appeal from Superior Court, Yuma County; Frank Baxter, Judge.

Suit by J. H. Maxey against the Board of Supervisors of Yuma County and Ike Proebstel and others, as Supervisors and members of the Board. Judgment for defendants, and plaintiff appeals. Affirmed.

W. E. Ryan, of Phœnix, for appellant. H. Wupperman, of Yuma, for appellees.

ROSS, J. This appeal is prosecuted from an order sustaining a general demurrer to the complaint and from a judgment of dismissal.

enabled to realize upon a sale made to an Briefly, the facts set out in the complaint innocent purchaser, still it is but a just rule are that the plaintiff appellant is a resident

brings the suit for himself and all others similarly situated; that in 1913 the taxpayers of Yuma county voted an issue of \$500,-000 county road bonds; that thereafter said road bonds were sold for their face value and accrued interest; that the board of supervisors employed a broker to assist in making the sale, to whom it paid the sum of \$28,-500; that it paid said sum, together with expenses for advertising and publishing the notice for bids, by warrants drawn on the general fund of the county levied and collected to meet the general county expenses for the fiscal year 1914-15; that at the time there was no excess in the general fund of the county, but, on the contrary, there was then an existing floating indebtedness of over \$50,000 due from the general fund of the county.

Appellant prays the mandate of the court directing the appellees to transfer from the fund realized upon the sale of said road bonds to the general fund the money so paid out for advertising and brokerage commissions. In addition to the general demurrer to the complaint, the appellees filed separate answers to the complaint and the alternative writ. The answers raise no issues of fact nor of law. The complaint sets forth, in addition to the facts we have stated, many propositions and conclusions of law as to the duties of the board of supervisors, and most of the answers are devoted to a denial thereof. The allegations in the answers to the effect that all of the \$500,000 realized had been expended on roads in and about Yuma Valley, except about \$45,000, proposed to be used in improving roads in the northern part of the county, suggests a problem that may be of local interest and concern, but it can have no weight or influence upon the questions of law we have to decide.

[1] The general demurrer, however, challenges the sufficiency of the facts stated to constitute a cause of action. The theory upon which the action was brought, we gather. was that all of the items enumerated in the complaint as "expenses" were legal charges against the proceeds realized from the sale of said bonds. The basis or excuse for such a contention is found in paragraph 5284, title 52, Civil Code of 1913, under and by virtue of chapter 2 of which the county proceeded in incurring such bonded indebtedness. Paragraph 5284 reads as follows:

"The expenses of all proceedings \* \* \* under this chapter shall be borne by the county \* \* instituting the proceedings necessary \* \* instituting the proceedings necessary and required hereunder; provided, however, that in the event the bonds or other evidences of indebtedness herein authorized shall be sold, such expenses shall be deducted from the proceeds of the sale of such bonds or other evidences of indebtedness."

taxpayer of Yuma county, Ariz., and that he | chapter 2, and could not lawfully be deducted from the proceeds of the sale of such bonds, and its repayment, whatever other fund it might have depleted, cannot be enforced against the road bond fund by this action or any other. Such an expense was not within the contemplation of chapter 2. and therefore could not be charged against the proceeds of the bonds issued thereunder. The authority for its payment must be found in other provisions of the law, and not here.

The items for advertising the sale of the road bonds were a proper charge against the proceeds of such bonds, but neither this court nor the trial court has been informed by the complaint or otherwise the amount of such items. It is alleged that money was paid out of the general fund on account of advertising, and that it should have been paid out of the road fund. How much we do not know.

[2] Granting this to be true, we know of no law, nor has any been pointed out to us, that specifically enjoins upon the board of supervisors of Yuma county the duty of transferring from the road fund to the general fund of the county the sum so paid out for advertising. It might be expedient for them to do so in order to avoid personal liability under paragraph 2442, Civil Code, which permits suit against members of the board of supervisors who order county money to be paid out without authority of law. But we do not believe it to be a duty of the courts, by mandamus or otherwise, to supervise and control the fiscal orders of the board of supervisors so as to keep the different funds of the counties always intact for the specific uses intended by law. The law has confided in these officers the power and duty of disbursing the counties' moneys for the specific purposes for which they are raised, and, so long as they conform to the law, they will receive its pro-If, however, they misappropriate tection. money or use it for purposes not intended, a remedy in the ordinary course of the common law, to both the county and taxpayer, is available.

The judgment is affirmed.

FRANKLIN, C. J., and CUNNINGHAM, J., concur.

SALINA CITY v. LEWIS. (No. 3101.) (Supreme Court of Utah. Jan. 24, 1918. Petition for Rehearing, April 9, 1918.)

1. Intoxicating Liquors == 17-Sale-Ordi-NANCES.

A city ordinance providing that "no person, by himself, as clerk, \* \* shall manufacture, sell, give away \* \* any intoxicating liquors \* \* shall be deemed guilty cating liquors \* \* shall be deemed guilty of the misdemeanor," is not so void for uncertainty as not to support a prosecution for the sale of intoxicants, since under the liberal The item of \$28,500, brokerage fees, was not an expense of the proceedings under demeanor" must be regarded as nullity.1 2. MUNICIPAL CORPORATIONS \$== 110 - MU-

NICIPAL OBDINANCES—POSTING

Under Comp. Laws 1907, § 205, as amended by Laws 1911, c. 125, § 1, requiring city ordinances to be published or posted before taking effect, an ordinance prohibiting the sale of interesting liquid and approximation of the sale of interesting liquid and the sale of interesting liquid and approximation of the sale of interesting liquid and toxicating liquors was valid notwithstanding it was posted by direction of the city council, although no formal resolution therefor had been

3. Criminal Law \$\sim 400(3) -- Posting of Ordinances-Evidence.

The posting of a municipal ordinance may be proved by oral evidence notwithstanding that Comp. Laws 1907, § 228, provides that a city recorder shall keep a record of the proceeds of the council; a transcript of such record not being exclusive evidence as to the proceedings before the council.

# On Petition for Rehearing.

4. CRIMINAL LAW \$== 15-STATUTES-REPEAL

A defendant, in a prosecution for selling intoxicating liquors in violation of law, tried and convicted in the district court February 27, 1917, on appeal from justice court, cannot object that the ordinance under which he was convicted was repealed by Laws 1917, c. 2, where such statute did not become effective until August 1, 1917.2

Appeal from District Court, Sevier County; H. N. Hayes, Judge.

Archie J. Lewis was convicted before a justice of the peace of selling intoxicating liquors in violation of law, and from a conviction on a trial de novo before a jury, he appeals. Affirmed.

S. P. Armstrong, of Salt Lake City, for appellant. N. J. Bates and T. A. Hunt, both of Richfield, for respondent.

CORFMAN, J. Appellant was tried and convicted in the justice's court of Salina City on a complaint charging him with unlawfully selling intoxicating liquors on October 27, 1916, in violation of the provisions of section 227, Revised Ordinances of Salina City, approved October 23, 1913, as amended March 10, 1914, and section 234 of said Revised Ordinances, alleged to be in force in said city. An appeal was taken to the district court of Sevier county, where an amended complaint was filed and a trial had de novo before a jury which resulted in the defendant again being convicted. From the judgment entered on the verdict this appeal is taken.

Appellant assails the validity of the original ordinance upon the ground that it was void for uncertainty, and the amendment thereto, not only on the ground that it was void for uncertainty, but that it never became effective because of its not having been published nor posted as provided by law.

Section 227 of the original ordinance complained of as being void for uncertainty is as follows:

this ordinance, manufacture, sell, exchange, barter, dispense, serve, give away, give in consideration of the purchase of any property, service or in evasion of this ordinance, or keep for sale or solicit, take or accept any order to effect or commit any of the foregoing acts, or for the shipment, service, or delivery of any liquor, contrary to law, or own, keep, or be in any way concerned, engaged or employed in owning, or keeping any intoxicating liquor, with intent to authorize or permit the same to be done, shall be deemed guilty of a misdemeanor." be deemed guilty of a misdemeanor.

The amendment to said section 227 complained of by appellant reads:

"No person by himself, his clerk, servant, employé or agent, shall, for himself or any person else directly or indirectly, or upon any pretense or by any device, except as provided in this ordinance, manufacture, sell, exchange, bar-ter, dispense, serve give area. ter, dispense, serve, give away, or give in the consideration of the purchase of any property or consideration of the purchase of any property or of any service or in evasion of this ordinance, or solicit, or take or accept any order for the purchase, sale, shipment, service or delivery of any such liquor, or aid in the delivery or distribution of any intoxicating liquor so ordered or shipped, or own, keep or be in any way concerned engaged and employed in owning or or shipped, or own, keep or be in any way concerned, engaged and employed in owning or keeping any intoxicating liquor with intent to violate any of the provisions of this ordinance or authorize or permit the same to be done, shall be deemed guilty of a misdemeanor.

Section 234 of the said ordinance reads:

"Violation by any person—Penalty.—Any person who shall in any way violate any of the provisions of this chapter shall be guilty of an offense and shall be punished by a fine of not less than fifty dollars nor more than two hundred ninety-nine dollars, or by imprisonment for ored ninety-nine dollars, or by imprisonment for not less than thirty days or more than six months, or by both such fine and imprisonment. If any person shall be convicted a second time for violating any of the provisions of this ordinance such person shall be punished for such second and each subsequent offense by both such fine and imprisonment. fine and imprisonment.

[1] The first contention made by appellant is that the amended ordinance is void for uncertainty, and the reasons assigned are best stated in the language of the brief, as follows:

follows:

"The amended ordinance provides that, 'No person \* \* shall be deemed guilty of a misdemeanor.' The original ordinance (section 227) was uncertain because it failed to state or specify what sale, whether the sale of intoxicating liquors or other article, was intended to be prohibited; and the amendment to said ordinance is also void for uncertainty because it does not provide what offense a person who sells intoxicating liquor shall be guilty of; the provision being that no person shall be guilty of a misdemeanor. It provides that no person shall sell intoxicating liquor, but is uncertain as to his guilt in case of disobedience."

The interpretation of the trial court of the section now under consideration in his instruction to the jury was in the following

"You are instructed that, where the language of an ordinance leads to a manifest contradiction of the apparent purpose of the enactment, a construction may be put upon it which modi-fies the literal meaning of the words, and that in this case the acts mentioned in said amended "Any person who by himself, his clerk, serv-ant or agent, shall for himself, within Salina City, directly or indirectly, or upon any pre-tense, or by any device, except as provided in out; in other words, that the said amendment of section 227 is held to be good, excepting as to the last sentence thereof, which reads 'shall be deemed guilty of a misdemeanor,' which said last-named sentence is to be regarded as a nullity."

Counsel for appellant in his brief argues, and cites many cases in support of his contention, that where a penal ordinance is ambiguous or uncertain, it must be strictly construed. He contends that the ordinance in question, as amended, when properly construed, is to the effect that, "No person \* \* \* shall be deemed guilty of a misdemeanor;" that, while it provides that no person shall sell intoxicating liquor, in case of disobedience, the guilt of the offender cannot be determined from the language of the ordinance.

Keeping in mind that the passage of the ordinance by the council of Salina City was undoubtedly with the intent and purpose of prohibiting the sale of intoxicating liquors within Salina City, and the fixing of a penalty in cases of its violation, in accordance with the charter powers of Salina City and the statutes of the state, we are clearly of the opinion that the trial court did right in holding that section 227 of the ordinance was effective, and that the last sentence, "shall be deemed guilty of a misdemeanor," should be disregarded.

While the rule of the common law was that, where penal ordinances are ambiguous and uncertain, they are to be strictly construed, and that such rule was adhered to in the cases referred to in appellant's brief, yet at the same time, and more especially in this jurisdiction, where the validity of an ordinance is called in question, it becomes the duty of the courts to resolve all reasonable doubts in favor of its validity.

Section 4052 (Penal Code) Comp. Laws Utah 1907, provides:

"The rule of the common law that penal statutes are to be strictly construed has no application to the Revised Statutes. The provisions of the Revised Statutes are to be construed according to the fair import of their terms with a view to effect the objects of the statutes and to promote justice."

While the foregoing rule of construction does not in express terms refer to ordinances of a municipality, yet we think it applies with equal force to the provisions of ordinances. As is said by Mr. McQuillin, in his excellent treatise on the Law of Municipal Corporations (section 810):

"The rules for the construction of state statutes usually apply to the construction of ordinances."

Then again this court has said that the word "statutes" includes "ordinances." Eureka City v. Wilson, 15 Utah, 53, 48 Pac. 41.

The ordinance in question was created for taken the public good and in keeping with the charter powers of Salina City and the legislative enactments of the state, and where the manifest objects sought to be attained by its passage can be made valid and operative by lows:

eliminating the words the trial court instructed the jury to disregard, we are of the unqualified opinion that said court did not commit error in so doing. 28 Cyc. 372; 2 Dillon, Mun. Corp. (5th Ed.) § 674; Eureka City v. Wilson, supra.

[2] 2. It is next contended by appellant that the ordinance, as amended by the city council did not become effective by reason of its not having been published nor posted as required by law.

Section 205, as amended by chapter 125, Laws Utah 1911, so far as material here, provides:

"All ordinances, before taking effect, shall be deposited in the office of the city recorder and published at least once in some newspaper published within the city, or if there is no newspaper published in the city, then by posting in three public places therein. \* \* \* The city recorder shall record all ordinances in a book kept for that purpose, together with the affidavits of publication by the publisher, or his agent, or if posted, with the certificates of the due posting thereof; and said book, or a certified copy of the ordinances, under the seal of the city, shall be received as evidence in all courts and places without further proof, or if printed in book or pamphlet form by authority of the board of commissioners or city council, they shall be so received; provided, that in cities of the third class the city council may, at its option, order that a certified copy of any ordinance be posted in three public places within the city, and thereafter no further publication shall be deemed necessary."

The Revised Ordinances of Salina City provide that a record of the ordinances shall be kept in accordance with the foregoing statute, and also provide that all ordinances passed by the city council shall be published in some newspaper printed in the city, or posted in three public places in the city, if so provided in the ordinance.

The original ordinance, the ordinance as amended, together with section 234, prescribing the penalty in case of violation thereof, as we have heretofore set forth in full, were all received and admitted in evidence at the trial over the objection of the defendant. The record also shows that the amended ordinance, thus offered and received in evidence, and now under consideration, was duly certified by the city recorder of Salina City, under the seal of said city, as having been posted after its passage as required by law. Further, the testimony shows that the ordinance, as amended, was actually posted by the city recorder. The contention, however, is made by appellant that no formal order was made by the city council directing or authorizing the recorder to post the ordinance, and that therefore the posting thus made was not sufficient to render the ordinance effective. The testimony shows that no record was made by the city recorder of any action taken on the part of the city council directing the posting. However, at the trial the city recorder was produced as a witness for respondent, and testified over the objection of appellant concerning the property as fol-

## Redirect:

"Q. State whether or not any order was made by the city council at the time this ordinance was passed, with reference to its being posted or published. A. Yes, sir. (Motion to strike out.) The Court: She may answer whether any order was made or not. A. Yes; there was. I was the clerk, and had the duty of recording the minutes of that meeting. Q. Did you make any record of that order that was made with reference to posting or publishing that ordinance? A. No, sir. Q. What was that order? A. Well, it was brought up that the city was financially embarrassed, and they thought by printing it would be more of a debt than posting. Q. Did they give you directions to post that ordinance? A. Yes, sir."

#### Cross-examination:

"Q. The only direction that you received, was by some of the council, not taking any action as a council, but simply individually stating to you that you could post those instead of publishing? A. Well, it was agreed by the council that they would be posted instead of printed. Q. There was no motion or resolution authorizing that action? A. No, sir. Q. The records don't show any such? A. No, sir. Q. If there had been any motion put, acting as a board, you would have had that noted in the resolutions of the council, would you? A. Yes, sir. Q. No vote was taken on it? A. No: I don't know of any vote taken. Q. If there had been a vote taken, and it had been put as a resolution, you would have had that matter in the minutes of the meeting? A. I think so. Q. Is that true? A. Yes, sir. Q. And you have searched in the minutes and everything relating to this ordinance, and find nothing of the kind? A. No, sir. Q. So you would sny that there was nothing of that kind done, that is, that the council didn't put any motion and vote upon it for the posting, authorizing you to post those notices? A. Well it was agreed upon. There wasn't any motion fany kind, but just informally told you that you could post the notices—some member of the council? A. Well, it was not only one member; it was all the members that were there. Q. There was some one that mentioned that you could just post those notices, and said something about saving the expense of the publishing? A. Yes, sir. Q. That was all that was done in the way of ordering the posting of the ordinance, or the amended ordinance? A. Yes, sir."

We have no doubt that the statutory requirement that the ordinance must be posted is mandatory, and that an ordinance will not become effective until posted in accordance therewith. However, we cannot agree with the contention of appellant that some formal order or resolution must be made or passed by the city council in order to render the posting of the ordinance effective. The very purpose of the posting of the ordinance, as a matter of course, is to give notice to the public of its passage and that all persons are to observe it as the law and be bound by its provisions. The appellant had that notice, and we think that he may not be heard to say that the exacting formalities he here contends for, not having been complied with, affords him an avenue to escape the penalties sought to be imposed upon him by the trial court as a violator of the ordinance he claims did not become effective because of noncompliance therewith.

[3] Referring to the evidence of the city

recorder above set forth, it will readily be seen that the question of publication in a newspaper or by posting in lieu thereof was before the council at the time the ordinance passed, and, while no formal resolution was offered and passed, it was made quite apparent from the testimony of the witness that the council fully intended that the posting of the notice was to be done by the recorder, and the recorder as fully understood that she was directed to do so as if the council had formally voted upon and passed a resolution to that effect and had had the same recorded in the minutes of the council meeting. True, the ordinances of Salina City contain an express provision for posting when the ordinance itself so provides, but it does not necessarily follow that because an ordinance when passed does not expressly direct such posting that the council may not otherwise direct the posting in compliance with the statute of this state. So, too, Comp. Laws 1907, § 228, provides that the city recorder shall keep a record of the proceedings of the city council, and that a transcript of such record shall be evidence in all courts, but the statute does not prescribe, and it does not necessarily follow, that such a transcript shall be the only evidence that may be received in a court of law of such proceedings. While the authorities are somewhat in conflict on this question and it is generally held that oral evidence may not be received to contradict the records of a municipal corporation, yet, where there is an entire omission of the facts in the record, upon the very best authority, the rule seems to be otherwise. McQuillin, Mun. Ordinances. § 130; Dillon, Mun. Corporations (5th Ed.) § 557. These text-writers are practically agreed that a distinction exists between evidence offered to contradict facts stated in the record and to show facts omitted therefrom. The rule is stated by Mr. Dillon thus:

"But a distinction has sometimes been drawn between evidence to contradict facts stated on the record and evidence to show facts omitted to be stated upon the record. Parol evidence of the latter kind is receivable unless the law expressly and imperatively requires all matters to appear of record, and makes the record the only evidence. Thus in a well-considered case in the Supreme Court of the United States it was held that the acts of a corporation might be proved otherwise than by its records or some written document, even although it was its duty to keep a fair and regular record of its proceedings. The statute did not prescribe that nothing but a recorded vote or written document should bind the corporation or be received as evidence. Such written evidence was not deemed indispensable unless positively required. The direction to keep a record was regarded as directory."

Again, the author McQuillin (section 115, supra), in speaking of the rules for conducting the business of city councils, takes occasion to say:

"In reference to the action of the county boards the Supreme Court of Wisconsin has tersely observed: 'It will not do to apply to the orders and resolutions of such bodies nice ver-

bal criticism and strict parliamentary distinctions, because the business is transacted generally by plain men not familiar with parliamentary law. Therefore their proceedings must be liberally construed in order to get at the real intent and meaning of the body. In like manner liberal construction is often applied to the action of councils in enacting ordinances."

We have heretofore taken occasion to say that the action of the city council of Salina City in seeking to pass the ordinance in question was in keeping with the charter powers of the city and the general trend of legislation within this state for many years. Their good faith and motives must be conceded.

We have failed to perceive, after due and careful consideration of all the questions raised by appellant on this appeal, wherein the trial court erred in upholding the ordinance and the conviction of the appellant under it a proper one.

The judgment of the trial court is therefore affirmed; respondent to recover its costs for printing the brief on appeal to this court.

FRICK, C. J., and McCARTY, THURMAN, and GIDEON, JJ., concur.

## On Petition for Rehearing.

CORFMAN, J. [4] Counsel for appellant has filed a petition for a rehearing in which it is urged that this court is in error in affirming the judgment of the district court. The writer and all his Associates, after a careful consideration of the questions involved on this appeal, for the reasons stated in the original opinion, agreed that the judgment of the trial court should be sustained. We are still of that opinion. It would subserve no good purpose to again review all the questions we have once decided. However, the contention is now made by appellant that under this court's ruling in the case of Pleasant Grove City v. Lindsay, 41 Utah, 154, 125 Pac. 389, appellant's conviction was had under a repealed ordinance.

In the Lindsay Case this court held that by the provisions of chapter 106, Sess. Laws 1911, which became effective May 9, 1911, the ordinance of Pleasant Grove City was repealed by implication, and the conviction of Lindsay in the district court of Utah county, on appeal from the municipal court of Pleasant Grove City, after the provisions of chapter 106 had become effective, was an erroneous conviction under a repealed ordinance, and therefore void.

In the case at bar the ordinance of Salina City under which appellant was tried was in full force and effect October 27, 1916, the time his conviction was had in the justice's court of Salina City. Appellant took an appeal to the district court, and was there tried and convicted on the 27th day of February, 1917.

In the Lindsay Case this court took occasion to say:

"If, however, chapter 106 had not gone into effect until after judgment was entered in the district court, this court could not reverse upon the sole ground that the ordinance was repealed by chapter 106, for the reason that the district court would then have been the court of last resort, and, the ordinance being in effect when the judgment was entered, the judgment could not be assailed because the ordinance was repealed after judgment"—citing 1 Lewis' Sutherland Stat. Const. (2d Ed.) § 286.

Therefore, conceding for argument's sake only that the provisions of chapter 2 of the Laws of Utah of 1917 repealed the ordinances of Salina City under which appellant was tried and convicted in the justice court on October 27, 1916, chapter 2 of Laws 1917 did not become effective until August 1, 1917, after appellant was convicted in the district court, and the rule contended for here by appellant has no application.

The petition for rehearing is denied.

FRICK, C. J., and McCARTY, THUR-MAN, and GIDEON, JJ., concur.

SALINA CITY v. NEILSEN. (No. 3102.) (Supreme Court of Utah. Jan. 24, 1918. On Petition for Rehearing, April 9, 1918.)

Appeal from District Court, Sevier County; H. N. Hayes, Judge. Thomas Neilsen was convicted before a justice

Thomas Neilsen was convicted before a justice of the peace of selling intoxicating liquors in violation of law, and from a conviction on a trial de novo before a jury, he appeals. Affirmed.

S. P. Armstrong, of Salt Lake City, for appellant. N. J. Bates and T. A. Hunt, both of Richfield, for respondent.

CORFMAN, J. The facts of this case and all the questions involved on appeal being the same as those in the case of Salina City v. Archie J. Lewis, 172 Pac. 286, just decided by this court, the decision here is controlled by and must follow that case.

It is therefore ordered that the judgment of the district court be affirmed; respondent to recover costs of printing its brief.

FRICK, C. J., and McCARTY, THURMAN, and GIDEON, JJ., concur.

## On Petition for Rehearing.

CORFMAN, J. The same questions being involved on petition for rehearing as in case No. 3101, Salina City v. Archie J. Lewis, 172 Pac. 286, decided, a rehearing in this case is denied.

FRICK, C. J., and McCARTY, THURMAN, and GIDEON, JJ., concur.

STATE v. DE WEESE. (No. 3188.)

(Supreme Court of Utah. March 27, 1918.)

1. Jury = 131(18)-QUALIFICATION-EXAM-

INATION.

Although a juror on his voir dire stated that, if defendant could prove his innocence, it was his duty to do so, where he afterwards stated that what he meant was that such duty devolved on defendant only after the state had

proven him guilty beyond a reasonable doubt, 7. CEIMINAL LAW \$\ightharpoonup 371(4)\to OTHER OFFENSand that if court so instructed he would acquit
defendant unless defendant's guilt was established beyond a reasonable doubt, the juror qualified himself, and defendant was not prejudiced
ified himself, and defendant was not prejudiced

7. CEIMINAL LAW \$\ightharpoonup 371(4)\to OTHER OFFENSES-MOTIVE.

If commission of other crimes by defendant,
of which his wife, the victim of the homicide,
had knowledge, offered any motive, defendant's by denial of challenge.

2. Criminal Law \$\infty\$1166\(\frac{1}{2}\)(6) — Harmless

ERROR—EXAMINATION OF JURORS.

A prospective juror, in answer to questions propounded by the court, stated that he had formed an opinion as to the guilt or innocence of defendant, that he retained such opinion, and that it was strong and fixed. When asked if, notwithstanding such opinion, he could act impartially and fairly on the evidence admitted, the juror answered, "It would have to be pretty the juror answered, "It would have to be pretty strong and the man produced who really did it." Finally the court asked just what the nature of his prejudice was. The juror answered, "Well, I believe a burglar would do most anything." The juror was excused, but defendant complains that because of the standing and in-fluence of the juror the answer forced by the court in the presence of other jurors was prej-udicial to defendant. Defendant's counsel interposed no objection and made no request that jury be instructed to disregard answers. *Held*, that the jurors which had been selected were not prejudiced by the proceedings complained of.

CRIMINAL LAW =1144(8)—APPEAL—PRE-SUMPTION—INTELLIGENCE OF JUEORS. It will be assumed on appeal that jurors se-

lected at the time a prospective juror on his voir dire stated his reasons for his prejudice were men of ordinary intelligence, with minds of their own, conscientious in respect to their duties, as demonstrated by their answers during the course of their examination.

4. Jury = 136(9)—Death of Juror-Fill-ing Vacancy — Further Peremptory CHALLENGES.

Under Comp. Laws 1907, \$ 4873, providing that if, before the conclusion of trial, a juror becomes sick so as to be unable to perform his becomes sick so as to be unable to perform his duty, the court may order him to be discharged, in which case a new juror may be sworn, and the trial begin anew, or the jury discharged and a new jury then or afterward impaneled, where one of jurors died after a substantial part of the state's evidence had been introduced, and the attorneys stipulated that a new juror be sworn, defendant, who had exhausted his peremptory challenge when the situation arose, would not be entitled to one or more additional peremptory challenges.

5. STATUTES &= 226—Adoption from Anoth-EB STATE—Construction.

The rule that, where a statute is adopted from another state, the construction placed upon it by the courts of such state prior to adoption is likewise adopted, does not go so far as to compel the adoption of a construction which is inconsistent, unreasonable, and unwarranted.

6. CRIMINAL LAW \$\ightharpoonup 371(4)\to Homicide\to Evidence\to Other Offenses\to Motive.

In a prosecution for murder, where the victim, defendant's wife, knew more or less of the details of other crimes committed by defendant, and admitted by him in a written admission assumed to be written in order that those constant might have first-head information and assumed to be written in order that those con-cerned might have first-hand information, and there was evidence of bitter feelings between the parties, making it highly probable that the wife, who had it within her power to make trouble for defendant, might turn against him, a situation of vital interest to defendant was shown, one from which a motive might be inferred, and to establish such motive the other crimes of defendant, as admitted by himself, became material evidence in the case. State v. Anselmo, 46 Utah, 137, 148 Pac. 1071.

ES-MOTIVE.

If commission of other crimes by defendant, of which his wife, the victim of the homicide, had knowledge, offered any motive, defendant's admissions thereof were admissible, it being for the jury, and not for the court, to say whether the motive disclosed was adequate.

8. Criminal Law 🖘 371(4)—Other Offens-

ES-WRITTEN ADMISSIONS.

Where a document written by defendant, in where a document written by detendant, in order that those concerned might have first-hand information, contained many admissions, in addition to admissions as to commission of other crimes by defendant, which were not inadmissible from any point of view, and admissions as to occurrences both before and after murder of defendant's wife and in explanation thereof, which were clearly released, and not observed. which were clearly relevant, and not obnoxious to defendant's objection that proof of other crimes would prejudice the jury, it was not er-ror to admit the document as a whole, where the court and counsel studiously adopted every precaution to prevent the evidence from being used for any other purpose than to show mo-

 CRIMINAL LAW 6-673(1) — INSTRUCTIONS
LIMITING APPLICATION OF EVIDENCE.
Where defendant did not ask for a deletion
or segregation, but objected to the written docuor segregation, but objected to the written document in its entirety, and to have excluded the document would have deprived the state of evidence to which it was entitled, the proper procedure was to admit the document and limit its application by proper instructions. State v. Greene, 33 Utah, 497, 94 Pac. 987; Groot v. Railroad, 34 Utah, 152, 96 Pac. 1019.

Railroad, 34 Utah, 152, 96 Pac. 1019.

10. CRIMINAL LAW \$\ightharpoonup 1144(10) — APPEAL — PREJUDICIAL ERROB—PRESUMPTION.

In a prosecution of defendant for the murder of his wife, the district attorney, in the peroration of his closing argument to the jury, said: "God Almighty, thousands of years ago, on Mount Sinai, declared what the law was, and we read in the Good Book that God said, "Thou shalt not covet! Thou shalt not lie! Thou shalt not cowmit adultery! Thou shalt not kill!" Gentlemen of the jury, this man (pointing to defendant) has committed all these crimes. This self-confessed burglar has all his life laughed and scoffed at the law, at the officers of the law, and if you turn him loose he will laugh and scoff at you." There was no exception taken to the remarks, no objection made until several weeks after the close of the trial. until several weeks after the close of the trial. *Held*, that the court on appeal could not presume that defendant was prejudiced by remarks. 11. CRIMINAL LAW & 1055—APPEAL—TIME-LY EXCEPTIONS—ARGUMENT.

Remarks of counsel in arguing a case to the jury, if deemed prejudicial, must be excepted to at the time they are made, to give the court opportunity to correct as far as possible any prejudicial. udicial effect.

12. Homicide ← 253(1)—First-Degree Mur-der—Sufficiency of Evidence.

Evidence held to sustain a conviction of murder in the first degree.

Appeal from District Court, Salt Lake County; J. Louis Brown, Judge.

Howard De Weese was convicted of murder in the first degree, and appeals. Affirmed and remanded.

Burton W. Musser and John A. Beck, Jr., both of Salt Lake City, for appellant. Dan and O. C. Dalby, Asst. Attys. Gen., for the State.

THURMAN, J. The defendant, Howard De Weese, charged in the information as D. C. Robbins, was convicted in the district court of Salt Lake county of the crime of murder in the first degree, committed at Salt Lake City on the 22d day of September, 1916. The defendant was sentenced to be executed, and has appealed to this court, assigning numerous errors alleged to have occurred during the impaneling of the jury and the trial of the case. These alleged errors relate to rulings of the court in impaneling the jury, the admission of certain evidence over the objections of the defendant, and remarks of the prosecuting attorney, alleged to be prejudicial, in his closing argument to the jury. More specific reference to these alleged errors will be made later on in this opinion.

The victim of the homicide was the wife of the defendant, and the circumstances attending the commission of the crime conclusively show that it was a most brutal and atrocious murder. The murder was committed at an apartment house, No. 4551/2 South Second East street, Salt Lake City, early on the morning of September 22, 1916.

On the 20th day of September, two days before the murder, the defendant and his wife, under the names of Mr. and Mrs. D. C. Robbins, rented the apartment from the proprietress, Miss Hattie Anderson, who was afterwards a witness in the case. The entrance to this apartment was from the rear. It consisted of a front room, which was also used as a bedroom, containing a sanitary couch about the size of an ordinary double bed, covered by a mattress, sheets, pillow, etc., also a dresser, some chairs, and probably other furniture not necessary to describe. The other room was used as a kitchen, containing a gas range and other kitchen furniture. There was also a bathroom used by the occupants of this apartment in common with other tenants in the building, and a common hall leading to the several rooms, so that each of the occupants had access to the bathroom without disturbing the other occupants, and likewise to the doors of each of the other apartments. Defendant and his wife rented the apartment on the 20th day of September, as above stated, and paid the rent for one week in advance. They then left the apartment, returning later in the day with their baggage. But little was seen or heard of defendant and his wife from then on. The witness Palmer saw him the next day, and the witness Paulson saw him leaving the premises on the early morning of the 22d, the day upon which the murder was committed. Nothing was seen or heard of either the defendant or his wife after the defendant was seen by the witness Paulson until about noon

B. Shields, Atty. Gen., and James H. Wolfe | murder was committed. On that day Miss Anderson, the proprietress of the apartments, suspecting that something was wrong, or at least feeling concerned at not seeing the parties who had rented the apartment, in company with Mr. and Mrs. Paulson, who occupied the apartment below, unlocked the door to defendant's apartment and entered the room. They were shocked and horrified at what they discovered. They found that defendant's wife had been murdered. They made no investigation in detail at that time. but immediately called the sheriff and other officers. Upon examination it was found by the officers that the deceased was lying on the bed, covered with bedclothing. A flatiron with a cloth wrapped around it was lying by her head, resting against it; her head was badly beaten; her face was crushed, nose broken, and the blood of the victim had spattered the walls of the room above her head and all over the pillow. There was also blood on the flatiron. The flatiron belonged to this apartment, and was kept in a little closet in the room. Two drawers of the dresser in the front room were open—the room otherwise did not appear to have been disturbed. There was some jewelry on the finger of the deceased, and some on the dresser above referred to. Various other articles and trinkets not necessary to describe were found by the officers. There was never any question in the minds of the officers or any one else acquainted with the situation but that the woman had been foully and brutally murdered while lying on her bed in the front room on this apartment, but who the murderer was now became the absorbing question. Everything possible seems to have been done to destroy every evidence of the identity of the parties. The face of the deceased had been beaten and crushed beyond all recognition. The room had been stripped of practically everything that could possibly throw light upon the identity of the persons who had rented the apartment or the person who had committed the murder. Suspicion naturally rested upon the defendant. He had disappeared; his whereabouts were known; no trace had been left behind. Every imaginary clew was followed, but, as there was no tangible clew to follow, all effort to run down the perpetrator of the deed was abortive, and the mystery surrounding the commission of the crime remained unsolved. On the 23d day of December, 1916, three months and one day after the date upon which the murder was committed, the defendant, then being in the city of Chicago, communicated to the witness Larkin, chief of detectives of the police force of that city, the fact that he was the husband of the murdered woman, and, while protesting his innocence, assumed to communicate to the detective all that he knew respecting the crime. The officers of Salt Lake City and county were of the 24th, more than two days after the immediately notified, and at once proceeded

to Chicago, and returned with the defendant, who voluntarily accompanied them back to Salt Lake. On their return they came by way of Denver, and there procured a suitcase of the defendant which had been shipped to that point from Salt Lake City on the morning when the murder was committed. Many admissions were made to the officers by the defendant as to the kind of life he had previously led. With it all, however, he protested from beginning to end that he was innocent of the murder of his wife.

As substantially all that is material in these admissions of the defendant is covered by and included in the document written by him, hereinafter known as Exhibit 39, the substance of which will be hereafter referred to in its proper place, we make no further statement at this time concerning these admissions. Exhibit 39 is a 21-page manuscript found in a safety deposit box in a Chicago bank after the defendant was brought to Salt Lake City. A safety deposit key was found in defendant's necktie, and after some reluctance he told the officers where the box could be found, and gave them authority to have the contents forwarded to Salt Lake City. Other manuscripts, in the form of letters the defendant had written to officers, were found in the box, but their materiality is of minor importance.

Some matters pertaining to the history of the principal parties to this tragedy, not heretofore detailed, are of sufficient importance to be stated in this connection. The defendant first met the woman, whom he afterwards married, and who was the victim of the tragedy, in New York City in 1914. She was then married to a Russian Jew named Fisher, who was engaged in keeping a rooming house and haberdashery combined. Defendant became acquainted with these people. and later on became their lodger in the rooming house referred to. Defendant and the woman fell in love, and in November, 1915, eloped and came West to Reno, Nev., accompanied by her son Max Fisher and his wife. They arrived at Reno and took up their residence for the purpose of procuring for her a divorce. They brought with them jewels approximately to the value of \$2,000. These they mortgaged to a bank in Reno, and secured a loan of \$750 with which they engaged in the rooming house business while acquiring residential qualifications. During this period defendant made frequent incursions into other sections of the country, sometimes remaining absent for several days. On his return he usually had jewels to pawn or dispose of, and by this means it is estimated. by his own admission and testimony of his witness, that during the six or eight months he was in Reno he had accumulated in all \$10,000 or \$12,000 worth of jewelry. At the end of six months after arriving in Reno The rooming house business was a losing venture and was abandoned. They took a trip for two or three weeks to California, then returned to Reno, wound up their business, and shipped some trunks, with clothing and other articles, to New York to Max Fisher, who had returned to that city. Defendant and his wife, ostensibly en route to the East, stopped over in Salt Lake City, as heretofore stated, September 20, 1916, and rented the apartment in which she was afterwards murdered.

[1] The first assignment of error relied on by appellant is the refusal of the court to sustain his challenge of the juror Caldwell. In answer to defendant's attorney, the juror, while being examined on his voir dire, stated in various forms substantially that, if the defendant could prove his innocence, it was his duty to do so. He also stated in effect, that if he did not prove his innocence he (the juror) would bring in a verdict of guilty if the evidence was strong enough to prove it. After this examination of the juror by the defendant's counsel, in answer to questions propounded by the court, the juror, in effect, stated he meant that if the state proved defendant's guilt beyond a reasonable doubt the juror would then require the defendant to prove his innocence if he could; that if the court instructed him to acquit the defendant. unless his guilt was established beyond a reasonable doubt, he would follow such instructions in spite of the fact that the defendant could probably prove his innocence. The juror also stated that he would not require the defendant to prove his innocence until after the state had proved his guilt beyond a reasonable doubt. We think the juror was fair. When he was made to understand his duty in respect to the matter complained of, he frankly expressed his willingness to accord to the defendant the particularright for which his attorney so earnestly contended. That the juror qualified himself, by his answers, to try the case, and that the defendant was not prejudiced by the ruling of the court denying the challenge, are questions about which we have no doubt whatever. This assignment is without merit.

[2] The next alleged error complained of by appellant relates to the examination of Henry Dinwoodey as to his qualifications to sit as a juror. Mr. Dinwoodey very frankly stated, in answer to questions propounded by the court, that he had formed an opinion as to the guilt or innocence of the defendant; that he retained such opinion; that it was very strong and fixed. When asked if he, notwithstanding such opinion. could act impartially and fairly on the evidence admitted, the juror answered, "It would have to be pretty strong, and the man produced who really did it." Finally the court asked, "Just what is the nature of Mrs. Fisher procured a divorce, and the next your prejudice: can you express it—explain day she and the defendant were married. It to the court?" The juror answered, "Well,

I believe a burglar would do most anything." The juror, of course, was excused; but appellant complains that, because of the standing and influence of Mr. Dinwoodey in the community, the answers forced by the court in the presence and hearing of the other jurors were exceedingly prejudicial to the defendant. There can be no doubt in the mind of this court that if the trial court had known, or could have surmised, that Mr. Dinwoodey would have answered the last question in the way he did, it would not have propounded the question at all. The proposed juror, in the beginning of his examination by the court, had stated that he received his information about the case from common newspaper talk only. Ordinarily information from reading newspapers will not and does not disqualify the juror; and, as is well known, there is a tendency on the part of the active business man to avoid jury duty if possible, especially in cases likely to be tedious and of long duration. These considerations probably induced the court to pursue an examination more searching and rigorous than it otherwise would have done. Besides this, counsel for defendant were in charge of defendant's defense. If, in their opinion, the court was pressing this question to the danger point, and should conclude its examination, they should have interposed an objection. They should have raised the question then and there. They had ample time and opportunity. And, finally, when the last question was answered, if they feared the influence of Mr. Dinwoodey's statements on the minds of the other jurors, counsel might at least have requested the court then and there to instruct the jury to disregard it and close their minds against it. Unless we can have more confidence in jurors than to believe that they will be swayed by every wind that blows and by every expression of opinion uttered in their presence, and that, too, in violation of the solemn oaths they have taken, the vaunted palladium of our civil rights, as the right to a trial by jury has been called, would better be abolished.

[3] Assuming, as we do, that the jurors selected were men of ordinary intelligence, with minds of their own, conscientious in respect to their duties as demonstrated by their answers during the course of their examination, it is quite clear to the mind of this court that they were not prejudiced by the proceedings complained of.

[4] After twelve jurors had been qualified and were sworn to try the case, and after a substantial part of the state's evidence had been introduced, one of the jurors died, rendering it necessary to fill up the panel and begin the trial anew.

Comp. Laws of Utah, 1907, § 4873, provides as follows:

"If, before the conclusion of the trial, a juror becomes sick, so as to be unable to perform his duty, the court may order him to be dis- under the same statute, likewise adopted

charged. In that case a new juror may be sworn and the trial begin anew, or the jury may be discharged and a new jury then or afterward impaneled.

It will be observed that this section of the Code provides two alternatives: (1) A new juror can be sworn and the trial begin anew; or (2) the entire jury may be discharged and a new jury impaneled. In the case at bar the prosecuting attorney and defendant's counsel stipulated that the court might adopt the first alternative. The new juror was therefore called and qualified to take the place of the deceased juror. The question raised by this assignment relates to the right of the defendant to exercise one or more additional peremptory challenges in view of the extraordinary situation caused by the death of the juror. The defendant had exhausted all his peremptory challenges when the extraordinary condition arose. but insisted that, as against the new juror, he had never had the opportunity of exercising the right, and therefore a challenge should be allowed. It was contended by defendant that the above section of our statute was adopted literally from the statute of California, and that the courts of that state. before we adopted the statute, had construed it as allowing additional challenges in such cases; that therefore the courts of this state are bound by that construction. As showing the construction placed upon the statute by the court of California appellant cites People v. Stewart, 64 Cal. 60, 28 Pac. 112; People v. Brady, 72 Cal. 490, 14 Pac. 202; People v. Wong Ark, 96 Cal. 125, 30 Pac. 1115; People v. Zeiler, 135 Cal. 462, 67 Pac. 754, 56 L. R. A. 882; and People v. Weber, 149 Cal. 325, 86 Pac. 671. These cases seem to favor the construction for which appellant contends. The first case cited by appellant apparently did not receive the serious consideration that its importance demands. The distinguished justice who wrote the opinion disposed of the question in space less than one column of the Pacific Reporter. He assumes that a trial beginning anew means the impaneling of a new jury entirely, thus ignoring the incongruity which such a construction would give to the section when considered as a whole. It places the two alternative methods on the same plane, and gives to each the same scope and meaning; in other words, whichever alternative is adopted the court must discharge the entire jury and draw a new one from the box. That cannot be the meaning of the statute. The other cases cited by appellant adhere to the doctrine annunciated in the first case, but apparently with more or less misgivings as to the correctness of the doctrine. Finally, it is manifest, from the later decisions cited, that if it were now a question of the first impression that court would adopt a different construction.

A thoroughly well-considered case, arising

from California, arose in North Dakota. | concerned, when the new juror was sworn North Dakota v. Hazledahl, 2 N. D. 521, 52 N. W. 315, 6 L. R. A. 150. While entertaining a more than ordinarily high regard for the opinions of the California court, as stated in the opinion of the North Dakota case just cited: "In this instance we are unable to follow where that court leads." The opinion in the North Dakota case is so consistent, sound, and well considered we are disposed to adopt the rule therein announced without further comment.

[5] We recognize the rule of construction contended for by appellant, to a modified extent at least, that where a state adopts a statute of another state it is presumed that it likewise adopts the construction that has been placed upon it by the courts of that state prior to its adoption. That rule is recognized by this court in the modified sense of which we speak in Dixon v. Ricketts, 26 Utah, 215, at page 221, 72 Pac. 947. It will be seen, however, that this court, while recognizing it as a general rule, does not fecognize it as absolutely binding. The rule does not go so far as to compel the adoption of a construction which in the judgment of the court is inconsistent, unreasonable, and unwarranted. Besides this, in the present case the rule has no force whatever as a rule of construction, inasmuch as all the cases relied on by appellant are subsequent to our adoption of the California statute. See marginal note to Comp. Laws Utah 1888, vol. 2, \$ 5056, in which the adoption of the statute in question here appears to have been made in 1878, five years previous to People v. Stewart, the earliest case cited by appellant. Appellant was therefore mistaken as to the question of priority.

In conclusion upon this point there is yet to be stated another reason that is worthy of at least a passing consideration. number of peremptory challenges to which a party is entitled is solely a matter of procedure; it is determined by the Legislature and fixed by statutory law, and even a defendant in a criminal case, while entitled absolutely to whatever number of peremptory challenges the statute gives him, acquires therein no vested right that would preclude the Legislature from increasing or diminishing the number at will. Being controlled absolutely by the Legislature, it follows that he is not entitled to any greater number of peremptory challenges than the statute provides. The statutes of Utah in cases of this kind allow 10 peremptory challenges. They also provide, as we have seen, what may be done should a juror, after being sworn become sick and unable to serve, but no provision allowing extra challenges on account of such contingency can be found within the statutes. How, then, can it be contended that the right exists? The defendant in this case was in no worse condition, so far as his peremptory challenges were cisco and Oakland as the "step-ladder" bur-

on his voir dire, than he would have been if the juror had not died, and he had exhausted his challenges before the last juror was called into the box. The court did not err in refusing defendant additional peremptory challenges. See 24 Cyc. 355; 16 R. C. L. p. 244, § 61.

[6] Numerous errors are assigned by appellant in relation to the admission in evidence of divers exhibits by the state, each of which tended to show admissions by the defendant of crimes committed by him other than the one for which he was being tried. As Exhibit 39 is by far the most far-reaching and important, and includes practically every admission covered by the other exhibits, we feel we will be doing no injustice by considering them altogether in the assignment relating to Exhibit 39.

This is the document referred to in the early pages of this opinion. As there stated, it was found in a safety deposit box in a Chicago bank, and forwarded to Salt Lake City with other manuscripts by authority of the defendant. The document consists of 21 pages of manuscript writing. It is therefore too voluminous to publish in full; it would unduly lengthen this opinion, and, after all, serve no better purpose than would a brief synopsis.

Defendant assumes to write the document in order that those concerned may have first-hand information. He disclaims any pride in the exploits he is going to relate. He says he is a burglar from necessity, in order to obtain the money necessary to his style of living. He has been engaged in tho business for twelve years; was captured once, which he admits was fortunate, because he was addicted to drugs and was placed where he could not obtain them. He served three years in prison, was paroled, and carried on the same business during his parole. States that the document is his last writing. He then proceeds to name the various places where he plied his profession-Westchester county, New York, where he was known as the "Phantom Burglar," New Rochelle, Port Chester, Pellham, Larchmont, Kye, and New Haven, Conn. That was in the fall of 1915, and his accumulations at that time amounted in value to the sum of at least \$50,000. Other places are also named. He boasts of his success in his chosen profession. He speaks of meeting the lady who afterwards gave up her home and friends and started with him on the "nerve-racking seas of a burglar's life." He states, however, that she had no idea of his occupation. He tells of the elopement from New York in November, 1915; their residence in Reno in anticipation of a divorce for her, and his desire to "pull off one or two jobs," return to New York, and settle down. He then speaks of their trip to California, and his exploits in San Franglar; of his making a laughing stock of their best and finest officers; speaks of the divorce, their marriage, his love for his wife; his making \$10,000 in Nevada and California; his desire for \$5,000 more, and then, with professed heartache and a resolution to tell the truth, he brings us back from California to Reno, in September, 1916, and thence on to Salt Lake City, where he knew there was a "good thing" and intended to "pull it off." Here he says, speaking of Salt Lake City:

"Would to God we had passed that accursed place; would to God I had left her with her husband and relatives; I have laughed and mocked at the law; I have strutted and patted myself on the back; I have said 'Some Kid'; blind fool, to think that God would let me get away with it. In one sweep he punished me for a hundred lives such as mine."

Speaks of numerous other burglaries, including that of "Dennishawn," in Los Angeles, the home of Ruth St. Dennis. tells of his wife's love of the glitter and flash of diamonds and warning her to be careful. Finally he comes to the renting of the apartment in Salt Lake City, and the fact that Ruth St. Dennis was performing at the Orpheum, and that he and his wife attended the Orpheum Theater on the night preceding her murder, she at the time wearing diamonds he had stolen from Ruth St. Dennis. His wife also wore a pair of ear screws and other jewelry. He had consented she might wear them on this particular occasion. To her wearing these he attributes their misfortune. As they left the theater that night he noticed two welldressed men whose stamp he understood, but thought no more of it until he arrived at the apartment. From this point he thought he saw the same two men watching him and his wife. He requested his wife to leave her door unlocked, as he was going out, vaguely hinting, on his usual business. He desired to enter without disturbing her on his return. It was then 1:30 the morning of the 22d. He kissed her good-bye, and went out "to try his hand for the last time." He did not succeed in his venture. He returned to the apartment, ascended quietly, and whispered, "Hello, Babes!" No answer. He does not describe what he saw. He was horrified; he approached her; she was cold. A great fear came over him; he would be accused; he could not explain his absence. He lifted her hands; the jewels were gone. He looked at all of the hiding places usual with them. He found some, but the main part of his stolen loot was again stolen, and with it the life of his wife. He destroyed every means of identification, went out, locked the door, and, as he left, waved a parting wave towards the window. This was 6:30 a.m. He had \$55 in cash and by this and various means reached the middle West. Here he explains how much he loved his wife; denied that they had ever

told of the finery he had given her, shipped to New York, and of the jewels, etc. His theory of the tragedy he now relates. He pictured in his imagination just how the tragedy occurred. The two men he had seen waited, saw him leave the apartment. They silently crept up stairs. She, disrobed, was awaiting his return. The jewels flashed; out came the blackjack-one stroke-the body quivered; a low moan, from the lips a balf whisper, "Dear," and then the other man picked up a heavy flatiron, brought it down with crashing force upon that loved face again and again, until the dear form lay still. Then stripping the fingers and arms of all valuables, taking from under the pillow a wallet containing \$460, throwing over that horrible sight the pillows and bedcovers, Then comes cursings, threatenthey fled. ings, and prophetic denunciations against the demons who murdered his wife. He then gives a list of the jewelry that was stolen from his wife at the time she was murdered. This consists, as represented, of numerous articles of jewelry, including rings, bracelets, neck chains, snake bracelets, pins and earrings, among which were what was called "Merry Widow" earrings, amounting in all to hundreds of stones, principally diamonds. The writer asserts that this list, with one exception, was stolen from the apartment when his wife was murdered. The exception referred to was a scarf pin which had been pawned by him, and therefore was not among the stolen jewels. The document was signed J. E. Warren, which the writer admits is not his true name.

Such, in substance, is Exhibit 39. It follows from what we have said as to the length of the document itself that the abstract we have furnished is only a brief synopsis; nevertheless we have endeavored to present sufficient of its contents to illustrate the grounds of the objection as well as such portions as are admittedly relevant and material. Defendant objected to its admissibility on the grounds that it was irrelevant, immaterial, and incompetent, the specific objection being that proof of the other crimes not tending to prove the crime for which he was being tried only tended to prejudice him in the minds of the jury. The document was admitted over defendant's objection, whereupon the defendant moved that the jury then and there be instructed that in considering the document they should only consider it in reference to the crime for which the defendant was then being tried, and not in reference to the burglaries he admitted having committed. The court, in effect, so charged the jury, except that they were permitted to consider the burglaries solely upon the question of motive.

by this and various means reached the middle West. Here he explains how much he loved his wife; denied that they had ever quarreled, except as true lovers quarrel; one charged with a specific crime, counsel for appellant in their admirable brief filed in this case clearly and succinctly enumerate many of the circumstances under which such evidence may be admitted. At page 26 of the brief they say:

Jones, 171 Mo. 401, 71 S. W. 680, 94 Am. St. Rep. 786; People v. Rogers, 192 N. Y. 331, 85 N. E. 135, 15 Ann. Cas. 177; Commonwealth v. Majors, 198 Pa. 290, 47 Atl. 741, 62 Am. St. Rep. 803; People v. Higgins, 127

"Generally speaking, evidence of other crimes is competent to prove the specific crime charged when it tends to show: (1) Motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so relating to each other that the proof of one tends to establish the other; (5) the identity of the person charged with the commission of the crime on trial."

The court in this case admitted the exhibit in evidence solely on the question of motive. If, however, it was permissible on other grounds, the state, of course, had the right to introduce it and have it considered by the jury. On the subject of motive on a trial for murder, Underhill on Criminal Evidence, at page 563, says:

"Motive, upon a trial for murder, need not be shown. The absence of motive does not alone require that the accused shall be acquitted thereof. It may be considered in determining the presence of intention. Any evidence that tends to show that the defendant had a motive for killing the deceased is always relevant as rendering more probable the inference that he did kill him."

The same author, speaking of the admission of evidence relating to other crimes, at page 163, same volume, says:

"All evidence is relevant which throws, or tends to throw, any light upon the guilt or innocence of the prisoner, and relevant evidence which is introduced to prove any material fact ought not to be rejected merely because it proves, or tends to prove, that at some other time, or at the same time, the accused has been guilty of some other separate, independent, and dissimilar crime."

Wharton in his work on Criminal Evidence, vol. 1, p. 145, after speaking generally of the question of motive, says:

"But in those cases in which the evidence of the crime charged is for the most part or wholly of a circumstantial character, motive frequently becomes a powerful aid in identifying the accused, and thus connecting him with the commission of the crime. And where, on the trial of a criminal action, evidence is offered which is competent proof of the presence of motive in the mind of the accused, such evidence is not to be rejected because it also shows, or tends to show, a distinct and different crime."

Again, on the same subject, at page 1167 (2d vol.), after speaking of the general rule which forbids testimony of other crimes when offered merely to show that the defendant would be likely to commit the crime with which he is charged, the same author says:

"But the evidence of other crimes is admissible to show motive, and, where relevant for this purpose, the admissibility is not affected by the fact that such evidence may prove other crimes."

As bearing upon the same question, and she should turn against him, which, under sustaining the same doctrine, see 12 Cyc. 394, 406, and 418; also 8 R. C. L. 199; Butt v. State, 81 Ark. 173, 98 S. W. 723, 118 Am. St. Rep. 42; People v. Ebanks, 117 Cal. 652, 49 Pac. 1049, 40 L. R. A. 269; State v. ferred. In order, however, to establish such

Rep. 786; People v. Rogers, 192 N. Y. 331, 85 N. E. 135, 15 Ann. Cas. 177; Commonwealth v. Majors, 198 Pa. 290, 47 Atl. 741, 82 Am. St. Rep. 803; People v. Higgins, 127 Mich. 292, 86 N. W. 812. On the other hand, in support of his contention that evidence of collateral and independent crimes is not admissible to prove the specific crime for which the defendant was on trial, appellant cites Wharton's Criminal Evidence (10th Ed.) §§ 29, 30, 31, 32, 46, 47, 49, and 50; also New York v. Molineux, 168 N. Y. 264. 61 N. E. 286, 62 L. R. A. 193 and 357, and note; New Hampshire v. Le Page, 57 N. H. 245, 24 Am. Rep. 69; People v. Sharp, 107 N. Y. 427, 14 N. E. 319, 1 Am. Rep. 851; State v. Anselmo, 46 Utah, 137, 148 Pac. 1071. The authorities cited by both appellant and respondent show the general rule as to this class of evidence in which it is held to be inadmissible, and the exceptional circumstances under which it may be admitted. None of the authorities referred to dispute the proposition that proof of other crimes. whether similar or dissimilar, connected or unconnected, may be admitted to prove a motive for the specific crime for which the defendant is being tried.

In the case at bar the question is presented: In what way could the proof of other crimes committed by the defendant tend to prove that he murdered his wife? It must be presumed from the history we have of these parties, as detailed in the preceding pages of this opinion, in fact it is conceded, that his wife was cognizant to a greater or less extent of the kind of life he was leading, his criminal conduct, his partnership with crime, and more or less of the details pertaining to his crimes as enumerated in Exhibit 39, a synopsis of which we have heretofore set out. It also appears, a matter to which we have not heretofore referred, that in Reno, before coming to Utah, defendant and his wife quarreled, and bitter feelings of one towards the other were manifested to such an extent as to cause a witness who overheard them deep anxiety and concern. It also appears that two or three trunks containing clothing and other articles which had been brought from New York to Nevada were expressed back to New York addressed to Max Fisher, her son, thus indicating at least that the parties were going back to the scene of his first exploits, the city where she had formerly lived with her first husband. She, perhaps more than any other person living, as far at least as the record discloses, had it within her power to expose him and make trouble for him in the event that she should turn against him, which, under the circumstances we have detailed, seemed highly probable. Here was a condition-a situation-of vital interest to the defendant and one from which a motive might be inmotive, his criminal record, the crimes he had committed as admitted by himself, became material evidence in the case. Again, we refer to Wharton, at page 1689 (vol. 2), heretofore referred to, but not quoted, wherein the author says:

"Facts and circumstances are relevant, on a homicide charge, to show that the motive for the homicide was a concealment of a prior crime when they tend to prove that the accused was guilty of a prior crime, and knew that he was suspected by the deceased to be so guilty or that deceased was likely to discover the fact; or that there was an attempt to conceal stolen goods; or that the deceased had knowledge of the prior crime."

This question was involved to some extent in a recent case decided by this court. State v. Inlow, 44 Utah, 498, 141 Pac. 530, Ann. Cas. 1917A, 741. Inlow was convicted of the crime of murder. As motive for the crime the state proved that White, the victim of the murder, was a witness against Inlow in a case then pending, in which Inlow was charged with the crime of burglary. The defendant in that case conceded that, for the purpose of showing motive on the part of Inlow, the state had the right to show that he was charged with a certain offense and that the deceased would be a witness against him. It was not controverted in that case that the state had the right to introduce such evidence for the purpose of proving motive. For further authority on this question, see Smith v. State, 44 Tex. Cr. R. 53, 68 S. W. 267; State v. Miller, 156 Mo. 76, 56 S. W. 907; Bess v. Commonwealth, 116 Ky. 927, 77 S. W. 349; People v. Harris, 136 N. Y. 423, 33 N. E. 65; Robinson v. State, 114 Ga. 56, 39 S. E. 862.

[7] It is not the province of this court, nor was it the province of the trial court, to determine whether the motive disclosed by Exhibit 39 was adequate or sufficient; that was a question solely for the jury. The question we have to decide is: Under the circumstances of this case, did the fact that the defendant had committed other crimes, of which the deceased had knowledge, offer any motive whatever for the defendant taking her life? We admit the danger of permitting evidence of other crimes than the one specifically charged against the defendant, and that such evidence should be admitted with great caution and circumspection, for the tendency to prejudice a defendant in such cases is admittedly great; but when the evidence is relevant, as in this case, to prove motive, as we think we have shown, then it is admissible by all of the authorities with which we are familiar.

[8] There are, however, other considerations connected with this question which apply with peculiar force in this particular case. Counsel for appellant, in their examination of the jurors touching their qualifications to sit in the case, took particular pains to examine the jurors concerning their attitude in the event that it should appear in the evidence and limit its application by proper instruction, which was done in this case. 12 Cyc. 631, and cases cited; State v. Greene,

other than the one for which he was on trial. Counsel elicited from each juror so examined the promise that he would not allow evidence of other crimes to influence his mind or prejudice him against the defendant. Not only was each juror so examined, but each juror heard the other jurors examined to the same effect, so that before the jurors were finally sworn to try the case they were not only prepared to expect evidence of the commission of other crimes by the defendant, but had been solemnly pledged to the proposition that they ought not to consider other crimes for the purpose of establishing the guilt of the defendant of the crime charged against him. Besides this, when Exhibit 39 was admitted in evidence, at the request of defendant's counsel, the court specially instructed the jury that evidence of other crimes should not be considered by them for the purpose of proving the offense charged, but that such evidence should be limited solely to the question of motive; and, finally, in the instructions at the close of the trial the court specifically instructed the jury as follows:

"You are instructed that the admission by the defendant of the commission of any other different crime from the one here charged in the information shall not be considered, nor have you the right to consider such evidence for the purpose of punishing him for the crime here charged, nor must you talk about it in your jury room, but must wholly free your minds from any such thing, and not permit it to prejudice you or bias your judgment against the cause of the defendant."

So that it appears in this case that, notwithstanding the evidence was admissible for the purpose of proving motive, nevertheless both the court and counsel for the defendant studiously adopted every precaution to prevent the evidence from being used for any other purpose.

[9] Finally, it must be conceded that Exhibit 39 contained many statements and admissions in addition to the enumeration of defendant's crimes which were clearly relevant and material and not inadmissible from any point of view. The relation of defendant and deceased in New York; their elopement; their relations in Nevada and California; their appearance in Salt Lake City and relations while there; their relations in the apartment; the defendant's conduct there, both before and after the murderall of these matters of information as shown by the exhibit, and many others that might be mentioned, were clearly relevant, and not obnoxious to the specific objection raised by defendant. The defendant did not ask for a deletion or segregation, but objected to the document in its entirety. To have excluded the exhibit would have been to deprive the state of evidence to which it was entitled. The true rule in such cases is to admit the evidence and limit its application by proper instruction, which was done in this case. 12 33 Utah, 497, 94 Pac. 987; Groot v. Railroad, 34 Utah, 152, 96 Pac. 1019.

There was no error in admitting Exhibit 39 in evidence.

What has been said in disposing of that question likewise disposes of all the assignments of error relating to the admission of other crimes in evidence whether in the form of exhibits or oral admissions sworn to by the witnesses.

Closely allied to the question we have just reviewed is another presented by the assignment of errors, which we will now consider.

[10, 11] The district attorney, in the peroration of his closing argument to the jury, said:

"God Almighty, thousands of years ago, on Mount Sinai, declared what the law was, and we read in the Good Book that God said, "Thou shalt not covet! Thou shalt not lie! Thou shalt not commit adultery! Thou shalt not kill!" Gentlemen of the jury, this man (pointing to defendant) has committed all these crimes. This self-confessed burglar has all his life laughed and scoffed at the law, at the officers of the law, and if you turn him loose he will laugh and scoff at you."

There was no exception taken to these remarks, no objection was raised then and there calling the court's attention to the fact that the remarks made by the district attorney were prejudicial, nor was there any objection made until several weeks after the close of the trial. It is a fundamental principle in practice that remarks of counsel in arguing a case to the jury, if deemed prejudicial, must be excepted to at the time, in order to give the court opportunity to correct, as far as possible, any prejudicial effect such remarks might have on the minds of the jurors. The authorities in support of this proposition are so numerous as to render it impracticable to do more than refer to reference books in which they are collated. Century Digest, vol. 14, § 1689, at page 2342; 12 Cyc. 584, in which it is said:

"Objections to improper remarks of the prosecuting attorney in his closing argument to the jury should be promptly made as soon as the improper remarks are uttered. Such objections come too late to be available to the accused if made after the counsel is through speaking, after the jury have rendered their verdict, or on motion for a new trial after a judgment of conviction."

This rule seems to be well-nigh universal. It cannot be successfully contended that the rule is technical or that it is hypercritical or unfair. While carefully attempting to safeguard every right of a defendant in a criminal case, the rights of the state must not be overlooked or disregarded. It would be manifestly unfair to the state and the people of the commonwealth to raise such an objection for the first time on a motion for a new trial, and expect the judgment to be reversed and the case tried over again, when, if seasonable objection had been made, any possible prejudice might have been effectually cured. The court does not feel justified in refusing to enforce this salutary rule of practice,

especially in view of the extra precautions taken by both the court and counsel for defendant, to which we have referred. In order to presume prejudice as resulting from the remarks of the district attorney, we would first have to conclude that the jurors were not only destitute of ordinary intelligence and common sense, but that they were likewise devoid of conscientious scruples, and disposed to recklessly disregard the obligations of the solemn oaths they had taken. We know of no case within the range of our experience where greater effort was made to disarm the jury of any and all prejudice respecting matters in evidence than was made by the court in the present case in respect to the subject-matter of this assignment. Τn view of these considerations, we do not feel justified in presuming that the defendant was prejudiced by the remarks of the district attorney in his closing address.

[12] This disposes of all the assignments of error which we deem necessary to consider except the last, in which it is contended that the evidence is insufficient to sustain the verdict of the jury. In considering this question but little need be added to what has been said. It is difficult to see, in view of the uncontroverted evidence in the case, how the jurors could have reached any other conclusion than the one they did. We have heretofore discussed the question of motive as reflecting upon the admissibility in evidence of other crimes admitted by the defendant. It was not in order at that time to refer to other motives which the defendant may have had for committing the crime charged against him. It is admitted by him, and proved by one of his witnesses, that he and his wife, while in Nevada and California, including jewels brought from New York, had accumulated in their possession jewels of the value of \$10,000 or \$12,000—a moderate fortune in itself for any person in the ordinary walks of life.

[13] Cupidity is everywhere recognized as one of the most powerful incentives to human action. In addition to the motive already considered for another purpose, sole and exclusive possession of this little fortune may have become a consuming desire. It is no answer to say the defendant might have robbed his wife without taking her life. This would by no means have been a safe and easy task. To rob her and then abandon her, in connection with other wrongs disclosed by the record, would be to arouse in her all the passion of an angry woman turned into an implacable Nemesis, pursuing him wherever he went, with all the ferocity of an incurable resentment. To rob her, and then attempt to continue the peaceful relation of husband and wife, would have proved equally futile. Knowing him as she did, he would have been the first person she would have suspected. The result in each case would have been the same; he would have become a fugitive and a vagabond upon the earth

as long as the existence of both continued. Hence, to take her life, to a man of his type, meant peace, security, and immunity from punishment for his other crimes, and to take the lewels at the same time meant wealth. comfort, and such happiness as wealth and comfort affords. Neither will it do to contend, as urged by appellant's counsel, that the defendant loved this woman. In addition to the fact disclosed by the record to the effect that they quarreled in Nevada and manifested ill feelings towards one another, there is one feature of his own admissions that forever precludes any idea of love on his part for the murdered woman. Defendant says, in Exhibit 39, that as they were leaving the Orpheum Theater on the night preceding the murder he noticed two men whose stamp he recognized because of his familiarity with such characters, and these men were watching him and his wife. She at the time was bedecked with jewels in more than ordinary After leaving the theater and profusion. arriving at the apartment, just as they were entering, he looked across and thought he again saw these two men who had followed him and his wife to their place of abode. In disregard of this apparently ominous circumstance, immediately after arriving at the apartment he left his wife alone, unprotected, and, worse still, he requested her to leave the door of her room unlocked and the street door as well so that on his return he could enter without disturbing her or the other occupants of the house. Upon his return he found her murdered. Whatever else may be said, and whatever significance this circumstance may bear in the case, it not only conclusively shows that he did not love his wife, but that he had an utterly inhuman disregard for her personal safety. If, then, it can be assumed that he had no love for his wife, the motives heretofore referred to were amply sufficient to justify the presumption, in connection with other circumstances, that he himself committed the awful crime.

In enumerating the articles of jewelry stolen from his wife at the time of the murder, he mentions a particularly attractive pair of earrings known as "Merry Widow earrings," which she wore at the Orpheum Theater the evening preceding the murder. In Exhibit 39 he attributes to the wearing of these earrings the direful tragedy which afterwards occurred. To apply his own imaginary theory, the flashing of these precious stones in the glaring light of the theater excited the cupidity of the two men who were watching them. These men followed him and his wife and found out their lodging place, and after he left the apartment they entered, found her disrobed awaiting his return. One of them struck her with a blackjack-the body quivered: the other picked up the flatiron, raised it above her head, and brought it down time and again with crashing force upon her face until her form lay still. Then, stripping her so inclined, were exceedingly opportune. of her jewelry and taking \$460 in money, These, together with the obliteration or the

hastily throwing over the horrible sight the pillows and bedcoverings, they fled. This is the defendant's theory of the murder, stated substantially in his own language. gave a list of all the jewelry taken from her by these murderers, which included the "Merry Widow earrings" above referred to. And yet the mountings of these earrings, with the precious stones extracted therefrom, were afterwards found by the vigilance of the officers of the state in a safety deposit box in a St. Louis bank. This box was rented and controlled by the defendant. The mountings were identified by a jeweler of New York who made them for the murdered woman while she was the wife of her former husband. The defendant told one of the officers that the man that stole these earrings was the man who murdered his wife. Ominous words, and of deep significance, in the light of their discovery afterwards in defendant's possession.

Again, in this connection it is pertinent to state that defendant related a story to the officers to the effect that, on the night of the Orpheum Theater which he and his wife attended, she wore several thousand dollars' worth of diamonds; that among these was one particular piece which was in possession of another party in St. Louis about a week after defendant arrived there. This party displayed this particular piece of jewelry in a saloon in St. Louis, and that led to a tragedy. After this tragedy defendant claimed to have recovered all of the jewels taken when his wife was murdered. He stated that the man who murdered his wife was dead.

In another connection, one of the officers who had been to St. Louis investigating the case, on his return, asked the defendant if he had recovered a pair of earrings at the apartment house after the murder. Defendant stated he had not. He then asked defendant where was the body of the man that killed his wife. Defendant (in reply) asked the officers if he, while there, had heard of a mystery murder of the underworld. The officer answered, "No;" that he had gone into that particular question, and the only mystery murder he had heard of was that of a policeman. The officer again asked defendant where was the man buried. The defendant made no reply.

This weird, unbelievable story was undoubtedly a fabrication pure and simplefabricated for the sole purpose of accounting for the "Merry Widow earrings" which were found in his safety deposit box in the St. Louis bank.

The defendant and his wife were total strangers in Salt Lake City. The witnesses Anderson, Paulson, and Palmer were the only persons of whom we have knowledge that even saw them while they occupied the apartment, and their knowledge did not amount to even the slightest acquaintance. The conditions for the perpetration of just such a deed as this, if one had the motive and was removal of every mark of identity as to the 2. Master and Servant 351-Workmen's woman murdered or the person who murder- Compensation Act-Security. woman murdered or the person who murdered her, made a case that would have baffled every attempt at solution had it not been that the defendant himself, as often happens in such cases, gave himself up to the officers of the law with what he believed to be a well-planned theory of defense. He alone had reasons for destroying every mark of identity pertaining to the murdered woman. A stranger entering that apartment, with whatever criminal design, could have had no motive for mutilating and disfiguring her face so as to destroy her identity. As suggested by the Attorney General in his masterful résumé of the facts, a stranger would only have been interested in hastily accomplishing his purpose and escaping without delay. To him what would it matter whether the unfortunate woman was Fanny De Weese or some one else? Not so with the defendant. His bringing her to that apartment, his previous relationship, his having been seen by at least three persons who knew of his relationship to the woman, his having to leave the apartment under circumstances that rendered it probable he might be seen leaving, his destroying every other possible means of identification, as admitted in Exhibit 39, and then leaving the apartment, locking the door. and fleeing from the state, combined with the other circumstances heretofore enumerated, point with unerring certainty to the defendant as the murderer of his wife. After the deed was committed the record discloses he contemplated suicide, attempted to accomplish it, and failed. The question is asked, why did he give himself up if he knew he was guilty? The problem is psychological. The writer confesses his inability to Similar conduct has happened solve it. before in the annals of crime, and probably will continue to happen in the future, as long as the enlightened consciences of men respond to the overpowering consciousness of guilt.

The defendant had a fair trial. He was defended by able counsel, who were fearless in the discharge of their professional duty. The conviction of the defendant is not attributable to any act or omission of his counsel. The indubitable facts alone are responsible. We find no error in the record. The judgment is affirmed and the cause remanded, with directions to the trial court to fix the date for execution.

FRICK, C. J., and McCARTY, CORFMAN, and GIDEON, JJ., concur.

INDUSTRIAL COMMISSION OF UTAH v. DALY MINING CO. (No. 9181.)

(Supreme Court of Utah. April 3, 1918.) 1. STATUTES \$== 181(1) - CONSTRUCTION - IN-TENT.

In construing statutes, the intent of the Legislature, if ascertainable, necessarily con-

Workmen's Compensation Act (Laws 1917, c. 100) § 53, requiring that employers shall insure payment of compensation in one of three ways, is compulsory on all employers.

3. Master and Servant 4:394—Mandamus
—Industrial Commission—Requiring Em-PLOYER TO SECURE PAYMENT OF COMPENSA-TION.

The Industrial Commission may proceed in mandamus to compel employers to secure payment of compensation to employes required by Workmen's Compensation Act, § 53, because it has no other adequate remedy, and cannot sue for premiums where the employer has not elected under what provision it will be bound.

4. MASTER AND SERVANT 6=383-WORKMEN'S

COMPENSATION ACT.

It is for the Industrial Commission alone It is for the Industrial Commission alone to decide whether an employer will deposit security where it has elected to come under Workmen's Compensation Act, § 53, subd. 3, providing that an employer need not insure where it furnishes to the commission satisfactory proof of financial ability to pay compensation direct to injured employés.

5. STATUTES \$== 181(2)—Construction. Where an act is susceptible of two constructions, the one most beneficial and useful should be adopted, if possible.

Original application for writ of mandate by the Industrial Commission of Utah to compel the Daly Mining Company to furnish security for payment of compensation to employés. Writ granted.

Dan B. Shields, Atty. Gen., and Jas. H. Wolfe and O. A. Dalby, Asst. Attys. Gen., for plaintiff. Marioneaux, Stott & Beck, of Salt Lake City, for defendant.

FRICK, C. J. This is an original application to this court by the plaintiff, hereinafter for convenience called the "commission," for a writ of mandate to require the defendant to comply with a certain order made by the commission to which we shall more specifically refer later. An alternative writ was duly issued requiring the defendant to comply with the order of the commission or to appear in this court and show cause why it refuses to do so. The defendant appeared and filed a general demurrer and answer at the same time. In view that the answer raises no material issue, the whole controversy was presented on the general demur-

The application for the writ is predicated on chapter 100, Laws Utah 1917, p. 306. The act is quite voluminous and is divided into more than 100 sections, some of which are in themselves very long. It is not practical to set forth the act at length nor to give all of its provisions even in condensed form. We shall therefore set forth such portions only of the act as are deemed strictly essential to a full understanding of the controversy, and the other portions that are deemed material will be stated in condensed form merely.

[1] The act creates what is termed the Industrial Commission of Utah, which is the

arrangement of the various matters contained in the act is not as orderly and logical as it might have been made, yet, when the objects and purposes of the act are considered and it is viewed as a whole, the intention of the Legislature, we think, can readily be ascertained. When that intention is once ascertained, it necessarily controls. 2 Lewis, Sutherland, St. Const. § 347. Counsel for the respective parties are, however, hopelessly at variance as to the real meaning of the several provisions of the act, and especially with respect of whether the provisions of the act are compulsory and thus require the employer to secure in advance the payment of any compensation to which any employe may become entitled under the act. The Attorney General insists with much vigor that in that regard the act is manifestly compulsory, while counsel for defendant with much force contend that the act is elective, or, at most, coercive. Whether it is the one or the other is the only question that is presented for determination, and we shall now, as briefly as possible, proceed to a consideration of that

We shall first set forth the portions of the act as before indicated. We shall refer to the sections in the order they are numbered in the act, regardless of the matter contained therein.

After stating matters of inducement and providing for the organization of the commission, in sections 1 to 31, section 32 prescribes rather drastic penalties in case any of the provisions or requirements of the act are violated.

Section 34 provides that all employers of labor, in January of each year, must make and file with the commission certain statements as provided in that section.

Section 35 creates what is termed "the state insurance fund for the purpose of insuring employers against liability for compensation under this act, and of assuring to the persons entitled thereto the compensation provided by this act."

Section 41 provides that all employers who insure in "the state insurance fund" shall receive from the commission a contract or policy of insurance in a form to be approved by the state commission.

Section 50 reads as follows:

"The following shall constitute employers subject to the provisions of this act: (1) The state and each county, city, town and school district therein. (2) Every person, firm and private therein. (2) Every person, firm and private corporation, including every public utility, that has in service four or more workmen or operatives regularly in the same business, or in or about the same establishment under any contract of hire, express or implied, oral or written, except agricultural laborers and domestic service. ants; provided, that employers who have in service less than four employes shall have the right to come under the terms of this act by complying with the provisions thereof, and all the rules and regulations of the commission. complying with the provisions thereof, and all this act shall be guilty of a misdemeanor. Prothe rules and regulations of the commission. vided, that subject to the supervision of the The term 'regularly' as herein used shall include commission nothing in this act shall be con-

plaintiff here, called the "commission." The all employments, whether continuous throughout the year or for only a portion of the year. It means all employments in the usual course of the trade, business, profession or occupation of an employer."

> Section 51 defines what employés come within the provisions of the act.

Section 52a provides:

"If a workman receives personal injury by ac-cident arising out of and in the course of his employment, his employer, or the insurance carrier shall pay compensation in the amounts and to the person or persons hereinafter specified."

Section 53 reads as follows:

"Employers, but not including municipal bodies, shall secure compensation to their employes in one of the following ways: (1) By insuring and keeping insured the payment of such com-pensation with the 'state insurance fund;' or (2) by insuring and keeping insured the pay-ment of such compensation with any stock corporation or mutual association authorized to transact the business of workmen's compensa-tion insurance in the state; or (3) by furnishing to the commission satisfactory proof of financial ability to pay direct the compensation in the amount and manner and when due as provided for in this act. In the latter case the commission may in its discretion require the deposit of acceptable security, indemnity, or bond to secure the payment of compensation liabilities as

they are incurred.

"All stock corporations or mutual associations of workmen's compentransacting the business of workmen's compensation insurance in this state under the terms of subdivision 2 of this section shall be subject to the rules and regulations of the commission with respect to rates to be charged, and methods

of compensation to be used."

Section 54 provides:

"If the insurance so effected is not with the state insurance fund the employer shall forthwith file with the commission in form prescribed by it a notice of his insurance, together with a copy of the contract or policy of insurance."

Section 61 merely fixes the rights of employes who are covered by insurance in the 'state insurance fund."

Section 63 is important, and hence we set it forth in full. It reads as follows:

"Subject to the approval of the commission, any employer may enter into or continue any agreement with his employés to provide a system of compensation, benefit or insurance in lieu of the compensation and insurance provided by this act. No such substitute system shall be approved unless it confers benefits upon injured employés and their dependents, at least equiva-lent to the benefits provided by this act, nor if it requires contributions from the employés unless it confers benefits in addition to those provided under this act at least commensurate with such contributions.

"Such substitute system may be terminated by the commission on reasonable notice and hearing to the interested parties if it shall appear that the same is not fairly administered or if its operation shall disclose defects threatening its solvency, or if for any substantial reason it fails to accomplish the purposes of this act; and in this case the commission shall determine upon the proper distribution of all remaining assets, if any, subject to the right of any party in interest to take an appeal as in other cases of appeal from the orders of the commission. Any employer who makes a deduction for such purposes from the wages or salary of any employé entitled to the benefits of this act shall be guilty of a misdemeanor. Pro-

strued as preventing the employer and his em-ployes entering, and it shall be lawful for them to enter, into mutual contracts and agreements respecting hospital benefits and accommoda-tions and medical and surgical services, nursing and medicines to be furnished the employes as in this act provided; but no profit, directly or indirectly, shall be made by any employer as a result of such contract or agreement, the purpose and intent of this act in such respect being that where hospitals are maintained and medical and surgical services and medicines furnished, by the employer from payments by or assessments of his employes, such payments or assessments shall be no more or greater than necessary to make such hospital benefits and acnecessary to make such hospital benefits and accommodations, including surgical and medical services and medicines, self-supporting for the care and treatment of his employés, and all sums received or retained by the employer from the employés for such purpose shall be paid and applied thereto; and provided further, that such hospitals so maintained in whole or in part by payments or assessments of employés, shall be subject to the inspection and under the supervision of the commission as to services supervision of the commission as to services and treatment rendered such employés."

Section 64 provides that all employers who do not insure either in the "state insurance fund" or with some other insurance company must, nevertheless, pay into the state treasury a tax equal to the premium tax that insurance companies generally are required to pay to the state on the premiums received by such companies from those who insure with

Sections 66, 67, 68, and 69 are of such a nature that we cannot well condense them, and for that reason we append them in full:

"Sec. 66. Employers who comply with the provisions of section 53 of this act shall not be liable to respond in damages for injuries sustained by their employés not resulting in death. tained by their employes not resulting in death. For injuries, however, resulting in death, the dependents of the deceased employé are given the right, within such time as the commission by rule shall prescribe, to elect (a) between bringing suit at law against such employer to recover damages for such death and in the event of suit said dependents must prove negevent of suit said dependents must prove negligence on the employer's part before they can recover, or (b) to accept the benefits allowed to dependents of deceased employés by this act in the event of death. If they elect (b) they shall not be entitled to sue such employer at law to recover damages. If they elect (a) they thereby forfeit any rights to compensation under this act and in a suit at law shall not be entitled to recover damages from such employer if the deceased employé was himself guilty of entitled to recover damages from such employer if the deceased employé was himself guilty of contributory negligence, or if he assumed the risk, or if his death was due in whole or part to the negligence of a fellow servant. If the dependents of the deceased elect to sue as herein provided, and in such suit recover judgment against the amployer than the commission shall in provided, and in such suit recover judgment against the employer, then the commission shall determine the amount to which the plaintiffs in such suit would be entitled by accepting the provisions of this act, and pay the same toward the satisfaction of the judgment so recovered, if the employer against whom the judgment is recovered was, at the time the injuries causing the death were received, insured in the state insurance fund; otherwise such judgment shall be paid by the employer or his insurance carrier.

rier.

"Any deficiency shall be paid by the employer against whom the judgment is recovered.

"See 67 Each employer providing insurance

"Sec. 67. Each employer providing insurance or electing directly to pay compensation to his injured, or the dependents of his killed, employes or electing directly to pay compensation to his tion of the commission may best subserve the injured, or the dependents of his killed, employes interests of the persons entitled to receive such as herein provided, other than the employers compensation."

mentioned in subdivision 1 of section 50 hereof, shall post in conspicuous places about his place of business typewritten or printed notices stating the fact that he has complied with the provisions of this act and all of the rules and provisions of this act and all of the rules and regulations of the commission made in pursuance thereof, and has been authorized by the commission directly to compensate such employés or dependents, and the same, when so posted, shall constitute sufficient notice to his employés of the fact that he has complied with the law as to securing compensation to his em-

the law as to securing compensation to his employés and their dependents.

"Sec. 68. Employers who shall fail to comply with the provisions of section 53 hereof, shall not be entitled to the benefits of this act during the period of noncompliance but shall be liable to their employés or the dependents of their employés in case of death or damage suffered by reason of personal injuries arising out of and in the course of employment caused by the wrongful act. neglect or default of the out of and in the course of employment caused by the wrongful act, neglect or default of the employer or any of the employer's officers, agents, or employés, and also to the personal representatives of such employés where death results from such injuries. And in such action, the defendant shall not avail himself or itself the defendant shall not avail himself or itself of either of the following defenses: The defense of the fellow-servant rule, the defense of the assumption of risk, or the defense of contributory negligence. And in all such cases proof of the injury shall constitute prima facie evidence of negligence on the part of the employer and the burden shall be upon the employer to show freedom from negligence resulting in such injury

jury.
"And such employers shall also be subject to the provisions of the two sections next succeed-

the provisions of the two sections next succeeding.

"Sec. 69. Any employé whose employer has failed to comply with the provisions of section 53 hereof, who has been injured by accident arising out of and in the course of his employment, wheresoever such injury has occurred, and which was not purposely self-inflicted, or his dependents in case death has ensued, may, in lieu of proceeding against his employer by civil action in the courts, as provided in the last preceding section, file his application with the commission for compensation in accordance the commission for compensation in accordance with the terms of this act, and the commis-sion shall hear and determine such application for compensation in like manner as in other claims before the commission; and the amount of the compensation which said commission may dascertain and determine to be due to such in-jured employé, or to his dependents in case death has ensued, shall be paid by such employ-er to the person entitled thereto within ten days after receiving notice of the amount thereof as fixed and determined by the commission; and in the event of the failure, neglect, or refusal of the employer to pay such compensation to the person entitled thereto, within said peri-od of ten days, the same shall constitute a liq-uidated claim for damages against such em-ployer in the amount so ascertained and fixed the commission, which, with an added penalty of fifty per centum, may be recovered in an action in the name of the state for the benefit of the person or persons entitled to the

same.
"The commission shall adopt and publish rules and regulations governing the procedure and shall prescribe forms of notices and the mode and manner of serving the same in all claims for compensation arising under this section. Any suit, action or proceeding brought against any employer under the provisions of this section, may be compromised by the commission, or such suit, action or proceeding may be prosecuted to final judgment as in the discre-

employer fails to pay an insured employé the amount of compensation to which the latter is entitled under the act.

Section 71 reads as follows:

"The right to recover compensation pursuant to the provisions of this act for injuries sustained by an employé shall be the exclusive remedy against the employer, except that where the injury is caused by the employer's willful misconduct and such act causing such injury is the personal act of the employer himself, or if the employer be a partnership, on the part of one of the partners, or if a corporation, on the part of an elective officer or officers thereof, and such act indicates a willful disregard of the such act indicates a willful disregard of the life, limb or bodily safety of employés, such in-jured employé may, at his option, either claim compensation under this act or maintain an action at law for damages. The term willful misconduct,' as employed in this section shall be construed to mean an act done knowingly and purposely with the direct object of injuring ing another."

Section 72 provides for an election of remedies in case an employé dies from an injury inflicted through the negligence of the master. The provisions of that section, and other similar provisions found in the act, merely make the act conform to our Constitution, which prohibits the Legislature from limiting the amount of damages that may be recovered in all cases of death resulting from negligent or wrongful acts of third persons.

The act contains many other provisions which are, however, not material to the con-

The application in this case is more particularly based upon subdivision 3 of section 53, supra. That section provides that all employers of labor, except municipalities, "shall secure compensation to their employes in one of the following ways": (1) By insuring payment of compensation in the "state insurance fund"; (2) by insuring payment by insuring with some company engaged in the indemnity insurance business; or (3) by furnishing satisfactory proof to the commission of the financial ability of the employer to pay such compensation direct to his em-If, however, the employer desires ployés. to pay direct without obtaining insurance as provided in subdivisions 1 and 2 aforesaid, the commission may, in its discretion, nevertheless require security in the manner provided by the act so that in case any employé shall become entitled to compensation the same will be paid without delay. It is alleged in the application that on the 1st day of July, 1917, the defendant made application to the commission pursuant to subdivision 3 aforesaid for the privilege of paying the compensation provided by the act to its employes direct; that the commission granted the privilege, upon the express condition, however, that the defendant "file with the commission its surety bond or liquid collateral in the sum of twenty-five thousand dollars." A formal order to that effect was made by the commission, and the defendant has failed and refused to comply with such

Section 70 provides a remedy in case an order or to otherwise secure the payment of compensation to its employes as provided by the act. All of the foregoing facts are admitted by the demurrer. The commission therefore prayed that the defendants be "commanded to file with the commission its bond in the sum of twenty-five thousand dollars or liquid security in that amount as required by said commission's order, or, in lieu thereof, to file its policy with said commission as evidence of its having insured its employés either in the 'state insurance fund' or in some stock corporation," as provided by the act.

> [2] It will be observed that the language of section 53 is mandatory and not merely permissive. True, employers are given the right to elect whether they will insure the payment of compensation in the "state insurance fund," or by obtaining insurance with some insurance company, or whether they will furnish proof to the commission that they are financially able to make prompt payment of the compensation to their employés. A mere cursory reading of the whole act will convince any one, we think, that the Legislature manifestly intended that all employers by one of the three methods referred to shall in advance secure the payment of the compensation to which any one of their employés may become entitled under the act. Such laws are in force in many states. Honold on Workmen's Compensation, § 32, note. The compulsory feature of such laws has not only been held valid and enforceable by state courts of last resort, as appears from the cases of State ex rel. v. Clausen, 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466, and State v. Mountain Timber Co., 75 Wash. 518, 135 Pac. 645, L. R. A. 1917D, 10, but has also been held valid and enforceable by the Supreme Court of the United States in Mountain Timber Co. v. Washington, 243 U. S. 219, 37 Sup. Ct. 260, 61 L. Ed. 685, Ann. Cas. 1917D, 642, and in New York Cent. R. Co. v. White, 243 U.S. 188, 37 Sup. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629. In the last case cited the court, in passing upon the scheme of compulsory compensation (243 U.S. at page 208, 37 Sup. Ct. at page 255 [61 L. Ed. 667, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629]), says:

> "We conclude that the prescribed scheme of compulsory compensation is not repugnant to the provisions of the fourteenth amendment."

> In that case, as pointed out by the court. the payment of compensation could be secured by either one of three methods (a) by state insurance, (b) by insurance with an insurance company, and (c) by a deposit of securities. Those are the precise methods provided for by the act in question. The Supreme Court of the United States, in the case last cited, found no valid objection to the enforcement of either method.

> Counsel for defendant, however, vigorously contend that the provisions of the act relat

ing to the insuring of the payment of compensation are merely elective, or, as they put it, are at most coercive in view of the severe penalties that are imposed and by reason of other provisions contained in the act. In order to give counsel the full benefit of their contention, we have felt constrained to set forth the various sections upon which they more especially rely in full. While we freely concede that there are quite a number of provisions and expressions contained in those sections which, if considered by themselves, would more or less strongly indicate the insurance feature to be elective. yet, when the act is considered as a whole, and when the manifest purpose thereof is kept in mind, it is quite clear, to our minds at least, that the Legislature intended the insuring of compensation in advance to be compulsory. That is, in adopting the act it was the manifest purpose and intention of the Legislature to require all employers coming within its provisions to secure the payment of compensation to their employes in advance by either one of the three methods stated in section 53, supra. True it is that there are a number of provisions contained in the act that are merely elective, but those provisions are merely incidental.

Counsel, however, insist that the fact that the Legislature has provided for very drastic penalties in case any of the provisions of the act are violated in and of itself shows that it was intended to make the act elective rather than compulsory. While there is some force to the argument, yet, in our judgment, the mere fact that violations of the provisions of the act are somewhat severely penalized, that, standing alone, does not necessarily determine that the act is not compulsory in so far as it relates to the insuring of the payment of compensation in advance. Every employer, after having fully complied with the insurance feature of the act, may, nevertheless, violate its provisions in some other respect, and hence become liable to be penalized. This applies with especial force to those employers who obtain the privilege of naving the compensation provided for in the act direct to their employes.

Counsel, however, also insist that in view that the act provides that the employers must post notices that they have complied with the provisions of the act also shows that it was not intended to include all employers, and hence this is another indication that the act is elective merely. In that connection it is argued that the presumption is that all men conform to the law and that the contrary is never presumed. From this counsel deduce that the posting of notices was required for the purpose of informing those who may seek employment which employer has adopted the provisions of the act and which one has not. When, however, the provisions of the Workmen's Compensation out receiving anything in return, controlling.

Acts of other states are examined, it will be found that such notices are required to be posted by the employers although the acts are concededly compulsory. It is manifest therefore that the purpose of the act requiring such notices to be posted is not to distinguish the employers who have complied with the act from those who have not, but that its purpose is to inform all those who may seek employment without further inquiry that the payment of compensation to which they may become entitled is secured as provided in the act. In other words, such a notice is for the benefit of the employes or for those who seek employment.

It is further contended that inasmuch as the act makes provision that employers who have obtained such insurance, under certain conditions, may withdraw from such insurance, also shows the act to be elective. Here, again, the right of withdrawal may be for a good and sufficient reason other than the one suggested by counsel. An employer may cease operations, or he may no longer be in the class covered by the act, or he may desire the other forms of insurance provided by the act, or may for some other reason desire to discontinue his business, and hence provision is made for his withdrawal.

[3] It is, however, further contended that the commission has a plain, speedy, and adequate remedy by merely bringing an action against the defendant for the amount of the tax, as counsel designate it, which defendant would be required to pay under the act, and hence this proceeding will not lie. The statute does not authorize such an action, and we know of no law whereby the commission may enforce payment of any money from any person who has not obligated himself to pay or where the statute imposes no such obligation. The duty that is imposed by the act, upon employers, is to comply with its provisions relating to the insuring of the payment of compensation provided for by it. As we read the act, the commission is empowered to enforce obedience to its provisions in that regard and to enforce the payment of the compensation when it becomes payable in accordance with the terms of the act; but no power is conferred upon the commission to sue to recover the amount employers are required to pay for insurance unless and until they have obligated themselves to pay. The only remedy that the commission has ir a case like the one at bar, therefore, as we view it, is to compel the delinquent employer to comply with the provisions of the act relating to the insuring of the payment of the compensation provided by the act.

Nor is the contention that since a particular employer may not become liable at all to pay any compensation under the act and that for that reason, as counsel suggest, he may be required to pay money for insurance withApart from the fact that compulsory com- plication. It is further ordered that the depensation acts are defensible, in that they ultimately result in the public welfare, the employer, however, also receives some benefit. Indeed, counsel very vigorously argue that inasmuch as the provisions of the act are beneficial to the employer, in that the amount that he is usually called on to pay to an employé who is injured through the employer's negligence is greatly reduced and in the saving of court costs and other incidental expenses, it was not necessary to make the provisions of the act compulsory, but that those benefits are a sufficient inducement to the employer to come within its provisions. It is argued that the beneficial provisions therefore are alone sufficient to induce the ordinary employer to avail himself of the provisions of the act. We have, however, already attempted to show that such a contention does not make the act elective.

[4] Finally, counsel insist that the defendant objects to being coerced in this manner, "because in this particular case the employer is especially well secured against accidents to its employés, does not need insurance, and objects to having insurance forced upon it contrary to law." The commission, upon whom was conferred the power to decide the question, however, held otherwise. It decided and ordered that the defendant secure the payment of the compensation as the act provides and as it in its discretion may do. Insurance is therefore not forced upon defendant "contrary to law," but it is merely required to do what the law enjoins.

[5] In conclusion, we desire to state that, if it be held that the provisions of the act are merely elective, then very little, if anything, is gained by its enactment. While such a reason may not be conclusive-may not even be controlling-yet it is one the court should not overlook. It is always important in construing and applying the provisions of any comprehensive act, such as the one under consideration, to keep in mind the purpose the Legislature had in view in adopting it. If therefore an act is subject to two constructions, one of which in a large measure would make it useless and of no material benefit to any one, while the other construction would manifestly make it effective and beneficial, and, moreover, would subserve the public welfare, the court should be slow to adopt the first construction, but should adopt the second if such may be done according to sound principles of law and rules of construction.

We are constrained to hold therefore that the act in question is compulsory, and that the defendant should be required to conform to and comply with the order of the commission to which we have hereinbefore referred.

It is therefore ordered that a peremptory writ of mandate issue as prayed in the ap- | Pac. 522; Mills v. Gray, 167 Pac. 359.

fendant pay the costs of this proceeding.

McCARTY, CORFMAN, THURMAN, and GIDEON, JJ., concur.

O'NEILL v. MUTUAL LIFE INS. CO. OF NEW YORK et al. (No. 3134.)

(Supreme Court of Utah. April 3, 1918.)

1. INSURANCE \$\infty\$590-Life Policy-Notice of Claim of Creditor-Effect.

Mere fact that general creditor of deceased

served notice on insurer that assignment of policy to claimant was fraudulently made to avoid payment of the debt did not constitute any lien, claim, or right against the moneys payable under the policy nor against the insurer.

2. Indemnity == 4-Bond-"Valuable Con-SIDERATION.

Where insured's creditors filed claim against insurer on ground that policy assignment was fraudulent, payment of the policy proceeds by the insurer was not a valuable consideration for an indemnity bond for the benefit of creditors exacted from the assignee; the filing of such claim by the creditors having created no liability against the insurer, and mere fear not being valuable consideration.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Valuable Consideration.]

3. Action €=25(1)—Indemnity Bond—Surt in Equity of Law.

Where insurer required bond indemnifying it against claims of insured's creditors who alleged that assignment of policy to plaintiff was fraudulent, the adequacy of plaintiff's remedy at law, either as a defense in any action on the indemnity bond or in proceedings by her to recover the money deposited to secure the bondsman, did not preclude her maintaining action to cancel the bond; there being no distinction between equity and law.1

CANCELLATION OF INSTRUMENTS 6=24(1)-

RESTORATION OF CONSIDERATION.

Where insurer required assignee of life policy to give indemnity bond against claims of creditors of insured, to do which \$800 of the policy was deposited as security, and the assignee sued to cancel the bond, she was not bound to restore what she had received from the policy, since if successful she would be entitled, not only to what she had received, but to the balance of the policy.

5. Cancellation of Instruments 6-5 -LACK OF CONSIDERATION.
Where general creditors of insured filed no-

tice with insurer that assignment of policy was fraudulent and the insurer before paying the iraudulent and the insurer before paying the policy required a bond indemnifying it against such claims, to secure which the assignee deposited part of the proceeds of the policy, since in fact there was no consideration for the bond, equity would intervene and afford the assignee relief by canceling the bond, though a court of equity will not inquire into the quantum of the consideration.

Appeal from District Court, Salt Lake County; Harold M. Stephens, Judge.

Action by Selma O'Neill against the Mutual Life Insurance Company of New York

1 Morgan v. Childs, Cole & Co., 41 Utah, 564, 128

and the Utah Savings & Trust Company. and all costs that said company might be Judgment dismissing the action, and plaintiff appeals. Reversed and remanded, with payable under the policy the plaintiff was instructions.

Chris Mathison, of Salt Lake City, for appellant. Van Cott, Allison & Riter and Ashby Snow, all of Salt Lake City, for respondents.

GIDEON, J. In this opinion the respondent Mutual Life Insurance Company will be designated "Insurance Company," and the respondent Utah Savings & Trust Company as "Trust Company."

To appellant's amended complaint the defendant Insurance Company filed a general and a special demurrer, and also a motion to strike out certain parts thereof. The defendant Trust Company interposed a general demurrer. Both the general and special demurrers of the Insurance Company and the general demurrer of the Trust Company were held to be good, and, the plaintiff refusing to amend after leave given, judgment was entered dismissing the action. From that judgment plaintiff appeals. It will be necessary, therefore, to state as briefly as may be the allegations of the complaint.

The corporate existence of both defendants is alleged. It is further stated: That on or about August 2, 1913, one William L. Waters died at San Francisco, Cal., and at that time an insurance policy issued by the defendant Insurance Company upon the life of Waters was in force, and there was payable under the policy the sum of \$2,454.23. That on the 26th day of June, 1913, the said Waters, with the consent and knowledge of the Insurance Company, assigned the policy and all benefits thereunder to the plaintiff, Selma O'Neill. A copy of the assignment is made a part of the complaint, and in that assignment it is stated that the policy was transferred to the plaintiff, in trust for the support of the mother of deceased (who was then a resident of Salt Lake City, Utah), if living, and if not living then to the plaintiff herself. That the Insurance Company was notified of the death of the insured and payment demanded on or about the 28th day of October, 1913. That payment was refused unless the plaintiff would cause to be executed and delivered to that company an indemnity bond in the sum of \$800 with surety conditioned that they would indemnify and save harmless the said Insurance Company against any loss it might sustain by reason of paying the amount of the policy to the plaintiff as trustee, and that they would defend any suit which might be instituted against the Insurance Company by one Dr. S. Nicholas Jacobs or one Mr. Bender, or any other person, and would pay all costs, counsel fees, and expenses the said Insurance Company might pay or be liable for in any suit or judgment that might thereafter be obtained against the Insurance Company.

liable to pay. That to obtain the moneys payable under the policy the plaintiff was compelled to and did on or about the 28th day of October, 1913, at Salt Lake City, Utah, deliver to the Insurance Company her bond of indemnity executed by herself as principal and by the defendant Utah Savings & Trust Company as surety. A copy of the bond is attached to the complaint as "Exhibit A." That upon the execution and delivery of such bond the Insurance Company paid to the plaintiff the sum so payable as aforesaid. It is further alleged that the bond of indemnity was and is void for the reason that the same was given without any consideration therefor; that the only pretended consideration was a notice given prior to the execution of such bond by Dr. S. Nicholas Jacobs and Mr. Bender to the Insurance Company, claiming that the assignment of the policy from Waters to the plaintiff was made for the purpose of defrauding creditors, and also claiming that debts due them from said Waters, deceased, amounting to the sums of \$540 and \$240, respectively, should be paid before the proceeds of said policy were paid. It is further alleged that the assignment was not made with the intent and the same did not operate to hinder, delay, or defraud the creditors of said Waters, all of which said Insurance Company knew at the time of the execution of the bond and the payment of the moneys due under the policy; that at said time the Insurance Company knew that there did not then exist any claim, right, or lien in or upon said insurance policy or the money payable thereunder, except to the plaintiff by virtue of said assignment; that at the time of the execution of the bond and the payment of the insurance money to the plaintiff said Jacobs and Bender were general creditors of the deceased; that neither of them or any other person has ever claimed to have any right or lien in or upon said insurance policy or the moneys payable thereunder; that neither said Jacobs nor Bender, nor any other person, has ever demanded that the Insurance Company pay to them or either of them any of the moneys payable under the policy; that no person has ever claimed that the plaintiff was not entitled to such insurance money as trustee under said assignment. It is further alleged that, to induce the Utah Savings & Trust Company to become surety on the plaintiff's bond and to indemnify it against any liability by reason of becoming such surety, plaintiff was compelled to and did deposit with said Trust Company the sum of \$800, being a part of the proceeds of said Insurance policy, under an agreement that the deposit should remain with the Trust Company until it should be relieved or discharged from liability by reason of becoming surety on the bond; that the

plaintiff has repeatedly requested the Insurance Company to surrender the bond and to relieve plaintiff and her surety from any liability thereunder, but such company has refused to do so, and continues to refuse, and claims the right to hold the plaintiff and her surety upon the bond for an indefinite period in the future; that plaintiff desired to withdraw the money deposited with the Trust Company and has requested it to permit her so to do, but the Trust Company has refused and still refuses to pay her such money without the consent of the Insurance Company or until it is relieved or discharged from liability as such surety. Plaintiff asks for a decree of court canceling the bond and for judgment against the Trust Company for \$800, and for general relief.

The indemnity bond made a part of the complaint recites the fact of the execution of the policy upon the life of the deceased for the sum of \$3,000; that Lucy M. Waters, wife of the deceased, was named beneficiary in said policy; that during the years 1911 and 1912 the Insurance Company loaned certain amounts to the deceased upon the pledge of the policy; that Lucy M. Waters, beneficiary, died prior to the assignment, viz. October 12, 1912. There is also incorporated in the bond a copy of the assignment and a statement that notice had been served upon the Insurance Company by Dr. Jacobs and Mr. Bender as alleged in the complaint; and further that the Insurance Company had been requested by the plaintiff to pay the full amount due on the policy to her after deducting the amount of the money loaned to the deceased, and that the Insurance Company required a bond to indemnify it against any and all claims which might arise on account of such payment, and that by reason thereof the principal and surety bound themselves to indemnify and save harmless the Insurance Company against any loss or damage it might sustain by reason of paying the amount of said policy to the plaintiff, and that they would defend any suit brought against the company on the policy by the said Dr. Jacobs or Mr. Bender, or by any other person.

It is contended by the appellant that the bond was given without consideration, and is therefore not binding upon the plaintiff or her surety, and for that reason the same should be delivered up and canceled. As alleged in the complaint, which is admitted by the demurrers filed, the only consideration for the execution of the bond was the fact that, after the death of Waters, one Dr. Jacobs and one Mr. Bender served written notice upon the Insurance Company that the assignment had been made for the purpose of defrauding Waters' creditors and that the amount due them must be paid from the moneys payable under the policy. No further action or proceedings was ever taken

right, claim, or lien upon the money determined. The appellant contends that under the terms of the policy the amount claimed was a debt due and payable, and that the Insurance Company was under obligations to pay the same, and that it had no legal right, as a condition precedent, to demand any security or indemnity before paying the amount due as stipulated in said policy.

[1] It must be held that the mere fact that some general creditors of the deceased had served notice, either written or otherwise, upon the Insurance Company that the assignment had been fraudulently made, or that they held a claim against the deceased which they insisted must be paid from the amount of the policy, could not, and did not, constitute any lien, claim, or right against the moneys payable under the policy, or against the Insurance Company. Wait on Fraudulent Conveyances (3d Ed.) par. 73; Simpson & Co. v. Dall, 3 Wall. 476, 18 L. Ed. 265.

"A valuable consideration has been defined to consist either in some right, interest, profit, or benefit accruing to the party who makes the promise, or some forbearance, detriment, loss, responsibility, act, labor, or service, given, suffered, or undertaken by the party to whom it is made." 6 A. & E. Enc. L. 703.

[2] If the notice served upon the Insurance Company did not have the effect of creating any lien, claim, or right against the Insurance Company or the debt it owed to the plaintiff under the terms of said policy, then it was not waiving or depriving itself of any right, interest, profit, or benefit to which it was legally entitled; consequently nothing passed from the Insurance Company to the plaintiff that would be a valuable consideration. As indicated, the only justification for demanding the bond was that the Insurance Company entertained some apparent fear or conjecture that some one might in the future have some claim on the money payable under the policy. The mere existence of a doubt or fear or a mere conjecture when there are no facts known to the defendant upon which to base such doubt or fear does not constitute a valuable consideration. Tucker v. Ronk, 43 Iowa, 80; Fitzgerald v. Fitzgerald & Mallory Const. Co., 44 Neb. 463, 62 N. W. 899; Ware, Murphy & Co. v. Morgan & Duncan, 67 Ala. 461.

[3] It is further contended, however, by the respondent, that even admitting that to be so, the plaintiff has a complete and adequate remedy at law, either as a defense against any action that might be brought upon the bond or in any proceedings instituted by her to recover the moneys deposited with the Trust Company. So far as this demurrer is concerned, the question whether this is a proceeding in equity or a proceeding in law We have but one form of is immaterial. action in this state. Under our Constitution law and equity may be administered in the same action. In answering a contention simby either Jacobs or Bender to have their lar to the one made by respondent, the Supreme Court of Missouri, in Sauter v. Leveridge, 103 Mo. 622, 15 S. W. 982, says:

"We have but one form of action in this state for all causes, whether formerly of common-law or equitable cognizance, and one court of general jurisdiction to try them. All that is necessary for the petition to contain is 'a plain and concise statement of the facts constituting a cause of action,' with a demand for the relief which the plaintiff supposes himself entitled to. From this the court determines the mode of trial, whether as an action at law or in equity. \* \* \* \*"

However, that is not an open question in this state. It has been determined in two opinions. In Morgan v. Childs, Cole & Co., 41 Utah, 564, 128 Pac. 522, this court, speaking through Mr. Justice Straup, says:

It is seen that the motion was granted and the action dismissed, not on the ground of insufficiency of evidence, but on the ground of a mistaken remedy. We think the trial court erred. In this, as in many other states in which the formal distinctions between actions at law and suits in equity are abolished, the court may administer relief according to the nature of the cause set out, whether it is such as would be granted in equity or such as would be given at law. 3 Cyc. 737. Our Constitution (section 19, art. 8) expressly provides that 'there shall be but one form of civil action, and law and equity may be administered in the same action.' Volker-Scowcroft Lumber Co. v. Vance, 36 Utah, 348, 103 Pac. 970, 24 L. R. A. (N. S.) 321, Ann. Cas. 1912A, 124."

That holding was later proved in Mills v. Gray, 167 Pac. 359, where the court, speaking through Mr. Chief Justice Frick, says:

"The party therefore is not entitled to have an action dismissed merely because the relief his adversary is entitled to may be equitable rather than legal."

[4] It is also insisted that the plaintiff cannot rescind or ask for a rescission of the bond without first restoring to the defendant Insurance Company whatever she has received. That well-recognized principle need not be considered, as it is not applicable when, as in this case, if the plaintiff is entitled to recover, she would receive and be entitled to retain the very thing in controversy. The rule seems to be well established that any one asking for a rescission of a contract is not required to restore that which in any event he would be entitled to retain either by virtue of the contract sought to be set aside or of the original liability. 6 Cyc. 311; 2 Pomeroy's Equitable Remedies, § 687.

It is further contended by the Insurance Company, as I understand it, that the bond must remain intact and in force for such length of time as to make it impossible for any one to have a legal claim against it, that is, as stated in respondent's brief, until the statute of limitations has run. Just what length of time might be required to bar all imaginary claims is not pointed out, or attempted to be pointed out, in respondent's brief. It will be remembered that the bond of indemnity is not only given to protect the Insurance Company against the claim of Dr. Jacobs or Mr. Bender, but against "all other

persons." Thus, I assume, that if there was some minor heir of the deceased the Insurance Company could rightfully claim that the bond be kept in force until a child two years old shall have reached its majority and for such length of time thereafter as the statute permits it to make a claim for any property to which it might have been entitled as an heir.

[5] Assuming, as we must, that the allegations of the complaint are true, and also having determined under the allegations contained therein that there was no consideration for the bond, and that the only possible justification for requiring the bond on the part of the Insurance Company was a mere conjecture or fear of some future litigation based upon no facts known to defendant at the time, which could be the basis for any successful claim, and accepting also the allegations that before the plaintiff could procure the money she found it necessary to deposit with the defendant Trust Company the sum of \$800 to indemnify that company against any possible loss, and that the Insurance Company refuses to cancel the bond, and that the Trust Company, rightfully as we think, declines to pay the money until it is released from its surety, can a court of equity grant relief? This money was given to plaintiff in trust for the support of the deceased's mother. It also appears from the record that deceased was a married man, and from these facts we have a right to assume that his mother was no longer a young woman, and, if this money is to be kept tied up at the mere pleasure or whim of the Insurance Company without any consideration for the execution of the indemnity bond under which it is held, it is a moral certainty that the efforts of the deceased to provide for the comforts of his mother in her old age would be defeated, and the only excuse for such miscarriage of justice, and for the failure to carry into effect the wish of the deceased, would be founded upon a contract based on mere conjecture with no legal basis for its existence. It seems to the members of this court that such a condition is intolerable and calls for the action of a court of equity to relieve the parties from such an unconscionable, unnecessary, and useless situation. That the defendant Trust Company would have a right to insist upon being relieved from the obligation assumed by it when it received the deposit is within its rights, and ordinary justice would so hold; but to determine that a court of equity cannot give relief in a case such as this would, in our opinion, "be derogatory to courts of equity and justice if they could not and did not lend relief." True, a court of equity will not inquire into the quantum of the consideration. If there was a partial consideration, the court should not inquire as to whether the parties had made an advantageous or disadvantageous contract or bargain. But under the facts as disclosed by the complaint, either the plaintiff in this case is a 2. Fixtures =14-Right of Removal-Infit subject for the appointment of a guardian to manage her affairs, or she was mistaken as to her rights, and to that extent at least was grossly imposed upon. A decree canceling the bond cannot by any possibility work any hardship upon the defendant Insurance Company or deprive it of any property or security to which it was originally, or at this time is, legally entitled; but to leave the parties as they are is depriving the plaintiff of a substantial right.

"Nor does the fact that there is a remedy at law oust the court of its equitable jurisdiction. That remedy must also be speedy, adequate, and efficacious to the end in view, or otherwise equity will entertain the plea of the suitor." Swan v. Balbot, 152 Cal. 145, 94 Pac. 239, 17 L. R. A. (N. S.) 1069.

We do not commend the complaint in this action as a model pleading, still we are clearly of the opinion that there are sufficient facts alleged therein to entitle plaintiff to relief, and that the same states a cause of action. The court sustained the defendant Insurance Company's motion to strike out certain parts of different paragraphs of the complaint as being conclusions of law, irrelevant, etc. We do not feel called upon to pass upon those numerous questions, but we are satisfied that, after striking out such parts of the complaint as are conclusions of law or irrelevant, there are enough facts left to have required the defendants to answer, and that the court erred in sustaining the demurrers to the complaint.

The bond given to the Insurance Company is set out in full in the amended complaint. It appears on the face of the bond that the consideration or excuse for requiring it was the notice served upon the Insurance Company by Dr. Jacobs and a Mr. Bender. Having found that that constituted no consideration for the bond, it would seem, after issues are made up, that unless the defendant has some additional defense not appearing upon the face of the bond it would be the duty of the court to enter judgment in favor of the plaintiff.

It follows that the cause must be reversed, and the case remanded, with instructions to overrule the demurrers and reinstate the case. Appellant to recover cost against respondent Insurance Company.

FRICK, C. J., and McCARTY, CORFMAN, and THURMAN, JJ., concur.

CALDER'S PARK CO. v. CORLESS, Sheriff, et al. (No. 3111.)

(Supreme Court of Utah. April 3, 1918.)

1. Fixtures 4-15-Removal by Tenant. Under the common law, structures, such as a scenic railway, when once annexed to the freehold, became a part of it, and were not subject to removal by the tenant.

TENTION OF PARTIES.

Courts generally favor the tenant, and recognize the right to remove fixtures when same may be done without material injury to the freehold, and in every case the intention and purpose of the parties as to whether fixtures are to be regarded as realty or personalty will be controlling.

3. FIXTURES €==27(2) — SCENIO RAILWAY — PERSONAL PROPERTY.

Where a park company leased land for the erection of a scenic railway by the tenants, and the lease provided for a right of option in the company to purchase the railway, such railway was personal property, subject to removal after expiration of the term if not sooner purchased under the option afforded the park company.

FIXTURES 6=28 - EXECUTION - SALE OF

FIXTURES—RIGHT OF REMOVAL.

Where a lease of land for erection of a scenic railway made by a park company to an amusement company obligated the amusement company not only to construct but to maintain and continued to the service of company not only to construct but to maintain and operate a scenic railway on the premises for the full term of 10 years, and to pay the park company 12½ per cent. of the gross receipts monthly, though such scenic railway was personal property, nurchasers thereof under execution sale could not remove the railway until the term of the lease had expired, since attaching creditors or nurchasers at execution sale ing creditors or purchasers at execution sale acquire no better right to fixtures than the lessee had under the lease.

Appeal from District Court, Salt Lake County; M. L. Ritchie, Judge.

Action by the Calder's Park Company against John S. Corless, Sheriff of Salt Lake County, Wandamere Amusement Company, Mildred Smith, and Peter Smith, her guardian ad litem, and the Utah Equipment & Storage Company. From judgment for defendants, plaintiff appeals. Reversed and cause remanded, and decree entered for plaintiff.

J. H. Hurd and L. L. Bagley, both of Salt Lake City, for appellant. F. E. McCracken and W. R. Hutchinson, both of Salt Lake City, for respondents.

CORFMAN, J. The plaintiff commenced this action in the district court of Salt Lake county to enjoin the defendants from tearing down and removing a scenic railway, with its equipment, from lands owned by the plaintiff. The record discloses little, if any, dispute as to the material facts.

It appears that on the 11th day of March. 1909, the plaintiff leased, in writing, for a term of ten years, to one W. E. Sutherland, a portion of certain lands owned by it, commonly known as Calder's Park and used for a public pleasure resort or amusement purposes; that under the terms of the lease the said Sutherland constructed and equipped for operation on the land a scenic railway and thereafter, with the consent of plaintiff, assigned the lease to the defendant Wandamere Amusement Company; that under the terms of the said lease the scenic railway was to be maintained and operated for a period of ten years, and the plaintiff was to have 121/2 per cent. of the gross receipts de-



rived from its operation. The lease further provided that the plaintiff had the option and privilege of purchasing the scenic railway, with its appurtenances, and terminating the lease upon payment of the sum of \$12,000 on or after the 1st day of October, 1909.

After the assignment of the lease by Sutherland to the Wandamere Amusement Company, the defendant Mildred Smith, by Peter Smith, her guardian ad litem, obtained a judgment for \$7,312.50 against the Wandamere Amusement Company, upon which execution was issued and placed in the hands of the defendant John S. Corless, as the sheriff of Salt Lake county, and the said sheriff, pursuant to a levy, on the 21st day of March, 1916, sold at execution sale all the interests of the Wandamere Amusement Company, exclusive of the leasehold interest in the land, to Mildred Smith, and she thereafter by her said guardian sold the same to the defendant Utah Equipment & Storage Company, contingent upon giving lawful and peaceable possession to the said purchaser. The plaintiff refused to permit a removal of the property from its land thus sold and brought this action seeking to enjoin the defendants from removing the same. was to the court without a jury, the issues found for the defendants, a judgment entered dismissing plaintiff's action, and in conformity therewith an order made requiring the plaintiff to permit the defendant Utah Equipment Company to remove the railway with its equipment from the lands of the plaintiff. Plaintiff appeals.

The errors assigned by plaintiff are 14 in number, all, however, bearing on the question as to whether the plaintiff is entitled to injunctive relief forbidding the removal of the property by the defendants, thus sold at execution sale, from the land of the plaintiff, without its consent.

Among the errors particularly complained of by plaintiff are the findings of the trial court, as follows:

"The court finds that, under the terms of the written lease given by the plaintiff to W. E. Sutherland and assigned to Wandamere Amusement Company, a corporation, the lessor acquired no lien, interest, or ownership in and to the property and equipment erected and used as a scenic railway, and that all of said property so sold by the sheriff is personal property and is not a part of the realty upon which the same is located.

"The court finds that the property owned by the Wandamere Amusement Company consisted of said scenic railway and equipment upon which said sheriff levied said execution, was the property of the Wandamere Amusement Company, and that the plaintiff has not exercised its option named in said written lease and had not purchased said property from the Wandamere Amusement Company under the terms of said lease at the time when said levy and sale were made by said sheriff, and the plaintiff has not acquired any interest in said property under the terms of said lease, and that plaintiff is not entitled to any equitable relief under the issues and facts proven in the action, and is not entitled to any relief as against the defendants or any of them under the evidence as proven."

The written agreement of lease entered into by the plaintiff and W. E. Sutherland for a term of ten years is silent as to whether or not the improvements to be placed upon the lands of the plaintiff may be removed from the premises upon the expiration of the term of lease, without the consent of the plaintiff.

[1-3] Under the rules of the common law. as it prevailed in England, structures of the character named in the lease when once annexed to the freehold became a part of it and were not subject to removal by the ten-This rule, with some exceptions, has been relaxed in favor of the tenant. courts now generally favor the tenant and recognize the right of removal, where the same may be done without material injury to the freehold, and in any case the intention and purpose of the parties as to whether fixtures are to be regarded as real or personal property will be controlling upon the courts. In view of these well-established and recognized doctrines, and taking into consideration the fact that in the case at bar the agreement of lease itself provided for the right of option in the lessor to purchase the scenic railway placed on plaintiff's land by the lessee, we think the same must be regarded and treated as personal property, subject to removal after the expiration of the term, if not sooner purchased under the option afforded the lessor under the pro visions of the lease.

[4] However, the right of defendants, as purchasers under execution sale, to remove the scenic railway from the plaintiff's lands before the termination of the lease, presents a different question.

The agreement of lease, after providing for the place on plaintiff's lands for the erection and maintenance of the scenic railway, with its appurtenances, provided that the lease should continue for a period of ten years, and the lessee therein covenanted and agreed:

"In consideration of the grant of the said privileges and lease to construct according to plans and specifications to be submitted to the first party herein the said railway and pavilion and all appurtenances necessary to complete the operation of the same at his own sole cost and expense. \* \* And that he will pay the said first party twelve and one-half (12½) per cent. of the gross receipts from the operation of the said scenic railway, monthly. \* \* \* continuance of this lease, he will give his personal attention to the construction, operationard maintenance of the said railway and party for the said railway and party a

"Second party further agrees that during the continuance of this lease, he will give his personal attention to the construction, operation and maintenance of the said railway and pavilion, and that he will not assign nor attempt to assign this lease to any person without the written consent of the said first party first had and obtained."

From the language of the foregoing provisions of the lease, it appears that the lessee is placed under obligation to not only construct but to maintain and operate a scenic railway on plaintiff's premises for the full term of ten years. In other words, it is made plain by the covenants of the lessee

the plaintiff's land a scenic railway for the full period of ten years, and that during this period he will not have the right to remove it without the plaintiff's consent. If then the lessee may not remove the property during the term, without the plaintiff's consent, the question then presents itself: Have the defendants, as purchasers under the execution sale, any better right to remove the property than had the lessee or those claiming directly under him? This is the decisive question in this case. Respondent contends in his brief, that, inasmuch as the execution sale did not affect the rights of the tenant under the lease, the purchaser may take the property purchased relieved of any and all rights the plaintiff may have had therein as against the lessee. In this contention we cannot agree. The title to the scenic railway acquired by the respondents as purchasers under execution sale, under the facts and circumstances here disclosed, must be held to be only such as they would receive by a conveyance or transfer direct from the lessee. Freeman on Executions (3d Ed.) vol. 3, p. 1934.

It is manifest from the terms of the lease that the plaintiff had the right to have the scenic railway kept and maintained upon its premises during the full term of the lease, and any attempt of the lessee or those claiming directly under him to remove it would have been a direct violation of its rights. Attaching creditors or purchasers at execution sale acquire no better right to improvements of the character involved in this action than had the lessee under the provisions of the lease. Ewell on Fixtures (2d Ed.) 545; L. V. G. M. & M. Co. v. Lambert, and GIDEON, JJ., concur.

that he is to construct and then maintain on | 15 Colo. App. 445, 62 Pac. 906; Webster Lumber Co. v. Keystone L. & M. Co., 51 W. Va. 545, 42 S. E. 632, 66 L. R. A. 33; Snowden v. Memphis Park Ass'n, 7 Lea (75 Tenn.) 224, 225.

> As pointed out, the agreement of lease between the plaintiff and the lessee. W. E. Sutherland, provided that the scenic railway should be maintained and operated on plaintiff's land for the full period of ten years. During this term the plaintiff is entitled to have it maintained in its park as an attraction to the public and to receive 121/2 per cent. of the gross income derived from its operation. The order therefore made by the trial court directed to the plaintiff to permit its removal by the defendants, claiming the right to do so under execution sale, before the expiration of the term as in the lease provided, was, to our minds, clearly an invasion of plaintiff's rights. For the reasons stated, we are of the opinion that the trial court committed error in sustaining defendants' demurrer to plaintiff's complaint, in dismissing the action, and in denying the plaintiff the injunctive relief prayed for against defendants in the complaint.

> It is therefore ordered that the judgment of the trial court be reversed, the cause be remanded to the district court, and that a decree be entered herein in favor of the plaintiff enjoining the defendants from removing the property involved in this action from plaintiff's premises, prior to the termination of the lease, in these proceedings mentioned and set forth. Costs to the plaintiff.

> FRICK, C. J., and McCARTY, THURMAN,

EGELUND v. FAYTER et ux. (No. 3126.) (Supreme Court of Utah. April 3, 1918.)

### 450(3)—PAROL EVIDENCE—WRITINGS—ADMISSIBILITY. 1. EVIDENCE

EXPLAINING In view of the fact that a deed in the form prescribed by Comp. Laws 1907, § 1981, conveys whatever appurtenances pertain to the land, where such a deed conveyed land and part of the water "flowing from a certain spring belonging to and used on the land of said grantenance" was continued in the land of said grantenance." tors," was silent as to whether there was a ditch or right of way for ditch across grantors' land for the spring water when the deed was executed, there was a latent ambiguity which either party could explain by parol.

2. EVIDENCE \$\iff 155(1)\$—EVIDENCE ADMISSIBLE TO CONTROVERT SIMILAR EVIDENCE OF OTHER PARTY—PAROL EVIDENCE—EXPLAIN-

OTHER PARTY—PAROL EVIDENCE—EXPLAINING WRITINGS.

In such case, after grantee had introduced parol evidence to show the existence of a ditch and right of way as appurtenant to his land, grantors could show a parol agreement that the right of way was for a pipe line and not a ditch.1

3. New Trial \$==119-Affidavit-Time to

FILE.

Where new trial was moved for on March 26th, it was within the discretion of the court to exclude evidence in support thereof, where the affidavits were not filed until April 26th. 4. APPEAL AND ERROR ⊕=1078(5)—ERROR WAIVED BY FAILURE TO ARGUE.

Alleged error in overruling motion for new trial, if not argued, is waived.

5. APPEAL AND ERROR \$\infty\$ 731(5)—Scope of Review—Preservation of Exceptions.

Rule of Practice 26 (97 Pac. x), requiring the evidence to be set out if alleged to be insufficient, and the particulars of insufficiency to be specified being mandatory, exception, recit-ing, "The court erred in rendering the follow-ing finding of fact," and setting out the finding, is insufficient, since it falls to indicate whether the error was of law or sufficiency of the evi-

Appeal from District Court, Salt Lake County; Harold M. Stephens, Judge.

Action by Alma Egelund against Louis Fayter and wife. Judgment for defendants, and plaintiff appeals. Affirmed.

Marks & Jensen, of Salt Lake City, for appellant. Van Cott & Moreton, of Salt Lake City, for respondents.

THURMAN, J. Plaintiff purchased 21/2 acres of land from the defendants, together with one-fifth interest in the water of a certain spring. The land purchased by plaintiff is the southeast portion of a larger tract owned by the defendants, and the parcel of

land not conveyed to plaintiff lies between the land so conveyed and the spring. It therefore appears that, in order to convey the water of the spring to the land purchased by plaintiff, it is necessary to cross defendants' intervening land. Plaintiff alleges in his complaint, and contended at the trial, that at the time the land was conveyed to him by defendants there was a right of way for a ditch across defendants' land from the spring to the land purchased by plaintiff, and that for several years prior to said conveyance a ditch had been maintained and used upon said right of way by defendants to convey the waters of said spring to the land so purchased by plaintiff. Plaintiff therefore insists that the right of way for a ditch across defendants' land is appurtenant to the land he purchased, and that it passed to him as such by conveyance of the land. On the other hand, defendants, while admitting the conveyance of the land and one-fifth of the water of the spring, deny the existence of a right of way for a ditch, or that there was any ditch from the spring to the land, and therefore that no ditch, or right of way for a ditch across defendants' land, passed by said conveyance. It is further alleged in their answer, and was contended at the trial, that at the time of the conveyance of the land to plaintiff it was orally agreed and understood between the parties that plaintiff was to have a right of way across defendants' land for a pipe line leading from said spring to plaintiff's land, provided said pipe line was laid at a certain depth below the surface. The deed in question was in the form prescribed by the statute, and by virtue of the statute conveyed whatever appurtenances pertained to the land. Comp. Laws Utah 1907, § 1981. The action is to quiet title and for injunctive relief. The case was tried to the court without a jury. Judgment was rendered for defendants. Plaintiff appeals.

The sole question of fact involved is as to whether or not there was a ditch or right of way for a ditch leading from the spring across defendants' land to plaintiff's land at the time he purchased the land. If there was, it would pass to plaintiff, by the conveyance, as appurtenant; if there was not, it would not so pass.

The errors complained of are that the court erred in admitting certain evidence, in refusing to admit a certain affidavit on application for a new trial, in denying plaintiff's motion for a new trial, and in the making of certain findings.

In the course of the trial, respondents offered in evidence certain testimony as to the parol agreement and understanding between the parties when the deed was executed concerning the right of way for a pipe line as alleged in defendants' answer. Appellant objected to said testimony on the grounds that it tended to contradict or vary

<sup>&</sup>lt;sup>1</sup> Buford v. Lonergan, 6 Utah, 801, 22 Pac. 164; Coulam v. Doull, 4 Utah, 267, 9 Pac, 568; Fayter v. North, 30 Utah, 156, 83 Pac, 742, 6 L. R. A. (N. 8.) 410.

<sup>&</sup>lt;sup>2</sup> Little et al. v. Gorman et al., 39 Utah, 63, 114
Pac. 321; Mader v. Taylor, 15 Utah, 161, 49 Pac. 255; Van Pelt v. Park, 18 Utah, 141, 55 Pac. 331; Marks v. Taylor, 23 Utah, 152, 65 Pac. 203; Genter v. Mining Co., 23 Utah, 165, 64 Pac. 362; Wasatch v. Mining Co., 23 Utah, 165, 64 Pac. 362; Wasatch Irrigation Co. v. Fulton, 23 Utah, 466, 65 Pac. 205; Lyon v. Mauss, 31 Utah, 283, 87 Pac. 1014; Blue Creek Land & Live Stock Co. v. Anderson, 35 Utah, 61, 99 Pac. 444.

relied on by appellant, after describing the land, reads as follows:

"Together with one-fifth of the water flowing from a certain spring belonging to, and used on the land of said grantors, in the southeast of section 33, township and range aforesaid."

The testimony was admitted; exception by the plaintiff.

[1] It will be remembered the real question in dispute was, not whether the deed passed the appurtenances to the land, for as a matter of law it did; but was there a ditch or right of way for a ditch across defendants' land for the spring water in question when the deed was executed by defendants? As to this question the deed was silent. There was a latent ambiguity which either party had the right to explain by parol testimony if such was available. Indeed, the appellant found it necessary, before this testimony of defendants was offered, to introduce parol testimony himself, tending to prove there was and had been a ditch for many years leading from the spring along the alleged right of way to appellant's land.

[2] If the clause in the deed, which we have quoted, had read "used on the land hereby granted," instead of "used on the land of said grantors," as the same appears, the appellant's objection would have been invincible, for it otherwise appears there was no other way to convey the water to appellant's land except across the land of defendants. But, as will be seen, it cannot be inferred, from the clause in the deed which we have quoted, that the spring water was ever used on appellant's land in any manner or form. After appellant had introduced parol evidence tending to prove the existence of the ditch and right of way as appurtenant to his land, the respondents certainly had the right by the same character of evidence to controvert the testimony so introduced by appellant. McPhee v. Young, 13 Colo. 80, 21 Pac. 1014-1017. Where the parol evidence offered does not tend to vary or contradict the terms of the writing, but merely to explain a latent ambiguity, we know of no respectable authority that holds it to be inadmissible. In support of this proposition, respondent cites Buford v. Lonergan, 6 Utah, 301, 22 Pac. 164; Bagley v. Rose Hill Sugar Co., 111 La. 249, 35 South. 539; Coulam v. Doull, 4 Utah, 267, 9 Pac. 568; Fayter v. North, 30 Utah, 156, 83 Pac. 742, 6 L. R. A. (N. S.) 410; 9 Ency. of Evid. 492, 493; Abbott's Trial Brief, 163. See, also, 10 R. C. L. 1019, and 17 Cyc. 638.

In support of his contention, appellant cites Jones on Evid. § 413 (416), p. 67, also same volume, section 486 (497), p. 367. The authorities cited by appellant are not in point for the reason there was no attempt by the testimony in question to vary or contradict the terms of the deed.

But appellant also insists that testimony relating to an agreement for a pipe line and

the terms of the deed. The clause in the deed | right of way therefor did not tend to controvert evidence relating to the existence of a right of way for a ditch. We think otherwise. We are of the opinion that an agreement for a pipe line right of way across defendants' land to convey the water of the spring, if such agreement was made, tended to controvert the existence of the ditch as well as the existence of the right of way for a ditch, especially in view of the testimony in this connection, relating to this assignment, which shows that appellant at the time the deed was executed asked the respondents how he was to get the water to his land. This testimony certainly implies that at the time there was no existing means of conveying the water. The testimony was admissible as against both grounds of objection. The foregoing remarks apply to all the assignments of error concerning the admission of testimony relating to the alleged parol agreement.

[8] Appellant also contends that the court erred in rejecting the evidence of one J. W. Goodwin in support of appellant's motion for a new trial. The motion for a new trial was filed and served on defendants March 26, 1917. The attidavit was not served on respondents until April 26, 1917, at which time they reserved the right to object to the same being filed. Appellant and his counsel both filed affidavits alleging want of knowledge on their part as to what Goodwin knew about the case, in time to file the affidavits within five days, as provided by the statute. The court rejected the affidavit and overruled appellant's motion for a new trial.

Appellant assigns the ruling of the court as error. The affidavit was not served and filed in time. Whether or not this was the reason for rejecting it does not appear. It was certainly a matter within the discretion of the court. We cannot determine from the record that there was any abuse of discretion in the matter complained of. In support of his contention that it was an abuse of discretion to reject the evidence, appellant cites Smith v. Whittier, 95 Cal. 279, 30 Pac. 531, in which the appellate court sustained the ruling of the trial court permitting an affidavit to be filed after the time allowed by the statute had expired.

[4] In that case the appellate court simply affirmed the ruling of the trial court, which is altogether different from reversing a ruling on account of abuse of discretion. We find no error in the court in rejecting the evidence, and, as to the alleged error in overruling the motion for a new trial, the same was not argued, and is therefore waived.

[6] The only remaining exceptions material to be considered relate to the findings of the court. The form of the exception is as follows: "The court erred in rendering the following finding of fact:" then quoting verbatim the finding. The same form is used as to two other findings of the court, all of such findings relating to facts deducible from evidence admitted in the case and upon which Lyon v. Mauss, 31 Utah, 283, 87 Pac. 1014; the court determined the merits of the cause. and Blue Creek Land & Live Stock Co. v.

There is nothing in either of these assignments to suggest or indicate whether appellant has assigned an error of law or sufficiency of the evidence. It is rendered still more obscure and doubtful by failing entirely to refer to any page or pages of either the transcript or abstract where the ruling and exceptions may be found. In other words, a total failure in every respect to comply with the requirements of rule 26 of the practice in this court (97 Pac. x) which has been in force ever since November 1, 1905. That portion of the rule pertinent here reads as follows:

"When the alleged error is upon the ground of the insufficiency of the evidence to sustain or justify the verdict or decision, the particulars wherein the evidence is so insufficient shall be specified. The said assignments, or so much thereof relied upon, shall be set forth in the printed abstract, together with references to the pages in the transcript and abstract where the rulings and exceptions pertaining thereto appear."

Prior to the adoption of rule 26, the practice in this court was governed entirely by statutory provisions which were very specific in requiring a specification of particulars in which the evidence is insufficient, where that ground was relied on. These statutes were enacted at a time anterior to 1888 and have existed in one form or another in all the revisions and compilations of the laws since that time. Comp. Laws Utah 1888, vol. 2, p. 291, §§ 3393 and 3402, at pages 296, 297; Revised Stat. Utah 1898, p. 726, §§ 3284 and 3296, at page 730; Comp. Laws Utah 1907. § 3284, as amended in Sess. Laws 1903, at page 33. The above sections relating to specification of particulars in which evidence is insufficient, required in motions for new trial, were eliminated by amendment in Sess. Laws of 1899, p. 82. Since then it has not been necessary to specify particulars as to insufficiency of the evidence in motions for a new trial, but section 3284, Comp. Laws Utah 1907, has been retained and is still the law. This court, however, in a recent well-considered case has held that rule 26 is a substantial compliance with sections 3284 last above referred to, notwithstanding it permits the assignment of errors to be filed within five days after the appeal is taken, instead of requiring the specification of particulars in the bill of exceptions. Little et al. v. Gorman et al., 39 Utah, 63, 114 Pac. 321. The provisions of the statutes above referred to have been under review by this court in numerous cases, and at all times have been held mandatory and imperative. Mader v. Taylor, 15 Utah, 161, 49 Pac. 255; Van Pelt v. Park, 18 Utah, 141, 55 Pac. 381; Marks v. Taylor, 23 Utah, 152, 65 Pac. 203; Genter v. Mining Co., 23 Utah, 165, 64 Pac. 362; Wasatch Irrigation Co. v. Fulton, 23 Utah, 466, 65 Pac. 205;

Lyon v. Mauss, 31 Utah, 283, 87 Pac. 1014; and Blue Creek Land & Live Stock Co. v. Anderson, 35 Utah, 61, 99 Pac. 444. The last two cases cited hold that the provisions of rule 26 relating to this question are mandatory, while the earlier cases cited construe the statutes, referred to, to the same effect.

Appellant, however, insists that, this being an equity case in which the court has the right and power to review the evidence and determine the case on the facts, rule 26 should not be enforced. That very question was determined adversely to appellant's contention in Van Pelt v. Park, supra, and, as we know of no reason why that case should be overruled, it is our duty to consider it as binding.

For the reasons above stated, we do not feel authorized to review the evidence for the purpose of determining whether it is or is not sufficient to sustain the findings. The respondents insist, as they have the right to do, that we have no power to review the evidence for such purpose under the assignment of errors filed by appellant. In view of what appears to be the uniform holdings of this court, we are bound to concur in the contention of respondents.

For the reasons above stated, the judgment of the trial court is affirmed.

FRICK, C. J., and McCARTY, CORFMAN, and GIDEON, JJ., concur.

SALISBURY v. POULSON. (No. 3183.)

(Supreme Court of Utah. March 27, 1918.)

1. Limitation of Actions \$==130(10) -- Statute of Limitations -- Dismissal-New Action-Statute.

Where plaintiff's first cause of action for false imprisonment, brought within the year limited by Comp. Laws 1907, § 2879, was dismissed because after a jury was impaneled it was discovered that the copy of the complaint which defendant's counsel had obtained from the clerk's office was not a copy of the original complaint filed and verified by plaintiff, such dismissal was not a trial on the merits, and a second action, instituted within a year after the order of dismissal was not barred by section 2879, in view of section 2893, providing that if any action be commenced within due time, and plaintiff fail otherwise than on the merits, and the time limited for the same shall have expired, plaintiff may commence a new action within a year after the failure.

2. APPEAL AND ERROR \$\infty\$ 1066 — HARMLESS ERROR—INSTRUCTION.

In an action for false imprisonment, where there was no evidence indicating defendant was guilty of restraining plaintiff by personal violence, an instruction, correctly defining intentional restraint, and referring to restraint by personal violence, was harmless to defendant.

3. FALSE IMPRISONMENT \$\iftharpoonup 23 - EVIDENCE - REASONABLE VALUE OF SERVICES.

Where an agreement is made as to the

Where an agreement is made as to the price to be paid for dental work, such agreement controls, and the reasonable value of the dentist's services, if otherwise competent, is imma-

terial in an action by the patient for false im- from his office into the exit and also another prisonment by him to make her pay what he claimed she owed.

4. False Imprisonment 6-10-Enforcement OF CONTRACT RIGHTS

Where a dentist did work for a patient for an agreed price of \$33, and she claimed that the agreed price was \$22, he had no right to take the law into his own hands and imprison blinking in his own hands and imprison. plaintiff in his office to force her to pay the amount due him under the agreement, or to enforce any lawful rights to which he was entitled. FALSE IMPRISONMENT \$== 5 - UNLAWFUL RESTRAINT.

Where a dentist, claiming his woman patient owed him \$33 for plate work, while she claimed that she owed only \$22, kept such patient in his office, locking the door, to force her to return the plate or to pay what he claimed, he falsely imprisoned her by unlawfully restraining her liberty, and was liable therefor.

Appeal from District Court, Cache County; J. D. Call, Judge.

Action by Matilda Salisbury against Dr. P. M. Poulson. From a judgment for plaintiff, defendant appeals. Affirmed.

A. A. Law, of Logan, for appellant. Nebeker. Thacker & Bowen, of Logan, for respondent.

Plaintiff, respondent here, GIDEON. J. brought this action in the district court of Cache county to recover damages for unlawful restraint and imprisonment of plaintiff in the office of defendant at Logan, Utah, on or about the 17th day of July, 1914. It appears from the record that the defendant was at that time, and had been for a number of years, practicing dentistry in that city; that immediately prior to that date the defendant, under contract, had been repairing a set of teeth and doing other dental work for the It is contended by the plaintiff plaintiff. that the agreed price for such work was \$22; on the part of defendant it is claimed that the agreed price was \$33. It also appears that on or about the 16th day of July plaintiff went to the office of defendant for the purpose of having the plate tested, and on that day paid the defendant the sum of \$11. On her return the following day to get the plate she tendered to defendant an additional \$11, at which time she and the defendant were alone in defendant's office. It also appears that on the preceding day the defendant had given to the plaintiff a receipt or statement in which the price of the work was stated at \$33. This plaintiff claimed she did not read until she returned home for the reason that she did not have her glasses with her and could not see to read without them. On the 17th, when plaintiff returned, she placed the plate in her mouth, handed the defendant a check for \$11, and stated, "There is the balance due you," whereupon it seems the defendant became excited, applied vile epithets to the plaintiff; stated to her that she was a liar; that she knew the price of

door leading into a different room; and informed the plaintiff in very emphatic language that she could not leave his office until the work was paid for, and that if she did not leave the teeth or pay the price he would take the dental work out of her mouth. He further stated that he would call the police. and when he attempted to do so by telephone plaintiff arose as though to leave, whereupon defendant immediately returned to where plaintiff was standing, shook his fist in her face, used profane language toward her, told her she could not leave, and told her to keep her seat until he had telephoned. He thereupon telephoned to the marshal of the town who in a short time came over to ascertain the trouble. At that time the defendant unlocked the door and admitted the officer, and again applied the same language toward the plaintiff in the presence of the officer, told her she could not leave his office without paying for the teeth or leaving the teeth. On the advice of the officer, the plaintiff left the teeth at the office, went to her groceryman in the town, obtained the additional \$11, returned and paid it to the defendant, and received her teeth. Plaintiff had then been in defendant's office between 30 and 50 minutes. It further appears that the plaintiff became very nervous and sick, and as a result of her experience suffered a miscarriage a few days thereafter. Plaintiff was awarded both compensatory and punitive damages in the court below, and from that judgment defendant appeals.

[1] It is contended by the appellant that the cause of action is barred by subdivision 3 of section 2879, Comp. Laws Utah 1907, which is as follows:

"Action for forfeiture, libel, assault,

Within one year: An actio An action for libel, slander, assault, battery, false imprisonment, or seduction."

In that regard it appears that on the 22d day of December, 1914, summons was served on the defendant, with notice that within ten days thereafter complaint would be filed with the clerk of the district court. It also appears that the attorney for plaintiff in preparing the complaint had drawn two complaints which differed in a material way, and that the plaintiff, after service of the summons, verified one complaint, and that complaint was filed with the clerk within the ten days. At the same time, through a mistake or oversight, the plaintiff failed to file a correct copy of the complaint verified by the plaintiff, but filed a copy of the other complaint prepared by plaintiff's counsel. Defendant's counsel subsequently secured the supposed copy of the complaint filed with the clerk, and in due time filed an answer thereto, and the cause of action was not called for trial until November 19, 1915. After the action had been called and a jury impaneled it was discovered the work was \$33; proceeded to lock the door | for the first time that the copy of the complaint which defendant's counsel had obtain-! ed from the clerk's office was not a copy of the original complaint filed, and which had been verified by plaintiff. Thereupon, on motion of defendant's counsel, that action was dismissed. Thereafter, on or about the 7th day of December, 1915, summons was served upon appellant, and the complaint in the present action filed, issues joined thereon and a trial had. Additional damages are claimed in this second cause of action not mentioned in the former action, but the causes of action mentioned in both complaints are based on the same act, and grew out of the same unlawful restraint or imprisonment, and is therefore the same cause of action. It is the contention of appellant that as more than one year had elapsed between the time of the injury complained of and the time of filing the second action, the cause of action is barred. Section 2893, Comp. Laws Utah 1907, is as follows:

"If any action be commenced within due time, and a judgment thereon for the plaintiff be re-versed, or if the plaintiff fail in such action or upon a cause of action otherwise than upon the merits, and the time limited for the same shall have expired, the plaintiff, or, if he die, and the cause of action survive, his representatives, may commence a new action within one year after the reversal or failure."

Under the facts stated, it is apparent that the dismissal of the first cause of action was not a trial upon the merits, and the second action having been instituted within one year after the order of dismissal, that action is not barred by the provisions of the statute. Hall v. Hurd. 40 Kan. 374. 19 Pac. 802: Luke v. Bennion, 36 Utah, 61, 106 Pac. 712.

[2-4] Other assignments of error refer to the instructions as given by the court and the refusal of the court to give other instructions requested by the defendant. It is especially urged that reference by the court in its instruction No. 4, in defining what constitutes an intentional restraint of the personal liberty of another, that the defendant was prejudiced by the court referring in that instruction to restraint by personal violence. No intimation was made in that instruction to show that the defendant in this case did exercise personal violence, but the court simply proceeded to define what constituted the intentional restraint by one person of another of his personal liberty, and stated that that might be effected by words alone, by acts alone, or by both acts and words, or by personal violence. No complaint is made that and THURMAN, JJ., concur.

that instruction is not a correct legal definition of what constitutes intentional restraint, and if there is no evidence in the record indicating that the defendant was guilty of restraining the plaintiff by personal violence, it is difficult to see in what way he would be prejudiced by that instruction.

Complaint is also made that the court erred in its refusal to permit defendant, over plaintiff's objections, to introduce proof as to the reasonable value of the work or services rendered plaintiff by defendant. Both parties contended that there had been an agreement and a price fixed for the work agreed upon. True, they did not agree as to the amount, but it being admitted that some agreement had been made as to the price of the work and services, the reasonable value of the same was therefore not a question in the case. In addition, let it be admitted that the defendant was right as to the correct price, and that the services and work were reasonably worth that amount, still that would give him no right to take the law into his own hands and imprison the plaintiff to enforce his version of the contract or to enforce any lawful rights to which he might have been entitled.

There are some further objections to the instructions given, but they are without merit. A careful reading of the entire instructions will disclose that the defendant, not only was not prejudiced by the instructions. but that every contention or defense made by him, whether he was legally entitled to it or not, was submitted to the jury, and the instructions were not only fair to the defendant. but were as favorable to him as he could possibly have any right to expect.

[5] The acts of the defendant as disclosed by the record, in our judgment, not only justifled the jury in its finding that the plaintiff was unlawfully restrained of her personal liberty, but, on the contrary, we do not see how any other finding is deducible from the defendant's own testimony. That the acts of defendant constituted unlawful restraint of plaintiff's liberty is amply supported by the authorities. Kroeger v. Passmore, 36 Mont. 504, 93 Pac. 805, 14 L. R. A. (N. S.) 988.

We find no prejudicial error in the record. Judgment is therefore affirmed. Respondent to recover costs.

FRICK, C. J., and McCARTY, CORFMAN,

HIRSH et al. v. OGDEN FURNITURE & CARPET CO. (No. 3156.)

(Supreme Court of Utah. March 28, 1918.)

APPEAL AND ERROR @== 984(1)-DEFAULT IN

1. APPEAL AND ERROR (COURT. FILING COST BILL—DISCRETION OF COURT. Under Comp. Laws 1907, § 3351, providing that when costs are awarded to a party by an appellate court, if he claims such costs, he must, within 30 days after the remittitur is filed with the clerk below, deliver to such clerk a memorandum of his costs; section 3005, providing that the court may, in furtherance of justice and on such terms as may be proper, relieve a party from a judgment or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect; and section 3321, providing that the clerk of Supreme Court shall remit to the lower court the papers transmitted on appeal, together with the judgment or decision of the court thereon, within 30 days after the same shall have been madewhere appellant, after judgment of reversal was filed in Supreme Court, did not within 30 days have remittitur sent down, and appellees days have remittitur sent down, and appellees thereafter caused remittitur to be filed in district court without notice to appellant, and appellant did not within 30 days thereafter file its cost bill, decision of district court denying appellant's motion to be relieved of default in failing to file cost bill within time will be affirmed, no abuse of discretion being shown.

2. STATUTES \$\infty 230\text{—Legislative Construc-TION-AMENDMENT.

As Laws 1917, c. 115, amended Comp. Laws 1907, § 3351, so as to require service of notice in case a remittitur is sent down, the legislative construction was that the old statute did not require notice.

3. Costs \$\infty\$3-Recovery-Compliance with STATUTE.

Costs are a creature of statute, and a party who is entitled thereto must comply with the conditions imposed by the statute.

4. Costs €==220 - Striking Cost Bill -

WAIVER OF RIGHT.

Plaintiff's counsel, who appeared specially, would not, by moving to strike defendant's cost bill and at the same time reserving the right to assail its correctness, waive the right to strike the bill.

Appeal from District Court, Weber County; E. A. Pratt, Judge.

Action by Ralph Hirsh and another, doing business as Hirsh & Dryfoos, against the Ogden Furniture & Carpet Company. From a judgment granting plaintiffs' motion to strike defendant's cost bill, defendant appeals. Affirmed.

R. S. Farnsworth, of Ogden, for appellant. C. R. Hollingsworth, of Ogden, for respondents.

FRICK, C. J. [1] The plaintiffs commenced an action in September, 1915, against the defendant, hereinafter called appellant, in the district court of Weber county, and recovered a judgment in that action against the appellant. The appellant appealed the case, and this court reversed the judgment and awarded costs to the appellant. Hirsh et al. v. Ogden Furniture & Carpet Co., 48 Utah, 434, 160 Pac. 283. The judgment of reversal was filed in this court September 28, 1916. late to the court's findings and conclusions

On October 31, 1916, more than 30 days after the judgment had been reversed and filed, and the appellant having failed to have the remittitur from this court sent down to the district court, plaintiffs' counsel caused the remittitur to be filed in the district court, and it was there filed on that date. Neither appellant nor its counsel was served with notice nor had any knowledge of the filing of the remittitur until December 22, 1916, on which day appellant's counsel filed in the district court its cost bill covering the costs awarded by this court to appellant. On December 27, 1916, plaintiffs' counsel appeared specially for that purpose in the district court, and filed a motion to strike the cost bill filed by appellant from the files of the district court upon the ground that the same was not filed within the time required by our statute. The statute (Comp. Laws 1907, \$ 3351) relied on by plaintiffs, and which was in force when the cost bill in question was filed and the motion to strike was decided. reads as follows:

"Whenever costs are awarded to a party by an appellate court, if he claims such costs, he an appellate court, if he claims such costs, he must, within thirty days after the remittive is filed with the clerk below, deliver to such clerk a memorandum of his costs verified as prescribed by the preceding section, and thereafter he may have an execution therefor as upon a judgment. The costs to be awarded to a party as provided in this and the preceding sections shall include the reasonable cost of printing transcripts and briefs, and the cost of transcribing the stenographer's notes or minutes of the trial or hearing."

Plaintiffs' counsel, in his motion to strike, also reserved the right, in case the motion to strike should be denied, to move for a retaxation of the costs. He also appeared specially for that purpose.

On January 6, 1917, appellant's counsel appeared and served a notice on plaintiffs' counsel that on the 8th day of January, the date fixed by the court, he would apply to the district court to be relieved of his default in failing to serve and file his cost bill within the 30 days required by the foregoing statute upon the grounds of "mistake, inadvertence, surprise, and excusable neglect." The motion was supported by affidavits, and the court also heard oral evidence in support of the motion, and likewise received affidavits and heard oral evidence in opposition to appellant's motion to be relieved, as appellant's counsel states it, "from the default in falling to file its cost bill within thirty days after the filing of the remittitur from the Supreme Court." After a full hearing of the evidence produced and the contentions of both sides, the district court found in favor of plaintiffs, granted their motion to strike appellant's cost bill, and entered judgment accordingly, from which judgment this appeal is prosecuted.

The principal errors that are assigned re-

of law and judgment. Appellant's counsel, with much vigor, contends that the court erred in not granting the relief asked by it in its motion to be relieved as before stated. Much evidence was presented by appellant in support of the motion and much more was adduced by plaintiffs in opposition thereto. The view that we take of this controversy makes it unnecessary for us to state the evidence even in condensed form. Counsel for appellant contends that the relief prayed for should have been granted under Comp. Laws 1907, § 3005, which, so far as material here, reads:

"The court may, in furtherance of justice, and on such terms as may be proper, allow a party to amend any pleading or proceeding \* \* \*; and may, also, upon such terms as may be just, relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect."

Counsel contends that the filing of the remittitur by plaintiffs' counsel on October 31, 1916, as before stated, was a proceeding taken against appellant, and, in view that it was filed without notice to it or its counsel, the foregoing provisions apply. If it be conceded that the provisions quoted from the statute apply to a case of this kind, yet in view of the evidence, and for the reasons hereinafter appearing, there is nothing upon which the discretion of the district court could have been based. It must not be overlooked that plaintiffs' counsel, in causing the remittitur from this court to be filed in the district court, did precisely what the statute authorized him to do. Comp. Laws 1907, § 3321. reads:

"The clerk of the Supreme Court shall remit to the lower court the papers transmitted to the Supreme Court on the appeal, together with the judgment or decision of the Supreme Court thereon, within thirty days after the same shall have been made, unless the Supreme Court, on application of either of the parties, shall direct them to be retained for the purpose of enabling such parties to move for a rehearing."

No application for a rehearing by either party was filed after the case was decided by this court. While the judgment in favor of plaintiffs in the principal case was reversed by this court, yet such reversal, in the main, was based upon the fact that appellant had properly tendered the amount of plaintiffs' claim before the action was commenced, and had thereafter kept that tender good, and for that reason the action was prematurely brought. By making tender, however, appellant had admitted the justice and correctness of plaintiffs' claim, and, moreover, had relieved itself from the payment of interest on the amount and the costs of suit. In view, therefore, that appellant had succeeded in its claim of tender, it was in no haste to have the remittitur go down. Upon the other hand, in view of the decision of this court, the plaintiffs had but one alternative, which was to receive the amount tendered and

close up the matter. It is readily understood, therefore, why plaintiffs' counsel, acting on behalf of his clients, desired that the remittitur from this court should go down as soon as possible, so that he might take down the tender and remit the money to his clients, who were residents of the city of Philadelphia. The record also shows that, immediately after plaintiffs' counsel had gotten the money tendered, he filed a dismissal of the case, as he had a right to do. True, the district court refused to enter judgment of dismissal, but why the court refused to do so we do not understand. That fact, however, we do not consider as material, and hence will not refer to it again.

[2] As we read the statute, plaintiffs' counsel had a perfect legal right to have the remittitur go down and to file the same in the district court just as was done. Nor is there anything in the statute which required him to serve notice on appellant or its counsel that the remittitur had been sent down and filed in the district court. That such was the case is, we think, made clear from the fact that since this motion was determined in the district court the Legislature has amended section 3351, supra (chapter 115, Laws Utah 1917, § 388), by requiring service of notice on the adverse party in case a remittitur is sent down as was done in this case, and that the time within which the cost bill must be served and filed dates from the service of such notice. If service of notice had thus been required under the statute as it stood, it would have been a useless ceremony to have amended it. Clearly the legislative construction was that the old statute did not require notice, and therefore they amended it so that service of notice was required.

[3] Apart, however, from the statute, we think all the authorities are to the effect that costs are a creature of statute, and that a party who is entitled thereto, in order to recover them from his adversary, must comply with the conditions imposed by the statute relating to costs.

In the case of Candler v. Washoe Lake, etc., Co., 28 Nev. 422, 82 Pac. 458, the decision of the court is correctly reflected in the first headnote, which reads:

"An appellant, to whom costs have been awarded on appeal, must comply with the statute and rules of the court governing the taxation of costs, in order to make the decision effectual."

"Costs are only recoverable by force of the statute, and the allowance of them, in any case, will depend on the terms of the statute." Apperson v. Mutual, etc., Co., 38 N. J. Law, p. 390.

In D. M. Osborne & Co. v. Paulson, 37 Minn. 46, 33 N. W. 12, it is held that if a party who is entitled to costs fails to claim them as provided by the rules of the Supreme Court, which rules are the source of the right to recover costs in Minnesota, he forfeits his right to recover costs.

In 7 R. C. L. § 31, p. 803, the law respect-

ing the right to recover costs in appellate question of whether plaintiffs' counsel, by courts is stated thus:

moving to strike the cost bill in question and

"The practice of awarding and taxing, the time within which cost bills must be filed, and the items allowable, are all matters of statutory regulation, amplified by rules of court."

In 11 Cyc. 204, it is said:

"The right to costs on appeal or writ of error are dependent solely on statute. In the absence of special statutory authorization, such costs cannot be allowed."

In Murray v. Whittaker, 17 Ill. 230, and in Campbell v. Weakley, 7 B. Mon. (46 Ky.) 22, it is held that the adverse party is not entitled to notice of the sending down of the mandate (remittitur) from the appellate court, and that either party has the right to file the mandate in the lower court without notice to his adversary.

Counsel for appellant has cited a number of cases which he claims favor his contention, among which are the following: Smith v. Alford, 31 Utah, 346, 88 Pac, 16: Douglas v. Badger State Mine, 41 Wash. 266, 83 Pac. 178, 4 L. R. A. (N. S.) 196; McDonald v. Burke, 3 Idaho (Hasb.) 493, 28 Pac. 440, 35 Am. St. Rep. 289; Burnham v. Hays, 3 Cal. 115, 58 Am. Dec. 389: Remsberg v. Hackney Mfg. Co., 174 Cal. 792, 164 Pac. 792; Olcese v. Justice's Court, 156 Cal. 82, 103 Pac. 317; Radovich v. French, 36 Neb. 341, 135 Pac. 920, 136 Pac. 704, 48 L. R. A. (N. S.) 542, Ann. Cas. 1915C, 1119; Botsford v. Van Riper, 32 Nev. 214, 106 Pac. 440; Haviland v. Southern California, etc., Co., 172 Cal. 601, 158 Pac. 328.

We have carefully considered the decisions in the foregoing cases, as well as all others cited by counsel, and we are constrained to say that none is in point or can be given effect upon the controlling question in the cuse at bar. Some of the decisions referred to refer to the setting aside of defaults, others refer to the question of what constitutes a proceeding, while still others refer to when a party by appearing in a case or proceeding waives the right to object to certain proceedings or confers jurisdiction over his person in the court.

[4] The only question involved in this proceeding to which any of the foregoing cases can be said to even remotely refer is the GIDEON, JJ., concur.

moving to strike the cost bill in question and at the same time reserving the right to assail the correctness of the bill, had waived his right to strike the bill. As we pointed out before, counsel appeared specially for the purpose of striking the cost bill, and also for the purpose of retaxing or striking certain items of costs contained in the bill. Counsel. therefore, by no act of his, waived the right to move to strike the cost bill because not filed within the time required by the statute. For the reasons just stated, the case of Smith v. Alford, supra, is not in point. In that case a cost bill had been prematurely filed by the prevailing party. The adverse party, at a time when the cost bill could have been properly filed, appeared generally and moved to retax the costs included in the bill. It was accordingly held by this court that having assailed the cost bill on the merits, at a time when it could have been properly filed, the adverse party recognized the bill as properly filed, and waived the right to assail it on the ground that it was prematurely filed. No such question is involved here.

In view, therefore, that the appellant has wholly failed to comply with the conditions imposed by section 3351, supra, respecting the filing of its cost bill, and nothing being made to appear that the district court in any particular has abused its discretion in refusing to relieve the appellant from complying with the statute, if, indeed, the court had the power under section 3005 to do that—a question not decided—we have no alternative save to affirm the judgment of the district court.

We desire to add in conclusion, however, that in view that section 3351 has been amended as before stated, and for that reason the question here involved cannot arise again, we have stated no more of the facts or proceedings of this case than was absolutely necessary to decide the question presented.

The judgment is therefore affirmed, plaintiffs to recover costs.

McCARTY, CORFMAN, THURMAN, and GIDEON. JJ., concur.

## GREAT FALLS TOWN-SITE CO. v. KOWELL

SAME v. KOWELL et ux.

(Nos. 3894, 3934.)

(Supreme Court of Montana. April 20, 1918.)

1. APPEAL AND ERROR @== 1078(6)-REVIEW-

MATTERS NOT ARGUED.

Where, on appeal from an order denying new trial, no argument is advanced challenging the justice or accuracy of the verdict, the order will be affirmed.

2. APPEAL AND ERROR &= 877(4)-ERROR NOT

AFFECTING APPELLANT.

Where plaintiff on appeal in ejectment does not complain of the judgment in so far as it adjudicates that plaintiff has no interest in the property, he cannot complain that the adjudication therein of title in defendant was not supported by a cross-complaint or counterclaim asking such relief.

Appeal from District Court, Cascade County; J. B. Leslie, Judge.

Action by the Great Falls Town-Site Company, a corporation, against John Kowell and wife. Judgment for defendants, and plaintiff appeals from judgment and from an order denying motion for new trial; the two appeals being consolidated. Affirmed.

Cooper, Stephenson & Hoover, of Great Falls, for appellant. Greene & Cockrill, of Great Falls, for respondents.

SANNER, J. These are separate appeals, one from the judgment, and another from an order denying plaintiff a new trial, consolidated and submitted at the request of counsel for plaintiff, appellant here.

The action was in ejectment, the plaintiff claiming title to a certain tract of land in Cascade county in the possession of the defendants John and Annie Kowell. Kowell answered, denying the plaintiff's title, pleading the statute of limitations, and affirmatively alleging facts and circumstances amounting to adverse possession for over 22 years, but without casting the affirmative allegations in the form of a counterclaim or cross-bill. Trial was to a jury, whose verdict was a general one "for the defendant." Upon this verdict judgment was entered that defendant John Kowell have his costs, and further that "the said defendant John Kowell have and retain possession of the lands in the answer of defendant described; he having established title thereto and the whole thereof by adverse possession according to law."

[1] Upon neither appeal is there any brief or argument challenging the justice or accuracy of the verdict, nor is it anywhere suggested that there is any reason why the plaintiff's motion for a new trial should have been granted. The order denying a new trial must therefore be affirmed.

[2] On the appeal from the judgment the only contention is that the judgment is too as roustabout in one of its warehouses at

broad, in that it affirmatively adjudicates title in the defendant without sufficient basis in the pleadings for such adjudications, and the only relief sought is a modification accordingly. In so far as the judgment determines the plaintiff to be without right or title, it is not assailed; yet by that judgment the plaintiff is put out of the case, and, being out, it cannot complain of provisions in the judgment which are academic so far as its interests are concerned. As it is not injured by the scope of the judgment, it cannot be benefited by a modification thereof.

The judgment is therefore also affirmed.

BRANTLY, C. J., and HOLLOWAY, J., concur.

SCHEYTT v. GALLATIN VALLEY MILL-ING CO. (No. 3893.)

(Supreme Court of Montana. April 16, 1918.)

1. MASTER AND SERVANT \$\infty 278(3)-INJURIES TO SERVANT - NEGLIGENCE - SUFFICIENCY OF EVIDENCE.

In action by servant for injuries from falling of pile of sacks of flour which he was climbing, evidence held insufficient to sustain finding that the sacks fell by reason of negligence of master.

2. Negligence 4=121(1), 134(1)-Burden of PROOF.

The burden is on one alleging negligence to prove it by substantial evidence, and evidence furnishing a basis for two equally permissible inconsistent conclusions is insufficient.

3. MASTER AND SERVANT \$==278(16) URE TO INSPECT—SUFFICIENCY OF EVIDENCE. Evidence held insufficient to sustain a finding that master did not inspect piled sacks of flour to see that they were not in danger of falling.

4. MASTER AND SERVANT \$== 124(1)-DUTY TO INSPECT.

Where a servant fails to show that piled sacks of flour, which fell while he was climbing them, were not piled straight, it was immaterial that the master failed to inspect to see that they were straight.

5. MASTER AND SERVANT \$\infty 265(5)\$—INJUBIES TO SERVANT—RES IPSA LOQUITUR.

Where from evidence it was as permissible to conclude that piled sacks of flour were caused to fall by plaintiff servant's manner of climbing them as that the pile was in a dangerous condi-tion, the doctrine of res ipsa loquitur did not apply.

Appeal from District Court, Gallatin County; Ben B. Law, Judge.

Action by Henry O. Scheytt against the Gallatin Valley Milling Company, a corporation. From judgment for plaintiff and order denying new trial, defendant appeals. Re versed, with directions.

Geo. Y. Patten, of Bozeman, for appellant. H. S. Farris and C. E. Carlson, both of Bozeman, for respondent.

BRANTLY, C. J. Action for damages for personal injuries sustained by plaintiff during the course of his employment by defendant Belgrade, in Gallatin county. The defendant | falling sacks, suffered a comminuted fracture owns and operates a flour mill at Belgrade. In connection with it, it owns warehouses used for the purpose of storing flour and other mill products. Plaintiff had been in the service of the defendant for three years and about eight months. During one year of this time he had occupied the position of foreman in charge of the roustabout crew consisting of from two to six men, but about a year before the time of the accident he had been superseded by Frank Lynn and thereafter served as a roustabout. While engaged in this capacity his duties required him to perform any labor necessary about the mill and warehouses, including the moving of sacks of flour from the mill to the warehouses and piling them thereon, and, when occasion demanded, taking the sacks from the piles and loading them in cars for shipment. The duties of the foreman were to supervise the roustabouts in the performance of their duties, including the handling and piling of flour in the warehouses and the inspection of the piles from time to time to see that in the process of settling they did not get out of plumb and become likely to fall, thus creating a source of danger to those who might be working in proximity to them or engaged in loading cars from them. The accident occurred on August 5, 1914. Lynn had been absent from July 20th in attending to other duties assigned him. He had returned about August 1st. During his absence the plaintiff had superintended the other roustabouts in the building of a pile of 98-pound sacks in one of the warehouses which adjoined the mill. It consisted of four or five tiers, each made up of two rows of sacks laid end to end, the joints being broken as in laying brick in a wall. The ends of them were tied or locked by sacks laid crosswise. The end of the tiers constituted the end, and the sides of the outer tiers the side, of the pile. It was 12 or 14 feet high, and extended up near the slant of the roof of the warehouse. Plaintiff had personally assisted in building this pile. Mr. Parkins, the secretary and head bookkeeper of the defendant, had charge of the business office, including general charge of the warehouses. On August 5th he delivered to plaintiff an order to clean a car on the warehouse track of the Milwaukee railroad and load it with flour, to be taken out about noon. Lynn, the foreman, was not then in the warehouse, but was nearby. Without notifying him of the receipt of the order or awaiting instructions from him, plaintiff proceeded, in company with Edgar Bertelson, another roustabout, to execute the order. While Bertelson was bringing up a truck to receive a load of sacks, plaintiff climbed up the side of the pile to pass them down. He had climbed up to the top of the pile near the roof, when the sacks began to roll and fall. He attempted to catch hold of the rafters to allow the sacks to go under him but was not able to do so.

of the femur of his left leg and a minor injury to the ankle.

The negligence alleged in the complaint is (1) that the defendant had permitted the tiers of sacks comprising the pile to be so negligently built that while the outside tier was apparently straight and safe, the tier immediately behind it was standing in an uneven, unsupported, crooked, leaning, and otherwise defective condition, so that it caused the first tier to fall upon the plaintiff as he attempted to climb the pile; and (2) that defendant had failed to inspect the tiers of sacks in the pile and had omitted to warn the plaintiff of its dangerous condition. The answer, admitting the occurrence of the accident and consequent injuries of the plaintiff, denies that defendant was guilty of negligence. It also alleges the usual defenses of contributory negligence and assumption of risk. The trial resulted in a verdict and judgment for the plaintiff. The defendant has appealed from the judgment and an order denying its motion for a new trial.

[1] Counsel challenges the integrity of the judgment on the ground that the evidence is insufficient to justify the verdict, and that the court therefore erred in denying defendant's motion for a new trial. Among others he makes the contention that there is no substantial evidence to establish the negligence alleged in respect to the condition of the pile of sacks. After a careful study of the record we have concluded that this contention must be sustained.

The plaintiff was himself the only witness who testified in his behalf as to the circumstances of the accident; and as his testimony was not aided in any way by that of any of defendant's witnesses, we must look to it alone to find support for the charge of negligence. As presented in the transcript, his testimony is not clear. The following brief synopsis of it, added to the foregoing statement, with the excerpts quoted below, includes all to be found therein on the subject. He stated: That the pile had been standing for about two weeks; that when he went to it he climbed up the middle of the side; that he went up until, he judges, his waistline was about even with the top; that he then saw that it was moving; and that he saw the first tier moving toward him, and a part. of the second. We quote:

"Q. Was the second tier leaning against the forward tier? A. Yes, sir. \* \* I then tried to run my hand into the rafters, but couldn't reach it, so as to let the flour go from under me. I then jumped and the flour fell over onto me. Q. Did any of the second tier fall, Mr. Scheytt? A. Some. Q. Do you know how much of the second tier fell? A. No, I do not."

"I don't know how much of the first tier of flour came with me when I fell, nor the second tier either. If they were leaning any, they are bound to come together. I hadn't touched the second row that made up the first tier as I got up on top. I stated that I had gotten up so He then jumped, and, being caught by the that my waistline was about even with the top.

In starting to climb the pile I did not run or jump; it wouldn't do any good to jump because you have got to go up the side. I didn't look around; I just walked up to the pile. It is not always easy to go on a pile of flour; but when climbing you have got to walk right up."

Again:

"Those tiers of flour should be as straight as possible; there is very little space, if any, between-probably a little at the bottom; there any—they should fit tight. There is sufficient space so that you can look up between them and see if the tiers are leaning against each other. When I came in and looked at this pile I gave a glance stift and it cancered to me to be seen glance at it, and it appeared to me to be safe-I mean by that that it was perfectly safe to climb up. The forward tier appeared to be straight. \* \* \* These piles of flour get out of plumb quite often, and the foreman's inspection discloses these defects. He would then order the men to repile or brace it. \* \* \*
There are piles of flour in all three of the warehouses, or two of them most of the time. Almost daily during that period of one year that I was foreman, I had occasion to inspect these piles, and I became quite skilled in noticing whether or not the flour was piled up properly or whether it was leaning, or whether it required repiling. As a matter of fact I became quite skilled in that respect. I would go along the ends of the piles and look between the tiers and see whether or not the tiers were leaning. At that particular pile there was no flour in the center [of the warehouse] at all. There is a vacant space there that there is no flour in at all. In other words, there was a space of about 10 feet in front of the end between the piles.

\* \* When I went into the warchouse in the morning of August 5, 1914, I did not inspect the pile to see whether it was safe; I just made a casual glance and then went up the center of the pile; it wasn't my duty to inspect it. I wasn't on the end of the pile; I went up along the side. I didn't go to the end of the pile at all."

The most that can be said of this testimony is that it amounts to a mere conclusion by the plaintiff that the second tier was out of plumb because the outer tier fell, bringing a part of it down. It negatives the idea that he ascertained this fact by observing the condition of the pile before he attempted to climb up on it; and the position in which he was standing at the time he discovered it in motion also negatives the idea that he could then observe whether the second tier was leaning. If there was no space between the tiers at the top, as he said should have been the case if the pile had been properly built, and he nowhere suggests that this was not the fact, it was manifestly impossible for him to see that the second or inner tier was out of plumb and leaning against the outer one. Nor is there any suggestion in his testimony that tends to exclude the idea that in attempting to climb to the top by thrusting his hands and feet between the sacks, as he must have done-he did not use a ladder or other device to assist him-he pulled the sacks down upon himself. Thus, whereas it was incumbent upon him to furnish the jury substantial proof of the defective and dangerous condition resulting from defendant's negligence, he left them to speculate

the probative value of the evidence is emphasized by the uncontradicted testimony of Mr. Fisher, the general manager of the defendant. When he heard of the accident he went immediately to the warehouse where plaintiff was lying on the floor, and upon asking him how he had been hurt received the answer, "that he thought he was careful, but probably he may have been a little careless, he thought probably it was his own fault." When the evidence is in this condition it will not support a recovery.

[2] The burden is upon him who alleges negligence to prove it by substantial evidence (Reino v. Mineral Land Dev. Co., 38 Mont. 291, 99 Pac. 853; Byrnes v. Butte Brewing Co., 44 Mont. 328, 119 Pac. 788, Ann. Cas. 1913B, 440); and this burden is not sustained if the evidence furnishes the basis for two equally permissible conclusions as to what caused the injury, one of which speaks negligence on the part of the defendant, while the other is wholly inconsistent with it, and points to some other efficient proximate cause. This court has repeatedly so held. Shaw v. New Year Gold Min. Co., 31 Mont. 138, 77 Pac. 515; Olson v. Montana Ore Pur. Co., 35 Mont. 400, 89 Pac. 731; Monson v. La France Copper Co., 39 Mont. 50, 101 Pac. 243, 133 Am. St. Rep. 549; Winnicott v. Orman, 39 Mont. 339, 102 Pac. 570.

[3, 4] While, as noted in the foregoing statement, one of the duties of the foreman was to inspect the piles from time to time, which would imply the duty also, in proper cases, to warn the employés who were required to work upon or near them of their dangerous condition, there is no evidence in the record that Lynn had neglected this duty. True, he testified that he had not received any instructions on the subject; but he also testified that it was his custom to observe the different piles from time to time. that he had looked over this particular pile on August 3d before the accident, and that it was apparently in a safe condition, because none of the tiers were leaning. In speaking of the two rows of sacks making up the outside tier, he stated further that by reason of the way the flour was piled it was impossible for the second tier to be in a leaning condition while the first or outside tier was straight. This testimony was not contradicted in any way. In face of these categorical statements, the jury could not have found from the fact alone that the pile fell that the defendant failed in its duty to inspect. But whether it did or not is wholly immaterial in view of the conclusion stated above. If the pile was not in a dangerous condition, no amount of inspection would have discovered any danger and so render a warning necessarv

it was incumbent upon him to furnish the jury substantial proof of the defective and dangerous condition resulting from defendant's negligence, he left them to speculate as to the cause of the injuries. That this is

ter. Barry v. Badger, 54 Mont. 224, 169 Pac. 34. "That rule, as applied to falling objects, covers cases where the occurrence is of such an unusual and extraordinary character that it would not happen except for want of due care, or that the cause of the fall was something over which the defendant had absolute and complete control; and that in the nature of things there could be no fall except in the negligent doing of some act peculiarly within the knowledge and control of the defendant." Samardege v. Hurley-Mason Co., 72 Wash, 459, 130 Pac, 755. As stated above, there is no evidence showing with any degree of certainty how the accident occurred and whether it was the result of the unstable condition of the pile or whether the plaintiff carelessly pulled the sacks down upon himself in his attempt to gain the top of the pile as he did.

Since the evidence is wholly insufficient to sustain the verdict, and it is apparent that the plaintiff produced at the trial all in his possession or available, it would serve no purpose to order another trial. For the same reason a determination of the several other contentions made by counsel is wholly unnecessary. The judgment and order are reversed and the district court is directed to dismiss the action.

Reversed.

SANNER and HOLLOWAY, JJ., concur.

UNITED STATES NAT. BANK OF RED LODGE v. SHUPAK et al. (No. 3891.) (Supreme Court of Montana. April 8, 1918.)

1. BILLS AND NOTES \$\infty\$ 318—ACTION ON NON-NEGOTIABLE NOTE—DEFENSES AVAILABLE.

Assuming that the note is nonnegotiable, and that plaintiff indorses for value took it subject to available and defenses existing in favor of ject to equities and defenses existing in favor of defendant makers at time of transfer, defendants might interpose any defense which they had against the original payee at such time.

2. Bills and Notes \$== 225-Negotiable In-STRUMENT LAW-APPLICABILITY.

The provisions of the Negotiable Instrument Law deal with negotiable, not with non-negotiable, instruments.

3. BILLS AND NOTES \$=395-PRESENTATION FOR PAYMENT-NECESSITY.

FOR PAYMENT—NECESSITY.

Under Rev. Codes, § 5918, providing that presentment for payment is not necessary to charge the person primarily liable, section 5919; specifying the time within which presentment must be made to charge those secondarily liable, and section 5920, indicating what constitutes such presentment where section was tutes such presentment, where action was brought within the period of limitations, defendant makers of demand note could not complain of failure sooner to present note for payment. 4. Tender == 13(3)-Statute-"Maturity."

have no application to cases of this charac- ; a demand note; "maturity" as used in such provision meaning the time when a note or bill becomes due.

> [Ed. Note.-For other definitions, see Words and Phrases, First and Second Series, Maturity; Tender.]

> 5. Banks and Banking \$\infty\$ 144 — Negligence of Collecting Bank.

Where demand note was payable at the bank to which plaintiff indorsee sent it for collection, to which plaintin indorsee sent it for collection, negligence of such bank in failing to charge the note to the account of defendant makers when they had funds to meet it cannot be imputed to plaintiff in view of Rev. Codes, \$ 5935, providing that where the instrument is made payable at a bank it is equivalent to an order to the bank to may the carry for the order to the bank to pay the same for the ac-count of the principal debtor; such section merely creating the bank the agent of the maker.

6. BANKS AND BANKING \$== 171(3)-COLLECT-ING-SELECTING AGENT.

Although note was payable at bank to which plaintiff sent it for collection, the rule that a bank which undertakes to collect commercial paper for its customers must select as subagent some one other than the party who is to make payment was inapplicable where plaintiff bank was acting for itself, and the bank to whom the note was sent for collection was not interested in it or expected to pay it.

7. PRINCIPAL AND AGENT (2005)—AUTHOR-ITY TO ACCEPT CHECK AS PAYMENT.

An agent has no implied authority to accept payment in anything but money.

8. PAYMENT \$ 21—CONDITIONAL PAYMENT—ACCEPTANCE OF CHECK.

A check is merely an order for money, and, in the absence of any agreement to the con-trary, its acceptance in discharge of an indebtedness is conditional upon its payment.

9. BILLS AND NOTES \$==431 - PAYMENT - WHAT CONSTITUTES.

Where, when a check on a bank collecting a note was given it in payment of the note, the bank was insolvent, the check was not a payment of the note.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Payment.]

Appeal from District Court, Carbon County; A. C. Spencer, Judge.

Action by the United States National Bank of Red Lodge against Harry Shupak and another, copartners. From a judgment for plaintiff, and from an order denying motion for new trial, defendants appeal. Affirmed.

E. B. Merrill, of Bridger, R. G. Wiggenhorn, of Red Lodge, and Goddard & Clark, of Billings, for appellants. John G. Skinner, of Red Lodge, and Johnston & Coleman, of Billings, for respondent.

HOLLOWAY, J. In August, 1913, Harry Shupak and Joe Kuchinski executed and delivered to the Bridger State Bank their promissory note for \$5,000. On the day following, the Bridger bank for value indorsed and transferred the note to the United States National Bank of Red Lodge. In The provision of Rev. Codes, § 5918, that, if the instrument is by its terms payable at a special place and the maker is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part, can have no application to note was retained by the Bridger bank until January 21, 1915, when it was presented to the makers for payment. They gave their check on the Bridger bank for the amount of the principal and interest, and received their note. Oa January 30, 1915, the Bridger bank failed and the state examiner took charge. Later a receiver was appointed and numerous forgeries by Hough, the president of the Bridger bank, including the one above, were discovered. At the time the genuine note was delivered up to the makers, they had to their credit on the books of the Bridger bank a sum in excess of the amount of the check which they gave in payment of the note, but the bank itself was then insolvent, and did not have funds in its vaults and with its correspondents sufficient to pay the check, and no attempt was made to charge the check to their account or to enter it upon the books of the bank. Shupak and Kuchinski were directors of the Bridger bank, and Kuchinski was its vice president. This action was brought by the Red Lodge bank to enforce payment of the genuine note. At the conclusion of the trial the court below directed a verdict for plaintiff, and from the judgment entered thereon and from an order denying them a new trial, defendants apmealed.

[1, 2] 1. It is insisted by appellants that the note is nonnegotiable. If we assume that it is and that the Red Lodge bank took it subject to the equities and defenses existing in favor of the makers at the time of the transfer, these defendants then might interpose any defense to this action which they had against the Bridger bank on August 22, 1913. Cornish v. Woolverton, 32 Mont. 456, 81 Pac. 4, 108 Am. St. Rep. 598; Buhler v. Loftus, 53 Mont. 546, 165 Pac. 601. But defendants plead no such defenses; on the contrary, their testimony discloses that they received full value for the note and that they had no defense against it at that time. If we should accept appellants' contention that the note is nonnegotiable, the foregoing discussion would be conclusive, for their further argument based upon certain sections of our Negotiable Instrument Law would have no pertinency whatever. provisions of that act deal with negotiable instruments, not with instruments nonnegotiable. 3 R. C. L. 1172.

[3] 2. We are of the opinion, however, that the note is negotiable. By its terms it is payable on demand, and appellants insist that plaintiff was guilty of negligence in failing to present it for payment within a reasonable time and that the negligence worked prejudice to them, since they were ready, able, and willing to pay it long before the Bridger bank failed. By this action plaintiff does not seek to hold any one but the makers—the parties primarily liable for the

which was in fact a forgery. The genuine payment of the note—and as to them presentnote was retained by the Bridger bank until ment was not necessary.

Section 5918, Revised Codes (the Uniform Negotiable Instrument Act), provides:

"Presentment for payment is not necessary in order to charge the person primarily liable on the instrument. \* \* \* But except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers." 8 C. J. 529; 7 Cyc. 963.

This section defines the purpose of presentment and is not modified by subsequent sections. Section 5919 specifies the time within which presentment must be made in order to charge those secondarily liable, and 5920 indicates what constitutes such presentment. The rule that presentment for payment is . not necessary to charge the makers applies equally to a demand note payable at a particular place. Farmers' Nat. Bank v. Venner, 192 Mass. 531, 78 N. E. 540, 7 Ann. Cas. 690. So long as this action was brought within the period of the statute of limitations, defendants cannot claim exemption from liability by reason of plaintiff's failure to present it for payment or commence this action at an earlier date.

[4] Section 5918, Revised Codes, further provides:

"If the instrument is, by its terms payable at a special place, and he [maker] is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part."

This provision, we think, can have no application to a demand note which "admits a present debt to be due to payee or holder, is payable absolutely and at all events and requires no other or previous demand than the institution of a suit thereon." McFarland v. Cutter, 1 Mont. 383. "Maturity," as used in this provision, means the time when a note or bill becomes due. Bouvier's Law Dictionary; Black's Law Dictionary; Gilbert v. Sprague, 88 Ill. App. 508. It does not seem reasonable that the provision above contemplates that a man will borrow money on a demand note only to keep it on hand to meet the note which evidences his debt. But for a stronger reason the provision cannot be invoked in this instance.

The note, being due on demand, was payable as soon as issued (7 Cyc. 848); but it was not until January 8, 1914, that defendants had to their credit in the Bridger bank funds sufficient to meet it. Thereafter from April 15th to June 20th, from July 30th to September 8th, and from September 28th to December 23d, in 1914, this balance was not sufficient. In other words, they did not keep money on deposit to meet this note, but increased or diminished their deposit as the exigencies of their business permitted or required. They cannot select a particular date upon which their balance was sufficient and insist that the note matured at that particular time.

does not seek to hold any one but the makers—the parties primarily liable for the payable at the Bridger bank, and defendants insist that, in failing to charge the note to their account whenever they had funds sufficient to meet it, the Bridger bank was guilty of negligence which is imputable to plaintiff. Section 5935, Revised Codes, provides:

"Where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debter there?" pal debtor thereon.

The authorities which have construed this section of the Uniform Negotiable Instruments Law are quite generally agreed that it merely creates the bank the agent of the maker and does not authorize it to receive payment for the holder. 8 C. J. 602: 3 R. C. . L. 1289. The duty which the bank owes to the maker arises from the relation of debtor and creditor, and not from the fact that it is the agent of the holder.

[6] It is insisted, also, that the Red Lodge bank was guilty of negligence in selecting the Bridger bank as its collecting agent, because the note was payable at that bank. We approve the rule, so often stated by the courts. that a bank which undertakes to collect commercial paper for its customer, must in the exercise of common prudence and ordinary care, select as a subagent some one other than the party who is to make payment. German Nat. Bank v. Burns, 12 Colo. 539, 21 Pac. 714, 13 Am. St. Rep. 247. The rule cannot have any application here, for two reasons: (a) The Red Lodge bank was acting for itself as the owner and holder of the note and owed no duty to any one; (b) the Bridger bank was not interested in the note and was not expected to pay it. It was merely the agent of the Red Lodge bank to collect the note from the makers who were responsible.

4. Defendants cannot insist that by giving their check on the Bridger bank they paid this note.

[7,8] (a) It is elementary that an agent has no implied authority to accept payment in anything but money. 3 R. C. L. 1284. A check is merely an order for money and in the absence of any agreement to the contrary, its acceptance in discharge of an indebtedness is conditional upon its payment. 8 C. J. 568; Eaton & Gilbert on Commercial Paper, 538; Daniels on Negotiable Instruments (6th Ed.) § 1623. In Taylor v. Wilson, 11 Metc. (Mass.) 44, 45 Am. Dec. 180, it is said:

"A check is merely evidence of a debt due om the drawer. Whether it shall operate as from the drawer. Whether it shall operate as payment or not, depends on two facts: First, that the drawer has funds to his credit in the bank upon which it is drawn; and, second, that the bank is solvent, or, in other words, pays its bills and the checks duly drawn upon it, on demand. The receipt of a check, therefore, before presentment, if there is no laches on the part of the holder, is not payment of the debt for which it is delivered.

[9] (b) At the time defendants gave their check it was worthless, because of the insolvency of the Bridger bank. It could not be paid, and by giving it defendants did not situation to their prejudice. Giving a worthless check does not pay a debt.

5. None of the special defenses pleaded can be maintained.

Recurring to the questions already determined; that presentment was not necessary in order to bind the makers, and that plaintiff's delay in commencing the action constitutes no defense, let us assume that the Red Lodge bank had sent this note for collection to a responsible third party who presented it for payment on January 21, 1915, received defendants' check on the Bridger bank which was dishonored when presented-as it would have been—the situation of defendants could not have been different from what it is: so that the employment of the Bridger bank as the collecting agent could not have operated to the defendants' prejudice.

The judgment and order are affirmed. Affirmed.

BRANTLY, C. J., and SANNER, J., con-

BORGESON v. TUBB. (No. 3900.)

(Supreme Court of Montana. April 15, 1918.)

1. DEEDS €=343 - ACCEPTANCE OF DEED OF

CORRECTION—EFFECT.

Acceptance by a grantee of a deed of correction in lieu of a prior deed misdescribing the land intended to be conveyed constitutes an election to take the land conveyed by the deed of correction, and relinquishment of title to the land conveyed in the prior deed.

2. Boundaries €==37(5)—Evidence of Prac-TICAL LOCATION.

Evidence held to show a practical location of boundary line.

3. BOUNDARIES \$\iftharpoonup 49 -- Practical Establishment of Boundary-Acquiescence.

A practical location of the boundary line by owners of adjoining lands and their subsequent acquiescence therein concludes them and their privies.

4. QUIETING TITLE \$==10(1)-PROOF OF TITLE. In action to quiet title, plaintiff must re-cover on the strength of his own title, and where the land has been in the actual possession of defendant and his grantors for years, defendant need not show any title to prevail where plaintiff does not show any better title.

Appeal from District Court. Fergus County; Roy E. Ayers, Judge.

Suit to quiet title by Claus Borgeson against T. J. Tubb. From order denying defendant new trial after a finding for plaintiff, defendant appeals. Reversed and cause remanded, with directions.

Chas. J. Marshall and E. K. Cheadle, both of Lewistown, for appellant. Belden & De Kalb, of Lewistown, for respondent.

HOLLOWAY, J. In 1882 Francis Janeaux laid out the southwest quarter of the northeast quarter of section 15, township 15 north, range 18 east, as the original town site of Lewistown, and caused a plat thereof to be part with anything of value or alter their filed with the county clerk and recorder. In

1884 an amended plat was filed, the evident | found for plaintiff, and defendant appealed purpose of which was to supply certain necessary indorsements omitted from the first, but by inadvertence this amended plat erroneously described the 40-acre tract upon which the town site is located, and in 1890 a second amended plat was filed to correct the error. In 1885 Janeaux laid out Janeaux addition No. 1 in the northwest quarter of the northeast quarter of section 15 above and caused a plat thereof to be filed. Upon the first plat of the original town site, block U 15 is represented as a quadrangle, though the block is not subdivided into lots. Upon each of the amended plats lot 7 of block U 15 is delineated as a full lot fronting 50 feet on Main street and extending back 90 feet. On the plat of Janeaux addition there is shown a fractional lot marked 1, block 12, with a frontage of 29.2 feet on Main street, and it is this parcel which is the subject of dispute.

In 1886 Janeaux executed and delivered a deed by which he assumed to convey to Oliver Jutras "fractional lot 8" in block U 15 of the original town site, and fractional lot 1 in block 12 of Janeaux addition No. 1. In 1890 the personal representatives of Francis Janeaux, then deceased, acting under an order of court, executed and delivered to Jutras a deed "Intended to correct a 'misdescription' of said land contained in" the deed of 1886. This new deed recites that:

"The correct description of said lands so conveyed and intended to be conveyed is as follows: Lot 7 in block U 15 on Main street, Lewistown, Fergus county, Mont.

Counsel for both parties agree that this deed refers to lot 7, block U 15, of the original town site.

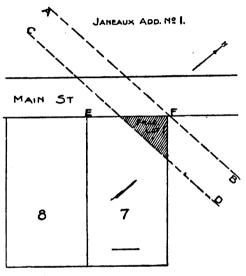
In 1893 Jutras mortgaged to Louis Landt lot 7, block U 15, of the original town site. This mortgage was foreclosed, and in due course a sheriff's deed was executed to Landt for the land according to the description in Thereafter Landt sold the the mortgage. land to plaintiff, Borgeson.

In 1903 Jutras executed and delivered a deed by which he assumed to convey to D. L. Walton fractional lot 1, block 12, Janeaux addition No. 1, and in 1904 Walton by deed assumed to convey the same property to defendant Tubb.

This suit was brought to quiet title. Plaintiff alleges that he is the owner of lot 7, block U 15, of the original town site; that the lot has a frontage of 50 feet on Main street, and extends back 90 feet; and that defendant asserts some adverse claim. Defendant by answer denied the material allegations of the complaint, alleged ownership of fractional lot 1, block 12, of Janeaux addition No. 1, and that it is a part of the land described in plaintiff's complaint. Defendant further pleaded the bar of the statute of limitations and title by adverse possession to the land claimed by him. The reply put in issue all the new matter. The trial court is lot 7, block U 15, original town site.

from an order denying him a new trial.

The original town site and Janeaux addition No. 1 were laid out with streets and alleys running at an angle approximately 45 degrees from the true points of the compass. They lie in adjacent 40's, and it is apparent that it was the intention of Janeaux that the north line of the original town site should be identical with the south line of the addition; but each of the plats was prepared by a different surveyor. According to the survey of the original town site as indicated by the plat, the north boundary line would be represented by the letters A B on the subjoined diagram; whereas according to the plat of the addition that line would be represented by the letters C D.



BLOCK UIS ORIGINAL TOWNSITE.

If the line A B correctly represents the true boundary between the two 40's, then fractional lot 1 never existed, except in the imagination of Janeaux and on the paper plat of the addition. If the line C D correctly represents the division line, then lot 7, block U 15, of the original town site, has always been a fractional lot with a frontage of Main street of 20.8 feet only, and fractional lot 1 in the addition exists in fact.

Plaintiff and defendant each relies upon title from Janeaux through a common source. Jutras, and the extent of the interest acquired by Jutras depends: First, upon the effect to be given to the correction deed, and, second, upon the location of the boundary line. The deed of 1886 from Janeaux to Jutras described the land to be conveyed as fractional lot 1, block 12, in the addition, and fractional lot 8, block U 15, original town site. The correction deed, reciting that its purpose was to correct a misdescription contained in the deed of 1886 declares that the property intended to be conveyed and which is conveyed

stated concisely in 8 R. C. L. 1027, as fol-Juma.

"Acceptance by a grantee of a deed of cor-rection from his grantor in lieu of a prior deed misdescribing the land intended to be conveyed constitutes an election by the grantee to take the land conveyed by the deed of correction, and a relinquishment of title to the land conveyed by the prior deed."

See Hall v. Wright, 138 Ky. 71, 127 S. W. 516, Ann. Cas. 1912A, 1255; Fox v. Windes, 127 Mo. 502, 30 S. W. 323, 48 Am. St. Rep. 648.

In other words, by accepting and acting under the correction deed Jutras elected to take lot 7, whatever it was in fact, in lieu of fractional lot 1 of the addition and fractional lot 8 of block U 15, and as against his grantor he surrendered all claim to fractional lot 1 as effectually as though he redeeded it. The title to lot 7 being in Jutras, Landt and his successor, Borgeson, succeeded to whatever property lot 7 describes, and whether it is a full lot 50x90 feet, or a fractional lot with only a frontage of 20.8 feet on Main street, depends primarily upon the correct location of the quarter quarter section line dividing the original town site from the addition.

Since neither right claimed in this instance accrued between the time the plat of the original town site was filed and the date of filing the plat of the addition, we deem it unnecessary to consider whether Janeaux could, by filing the plat of the addition, impeach the validity of the plat of the original town site or modify it to any extent.

The witness Tilzey testified that he made a survey and located the line correctly, and according to his testimony the boundary is represented by the line C D. His testimony, though not conclusive, is uncontradicted. Janeaux, the original source of title, by his deed of 1886, and again by the correction deed of 1890, acknowledged the existence of fractional lot 1, and, as a corollary, the correctness of the line C D, and that lot 7, original town site, was a fractional lot. Jutras likewise made the same acknowledgment by accepting those deeds. The evidence is uncontradicted that after Landt succeeded to the Jutras interest under the mortgage Jutras maintained a fence for some years on the line O D between fractional lot 1 in the addition and lot 7, and that on two or three occasions Landt tried to purchase fractional lot 1. About 1896 Jutras constructed a wooden sidewalk on the Main street frontage of 50 feet (between the letters E and F) for himself and Landt, and in settlement Landt paid upon the basis that he owned only two-fifths or 20 feet frontage, and so insistent was he to escape a greater burden that he actually counted the nails used in building the walk and weighed the nails

[1] We think the correct rule of law is, bought, but not used, to assure himself that he was not being charged for more than his just proportion of the costs. Later a concrete walk was laid in place of the wooden one, and again Landt paid for only two-fifths and Tubb for three-fifths of the whole. The same rule was observed in defraying the expense of sprinkling the street and keeping the sidewalk clean, and from 1890 Jutras and his successors have paid the taxes upon fractional lot 1. When Borgeson sought to purchase from Landt, a great deal of correspondence passed relating particularly to the quantity of land which was to be conveyed, with the result that Landt advised that Tubb's interest be purchased also, and refused to give a warranty deed or to convey lot 7 by metes and bounds as a full lot with a frontage of 50 feet on Main street.

[2, 3] Without entering upon a discussion of the question of adverse possession as a foundation of a claim of title in Jutras and his successors, this evidence, in the absence of anything to the contrary, is decisive that as between Jutras and Landt there was a practical location of the boundary line between lot 7 of the original town site and fractional lot 1 of the addition, and thereafter acquiescence in the line so established, which concludes them and their privies. Hoar v. Hennessy, 29 Mont. 253, 74 Pac. 452; 9 Corpus Juris, 242-244; 4 R. C. L. 128-131.

Though Jutras erroneously assumed that he owned fractional lot 1 after he received and accepted the correction deed, there is not any evidence that he intended to include it within the description of lot 7 when he executed and delivered the mortgage to Landt; on the contrary, the evidence is as nearly conclusive as it could well be that neither mortgagor nor mortgagee understood that it was included. The conduct of Landt after he received the sheriff's deed admits of but one interpretation, that he did not claim fractional lot 1, and would not bear the financial burdens imposed upon it.

[4] Since plaintiff must prevail, if at all, upon the strength of his own case rather than upon the weakness of his adversary, it is not material whether title to fractional lot 1 is in the Janeaux estate or whether defendant has any title whatever. He and his predecessors have been in actual possession of it from 1890 or earlier, and this of itself is sufficient to defeat the claim of anyone else who cannot show a better title. McCauley v. Ohenstein, 44 Neb. 89, 62 N. W. 232; Shelton Logging Co. v. Gosser, 26 Wash. 126, 66 Pac. 151.

The order is reversed, and the cause is remanded, with direction to set aside the decree and dismiss the complaint.

Reversed.

BRANTLY, C. J., and SANNER, J., con-

STATE ex rel. HOLCOMB v. DISTRICT COURT OF SEVENTEENTH JUDICIAL DIST. IN AND FOR PHILLIPS COUN-TY et al. (No. 4198.)

(Supreme Court of Montana. April 16, 1918.)

1. Discovery ==51-Petition-Sufficiency.
Under Rev. Codes, §§ 8042, 8043, as to taking of testimony of adverse parties, a petition conforming to the statutes, stating the facts required thereby, is sufficient.

2. DISCOVERY €==47 — EXAMINATION OF ADVERSE PARTIES—STATUTES.

Under Rev. Codes, \$\$ 8042, 8043, as to taking and perpetuation of testimony, an adverse party may be examined as a witness.

3. DISCOVERY \$==41-OBJECTIONS.

Parties whose testimony was sought to be taken in effect agreed that their testimony should be taken when they stipulated for a change in the time and place of taking.

Proceeding by the State of Montana, on the relation of Rollin P. Holcomb, against the District Court of the Seventeenth Judicial District in and for the County of Phillips, and John Hurly, Judge, for the annulment of an order vacating an order to take testimony. Order annulled.

Norris, Hurd & McKellar, of Glasgow, for relator. Slattery & Kline, of Glasgow, for respondent.

SANNER, J. The relator, Rollin P. Holcomb, presented to Hon. John Hurly, as judge of the district court of Phillips county. a verified petition praying an order to take the testimony of R. D. Sutherland, E. R. Kahla, and P. E. Skjerseth before John Hurly, judge of said court, at Saco, Mont., the said Sutherland, as cashier of the First National Bank of Saco, to bring with him certain accounts and records of said bank for use in connection with such testimony. The petition recited that Holcomb "expects to be a party to an action" in said or some other district court of the state, having as adversaries the bank and the individuals above named; that the controversy relates to the amount of indebtedness due the bank from Holcomb, and upon the trial thereof it will be necessary for him to prove certain facts which are set forth, relative to the execution and purpose of certain promissory notes and relative to payments made by Holcomb upon or in connection with the same, and not credited or miscredited to Skjerseth; that the said witnesses reside at Saco, and all of them are or have been officers of said bank; that the accounts and records desired are necessary to illustrate and make understandable the testimony sought to be taken. The petition was granted, and the order made accordingly, designating February 2, 1918, at 1 p. m. at the courthouse in Malta as the time and place for such examination, and directing subpænas to issue. Subpænas were

later changed by stipulation to Saco on February 11, 1918.

Thereafter the bank and the individuals so named moved the judge to vacate and set aside the order directing that such testimony be taken, upon the ground "that neither said court nor judge had, nor has either of them, jurisdiction to make or enforce said order,' for that no sufficient showing is made in the petition therefor, and the persons named are not subject to have their testimony taken in advance because they are adverse parties. This motion was granted, the order referred to was vacated, and in consequence the testimony sought was not taken and cannot be taken until the order to vacate is itself annulled, and it is this which the relator seeks by the present proceeding.

[1] Assuming that the motion to vacate was properly addressed and presented to the authority from whence the order sought to be vacated had come, the fundamental question presented is whether a sufficient showing was made by the relator's petition to authorize the order of examination. Of this we have not the slightest doubt. The proceeding was under the authority of sections 8042 and 8043, Revised Codes, which pro-

"Sec. 8042. The testimony of a witness may be taken and perpetuated as provided in this chap-

taken and perpetuaceu as provided in ter."

"Sec. 8043. The applicant must produce to a judge of the district court a petition, verified by the oath of the applicant, stating: that the applicant expects to be a party to an action in a court in this state, and, in such case, the names of the persons whom he expects will be adverse parties; \* \* \* and, the name of the witness to be examined, his place of residence, and a general parties; and, his place of residence, and a general outline of the facts expected to be proved. The judge to whom such petition is presented must make an order allowing the examination.

These requirements are simple, direct, and plain. With them the relator's petition fully complied and thus he became entitled to the order. 13 Cyc. 875, 876; Marton v. Hicks, 6 Hun (N. Y.) 238; In re Livingston, 12 Mo. App. 80; Newton v. State, 21 Fla. 53; Morse v. Grimke (City Ct. N. Y.) 8 N. Y. Supp. 1. Much discussion and citation of authority are offered to show that something more than the statute requires was necessary but what other courts may have said touching other statutes or in the effort to construe provisions similarly clear is not convincing. Rev. Codes, § 4.

[2, 3] Contention is made, however, that under these provisions a party may not be subject to examination. The answer is that an adverse party may be a witness and as such may be examined. In any event, the respondents, viewing them as parties, agreed in effect that their testimony should be taken when they stipulated for a change in the time and place of taking.

The order to take the testimony having issued, but the time and place so fixed were been made on a sufficient showing, it required something more than an attack upon that showing to justify a vacation of the order.

It follows that the order vacating the order to take testimony must be annulled. It is so adjudged and directed; the respondents to proceed accordingly.

BRANTLY, C. J., and HOLLOWAY, J., concur.

BUNTIN v. CHICAGO, M. & ST. P. RY. CO. et al. (No. 3888.)

(Supreme Court of Montana. March 25, 1918.) New Trial \$\infty 28 - Grounds - Suppressing Testimony - "Contempt" - "Misdemeanor"-"Irregularity."

Act of one defendant and a third party in Act of one detendant and a third party in secreting one of plaintiff's material witnesses who had promised to be present and testify on the following day, and compelled him to stay in hiding until the trial was concluded, was a suppression of material testimony constituting contempt under Rev. Codes, § 7309(8), a misdemeanor under section 8249, and misconduct or irregularity for which a new trial should have irregularity for which a new trial should have been granted under section 6794(1), as to irregularity in proceedings of court, jury, or adverse party.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Contempt; Irregularity; Misdemeanor.]

Appeal from District Court, Fergus County; Roy E. Ayers, Judge.

Action by C. W. Buntin, as administrator of the estate of John Zuke, deceased, against the Chicago, Milwaukee & St. Paul Railway Company and another. Verdict for defendants. From an order overruling plaintiff's motion for new trial, he appeals. Reversed, and cause remanded.

E. K. Cheadle, of Lewistown, and B. K. Wheeler, of Butte, for appellant. Chas. J. Marshall, of Lewistown, for respondents.

HOLLOWAY, J. Defendants having secured a favorable verdict upon the trial of this case, plaintiff moved for a new trial, specifying as one ground of his motion irregularities in the proceedings of the defendants by which plaintiff was prevented from having a fair trial. The motion was overruled, and plaintiff appealed from the order.

In support of the motion certain affidavits were presented, among them the affidavit of Walter Weide, which, after setting forth the facts within his knowledge concerning plainfiff's cause of action, states that he came to Lewistown on December 17, 1914, the day before the trial, and on that evening talked with counsel for plaintiff concerning the facts to which he could testify, and promised them to be present in court on the morning following at 9:30; that before that hour defendant Hopkins, an agent of the defendant railway company, and a third party unknown to him, secreted him in a room in a downtown office building, and compelled him to stay in hiding until the trial was concluded. | County; R. Lee McCulloch, Judge.

The other affidavits present material matters. but they need not be considered here. There were no counter affidavits filed, and the facts disclosed stand admitted.

The action of these parties in thus suppressing material testimony constituted contempt (section 7309(8), Rev. Codes), a misdemeanor (section 8249, Rev. Codes), and misconduct or irregularity for which a new trial should have been granted (section 6794(1), Rev. Codes; 29 Cyc. 774).

While this court has no means of ascertaining the extent of the wrong done to plaintiff in this instance, we are not disposed to enter upon a critical analysis of the subject. The character of the offense committed is so odious and so utterly at war with every intelligent notion of the due administration of justice that the prevailing parties will not be permitted to profit by such wrongdoing. Barron v. Jackson, 40 N. H. 365; Carey v. King, 5 Ga. 75.

The order is reversed, and the cause is remanded for a new trial.

Reversed and remanded.

BRANTLY, C. J., and SANNER, J., concur.

ST. PAUL MACHINERY MFG. CO. v. BRUCE et al. (No. 3887.)

(Supreme Court of Montana. April 13, 1918.)

APPEAL AND ERROR \$\iff 927(7) -- REVIEW -- JUDGMENT ON DIRECTED VERDICT.

In order to sustain a judgment based upon

directed verdict, the question is not whether the inferences necessary to maintain respondent's case were permissible from the evidence, but whether they were necessary.

2. PARTNERSHIP 2218(3)—EVIDENCE—QUESTIONS FOR JURY.

In an action for the purchase price of goods sold, evidence held to make the question of defendant's partnership one for the jury.

3. PARTNERSHIP 6=28-LIABILITY AS PART-NER-INTENT.

No one who has not held himself out as a partner is liable as such unless he is a partner in fact, and whether he is so is a question of intent.

4. SALES \$\infty\$=179(4)\top-Defenses of Purchaser \top-Failure of Consideration.

Failure of consideration cannot be raised by one who accepts and retains property sold. SALES == 288(2) - DEFENSES - BREACH OF

WARRANTY. Breaches of warranty after acceptance of goods sold cannot be urged as a defense, but only as a counterclaim.

6. Pleading €=93(2) - Inconsistent Defenses—Sales.

One sued as partner for price of tractor sold to partnership may, under Rev. Codes, § 6549, permitting inconsistent defenses, plead non-existence of partnership, and in addition that there was a failure of consideration and breach of warranty, and evidence to rebut waiver by showing conditional acceptance of tractor was admissible as against objection that, if not a partner, it was immaterial to him.

Appeal from District Court, Lewis & Clark

facturing Company against A. C. Bruce, F. C. Parker, and F. J. Edwards, copartners doing business under the firm name and style of the Confederate Creek Farm. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

C. W. Wiley, of Ft. Benton, and Edw. Horsky, of Helena, for appellants. Day & Mapes, of Helena, for respondent.

SANNER, J. [1] Action by the respondent against "A. C. Bruce, F. C. Parker, and F. J. Edwards, partners doing business under the firm name and style of the Confederate Creek Farm," to recover the contract price of a certain tractor sold by the respondent to the Confederate Creek Farm. Bruce and Parken were not served, but issue was joined by the defendant Edwards, who denied the partnership, and alleged that the tractor was so deficient as to amount to failure of consideration and to such breaches of warranty as would defeat the right to recover the price. The court directed a verdict for the respondent and against Edwards, and he appeals from an order denying him a new trial. It is to be noticed that, since the verdict upon which the judgment stands was a directed one, the question is not whether the inferences necessary to maintain the respondent's case were from the evidence permissible, but whether they were necessary.

[2] 1. To support the issue of partnership the respondent presented these facts:

(a) On April 11, 1912, Edwards executed a deed conveying to Bruce and Parker an undivided one-sixth interest in and to certain real estate in Broadwater county, and signed a mutual option contract by which he should be privileged to repurchase said interest or they should be privileged to acquire an additional interest in said property up to "40 per cent." thereof. At the same time an agreement was entered into which recites the existence of said property, the ownership by Bruce and Parker of an undivided one-sixth interest therein, and by Edwards of an undivided five-sixths interest therein, the exist-· ence upon the land of certain personal property similarly owned, a purpose on the part of "all the owners \* \* \* to develop such property and \* \* \* to farm said lands in a farmerlike manner," and stipulates that the money "necessary for the contemplated development and operation of said property" shall be borrowed, or raised on mortgage to be executed by Edwards and wife; that all the obligations incurred in such "development and operation" shall be paid before there is any division of profits; that such "development and operation" shall be in charge of Parker, who shall give all his time and best efforts to the enterprise and receive a monthly compensation to be charged to the cost of in fact is a question of intent (Parchen v.

Action by the St. Paul Machinery Manu- 1 such "development and operation"; that all machinery, implements, and personal property bought for the "development and operation" of said real estate shall belong thereto and be owned by the parties in proportion to their respective interests therein; that after all obligations are paid, the remainder of the proceeds or profits shall be divided, one-half to Edwards and one-half to Bruce and Parker.

> (b) The sum of \$6,000 for the carrying out of the project was borrowed from the Union Bank & Trust Company of Helena, upon notes signed by Edwards, Bruce, and Parker. Thereafter it was ascertained that additional funds to the extent of \$2,000 would be needed, making in all \$8,000, and it was then agreed that Edwards should obtain the total sum from the Montana Life Insurance Company on mortgage of the real estate executed by Edwards and wife, with which moneys the notes to the Union Bank & Trust Company should be taken up and the balance applied to operating costs, all of which was done. Bruce and Parker had by this time paid the consideration for the deed, but apparently the latter had not been delivered. for the agreements and the deed were on July 22, 1912, placed in escrow with the stipulation that the deed should be delivered upon payment of the mortgage obligation to the Insurance Company.

> (c) The moneys procured for the development and operation of the property were carried in an account at the Union Bank in the name of the Confederate Creek Farm. Parker repaired to the lands and proceeded to carry on operations, plowing, seeding, buying machinery, and otherwise going forward with the work. Payments for current expense were made by check in the name of the Confederate Creek Farm, by Parker as On two occasions Edwards, at Parker's request, participated in the conduct of the concern, at one time buying seed potatoes, and at another buying a packer.

> (d) On July 24, 1912, Bruce and Parker ordered from the respondent a tractor, agreeing in the name of the Confederate Creek Farm to pay for it. The tractor was sent, tried, and retained, but not paid for. The development of the property did not prove a success, and neither Bruce nor Parker returned to the premises after December 19. 1912.

> [3] That we have here sufficient of the indicia of partnership to permit the inference of its existence cannot be doubted; but whether they command that inference is a different matter, especially when viewed in the light of all the evidence. No one who has not held himself out as a partner is liable as such unless he is a partner in fact (Rev. Codes, § 5492), and whether he is such

Anderson, 5 Mont. 438, 446, 5 Pac. 588, 51 Am. Rep. 65; McCormick v. Stimson, 54 Mont. 272, 169 Pac. 726). In none of the agreements is the word "partnership" to be found. This, of course, is not decisive; for, while an agreement by individuals to enter into a common enterprise does not necessarily create a partnership, even though that term is given to the association by the agreement itself, and while, on the other hand, a partnership may be the nature of an association, even though the parties say in their agreement that such is not their purpose (Beecher v. Bush, 45 Mich. 193, 7 N. W. 785, 40 Am. Rep. 465, quoted in Parchen v. Anderson, supra), still the presence or absence of a term so aptly characteristic is evidence of considerable value in determining the relationship intended to be created. Again, the existence of a partnership fund or common property is by no means established in this case beyond debate. Certainly such a fund is not to be seen in the land, as respondent insists, because none of the parties had any power or right of disposition over the interests of the others or beyond their own respective interests, specifically defined. Weiss v. Hamilton, 40 Mont. 99, 105 Pac. 74. Was it in the money raised for the purpose of carrying on the intended operations? The respondent does not so contend, and it is notable that the machinery, implements, and other property purchased with it were to "become a part of and belong to" the real estate, the tenure of which excludes the idea of partnership property. Finally, the fact that profits were to be shared is persuasive only. Parchen v. Anderson, supra: Beasley v. Berry, 33 Mont. 477, 84 Pac. 791; Flathead County State Bank v. Ingham, 51 Mont. 438, 153 Pac. 1005. Many agreements exist which contemplate a division of profits. but which are not partnerships. One of these is exhibited in Flathead County State Bank v. Ingham, just cited, the features of which are not essentially different from those presented here. Indeed, in the absence of any language constituting that mutual agency so necessary to a partnership (Parchen v. Anderson, supra; Croft et al. v. Bain et al., 49 Mont. 484, 143 Pac. 960), the situation in the two cases is the same; and if we substitute Edwards for Ingham, Bruce and Parker for Jones, and farming for horse raising, the resemblance is absolute, save for the fact that Ingham honored drafts, and thus created the fund to carry on that enterprise, whereas here the fund necessary to conduct the farming operations was ultimately raised by mortgage upon the land, which mortgage, or the indebtedness secured thereby, it was expressly stipulated must be fully paid before any profit sharing should occur.

Concerning the actions of Edwards to aid dicated for the exclusion of much of this evtene enterprise after it was launched, the evidence is conflicting; but, if he did what the respondent asserts, the actions in themselves none of his business whether the considera-

were colorless, and their significance depends upon the agreements which it is supposed they were designed to forward. The weakness of his case consists in the absence of any definite declaration that he had no intention to form a partnership; but he shows enough to present that attitude. He denies knowledge of the use of the name Confederate Creek Farm to describe any partnership or account. He supposed that when the papers were signed and the moneys procured that was all he had to do with the matter. and he never went upon the premises which. as he claims, Bruce and Parker were to farm and develop. On the whole evidence, therefore, we feel compelled to say that the question of partnership was for the jury.

[4-6] 2. Nor, in our opinion, was the evidence touching the sale of the tractor such as to command a drected verdict; for the effect of the ruling was to exclude failure of consideration and breaches of warranty from the case. It can be justified, assuming the partnership, only upon the view that failure of consideration cannot be raised by one who accepts and retains property sold, and that breaches of warranty after acceptance cannot be urged as a defense, but only as a counterclaim. These propositions are correct (Best Manufacturing Co. v. Hutton, 49 Mont. 78, 141 Pac. 653); but their application depends upon the existence of an unqualified or unconditional acceptance, and the acceptance here was not of that character. If it amounted to anything more than the final closure of an agreement to purchase the tractor, it was clearly subject to the warranty implied by law and to the guaranty expressed in the contract, which was to be for one year. This is the situation suggested by the evidence actually admitted. the appellant complains that the trial court excluded evidence which would have made a verdict by direction unthinkable. The evidence so offered discloses that after the purchase, or what is called the acceptance, the respondent made persistent efforts and repeated promises to rectify and make effective the machine, found to be seriously deficient. It tended to show that the so-called acceptance was regarded by purchaser and seller alike as a conditional one, and that the seller had waived the benefit of those terms of the contract in virtue of which the retention of the tractor would amount to an acceptance. It is manifest that a case made up of this excluded evidence and the evidence actually admitted would be an altogether different one from that presented in Berlin Machine Works v. Midland Coal & Lumber Co., 45 Mont. 390, 123 Pac. 396, or Best Manufacturing Co. v. Hutton, supra, relied on as justifying the rulings. One of the reasons indicated for the exclusion of much of this evidence is that, unless the appellant was a partner as alleged in the complaint, it was

tion failed or breaches of warranty occurred. This view is logical and at the proper stage of the case was presentable to the jury by suitable instructions; but it could not authorize the exclusion of the evidence because the appellant was entitled to deny the partnership and to plead the special defenses in his answer (Rev. Codes, \$ 6549; O'Donnell et al. v. City of Butte, 44 Mont. 97, 119 Pac. 281), leaving it to the jury to say whether either position had been maintained.

The order appealed from is reversed, and the cause is remanded for a new trial.

Reversed and remanded.

BRANTLY, C. J., and HOLLOWAY, J., concur.

BONHAM v. BONHAM. (No. 895.)

(Supreme Court of Wyoming. May 2, 1918.) DIVORCE \$\instruct{130}\$—EVIDENCE—SUFFICIENCY-CRUELTY.

In an action by a wife against her husband for divorce on account of cruelty, evidence held not sufficient to require judgment for plaintiff.

Error to District Court, Sheridan county; E. C. Raymond, Judge.

Suit by Virginia A. Bonham against Alfred E. Bonham for divorce. Judgment for defendant, and plaintiff brings error. firmed.

F. W. Byrd, of Sheridan, for plaintiff in error. R. E. McNally and D. L. Gogerty, both of Sheridan, for defendant in error.

POTTER, C. J. This is an action for divorce brought by Virginia A. Bonham against Alfred E. Bonham. The plaintiff asks in her petition also that a reasonable portion of the property held in defendant's name be awarded to her. At the conclusion of plaintiff's evidence, the court rendered a decision and judgment in favor of the defendant; this appearing to have been done without a motion or suggestion on the part of the defendant. The court found that the plaintiff had wholly failed to establish any ground for divorce, or any need for the intervention of the court in adjusting the property rights of the parties. The case is here on error, and the only question presented is the sufficiency of the evidence to sustain the finding and judgment denying plaintiff's right to a di-

The parties were married September 8, 1875, and lived together until February 9, 1915, when the plaintiff left the defendant and their home in Sheridan, in this state, and established another home in the same city for herself and a married son, referred to in the evidence as Will, with his five children, who had been making their home with the plaintiff and defendant for several months preceding the separation. That son appears | red so many years prior to the separation

to have had some trouble with his wife, and with his children he came to live with his parents, the parties to this suit, with their consent at the time. The defendant, after a few months, objected to his remaining there at his home with the children, and this seems to have been the chief cause of the difficulty between the plaintiff and defendant resulting in their separation; the plaintiff defending the son and insisting that he and his children be not compelled to leave the house.

It is alleged as ground for divorce that defendant had been guilty of extreme cruelty to the plaintiff. No act of physical or personal violence is alleged or shown. But the charge of cruelty is based upon certain alleged conduct of the defendant during the married life of the parties, and particularly the last year or two of their life together, consisting principally of occasional outbursts of anger over matters displeasing to him, accompanied by profane language, the defendant having a "miserable temper" as stated by the plaintiff in her testimony; habitual complaints and exhibition of anger upon a presentation of bills for living expenses: threats on one or two occasions when angry to kill himself; accusing the plaintiff of lying to him, the defendant, on one or two occasions during a disagreement concerning the son aforesaid and his failure to secure employment, or when he was angrily complaining about some other matter: during the earlier years of their marriage violently beating his Horses; complaining at one time about the plaintiff's wanting and having a special nurse when she was in the hospital for an operation; and one act of violence toward a son then about twelve years old, several years before their separation, when he was angered about something the boy had We have not attempted to mention done. every instance mentioned in the testimony of the exhibition of anger by the defendant during the married life of the parties, but what we have stated indicates generally the facts upon which the plaintiff bases her charges of cruelty. It appears from the testimony of the plaintiff that these outbursts of anger were not as a rule directed toward her. Indeed, in very few instances is it shown that the defendant exhibited any anger toward her or because of anything she had or had not done.

There are other acts alleged and testified to by the plaintiff which she says occurred during the early years of their married life, some of which are not at all corroborated and bear no relation to defendant's subsequent conduct complained of, and some shown only by his alleged admission to the plaintiff, such as at one time prior to their marriage that he had been a member of a vigilance committee in Colorado, all of which occuroccurring subsequently, that they are not entitled to consideration. One act of the defendant is alleged and testified to by the plaintiff, with some corroboration by other witnesses, as having occurred a few months prior to the separation. It is alleged, and the plaintiff testifies, that a few months prior to the separation the defendant, taking to his assistance an unmarried son then living with him, and the married son above mentioned, removed certain furniture of a tenant from one of his houses, and brought the same to the house where he, the defendant, was living, destroyed some of it and attempted to secrete the remainder; and it is sought by the evidence as to that matter to show that the defendant had burglarized the house and stolen the furniture. But it appears from the plaintiff's evidence that the defendant after having been arrested was discharged upon a preliminary hearing before the examining magistrate, and that the furniture which had been taken from the defendant's home upon a search warrant was returned to him by order of said magistrate. And there does not appear to have been any further attempt to hold or prosecute him.

The married son, about whose presence in the home the parties disagreed, testified against his father on his said examination, and the plaintiff offered or was willing to testify against him at that hearing, and she appears to have been very indignant over his discharge, showing her resentment to such an extent as to assert in her testimony that the defendant had "bought off" the prosecuting attorney and examining magistrate, and apparently without anything to justify the assertion except the fact that the proseouting attorney had not immediately authorized a search warrant when requested to do so, and that defendant was not bound over or held for trial on the charge against him. And it appears also from the plaintiff's testimony, on cross-examination that shortly before the hearing aforesaid she had gone to the county and prosecuting attorney proposing or suggesting that the defendant be tried on a charge of insanity; but she explained that she first went to the family doctor and he told her to go to the county attorney. She further testified about that as follows:

"Q. Wasn't Bill trying to railroad your husband to the penitentiary or insane asylum? A. No, sir: he was like me. He was up a stump. Q. Didn't he know enough to get out and leave his father? A. How would you like to get out in the dead of winter with the children? The month of August, when the boy was not working, he had money at that time and was turning in money all the time. Q. So when Mr. Bonham was tried on this charge of larceny, you not only offered to testify against him and Will did testify against him, but you went to the county attorney to try to have him taken up for insanity? A. No, that was before this came up, before Christmas, and this trial never came up until the day before we left home the 8th of February. Q. At that time you said

and are so clearly unrelated to anything | Mr. Bonham was insane? A. We didn't know. We knew he had this sick spell."

> It appears that about a year, or perhaps two years, before the plaintiff left the defendant, the latter had a severe sickness, and most of the occasions of the exhibition of temper mentioned in the evidence appear to have occurred after that. The evidence is to be understood, we think, as showing that after the "sick spell," as it is referred to in the testimony, the defendant became less able to control his feeling of displeasure or his disposition to anger. But during that period his anger seems to have been caused chiefly by the fact that his married son aforesaid, while without steady employment, continued to remain at his house. He expressed a desire that they leave his home, while the plaintiff insisted that they should remain. And, as above indicated, we think it apparent that this became the chief cause of the difficulty between the parties, and the controlling cause of plaintiff leaving the defendant and establishing another home for herself with her said son and the latter's children. She testifies that she took care of that home, doing the cooking and other housework; her son then securing regular employment.

> As a part of the evidence indicating that the son Will's presence in the home was the principal cause of the difficulty, we quote further from plaintiff's cross-examination:

Q. Referring to the trouble last winter with reference to the Harris property being stolen, that trouble occurred at the height of the fami-A. No family troubles had ever been before. He troubles between Bill and Bill's family? was in October that he began. It was soon after that he began to carry on. Q. October, 1914? A. October, about the 20th, 1914. Q. 1914? A. October, about the 20th, 1914. Q. Then is when your trouble started? A. That is when he started to carry on about Bill being there with the children: along in November was the first I heard him say. It was about the time Will did a little piece of work for you. Q. What was the nature of this trouble with Bill? A. It seemed as though he thought that Will wasn't paying in as much as his share. The boy paid in all he had, all he could earn and had a chance to earn. He was going every place in this town knocking him. There wasn't a place that he didn't knock against Will. O. place in this town knocking him. There wasn't a place that he didn't knock against Will. Q. You mean to say that he was knocking against Will all the time? A. He swore that boy couldn't get a day's work in this town, and, 'I'll see that he can't get a day's work in this town.' Q. At the time Bill came to town. trying to railroad your hustiary or insane asylum? A. ke me. He was up a stump, enough to get out and leave ow would you like to get out ter with the children? The when the boy was not workat that time and was turning that time, Q. So when Mr. on this charge of larceny, do to testify against him and ainst him, but you went to yo to try to have him taken A. No, that was before this iristmas, and this trial never day before we left home the Q. At that time you said things were congenial then for a while between

didn't think he did, because Bill was working the high school, as the plaintiff testified, and He even walked to the mines a half dozen times. Q. You say, a few days before Thanksgiving, Q. 10u say, a few days before Thanksgiving, Mr. Bonham reared up and started raising this trouble because Bill wasn't working. Prior to that time and during the months of August, September; and October. was Mr. Bonham treating Bill and his family all right? A. He did until after he took those goods. Then he became to rear part terms and them. gan to rear and tear around then. Your affection for Mr. Bonham hadn't abated in the least on October 19th or 20th, when this trouble came. At that time you had the very kindest feelings? A. No, sir; not from the time he began to carry on, after he had that sick spell. Nobody can stand such carrying on as he had for months. He wasn't mad at Will, as he had for months. He wasn't mad at Will, but he was mad at everything he happened to think about. Q. When the trouble started between Bill and his father, you know when that started? A. It was along in November some time, I think it was. Q. Now, before that, Bill and his father got along all right? A. As far as I know. Q. Now, you and Mr. Bonham were getting along all right at that time? A. No, we wasn't, and hadn't for many years."

The plaintiff relies upon the principle, stated in the brief as the modern rule, and citing the note to Goff v. Goff. 9 Ann. Cas. 1091, that any unjustifiable conduct which so grievously wounds the mental feelings of husband or wife, or utterly destroys his or her peace of mind, as to seriously endanger life or impair bodily health, or which utterly destroys the legitimate ends and objects of matrimony, constitutes cruelty, although no physical or personal violence may be inflicted or even threatened, or reasonably apprehended. If that principle be accepted, a careful examination of the evidence in this case fails to convince us that the trial court erred in holding the evidence insufficient to establish a ground for divorce. It is stated in the same note, and it seems to be a general rule, that mere austerity of temper, petulance of manner, rudeness of language, a want of civil attention, even occasional sallies of passion, if they do not threaten bodily harm, do not constitute cruelty. 14 Cyc. 608, and see note to Mosher v. Mosher, 12 L. R. A. (N. S.) 820. We think it unnecessary to rehearse the evidence more in detail. It would serve no useful purpose to do so. The trial court had not only the evidence contained in this record before it, but the witnesses were also before that court, and the latter was able to consider the testimony of the plaintiff, in view of her appearance on the stand, and to observe her general demeanor as well as her condition as to health and the presence or absence of suffering of mind or body. And that court was in a much better position than this court to determine whether the acts of the defendant complained of had seriously endangered the plaintiff's life or impaired her health. And, considering the long period of time that the parties had lived together and had worked together to accumulate what property they had, that they had raised a family of five

that most of the angry outbursts and acts of which the plaintiff complains occurred after his sick spell and while he appears to have been annoyed by the continued presence of the married son aforesaid and his children in his home, without the son obtaining employment and contributing as much as he thought he should to the household expenses, we cannot doubt the correctness of the trial court's conclusion.

Some of the property accumulated by the parties, consisting of certain lots and improvements, appears to have stood in the name of the plaintiff, and she was receiving the income thereof. Moreover, it appears that while the parties were living together neither one had freer access to the family pocketbook than the other. It appears further that the defendant was anxious for the plaintiff to return to him, and in his answer he denies the various charges of cruelty alleged against him, and alleges that the plaintiff left his home over his protest and against his will, but that it remains as ever open to her, and that her presence there is desired and hoped for by him. The judgment will be affirmed.

Affirmed.

BEARD and BLYDENBURGH, JJ., con-

ARNOLD v. NICHOLS. (No. 906.)

(Supreme Court of Wyoming. May 2, 1918.) APPEAL AND EBBOR \$\infty 655(2) - BILL OF EXCEPTIONS-TIME FOR ALLOWANCE.

Where a decree was rendered May 5th, and motion for new trial denied May 13th, and the bill of exceptions was not presented for allowance until September 30th, the bill of exceptions must be stricken, as not having been presented for allowance in time.

2. Quieting Title \$34(1)-Petition-Suf-FICIENCY.

A petition in a suit to quiet title and to cancel a mortgage, alleging that plaintiff was the owner in fee simple under a warranty deed, that G. and R., prior to plaintiff's acquisition of title, were the owners thereof and conveyed by warranty deed to one through whom by mesne conveyance plaintiff obtained title, that at such time the mortgage sought to be canceled was a valid and subsisting lien, that after the debt secured thereby became due G. purchased the mortgage and had the same assigned to him, and thereafter assigned it without recourse to defendant, both assignments being placed on record, stated a good cause of action.

3. ESTOPPEL \$\infty 38 - DISCHARGE - ACQUISI-

TION OF MORTGAGE BY WARRANTOR.

Where one who has conveyed with warranty land which is subject to a mortgage afterwards takes an assignment of such mortgage, the mortgage becomes discharged by coming into his hands.

Error to District Court, Crook County; E. C. Raymond, Judge.

Action by William R. Nichols against Alice Arnold to quiet title. Decree for plainchildren, all of whom had graduated from tiff, and defendant brings error. Affirmed.

Harry P. Ilsley, of Sundance, for plaintiff in error. M. Nichols, of Sundance, for defendant in error.

BEARD, J. The defendant in error, William R. Nichols, brought an action against the plaintiff in error, Alice Arnold, in the district court to quiet title in him to certain described real estate and to cancel a certain mortgage of record thereon. Decree was entered in favor of plaintiff below, and defendant, Arnold, brings error.

[1] Defendant in error filed a motion to strike the bill of exceptions from the record. for the reason that it was not presented for allowance within the required time. decree was rendered May 5, 1916, the motion for a new trial denied May 13, 1916, and the bill was not presented for allowance until September 30, 1916. The trial judge who signed the bill certifies that "time for allowing bill of exceptions was not asked for or granted." Following the rule announced in International Harvester Co. v. Jackson Lumber Co., 170 Pac. 6, decided by this court January 21, 1918, the motion to strike the bill from the record must be granted, and the bill of exceptions is therefore stricken from the record.

[2] In the absence of a bill of exceptions. the only question presented by the record here is the sufficiency of the petition to state a cause of action. The petition was not demurred to in the court below, and the question is raised for the first time here by the petition in error. While the objection that the facts stated in a petition are insufficient to constitute a cause of action may be made for the first time in this court, the better practice is to do so by demurrer in the trial court. The petition in this case is quite inartificially drawn, but, fairly construed, we think it states a cause of action. It is alleged, in substance, that plaintiff is the owner in fee simple of the land described in the petition by virtue of a warranty deed; that Charles Graham and Menirva J. Ross, prior to the time plaintiff acquired title to said land, were the owners thereof and conveyed the same by warranty deed to John A. Ross through whom by mesne conveyances plaintiff obtained title; that at the time of said conveyance by said Graham and Menirva Ross the mortgage sought to be canceled in this action was a valid and subsisting lien of record on said land; that thereafter, and after the debt secured by said mortgage became due, said Graham purchased said mortgage and had the same assigned to him, and thereafter assigned the same, without recourse, to defendant Alice Arnold, both of

L. M. Simons, of Belle Fourche, S. D., and warranty of the title against incumbrances by Graham, a breach of the warranty by reason of the existence of the mortgage on the land at the time he conveyed it, and that he thereafter became the owner of the mortgage.

> [3] Upon the facts alleged in the petition, the purchase of the mortgage by Graham extinguished the lien; the rule being that payment by one who has warranted against incumbrances extinguishes them. "When one who has conveyed land with warranty, which is subject to a mortgage, whether made by him or by another, afterwards takes an assignment of such mortgage, he holds it for the benefit of the person to whom he has granted the land, and the mortgage is in fact discharged by coming into his hands. Even if he should assign it to one who in good faith pays full consideration for it, the purchaser would acquire no lien upon the land." 2 Jones on Mortgages (7th Ed.) § 867. The facts stated in the petition in this case bring it within that rule. Graham by his deed covenanted to protect the title against incumbrances, and at that time the mortgage in question was a valid lien upon the land. When he took it up, he simply did that which he had agreed to do, and by so doing the lien was extinguished. All he acquired by his purchase of the mortgage, if anything, was a personal claim against the mortgagors. and his assignee, defendant, Alice Arnold, took nothing more, especially as the debt secured by the mortgage was then past due. There being nothing stated in the petition which would tend to take the case out of the rule above stated, the petition stated a cause of action.

> No prejudicial error being made to appear by the record, the judgment is affirmed. Affirmed.

> POTTER, C. J., and BLYDENBURGH, J. concur.

> STATE ex rel. NORTHERN PAC. RY. CO. v. SUPERIOR COURT OF WASHINGTON FOR KING COUNTY et al. (No. 14523.)

(Supreme Court of Washington. April 16, 1918.)

1. JUDGMENT €==207 — MODIFICATION OF VA-CATION—COMMON LAW.

At common law, a court might at any time during the term modify or vacate a judgment to make it conform to the judgment actually rendered; but after adjournment it was powerless to protect itself from its own errors or the parties from fraudulent interference in procuring judgments.

2. JUDGMENT &= 407(5)—VACATION—REMEDY.
In view of Rem. Code 1915, §§ 303, 464, allowing modification of judgment for mistake, inadvertence, surprise, or excusable neglect withwhich assignments were placed on record.
We think the petition, when liberally construed, as it must be when attacked for the first time in this court, fairly alleges the judgment, exclusively by suit in equity. 3. JUDGMENT \$2569-RES JUDICATA-JUDG- have acted on the faith of the entry." MENT NOT ON MERITS.

The court being without jurisdiction to hear a motion under Rem. Code 1915, §§ 303, 464, to vacate and amend a judgment, its judgment denying such relief would not bind appliant in the court of the co cant in a suit on the merits for equitable relief from such judgment.

Original application for Department 2. prohibition by the State, on the relation of the Northern Pacific Railway Company, against the Superior Court of the State of Washington for King County and Hon. King Dykeman, Judge thereof. Writ ordered to issue.

C. H. Winders, of Seattle, for plaintiff. Ralph S. Pierce, of Seattle, for defendants.

CHADWICK, J. A judgment was entered on the 26th day of September, 1916, in the case of Northern Pacific Railway Company v. Gottleib Weibel in the Superior Court for King County. After a lapse of more than one year, application was made by counsel for Weibel to reopen the judgment and make it conform, as he contends, to an oral stipulation of the parties, which he insists is shown by the minute entry of the clerk made at the time. The case was settled in court but without trial. The minute entry is as follows:

"Counsel for parties stipulate in open court that a decree be entered awarding to plaintiff title of a strip of land six (6) feet wide adjoining the easterly rail of the plaintiff track and awarding the defendant the remainder of land in controversy.

A form of judgment was prepared by counsel for the Northern Pacific Railway Company. This judgment was "O. K'd." by counsel for Weibel, and duly entered.

Counsel for respondent, who was counsel for Weibel at the time the judgment was entered, asserts that the property as agreed upon is not as described in the judgment; that he "O. K.'d." the judgment as prepared by counsel for relator assuming that it correctly stated the fact, and as it is evidenced by the minute entry of the clerk. The respondent court, being of the opinion that the judgment was erroneous, in that it did not correctly describe the property, and did not in other respects conform to the oral stipulation, which the parties had entered into, took the matter under advisement with the announcement that he would vacate and amend the judgment. Whereupon relator made application in this court for an original writ of

Relator has demurred to respondents' answer, contending that the court is without jurisdiction to proceed under either section 303 or section 464 of the Code. Respondent insists that the court "has inherent power, independent of the statute, to so modify its judgment entry as to make it conform to the judgment actually entered [rendered], at any time, when to do so will not affect the sub-

O'Bryan v. American Investment & Improvement Co., 50 Wash. 371, 97 Pac. 241. Litzel! v. Hart, 96 Wash. 471, 165 Pac. 398, 1s cited. In that case it is held that, when the original decree is not the decree actually rendered by the court, the court has inherent power to make it conform to the judgment actually rendered.

[1] At common law a court might at any time during the term modify or vacate a judgment to make it conform to the judgment actually rendered. After adjournment of the term, a court was powerless to protect itself from its own errors, or the parties from fraudulent interference in the procuring of judgments. In consequence of the hardships of the common-law rule, statutes have been passed in many states providing for a definite time within which courts may vacate or modify judgments. In this state this may be done by motion or petition, if the matter is called to the attention of the court within one year. Seattle v. Krutz, 78 Wash. 553, 139 Pac. 498; State ex rel. Pacific Loan Co. v. Superior Court, 84 Wash. 392, 146 Pac. 834.

The grounds upon which a judgment may be vacated or modified are fixed by statute. These grounds, in so far as they affect the present proceeding, are "\* \* mistake. inadvertence, surprise, or excusable neglect." Rem. Code, § 303. But this statute was not ample to do justice in all cases, and consequently this court has held a party may, after the expiration of the time limited by law, file a bill in equity to relieve himself of a judgment where its enforcement would result in inequity. Anderson v. Burgoyne, 60 Wash. 511, 111 Pac. 777; Rowe v. Silbaugh, 96 Wash. 138, 164 Pac. 923; Denny Renton Clay & Coal Co. v. Sartori, 87 Wash. 545, 151 Pac. 1088. A bill in equity must, however, be founded upon some recognized doctrine of equity jurisprudence. The motion in the instant case, if considered at all, would have to rest upon the ground of excusable neglect. This is a statutory ground. The application is not timely, and must be denied.

If the entry of the judgment under the circumstances as alleged by the moving party operated as a constructive fraud, the remedy, if any there be, is by bill in equity where witnesses may be called and the matter tried out as in an ordinary suit. The broad statements of the law contained in the cases cited be respondent are correct if treated as abstract propositions. A court has inherent power to make its judgments conform to the truth, but it does not follow that the Legislature may not fix a time, beyond which a court may not exercise even an inherent power. Being so limited by statute, the court is without jurisdiction to proceed either upon its own motion, or the motion or petition of a stantial rights of innocent third persons who litigant, to vacate a judgment after the expiration of a year. This holding is sustained, not only by reference to the statute, but by reasons of public policy. It tends to give finality to judgments and to bring litigation to an end. In the O'Bryan Case the motion was made within the year. The Litzell Case was an original proceeding, and can be sustained upon the ground, either that it had been begun within the year, or that it was an original suit in equity.

[2, 3] If Weibel has any rights of which the court ought to take notice, his remedy is in equity. It was suggested in argument that, if this writ issues, Weibel will be barred of all remedy; that our order will be res judicata. But this does not follow. The court being without jurisdiction to hear the motion, a judgment would not bind him in a suit upon the merits. It is a rule of law and procedure that one who has mistaken his remedy, and who has not been called upon to affirm an issue of fact, or law, going to the merits of the case, can assert his right to a remedy which the law will allow in a subsequent suit.

The writ will issue.

ELLIS, C. J., and MOUNT and HOLCOMB, JJ., concur.

In re SHILSHOLE AVE. IN CITY OF SEATTLE.

BALCOM MILLS, Inc., et al. v. CITY OF SEATTLE.

Petition of CAMPBELL. (No. 13750.) (Supreme Court of Washington. April 15, 1918.)

1. JUDGMENT €=321 — MODIFICATION — MISTAKE—TIME.

Whether application for modification of a judgment for mistake and inadvertence is made under Rem. Code 1915, § 303, as to amendment of proceedings for mistake or inadvertence, or sections 484-473, requiring modification for mistake to be applied for within one year, it must be made within a year from the entry of the judgment.

But since an appeal may consume the entire year, the time during which an appeal is pending should not be counted in determining whether the application for modification has been made within a year.

Ellis, C. J., dissenting.

Proceeding by the City of Seattle against Balcom Mills, Incorporated, and others for the assessment for change of grade in the matter of Shilshole Avenue. On application of Edwin E. Campbell for leave to petition the lower court for modification of the judgment canceling the assessment on certain lands. Application granted.

See, also, 94 Wash. 583, 162 Pac. 1010.

Hugh M. Caldwell, Walter F. Meier and Edwin C. Ewing, all of Seattle, for appellant. William Froude, Higgins & Hughes, Donworth & Todd, J. P. Wall, and W. W. Wilshire, all of Seattle, for respondents.

FULLERTON, J. The city of Seattle caused a change of grade in certain of its streets and avenues, the change being made necessary by the construction of the Lake Washington canal. To meet the expense of reconstructing the streets to make them conform te the grades established, an assessment was levied upon abutting and adjoining property claimed by the city to be benefited by the Among the property so assessed change. were lots 28 and 29, in block 71, of Gilman Park addition to the city of Seattle, then and now the property of one Edwin E. Campbell. Lots in the block named belonging to other owners were also assessed and Campbell, along with these owners, objected to the assessments before the city council. When the assessment roll was brought on for hearing by that body, the objections were overruled, and Campbell with the other owners appealed to the superior court. At the conclusion of the hearing in the superior court. a judgment was entered canceling the assessments on all of the lots in block 71 except the assessment upon lot 28. From the judgment of the superior court the city appealed to this court, where the judgment was affirmed. The record shows that the judgment of the superior court was entered on February 29, 1916, that the opinion of the court affirming the judgment was handed down on February 8, 1917, and that remittitur was forwarded to the superior court on April 11, 1917.

On January 23, 1918, Campbell filed in this court the application now before us, asking leave of this court to petition the lower court for a modification of the judgment. The application was accompanied by an affidavit. in which it is averred that lot 28 was in the same situation as other lots in block 71 in so far as the legality of the assessment was concerned, and that the court in fact did order the assessment upon the lot canceled. but that it was not included in the formal judgment entered through mistake and inadvertence; the affidavit further averring that the applicant did not discover the omission until the city had threatened to enforce the assessment after the return of the remittitur from this court.

[1] The city of Seattle opposes the application on the ground that it was not made within a year after the entry of the judgment in the trial court. Against this the applicant contends, first, that it is an application under section 303 of the Code (Rem.). and that there is no limitation as to the time within which an application may be made to relieve from a judgment on the grounds therein recited, notwithstanding there may be a limitation to an application under sections 464-473. In support of this position the applicant cites the case of Marston v. Humes, 3 Wash. 267, 28 Pac. 520. It must be conceded that the case as decided

limitation, there is no limitation as to the time within which a party may be relieved from a judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect. It will be seen, however, from an examination of the opinion, that the question was not much considered by the court, as it was "practically conceded by counsel for the petitioner that \* \* \* the court had jurisdiction to enter the order in question. \* \* \*" But if the case is to be taken as authority for the proposition, it has been many times overruled. Since the decision in that case, although without directly referring to it, we have repeatedly held that the limitation of one year prescribed in section 466 of the Code fixed the extreme limit within which judgments can be vacated on motion or by petition.

The question was squarely before us in Keith v. Rose, 59 Wash. 197, 109 Pac. 810. That was an appeal from a judgment entered in an action brought to recover real property sold under a judgment in a tax foreclosure proceeding which had been vacated on motion after the sale was made and after the limitation of one year. We held the vacation without force, because made after the year had expired and after the court had lost jurisdiction over the subject-matter. In the course of the opinion, Chief Justice Rudkin used this language:

"Proceedings to vacate a judgment must be instituted under either section 303 or section 464. Rem. & Bal. Code. Under section 303 as originally enacted (Code of 1881, \$ 109), the application had to be made within a reasonable time, not exceeding five months after the expiration of the term. Terms of court were abolished by the Constitution, and the limit with reference to the term was left out of the amendment of February 26, 1891 (Laws of 1891, p. 106; Rem. & Bal. Code, \$ 303), but the Legislature did not thereby intend that such motions should be entertained at any time after judgment. Section 466, Rem. & Bal. Code, fixes the extreme limit beyond which judgments cannot be vacated on motion at one year, and such has been the limitation uniformly applied by this law. Greene v. Williams, 13 Wash. 674, 43 Pac. 938; Denton v. Merchants' Nat. Bank, 18 Wash. 387, 51 Pac. 473; Boston Nat. Bank, v. Hammond, 21 Wash. 158, 57 Pac. 365; Twigg v. James. 37 Wash. 434, 79 Pac. 959; Scott v. Hanford, 37 Wash. 5, 79 Pac. 481."

To the cases cited by the learned Chief Justice may be added the following subsequent cases: State ex rel. Pacific, etc., Co. v. Superior Court, 84 Wash. 392, 146 Pac. 834; Denny-Renton Clay & Coal Co. v. Sartori, 87 Wash. 545, 151 Pac. 1088; Davis v. Seavey, 95 Wash. 57, 163 Pac. 35; Litzell v. Hart, 96 Wash. 471, 165 Pac. 893; Burke v. Bladine, 169 Pac. 811; State ex rel. N. P. R. Co. v. Superior Court, 172 Pac. 336.

We have no doubt therefore that, notwithstanding the case relied upon by the applicant, the prevailing rule is that an application for relief from, or for the modification or vacation of, a judgment, whether made this court will, upon a proper showing made

holds that, outside of the general statute of under section 303 or under sections 464-473 limitation, there is no limitation as to the of the Code, must be made within a year time within which a party may be relieved from the entry of the judgment.

[2] A second contention is that the limitation, conceding it to apply to section 303. is not a bar to the present application. From the facts before recited it will be observed that the judgment was in favor of the applicant, that the opposing party appealed therefrom, that the appeal pended in this court until after the expiration of a year from the date of the entry of the judgment in the superior court, and that the applicant did not discover the inadvertence therein until after it had been remanded on affirmance by this court. It is urged that, because of this condition, either the period of limitation should be held to begin to run from the date of the affirmance of the judgment by this court, or the time during which the cause was pending in the appellate court should not be counted in determining the period of the statute; otherwise, a litigant affected by an inadvertent judgment entry may be denied the benefit of the statute. We think there is merit in the contention, especially in view of our holdings on cognate questions. We have held that an appeal from a judgment of the superior court transfers the cause to this court, and that the superior court is without power pending the appeal to vacate, change or modify the judgment. State ex rel. Mullen v. Superior Court, 15 Wash. 376, 46 Pac. 402; Canada Settlers' L. & T. Co. v. Murray, 20 Wash. 656, 56 Psc. 368; Ætna Life Ins. Co. v. Thompson, 34 Wash. 610, 76 Pac. 105; Inland Nursery, etc., Co. v. Rice, 56 Wash. 21, 104 Pac. 1117; Gust v. Gust, 71 Wash. 75, 127 Pac. 566; Kawabe v. Continental Life Ins. Co., 169 Pac. 329.

We have held also that this court in the consideration of an appealed cause must consider it upon the record as made, being without power to open up the cause for the introduction of extrinsic matters or to authorize the trial court to do so while it still retained jurisdiction of the cause. Kawabe v. Continental Life Ins. Co., 97 Wash. 257, 166 Pac. 617.

So we have held that a judgment of the superior court appealed to this court and determined upon its merits becomes in effect a judgment of this court, and that the trial court is without power after its remand co vacate or otherwise modify it on motion or petition except in such manner as may be necessary to carry out the mandate of this court. Kath v. Brown, 53 Wash. 480, 102 Pac. 424, 132 Am. St. Rep. 1084; Richardson v. Sears, 87 Wash. 207, 151 Pac. 504; Pacific Drug Co. v. Hamilton, 76 Wash. 524, 136 Pac. 1144; State ex rel. Jefferson County v. Hatch, 86 Wash. 164, 78 Pac. 796; State ex rel. Wolferman v. Superior Court, 8 Wash. 591, 36 Pac. 443. The latter rule is subject to the modification, however, that lower court for the vacation of a judgment affirmed by this court, for all or any of the causes set forth in section 303 of the Code or for any or all of the causes set forth in the chapter of the Code included within sections 464-473. Post v. Spokane, 28 Wash. 701, 69 Pac. 371, 1104; State ex rel. Post v. Superior Court, 31 Wash. 53, 71 Pac. 740; Post v. Spokane, 35 Wash. 114, 76 Pac. 510; Kath v. Brown, 69 Wash. 306, 124 Pac. 900; Kawabe v. Continental Life Ins. Co., 169 Pac. 329.

It is readily seen from these holdings that, the limitation prescribed in the statute is to be held to run without cessation from the date of the entry of the judgment in the superior court, a party to such a judgment may, without fault of his own, be denied the opportunity, granted him by the terms of the statute, to correct any defect therein. Appeals from judgment, it will be remembered, may be taken by giving oral notice at the time the judgment is rendered, or may be taken by giving written notice immediately thereafter. Pending the appeal, the respondent therein has no control over it except to see that it is prosecuted with reasonable diligence; he may not during that time, either in the court of original jurisdiction or in the appeal court, move for the vacation or modification. As is shown in the present case and in other cases where rearguments have been found necessary, the appeal may pend for the entire statutory year no matter with what diligence it is pursued. In every case therefore when these conditions combine a respondent who discovers an inadvertence in the judgment materially affecting his interests is for want of an opportunity denied the right to have it corrected. It is our opinion that this was not the purpose or intent of the statute. We think it was intended that the remedy should be open for a full year and lost, if lost at all, not by fortuitous circumstances without the control of the party, but by his own omission or neglect. So concluding, we hold that the time during which the appeal was pending should not be counted as part of the time within which the applicant was required to move against the judgment.

It is no answer to this position to say that the applicant himself might have appealed from the judgment. His prima facie showing is that he did not discover it in time. Moreover, to hold that because he did not appeal he has lost the benefit given him by statute would be a perversion of the statute. The very purpose of the statute is to give an opportunity to correct inadvertences which were undiscoverable at the time of the judgment, or inadvertences existing at the time which the party is excused for failing to discover.

As shown in the case of Denny-Renton Clay & Coal Co. v. Sartori, 87 Wash. 545, the fraudulent mortgagor.

within the year, grant leave to apply to the [151 Pac. 1088, this court denied an application to vacate a judgment after the year from the date of the entry of the judgment in the superior court made on the ground of newly discovered evidence, although it appeared that an appeal of the cause had intervened between the entry of the judgment and the date of the application which. had it been taken into consideration, would have shown the application to have been made within the statutory time. As shown in the opinion cited, the application was denied from the bench without a formal written opinion. Whether the question here discussed was suggested at the hearing does not appear. Conceding, however, that it was suggested, we cannot regard the ruling as controlling in the present case.

> On the merits of the controversy, there is no denial of the facts set forth in the applicant's affidavit, and as these present a prima facie case for relief we have concluded that the application should be granted. It must be understood, however, that the application is not hereby predetermined. We merely grant to the superior court leave to entertain an application for a modification of the judgment. That court will, in considering it, exercise its own judicial discre-

Let an order be entered accordingly.

WEBSTER, MAIN, and PARKER, JJ., concur.

ELLIS, C. J. I dissent. The application could have been made and should have been made to this court for leave to move for correction in the lower court within the statutory period of one year.

FLORENCE v. DE BEAUMONT et al. (No. 14521.)

(Supreme Court of Washington. April 24, 1918.)

1. FRAUD 50-BURDEN OF PROOF. The burden of proving fraud is upon the party asserting it. 2. Attorney and Client \$==104-Notice-

AGENCY

AGENCY.
Defendant, being indebted, conveyed his property to one D., D. mortgaged the personal property to defendant M., the attorney for defendant, and D. also acted as attorney for M. in drawing up the chattel mortgage, but did not advise defendant M. as to D.'s title to the chattels or his right to mortgage them. Held, in a suit to recover unlawful preferences, that the attorney was not M.'s agent, so that his knowledge of defendant's insolvency and fraudulent purpose could be imputed to M.

ATTORNEY AND CLIENT 4=104-Notice-

CONCEALMENT.

The knowledge of an attorney that a chattel mortgage taken constitutes an unlawful pref-erence cannot be imputed to the mortgages when it had been willfully concealed by the attorney, who, while nominally acting as the mortgagee's attorney, was really representing

Asotin County: Chester F. Miller, Judge. Suit by Charles S. Florence, trustee of the estate of H. C. De Beaumont, against H. C. De Beaumont, F. G. Morrison, and others to set aside fraudulent conveyance. From a judgment dismissing the action as to defendant Morrison, plaintiff appeals. Affirmed.

Fred E. Butler, of Lewiston, Idaho, and E. J. Doyle, of Clarkston, for appellant. C. H. Baldwin, of Asotin, for respondent.

ELLIS, C. J. Plaintiff, trustee of the estate of H. C. De Beaumont, a bankrupt, brought this action against De Beaumont and wife, T. U. Denny and wife, and F. G. Morrison, to set aside as in fraud of creditors a deed and bill of sale made by De Beaumont and wife to Denny and a chattel mortgage made by Denny and wife to Morrison, and to recover the personal property transferred and mortgaged by these instruments, or its value, and further to recover from Denny the value of a crop of grain at the time of the transactions in question growing upon the land conveyed by De Beaumont and wife to Denny. It was orally stipulated in this court that F. G. Morrison after plaintiff took this appeal has died, and that Ellen T. Morrison, the duly appointed executrix of his estate, be substituted as respondent in this appeal.

We find it unnecessary to notice the pleadings further than to say that they sufficiently present the issue of good faith in these transactions. The cause was tried to the court without a jury. The court found in substance that upon and prior to May 12, 1914, De Beaumont and wife were the owners as their community property of 320 acres of land in Asotin county, Wash., subject to a mortgage for \$9,000 to the Holland Bank: that they also owned certain farm machinery, hogs, cattle, sheep, and eight work mules and harness; that the mules were subject to a mortgage of \$500 to the Holland Bank; that there was growing upon the premises during the seasons of 1914-15 a crop of grain; that the land and personal property constituted all of the property owned by the De Beaumonts at that time from which claims of creditors could be satisfied; that at that time and prior thereto De Beaumont was insolvent, owing debts in the sum of \$15,000; that on May 12, 1914, De Beaumont conveyed the real estate mentioned to Denny, and on the same day transferred and delivered to Denny all of the above-mentioned personal property and crops on the land; that the deed and bill of sale were filed for record on May 13, 1914, at the request of C. H. Baldwin, attorney for De Beaumont and Denny; that the deed and bill of sale were without consideration and were made for the purpose of hindering, delaying, and defrauding De Beaumont's creditors; that at the time of this transaction De Beaumont's attorney, Baldwin, was preparing for him a petition in bankruptcy, and that Denny

Department 1. Appeal from Superior Court, knew of De Beaumont's insolvency, and took the same for the purpose of assisting De Beaumont in defrauding his creditors; that for the purpose of securing Mrs. De Beaumont's signature to the deed and bill of sale Denny paid to her the sum of \$950, which thereby became community property of the De Beaumonts; that demand has been made by the trustee for the possession of the land and the delivery of the personal property upon Denny, who has refused to deliver the same, and upon Mrs. De Beaumont for the \$950 which she also has refused to pay to the trustee. Touching the mortgage from Denny to Morrison the court specifically found:

"(23) That on the 12th day of May, 1914, said T. U. Denny made, executed and delivered to F. G. Morrison a chattel mortgage to secure the payment of \$1,500 secured upon the personal property above mentioned and described, including said crop of grain.

"(24) That at the time said mortgage was made said F. G. Morrison was unable to leave his home on account of physical injury, and

his home on account of physical injury, and said Chas. H. Baldwin drew up said mortgage and looked after the interests of said Morrison

and looked after the interests of said morrison in taking said mortgage.

"(25) That at said time said Chas, H. Baldwin was the attorney of the said H. C. De Beaumont and knew of his insolvent condition.

"(26) That said chattel mortgage given to said F. G. Morrison by said T. U. Denny as aforeseid was in considerable. aforesaid was in consideration of the sum of \$1.500 paid by the said Morrison to the said

\$1,000 paid by the said morrison took said Denny.

"(27) That said F. G. Morrison took said chattel mortgage, without knowledge of the insolvent condition of said H. C. De Beaumont, and without knowledge of the fraudulent transactions which had taken place between said H. C. De Beaumont and said T. U. Denny, and was to the extent of his mortgage an innocent purchaser of said personal property covered

was to the extent of his mortgage an innocent purchaser of said personal property covered by his said mortgage. "(28) That the sum secured by said mort-gage was prior to the trial of this action repaid to the said F. G. Morrison by the said T. U. Denny, and that said mortgage has been satisfied and released.

"(29) That said F. G. Morrison has never received or converted to his use any property belonging to the estate of said H. C. De Beau-

belonging to the estate of said II. C. De Deaumont, bankrupt, as aforesaid.

"(30) That the value of the personal property transferred by said H. C. De Beaumont to T. U. Denny as aforesaid was \$2,000, and that the landlord's interest in the crops grown on the lands sold by said De Beaumont to said on the lands sold by said De Beaumont to said Denny was of the value of \$950; that the said T. U. Denny should be credited in his accounting with the sum of \$600 paid by him to the Holland Bank to release the mortgage on the mules described in said bill of sale, and with the sum of \$150 paid as interest on the real mortgage held by said Holland Bank, leaving a balance of \$2,200 to be accounted for by the said T. U. Denny to the said trustee."

Upon these findings and appropriate conclusions of law the court decreed that plaintiff have judgment against Denny and Mrs. De Beaumont, jointly, for the sum of \$950 and interest from May 18, 1913, aggregating \$1,160.58; that plaintiff recover from Denny the further sum of \$1,250, with interest from May 18, 1913, aggregating \$1,517.08; and that plaintiff recover his costs against the De Beaumonts and Denny. The court further ordered that the action be dismissed as when he received the deed and bill of sale to the defendant Morrison, and that he recover his costs. From this order of dismissal as to Morrison, plaintiff appeals.

We have examined the evidence as set out in the abstracts of record with frequent recourse to the statement of facts. We are satisfied that it supports the findings by a fair preponderance in every particular save one. The finding numbered 23 is in error in that it states that the original chattel mortgage from Denny to Morrison for \$1,500 covered a crop on the land. As a matter of fact the mortgage on the crop was executed on Octoher 20, 1914, for an additional sum of \$285, but we find this fact immaterial inasmuch as this money was loaned for the purpose and was used for the purpose of putting in the crop and was repaid from the crop, so that in any view of the case that transaction, both by reason of its date and purpose, was wholly devoid of any fraudulent design or injurious results to De Beaumont's creditors. It was wholly independent of the main transaction, and requires no further notice. The findings being sustained in other respects by ample evidence, we shall treat as established the fact that the transfers from De Beaumont to Denny were made in fraud of De Beaumont's creditors; that Denny was an active participant in the covinous purpose, but that Morrison had no actual knowledge thereof, or of De Beaumont's insolvency.

[1] It is elementary that the burden of proving fraud is upon the party who asserts There was no evidence whatever that Morrison actually knew of De Beaumont's insolvency, or of his purpose in making the transfers to Denny. In fact the evidence does not show that he was advised when he made the loan of \$1,500 that Denny was purchasing the chattels from De Beaumont. Were it not for the fact that the court found, on ample evidence, that the attorney who represented all parties in this transaction knew of De Beaumont's insolvent condition at the time and was preparing papers for his voluntary bankruptcy, the discussion would end here. But that fact makes it necessary to consider the question of law as to whether, in the light of all the evidence, the knowledge of the attorney must be imputed to Morrison so as to make him in law a participant in the covin of De Beaumont and Denny.

[2] As to what notice or knowledge of an agent or an attorney will impute notice to the principal or client we are committed to the rule stated by Mechem as sustained by reason and authority as follows:

"The law imputes to the principal, and charges him with, all notice or knowledge relating to the subject-matter of the agency which the agent acquires or obtains while acting as such agent and within the scope of his authority, or, according to the weight of authority, which he may previously have acquired, and which he then had in mind, or which he had acquired so recently as to reasonably warrant the assumption that he still retained it: Provided, however, that such notice or knowledge will not be imputed: (1) Where it is such as it is the

agent's duty not to disclose; (2) where the agent's relations to the subject-matter are so adverse as to practically destroy the relation of agency; and (3) where the person claiming the benefit of the notice, or those whom he represents. colluded with the agent to cheat or defraud the principal." 2 Mechem on Agency (2d Ed.) § 1813, p. 1397.

See Gaskill v. Northern Assurance Co., 73 Wash. 668, 132 Pac. 643.

Though this rule is a wholesome one and well sustained by authority, "the courts show a plain determination not to extend it, but to keep it confined within narrow and necessary limits." 2 Pomeroy, Equity Jurisprudence (2d Ed.) § 672, p. 1169. An agent or attorney can no more bind his principal by his knowledge than by his acts in matters outside the scope of his authority or employment. The knowledge of the agent to be notice to the principal must be that of an agent who has authority to deal for the principal in reference to the specific matter which the knowledge affects. As said by an eminent jurist in a well reasoned and leading case on this subject:

"The rule which imputes to the principal the knowledge possessed by the agent applies only to cases where the knowledge is possessed by an agent within the scope of whose authority the subject-matter lies; in other words, the knowledge or notice must come to an agent who has authority to deal in reference to those matters which the knowledge or notice affects. The facts of which the agent had notice must be within the scope of the agency, so that it becomes his duty to act upon them or communicate them to his principal. As it is the rule that whether the principal is bound by contracts entered into by the agent depends upon the nature and extent of the agency, so does the effect upon the principal of notice to the agent depend upon the same conditions. Hence, in order to determine whether the knowledge of the agent should be imputed to the principal, it becomes of primary importance to ascertain the exact scope and extent of the agency." Trentor v. Pothen, 46 Minn. 298, 300, 301, 49 N. W. 129, 24 Am. St. Rep. 225.

See, also, Atchison, etc., R. Co. v. Benton, 42 Kan. 698, 22 Pac. 698; Larzelere v. Starkweather, 38 Mich. 96.

The evidence before us makes it plain that the agency of Baldwin for Morrison was extremely limited in its subject-matter. So far as the record shows, it extended no further than to advise Morrison of the existence and physical value of the chattels on which he was lending his money. Before he talked with Baldwin he had practically agreed to lend the money to Denny whom he had known for some years. He had been injured in an accident, and was confined to his home when Baldwin came to him with the chattel mortgage, and because of his injury he then told Baldwin, who had in prior years been attorney for him in other matters, in substance that he would take his estimate of the property and make the loan. While he admitted that Baldwin was his agent to that extent, it is clear that throughout the whole transaction Baldwin was really the attorney

was serving them in his visit to Morrison. Denny's title to the chattels or his right to mortgage the same was a matter concerning which there is no evidence whatever that Morrison ever sought or received advice from Baldwin. That matter was wholly outside the scope of Baldwin's agency for Morrison so far as any such agency was established by the evidence. The fact that Baldwin drew the chattel mortgage we regard as immaterial. He received no fee from Morrison for doing so, nor in fact for any other services in the premises. He received his compensation for all of his services from Denny or De Beaumont. In any event he was a mere scrivener in drawing the chattel mortgage. We are clearly of the opinion that in view of the special and limited nature of Baldwin's agency for Morrison, Baldwin's knowledge of the insolvency and fraudulent purpose of De Beaumont, and of Denny's participation in that purpose cannot be imputed to Morrison.

[3] But there is another reason potent in equity why Morrison cannot be affected with notice of Baldwin's knowledge of the covinous nature of the transaction as between De Beaumont and Denny, whatever may have been the scope of Baldwin's agency for Morrison. Baldwin was agent and attorney for both Denny and De Beaumont on the one hand and for Morrison on the other. If Morrison told the truth Baldwin never advised him that De Beaumont was insolvent and was about to go into voluntary bankruptcy. or that the transfers of his property to Dennv were such as to be in fraud of De Beaumont's creditors, or that such was the purpose of De Beaumont and Denny. Obviously this knowledge was withheld from Morrison with the consent, or at least with the connivance, of both De Beaumont and Denny. True, nobody so testified in terms, but the facts clearly raise that inference. The very fact that Morrison did not actually know of the fraudulent purpose of De Beaumont and Denny who were acting under the advice and direction of Baldwin, and who, as Baldwin knew, had to have the money from Morrison in order to carry out that purpose by securing Mrs. De Beaumont's co-operation, makes the inference that Denny and De Beaumont knew that the knowledge would be withheld by Baldwin from Morrison almost a certainty. At any rate, that was an inference which the trial court had the right to draw from the undisputed facts. In such a case the concealment constitutes a fraud upon the party kept in ignorance; the agent himself being such an instrument in that fraud as, in the language of Mechem above quoted, "to practically destroy the relation of agency." Mechem. after pointing out that the rule of imputed notice rests in the assumption that the agent

touching the subject-matter material to the principal's protection and interest, says:

"This presumption however, it is said, will not prevail where it is certainly to be expected that the agent will not perform his duty, as where the agent, though nominally acting as such, is in reality acting in his own or another's interest, and adversely to that of his principal." 2 Mechem on Agency (2d Ed.) \$ 1815, p. 1399.

See, also, 2 Pomeroy, Equity Jurisprudence (3d Ed.) § 674.

From whatever angle this transaction may be viewed in the light of the evidence we are satisfied that Morrison had no actual knowledge of the fraudulent purpose of De Beaumont and Denny, and that notice cannot be imputed to him from his limited employment of their attorney, Baldwin, in this transaction. The judgment is affirmed.

WEBSTER, FULLERTON, MAIN, and PARKER, JJ., concur.

KLINE v. INDUSTRIAL INS. COMMISSION. (No. 14598.)

(Supreme Court of Washington. April 24, 1918.)

MASTER AND SERVANT \$\iff 417(9)\$—INJURIES TO SERVANTS—INDUSTRIAL INSURANCE COMMISSION—CONCLUSIVENESS OF JUDGMENT OF COURT.

Where a judgment on appeal directs the Industrial Insurance Commission to fix the amount of a lump sum award to a servant for a permanent partial disability, under Compensation Act (Laws 1911, p. 360, § 5, subd. "f"; Rem. Code 1915, § 6604—5, subd. "f") the commission may take into consideration competent medical advice as to the effect of an operation upon the injury, but cannot suspend compensation on the ground that the injury was a hernia, as to which by a rule of the commission, claimant is required to first undergo an operation.

from

Department 1. Appeal

Court, King County; A. W. Frater, Judge. Proceedings by John E. Kline against the Industrial Insurance Commission for an award under the Workmen's Compensation Act. The Commission disallowed the claim, and the claimant appealed to the Superior Court, which ordered the Commission to fix an award at a lump sum, and thereafter claimant made application for an order, directing the Commission to fix the amount of claimant's compensation, and from a denial of the application, claimant appeals.

Geo. McKay, of Seattle, for appellant. W. V. Tanner, Atty. Gen., and Howard Waterman, Asst. Atty. Gen., for respondent.

Reversed and remanded, with instructions.

an instrument in that fraud as, in the language of Mechem above quoted, "to practicallant, John E. Kline, received an injury in the destroy the relation of agency." Mechem, after pointing out that the rule of imputed filed a claim with the Industrial Insurance notice rests in the assumption that the agent will report to the principal everything he appealed to the superior court, alleging

that he had suffered a rupture known and classified in surgery as a "permanent partial disability" which had caused "permanent partial disability," upon which issue was duly joined. After a trial upon the merits the court made findings and conclusions to the effect that appellant, while engaged in an extrahazardous employment within the scope of the Workmen's Compensation Act, "suffered a rupture known and classified in surgery as a permanent partial disability. which has caused a permanent partial disability," upon which judgment was entered, ordering respondent to determine and fix the compensation of appellant according to law. This judgment was never appealed from, but remains in full force and effect.

Respondent having failed to comply with the judgment, an application was thereafter made to the superior court for an order compefling respondent to proceed to fix the amount of appellant's compensation in a lump sum as provided by law. The affidavit in support of the application sets forth that appellant has offered to furnish respondent proof as to the extent of his injury, which proof respondent refused to receive except

as shown by the following letter:

"Mr. John E. Kline, 3902 40th Ave., S. W., Seattle, Washington—Dear Sir: Subject: Re Claim No. 32617. Relative to the settlement of your claim with this department, you are advised that since your disability has been determined to be a hernia your case comes within the rules of the department governing settlethe rules of the department governing settlements for hernia, i. e., that no payment for permanent disability will be made in case of hernia, but the department requires an operation to head in those cases which according to tion to be had in these cases, which according to all medical advice renders the condition of the claimant as good if not better than it was prior to receiving the hernia. After an operation has been performed and we have been notition has been performed and we have been notified of the same, we pay compensation for time loss beginning five days prior to the date of operation, continuing until claimant is able to resume a gainful occupation. You may, therefore, understand that before any payment can be made to you it will be necessary for you to undergo an operation, and when you have same done you should notify us and payments will be made as above stated. Respectfully yours, Industrial Insurance Commission, by John M. Wilson, Chairman."

For return to the show cause order issued by the court respondent alleged:

"That on December 7, 1914, the Industrial Insurance Commission duly established and promulgated the following rules governing the administration of the Workmen's Compensation

"Rule I. (a) There must be an accident resulting in hernia. (b) It must appear suddenly. (c) Be accompanied by pain. (d) Immediately follow an accident. (e) There must be proof that the hernia did not exist prior to the acci-

dent.
"'Rule II. All hernia, inguinal or femoral, which are shown to come under rule I, while the workman is engaged in his usual occupation partial disability resulting after the operation. If so, it will be estimated and paid. Time loss If so, it will be estimated and paid. Time loss between the date of accident and the date of operation will not be allowed if longer than five

days.

"'Rule III. The hernia claimant whose case comes under rules 1 and 2, who persists in wearing a truss instead of being operated, puts himself in the same position as the man with the same position as the man with the same position. the fractured leg who refuses surgical attention. The commission may order him before a competent anesthetist to determine if he can safely take an anesthetic. If so, he must be operated to receive his time loss during the recovery from operation. If, however, it is shown that he had some about disease that renders it upsets has some chronic disease that renders it unsafe for him to take an anesthetic, his disability will be estimated as a permanent partial disability and claim settled as such.'

and claim settled as such."
"That the judgment in the above action made and entered on February 15, 1917, reads as follows: 'It is decreed that the defendant proceed to determine and fix the compensation of the plaintiff, according to law, and that it pay the sum of \$25.00 to George McKay, the attorney for the plaintiff."
"That pursuant to said judgment and pur-

"That pursuant to said judgment and pursuant to the rules above quoted, on May 17, 1917, the defendant directed the plaintiff to submit to surgical treatment by radical operation, as appears in the letter set forth in plaintiff, and the submit to submit to the order to show cause. That tiff's affidavit for the order to show cause. That such surgical treatment is reasonably essential to the recovery of the plaintiff. That plaintiff has refused to submit to such surgical treatment, and that the commission has therefore suspended the compensation of the plaintiff."

From an order denying the application this appeal is prosecuted.

Subdivision "f" of section 5, p. 360, Laws 1911 (Rem. Code, § 6604—5) provides:

"Permanent partial disability means the loss of either one foot, one leg, one hand, one arm, one eye, one or more fingers, one or more toes, any dislocation where ligaments are severed, or any dislocation where ligaments are severed, or any other injury known in surgery to be permanent partial disability. For any permanent partial disability resulting from an injury, the workman shall receive compensation in a lump sum in an amount equal to the extent of the injury, to be decided in the first instance by the department, but not in any case to exceed the sum of \$1,500.00. The loss of one major arm at or above the elbow shall be deemed the maximum permanent partial disability. Commaximum permanent partial disability. Compensation for any other permanent partial disability shall be in the proportion which the extent of such disability shall bear to the said maximum."

It will be seen that this statute in defining permanent partial disability, after specifying certain disabilities by name, concludes with the comprehensive definition, "or any other injury know in surgery to be permanent partial disability." It further provides that for an injury constituting such disability the workman shall receive compensation in a "lump sum" in an amount equal to the extent of his injury, to be ascertained in the manner therein prescribed. As already noted, the superior court expressly found that appellant had suffered a rupture which is known and classified in surgery as a permanent partial the workman is engaged in his usual occupation and in the course of his employment, shall be treated in a surgical manner by radical operation. If death results from such operation, the death claim shall be paid and considered as a result of the accident. On these cases, time loss only, shall be paid, unless it is shown by special examination that they have a permanent ity, and also indicates its purpose not to pensation in a lump sum as for permanent award appellant's compensation in a lump sum. The first sentence in the letter states:

"Relative to the settlement of your claim with this department, you are advised that since your disability has been determined to be a hernia your case comes within the rules of the deyour case comes within the rules of the de-partment governing settlements for hernia, i. e., that no payment for permanent disability will be made in case of hernia, but the department requires an operation to be had in these cases, which according to all medical advice renders the condition of the claimant as good if not better than it was prior to receiving the hernia."

The fallacy of this position lies in assuming that the judgment of the superior court merely determined that appellant's injury constituted hernia. What the court actually found was that appellant's rupture received in the course of his employment was a permanent partial disability within the meaning of the Workmen's Compensation Act, and as a result thereof appellant was permanently partially disabled; for which, under the provisions of the statute above set forth, he was entitled to compensation in a lump sum. This issue was squarely raised by the pleadings, and respondent cannot overthrow the judgment by invoking its own rules. The purpose of the procedure prescribed by the rules of the commission is to determine in a given case whether hernia constitutés a permanent partial disability or a temporary partial disability-a fact which in this case had already been determined by a valid judgment of a court having jurisdiction of both the subject-matter and the parties.

We are not called upon at this time to determine the extent of the commission's power to make rules for the purpose of ascertaining whether a particular injury constitutes permanent or temporary disability, nor whether the rules in question are reasonable or unreasonable. It is certain that, whatsoever authority it possesses in this respect, it cannot establish rules in direct conflict with the provisions of the act or defeat the mandate of a court of competent jurisdiction. It cannot provide for compensation in "payments" when the statute requires that the compensation shall be in gross; neither can it reverse the judgment of a court in an action to which it was a party by appealing to itself. When it was finally determined that appellant's injury constituted a permanent partial disability, the only course open to the commission was to proceed to fix the amount of the award in a lump sum against the accident fund. To sustain respondent's position would be to nullify a solemn judgment of a court of competent jurisdiction as well as to repeal an express provision of the statute. To illustrate: Let it be supposed that appellant should submit to radical operation which would effect a complete and permanent cure, this would demonstrate that his injury was temporary and not permanent. and thus deprive him of the right to com-

partial disability established by the judgment. Moreover, respondent by its letter does not claim that the examination of or operation upon appellant would be for the purpose of enabling it to ascertain the extent of disability as the basis for fixing the amount of compensation due appellant as for permanent partial disability. Its purpose is to establish by the operation the fact that appellant's injury is temporary only.

In this connection we deem it proper to say that respondent, in the exercise of its discretion in fixing the amount of the award by comparing the extent of appellant's injury to the standard prescribed by the statute, may take into consideration competent medical advice as to the reasonable and probable effect of an operation upon the injury from which appellant has suffered. It may not, however, refuse or "suspend" compensation until the appellant submits to an operation. In any event the award must be in a lump sum as provided by the statute.

The judgment will be reversed, and the cause remanded, with instructions to the superior court to enter an order directing respondent forthwith to proceed to fix the amount of appellant's compensation in a lump sum as for permanent partial disability in accordance with the standard prescribed by the statute.

ELLIS, C. J., and FULLERTON, PAR-KER, and MAIN, JJ., concur.

WRIGHT V. SEATTLE GROCERY CO. (No. 14677.)

(Supreme Court of Washington. April 18, 1918.)

1. APPEAL AND ERROR @=376 - BOND OBLI-

GEES—ASSIGNMENT OF CAUSE OF ACTION.
In view of Rem. Code 1915, \$ 193, preventing abatement of action because of transfer of interest in the cause, where plaintiff after judgent assigned his claim, it was not necessary that the appeal bond name the assignee as an obligee, since until order of substitution the original plaintiff continued to be the adverse party within section 1721, designating the person to whom the bond shall run.

2. APPEAL AND ERROR = 1244 — SUIT ON BOND—ASSIGNMENT OF CAUSE OF ACTION.

The assignment of a judgment by the judgment creditor carries with it to the assignee the

right to sue upon the appeal bond running to his assignor, even though the assignment is made and filed before the bond is executed.

Department 1. Appeal from Superior Court, King County; J. T. Ronald, Judge.

Action by Chauncey Wright against the Seattle Grocery Company, a corporation. Judgment for plaintiff, defendant appealed, and plaintiff's assignee moves to dismiss the appeal. Motion denied.

Elias A. Wright and Sam A. Wright, both of Seattle, for appellant. Leopold M. Stern, of Seattle, for respondent.

WEBSTER, J. Motion to dismiss appeal | 585; Van Stewart v. Miles, 105 Mo. App. 242, upon the ground that the assignee of the judgment appealed from, though duly served with notice of appeal, was not named as the obligee in the appeal and supersedeas bond executed pursuant to statute. In the superior court respondent obtained a judgment against the appellant which he thereafter assigned to Prudential Surety Company, Inc. This assignment was filed with the clerk prior to the taking of the appeal. Although the notice of appeal was served upon both the respondent and his assignee, the latter was not named as obligee in the appeal and supersedeas bond given for the purpose of perfecting the appeal. The motion to dismiss the appeal is made by the assignee, who has not been substituted as a party to the action.

Section 193, Rem. Code, provides:

"No action shall abate by the death, marriage, or other disability of the party, or by the trans-fer of any interest therein, if the cause of action survive or continue; but the court may at any time, within one year thereafter, on motion, allow the action to be continued by or against his representatives or successors in interest."

In Schroeder v. Pratt, 21 Utah, 176, 60 Pac. 512, the Supreme Court of Utah, considering a similar statute, said:

"A motion to dismiss the appeal is made on the grounds that the judgment herein was assigned in writing to P. J. Daly and Frank B. Stephens, and that the assignment was filed in the office of the clerk of the court below prior to the service of the notice of appeal on the respondent, A. T. Schroeder, and that no notice of appeal was served on the assignees of said judgment. Such an assignment, under the provisions of section 2920 of the Revised Statutes, does not abate the action, but the same may be carried on in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action. It does not appear that the appellants had actual notice of the assignment, and no substitution of parties has been made. Until the assignees are substituted as parties in place of "A motion to dismiss the appeal is made on A. T. Schroeder, he is the person upon whom notice in the case should be served. The motion to dismiss is overruled."

[1] It necessarily follows that, if it was not essential to serve notice of appeal upon the assignee, it was not necessary that he be named in the bond. Until an order of substitution has been made, the respondent continues to be the "adverse party" within the contemplation of section 1721, Rem. Code, designating the person to whom the bond on appeal shall be executed.

[2] Furthermore, the rights of the assignee are in no wise affected by the failure of the undertaking to name such assignee as the obligee therein; the authorities holding that the assignment of a judgment by the judgment creditor carries with it to the assignee the right to sue upon the bond running to his assignor, even though the assignment is made and filed before the bond is executed. May v. Kellar, 1 Mo. App. 381; Bennett v. McGrade. 15 Minn. 132 (Gil. 99); Ullmann v. Kline, 87 Ill. 268; Knight v. Griffey, 161 Ill. 85, 43 N. E. 727; Wehle v. Spellman, 75 N. Y. ing and killing Opal Harmeson.

79 S. W. 988; Crum v. Stanley, 55 Neb. 351, 75 N. W. 851.

In May v. Kellar, supra, Bakewell, J., delivering the opinion of the court on motion for rehearing, said:

"Though the judgment was assigned by May to Lackland & Broadhead before the appeal bond was given, we are of opinion that the bond was properly executed to May, as the adverse party in the suit, within the meaning of the statute. \* \* \* When the judgment was assigned to Lackland & Broadhead, there passed to them all remedies provided by law for the enforcement of that judgment, including recourse upon the appeal bond.'

In Bennett v. McGrade, supra, the Supreme Court of Minnesota said:

"After the commencement of the original action against McGrade, Williams, the plaintiff therein, assigned the property and claim for the recovery of which the action was brought to Bennett. Bennett therefore became the real Bennett. Bennett therefore became the real owner, and, although the proceedings were continued in the name of Williams, they were for Bennett's interest; the bond for the appeal, being one of the subsequent proceedings, although taken in the name of Williams, was for the use of Bennett."

The motion to dismiss the appeal is denied.

ELLIS, C. J., and FULLERTON, MAIN, and PARKER, JJ., concur.

STATE v. MUSSELMAN. (No. 14612.) (Supreme Court of Washington. April 23, 1918.)

CRIMINAL LAW 5594(3) — CONTINUANCE — DISCRETION OF COURT.

In a prosecution for murder, it was an abuse of discretion for the trial court to refuse a of discretion for the trial court to reason accontinuance for the purpose of securing witnesses from a foreign state as to the mental responsibility of defendant; it appearing that there was a fair probability that such a testimony could be procured if the case were continued, and the case having been brought to trial with unusual haste.

Department 1. Appeal from Superior Court, Okanogan County; C. H. Neal, Judge. Frank Musselman was convicted of murder, and he appeals. Reversed.

Wm. O'Connor, of Seattle, for appellant. Chas. A. Johnson and A. J. O'Connor, both of Okanogan, for the State.

WEBSTER, J. The defendant was convicted of the crime of murder in the first degree and appeals. The only assignment of error it will be necessary to notice is that the court abused its discretion in denying appellant's application for a continuance upon the ground of absent witnesses. The facts pertinent to this inquiry, briefly stated, are these: On July 12, 1917, the prosecuting attorney of Okanogan county filed in the superior court an information, charging that on July 6, 1917, the defendant committed the crime of murder in the first degree by shoot-On the

same day the appellant was arraigned and entered a plea of not guilty. Being without funds the appellant was unable to employ counsel, and the court appointed William O'Connor, Esq., to represent the accused upon the trial of the charge contained in the information. At that time the cause was set for trial on August 8, 1917. In the meantime Mr. O'Connor, with commendable diligence and industry, made a careful examination of the case, and on August 6, 1917, asked and obtained leave of court to interpose the statutory plea of mental irresponsibility, which was filed on the following day. On the following day the following day day the following day day th August 6, 1917, he applied to the court for an order, continuing the trial of the cause to November, 1917, for the purpose of enabling the defendant to procure material and necessary evidence to establish the plea of mental irresponsibility, and in support thereof, filed the following affidavit:

"William O'Connor, being first duly sworn, on oath deposes and says that he is the attorney for the defendant in the above-entitled action, that the defendant cannot safely proceed to trial on the date set, to wit, August 8, 1917, on account of the absence of material testimony. Affant eaters that he was appointed to defend on account of the absence of material testimony. Affiant states that he was appointed to defend Frank Musselman at the time the said defendant was arraigned, and that said defendant is now and was at that time without funds. That the defendant was a resident of Douglas, N. D., and was in the state of Washington for a week or ten days prior to the time the crime charged was committed. That said defendant was arraigned upon the 12th day of July. and at that was committed. That said defendant was arraigned upon the 12th day of July, and at that time the trial was set for the 8th day of August, 1917. That at that time this affiant requested that the trial be set for a later date up the case and get testimony, and investigate the case. That this affiant commenced at once to write to relatives and friends of the defendant in an effort to ascertain the facts surrounding the defendant and the deceased and to all ant in an effort to ascertain the facts surrounding the defendant and the deceased and to all possible sources from which information might be obtained from the data this affiant possessed. That this affiant is satisfied from the data obtained and from observations that the defendant is insane and has entered a plea of insanity in his behalf. That this affiant has just secured some of this information on the 4th day of August, 1917, by reason of the fact that it must be obtained by correspondence by this affiant. This affiant is assured that if said cause is continued until after harvest is over that Ettie M. Heath of Douglas, N. D., will appear and testify in behalf of the defendant to the following facts: That she has known defendant all his life; that prior to a year ago the defendant was energetic, cheerful and liked companionship as well as the average man and was well liked; that during the past year the defendant seemed to be wholly preoccupied with himself; that he could not apply himself mentally or physically as he used to; that he became gloomy and self-absorbed, and seemed to be studying upon something; that he avoided companionship and kept to himself, and seemed to be absent-minded and unable to fix his mind and attention upon anything for any length of time; also that she has been informed that the grandmother of the defendant went insane; that this witness cannot come on account of harvest, but has assured this affiant that she will

"Affiant is assured that if said cause is continued until after harvest, which will be about November, 1917, about three months, that G. J. Afdahl, of Douglas, N. D., will appear voluntarily and testify on behalf of the defendant to the following facts: That he has been acquainted with the defendant for a number of years; that the defendant worked for him last year upon his farm; that he saw the defendant frequently last year and the spring of this year up to the time the defendant left Douglas, N. D., about June 21, 1917; that he noticed a great change in the defendant in the last year or more; that the defendant used to be cheeror more; that the defendant used to be cheerful, energetic, and attentive to his duties; that during the past year the defendant was morose, during the past year the determine was more, absent-minded, seemed to have lost his energy, and was not attentive to his work as formerly that he seemed to desire to be alone, and seemed to be in a study most of the time, and acted

to be in a study most of the time, and acted very peculiar.

"Affiant believes that, if said cause is continued until next fall, he can secure the presence of the defendant's mother, Mrs. J. B. Musselman, who resides at Burnt River Pumping Station, Alberta, Canada, who will, he is informed, testify that the defendant's grandmother went insane and died insane, and that as a child defendant had convulsions; that the last heard from his mother, she was quite sick with shock.

last heard from his mother, she was quite sick with shock.

"Affiant has tried to secure the presence of these witnesses for the 8th of August, but has been unable to do so, but is assured that they will appear later. That he cannot secure this evidence from any other source, or within the state of Washington at any time from any source, within the state at this time, and within call of the process of the court. That all of this evidence is very material on the question of the insanity of the accused at the time of the commission of the crime charged, and it would be unsafe for defendant to go to trial without it. That this affiant has been unable to secure this evidence elsewhere, and has no other evidence to cover the facts set forth and covered by their testimony. All of these witnesses have never been within the state so they could be reached by summons of the defendant, could be reached by summons of the defendant, and that the facts are part of the chain necessary to establish defendant's plea."

In addition thereto counsel for defendant filed separate affidavits of all the persons named as witnesses whose evidence he desired to obtain in support of the plea of insanity, with the exception of appellant's These affidavits verify the statements made in counsel's affidavit as to the testimony they would give and their willingness to appear as witnesses upon the trial that this witness cannot come on account of harvest, but has assured this affiant that she will come voluntarily at a later date.

"Affiant is assured that, if said cause be continued until after harvest is over, O. M. Heath, of Douglas, N. D., will appear and testify in behalf of the defendant to the following facts:

"If subpœnaed by the state of Washington" in the event the cause should be continued until after the harvest season in North Dakota.

The application was denied, and the cause proceeded to trial on August 8, 1917, as originally application. "if subpænaed by the state of Washington"

the defendant was insane and legally irresponsible for his acts. The only witnesses in defendant's behalf were himself and Dr. C. W. Lane who, testifying as an expert without compensation, expressed the positive opinion that appellant was insane, the form of his insanity being paranoia. While Dr. Lewis, called in behalf of the state, testified that in his opinion appellant was sane, he also said that his opinion might be materially modified if he knew more of appellant's history.

It will require no argument to demonstrate that the evidence which it is said the absent witnesses would give was material, competent, and highly important to the accused, and that reasonable diligence, under the peculiar circumstances which confronted appellant's counsel, was employed for the purpose of procuring the attendance of the witnesses. If the action of the court is to be sustained, it must be so upon the ground that the witnesses were not subject to the compulsory process of this state, and there was no reasonable probability that they would be present if the trial of the cause was postponed. The request of the defendant was not an unreasonable one. It might very well be that witnesses from agricultural districts would be willing to volunteer their presence at a time when they could do so without great sacrifice, when they would not be willing to appear if it entailed the loss of their crops, a condition which the courts ought to understand and appreciate.

The spirit of our institutions is such that every person accused of crime shall have a fair and reasonable opportunity of preparing his defense and producing in court the witnesses upon whose testimony he relies for an acquittal. This rule is not prompted by any undue consideration of the rights of the defendant alone, it being a matter of vital importance to society itself that trials be fairly conducted, and that full means of preparation be granted the prisoner to the end that punishment shall be visited only upon the guilty.

With reference to the question of whether a continuance should be granted upon the ground of absent witnesses who are without the territorial jurisdiction of the court, the modern rule seems to be that the mere fact of such nonresidence is not of itself a sufficient reason for denying a postponement of the trial, provided it is made to appear that there is reasonable probability of such witnesses being produced in the event a continuance is granted. Mr. Freeman, in his copious note to the case of Blackburn v. State, 122 Am. St. Rep. 743, treating of this subject says:

"When a witness is beyond the jurisdiction of the court, it is not error to refuse a continuance

inally fixed by the court. Upon the trial the appear that there is any ground to expect his killing was admitted, the sole defense relied attendance in future. Upon this general propuls upon being that at the time of the shooting whether a continuance should be denied merely because an absent witness resides out of the state, and is therefore not amenable to process, state, and is therefore not amenable to process, is a question which seems to have given the trial courts a good deal of trouble, some judges being of the opinion that they had no discretion under such circumstances, but that the continuance must be denied. This, however, is a mistake, for, as we shall see, the granting of a continuance is as much within the discretion of the trial court when the absent witness is a nonresident or temporarily out of the state as if he was in the state. In both instances, the only question to be considered in the probabilonly question to be considered is the probability of securing his testimony at a future trial if the case is continued."

In 6 Ruling Case Law, at page 559, it is

"The general rule is that a continuance will not be granted unless it is shown that the testimony of the witness whose presence is desired can in all probability be secured at a future trial. Under this rule a continuance has been properly denied where the witness was beyond the jurisdiction of the court and not subject to its process. The mere fact that a witness is in another state, and therefore not amenable to the process of the court, should not, however, be conclusive of this question. The granting of a continuance is as much in the discretion of the continuance is as much in the discretion of the court where the absent witness is a nonresident or temporarily out of the state as where he is in the state. The inquiry in either case is the same. Are there reasonable grounds to believe that the presence of the witness will be had if the case is continued? But naturally if a witness is beyond the jurisdiction of the court and it does not appear that there is any ground to expect his attendance in the future, a continuance on the ground of his absence will be denied."

In White v. Commonwealth, 80 Ky. 482, Judge Hines, delivering the opinion of the court, said:

"Whether the witness is a resident of the state or nonresident and absent from the state, the inquiry in either case is the same: Is the the inquiry in either case is the same: Is the evidence material, has diligence been used to secure his attendance, and are there reasonable grounds to believe that the presence of the witness will be had by a continuance? The question is not whether the court can enforce the attendance, because, if that were true, a continuance could not be had on account of the absence of a citizen of this state who was at the sence of a citizen of this state, who was at the time within the jurisdiction of another sover-eignty. In neither case could coercive process be applied. The right to a continuance in either case would depend upon the probabilities of the witness coming within or submitting himself to the jurisdiction of the court.

In Brown v. State, 65 Ga. 332, Chief Justice Jackson, speaking to this question, observed:

"Whilst therefore the general rule is that cases will not be continued for absence of witnesses outside the reach of the compulsory process of the court, yet where there has been no lack of diligence, where the witness has promised to at-tend, where the testimony is of great materiality, where the application is not made for de-lay, but there is a reasonable expectation that the testimony will be on hand within a reasonable time, the case should be either continued for the term or postponed to a day certain, so as to give the defendant an opportunity of procuring the witness.'

Does the record here disclose that there is on the ground of his absence, when it does not reasonable probability that the absent wittify if they are afforded a reasonable opportunity of doing so? The very fact that the absent witnesses were sufficiently interested to make the affidavits is some indication of their willingness to testify. If it were not for the clause, "if subprenaed by the state of Washington," inserted in the several affidavits, we would have no hesitancy in saying that there was a reasonable probability that the witnesses would appear and testify. If a literal construction is placed upon that language, it is perfectly plain that the absent witnesses have conditioned their coming to the state upon terms which it is impossible to meet. Palpably the state of Washington cannot effectively subpoena witnesses in the state of North Dakota. We do not deem it fair, however, to separate these words from the body of the affidavits and attach all-controlling significance to them and ignore the remainder of the affidavits. It seems plain that the witnesses intend to come under some reasonable conditions. We think the words were inserted for the purpose of indicating that the witnesses desired to be assured of receiving their legal fees and allowances; and, if they volunteer to come to the state, they will be entitled to mileage from the point where they cross our border, together with witness fees during their attendance upon the court. If, however, it be assumed that these witnesses would not come to this state unless their entire expenses were paid, the appellant has had no reasonable opportunity of communicating with his relatives and friends looking to the securing of funds for that purpose.

Let it be remembered that the appellant is a stranger within our gates. No one subject to the compulsory process of the courts of Washington, save the relatives of the deceased girl, know anything concerning the life and history of the accused. All of these facts, however, are peculiarly within the knowledge of appellant's mother, and surely no court would be justified in assuming that she would fail her son in this the hour of his extremity.

We cannot overlook the fact that the accused was forced to trial with unusual haste, only 25 days elapsing between the date counsel was appointed to defend him and the beginning of the trial. The state of Washington in the enforcement of its criminal laws does not demand any victims, and before this court should put the seal of its approval upon a conviction of one accused of a heinous crime, as the result of a trial wherein he was denied all opportunity of presenting evidence upon the single and vital issue in the case, it should pause and seriously consider. It seems to be more in keeping with the orderly and wholesome administration of justice to and wholesome administration of justice to afford the accused a fair chance of presenting his case and procuring his witnesses, than to stance an alternative writ in mandamus bearing

nesses, or some of them, will appear and test indulge in finespun theories or speculations as to whether such course will avail him anything.

> While the matter of granting continuances because of the absence of witnesses is largely within the sound discretion of the trial court, and as a general proposition its ruling will not be disturbed, except in cases where manifest injustice has resulted, yet it is the duty of appellate courts to reverse such rulings in cases where a fair trial has been denied. As said by Cobb, J., in Ryder v. State, 100 Ga. 528, 28 S. E. 246, 38 L. R. A. 721, 62 Am. St. Rep. 334:

> "W. L. Ryder was indicted for the offense of murder. His defense was that he did not com-mit the homicide charged in the indictment, and that, if he did, he was insane at the time the killing was done. \* \* In a case like the killing was done. \* \* In a case like the present, where there has been a shocking homicide, and where there can be scarcely a doubt that the accused committed it, although he does ont expressly so admit in his plea, the defense mainly relied on being that of insanity at the time of the killing, it was depriving the accused of a very great right when he was forced to trial in the absence of these four witnesses, who knew the facts that were material to his defense, and when presents were inverted to the accused of the control and whose presence was important to the proper determination of the issue.

> While we are loath to disturb the verdict. we are forced to the conclusion that the learned trial court abused its discretion in denying appellant's application for a continuance, and because of this error the judgment will be reversed, and the cause remanded for a new trial at such reasonable time in the future as will afford appellant a fair opportunity of having his witnesses present.

> ELLIS, C. J., and PARKER and MAIN. JJ., concur.

> STATE ex rel. PRUDENTIAL SAVINGS & LOAN ASS'N et al. v. MARTIN et al. (No. 14492.)

(Supreme Court of Washington. April 24, 1918.)

MANDAMUS \$\infty\$=160(1)—ALTERNATIVE WRIT
—SUFFICIENCY—FORM.
Under Rem. Code 1915, \$ 1016, providing

that the writ of mandamus may be either alternative or peremptory, that the alternative writ must state generally the allegation against the must state generally the allegation against the party to whom it is directed, and command such party, immediately after the receipt of the writ or at some specified time, to do the act required or to show cause why he has not done so, a copy of an order by the court certified by the clerk commanding defendants in mandamus to perform certain acts, or to show reason why they had not done so, is sufficient as to form.

FORM.

An alternative writ in mandamus was not insufficient as not running in the name of the state, where it bears the title of the court and of the cause, which was "State of Washington, on the relation," etc.

3. MANDAMUS \$==160(1)-ALTERNATIVE WRIT

original order does not bear such seal.

4. Mandamus = 160(1)-Alternative Writ FORM.

An order by the court in effect an alternative writ of mandamus, which recited that it was done in open court and bore all the formal indicia of the action of the court as such, was not defective as being a mere order of a particular judge.

Appeal from Superior Department 2. Court, King County; Kenneth Mackintosh, Judge.

Mandamus by the State, on the relation of the Prudential Savings & Loan Association and others, against Jesse P. Martin and others. Judgment against defendants, and they appeal. Affirmed.

Frank A. Steele and Earle & Steinert, all of Seattle, for appellants. P. Tworoger, of Seattle, for respondents.

ELLIS, C. J. Action of mandamus commenced in the superior court of the state of Washington for King county. Relators filed the prescribed affidavit and thereupon obtained an alternative or show cause order, which, omitting title of the court, was as follows:

"The State of Washington, on the Relation of Prudential Savings & Loan Association, a Corporation, George E. Tilton, Frank Atwood, Peter Bettinger, Mary E. Bettinger, C. T. Scott, William Jaynes, and W. L. Stockwell, Its Board of Directors, Plaintiffs, v. Jesse P. Martin, Frank A. Steele, and J. H. Thaw, Defendants. No. 124282. Alternative Writ of Mandamus. The above matter coming on to be heard upon application for an alternative writ of mandate, it appearing to the court from the affidavit of George E. Tilton that the Prudential Savings & Loan Association is entitled to do business in the said state of Washington, as a loan & savings association; that it has a place of business in the said state of the said st ness in Seattle, said state, and that George E. Tilton with the other plaintiffs are the board of directors of said association; that said George E. Tilton is the duly elected, qualified and acting president and general manager there-of, and that the defendants Jesse P. Martin, Frank A. Steele, and J. H. Thaw are in possession of the place of business of said association. and the books, records and papers thereof, and refuse to surrender the same to said Tilton, and recuse to surrender the same to said Tilton, and are precluding him from exercising his right to said offices, contrary to law and the by-laws of said association: It is now therefore ordered that you, Jesse P. Martin, Frank A. Steele, and J. H. Thaw, are hereby ordered to surrender to the said Tilton, the place of business of raid acceptation and the backtransacture. said association, and the books, papers, records and memorandum of said association, or in the alternative show cause on the 6th day of September, 1917, in department No. 1, of the above court, at Seattle, Washington, at 9:30 a. m. why you have, and will not surrender possession thouse of the surrender possession that the surrender possess why you have, and will not surrenger possession thereof, and why you are precluding the plaintiff George E. Tilton from exercising the duties of his office to which he is entitled. Done in open court this 1st day of September, 1917. Mitchell Gilliam. Judge."

The affidavit and a certified copy of this order regularly certified by the clerk of the court were served upon the defendants. While the record before us does not affirm-

the seal of the court is sufficient, although the atively show that the certified copy of the order was attested by the seal of the court. we must assume that it was, since no objection on that ground is urged and the admitted certification by the clerk implies that it was so attested. On the return day defendants entered a special appearance and objected to the jurisdiction of the court over their persons on the ground that no process or writ known to the law had been issued out of the court or served upon them. Their objection was overruled. They stood upon their special appearance. Judgment was entered against them, from which they appeal.

> The sole question presented by this appeal is as to the sufficiency of a certified copy of the order above set out to operate as an alternative writ of mandate. The objections urged by appellant are: (1) That it does not run in the name of the state; (2) that the original order was not under the seal of the court; and (3) that it is a mere order of a particular judge, not the process of a court.

> [1] It may be conceded at the outset that a certified copy of the order would not meet the technical requirements of a writ at common law. This court, however, from the beginning has held that it will look to the substance rather than the form. We must look therefore to the statute to determine whether or not a copy of the foregoing order certifled by the clerk under the seal of the court meets the substance of its requirements. The governing statute, Rem. Code, \$ 1016, is as follows:

> "The writ may be either alternative or pcremptory. The alternative writ must state generally the allegation against the party to whom it is directed, and command such party, immediately after the receipt of the writ, or at some be performed, or to show cause before the court at a specified time and place, why he has not done so."

> It will be noted that this statute prescribes no particular form for the alternative writ, but does prescribe its substance. Having regard to the substance of his right, it is manifest that all that the party against whom the writ is directed can demand is a notice bearing upon its face evidence that it was issued by order of a court of competent jurisdiction and notifying him of the exact thing ordered to be done, and that the order be in the alternative that he do that thing or show cause in court at a time and place certain why he has not done it. It is self-evident that a copy of the foregoing order certified by the clerk meets all of these requirements, and is therefore in every matter of substance the alternative writ contemplated by the statute.

> [2] The objection that the writ here in question did not run in the name of the state, we think, is met by the fact that it bears the title of the court and of the cause, which was "State of Washington, on the relation," etc.



proceedings in the cause ran in the name of the state. To have inserted under this title and above the body of the order the words, "In the name of the State of Washington," would have added nothing in substance and nothing material in form.

[3] The contention that the writ was not under the seal of the court, we take it, is based upon the fact that the order as entered upon the court's records did not bear the seal of the court. It is not disputed, however, that the certified copy of the order, which is in fact the writ and which was served upon appellants entitled as a writ, bore the seal of the court. It was therefore attested by the seal as effectually as any form of order or writ can be.

[4] The last objection, that the order was a mere order of a particular judge and not the process of a court, is a little difficult to comprehend. The order itself shows that it did not purport to be the act of a particular judge as such, but it did purport to be the act of a judge sitting as a court. The closing words are, "Done in open court this 1st day of September, 1917." It bore upon its face all the formal indicia of the action of the court as such. The claim that it was not the process of a court we have already answered. While the order itself was not the process of the court, the certified copy containing the court's mandate in the very terms of the order met every requirement of the statute which prescribes no particular form. It is true that in the recent case of State ex rel. Hackett v. Arnest, 170 Pac. 563, we held that the writ must be served in the same manner as a summons in a civil action. and therefore the copy served need not be certified. But in that case the writ apparently followed the usual form of the commonlaw writ. In this case, however, the certified copy of the court's order which, as the record shows, was entitled an alternative writ of mandamus, was so certified as to make it, in substance, the writ required by statute.

We find it unnecessary to review the several decisions of this court cited on either side for the reason that the statute itself is controlling. None of the cases cited has any direct bearing upon the question here presented.

The argument that our holding would warrant the commencement of a suit on a promissory note by a mere show cause order is without merit. In such a suit jurisdiction can only be acquired by service of a summons, and this simply because the statute so provides. The action of mandamus, however, and other special proceedings of like character, may be commenced by the service of the writ. Smith v. Ormsby, 20 Wash. 396, 55 Pac. 570, 72 Am. St. Rep. 110; State ex rel.

Not only the writ but the affidavit and all | Cicoria v. Corgiat, 50 Wash, 95, 96 Pac. 689. The judgment is affirmed.

> MOUNT, PARKER, HOLCOMB, CHADWICK, JJ., concur.

KIES v. WILKINSON. (No. 14467.)

(Supreme Court of Washington. April 24, 1918.)

1. BANKS AND BANKING \$\infty\$80(7)—GENERAL AND SPECIAL DEPOSITS—PUBLIC FUNDS.

Funds deposited by county clerk in a bank in an ordinary checking account under his name as county clerk constitute, in the absence of statute, a general, and not a special, deposit.

2. BANKS AND BANKING \$= 80(7)-INSOLVEN-

CY-PAYMENT OF CREDITORS.

Funds deposited by a county clerk in his own name as county clerk subject to check without any understanding that the identical money deposited should be returned to him or that it should be used for any specific purpose, he having full control of the funds, was not a wrongful or unlawful deposit within the exception to the rule that in case of insolvency the assets of the bank become a fund for the payment of the creditors generally.

3. BANKS AND BANKING \$\iff 80(7)\$ — PUBLIC FUNDS—DEPOSIT BY COUNTY CLERK.

A deposit of funds in a bank by a county clerk in his own name as such subject to check and without any understanding that it should be treated as a special fund was not a public or trust deposit.

4. Banks and Banking \$\infty\$63\\\ \_4\text{-Insolven-cy-Unlawful Preference-Security.}

CY-UNLAWFUL PREFERENCE—SECURITY.

Where funds were deposited in a bank by a county clerk in an ordinary checking account, the bank examiner, while in charge investigating the solvency of the bank, could not appropriate collaterals to secure such account, regardless of good or bad faith; such appropriation constituting an unlawful preference.

5. Banks and Banking \$\infty\$=77(6)—Insolvenoy—Recovery of Preferences—Pleading.
In an action by a receiver of an insolvent
bank against a depositor to recover a preference,
a complaint which failed to allege the amount
of claims filed and the value of the assets so
that the necessity of setting aside the preference and determining the depositor's liability
could be adjudicated was fatally defective could be adjudicated was fatally defective.

Department 2. Appeal from Superior Court, Clarke County; Wm. T. Darch, Judge.

Action by M. B. Kies, as receiver of the Commercial Bank of Vancouver, against John Judgment for defendant, and Wilkinson. plaintiff appeals. Reversed and remanded, with directions.

McMaster, Hall & Drowley, of Vancouver. for appellant. Miller & Wilkinson, of Vancouver, and A. E. Clarke, for respondent,

HOLCOMB, J. On December 17, 1910, the state bank examiner took charge of the Commercial Bank, a state bank doing business at Vancouver, acting under the authority of section 3305, Rem. & Bal. Code, now repealed.

Respondent was then county clerk of Clarke county, and maintained an ordinary checking account with the bank under the name of John Wilkinson, county clerk of in charge the balance to his credit was

Up to December 17th the respondent had never been given any security of any kind, but on or within two or three days after that date the bank turned over to respondent a promissory note for \$11,000 given to the bank by one Harvey. This seems to have been done at the instance of the president of the bank, and he and the cashier seem to have led the deputy state bank examiner in charge to believe that the possession of this note belonged to respondent as collateral security for his account. Respondent accepted the collateral offered and retained it as security for his account for a little over two weeks, at the end of which time he was called upon to surrender it, and received payment from the deputy bank examiner of his account in full.

The examiner continued his possession of the bank and investigation of its affairs for about two months longer, and, being then convinced that the bank was insolvent, caused proceedings for the appointment of a receiver to be carried through by the attorney general. The bank was then duly adjudged insolvent, and appellant was appointed its receiver in March, 1911. Upon his appointment the receiver investigated the matter, and, being convinced that the payment of respondent's account in full was without authority and an illegal preference, he demanded repayment of the same. Repayment being refused, he began this action in tort to recover as damages the sum of \$3,502.48 paid over to respondent, alleging that the respondent and the other defendants named, co-operating and participating together, caused to be assigned, set over, transferred, and delivered to respondent the note heretofore mentioned, and the respondent participating with them received the note as and for collateral security for the payment of his account. It was alleged also that the note was a part of the general assets of the bank, and was given and received as above stated with the intent and for the purpose on the part of all the parties to the transaction of wrongfully preferring the respondent. Wilkinson, over other general creditors of the bank. It is also alleged that, in pursuance of the above intent and purpose, the defendants all co-operating and participating, on about January 7, 1911, the other defendants caused to be paid over to respondent the sum of \$3,502.48 in full payment of his account and deposit, and that thereupon respondent surrendered the pretended collateral security above mentioned; that it was the intent and purpose on the part of all the defendants parties to the above transaction that respondent should be wrongfully preferred to the other general creditors of the bank; that by reason of the foregoing acts and doings of all the defendants the Commercial Bank of Vancouver was damaged in the sum so taken and the funds | a showing of facts sufficient to create a trust,

Clarke county, and when the bank was taken and assets of the bank depleted by that amount. Judgment was demanded for the sum so taken, with interest at the legal rate from January 7, 1911.

A demurrer to the complaint on the part of one of the defendants was sustained by the court. The defendant Mohundro died during the pendency of the action, and the action continued against respondent alone.

Respondent demurred to the complaint for insufficient facts. His demurrer after consideration by the court was overruled. Respondent then answered, denying part of the complaint, and admitting the remainder. There was no affirmative defense. On the issues thus made the court tried the cause without a jury, and made findings of fact in which all the material allegations of the complaint were found true. Conclusions of law and judgment were nevertheless rendered for the respondent.

There was no allegation in the complaint that the assets in the hands of the receiver were insufficient to satisfy the claims of all. creditors. The appellant did, however, after the trial of the cause by the court, ask that the proceeding be reopened, and that he be permitted to introduce proof to the effect that the assets of the defunct bank were insufficient to pay any more than 20 per cent., or 25 per cent. in all, of the claims of general creditors. This application was denied by the court for the reason that the court was of the opinion that it would be immaterial to make such proof, because of his conclusion that in any event the respondent was not liable, since the deposit was a deposit by a public officer as such of the public funds coming into his hands as county clerk; the deposit thereby constituting a trust fund which upon the failure of the bank respondent was entitled to receive back intact.

[1] There is no statute requiring county clerks to deposit funds in their hands as such in any bank or requiring any bank to be designated as depositary for such fund. While it is true that the funds deposited by respondent as county clerk of Clarke county implied a notice to the depositary that the funds were public funds, and not private funds of the depositor, nevertheless the funds were deposited subject to check as an ordinary account, and as such constituted a general, and not a special, deposit. It is contended by respondent that the deposit by the county clerk as such created it a deposit of county funds, or of public funds belonging to litigants in the court of which respondent was clerk. There is a conflict of opinion among authorities as to whether, in the absence of statute, there exists in any political subdivision a common-law right to have its debts paid to it in preference to other creditors when the debtor is insolvent. But, as applied to insolvent banks in which deposits of public money have been made, the better rule seems to be that, in the absence of statute or

a claim for public money has no preference over the claims of the general creditors of the bank, but stand on the same footing with them. 3 R. C. L. § 182; note to Page County v. Rose, 8 Ann. Cas. 116, and cases there cited. Ordinarily public money in the hands of its official custodian without special authority to deposit the same in a bank is a trust fund, and when a bank accepts such money knowing its trust character, the bank becomes a quasi trustee, and the trust character attaches to the fund in the hands of the bank. making it a preferred claim if it has not been so commingled with the other funds of the bank as to have lost its identity. Note, same case, and cases cited therein.

In this case the funds were deposited by the county clerk from time to time and checked against from time to time, and were not one special deposit of a trust character other than that they constituted a trust fund in the hands of the clerk himself They were evidently carried in the bank commingled with all its other funds, until the bank was closed for liquidation.

[2] When a bank becomes insolvent and is taken over by the public examiner, the assets of the bank become a fund for the payment of the claims of the various creditors, and unless some reason is shown, recognized by law, that entitles one creditor to a preference over the others, they should all be treated alike. If the assets are sufficient in amount, the creditors can be paid in full; but where there are not sufficient funds to pay the just claims of all of the creditors in full, then such fund as there is should be proportioned among such creditors according to the amounts of their respective claims. This rule applies to all bank depositors. City of Sturgis v. Meade County Bank, 38 S. D. 317, 161 N. W. 327; Cavin v. Gleason, 105 N. Y. 256, 11 N. E. 504.

As a rule, when money is deposited in a bank, title to it passes to the bank. The bank becomes the debtor of the depositor to the extent of the deposit, and to that extent the depositor becomes the creditor of the bank. Allibone v. Ames, 9 S. D. 74, 68 N. W. 165, 33 L. R. A. 585. Such deposit then constitutes a part of the assets of the bank, and, in case of insolvency, belongs to the creditors of the bank in proportion to the amounts of their respective claims. Exceptions to this rule are: First, where money or other thing is deposited with the understanding that that particular money or thing is to be returned to the depositor; second. where the money or thing deposited is to be used for a specifically designated purpose; and, third, where the deposit itself was wrongful or unlawful. City of Sturgis v. Meade County, supra.

The money involved in this case was deposited by the county clerk, subject to his check, without any understanding that the identical money deposited should be returned to him, or that it should be used for any iner, by the fact that the state bank examiner

specific purpose. It cannot be said that it falls within the third exception to the above rule, that the deposit itself was wrongful or unlawful; for, while the clerk was responsible for the fund in his hands, he had a perfect right to deposit it in bank wherever he pleased, being responsible for the safety of the funds. Phillips v. Yates Center Ntl. Bank, 98 Kan. 383, 158 Pac. 23, L. R. A. 1917A, 680; State ex rel. v. McFetridge, 84 Wis. 473, 54 N. W. 1, 998, 20 L. R. A. 223; 3 R. C. L. 182.

[3] We are forced to the conclusion, therefore, that the deposit of respondent in the insolvent bank was not a public or a trust deposit.

[4] The question then arises whether or not the officers in the bank were relieved from responsibility because of the approval of the appropriation of collateral to the security of the fund of the respondent and its reduction thereafter into payment of the deposit. At the time of the delivery of the note as collateral the bank examiner was in charge of the bank through a deputy. The bank examiner under the law then in force (Rem. & Bal. Code, § 3305) was required, upon taking charge of the bank, to ascertain as soon as possible, by thorough examination into its affairs, its actual condition, and, whenever he should become satisfied that the bank could not resume business or liquidate its indebtedness to the satisfaction of all of its creditors, to report the fact of its insolvency to the Attorney General, who was thereupon required to institute proper proceedings in the proper court for the appointment of a receiver to take charge of and wind up the affairs and business of the bank for the benefit of its depositors, creditors, and stockholders. At the time of the transaction in question the bank examiner had not closed the bank, but was in charge of its assets. There was no authority conferred upon him by law to act as agent for the bank or its officers, and his sole authority was to act as agent for the state to examine into the affairs and condition of the bank and report its condition as soon as he could ascertain it. He, of course, had the right to require liquidation of the assets of the bank, but no right to make any contract for the bank or to ratify any contract which had been theretofore made. There had been no prior contract between the bank or its officers and respondent for the security of the respondent's funds on deposit. The offering of security by the officers of the bank seems to have been merely voluntary, but for the bona fide purpose of securing a public officer's deposit. Neither is there any question of the good faith of respondent. He gratefully accepted security and the subsequent payment of his deposit. At that time he was to some extent justified, although he knew that the bank was in the hands of the state bank examhad not declared the bank insolvent and ap-. plied for a receiver, and did not thereafter for about 60 days. Appellant does not charge respondent with actual bad faith, but charges only that the taking of the funds by him from the hands of the bank examiner was unlawful and wrongful, inasmuch as the deposit was not a trust deposit; that the funds which had theretofore been deposited could not be traced or identified, and were not county or public funds deposited in the bank as a county depositary or deposited with notice that they were county funds; and that by reason of these propositions the transaction between the officers of the bank and the bank examiner, on the one hand, and respondent, on the other, constituted an unlawful preference regardless of the good or bad faith of the transaction, and prima facle damage to the insolvent estate.

These propositions are correct, and, as stated in the previous discussion of the trust fund theory of the deposit, there being no such status, respondent had no right to a preference over other creditors of the insolvent. 7 C. J. 629, 643; Brown v. Sheldon State Bank, 139 Iowa, 83, 117 N. W. 289; Alston v. Alabama, 92 Ala. 124, 9 South. 732, 13 L. R. A. 659; McLain v. Wallace, 103 Ind. 562, 5 N. E. 911; Otis v. Gross, 96 Ill. 612, 36 Am. Rep. 157; Retan v Union Trust Co., 134 Mich. 1, 95 N. W. 1006; Southern Development Co. v. H. & T. C. R. Co. (C. C.) 27 Fed. 344; In re Nichols (D. C.) 166 Fed. 603; Phillips v. Yates, etc., Bank, 98 Kan. 383, 158 Pac. 23, L. R. A. 1917A, 680.

[6] This, however, is not an action to set aside a transfer of funds, follow the funds, and recover them for the estate, but is an action against respondent and his codefendants for damages for the wrongful taking of the fund. Notwithstanding that the taking of the fund was in law wrongful and unlawful, even in cases arising under the federal bankruptcy laws, where the procedure against unlawful preferences and preferring debtors to preferred creditors is much more drastic than in this sort of action, it has been generally held that the trustee cannot maintain an action to set aside a preference and avoid a transfer unless it is shown by the complaint that he has not sufficient assets in his hands to satisfy the claims of the debtor. No such showing being made in the complaint, for all that appears there may be money and property enough in the hands of the trustee to pay every claim filed against the debtor. Admitting that the facts stated show the transfers to have been fraudulent, still no right to avoid them exists unless it appears that some one was harmed. Having and MOUNT, JJ., concur.

elected to sue for damages, it was incumbent upon appellant to allege and prove a proper measure of damage. The complaint ought to show and evidence sustain the amount of the claims filed and the value of the assets in the hands of the trustee, so that the court may determine the necessity of setting aside or recovering the value of the preference. Mueller v. Bruss, 112 Wis. 406, 88 N. W. 229; Deland v. Miller, 119 Iowa, 368, 98 N. W. 304; Roney v. Conable, 125 Iowa, 664, 101 N. W. 505; Seager v. Armstrong, 95 Minn. 414, 104 N. W. 479.

In this case it will be observed that, so far as the complaint is concerned, there may be ample money in the hands of the trustee to satisfy and discharge all the liabilities of the estate, if there be any, which does not appear. This is a fatal defect, and the demurrer to the complaint should have been sustained.

However, after the trial had closed, but before any decision had been rendered, appellant, realizing the probable fatality of that defect, offered to prove the condition of the estate as has been heretofore stated. This was refused by the trial court for the reason that the trial court was of the opinion that in any event the respondent was not liable. We are of a different opinion. The respondent is liable only to the extent of the damage sustained by the estate. For that reason the rejected proof should have been received, and the pleadings should have been amended or deemed amended, and issues formed thereon, so that respondent could meet the proof of appellant upon that phase of the matter. It is possible that the estate will not be damaged more than 75 per cent., at the most, and possibly less, of the amount turned over by the bank to respondent. At any rate it is a matter that should be put at issue and proof received to show the true facts.

The judgment will be reversed, and the cause remanded, with instructions to the lower court to reopen the case, sustain the demurrer of respondent, or consider all the pleadings amended to conform to the offer of proof (which amounts to a tender of amendment to the complaint on the part of appellant), receive the evidence of appellant under the offer of proof, and that of respondent, if any, and render judgment thereon. This determination also will be without prejudice to the respondent, to his right to file a claim with the receiver and receive the same dividends as were given to other general depositors.

ELLIS, C. J., and CHADWICK, MAIN,

CALVIN PHILIPS & CO. v. NEWOU CO. (No. 14432.)

(Supreme Court of Washington. April 18, 1918.)

1. Brokers 4-9 - Contracts - Release ESTOPPEL.

Where defendant employed plaintiff brokers to secure a loan, and after some delay plain-tiff's employe in a telephone conversation with another loan broker by mutual mistake as to the loan involved stated that it would not be made, plaintiff was not thereby estopped to deny the release of defendant from its obligation and contract for commission, since there was a mu-tual mistake, and in any event the release was made orally to another than defendant, and for the further reason that defendant could have repudiated its application to the second broker without liability, so that there was no benefit, on one side, and injury, on the other, which are essential to an estoppel in pais.

2. Brokers \$\infty 50-Contracts-Performance

REASONABLE TIME.

Where defendant applied to plaintiff broker for a loan "to or through" such broker, to be made within a reasonable time, but both par-ties contemplated securing the loan from an into make the loan itself, defendant could repudiate the application if not accepted by the insurance company within a reasonable time.

3. Brokers 52 - Contracts - Perform-ANCE.

Where defendant applied to plaintiff brokers for a loan to be made through them from an insurance company, insurance company's acceptance "subject to inspection," and requiring additional sureties, was not a binding acceptance.

4. Brokers 4=86(1)—Contracts—Perform-ANCE-EVIDENCE.

Evidence held insufficient to show acceptance within reasonable time of application for loan by the contemplated lender so as to show performance of the broker's contract to procure a loan.

5. EVIDENCE \$\iff 450(6)\$—PAROL EVIDENCE EXPLAINING WRITING—ADMISSIBILITY.

Where plaintiff brokers agreed to procure a loan for defendant, parol evidence was admissible to show the purposes for which the loan was asked, on the issue of whether acceptance was procured within a reasonable time.

Department 1. Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Action by Calvin Philips & Co. against the Newoc Company. Judgment for defendant dismissing the action, and plaintiff appeals. Affirmed.

E. L. Skeel, J. J. Geary, and Roberts, Wilson & Skeel, all of Seattle, for appellant. Herr, Bayley & Croson, of Seattle, for respondent.

ELLIS, C. J. This is an action for a commission claimed by plaintiff to have been earned under a contract to procure a loan on real estate.

Plaintiff was the resident financial correspondent of the Penn Mutual Life Insurance Company of Philadelphia, Pa. One R. G. Holt, the Western fiscal agent of the insur- Penn Mutual Company whereby, to save ance company, had headquarters at Denver, | time, applications would be submitted to that

Colo. It was Holt's duty to examine Western properties offered as security for loans and report his approval or rejection to the home office at Philadelphia. Defendant was a Washington corporation. Charles Cowen was its president and principal stockholder. Frank S. Bayley was its secretary. It owned lot 20 and the south half of lot 21 in block 12 of Brooklyn addition to Seattle. property was subject to a mortgage for \$12,-000, due September 1, 1916, which was controlled by John Davis & Co. The debt so secured was broken up into parts which were held by various debenture holders. Davis & Co. had notified defendant that this mortgage would be called at maturity, and that defendant must signify an intention to make payment in time to assemble these debentures before maturity. The purpose of the loan here in question was to pay this existing mortgage. Plaintiff at the time of the transaction here involved was fully advised of these things.

Some time in May, 1916, defendant, through its president, Charles Cowen, began negotiations with plaintiff through its president. Calvin Philips, for the procuring of a loan upon the property above described for the purpose mentioned. The loan application and the commission agreement as parts of the same transaction were dated July 20, 1916, and were executed July 26, 1916. The application was made "to or through Calvin Philips & Co.," so that the latter might lend its own money or the money of a third party. Neither the application nor the commission agreement contained any reference to the source from which the loan was to be procured, but it is admitted that throughout the whole transaction, both before and after the application, no other source was contemplated by either party than the Penn Mutual Life Insurance Company. The application stipulated that the loan would be personally guaranteed by Charles Cowen, defendant's president. Defendant was advised that Holt must tentatively approve the application and security before the loan would be finally approved by the insurance company. Plaintiff's president testified that he informed Cowen that Holt would arrive in Seattle about the middle of August. Cowen testified that the promised time was early in August. After the application was taken, owing to Cowen's insistence on an early reply, Philips on July 31, 1916, forwarded the application to Holt at Denver for his approval prior to inspection of the property. Holt replied in due course, stating that he had forwarded it to the home office with his recommendation that it be accepted "subject to inspection." The term "subject to inspection" was explained by plaintiff's president as follows: Plaintiff had a working agreement with the

For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

company before inspection of the security by Holt. An approval subject to inspection meant that plaintiff was authorized to close the loan on condition that, if the property when subsequently inspected by Holt failed to meet his approval, plaintiff would buy the loan from the insurance company. On August 8, 1916, the insurance company's home office at Philadelphia approved the application "subject to inspection," and so informed plaintiff by a letter which was received at Seattle on Saturday, August 12, 1916. That letter, so far as here material, was as follows:

"We have received from Mr. Holt the application of the Newoc Company for a loan of \$13,500, 6 per cent., repayable \$500 at the end of one year, \$1,000 at the end of two, three, and four years, \$500 at the end of six, seven, eight, and nine years, \$7,500 at the end of ten years, covering three-story brick store and apartment building, 4230 14th Avenue, N. E., lot 60x103 feet, Seattle, the borrower to have the privilege of doubling the above annual payments, and principal and interest to be guaranteed by Messrs. Chas. Cowen and Frank S. Bagley. This application has been approved upon the above basis, and the loan will be made, if all things are found satisfactory, subject to settlement at our convenience."

Plaintiff's office, being unable to reach Cowen by telephone on Saturday, wrote defendant on Monday, August 14th, as follows: "We have received from the Penn Mutual Life Insurance Company of Philadelphia its approval of your application for a loan of \$13,500. The loan will be made if title and all things are found satisfactory."

On August 15th Cowen called at plaintiff's office, and, on being told of the letter, stated that he had not received it, and that he had made application to John Davis & Co. for the money. That application was made under the following circumstances: On August 7th John Davis, desiring final assurance as to defendant's ability to take up the prior mortgage, at request of Cowen, who was then in Davis' office, called up plaintiff's office for information. Calvin Philips, Jr., a son of plaintiff's president, answered the phone, and Davis asked whether the loan to Cowen would be made. Philips, Jr., having in mind another application made by one Cahen, which had been rejected, answered "No," and told Davis that, if he so desired, he could go ahead and make the loan himself, as plaintiff had turned it down. It was admitted that this was an error resulting from confusion in the mind of young Philips of the names "Cahen" and "Cowen." Davis reported that statement to Cowen, who then signed an application to John Davis & Co. for a \$12,000 loan to replace the old mort-

As to what further transpired at the interview in plaintiff's office on August 15th, plaintiff's president testified that Cowen said he would try to get Davis & Co. to release him from its application, and would then submit his abstract of title to plaintiff for examination. Cowen denied this, and fur-

ther testified that on August 10th he informed plaintiff that he would wait no longer for an answer, and that he maintained the same attitude at the meeting of August 15th. Some time later defendant, with the consent of John Davis & Co., secured a loan on the property in question from another source and paid off the prior mortgage. Holt arrived in Seattle August 18, 1916, examined defendant's property, and thereafter communicated with the home office of the insurance company recommending the loan. On August 29, 1916, the home office of the insurance company wrote plaintiff as follows:

"After investigation of the security in connection with the following proposed loans, our committee has concluded to remove the 'subject' condition. The Newoc Company \$13,500.00. "Manatawn Realty Company \$16,000.00."

When this letter was received by plaintiff does not appear, but in due course it must have been some days after the 1st of September.

In its complaint plaintiff alleges that, pursuant to the application and commission contract, it negotiated with the Penn Mutual Life Insurance Company to procure the loan; that the insurance company approved the loan application, and agreed to make the loan if the title to the property should be found satisfactory as provided in the application; that it thereafter notified defendant of such approval, and defendant refused to take the loan. Defendant answered, alleging failure of plaintiff to procure the loan in a reasonable time, withdrawal by defendant of its application, and release of defendant by plaintiff from the contract prior to the time of any notification by plaintiff of approval by the insurance company.

The trial was to the court without a jury. The court found that the application and contract were made on July 20, 1916, and provided no specific time limit for procuring the loan, but stipulated that defendant would not make application elsewhere until an adverse decision by plaintiff; that plaintiff knew that prompt action was necessary because the loan was wanted to pay off the mortgage falling due September 1, 1916; that plaintiff informed defendant at various times from July 20th to about August 7th that Holt was expected at any time, but Holt did not arrive until August 18th; that on August 8, 1916, the insurance company wrote plaintiff that defendant's application had been approved on certain conditions, among which was the condition that the loan should be guaranteed personally by Frank S. Bayley, and also subject to inspection; and that the application and loan were not finally approved and accepted by the insurance company upon any basis until August 29, 1916, at Philadelphia, Pa. The court further found that during the negotiations it was not understood that the money for the loan would come from any other source than the insurance company, and that plaintiff did not offer or agree to

the acceptance by the insurance company of the loan was not within a reasonable time after delivery of the application nor in accordance with its terms; and that by reason thereof plaintiff did not perform the terms and conditions contained in the application and commission agreement to be performed on its part. Finally, the court found the facts as above stated touching the conversation between Calvin Philips, Jr., and John Davis, wherein, by reason of the confusion of the names of "Cowen" and "Cahen," Davis and defendant were led to believe that defendant was released from his application with plaintiff. As matters of law the court concluded that plaintiff never performed its contract so as to earn the commission sued for, and that plaintiff was estopped by reason of the above-mentioned conversation with Davis from claiming a commission, and that defendant was entitled to judgment dismissing the action. Judgment went accordingly. Plaintiff appeals.

Appellant's principal assignments of error and practically all of its argument are directed to the contention that the court's findings were not supported by the evidence, and that the conclusions are contrary to the law.

[1] Touching the question of estoppel, it is urged that appellant was not estopped to deny that it released respondent from its application and contract by the telephone conversation with John Davis on August 7th. In this view we concur. In the first place, there was no privity between John Davis & Co., to whom the alleged release was made, and the respondent, Newoc Company. In the second place, the information that the loan had been refused by appellant was based upon a mutual mistake of Calvin Philips, Jr., and John Davis as to the identity of the loan concerning which they were talking. When, therefore, acting on that mistake, Davis induced respondent to make an application to John Davis & Co., that application was made on a misapprehension of the facts by both parties. As between respondent and John Davis & Co., therefore the application to John Davis & Co. was not a binding obligation. Respondent on discovering the mistake had a perfect right to repudiate that application without incurring any liability to John Davis & Co. and the transaction is therefore, as between appellant and respondent, wanting in the essential elements of an estoppel in pais, viz. a benefit on the one side or an injury on the other. Peck v. Peck, 76 Wash. 548, 561, 137 Pac. 137.

[2] Appellant further contends that respondent had no right to repugiate the loan application and commission agreement on the ground that the Penn Mutual Life Insurance Company was unreasonably delaying its answer. This is on the theory that, since the application was made "to or through Calvin Philips & Co.," appellant might have made

procure the loan from any other source; that, the loan itself or might have procured it from some other source than the insurance company. The answer is that it never offered to nor bound itself to make the loan direct, and that there is neither allegation nor evidence that it ever attempted to procure, could have procured, or would have procured loan from any other source. Its sole claim of performance was that it negotiated with and finally procured consent to make the loan from the insurance company. If appellant did not procure from the insurance company an unqualified approval of respondent's application within a time reasonable under the circumstances, it did not earn its commission, since that is the only way in which it claims to have earned it.

> [3] The issue here is thus reduced to this: Did the appellant secure such an unqualified acceptance of the loan by the insurance company within a reasonable time as contemplated by the loan application and commission contract? As answering this question in the aurmative, appellant relies upon its notification to respondent by the letter of August 14th that the application had been approved and the loan would be made. If, however, the application had not in fact then been approved according to its terms, but only with added conditions not contemplated by the application, then it is plain that the letter of notification to respondent had no probative force to establish the requisite unconditional acceptance; hence no tendency to prove the earning of appellant's commission. That letter could only have such probative force when supplemented by proof that the insurance company had prior to that time actually accepted the application as made. Without such supplemental proof the letter to respondent was a mere self-serving declaration on appellant's part. No such supplemental proof was made. On the contrary, the letter from the Penn Mutual Life Insurance Company to appellant dated August 8, 1916, imposed the added condition not found in the application that principal and interest of the proposed loan should be guaranteed by Frank S. Bagley, evidently meaning Frank S. Bayley, who was secretary of respondent. This was not an acceptance of the application, and did not bind the insurance company to make the loan as applied for, even subject to inspection of the property; yet it is the only acceptance or authorization to make the loan of which there was any proof prior to the final unconditional acceptance of August 29th removing the subject to inspection condition. Even that letter does not purport to remove the requirement of the former letter that the loan be guaranteed by Bayley. It is true that appellant's president testified that the last-mentioned condition was a mistake which was later corrected by the insurance company, but no letter or telegram was offered in proof of such correction, and there is nothing whatever in the evidence to show when, if ever, that correction was made. The burden was

upon appellant to show a timely authorization to make the loan as applied for. A mere general statement that the requirement that Bayley should guarantee the loan was a mistake which was "later" corrected was not such proof. The time and manner of such correction, if ever made, was peculiarly within appellant's knowledge. As a part of its proof of an acceptance of the loan by the insurance company within a reasonable time it was incumbent upon appellant to show that that correction was made within such reasonable time. It is true also that respondent did not know of the conditional form of the acceptance and sought to withdraw its application before it discovered the truth. It may be conceded also that respondent had no right to withdraw the application till a reasonable time had expired. The attempted withdrawal, however, neither hastened nor retarded the acceptance of the application by the Penn Mutual Company. The vital point is that appellant is seeking in this action to recover as for a commission actually earned: it must show, therefore, an actual acceptance within a reasonable time regardiess of respondent's knowledge or lack of knowledge as to the character of the acceptance which was actually secured.

Moreover, the approval of the insurance company embodied in its letter of August 8th, in addition to requiring a guaranty not called for in the application, was only an approval subject to inspection. Obviously such an acceptance or approval would bind nobody to make the loan. It would be in no sense binding as between the applicant for the loan and the insurance company until actual inspection and acceptance by its fiscal agent, Holt, of the security offered or until appellant itself had actually made the loan without such inspection and acceptance. Appellant's notice of August 14th to respondent was not an offer on its own part to make the loan. Even if it could be so construed, it contained the saving clause, "if title and all things be found satisfactory." It did not bind the insurance company to respondent to make the loan, because that company had only authorized an acceptance subject to inspection and approval of the security, which was, for practical purposes, no acceptance. It did not bind appellant to make the loan, because it contained no promise or claim that appellant or any one save the Penn Mutual Life Insurance Company would make it, and that only if all things were found satisfactory. Appellant was taking no risk of the loan being refused by the insurance company's fiscal agent, Holt. Whether intentional or not, it was apparently attempting to lead respondent to take that risk without frankly divulging the fact that there was such a risk. These considerations make it too plain for cavil that the court's finding of fact that the application and loan were not approved and accepted by the insurance company so

sis until its letter of August 29, 1916, at Philadelphia, Pa., was amply supported by the evidence. That acceptance, in the nature of things, could not have been communicated to respondent at Seattle until some time after September 1, 1916.

[4] The court's further finding that no acceptance of the loan by the insurance company was made within a reasonable time is also amply sustained. The evidence clearly shows not only that appellant was fully advised before taking the application of respondent's purpose in seeking the loan, viz. to take up the prior mortgage maturing September 1, 1916, but also shows that both parties by their subsequent conduct throughout recognized that only an acceptance communicated to respondent in time to enable it to close the loan and make the necessary arrangements to pay off the prior mortgage on or about its maturity would be an acceptance within a reasonable time.

[5] Appellant argues that evidence of these things was inadmissible as tending to impair or vary the terms of the written contract. The case of Hoffman v. Tribune Pub. Co., 65 Wash. 467, 118 Pac. 306, is cited in this connection. As we read it, however, that decision is not in conflict with the views here expressed. There the written contract was construed as a contract to furnish machinery within a reasonable time. Defendant in that case attempted to show a contemporaneous, collateral, oral agreement that the delivery was to be made within four weeks, and, as the opinion says, "irrespective of the question whether that period was or was not a reasonable time." We held that this was an attempt to vary the written contract by oral evidence rather than to prove what was a reasonable time, but we also said:

"What constituted a reasonable time was a question of fact which appellant was entitled to show by competent evidence. The trial judge expressed and announced his willingness to admit such evidence."

As we view it, that is what was done in this case. What is a reasonable time being a question of fact, it could only be determined by parol evidence as to the situation of the parties, the purpose of the contract. and the practical construction put upon it as shown by the subsequent conduct and declarations of the parties. Alexander v. Sherwood Co., 72 W. Va. 195, 77 S. E. 1027, 49 L. R. A. (N. S.) 985, and note page 995; Alford v. Creagh, 7 Ala. App. 358, 365, 366, 62 South. 254; Cotton v. Cotton, 75 Ala. 345; Cocker & Co. v. Franklin Hemp, etc., Co., 3 Sumn. 530, Fed. Cas. No. 2,932; Biddison v. Johnson, 50 Ill. App. 173; Geiger v. Kiser, 47 Colo. 297, 301, 107 Pac. 267; Smith Sand & Gravel Co. v. Corbin, 81 Wash. 494, 499, 142 Pac. 1163.

Appellant's president testified:

the application and loan were not approved and accepted by the insurance company so far as respondent was concerned on any ba-

not tell him that Mr. Holt would be here early (4. LIBEL AND SLANDER == 123(7)—DEFENSE— I believe we told him the middle Mr. Cowen came in every two or three days, and we kept him posted as to the progress in the matter. After Mr. Cowen sign-ed the application he frequently pressed us for

The record is replete with testimony showing that appellant was throughout conceding that an acceptance too late to close the loan in time to enable respondent to meet the prior mortgage would not be an acceptance within a reasonable time.

We are clear that the court committed no error in making the last two findings complained of. It follows that appellant failed in an essential element of proof in that it did not establish as a fact that it had procured the unqualified consent of the insurance company to make the loan within a reasonable time under the circumstances of this case and therefore failed to prove that it had earned the commission claimed.

The judgment is affirmed.

WEBSTER, FULLERTON, MAIN, and PARKER, JJ., concur.

ECUYER v. NEW YORK LIFE INS. CO. (No. 14551.)

(Supreme Court of Washington. April 18, 1918.)

1. LIBEL AND SLANDER &== 10(6) — SLANDER PEB SE—CHARGE OF EMBEZZLEMENT—"ACTIONABLE PER SE."

A charge by a life insurance company, through its auditor, to its cash clerk's father, that such clerk had stolen money received in payment of premiums, a statement through the company's auditor and cashier to the business manager of another company, to whom the clerk, after his discharge, had applied for employment, that the clerk had been careless in terminal his ceep, a statement through the company has ceep, a statement through the company. keeping his cash, a statement through the com-pany's agent to its cashier that the clerk's accounts were not exactly right, and a statement through the company's auditor to another cashthrough the company's auditor to another casi-ier of the company that the clerk was short in his accounts, etc., were slanderous per se, unless true or privileged, since words falsely spoken of a person, which impute to him some criminal offense involving moral turpitude, for which he might be indicted and punished, and defamatory words, falsely spoken of a person, which in themselves prejudice him in his profession, trade, or vocation, are slanderous, and actionable per se.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Actionable Per Se; Slanderous Words.]

2. Libel and Slander 4=54-Truth as De-

The truth of the communication is a complete defense to a civil action for libel or slan-

3. Libel and Slander \( == 101(5) - Truth-Burden of Proof.

In an action for slander, the burden to prove the truth of the defamatory words is on de-fendant, since such words are presumed to be false until the contrary is shown.

RETABLISHMENT BY PLAINTIFF'S EVIDENCE.
In an action for slander, the defense of truth, as in other cases where judgment of nonsuit is asked, may be established by plaintiff's own evidence.

LIBEL AND SLANDER 4=123(7)-TRUTH-

O. LIBEL AND SLANDER @==123(7)—TRUTH—QUESTION FOR JURY.

In an action for slander against a life insurance company by its cash clerk, charged by the company's auditor, in the presence of his father, with stealing money collected by him in payment of premiums, whether the company had made out its defense of truth held for the

6. LIBEL AND SLANDER \$\sim 41 -- "QUALIFIED PRIVILEGE"-COMMON INTEREST.

Where an alleged slanderous communication

is prompted by a duty to the public or a third person, or is made in good faith and without malice, touching a matter in which the party making it has an interest, to another having a corresponding interest, it is qualifiedly privileged.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Qualified Privilege.

7. Libel and Slander 4 51(1), 101(4)-MALICE-QUALIFIED PRIVILEGE-BURDEN OF Proof.

Though malice is the gist of the criminal charge of libel, it is not ordinarily an essential element in the civil action for slander or libel, except in cases involving qualified privi-lege, where actual malice must be proved; the burden being on plaintiff.

8. Libel and Slander 🖚 123(8)—Privilege

-MALICE-QUESTIONS FOR COURT AND JURY. Where it is not disputed that the slanderous words were uttered, the question whether the occasion was privileged is one for the court; whether good faith existed in the statement made, or whether it was malicious, is usually a question of fact for the jury, from the language itself and the surrounding circumstances.

9. LIBEL AND SLANDER 6=123(8)-PRIVILEGE -QUESTION FOR COURT.

In an action by a life insurance company's In an action by a life insurance company's cash clerk, 25 years old and living with his father, against the company, for slander in charging him, through its auditor, in the prescuce of his father, with stealing premium receipts, the question of privilege was for the court; there being no dispute that the father was present when the words were spoken, and none as to why he was there.

10. LIBEL AND SLANDER 4 44(3)—QUALIFIED PRIVILEGE - COMMUNICATION IN PRESENCE OF PARENT.

OF PARENT.
Communications made to or in the presence of a parent of a minor, touching his conduct, by reason of the parent's interest, are qualifiedly privileged, if made fairly and in good faith, particularly if the interview is sought by the parent, a rule soundly applied where the child, though adult, is a female living with the parent; in other cases, except where the communication was invited or acquiesced in by the traduced person himself, it is no more privileged when made to parents or other kindred than if made to strangers. made to strangers.

11. LIBEL AND SLANDER 47-QUALIFIED PRIVILEGE—CONSENT TO PRESENCE OF OTHER ERS.

Where an interview in the presence of others was invited, or even reluctantly consented to, by the person claimed to have been de-famed, the occasion was qualifiedly privileged, whether such persons were strangers or kindred.

12. Libel and Slander &= 123(8) - Quali- also made collections. When plaintiff or FIED PRIVILEGE - MALICE - QUESTION FOR JITRY

In an action for slander against a life in-surance company by its cash clerk, the question of the company's malicious excess of privilege in charging the clerk, in the presence of his father, through its auditor, with larceny of cash received in payment of premiums, was for the jury under the evidence.

3. Libel and Slander 🖘 45(2)—C Privilege—Business Reference. -QUALIFIED

Where the business manager of one life in-Where the business manager of one life in-surance company, to whom the former cash clerk of another had applied for employment, was referred by the clerk to the cashier of the other company, and such cashier informed the business manager, on inquiry, that the clerk had been careless, the occasion of such commu-nication was one of qualified privilege.

14. LIBEL AND SLANDER \$\infty\$ 51(4)—QUALIFIED PRIVILEGE—STATEMENT WITHIN.

Where the agents of one life insurance company, when they received inquiry from the agent of another as to the conduct of a former employe, who had applied to the other company for employment, stated truthfully that he had been at least careless in keeping his cash, they did not exceed the qualified privilege of the communication.

Department 2. Appeal from Superior Court, King County; A. W. Frater, Judge. Action by Harry P. Ecuyer against the New York Life Insurance Company. From judgment of dismissal, plaintiff appeals. Reversed, and cause remanded for new trial.

Jas. R. Chambers, of Seattle, for appellant. H. T. Granger, of Seattle, for respondent.

ELLIS, C. J. This is an action for slander. Defendant New York Life Insurance Company has its principal office in New York City. Throughout the United States and Canada it has branch offices. Through these offices new business is written and premiums on current and renewal policies are collected. One A. S. Elford was in charge of the Seattle office, and, as inspector of agencies, had general supervision over other branch offices in Oregon, Washington, Montana, Utah, British Columbia, and Alberta, Canada. One C. C. Norton was cashier of the Seattle office. One S. S. Buxton was traveling auditor for the company. It was his business to visit all branch offices, and audit and check up their financial operations, accounts, and books. Plaintiff, a man 25 years of age at the time of the alleged slander, was what is known as the first bonded clerk in the Seattle office. One Sparre was what is known as the second bonded clerk. The principal duty of these two clerks was the collection of premiums. Each had a cash drawer and kept his own cashbook. Premium receipts would be forwarded by the home office to the Seattle office for collection. The collections were many, sometimes running as high in volume as \$10,000 a day. Plaintiff and Sparre did

Sparre made a collection, he would countersign the receipt, place the money in his cash drawer, make a memorandum of the collection, and attach it to the particular premium card, place this in a drawer or box, and from these later in the day write up his cashbook. Each afternoon the cash was counted, to see if it balanced with the cashbook, and a cash sheet was made from the cash and the cashbooks. No one else than plaintiff had a key to plaintiff's cash drawer, except the cashier, Norton. There was evidence, however, showing that it was the practice during business hours to leave the keys in the locks of the cash drawers. Sometimes the drawers were not tightly closed, so that it was physically possible for any of the employes to have taken money from plaintiff's cash drawer, if so inclined.

On April 11, 1916, Buxton, the traveling auditor, appeared and checked up the Seattle office. He produced two receipts for the premiums, one for \$32.30 and one for \$4, which were countersigned with plaintiff's name. Where he procured these receipts does not appear in the evidence. Plaintiff. however, admitted that the signatures were his. The cashbook for the day on which these receipts were given showed no corresponding entries. Buxton and Norton called plaintiff's attention to the discrepancy, showed him the receipts, indicated that the money did not appear on the cashbook, charged plaintiff with having taken it, and demanded payment. Plaintiff told them that he had no independent memory of making these collections, and did not know what became of the money, but positively denied that he took it. The only explanation he gave of failure to make the entries on the cashbook was that the collection slips were not attached to the premium cards and that the money was not in the cash box when the cashbook was written up for that day. Whether he ever made slips for these collections he had no memory. If he did, what became of them was and is wholly unex-

After a long conference, in which Buxton endeavored to get plaintiff to admit that he had taken the money, and urged him to give a list of other sums which Buxton assumed he had taken, Norton suggested that plaintiff have his father, with whom he lived, come to the office and talk the matter over. Plaintiff demurred, Norton insisted, and plaintiff finally consented. Norton thereupon called plaintiff's father by telephone, and he came to the office late in the afternoon. The premium receipts and cashbook were shown to him, and in the course of the conversation both Norton and Buxton repeatedly said to him:

as \$10,000 a day. Plaintiff and Sparre did

"Harry is short in his money. \* \* \* He
most of the collecting, though the cashier
and what is known as the cash sheet clerk Harry is short in his accounts. \* \* \* He



has been taking the company's money.

Harry has stolen the money.

\* \* \* Harry has stolen the company's money.

Harry used this money for that he has taken?"

On plaintiff producing his personal bank book and calling attention to the fact that it showed no abnormal deposits at the time in question, Buxton answered in the father's presence:

"If you wanted it bad enough to steal it, you would not deposit it."

Buxton again, in the presence of the father, asked for a list of the money he had taken, and said:

"We had a boy in an office that had been stealing money, and I asked for a list of the money he had taken, so as to save me time. I wish Harry would do the same."

And further:

"You go home, and think the matter over, and give me a list of the other items you have taken."

Plaintiff's father asked if it would seem possible that plaintiff would steal so small an amount. Buxton replied:

"O, well! that is the way they all start."

Plaintiff repeatedly told Buxton that he had taken no money and would make no such When asked to pay the money back, plaintiff stated he would not pay it: that he had not taken it, and would just as soon throw it in the bay. Buxton and Norton threatened to notify the bonding company, which was surety on plaintiff's bond, and intimated that the surety company would prosecute the plaintiff if he did not pay the money. He still refused. At the close of this interview plaintiff was discharged. He went home with his father, and on the following day the father, as he testified, against plaintiff's desires, returned to the office and paid the amount of the shortage. Later in the same month of April, 1916, plaintiff applied to Herbert H. Ward, business manager of the Pacific Mutual Insurance Company of California in the Pacific Northwest, with offices at Portland, Seattle, and Tacoma, for employment with that company. Ward testified that he proposed to plaintiff that he (Ward) see Norton, of the New York Life Insurance Company, as to plaintiff's fitness for the place. To this plaintiff assented. Ward accordingly called on Norton at the Seattle office, who informed him that the office had been checked up by a traveling auditor, who had found things which made it impossible to give plaintiff an unqualified reference. On Norton's suggestion, Buxton was called in, and stated that plaintiff had been at least careless in his work; that when he checked plaintiff there was an item of some \$34, more or less, short, and referred to another item of \$4; that Buxton stated that plaintiff had been careless in his work, had left his keys in the cash drawer containing \$200 or \$300 in cash; that, if a man wanted to steal, that would be one way to do it. He stated that

in his accounts. As a result of the talk, Ward did not employ plaintiff, advising him that he would not do so without a "clean bill of health" from the New York Life Insurance Company.

One G. R. Johnson testified by deposition that in April, 1916, he was cashier of the New York Life Insurance Company's branch office at Calgary, Alberta, Canada; that on April 22, 1916, Buxton was auditing that office, and spoke to Johnson of plaintiff, saying he was short in his accounts, and in substance that he had received cash for premiums and did not turn the money into the company. nor report it. The witness explained that this was said in connection with advice to Johnson to keep separate cash drawers for himself and for his clerk; that when Buxton was informed that in the Calgary office only one cash drawer was used, he brought up the matter of the shortage in the Seattle office. On being asked if the information given by Buxton was that plaintiff himself had taken the money, Johnson answered:

"His accounts were short; yes, sir. He did not charge it to any of the clerks."

In April and May, 1916, one E. J. Englehardt was cashier of the branch office of the New York Life Insurance Company at Butte. Mont. This office was under the supervision of A. S. Elford, manager of the Seattle office and inspector of agencies for the Northwest. Englehardt testified by deposition that in April or early in May, 1916. Elford was in the Butte office when the witness had a conversation with him in reference to plaintiff, with whom witness was acquainted. Witness could not recall exactly what was said, but stated that he inferred from what Elford said that plaintiff's accounts were not exactly right. In connection with Englehardt's deposition a letter from Englehardt to plaintiff was offered, in which Englehardt wrote to plaintiff touching this conversation:

"He said you were let out because of a shortage in your accounts."

Plaintiff charged as libelous (1) the statements made on April 11, 1916, through defendant's agents, Norton and Buxton, in the presence of plaintiff's father; (2) the statement made on or about April 15, 1916, through defendant's agents, Buxton and Norton, to Ward, thereby preventing plaintiff from securing employment with Ward's company; (3) the statement made at Butte, Mont., on or about April 22, 1916, through defendant's agent, Elford, to Englehardt; and (4) the statement made at Alberta, Canada, on or about April 22, 1916, through defendant's agent, Buxton, to Johnson. He claimed damages in the sum of \$60,000.

or less, short, and referred to another item of \$4; that Buxton stated that plaintiff had been careless in his work, had left his keys in the cash drawer containing \$200 or \$300 it good; that on the evening of April 11, in cash; that, if a man wanted to steal, that under the plaintiff was short in his money; also, short before answered (1) that Buxton, on discovering the shortage in plaintiff is accounts, demanded that plaintiff make it good; that on the evening of April 11, 1916, that of plaintiff is accounts, demanded that plaintiff is accounts, demanded tha

they were true, and that they were made without malice or intent to injure plaintiff; (2) that the communications made to Ward were privileged, being made in good faith, in the honest belief that they were true, without malice, in strict confidence, and were not volunteered, but were made in response to an inquiry from Ward; (3) that the statements alleged to have been made by Elford and Buxton, subsequent to the conversation of the evening of April 11, 1916, in the Seattle office, were not made by these persons as representatives of defendant, or with its authority. Plaintiff by reply traversed all affirmative matter in the answer.

The case went to trial to a jury. At the close of the plaintiff's evidence, defendant challenged its sufficiency by motion for nonsuit, which was granted. The action was dismissed, and plaintiff appeals.

[17] In this state we have no statute defining slander generally. We shall not attempt a comprehensive definition of slander as it is recognized at common law. It will suffice here to say that words falsely spoken of a person, which impute to him some criminal offense involving moral turpitude, for which he, if the charge were true, might be indicted and punished, and defamatory words falsely spoken of a person, which in themselves prejudice him in his profession, trade, or vocation, are slanderous and actionable per se. Newell, Slander & Libel (2d Ed.) pp. 38-41. It is obvious, therefore, that all four of the utterances here charged as slanders were slanderous per se, unless they were either true or privileged. Appellant contends that neither of them was either true or privileged. Respondent insists that all were true, and all were privileged, whether true or not. To avoid confusion, we shall consider the first and second charges separately.

[2-5] 1. Was the truth of the first charge established? The truth of the communication is a complete defense to the civil action for libel or slander. But defamatory words are presumed to be false until proven to be true. The onus of such proof lies on the defendant. Odgers, Libel & Slander (3d Ed.) p. 192. This matter of defense, as in other cases where a judgment of nonsuit is asked, may be established by the plaintiff's own evidence. The words charged as slanderous in the first communication were proven to have been published by utterance to and in the They were presence of appellant's father. direct, unequivocal, and repeated charges that appellant had stolen the money then missing and other unnamed sums. So far as the evidence shows, the whole truth was that the receipts showed that appellant had collected the money and his cashbook showed that he had not accounted for it. Had the offending communication been confined to a statement of those facts, the evidence, which conclusively established their truth, would tuated by ill will in what he did and said,

made in good faith, in the honest belief that | have made a complete defense. But it was not so confined. He was charged with stealing the money. That charge was not established by such a degree of proof that any court would be justified in saying that the minds of reasonable men might not differ as to its truth. The question was one for the Appellant denied that he took the jury. money, the key was in the lock of the cash drawer, the room was the common office room of many employes, any one of whom might have taken the money and the corresponding memorandum slips. The evidence was conclusive of appellant's carelessness, but not of his dishonesty.

[8] Was the occasion of the first communication privileged, and, if so, was there any excess of the privilege? If privileged at all, it needs neither argument nor citation of authority to show that the privilege was not absolute, but qualified or imperfect. The rule of qualified privilege is this: Where the communication is prompted by a duty to the public or to a third person, or is made touching a matter in which the party making it has an interest to another having a corresponding interest, it is privileged, if made in good faith and without malice. Fahey v. Shafer, 98 Wash. 517, 167 Pac. 1118, 1120.

[7] Though malice is the gist of the criminal charge of libel (State v. Sefrit, 82 Wash. 520, 534, 144 Pac. 725), it is not ordinarily an essential element in the civil action for slander or libel (Wilson v. Sun Publishing Co., 85 Wash. 503, 515, 148 Pac. 774, Ann. Cas. 1917B, 442). But this is not true in cases involving the qualified privilege. In such cases actual malice must be proved, and the onus of proof is upon the plaintiff. Fahey v. Shafer, supra.

[8] Where it is not disputed that the words were uttered, the question whether the occasion was privileged is one for the court: whether bona fides existed in the statement made, or whether it was malicious, is usually a question of fact for the jury. Moore v. Butler, 48 N. H. 161, 166. This the jury must determine from the language itself and the "The meaning surrounding circumstances. in law of a privileged communication is that it is made on such an occasion as rebuts the prima facie inference of malice arising from the publication of matter prejudicial to the character of the plaintiff, and throws upon him the onus of proving malice in fact, but not of proving it by extrinsic evidence only. He has still a right to require that the alleged libel itself shall be submitted to the jury, that they may judge whether there is any evidence of malice on the face of it. • • • The effect, therefore, of showing that the communication was made upon privileged occasion is prima facie to rebut the quality or element of malice, and casts upon the plaintiff the necessity of showing malice in fact—that is, that the defendant was ac-

with a design to causelessly or wantonly injure the plaintiff—and this malice in fact, resting, as it must, upon the libelous matter itself, and the surrounding circumstances tending to prove fact and motive, is a question to be determined by the jury. The question whether the occasion is such as to rebut the inference of malice if the communication be bona fide is one of law for the court; but whether bona fides exist is one of fact for the jury." Bacon v. Michigan Cent. R. Co., 66 Mich. 166, 172, 33 N. W. 181, 184, 185. See, also, Nichols v. Eaton, 110 Iowa, 509, 81 N. W. 792, 47 L. R. A. 483, 80 Am. St. Rep. 319: Fresh v. Cutter, 73 Md. 87, 20 Atl. 774, 10 L. R. A. 67, 25 Am. St. Rep. 575; Abraham v. Baldwin, 52 Fla. 151, 42 South. 591, 10 L. R. A. (N. S.) 1051, 10 Ann. Cas. 1148; Brow v. Hathaway, 13 Allen (Mass.) 239.

[9, 16] In the record before us there is no dispute as to the fact of the father's presence when the offending words were spoken, nor, as to why he was there. The question of privilege was therefore one for the court. It is generally held that communications made to or in the presence of a parent of a minor touching the minor's conduct, by reason of the parent's interest, are qualifiedly privileged, if made fairly and in good faith. This is especially true, if the interview be sought by the parent. Long v. Peters, 47 Iowa, 239; Moore v. Butler, supra. The same rule has been applied, and we think soundly, where the child, though an adult, is a female living with, and under the care and protection of, the parent. Rosenbaum v. Roche, 46 Tex. Civ. App. 237, 101 S. W. 1164. In other cases, except where the communication was invited or acquiesced in by the traduced person himself, it is no more privileged when made to parents or other kindred than if made to strangers. Miller v. Johnson, 79 Ill. 58; Davis v. State, 74 Tex. Cr. R. 298, 167 S. W. 1108, L. R. A. 1915A, 572; Thorn v. Moser, 1 Denio (N. Y.) 488; Rose v. Imperial Engine Co., 110 App. Div. 437, 96 N. Y. Supp. 808.

[11] But where the interview in the presence of others was either invited or consented to by the person claiming to have been defamed, the occasion is qualifiedly privileged. whether such persons be strangers or kindred. Christopher v. Akin, 214 Mass. 332, 101 N. E. 971, 46 L. R. A. (N. S.) 104, and note. Appellant did not invite his father's presence at the interview in respondent's office, but he consented to it—reluctantly, it is true, but without coercion. He was a man of full age and intelligence. His consent must be held voluntary. We think the occasion was one of qualified privilege, and so

[12] Whether the privilege of the occasion was exceeded depends upon the good faith of the charges made. This, as we have shown, is to be determined from the character of

circumstances. Had the charge been confined to the admitted facts, with the legitimate deduction that he was short in his accounts, we would be able to say as a matter of law that the communication was not in excess of the privilege. But inasmuch as these facts were explicable on another hypothesis than that appellant stole the money, others in the office having at least potential access to his cash drawer, and in view of the further fact that he persistently denied having taken the money himself, we cannot say as a matter of law that the direct unqualified charges of larceny, not only of this but of other money, repeatedly made, was not in excess of the privilege of the occasion. If the charges of theft were made under an honest suspicion that appellant had stolen the money, the privilege of the occasion was not exceeded; but if they were made to coerce payment by the father, or with any other sinister purpose, the privilege was exceeded. "This is not a lawful method of collecting a debt, or of compelling another person than the debtor to pay it." Beals v. Thompson. 149 Mass. 405, 21 N. E. 959. Either of these inferences might be drawn by the jury from the facts. The question of malicious excess of privilege was, under the evidence before us, one for the jury under proper instruction.

[13, 14] 2. The occasion of the communication to Ward was clearly one of qualified privilege. Appellant had applied to Ward for employment. Ward had an interest which prompted him to inquire of appellant's former employer as to his fitness for the employment. Statements made under such circumstances are universally held to be qualifiedly privileged. We have carefully considered the evidence touching the communication made to Ward by respondent's agents Buxton and Norton. We are satisfied that the privilege was not exceeded. They stated the facts truthfully, and said that appellant had been at least careless. There is no evidence that they directly charged appellant with theft, or that the words used were designedly capable of that construction, however Ward may have construed them.

3. The other two communications charged in the complaint as slanderous fall in the same category. We find it unnecessary to determine whether either of them was privileged or not. The evidence shows that the statement made by Buxton to Johnson at Calgary was made by way of caution, and to illustrate the advisability of having an individual cash drawer for each collector. The statement went no further than that appellant was short in his accounts, and that none of the clerks was charged with the theft. The evidence of the statement to Englehardt. made by Elford at Butte, was extremely vague; but, even assuming that it was precisely what Englehardt wrote to appellant, viz., "He said you were let out because of a those charges in the light of all of the known shortage in your accounts," it was confined

to the exact truth. As we have seen, the truth of the offending statement is a complete defense, regardless of the question of

The judgment is reversed, and the cause is remanded for a new trial in accordance with this opinion.

CHADWICK and HOLCOMB, JJ., concur.

STATE v. SNYDER. (No. 2315.)

(Supreme Court of Nevada. April 30, 1918.)

1. Robbery &= 6-Admini son-Statute-"Force." ADMINISTRATION OF POI-

Where defendant administered poison to produce unconsciousness and took money from cash register in saloon of which unconscious person had charge, he was guilty of "robbery," defined by statute to be unlawful taking of personal property from person of another or in his presence against his will by means of force or violence or fear of injury, since the administration of the poison constituted "force."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Force; Robbery.]

2. ROBBERY 24(5)—Poison—Sufficiency

OF EVIDENCE.

In a prosecution for robbery by administering chloral hydrate to produce unconsciousness, evidence held not to show that the condition in which the person robbed was found could not have been so caused.

3. Robbery \$== 24(1)-Sufficiency of Evi-

DENCE.

In a prosecution for robbery by administering chloral hydrate to render unconscious the barkeener whose cash register was robbed, evidence connecting defendant with the crime, alleged to have been committed by himself and two others, held to sustain conviction.

Appeal from District Court, Washoe County; E. J. L. Taber, Judge.

Al. Snyder was convicted of robbery, and appeals. Affirmed.

Withers & Withers, of Reno, for appellant. Geo. B. Thatcher, Atty. Gen., E. T. Patrick and Wm. McKnight, Deputy Attys. Gen., and E. F. Lunsford, Dist. Atty., of Reno, for the State.

COLEMAN, J. Appellant was convicted of the crime of robbery, and appeals.

"Robbery" is defined by our statute to be: "The unlawful taking of personal property from the person of another, or in his presence, against his will, by means of force or violence or fear of injury, immediate or future, to his person or property; \* \* \* the degree of force is immaterial." Rev. Laws, § 6427.

The state did not contend upon the trial that appellant used actual force in perpetrating the crime, but constructive force, in that he administered poison to one Cooper with the intention of producing unconsciousness, and while Cooper was in that condition took money from a cash register in the saloon of which the latter had charge.

thing as constructive force. Force was an essential element in both robbery and rape at common law, and is so by statute, except in rape where carnal knowledge is had of a female under the age of consent; but it has been held in this state, in England, and in some of the other states, that the force used in perpetrating the crime of rape may be constructive as well as actual. In the case of Queen v. Camplin, 1 Cox Crim. Law Cas. 220, 1 Car. & K. 746, 1 Denison Crim. Cas. 89, wherein the defendant gave a young girl liquor for the purpose of exciting her passions, and not with the intention of causing intoxication, but from which she became intoxicated, and while she was in that condition and insensible he had carnal intercourse with her, the court said that:

"The case therefore falls within the description of those cases in which force and violence constitute the crime, but in which fraud is held to supply the want of both."

In Lewis v. State, 30 Ala. 54, 68 Am. Dec. 113. it was said:

"It is settled by a chain of adjudication, too "It is settled by a chain of adjudication, too long and unbroken to be now shaken, that force is a necessary ingredient in the crime of rape. Bishop's Crim. Law, \$ 411. The only relaxation of this rule is that this force may be constructive. Under this relaxation, it has been held that where a female was an idiot, or had been rendered insensible by the use of drugs or intoxicating drinks, and, in one case, where she was under the age of ten years, she was incanable of consenting, and the law implied force. Rex v. Ryan, 2 Cox's C. C. 115; Commonwealth v. Fields, 4 Leigh [Va.] 648; State v. Shepard, 7 Conn. 54; Regina v. Camplin, 1 Car. & Kir. 746; Bishop's Cr. Law, \$ 343."

In Pomeroy v. State, 94 Ind. 96, 48 Am. Rep. 146, wherein the defendant had been convicted of rape, the court said:

"In People v. Crosswell [Crosswell v. People]
13 Mich. 427 [87 Am. Dec. 774], after citing
some decisions, both in England and in this
country, to the effect that if the woman's consent is obtained by fraud the crime of rape is
not committed, Cooley, J., said: 'But there are
some cases in this country to the contrary, and
they seem to us to stand upon much the better
ressons and to be more in accordance with the reasons, and to be more in accordance with the general rules of criminal law. People v. Met-calf, 1 Whart. C. C. 378, and note 381; State v. Shepard, 7 Conn. 54. And in England, where a medical practitioner had knowledge of the a medical practitioner had knowledge of the person of a weak-minded patient, on pretense of medical treatment, the offense was held to be rape. Regina v. Stanton, 1 C. & K. 415; Same Case, 1 Den. C. C. The outrage upon the woman, and the injury to society, is just as great in these cases as if actual force had been employed; and we have been upuble to satisfy ployed; and we have been unable to satisfy ourselves that the act can be said to be any less against the will of the woman when her consent is obtained by fraud, than when it is extorted by threats or force."

In another rape case the Supreme Court of Wisconsin says:

"Under such circumstances, the assault with intent to commit rape is complete, and we find no objection to the instruction because it did not require that some additional force must be Appellant contends that under our statute employed by the assailant to that involved condefining "robbery" there can be no such structively in the acts of giving her the liquor with these intents in his mind. There is no dispute but that he took the actual steps of giving her the liquor, and, since the jury found this was done with the criminal intent charged, the essentials of the offense are present. State v. Lung, 21 Nev. 209, 28 Pac. 235, 37 Am. St. Rep. 505." Quinn v. State, 153 Wis. 573, 142 N. W. 510, 46 L. R. A. (N. S.) 422.

This court, in considering a case wherein the defendant was convicted of an attempt to commit rape, after reviewing the authorities wherein it had been held that the force necessary to constitute rape might be constructive, said:

"As an attempt to commit a crime can only be made under circumstances which, had the attempt succeeded, would have constituted the entire substantive offense (1 Bish. Crim. Law, §§ 731, 736; State v. Brooks, 76 N. C. 1), the result which we gather from these principles is that, for a man to be guilty of the crime of an attempt to commit rape, he must have intended to use the force necessary to accomplish his purpose, notwithstanding the woman's resistance, or, in the case of constructive force, to either destroy her power to resist him by the administration of liquors or drugs, or to take advantage of the fact that she was already in a condition in which either the mental or physical ability to resist is wanting." State v. Lung, 21 Nev. 209, 28 Pac. 235, 37 Am. St. Rep. 505.

It will be seen that the court, in the last-mentioned case, held that one of two things would constitute constructive force, namely, (a) the destroying of the woman's power of resistance by administering liquors or drugs, or (b) the taking advantage of the fact that the woman was already in the condition in which the mental or physical ability to resist was wanting. See, also, Hirdes v. Cross, Ottawa Circuit Judge, 174 Mich. 321, 146 N. W. 646, 52 L. R. A. (N. S.) 373; Rahke v. State, 168 Ind. 615, 81 N. E. 584.

[1] We are unable to see why a different rule should be established in a case wherein robbery is charged and in which force is an essential element, than in a case wherein rape is the charge, wherein force is likewise an essential element. If constructive force may be used in the one case, why not in the other? No satisfactory reason has been advanced why a different rule should exist, and we are unable to think of one worthy to be mentioned, and are therefore of the opinion that the trial court did not err in holding that constructive force was resorted to by appellant.

[2] It is also contended in behalf of appellant that the evidence of the doctors shows that the condition in which Cooper was found could not have been caused by chloral hydrate, as contended by the state, for the reason that the witness Cooper testified that almost immediately upon drinking the beer testified to he became unconscious, because, as contended, chloral hydrate does not produce the condition of unconsciousness in which Cooper was found in less than 30 minutes, unless a dose is taken which will cause certain death. While one of the witnesses testified flatly that chloral hydrate

would not produce unconsciousness in less than 30 minutes, Dr. Kistler, who had been called to attend Cooper, did not so testify; and, while his testimony was somewhat uncertain, he did state:

"At the time that I was called to treat the man, I supposed he was suffering from chloral poisoning. I have the same opinion now."

From an examination of the works of text-writers, it is apparent that what may be a medicinal dose for one person is a poisonous dose for another. In some instances a dose of 30 grains has proven fatal, while in other cases more than an ounce has been taken without ill effect. Reese, Med. Juris. & Tox. (8th Ed.) 573; Herold's Man. of Legal Medicine, p. 105.

Taylor, in his Principles of Medical Jurisprudence, vol. 1, p. 387, speaking of this drug, says:

"It has been given in very large doses, sometimes with benefit, but at other times causing dangerous symptoms, followed by death. \* \* \* A patient under Dr. Habershon at Guy's took half a drachm (30 grains) of the hydrate at night. He became unconscious almost immediately after swallowing the draught—the face and hands turned livid and cold, and breathing took place only at long intervals, indeed for about five hours death seemed impending. He recovered the next day. Lancet, 1870, 2, 402. A case is reported in the same journal in which a dose of 160 grains was given by mistake to an hospital patient, a middle-aged man. The man slept well and recovered, notwithstanding the large dose taken."

We do not think the contention of appellant can be sustained.

[3] It is also contended that the evidence is not sufficient to connect appellant with the crime. The defendant was jointly charged with Pat Bond and Sherman Owensby with the crime of which he was convicted, but upon application he was granted a separate trial. The testimony on the part of the defense shows that on the evening of June 26. 1917, the defendant met Pat Bond in Reno. and together they visited several saloons: that on the following morning Owensby, who was then unknown to appellant, arrived from Sacramento and met Bond, whom he had known in Southern California; that later they were met by appellant, after which they visited several saloons together. Shortly after noon of that day they all took the same street car for Sparks, though, as they testifled, appellant did not know that Bond and Owensby were on the car, nor did they know that appellant was aboard. The car passed through the town, and when it reached the end of the line they all got off; Bond and Owensby going to the Rio Vista saloon, They had several followed by appellant. drinks, after which a lunch was ordered and served by Cooper, the bartender, on a table in the saloon. Cooper was invited to join the party and got for himself a pint of beer. which he opened and placed on the table at which the lunch was served. He then went to the kitchen for a moment, and upon his return began to drink the beer, and soon

became unconscious. While he was in this condition, Bond went to the cash register and took therefrom some money. Appellant testified that when Bond went to the cash register he became scared and went outside of the saloon and stopped on the sidewalk, and while standing there was passed by the other two men, who ran up the street. Appellant then walked some distance from the saloon, turned around, and, as he claimed. was on his way to the depot to take the train for Lovelock and while walking past the saloon was arrested. Chloral hydrate was found in the possession of the other two men; and, while none was found in the possession of appellant, a day or two after his arrest two small vials of the drug were found about 75 feet from where appellant had been arrested. It further appeared that it was impossible for the other two men to have been at the point at which the vials mentioned were found between the time of their arrival in Sparks and their arrest.

The appellant at no time sought to render any assistance to Cooper or to notify any one of his condition. In view of this chain of circumstances, would this court be justified in setting aside the verdict of the jury? This court, in determining the sufficiency of circumstantial evidence, has said:

"If the circumstances, all taken together, exclude to a moral certainty every hypothesis but the single one of guilt, and establish that one beyond a reasonable doubt, they are sufficient." State v. Mandich, 24 Nev. 336, 54 Pac. 516.

Having held that the testimony of Dr. Kistler, who was called to attend Cooper, to the effect that it was his opinion that Cooper's unconsciousness was caused by a dose of chloral hydrate, was sufficient to justify a conclusion on the part of the jury that Cooper's condition was due to a dose of that medicine, let us, in the light of the rule just enunciated, ascertain if the circumstantial evidence in the case is strong enough to warrant the jury in concluding that appellant was a party to its administration to Cooper. If appellant was not a party to the crime, he is the victim of a most remarkable chain of circumstances. Appellant's association with Bond on the night of June 26th might have been a mere chance affair; his meeting Owensby the next morning, shortly after his arrival from Sacramento, may have had no significance; his going to Sparks on the same car might have been a mere coincident, but his riding through the town of Sparks to the end of the car line, as did Bond and Owensby, is a very suspicious circumstance; his following Bond and Owensby into the Rio Vista saloon would not necessarily signify anything; his drinking with them might have been merely the result of a desire to quench his thirst; his partaking of lunch with them might have signified nothing more than a desire to be sociable; the two vials of chloral hydrate may have been lost by some one else —but to what could appellant's failure to call for help when Cooper became unconscious have been due? If he was blameless, why did he merely walk out of the saloon and stand on the sidewalk when the cash register was being robbed, without giving an alarm? In our opinion, while none of the circumstances mentioned, considered alone, necessarily signifies anything, it could hardly be possible for a chain of circumstances such as those mentioned to have existed by mere chance, and we are of the opinion that they were sufficient to justify the jury in bringing in a verdict of guilty.

It is ordered that the judgment be affirmed.

SANDERS, J., concurs.

McCARRAN, C. J. I concur.

In my judgment the very language of our statute opens the door to the reason and admits the rule which recognizes constructive force. By the statute it is declared that:

"Robbery is the unlawful taking of personal property from the person of another, or in his presence, against his will, by means of force or violence or fear of injury \* \* \* to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial." Section 6427, R. L.

The agency of constructive force is recognized by authorities without number, where this agency has appeared in the perpetration of the crime of rape. In such crimes, the administering of liquor or drugs to an extent sufficient to destroy the power of resistance is declared to meet the law's contemplation of force. People v. Español, 16 Porto Rico Rep. 203; State v. Warren, 232 Mo. 185, 134 S. W. 522, Ann. Cas. 1912B, 1043.

In considering the subject, Mr. Wharton, referring to the crime of robbery, recognizes constructive force as sufficient to satisfy the law's requirement. 1 Wharton's Law of Crimes (10th Ed.) p. 744, § 850.

The reason which gave rise to the recognition of constructive force in cases of rape is equally cogent in furtherance of a relaxation of the rule as to the element of force in the crime of robbery to the extent that the necessary ingredient in that respect may be only constructive. "Force" is the power or energy by which resistance is overcome. In the crime of robbery "the degree is immaterial," says the statute. When, to take the personal effects of another, a blow is struck with a bludgeon, thereby paralyzing the victim's power of resistance, the taking will constitute robbery. The same effect might be produced on the victim by the physical act of administering a deadly potion. In either case resistance is involuntarily overcome. Great physical strength might be required to accomplish the result in the first instance, while a mere turning of the hand might effect the consequence in the second; force, however, is present in both. The agency through which the

force operates is immaterial. The result in either case is the overcoming of resistance without the voluntary co-operation of the ing, "a drug," and as thus modified it was subject whose resistance is repressed; this is the test.

In the case at bar, resistance was overcome by force which operated through the agency of chloral hydrate, administered to the party in charge of the saloon. Destruction of the power of resistance was accomplished by the act of the defendant, operating through the force and efficacy of the poison. A blow with a "billy" might have produced this same result. To say that the one method would have been less forceful than the other in bringing about the consequence is but to conjure with comparison.

STATE v. BOND et al. (No. 2315-A.) (Supreme Court of Nevada. April 30, 1918.) CRIMINAL LAW \$==1173(4)-APPEAL-HARM-

LESS ERROR—INSTRUCTION.
Where the information charging robbery did not allege the use of chloral hydrate or any drug alleged the cose of chioral hydrate or any drug to render unconscious the person robbed, but alleged the robbery was committed by force and violence, and the evidence showed that, while much chloral hydrate was found on de-fendants, some was in solution, and in one bot-tle a foreign substance as sugger or distrible head tie a foreign substance, as sugar or digitalis, had been mixed with chloral hydrate, defendants were not prejudiced by an instruction that the state must prove beyond a reasonable doubt that a drug was actually administered to the person robbed, etc., instead of their request using the phrase "such chloral hydrate," instead of the phrase "a drug."

Appeal from District Court, Washoe County; E. J. L. Taber, Judge.

Pat Bond and Sherman Owensby were convicted of robbery, and they appeal. firmed.

Withers & Withers, of Reno, for appellants. George B. Thatcher, Atty. Gen., E. T. Patrick and Wm. McKnight, Deputy Attys. Gen., and E. F. Lunsford, Dist. Atty., of Reno, for the State.

COLEMAN, J. The facts in this case are substantially the same as those in the case of State v. Al. Snyder, 172 Pac. 364, this day decided. The only question which we deem it necessary to consider is that raised by the assignment of error based upon the action of the court in refusing to give, without modification, instruction D2, which reads as follows:

"You are further instructed that although you may find from the evidence that the defendants, or either of them, may have had in his posses sion chloral hydrate and may have had the op-portunity to use the same, such facts alone are insufficient to convict the defendants of the of-fense charged, to wit, robbery; but the state must prove beyond a reasonable doubt that such chloral hudrate was actually administered to the and that such drug, and not some other cause, made the said Cooper become unconscious and insensible."

The court modified the instruction by substituting for the italicized words the followgiven.

The information charging the defendants with robbery did not allege the use of chloral hydrate, or any drug, but alleged that robbery was committed by the use of force and violence; and the evidence showed that, while a large quantity of chloral hydrate was found upon the defendants, some of it was in solution, and the analysis of one bottle containing the solution showed that a foreign substance, such as sugar or digitalis, had been mixed with chloral hydrate. We are unable to see wherein the defendants were prejudiced by the instruction. What does it matter whether the jury found from the evidence that the defendants administered pure chloral hydrate or chloral hydrate in solution? Hawley, C. J., in State v. Loveless, 17 Nev. 424, 30 Pac. 1080, quoted with approval as follows:

"The rule is that judgments will be reversed for alleged errors in instructions only when, looking at the testimony, we can see that the jury may have been misled by them to the prejudice of the defendant, or when, in the absence of the testimony, it is apparent that the instructions would be improper under any possible condition of the evidence."

We do not think the defendants were in any way prejudiced by the action of the court, and the judgment is affirmed.

McCARRAN, C. J., and SANDERS, J., concur.

CITY OF RENO v. DIXON. (No. 2308.)

(Supreme Court of Nevada. April 30, 1918.)

Criminal Law == 1019 - Supreme Court -Jurisdiction-Criminal Cases-"Cases at LAW."

LAW."

The penalty which a city under its charter (Sess. Acts 1915, c. 184; Sess. Acts 1917, c. 76) may prescribe for violation of an ordinance being such that the offense under the definition of Rev. Laws, § 6266, is a misdemeanor, the Supreme Court has no jurisdiction of appeal from conviction thereof, its appellate jurisdiction in criminal cases being by Const. art. 6, § 4, limited to felony, and it being immaterial that the case was transferred from the police that the case was transferred from the police court to the district court because the validity of the tax imposed by the ordinance was attacked; "cases at law" in which is involved the legality of a tax, of which the Supreme Court is given appellate jurisdiction, not including a criminal case.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Case at IAW.

Appeal from District Court, Washoe County; T. F. Moran, Judge.

J. B. Dixon, prosecuted by the City of Reno for violation of ordinance against practicing the profession of law without a license, was, on removal of the case from the city court to the district court, convicted, and appeals. Appeal dismissed.

L. D. Summerfield, of Reno. for respondent.

McCARRAN, C. J. A prosecution was commenced in the police court of the city of Reno against the appellant, Dixon, by a complaint under oath. In that complaint the appellant was charged with having unlawfully practiced the profession of law at and within the city of Reno without having first obtained and paid for a license from the city clerk of the city of Reno. The prosecution was instituted under a city ordinance. Appellant was arraigned in the police court upon the complaint. On arraignment, appellant filed a motion to set aside the complaint, alleging, among other things, that the ordinance under which the license tax was imposed was invalid. Upon the filing of the motion by the appellant, the police court made an order transferring the cause to the second judicial district court in and for the county of Washoe, upon the ground that the validity of a tax was involved and that the police court was without jurisdiction. In the meantime, the matter had been considered by this court under proceedings in habeas corpus. In re Dixon, 40 Nev. 228, 161 Pac. 737. It was pursuant to the order of this court that the municipal court transferred the matter to the district court. On trial in the district court before a jury, a verdict of a conviction was rendered against the appellant. From that verdict, and from the judgment entered pursuant thereto, appellant seeks to appeal to this court. A motion to dismiss the appeal is earnestly presented here by respondent.

The prosecution in this case was conducted against the defendant for a violation of a municipal ordinance. Viewing the matter as of the first instance, the municipal court had without doubt jurisdiction of the offense charged against the petitioner, and that court might with propriety have tried and determined the matter. It was on the motion of appellant, in which motion he raised the question of the legality of an ordinance imposing a tax, that the matter was transferred to the district court. In the case of Ex parte Dixon, supra, following the doctrine of the case of State v. Rising, 10 Nev. 97, we held that it was in obedience to the statute that the judge of the municipal court was required to transfer the proceedings to the district court.

By statutory declaration the Legislature of this state has declared what is to be regarded as a misdemeanor and what is to be regarded as a felony. Section 6266, Rev. Laws, provides:

A crime is an act or omission forbidden by law and punishable upon conviction by death, imprisonment, fine or other penal discipline.

\* \* Every crime punishable by a fine of not more than five hundred dollars, or by im-

James M. Frame, of Reno, for appellant prisonment in a county jail for not more than six months, is a misdemeanor.

> The offense charged against the appellant was not raised to the dignity of a felony by being transferred to the district court. It was in the first instance, and remains until the present, possessed only of the qualities and characteristics of a misdemeanor. It originated under a provision of the charter of the city of Reno authorizing the city council "to prescribe fines, forfeitures, and penalties for the breach or violation of any ordinance, or the provisions of this charter, in which it is further provided:

> "No penalty shall exceed the sum of \$500 or six months imprisonment, or both such fine and imprisonment." Session Acts 1915, p. 273; Session Acts 1917, p. 119.

The right of appeal to this court in such matters has been definitely and positively negatived by the case of Town of Gold Hill v. Brisacher, 14 Nev. 52, and as said there by Mr. Chief Justice Beatty, after referring to the case of State v. Rising, supra, so we say here:

"This is clearly a criminal case, and cannot therefore be one of the 'cases at law' in which this court has appellate jurisdiction; and, since the offense charged does not amount to a felony, we have no jurisdiction of it as a criminal case. Const. art. 6, § 4.

The appeal is dismissed.

It is so ordered.

COLEMAN and SANDERS, JJ., concur.

DIXON v. SOUTHERN PAC. CO. (No. 2303.) (Supreme Court of Nevada. April 30, 1918.)

1. TROVER AND CONVERSION \$== 1-RECEPTION FROM WRONGFUL POSSESSOR. .

As a general rule, it is a conversion to receive property from one wrongfully in possession, and thereafter to exercise control of it against the wish of the person entitled.

CARRIERS -91 - LIABILITY OF CARRIER -CONVERSION.

The carrying of goods by a carrier from terminus to terminus on the requirement of a per-son unlawfully in possession is not a conversion, though if the true owner intervenes before the goods are delivered, and demands them, and the carrier refuses to deliver them, it is liable in trover.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Conversion.l

3. CARBIERS \$\leftharpoonup 42\to Transporting Ore-No-tice of Title.

Where the owner of ore on a mine dump, anticipating that E., who was operating the mine, would endeavor to ship it, notified the railroad, and forbade the transportation of such ore, and the railroad, when E. offered the ore for transportation, required him to make affidavit that such ore was his, which he did, and the railroad transported the ore for him, such railroad was liable to the owner of the ore as for a conversion, being charged with constructive notice of the owner's right.

sion, with legal interest from the date to that of rendering judgment, though special and exemplary damages may be allowed in certain cases.

5. EVIDENCE \$\infty 20(1) \to JUDICIAL NOTICE \text{EX-}

TEACTION OF MINERAL FROM ORE.

Courts cannot take judicial notice of what
percentage of mineral can be extracted from a
particular class of ore, which is a matter of
proof in each particular case where material.

Appeal from District Court, Washoe County: Mark R. Averill, Judge.

Suit by J. B. Dixon against the Southern Pacific Company, a corporation. From a Judgment for plaintiff, defendant appeals. Reversed, and cause remanded for new trial, unless plaintiff agrees to a reduction of judgment, in which event, as modified, it will be affirmed.

Brown & Belford, of Reno, for appellant. J. B. Dixon and A. E. Painter, both of Reno, for respondent.

COLEMAN, J. Respondent brought suit to recover damages alleged to have been sustained by the conversion by appellant of certain ore which respondent claimed to own. The undisputed facts are that in July, 1914, appellant was engaged in operating a line of railway in the state of Nevada; that the respondent owned certain ore which he had purchased at an execution sale, wherein it and other personal property was sold under a judgment against the Nevada United Mines Company: that one Galvin was the purchaser at an execution sale of the mining claim upon which said ore was situated, and thereafter entered into an agreement with one Ephraim, pursuant to which Ephraim mined and extracted therefrom certain ore: that in the month of June, 1914, respondent, anticipating that the said Ephraim intended to ship respondent's ore, notified the railroad company that he owned some ore upon the dump of the mine in question, and that he anticipated that Ephraim would endeavor to ship it, and forbade the transportation thereof by the railway company; that about ten days or two weeks after said notice had been given, the said Ephraim offered to the appellant for transportation about 261/2 tons of ore; that thereupon the appellant required that the said Ephraim make affidavit that he owned the ore so tendered for transportation, and upon his doing so the ore was received and transported to the Western Ore Purchasing Company at Hazen, Nevada, which was engaged in the business of sampling and buying ores. The question of the ownership of the ore so shipped was litigated in the trial court, which found that respondent owned 14 tons thereof, and the finding on that point is not questioned here. The court found that the said 14 tons of ore was converted by appellant, that it was of the value of \$2,205,70. that \$6 a ton should be deducted as smelting

for \$2,121.70. A motion for a new trial having been denied an appeal was taken.

[1] It is urged as a ground for reversal that under the circumstances of this case appellant could not have been guilty of conversion. As a general rule, it constitutes conversion to receive property from one wrongfully in possession of it and thereafter exercise dominion or control over it against the wish of the person rightfully entitled to its possession. 38 Cyc. 2024. But appellant contends that since a common carrier must accept for transportation property offered to it or be liable in damages for refusal to do so (citing Hutchinson on Carriers [3d Ed.] \$ 47; Michie on Carriers, § 333; Revised Laws of Nevada, \$\$ 3558, 3559), the facts of this case constitute an exception to the general rule, and that the rule which controls is that laid down in Fowler v. Hollins, 7 Q. B. 616, where it is said:

"The trade of a common carrier is one of the few occupations where the person carrying it on is bound by law to exercise upon requirement of a person bringing him goods to be carried, and it would be unjust that he should be bound by law to do an act which the law, in the event of the person bringing the goods not being the true owner, declared to be an unlawful act. It has therefore been deemed that the carrying of goods by a carrier from terminus to terminus, upon the requirement of a person unlawfully in possession of them, is not conversion, although, if the true owner intervenes before the goods be delivered and demands them, and the carrier refuses to deliver them he is liable in an action of trover."

In support of this doctrine, our attention is called to Gurley v. Armstead, 148 Mass. 267, 19 N. E. 389, 2 L. R. A. 80, 12 Am. St. Rep. 555; White Live Stock Co. v. Railway Co., 87 Mo. App. 330; Nanson v. Jacobs, 93 Mo. 331, 6 S. W. 246, 3 Am. St. Rep. 531; Burditt v. Hunt, 25 Me. 419, 43 Am. Dec. 289; Shellnut v. Cent. Ry. Co., 131 Ga. 404, 62 S. E. 294, 18 L. R. A. (N. S.) 494.

[2] We approve of the rule just mentioned, but it is based upon a reason which does not exist in the case at bar. The reason for the rule is that a common carrier cannot be expected to inquire into the right of a person in possession of property to ship it; but it will be observed that as soon as the carrier has notice from the person rightfully entitled to the possession of the property to deliver the same to him, failure to do so will make the carrier liable.

Counsel for appellant say in their brief:

"It is only where the goods are in the possession of the carrier, and the true owner, who is not the shipper or the consignee, comes and demands possession, that the railroad company must satisfy itself as to the title and deliver the goods to the party to whom they belong."

thereof, and the finding on that point is not questioned here. The court found that the said 14 tons of ore was converted by appellant, that it was of the value of \$2,205.70, that \$6 a ton should be deducted as smelting charges, and gave judgment against appellant [3] We find nothing in the authorities or in reason to justify this contention. A carrier can be guilty of conversion by wrongfully taking into its possession property and exercising dominion over it, as well as by charges, and gave judgment against appellant

er it comes into its possession. Let us illustrate: Suppose that while Jones, a bank clerk, is taking a sack of gold from one bank to another, and just as he gets opposite the express company's office the gold is snatched from him by a thief, who carries it into the express office and offers it to the company for transportation, but before the company receives it, Jones acquaints the company with the facts and notifies it not to receive the gold. Could it be said that in case the gold is accepted, transported to California. and there delivered to the thief, the company would not be liable for conversion simply because it did not have possession of the gold at the time it was warned of the facts? We think not. Yet, if the contention of counsel is sound, the express company would not be liable because it was notified of the facts a moment before it received possession of the gold, instead of after its receipt thereof.

We do not wish to be understood as holding that notice to a common carrier by the owner of property that he expected some one to tender for transportation property not capable of accurate description, belonging to him, and warning such carrier not to accept it, would in every instance make such carrier liable should it accept and transport the property and thereafter deliver it to one not the owner. But in the case at bar the carrier had notice that a particular person, one Ephraim, would offer the ore for transportation: and when it was offered, the company, having in mind'the notice received by it, required of Ephraim an affidavit of ownership. Since the notice which appellant received was sufficient to warrant it in taking the precaution of requiring an affidavit from Ephraim, we conclude that appellant was brought within the rule asserted in Lang Syne M. Co. v. Ross, 20 Nev. 127, 18 Pac. 358, 19 Am. St. Rep. 337, as follows:

"Whenever a party has information or knowledge of certain extraneous facts which of themselves do not amount to, nor tend to show, an actual notice, but which are sufficient to put a actual notice, but which are sumcient to put a reasonably prudent man upon an inquiry respecting a conflicting interest, claim, or right, and the circumstances are such that the inquiry, if made and followed up with reasonable care and diligence, would lead to the discovery of the truth—to a knowledge of the interest, claim, or right which really aviety—then the party is the right which really exists—then the party is absolutely charged with a constructive notice of such interest, claim, or right."

See, also, Rollo v. Nelson, 34 Utah, 116. 96 Pac. 263, 26 L. R. A. (N. S.) 315; 29 Cyc. 1114.

[4] It is also contended that the court erred in its finding as to the amount of damages sustained by respondent. Appellant offered evidence to the effect, that the ore purchasing company paid Ephraim the sum of \$544.92 for the two shipments of ore, which was based upon the value of the ore at the time of purchase, while the court in making its findings and rendering judgment based its conclusion upon the highest market price of the in a written statement filed with the clerk

metals contained in the ore between the date of receipt of the ore and the date of trial. That this was clearly error is not debatable. This court has, in several instances, had occasion to lay down the rule which should control our courts in fixing the damage which a party sustains under circumstances like those existing in the case at bar. In Torp v. Clemons, 37 Nev. 474-485, 142 Pac. 1115, where the prior decisions of this court on the point were cited, it was held that the measure of damage for wrongful conversion of property is the value of the property at the time of conversion, with legal interest from the date of conversion to the date of rendering judgment. It is contended that some other courts have laid down a different rule, and one which we should follow. Suffice it to say that this court, in Boylan v. Huquet, 8 Nev. 345, considered at some length this question, adverted to the decisions taking the contrary view and adopted the rule which has ever since been adhered to, and we see no reason for repudiating it now. True, as said in Ward v. Carson River Wood Co., 13 Nev. 62, special and exemplary damages may be allowed in certain cases, but the trial court did not find that respondent was entitled to recover special or exemplary damages.

[5] We deem it proper to say, also, that the learned trial judge, in taking a 90 per cent. extraction as a basis for figuring the value of the ore in question, merely assumed that a 90 per cent. extraction could be obtained, as shown by his opinion, and did not base his conclusion upon any evidence introduced at the trial. Courts cannot take judicial notice of what percentage of mineral can be extracted from a particular class of ore: it is a matter of proof in each particular case. In re Richardson v. National Ore P. & R. Co., 34 Nev. 455, 124 Pac. 779, it was said:

"Courts in this state will take judicial knowledge of the fact that processes of crushing, amalgamating, and cyaniding ores will not effect an extraction of 100 per cent. of the metallic content. What would be a reasonable per cent. of extraction would depend largely upon the process used and the character of the ore; but there is nothing in this case to show what ought to have heen such extraction." to have been such extraction.

Counsel for appellant suggest in their brief that in case this court finds that appellant was guilty of conversion the judgment may be reduced to \$287.28, with legal interest from the date of conversion, which it claims is based upon the highest selling price of the metallic contents of the ore during July, 1914. Since the evidence in this case is such that it is impossible for us to say for just what sum the judgment should be, it is ordered that the judgment of the district court be reversed and the cause remanded for a new trial, unless the respondent agrees, within 10 days from the filing of the remittitur herein in the district court,

of said court, to a reduction of the said the same objection is presented for our conjudgment to the sum of \$287.28, with legal interest as aforesaid; in which event, the judgment as thus modified will be affirmed; appellant to recover its costs on appeal.

McCARRAN, C. J., and SANDERS, J., concur.

STATE v. McFARLIN. (No. 2291.)

(Supreme Court of Nevada. April 30, 1918.)

1. Indictment and Information €==110(13) -ELEMENTS.

Embezzlement is a statutory crime, and all that is necessary in charging the offense is to follow the statute.

€=32—ELEMENTS—STATU-2. Embezzlement

2. EMBEZZIEMENT & 32—ELEMENTS—STATUTORY PROVISIONS.

An information alleging that defendant was manager of a county-owned telephone system, and as such manager came into possession of certain money for transmission to the county treasurer, and feloniously converted it to his own use, sufficiently charged embezziement under Rev. Laws, \$ 6653, as to misappropriation of corporation money by agent, manager, or clerk thereof.

3. CRIMINAL LAW \$== 434-EVIDENCE-BOOKS OF ACCOUNT.

In prosecution of manager of county-owned telephone system for embezzlement, it was improper to introduce books of account of the system, where defendant was not familiar with the books and his attention had not been called to the particular accounts introduced.

4. Embezzlement 6=38 - Evidence - Gam-BLING.

In prosecution of county official for embezzlement, it was improper to admit evidence that he played slot machines for trade checks to a limited extent.

5. CRIMINAL LAW 4=673(2) - EVIDENCE OF

OTHER OFFENSES-INSTRUCTIONS.

In prosecution for embezzlement of certain money, the court should instruct as to the purpose for which other shortages might be considered by the jury.

6. CRIMINAL LAW 6=369(1) - EVIDENCE OF OTHER OFFENSES.

Evidence of other crimes can generally be considered only when it tends to establish motive, intent, absence of mistake or accident, a common plan or scheme, or identity.

Appeal from District Court, Churchill County; T. C. Hart, Judge.

George B. McFarlin was convicted of embezzlement, and from the judgment, and denial of his motion for new trial, he appeals. Reversed, and new trial granted.

See, also, 167 Pac. 1011.

James M. Frame and Howard Browne, both of Reno, for appellant. Geo. B. Thatcher, Atty. Gen., and G. J. Kenny, Dist. Atty., of Fallon, for the State.

COLEMAN, J. Appellant was convicted in the district court upon the charge of embezzlement, and appeals from the judgment, and from the order denying a motion for a new trial.

It was urged in the trial court that the information does not charge an offense, and hands for a specific purpose, viz. for trans-

sideration. It is said that the information is bad, because (1) there is no allegation that the defendant was authorized to receive the money; (2) there is no allegation that the defendant was intrusted with the money by virtue of his employment: and (3) there is no allegation that defendant was, by virtue of his employment, charged with the duty of receiving the money. To sustain these contentions our attention is called to Ex parte Ricord, 11 Nev. 287; Ricord v. C. P. R. R. Co., 15 Nev. 167; People v. Bailey, 23 Cal. 577; People v. Shearer, 143 Cal. 66, 76 Pac. 813.

[1,2] Without undertaking to specifically point out wherein the cases mentioned are not in point, we think it sufficient to say that they were instituted under statutes unlike our present statute. Embezzlement is a statutory crime, and all that is necessary in charging the offense is to follow the statute. The statute under which the case was instituted is section 6653, Revised Laws, and that portion which is of importance in considering the objections urged reads as follows:

"Any agent, manager or clerk of any \* \* \* prporation \* \* with whom any money corporation shall have been deposited or intrusted. who shall use or appropriate such money

\* \* or any part thereof in any manner or
for any other purpose than that for which the
same was deposited or intrusted, shall be guilty
of embezzlement, \* \* " of embezzlement

Omitting the formal parts of the information in question, it charges that the defendant-

"while then and there an employe of the county of Churchill, a political subdivision of the state of Nevada, to wit, the duly appointed and acting manager of the Churchill County Telephone & Telegraph System, which said system being then and there exclusively owned and operated by the said county of Churchill, state of Nevada, and then and there, by virtue of said employment, as manager aforesaid, there came into the possession and under the control of said defendment, as manager aforesaid, there came into the possession and under the control of said defendant, for transmission to the county treasurer of the said county of Churchill, state of Nevada, the sum of \$556.02, lawful money of the United States, of the personal property of the said county of Churchill, state of Nevada, said sum, \$556.02, lawful money, being public money received by said defendant for the said county of Churchill, state of Nevada, during the month of March, A. D. 1916, while said public money and personal property were so in his possession and under his control by virtue of said employment as aforesaid, then and there, to wit, on the 31st under his control by virtue of said employment as aforesaid, then and there, to wit, on the 31st day of March, A. D., 1916, or thereabout, said defendant did willfully, feloniously, and unlawfully use, embezzle, and convert said sum of public money and personal property, received by him as aforesaid, for his own private purposes and for appropriate they are delay suffering the property. and for a purpose other than one duly authorized by law."

It will be seen that the information charges that the defendant was manager of the telephone system; that as such manager there came into his possession and under his control certain money, the property of Churchill county; that it came into his mission to the county treasurer; that while negligently performed his duty as secretary of the money was in his possession for that purpose he feloniously and unlawfully converted the books were in the handwriting of Bolton. it to his own use. These allegations seem to fully comply with the requirements of the statute. We think that the information is good.

[3] It is also urged that the trial court erred in overruling an objection to certain pages in the books of account of the telephone system, offered in evidence by the state. This objection should have been sustained, and the failure to do so was prejudicial to the defendant. The defendant was not the bookkeeper, did not understand bookkeeping, was not familiar with the books, and his attention was never directed to the items on the pages introduced in evidence. It is a general rule that where an employé of a concern is on trial for embezzlement neither the books, nor portions of the books of the concern, which are not in the defendant's handwriting, are legal evidence against him, unless there be testimony tending to show that his attention was called to them and that he made some admission in regard to the portion offered in evidence. Lang v. State, 97 Ala. 46, 12 South. 183. In People v. Burnham, 119 App. Div. 302, 104 N. Y. Supp. 725, which was a case similar to the one at bar, it was said:

"There was also evidence admitted, against the objection and exception of the defendant, in relation to the entry in the books of the corporarelation to the entry in the books of the corpora-tion respecting this payment, which was incom-petent as against the defendant. He was not shown to have had anything to do with these books, or any knowledge of their contents, or any connection with the entries. The books of a corporation are not evidence as against an officer of the corporation in a criminal prosecution against him.

In People v. Blackman, 127 Cal. 248, 59 Pac. 573, where this identical question was before the court, it was said:

"A great many entries made in a great many books were offered and received, over the objection of defendant. It appeared that some of the entries were in the handwriting of defendant, and others were not. They were introduced, not only to show the receipt of money by the defendant, but also to show forced balances, and bookkeeper was not sworn as a witness, but they were merely shown to be books kept by the company. Bolton, the bookkeeper, at about the time the shortage was discovered, had committed suicide. The position of the learned judge of the trial court was stated by him: 'This is one of the books of the company. He is charged by the by-laws and the custom of the company with the keeping of the books. This book was presumably in his custody and under his control. I don't care who kept it. If there is anything wrong about it, that is for the defense.' As a matter of course, this view is not insisted upon here. The presumption of innocence would overcome all the presumptions of knowledge and control, if they existed; and it was for the pros-ecution to show that the defendant was responsible for the condition of the books, and in a instruction, that you cannot find the defendant criminal proceeding it is not enough that it was his duty to know of their contents, and that in the information, but that, in determining a civil action they would be competent evidence whether or not he is guilty of the charge in the against him on that ground. He cannot be held information, you are permitted and should take

It was not shown that defendant examined them to see that they were correct, or, save by the presumption mentioned, that he knew anything about them.

See, also, Rudd v. Robinson, 126 N. Y. 113, 26 N. E. 1046, 12 L. R. A. 473, 22 Am. St. Rep. 816; State v. Carmean, 126 Iowa, 291. 102 N. W. 97, 106 Am. St. Rep. 352; People v. Rowland, 12 Cal. App. 6, 106 Pac. 428.

[4] It is next contended that the trial court should have excluded the evidence offered relative to the defendant's playing slot machines. The testimony shows no gambling on the part of the defendant, other than by playing slot machines for "bingles," which were good in trade only, and the extent to which he is shown to have indulged in the practice was not extensive. Under the circumstances, we think the objection to this testimony should have been sustained.

[5, 6] Evidence of other shortages than that charged in the information was admitted upon the trial of this case, and in instructing the jury, before the case was submitted, the court gave, at the request of counsel for the defendant, the following instruction:

"The particular offense charged against the defendant is an alleged shortage occurring on or about the 31st day of March, 1916, and it is for about the 31st day of March, 1916, and it is for that offense, and for that offense alone, that the defendant is on trial. While the testimony of other alleged shortages in the year 1916 have been admitted in evidence, it is only proper for you to consider such testimony in so far as the same tends to throw light upon the transactions of the month of March, 1916, as alleged in the information, and before you can convict the defendant of the offense charged in the information you must find from the evidence beyond a reasonable doubt that the offense alleged in a reasonable doubt that the offense alleged in the information was committed on or about the 31st day of March, 1916."

Some hours after the case had been submitted, the jury returned into court and made it clear that they did not fully understand the purposes for which they might consider the evidence of other shortages than that charged in the information. After some discussion, the court instructed the jury orally as follows:

"Then, gentlemen of the jury, I will further instruct you, as to the instructions already given, that it is proper for you to consider all of the testimony, certainly, which is before you, and that you may and should take into consideration all of the testimnoy as submitted, whether it be concerning transactions that took place in 1916 or the year previous, in determining whether or not the defendant is guilty of the charge contained in the information, but that you only take those things into consideration for the purpose of considering and determining whether the pose of considering and determining whether the defendant is guilty of the charge as contained in the information and for no other purpose.
"I will say further, gentlemen, by way of

for the crime of embezzlement because he has into consideration all of the evidence as to the

circumstances and transactions during the time covered by the testimony during the time not only of 1917, all of 1916, during the year 1916."

It is contended that the oral instructions given by the court, as quoted, were erroneous and misleading. We are of the opinion that the court should have instructed as to the purposes for which other shortages than that charged in the information might have been considered by the jury. It is the general rule that evidence of the perpetration of distinct crimes from those for which a defendant is being tried will not be considered. There are, however, exceptions to this general rule. In the well-known case of People v. Molineaux, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193, this question was considered at length, and it was held that, generally speaking, evidence of other crimes might be considered only when it tends to establish either (1) motive; (2) intent; (3) absence of mistake or accident; (4) a common scheme or plan, embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; or (5) the identity of the person charged with the commission of the crime for which the defendant is being tried. Such is, we think, the correct rule, Horn v. State, 12 Wyo. 80, 73 Pac. 705; Bond v. State. 9 Okl. Cr. 696, 129 Pac. 666; People v. Ruef, 14 Cal. App. 576, 114 Pac. 54; Williams v. State, 4 Okl. Cr. 523, 114 Pac. 1114; Rice v. People, 55 Colo. 506, 136 Pac. 74; People v. Rowland, 12 Cal. App. 6, 106 Pac. 433. No doubt, upon another trial of this case, the jury will be fully instructed as to the purpose for which evidence of other shortages than the one charged in the information may be considered.

The errors assigned to the refusal of the court to grant a new trial because of newly discovered evidence and the failure of the state to prove the venue we do not deem it necessary to consider, as these questions will not arise upon another trial.

For the errors pointed out, it is ordered that the judgment and order appealed from be reversed, and that a new trial be granted the defendant.

## SANDERS, J., concurs.

McCARRAN, C. J. I concur. In my judgment this case must be reversed for reasons in addition to those dwelt upon in the opinion of Mr. Justice COLEMAN. The force and effect of the error to which I refer is best understood when the record is made clear. The indictment charges:

"That said defendant, on the 31st day of March, A. D. 1916, or thereabouts. \* \* \* at and within the county of Churchill, state of Nevada, while then and there an employé of the county of Churchill, a political subdivision of the state of Nevada, to wit, the duly appointed and acting manager of the Churchill County Telephone & Telegraph system, which said sys-tem being then and there exclusively owned and operated by the said county of Churchill, state feel clear as to what the law is concerning any of Nevada, and then and there, by virtue of features, I think they should be given additional

said employment, as manager aforesaid, there came into the possession and under the control of said defendant, for transmission to the county treasurer of the said county of Churchill, state of Nevada, the sum of \$556.02, lawful money of the United States, of the personal property of the said county of Churchill, state of Nevada, said sum, \$556.02, lawful money, being public money received by said defendant for the said county of Churchill, state of Nevada, during the month of March, A. D. 1916, while said public money and personal property were so in his possession and under his control by virtue of said employment aforesaid, then and there, to wit. on the 31st day of March, A. D. 1916, or came into the possession and under the control said employment atoresaid, then and there, to wit, on the 31st day of March, A. D. 1916, or thereabouts, said defendant did willfully, feloniously, and unlawfully use, embezzle, and convert said sum of public money and personal property, received by him as aforesaid, for his own private purposes and for a purpose other than one duly authorized by law."

During the course of the trial testimony was admitted of other shortages, as such were made to appear in the books of the telephone office. It must be presumed that the court admitted this testimony only under the well-known exception to the rule excluding proof of crimes other than that of which the defendant stands accused.

The court, at the request of defendant, gave the following instruction:

"The particular offense charged against the afainst the defendant is an alleged shortage occurring on or about the 31st day of March, 1916, and it is for that offense, and for that offense alone, that the defendant is on trial. While the testimony of other alleged shortages in the year 1916 have of other alleged shortages in the year 1916 have been admitted in evidence, it is only proper for you to consider such testimony in so far as the same tends to throw light upon the transactions of the month of March, 1916, as alleged in the information, and before you can convict the defendant of the offense charged in the information you must find from the evidence beyond a reasonable doubt that the offense alleged in the information was committed on or about the 31st day of March, 1916." day of March, 1916."

The case having been submitted to the jury, the record discloses that they appeared in court some hours later, at which time a colloquy took place between members of the jury and the court. In part it appears as follows:

"Foreman of the Jury: One or two members

want to ask a few questions.
"The Court: Do you mean as to some feature of the testimony, or do you want additional instructions?

"Juryman: On instructions.
"The Court: As to some feature of the instruc-

tions?
"Juryman: In regard to using the evidence as whether we should go to introduced in the book, whether we should go to the last of the year or not in that book. I don't the last of the year or not in that book. I don't understand the instructions, whether we are to use the testimony as introduced by the books up to the last of the year. Perhaps I can make it a little plainer yet—whether the shortage claims to be monthly or just March; whether that can be traced up from month to month to that can be traced up from month to month to tend to connect the shortage for the month of March; whether it can be traced up to the end of the year or not. That is the misunderstand-ing, is it not? "Jury: Yes. "Mr. Frame (counsel for defendant): I would

mr. Frame (counsel for defendant): I would suggest that the court call their attention to the instruction that covers that point.

"The Court: Of course, if the jury does not feel clear as to what the law is concerning any

instructions; however, the court cannot give any | not the defendant is guilty of the charge confurther instructions, except in writing, except desired by counsel. If the plaintiff or defendant wishes to submit any additional instruction to the jury, I think the thing to do would be to pass upon those as presented, and then submit additional instructions if the jury does not feel clear. Of course, I am willing to follow the instructions of counsel.

"Mr. Frame: I was going to suggest that the court read to the jury the instructions already given on that point, and if not satisfactory, or the jury wants further information or any member of it, and indicates that, then we will know just what point, particular point, to address an

instruction to

Here it appears that the court read the instruction bearing upon this phase of the evidence, and then the colloguy continued

"Juryman: That particular place that the difficulty arises in the minds of the jurors is whether that can be connected with any shortage during the month of March, can be traced from month to month up to the end of the year. Some of them are not clear—don't feel satisfied that they can go beyond the month of March.
"The Court: If counsel consents that any ad-

ditional instruction be given verbally or in writing as the law permits, you may insist on that.

"Mr. Frame: However, I would have no objection to the court orally explaining this instruction to the jury."

Whereupon the court proceeded as follows: "Then, gentlemen of the jury, I will further instruct you, as to the instructions already given, that it is proper for you to consider all of the testimony, certainly, which is before you, and that you may and should take into consideration all of the testimony as submitted, whether it be concerning transactions that took place in 1916 or the year previous, in determining whether or not the defendant is guilty of the charge contained in the information, but that you only take those things into consideration for you only take those things into consideration for the purpose of considering and determining whether the defendant is guilty of the charge as contained in the information and for no other purpose.
"Mr. Frame: And, if the court please, I de-

sire to request the court at this time to add the further instruction to the one already given to the effect that the jury would not be justified in convicting the defendant of any—upon any shortage which is alleged to have occurred with-

shortage which is alleged to have occurred within some other month, or at some other time
than March 31, 1916.
"The Court: I will say further, gentlemen,
by way of instruction, that you cannot find the
defendant guilty of any other charge than that
contained in the information, but that in determining whether or not he is guilty of the charge
in the information that you are permitted and in the information that you are permitted and should take into consideration all of the evidence as to the circumstances and transactions during the time covered by the testimony during the time not only of 1917, all of 1916, during the year 1916. Does that cover the point, gentle-

"Juryman: That covers the point, I think."

Undoubtedly this was the turning point in the case, for it is disclosed that the jury returned in but a few minutes with a verdict of guilty. The oral instruction given by the court as to the evidence of other shortages was erronecus. The court used the significant language:

"You may and should take into consideration all of the testimony as submitted, whether it be concerning transactions that took place in 1916 tained in the information.

And again the court said:

"In determining whether or not he is guilty of the charge in the information, \* \* \* you are permitted and should take into consideration all of the evidence as to the circumstances and transactions during the time covered by the testimony, during the time not only of 1917, all of 1916, during the year 1916."

There is no rule of criminal jurisprudence to which the authorities have more tenaciously adhered than that which applies to proof of other crimes than that for which the defendant stands accused. The general rule in this respect, and that which has constituted an unalterable rule in American jurisprudence, is that, when one is put upon trial for an offense, if he is to be convicted at all, it must be only upon evidence which shows his guilt of that offense. To this rule there is a well-defined exception. This exception, it may well be stated, permits the prosecution to put in evidence all relevant facts and circumstances which tend to establish any of the constitutent elements of the crime of which the defendant is accused in the case on trial, even though such facts and circumstances tend to prove that the defendant has committed other crimes. The application of the exception of the admissibility of evidence must depend largely on the crime charged and the circumstances under which the same was committed. Evidence of this character, when the same is admitted by the trial court, calls for an instruction to the jury emphatically limiting the purpose for which such evidence may be considered by them. Evidence of other offenses than that charged in an indictment has been in all jurisdictions guarded against, and courts and textwriters have warned against the introduction of such, drawing attention to the havoc that may be wrought unless safeguarded by instruction clear and unequivocal.

By the language of the trial court here the jury was instructed, and that, too, at a point in their consideration when a misguiding word meant the fixing of the verdict, that in determining whether or not the defendant was guilty of the charge in the information they should take into consideration all of the evidence as to the circumstances and transactions during the time covered by the testimony, during the years 1916 and 1917. The jury was told by the court that they should only take those things into consideration for the purpose of considering and determining whether the defendant was guilty of the charge as contained in the information, and for no other purpose. Here was a direction from the court that the jury should consider the evidence of other shortages to establish the shortage—hence the crime—of March 31, 1916. This instruction had a direct bearing upon a peculiar element of evidence, nameor the year previous, in determining whether or ly, the books of the telephone office; and

"The defendant was not the bookkeeper, did not understand bookkeeping, was not familiar with the books, and his attention was never directed to the items on the pages introduced in evidence."

Had the evidence been admissible at all, and we have held to the contrary in the opinion of Mr. Justice OOLEMAN, it was proper that it should be accompanied by instructions designating and limiting the purpose for which it should be considered. In this respect it may be observed that such evidence is admissible, as I have already stated, and may be considered by the jury, for the purpose of establishing motive or purpose, or as proving a general plan or scheme followed or carried out by the accused. "When such testimony is received," says the Supreme Court of Colorado, "the trial judge should then limit it to the purpose for which it is admitted. Jaynes v. People, 44 Colo, 535, 99 Pac, 325, 16 Ann. Cas. 787.

MACLEAN v. BRODIGAN, Secretary of State, et al. (No. 2333.)

(Supreme Court of Nevada. April 30, 1918.)

1. STATUTES \$== 138(2)-REVIVOR OF STATUTE BY TITLE—ELECTIONS—ELECTORS IN MILITARY SERVICE—"AMENDMENT"—"REVISION" "REVIVE.

The provision of Const. art. 4, § 17, that no law shall be revised or amended by reference to its title only, does not render invalid the provision of St. 1917, c. 197, that electors in the military service of the United States may vote in accordance with St. 1899, c. 94, which was repealed by St. 1913, c. 284; revival by title not being prohibited; for an "amendment" is an alteration effecting a change in the draft. or alteration effecting a change in the draft, or form, or substance, of a law already enacted, or of a bill proposed for enactment, but, when the legislative body attempts to revise, it thereby assumes to make additions or changes or corrections to alter or reform something then in force and effect, and "revision" in a legislative sense applies only to a measure, bill, or law then hav-ing existence, life, and force, and cannot, in the nature of things, apply to a nullified or repealed act; and the term "revive," as applied to legislative proceedings, signifies the reconference of validity, force, and effect, at least the recon-ference of such validity, force, and effect as the revived measure, law, or bill formerly possessed.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Amendment; Revision; Revive.]

2. STATUTES \$== 170-Incorporation of Re-PEALED ACT-EFFECT.

Where one act of the Legislature specifically adopts the provisions of another act upon the same general subject, the effect is to incorporate the adopted act, making it effective for the designated purpose, and that the adopted act has been repealed is immaterial.

3. Elections 🖘 9 — Voting — Persons Engaged in "Military Service."

St. 1917, c. 197, providing for taking of votes of electors in the military service of the United States, is a compliance with Const. art. 2, § 3, and is not void for discrimination against

here the observation in the opinion of Mr. in the military service, since "military service" includes every branch of service in either the armies or navies of the United States.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Military Service.]

Appeal from District Court, Ormsby County; Frank P. Langan, Judge.

Action by Donald Maclean against George Brodigan, as Secretary of State of the State of Nevada, and Maurice J. Sullivan, as Lieutenant Governor and ex officio Adjutant General of the State of Nevada. From order overruling a general demurrer to the complaint and judgment, the defendants appeal. Reversed.

Geo. B. Thatcher, Atty. Gen., and E. T. Patrick and Wm. McKnight, Deputy Attys. Gen. (Hoyt, Gibbons, French & Springmeyer, of Reno, of counsel), for appellants. W. E. Baldy, of Carson City (R. A. McKay, of Carson City, of counsel), for respondent. H. V. Morehouse and James Glynn, both of Reno, and Alfred Chartz, of Carson City, amici curise.

McCARRAN, C. J. This action was commenced in the district court to enjoin the appellant Sullivan, as adjutant general, from certifying to the secretary of state any list or lists of electors now engaged in the military service of the United States, and to enjoin the appellant Brodigan, as secretary of state, from incurring any expense in the purchase of ballot paper or registration supplies for the taking of the votes of the electors of the state of Nevada now engaged in the military service of the United States. and from incurring any cost or expense therefor to the state of Nevada, and to restrain both appellants in their official capacity from doing anything whatever imposed upon them or either of them by the act of the Legislature of Nevada of March 14, 1899. From the order overruling a general demurrer, an appeal to this court is taken.

[1] One question only is here involved, to wit: Is the statute of March 14, 1899, entitled "An act to provide for taking the votes of electors of the state of Nevada, who may be in the military service of the United States," now in force and effect as a mode by which citizens of this state now in the military forces of the United States may vote in our state elections? The act just referred to (Stat. 1899, p. 108) was one the original purpose of which was to take the vote of the electors of the state of Nevada who might be in the service of the United States and beyond the territorial limits of the state. It provided that the adjutant general of the state should in due time make and deliver to the secretary of state duly certified separate lists for each county having soldiers in the service, giving the names of all qualifled electors under the law of this state at electors in the naval service, or conscripted men the time of their enlistment, etc.

was required to immediately transmit duly certified copies of such lists to the commanding officer of each of the organizations of which electors of this state might be mem-The act then proceeds to prescribe for the holding of an election at a place beyond the territorial limits of this state, where electors of this state might be engaged in the military service. It designates who should be the officers of such election, how the vote should be counted and canvassed, and how the same should be returned or transmitted after the election was conducted.

By an act approved March 31, 1913, entitled "An act relating to elections and removals from office," the act of March 14, 1899, was specifically repealed. Stat. 1913, p. 568.

By section 149 of an act entitled "An act relating to elections" approved March 29, 1915, it is provided:

"Electors of the state of Nevada in the military service of the United States may, when called into such service, vote in accordance with the provisions of the act approved March 14, 1899." Stat. 1915, p. 507.

By section 101 of an act entitled "An act relating to elections," approved March 24, 1917, it is provided:

"Electors of the state of Nevada in the military service of the United States may, when called into such service, vote in accordance with the provisions of the act approved March 14, 1899." Stat. 1917, p. 385.

It is the contention of respondent here that section 101 of the act of 1917, just quoted, is without force or effect, and that the act of March 14, 1899, is not revived. We have been referred especially to our constitutional provision (section 17 of article 4), reading as follows:

"Each law enacted by the Legislature shall embrace but one subject, and matter properly connected therewith, which subject shall be briefly expressed in the title; and no law shall be revised or amended by reference to its title only; but, in such case, the act as revised, or section as amended, shall be re-enacted and published at length.'

In furtherance of respondent's contention. reference is made to decisions bearing upon constitutional provisions somewhat like ours, but a studied difference may be noted when comparing our constitutional provision with the provisions in states like Alabama, New Jersey, and Kansas, in each of which it is provided:

"No law shall be revived, amended, or the provisions thereof extended or conferred, by reference to its title only; but so much thereof as is revived, amended, extended, or conferred, shall be re-enacted and published at length."
Ala. art. 4, § 45.

A like provision is found in the Constitution of New Jersey (Const. N. J. art. 4, § 7), and also in the Constitution of Kansas (Const. Kan. art. 2, § 16).

If by our constitutional provision the Legislature was prohibited from reviving stat-

provisions of the act, the secretary of state the effect of the constitutional inhibition might be relied on by respondent here.

> In Riter v. Douglass, 32 Nev. 400, 109 Pac. 444, we expressed the rule directly applicable here:

> "Congress is authorized only to enact such laws as the national Constitution expressly grants it or is clearly implied with the grant; while the lawmaking power of the state is authorized to enact legislation on all subjects which are not expressly prohibited by our state Constitution or in contravention of the federal Constitution or in contravention of the federal Constitution."

> The Legislature of 1917, steeped as it must have been in the atmosphere of contingency, when the aurora borealis of war was all too visible, sought to make provision for the taking of the votes of citizens of this state who might, at the time of the holding of the next election, be in the military service of the country. The Legislature of 1899 had enacted a law comprehensive and effective at least for conditions then prevailing. A subsequent Legislature had repealed that statute, but the Legislature of 1917 sought to make it operative, not as an individual statute, but as a part of the working plan of the general election law.

> Acts of the Legislature which attempt to revive a statute formerly nullified are not to be confused or confounded with acts attempting to amend or revise. An amendment is an alteration effecting a change in the draft, or form, or substance of a law already enacted, or of a bill proposed for enactment. State v. Wright and Harris, 14 Or. 365, 12 Pac. 708. When the legislative body attempts to revise, it thereby assumes to make additions or changes or corrections to alter or to reform something then in force and effect. Revision in a legislative sense can only apply to a measure, bill, or law then having existence, life, and force, and cannot, in the very nature of things, apply to a nullified or repealed act. The term "revive," as applied to legislative proceedings, signifies the reconference of validity, force, and effect; at least, the reconference of such validity, force, and effect as the revived measure, law, or bill formerly possessed. While revision or amendment by title only is by our Constitution prohibited, such prohibition does not extend to revival by title, hence the Legislature of 1917, in enacting section 101 of the election law, did not run counter to the constitutional provision.

[2] Where one act of the Legislature specifically adopts provisions of another act, the latter being of the same general subject-matter, or being by nature or substance properly connected therewith, the effect of the adopting act is to incorporate the adopted act and make the latter effective in the policy and for the purpose designated. The fact that the adopted act may have been at a former time repealed or nullified does not operate against its effectiveness when revived by adoption utes by title only, then the rule recognizing into a valid and effective law. Lewis' Suthv. Glassco, 203 Ill. 353, 67 N. E. 499. The rule which we have applied here has found sanction even under that strict rule of construction which applies to criminal statutes. State v. Caseday, 58 Or. 429, 115 Pac. 287.

In reviving a statute by making the same a part of another and newer act, the revived or adopted statute takes its new validity, or new life, so to speak, not from its former existence or enactment, but rather by virtue of the force, effect, and life of the adopting statute. A repeal of a reviving or adopting statute may repeal the revived or adopted provision if the latter had been repealed prior to the time of adoption, but the repeal of an adopted statute, where the same was in force and effect at the time of its adoption, will not affect its validity or operation within the scope of its functions, as prescribed by the adopting act. Gaston v. Lamkin, 115 Mo. 20, 21 S. W. 1100. In the last-cited case, the court voiced the rule thus:

"The general rule governing in such case seems to be that, where one statute refers to another for rules of procedure prescribed by the for-mer, the former statute, if specifically referred to, becomes a part of the referring statute, and the rules of procedure prescribed by the earlier statute, so far as they form a part of the second enactment, continue in force, although the earlier statute be afterwards modified or repealed."

This rule might, we think, be regarded in some instances as too general, but where the language of adoption or revival is direct as to reference and specific as to intendment, as it is in the reviving statute here involved. the rule is eminently applicable. Ventura County v. Clay, 112 Cal. 65, 44 Pac. 488.

It might be noted that the Supreme Court of Washington (State v. Tausick, 64 Wash. 69, 116 Pac. 651, 35 L. R. A. [N. S.] 802), has said, under conditions not unlike those presented here, that under a constitutional inhibition providing that no act shall be "revised" or "amended" by mere reference to its title, an adopted statute, not being amendatory or revisory in character, is not obnoxious to this constitutional provision.

In the case of Brig Aurora, 7 Cranch, 382, 3 L. Ed. 378, the Supreme Court of the United States observed the rule. There provision was made for a revival of a statute by proclamation of the President, contingent upon certain acts of a foreign nation. court, in addressing itself to the subject,

"We can see no sufficient reason, why the Legislature should not exercise its discretion in reviving the act of March 1, 1809, either expressly or conditionally, as their judgment should di-

In the case of Field v. Clark, 143 U. S. 649, 12 Sup. Ct. 495, 36 L. Ed. 294, the rule as declared in the Aurora Case was approved.

The Supreme Court of Florida, in the case of State ex rel. Attorney General v. Green, 36 Fla. 154, 18 South. 334, met the identical the military forces of the government.

erland Stat. Const. (2d Ed.) p. 788; People question here under consideration, and under very like circumstances as to repeal and revival, and under a constitutional provision identical to ours. Article 3, \$ 16, Const. of Fla. The views expressed and reasoning followed by the court there is illuminative of the subject. There the court drew the distinction between constitutional provisions prohibiting revival of statutes and those prohibiting revision of statutes. In the case of Quinlan v. Houston & T. C. Ry. Co., 89 Tex. 356, 34 S. W. 738, the Supreme Court of Texas held likewise. To the same general effect is the application of the rule in the case of Flanders v. Town of Merrimack, 48 Wis. 567, 4 N. W. 741.

> [3] Section 3 of article 2 of our Constitution provides:

"The right of suffrage shall be enjoyed by all persons, otherwise entitled to the same who may be in the military or naval service of the United States; provided, the votes so cast shall be made to apply to the county and township of which said voters were bona fide residents at the time of their enlistment; and provided further, that the payment of a poll tax or a registration of such voters shall not be required as a condition to the right of voting. Provision shall be made by law, regulating the manner of voting, holding elections, and making returns of such elections, wherein other provisions are not contained in this Constitution." tained in this Constitution.'

It is contended by respondent that the act of 1899, if the same was revived, is void because it unduly and unjustly discriminates between volunteers in the United States army service and volunteers in the naval service, and also discriminates between volunteers in the United States service and conscripted men in the military service. Their contention in this respect is based on the fact that no mention is made of those electors of this state who may be in the naval service of the United This entire contention is, in our judgment, met by the fact that the term "military" is not limited in its application to the land forces, but applies equally to the naval branch of the nation's offensive and defensive machinery.

The Circuit Court of the United States, in Re Burns (C. C.) 87 Fed. 796, regarded the term "military service," as used in the third Article of War, as applying as well to the volunteer army as to the regular army of the United States. A statute prohibiting the enlistment or mustering into the military service of any person under the age of 21 years without the written consent of his parents or guardian, was there held to apply to the volunteer forces as well as to the regular army.

The military force of the government is seated in its army and navy. These are coordinate factors, and an individual belonging to either is properly in the military service of the country. The case of Stocker v. United States, 39 Ct. Cl. 300, is authority for the assertion that the army and navy constitute

It may be noted in passing that by the recent enactment of Congress to extend protection to the civil rights of members of the military and naval establishments of the United States engaged in the present war (approved March 8, 1918), the term "person in military service" as used in the act is declared to include all officers and enlisted men of the Regular Army, the Regular Army Reserve, the Officers' Reserve Corps, the Enlisted Reserve Corps, all officers and enlisted men of the National Guard and the National Guard Reserve, and all officers and enlisted men of the Navy and Marine Corps and the Coast Guard: also all officers and enlisted men of the Naval Militia, Naval Reserve Force, Marine Corps Reserve, and National Naval Volunteers.

It is conclusive of the question to say that it must be assumed that the Legislature of 1899, when it enacted the statute revived by our act of 1917, did so with a view to complying with the declared policy of the state as enunciated in section 3 of article 2 of the Constitution. It must be inferred that the Legislature took cognizance of the terms and provisions of that section of the Constitution, and that when, in the act of March 14, 1899, it used the term "military service," it did so advisedly and for the purpose of extending the right of suffrage to all persons who might be in the land or naval or other forces of the United States. Hence the logical inference may be drawn in favor of the intendment of the Legislature that the term "military service" was used in contemplation of all branches of the maintained fighting forces of the country. The same reasoning must apply as to the legislative intent when section 101 of the Act of 1917 was incorporated into our statute relating to elections.

By section 101 of the 1917 act relating to elections the Legislature sought to establish a method or mode by which electors of the state of Nevada in the military service of the United States might cast their vote at elections. Section 101 of the act of 1917 does not limit its force or effect to either volunteers or conscripted men. It is to all electors of the state of Nevada who may be in the military service of the United States, regardless of how they may have entered that service. that section 101 of the law seeks to accord a way by which their votes may be taken, counted, and convassed. Hence, if the act of 1899 applied only to those who might have been in the military service of the United States as volunteers, nevertheless the provisions of the act of 1899, whereby the votes of such volunteers might be taken, counted, and canvassed, are by the act of 1917 made applicable, not alone to volunteers, but to all in the military service of the United States who may be qualified electors of the state of Nevada.

It must be understood that we do not assume to deal with the question of expediency. or as to whether or not the policy of the act of March 14, 1899, is such as would be considered in keeping with conditions that confront this state to-day; nor would we assume to determine the effectiveness of the statute of March 14, 1899, or as to its being sufficiently comprehensive to accomplish the result desired under present conditions. Of this we may entertain a doubt; indeed, if we were called to pass upon the question under different conditions it might be found necessary to express different views; but this is an appeal from an order overruling a general demurrer, and we assume to determine one question

The Legislature of 1917 sought to establish a method by which electors of this state who might be in any branch of military service could cast their vote at elections held in this state during such service. With that object in view, the Legislature adopted and incorporated into the general election laws the method by which a similar object had been carried out by a former Legislature. The method in the former instance may have applied only to those electors who were then in the military service under the volunteer system, but if the Legislature of 1917 intended, and we assume it did, that this method should now apply to all electors in the military service, regardless of the manner of their induction into that service, such intendment must be carried out so far as possible. The result intended may be incapable of accomplishment under the method prescribed, but questions involving such, if they arise, are for the fufure

The order and judgment appealed from are reversed. It is so ordered.

COLEMAN and SANDERS, JJ., concur.

MAZADE v. JUSTICE'S COURT OF GOLD-FIELD TP., ESMERALDA COUN-TY, et al. (No. 2285.)

(Supreme Court of Nevada. April 30, 1918.)

1. JUSTICES OF THE PEACE \$==141(1)-JUDG-MENTS REVIEWABLE-OBDER ON CERTIORARI APPEAL FROM JUSTICE'S COURT.

The district court has final appellate juris-The district court has final appellate jurisdiction over justice's court, so that where defendant, having suffered adverse judgment in justice's court, brought certiorari to the district court, which dismissed the writ, the Supreme Court had no jurisdiction over an appeal under the title of the cause followed in the justice's court; a different title having been used in the district court.

2. APPEAL AND ERROR \$\instructure{3}\text{384(1)}\to JUDGMENTS}\$
REVIEWABLE—ORDER ON CERTIORARI—APPEAL FROM JUSTICE'S COURT—BOND.

Where judgment in justice's court went against defendant, and he brought certiorari against the justice to review the judgment in the district court which dismissed the writ, a bond on appeal to the Supreme Court, bearing the

title of the cause in the justice's court, gave no jurisdiction of the appeal in view of Rev. Laws, \$\$ 5325, 5330, prescribing method of appeal.

3. APPEAL AND ERROR \$\iff=386(1)\to JUDGMENTS
REVIEWABLE\to ORDER ON CERTIORABI\to APPEAL FROM JUSTICE'S COURT\to BOND.

A bond on appeal from order dismissing
writ of certiorari to review judgment of justice's court, which was never filed in the district court as required by Rev. Laws, \$ 5346, nor approved by the justices of the Supreme Court under section 5358, conferred no jurisdiction of the appeal.

Certiorari by Louis Mazade to review a judgment of the Justice's Court of Goldfield Township, Esmeralda County, in an action by M. C. Peterman against Louis Mazade. From the judgment of the district court dismissing the writ of certiorari and order on motion for new trial adhering to the former ruling, Mazade appeals, and defendant moves to dismiss the appeal. Appeal dismissed.

E. Carter Edwards, of Goldfield, for appellant. M. A. Diskin, of Goldfield, for respondents.

McCARRAN, C. J. An action was commenced in the justice court of Goldfield township in which one M. C. Peterman was plaintiff and Louis Mazade was defendant. Judgment was entered against defendant in that court and he sued out a writ of certiorari in the district court. The proceedings in the district court were all had under the entitlement, "Louis Mazade v. Justice's Court of Goldfield Township, in the County of Esmeralda, State of Nevada, and Marvin Arnold, Justice of the Peace of said Justice's Court.'

In the district court the writ of certiorari was dismissed. On motion for new trial, the court adhered to its former ruling. Petitioner in the district court, who was defendant in the justice court, has attempted to appeal to this court from the ruling and order of the district court. A motion to dismiss the appeal is earnestly prosecuted here and we regard at least one point raised as conclusive.

[1] As we have already noted, all the proceedings in furtherance of the writ of certiorari in the district court were in a matter entitled as above set forth. In attempting to come to this court, however, the entire proceeding on appeal, as instituted within the time allowed (if it was within time), is entitled, "Peterman v. Louis Mazade." This was the entitlement of the action in the justice court, and an appeal from that could at most only be taken to the district court; the latter having final appellate jurisdiction. Leonard v. Peacock, 8 Nev. 157; Bancroft v. Pike, 33 Nev. 80, 110 Pac. 1.

[2] It is insisted by respondent here that this appeal should be dismissed, as no bond or undertaking on appeal was ever filed. In the record we find an instrument purporting 5346, Rev. L.). While it appears in the files to be a "Bond on Appeal from Judgment and of this court, no attempt has been made to

Stay of Execution." This instrument is entitled, "M. C. Peterman v. Louis Mazade." There is no appeal to this court and no notice of appeal from the judgment or to stay execution in the case of "M. C. Peterman v. Louis Mazade." The judgment in that case was and is in the justice court of Goldfield The execution, if any were to township. issue, could only issue from the justice's court. The matter in the district court was a proceeding in certiorari, and the order of that court was one dismissing the proceeding under the writ. 'The certiorari proceedings and the order dismissing the same were in an entirely separate and distinct matter entitled, whether properly or otherwise, "Louis Mazade v. Justice's Court of Goldfield Township, etc., and Marvin Arnold, Justice of the Peace Thereof."

Section 5325, Rev. L., provides:

"A judgment or order in a civil action, except when expressly made final by this act, may be reviewed as prescribed by this title, and not otherwise." otherwise.

Section 5330, Rev. L., provides:

"An appeal is taken by filing with the clerk of the court in which the judgment or order appealed from is entered, a notice stating the appeal from the same or some specific part thereof, and within three days thereafter serving a similar notice or copy thereof on the adverse party or his attorney. \* \* \* The ormg a similar notice or copy thereof on the adverse party or his attorney. \* \* \* The order of service is immaterial, but the appeal is ineffectual for any purpose unless within five days after service of the notice of appeal an undertaking be filed, or a deposit of money be made with the clerk, as hereinafter provided, or the undertaking be waived by the adverse party in writing." party in writing.

In this case the only proceeding in which an order or judgment was entered by the district court was in the case of "Louis Mazade v. The Justice's Court of Goldfield Township," etc. The case of Peterman v. Louis Mazade was never in the district court. either by appeal or otherwise. Hence there could be no order or judgment entered in that case in the district court from which appeal could be taken to this court. A bond or undertaking on appeal filed in one case or under one entitlement can certainly not be effectual as a bond or undertaking on appeal in another and entirely different proceeding. Hence there was no bond on appeal filed in the district court in this case as required by the statute.

[3] Appellant here practically admits that his first effort in attempting to perfect an appeal to this court amounted to a nullity, for at a later date he filed an instrument called "Amended Bond on Appeal," changing the entitlement of the case to, "Mazade v. Justice's Court," etc. This instrument, however, although purporting to effect appeal from the certiorari proceedings as entertained by the district court, was never filed in that court as prescribed by statute (section

tion 5358, Rev. L.), which provides:

"No appeal shall be dismissed for insufficien-"No appeal shall be dismissed for insufficiency of the notice of appeal or undertaking thereon; provided, that a good and sufficient undertaking approved by the justices of the Supreme Court or a majority thereof, be filed in the Supreme Court before the hearing upon motion to dismiss the appeal; provided, that the respondent shall not be delayed, but may move when the cause is regularly called, for the disposition of the same, if such undertaking be not given," etc.

The instrument styled "Amended Bond on Appeal," and purporting to be in the case of Mazade v. Justice's Court, has never been approved by the justices of this court nor by a majority thereof, nor has it ever been presented for approval.

We may repeat our assertion as set forth in Shute v. Big Meadow Investment Co., 170 Pac. 1049:

"By the terms of the statute the approval by the court is made indispensable to the efficacy of the undertaking."

Here, as in that case, the instrument styled "Amended Bond on Appeal" is without force or effect so far as this appeal is concerned.

The motion to dismiss might prevail on other grounds; for instance, the notice of appeal is entitled in the case of "M. C. Peterman v. Louis Mazade," and is addressed, "To the Plaintiff, M. C. Peterman, Above Named. and to His Attorney, M. A. Diskin." notice of appeal, signed by the attorney for the petitioner in the certiorari proceedings, declares:

"That the defendant in the above entitled action hereby appeals to the Supreme Court of the state of Nevada from the judgment herein entered," etc.

No judgment was entered by the district court in the case of "M. C. Peterman v. Louis Mazade," because no such case was before the court for the entry of judgment. The only matter in the district court was a proceeding in certiorari by "Louis Mazade v. Justice's Court of Goldfield Township and the Justice Thereof."

It is unnecessary for us to dwell on the effect of such a notice. We deem it sufficient to conclude the matter on the sufficiency of the undertaking, which is fatal. Shute v. Big Meadow Investment Co., supra.

For the foregoing reasons, it is ordered that the appeal be dismissed.

COLEMAN and SANDERS, JJ., concur.

STATE ex rel. ALLEN CLARK CO. v. PA-CIFIC WALL PAPER & PAINT CO. et al. (No. 2294.)

(Supreme Court of Nevada. April 30, 1918.) CERTIORABI 55(1)-JUDGMENTS REVIEWABLE OBDER ON CERTIORARI-JUSTICE'S COURTS SCOPE OF REVIEW.

on defendant's appeal from adverse judgment in justice's court to the district court affirming the judgment of the justice's court

comply with the provision of the statute (sec- | on questions of law only the judgment was affirmed, defendant's right to certiorari was limited to a review of the district court judgment, from which no appeal lies; and certiorari would not lie from the Supreme Court to review the judgment of the justice.

> Original proceeding in certiorari by State, on the relation of the Allen Clark Company, against the Pacific Wall Paper & Paint Company and others. Writ discharged.

> O. H. Mack, of Reno, for relator. Charles H. Burritt, of Reno, for respondents.

> SANDERS, J. This is an original proin certiorari. ceeding Upon the verified application of the Allen Clark Company, a corporation, this court issued a writ of certiorari, directed to the justice's court of Reno township, county of Washoe, state of Nevada, F. K. Unsworth, justice thereof, and to E. H. Beemer, clerk of the district court of the Second judicial district of the state of Nevada in and for the county of Washoe, and ex officio county clerk of said county, commanding said parties to certify to this court the transcript of the proceedings in said justice's court and in the district court on appeal in the two cases of the Pacific Wall Paper & Paint Company, a corporation, against the petitioner. From the returns to the writ it is made to appear that the petitioner appealed from the judgment rendered against it in the said justice's court to the said district court upon questions of law only. The primary purpose of the actions was to foreclose two claims of lien for labor and material supplied by plaintiff in the alteration and repair of certain premises of the petitioner, situate in said Reno township. Jurisdiction is conferred by statute upon justices' courts in such cases when the amount of the lien does not exceed \$300. Section 5714, Revised Laws; Phillips v. Snowden Placer Co., 160 Pac. 786.

> The petitioner seeks to review the judgment, not of the district court, but of the said justice's court. The question for our determination is whether the petitioner's right to certiorari, if certiorari should be issued at all, is not limited to a review of the judgment of the district court? questions of law presented to the latter court for its determination on appeal were: First. Did the justice's court have jurisdiction over the subject-matter of the suit? Did the complaint state facts sufficient to constitute a cause of action? Third. Had the justice the power and jurisdiction to render a judgment in personam in an action brought primarily to enforce a mechanic's lien where the claim of lien fails? The district court decided these questions adversely to the contention of the petitioner and affirmed the judgment of the justice's court. Having jurisdiction to determine the questions of law thus presented, its judgment



operates to estop the petitioner from proceeding in this court to review by certiorari the judgment of the justice's court.

The petitioner's proper method of redress is an application to this court for a writ of certiorari to review the judgment of the district court, from which the law has provided no appeal. The judgment of the district court is in all respects a judgment by a competent court and one of general jurisdiction. So long as its judgment stands unassailed, it cannot be ignored or swept aside by this proceeding. Oicese v. Justice's Court, 156 Cal. 82, 103 Pac. 317.

The writ is discharged. It is so ordered.

COLEMAN, J., concurs.

McCARRAN, C. J. (concurring). I concur in the order. The writ of certiorari, if it sought to review the order in the district court, should have been directed to that court, and not to the clerk thereof, a ministerial officer.

Section 5686, Rev. Laws, prescribes:

"The writ may be directed to the inferior tribunal, board, or officer, or to any other person having the custody of the record or proceedings to be certified. When directed to a tribunal, the clerk, if there be one, shall return the writ with the transcript required."

In a case where the petitioner in certiorari seeks to cause a review of the proceedings of a court, the writ issues against the tribunal rather than against the clerk thereof. Onesti v. Freelon, 61 Cal. 625.

As I view it, the dismissal of the writ on the grounds and for the reason stated in the opinion of Mr. Justice SANDERS, or for the reason which I here state, does not preclude the bringing of a proper proceeding, and the issuance of a proper writ following this dismissal. The question paramount in the merits of the proceedings involves the right of a court to issue a personal judgment against a defendant where the action was instituted to foreclose a mechanic's lien in accordance with our statutory provisions governing such matters. This question has been dealt with by the courts with varying results. It should be finally settled and determined by this court, in order that the rule may be fixed, and the question put at rest.

HAMMOND LUMBER CO. v. BRAWLEY CO-OP. BLDG. CO. et al. (L. A. 4042.) (Supreme Court of California. April 11, 1918.) APPEAL AND ERROR 6-614-RECORD-UNAUTHENDICATED STATEMENT.

APPEAL AND EEROR & SIGH-HECORD—UNAU-THENTICATED STATEMENT.

Where the transcript contains printed matter designated by appellants as a statement of the case, but the so-called statement is not made the subject of stipulation, and is not authenticated in any manner, there is no record upon which the Supreme Court can say that error was committed as claimed in rulings on the admission and rejection of evidence.

Department 2. Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by the Hammond Lumber Company, a corporation, against the Brawley Co-Operative Building Company, a corporation, and the National Lumber Company, a corporation. From judgment and decree foreclosing a mortgage, defendants appeal. Judgment affirmed.

Frank Birkhauser, of Brawley, for appellants. McPherrin & Nichols, of Imperial, for respondent.

VICTOR E. SHAW, Judge pro tem. This is an appeal from a judgment and decree foreclosing a mortgage upon real estate, wherein the sole and only errors alleged to have been committed were in rulings of the court upon the admission and rejection of evidence offered.

The attorneys have stipulated as to the correctness of the judgment roll, copy of which appears in the transcript, which also contains some printed matter designated by appellants as "a statement of the case," which, no doubt, was intended as a bill of exceptions to exhibit the alleged errors of which counsel complain. This so-called statement, however, is not made the subject of stipulation, nor is it authenticated in any manner whatsoever.

Hence, there is no record upon which this court can say that error was committed as claimed by appellants.

The judgment is affirmed.

We concur: WILBUR, J.; MELVIN, J.

ANDERSON v. WICKLIFFE et al. (L. A. 4171.)

(Supreme Court of California. April 12, 1918. Rehearing Denied May 9, 1918.)

1. CORPORATIONS 432(4)—REPRESENTATION BY AGENTS—USE OF SEAL—EVIDENCE OF AUTHORITY.

The fact that a corporate scal was affixed to the assignment of a note and mortgage transferred by a corporation makes a prima facie showing that the officer executing the assignment had authority so to do.

2. TRIAL \$\infty\$165-Nonsuit-Determination.
On motion for nonsuit, the plaintiff is entitled to the most favorable consideration of every piece of evidence tending to sustain his averments.

8. BILLS AND NOTES \$\iiii316\tag{316}\tag{Assignment}\tag{Consideration Between Assignees and Assignoss.

In a suit for foreclosure of a note and mortgage, the existence of a consideration as between the original holder of the note and its transferee was a matter of no concern to the maker. 4. BILLS AND NOTES \$\infty\$318—NONNEGOTIABLE

A. BILLS AND NOTES \$318—NONNEGOTIABLE NOTES—DEFENSES AGAINST ASSIGNEES.

A note secured by and assigned with a mortgage is nonnegotiable, and defenses against the holder may be set up as fully as against the original payee.

5. Contracts \$38-In Writing-Consideration-Presumption.

The written assignment of a note and mortgage imports a consideration under Civ. Code, § 1614, providing that a written instrument is presumptive evidence of a consideration.

Department 1. Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge. Suit by C. S. Anderson against G. Wickliffe and others. Judgment for defendants, motion for a new trial denied, and plaintiff appeals. Judgment and order reversed.

R. L. Horton, of Los Angeles, for appellant. Waldo M. York and G. W. Wickliffe, both of Los Angeles, for respondents.

SLOSS, J. The defendants executed a mortgage of real property to secure a promissory note made by them to Security Building Company, a corporation. The plaintiff, alleging that he was the assignee of the note and mortgage, brought this action of foreclosure. The defendants denied the assignment to plaintiff, and set up affirmative defenses, which need not be considered here. At the close of plaintiff's case, the court granted the defendants' motion for nonsuit, and judgment was entered accordingly. The plaintiff appeals from the judgment, and from an order denying his motion for a new trial.

[1, 2] The motion for nonsuit was based on the grounds that the assignments under which plaintiff claimed had not been proven, and that there was no consideration for the alleged assignments if such there had been.

The plaintiff introduced testimony that one Yeager was the secretary of Security Building Company, and offered in evidence a writing, purporting to assign to National Building Company the note and mortgage in question. Proof was made that this instrument, which bore the impress of the corporate seal of Security Building Company, was signed, in the name of said Security Building Company, by Yeager as its secretary. Subsequent assignments from National Building Company to E. M. Smith, and from Smith to the plaintiff, were also offered. All these papers were excluded on the ground that there was no proof of the authority of Yeager to execute the first of the assignments. The rulings are assigned as error. There can be no doubt that the claim is well founded. The fact that the corporate seal was affixed afforded a prima facie showing that the officer executing the paper had due authority to execute it. 10 Cyc. 1018; Thomp. Corp. \$ 5105; So. Cal., etc., Co. v. Bustamente, 52 Cal. 192; Scallard v. Eel R., etc., Co., 70 Cal. 144, 11 Pac. 590; Crescent City Wharf Co. v. Simpson, 77 Cal. 286, 19 Pac. 426; Andres v. Fry, 113 Cal. 124, 45 Pac. 534. If the documents offered by plaintiff had been admitted in evidence, as they should have been, there would have been no ground for a nonsuit.

thority would not have been overcome, as matter of law, by the circumstances disclosed by the record. On motion for nonsuit, the plaintiff must be given the benefit of every piece of evidence which tends to sustain his averments, and such evidence must be viewed in the light most favorable to plaintiff's claim. We need not here decide whether, if the case had been submitted on the merits without further evidence, the court might not have properly found that Yeager had no authority.

[3-5] The existence of a consideration, as between the original holder of the note and its transferee, was a matter of no concern to the maker. 29 Cyc. 1284; Ginocchio v. Amador, etc., Co., 67 Cal. 493, 8 Pac. 29. The note, being secured by mortgage, was not negotiable (Meyer v. Weber, 133 Cal. 681, 65 Pac. 1110), and the defenses set up in the answer will therefore be available against the plaintiff, as fully as they would have been against the original payee, when the defendants come to put in their case. But, apart from this, the writing itself imported a consideration (Civ. Code, § 1614), and there was, in fact, ample other evidence of consideration.

It becomes unnecessary to consider the further points made by the appellant.

The judgment and the order denying a new trial are reversed.

We concur: SHAW, J.; RICHARDS, Judge pro tem.

FOSTER v. BRANEN et al. (L. A. 4173.)
(Supreme Court of California. April 12, 1918.)

1. JUDGMENT \$\iftitledeta 570(3) \to Bar-Dismissal on Plaintiff's Direction.

Dismissal on plaintiff's direction does not operate as a bar to a subsequent suit.

2. Costs == 260(4) - Frivolous Appeals-

DAMAGES.

In a mortgage foreclosure suit, an appeal by subsequent purchasers who had answered, denying the execution of the note and mortgage, the payment of \$15 for a search of title and reasonableness of attorney's fees demanded by plaintiff, and alleging estoppel by reason of three prior dismissals on plaintiff's direction keld frivolous, within the rule calling for imposition of damages on appellants.

Department 1. Appeal from Superior Court, Los Angeles County; Curtis C. Legerton, Judge.

Suit by D. E. Foster against Helen Branen, Julia P. Warden, and another to foreclose a mortgage. Decree for plaintiff, and defendant Julia P. Warden and another appeal. Affirmed, and damages imposed on appellants.

J. Irving McKenna and Catherine A. McKenna, both of Los Angeles, for appellants. Arthur G. Stepper, of Los Angeles, for respondent.

would have been no ground for a nonsuit. SHAW, J. The defendants, Julia P. and C. The prima facle proof of the secretary's au- D. Warden, appeal from the judgment.

The action was to foreclose a mortgage exponent appearing that such agreement was within the defendant Helen Branen upon the manager's authority and no foundation ecuted by the defendant Helen Branen upon a tract of land subsequently conveyed to the defendant Julia P. Warden. Helen Branen made no answer to the complaint. Julia P. Warden and C. D. Warden, who was interested only as the husband of Julia P. Warden, filed an answer, denying the execution of the note and mortgage sued on, denying also the payment of \$15 for a search of title and the reasonableness of the sum of money demanded as attorney's fees by the plaintiff, and further alleging that the plaintiff was estopped from maintaining the action by reason of the fact that he had prosecuted three prior actions on the same mortgage and note, all of which had been dismissed.

[1] The evidence shows that the previous actions referred to were dismissed by the clerk on the direction of the plaintiff in the case. There is no merit in the claim that such a dismissal is a bar to a subsequent suit. It appears that at the time the dismissal was ordered the defendants had paid a part of the interest due on the note. was no settlement of the cause of action, nor anything which purported to be a decision against the plaintiff on the merits of the case. No other question is presented.

[2] The appeal is frivolous, and obviously taken for delay only. The case calls for the imposition of damages, which the court fixes at the sum of \$100.

It is ordered that the judgment be affirmed, and that plaintiff recover of the appellants, Julia P. and C. D. Warden, the sum of \$100 as damages by the appeal, together with costs.

We concur: SLOSS, J.; RICHARDS, Judge pro tem.

WILLIAMS v. YOUTZ. (L. A. 4185.)

(Supreme Court of California. April 11, 1918.) 1. Corporations 4-123(14) - Pledge of

STOCK-SALE.

A promissory note, giving a third party the right to call for additional security as it may deem proper, and on failure to respond forth-with the note was immediately to become due and payable, "or on the nonperformance of this and payable, promise" sai promise" said payee is given full power and authority to collect the securities without do-mand or notice, authorized sale of stock secur-ing such note upon default in payment thereof.

2. PLEADING \$\infty 258(1)\to Amendment\to Time.

Where defendant, in an action on a promissory note, applied for permission to amend his answer on the day of the trial five months aft-er filing his original answer to embrace matters of which he had knowledge at the time of filing such original answer, it was not error to refuse such request.

3. EVIDENCE \$370(5)-DOCUMENTS-PRELIM-

INARY PROOF. In an action on a promissory note, it was therefor having been laid.

Department 1. Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by Gara Williams against J. E. Youtz. Judgment for plaintiff, and defendant appeals. Affirmed.

Harriman, Ryckman & Tuttle and Henry W. Nisbet, all of Los Angeles, for appellant. Slosson & Mitchell, of Los Angeles, for respondent.

RICHARDS, Judge pro tem. This is an appeal from a judgment in plaintiff's favor and from an order denying defendant's motion for a new trial. The action is one to recover a balance alleged to be due upon 11 promissory notes, each for the sum of \$1,000, executed in the course of a single transaction by the plaintiff, and each secured by a pledge of certain stock. Each of said notes contained the following provision:

"That the Merchants' & Insurers' Reporting Company has the right to call for such additional security as it may deem proper, and on failure to respond forthwith to such call this obligation shall immediately thereon become due and payable; or on the nonperformance of this promise, the said payee, its president or secretary, or assigns, is and are hereby given full power and authority to sell, assign, and deliver or collect the whole or any part of the abovenamed securities, or any substitute therefor, or any addition thereto, at public or private sale, at any time or times hereafter, without demand, advertisement or notice, such demand, advertisement and notice being hereby expressly tisement waived."

The defendant failed to pay his notes at their maturity, whereupon the stock so pledged as security was sold without demand or notice and the sums realized at such sale applied upon the notes. This is an action to recover the balance still remaining due thereon.

[1] Upon the trial of the cause the defendant insisted, and here insists, that the abovequoted clause in his said notes, providing for the sale of their security without demand or notice, had reference solely to the provisions therein relative to the failure of the maker to respond to a call from the holder of the notes for additional security, and did not refer to or include any failure on the part of the maker of the note to fulfill his promise to pay the same. There is no merit in this contention. The language of the above proviso is unequivocal, and refers directly to any nonperformance of the maker's promise as embodied in the terms of his notes. The sale of the stock pledged for the performance of his said promise was therefore properly made without demand or notice in accordance with the express terms of the waivnot error to exclude an agreement between defendant and the payee's manager, whereby defendant was to be employed for a term of ten years, payment to be applied on the notes; it views in the case of Williams v. Parker, 30

Cal. App. 71, 157 Pac. 550, arising out of this the corporation was not attached, nor was same transaction, and wherein this identical waiver was the subject of review.

[2] The appellant's next contention is that the court erred in refusing to permit the defendant to make an amendment to his answer on the day the cause was set for trial. The action was commenced on August 21, The defendant's original answer in the case was filed on October 6, 1913. The case came on for trial on March 10, 1914, more than five months after the date of the filing of defendant's original answer. In his said answer the defendant had denied specifically the averments of the plaintin's complaint, and had also pleaded payment of the notes sued upon in full. The proposed amendment to his said answer embraced matter alleged to have occurred prior to the inception of the action or the filing of his answer therein, which matter in itself could hardly be said to constitute a defense to the action, since it related to statements of stockholders of the corporation holding said notes made generally in a stockholders' meeting of said corporation, and not embodied in any resolutions or other formal action, to the effect that they did not desire that proceedings should be taken to enforce the collection of said notes. The defendant was himself present at such meeting, and every fact and thing alleged to have occurred thereat were fully known to him at the time his original answer was filed; besides, the matters as set forth in his proposed amendment to his answer were utterly inconsistent with the averments of his original answer, to the effect that said notes had been by the defendant fully paid. Granting the correctness of the rule invoked by the appellant as to the liberality with which courts should admit pleadings to be amended, we are unable to find any abuse of discretion on the part of the trial court in refusing defendant permission to amend his answer on the day of trial as to the matters above set forth. The cases of Manha v. Union Fertilizer Co., 151 Cal. 581, 91 Pac. 393, and Todhunter v. Klemmer, 134 Cal. 60, 66 Pac. 75, are fully in point as sustaining the discretion of the trial court in refusing to allow the defendant to amend his answer, in the absence of any showing why the matters sought to be brought into it at that late date were not embraced in the original answer, or why the application to amend was not earlier made.

[3] The next contention on the part of appellant is that the trial court erred in its refusal to permit the introduction in evidence of a purported agreement between the defendant and the corporation holding his notes, providing for his employment for a term of ten years at a stated salary, which was to be applied to the payment of his notes. The agreement in question was signed by the manager of said corporation.

there any showing, or attempt at showing. what the powers of the manager of the corporation were, or that he had ever been authorized by resolution or otherwise to enter into the agreement in question. The agreement itself was outside the usual course of business of like corporations, and went far beyond the ordinary powers reposed in managers of such institutions. The objection that no proper foundation had been laid for the admission of the agreement in evidence was therefore well taken, and no error was committed by the trial court in sustaining the same.

The appellant's final point that the judgment is unsupported by the findings we find upon an examination of the record entirely without merit.

Judgment and order affirmed.

We concur: SLOSS, J.; SHAW, J.

## SHARPLESS et al. v. PANTAGES. (L. A. 4169.)

(Supreme Court of California. April 12, 1918.)

THEATERS AND SHOWS 4-6-NEGLIGENCE-

1. THEATERS AND SHOWS &—6—NEGLIGENCE—PLEADING—SUFFICIENOY.

An allegation that defendant operated and conducted his theater and its carpets negligently, in that a strip of carpet was so laid that plaintiff in passing downstairs was tripped and thrown by reason of the fact that the carpet was loose and thereby she sustained injuries, was not a too general allegation of negligence. ligence.

2. THEATERS AND SHOWS 6-6-EVIDENCE. In action for injuries occasioned by loose

carpet on stairs in theater, it was within the discretion of the court to permit a witness to days after the accident, especially where there was evidence that there had been no change in its condition.

3. Theaters and Shows 6-8-Negligence-SUFFICIENCY OF EVIDENCE.

Testimony of injured patron of theater that as she was going down the stairs her foot slip-ped because of the loose condition of the carpet, and that her fall was occasioned thereby, was sufficient to sustain a finding that theater was negligent.

THEATERS AND SHOWS &== 6 — DUTY TO PATRONS—CARPETS.

It is the duty of a theater to use ordinary care to so maintain carpets on its stairs that it would be safe for persons to pass thereon ir an ordinary manner.

5. Trial = 238-Instructions.

The court properly instructed the jury that, while they were authorized to determine the facts, they must take the law governing the facts, they must take the law governing the same from the instructions given to them by the court, and that it was a violation of their duty to determine that the law was different from that given by the court.

6. TRIAL \$\infty\$260(1)—INSTRUCTIONS.

The court need not give requested instructions covered by those given, or amplify unnecessarily propositions which to a jury of ordinary intelligence would be apparent from The seal of the instructions given.

7. Appeal and Error @=1002-Findings of (loose condition of the carpet and that her

FACT—CONFLICTING EVIDENCE.

Verdict of jury on conflicting evidence cannot be disturbed on appeal.

Department 1. Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by Susie J. Sharpless and Joseph W. Sharpless, her husband, against Alexander Pantages, doing business under the name of Pantages Circuit of Vaudeville Theaters. Judgment for plaintiffs. From the judgment, and an order denying a motion for a new trial, defendant appeals. Affirmed.

Chas. E. Barrett, of Las Vegas, Nev., and Hickcox & Crenshaw, Harry A. Holizer, and L. D. Collings, all of Los Angeles, for appellant. George L. Greer and S. L. Carpenter, both of Los Angeles, for respondents.

SHAW, J. The defendant appeals from the judgment and from an order denying his motion for a new trial.

The action was to recover damages alleged to have been caused to the plaintiff, Susie J. Sharpless, by the negligence of the defendant. The defendant was conducting a theater in the city of Los Angeles. The negligence alleged is that the defendant operated and conducted his theater and its carpets negligently, in that one of the strips of carpet in a balcony aisle and stairs was so laid that the plaintiff in passing down said stairs was tripped and thrown by reason of the fact that the carpet was loose and thereby she sustained the injuries complained of.

[1] There is no merit in the contention that the complaint is insufficient in respect to the allegations of negligence. It is well settled that it is sufficient to charge negligence in general terms, and that, when that which is done is stated, it is sufficient to say that it was negligently done without stating the particular omission which rendered the act Stein v. United Railroads, 159 negligent. Cal. 368, 113 Pac. 663. The complaint was sufficient in this respect.

[2] It was within the discretion of the court to allow the witness Foster to testify to the condition of the carpet complained of upon an examination made by him two days after the accident occurred, especially in view of the fact that there was other evidence tending to show that there had been no change in its condition in the meantime.

It is claimed that a medical witness, in describing the injuries of the plaintiff, was permitted to magnify the same over the objection of the defendant. We do not find any merit in this contention and it is unnecessary to consider it further.

[3, 4] The contention that the motion for a nonsuit should have been granted is also without merit. The testimony of the plaintiff and other witnesses was sufficient to fall was occasioned thereby. It being the duty of the defendant to use ordinary care to maintain the carpet upon the steps in such condition that it would be safe for persons to pass thereon in an ordinary manner, the fact that the plaintiff's foot slipped as she stepped upon the carpet is some evidence tending to show that defendant had failed to do so and it is sufficient to sustain the decision upon the motion for a nonsuit.

[6] The court properly instructed the jury that while they were authorized to determine the facts involved in the case from the evidence, they must take the law governing the same from the instructions given to them by the court, and that it was a violation of their duty to determine that the law was different from that given by the court. This proposition has been so often decided and is so well established that we deem it unnecessary to discuss it further or cite authorities in its support. Some complaint is made that the instructions state to the jury as a matter of law that the defendant was guilty of negligence. We have examined the instructions throughout and find no basis for that objection.

[6] The defendant asserts that the court erred in refusing to give a number of instructions asked by the defendant. We have examined the instructions given with reference to the instructions asked and refused and find that in each instance the subject of the instructions refused was sufficiently covered by those given. It should be unnecessary to say that there is no law requiring the court to repeat an instruction once given or to amplify unnecessarily upon propositions which to a jury of ordinary intelligence would be apparent from the instructions given.

[7] The most that can be said in favor of the defendant with respect to the sufficiency of the evidence to sustain the verdict is that there was some conflict upon some points therein. In such a case the verdict of the jury cannot be disturbed by the court on appeal.

Other rulings are complained of, but we deem them so trivial that they do not deserve consideration. We find no merit in the appeal

The judgment and order are affirmed.

SLOSS, J.; RICHARDS, We concur: Judge pro tem.

In re O'HARE'S ESTATE. (L. A. 5400.) (Supreme Court of California. April 11, 1918.) APPEAL AND EBROB \$\infty 907(3)\text{-Review-Assumption as to Proof-Absence of Ex-CEPTIONS.

On appeal by the executrix from decree of show that as she was going down the steps distribution, the record, which contained no in question her foot slipped because of the of the contentions of fact that a brother of tes-

tator, named in the residuary clause of the will as a nephew, could not be the brother of that as a nepnew, could not be the brother of that name to whom a specific legacy was given, etc., the Supreme Court being bound to assume that there was a showing that no nephew of the brother's name ever existed, and that the circumstances proved the brother to be the one

Department 2. Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

In the matter of the estate of Martin O'Hare, deceased. From decree of distribution, Margaret O'Hare, the executrix, appeals in several capacities. Affirmed.

E. S. Janes, of Los Angeles, for appellant. Stewart & Stewart, of Los Angeles, for respondent.

MELVIN, J. Margaret O'Hare, the executrix, appeals in several capacities from a decree of distribution which, among other provisions, gives to Michael O'Hare, brother of testator, in addition to a legacy of \$500, one-fourth of the residue of the estate: and to the children of Martin O'Hare, a deceased nephew, his share under the will.

Appellant's counsel made two motions: One, under section 473, Code of Civil Procedure, was to be permitted to file a bill of exceptions as he, not realizing that his notice of appeal was a waiver of his right to a notice of decision, had allowed his time to file a bill of exceptions to pass, while awaiting such notice of decision. This motion was denied. The other motion was one to amend and substitute a judgment and decree for the one entered. It also was denied. There is, therefore, no record to support the objections made by appellant.

There appears in the transcript, however, that which purports to be a copy of the will. It contains the following provisions, among

"I give and bequeath to my brother, Michael O'Hare (also spelled O'Hcher in Ireland), residing at Inchaboy, Postoffice, Gort, County Galaway, Ireland, the sum of five hundred dollars."

"All the rest, residue and remainder of my said estate I give, devise and bequeath to my said nieces, Mary Reilly and Bridget O'Hare, and my nephews, Martin O'Hare, John O'Hare and Michael O'Hare, share and share alike."

Specifically the part of the decree to which appellant objects is as follows:

"The court finds that the brother, Michael O'Hare, is entitled, in addition to the \$500 money legacy bequeathed to him, to one-fourth of the residue of said estate; and the court finds that John O'Hare, Mary A. O'Hare, Joseph O'Hare and Catherine O'Hare, the four children of any all of the children of Martin O'Hare. dren of and all of the children of Martin O'Hare, deceased nephew of decedent, are entitled to take of said estate the share to which their father, the said nephew, Martin O'Hare, would have been entitled, if living, to wit, a general legacy of \$1,000 and one-fourth of the residue of said estate, after the other general legacies are paid."

It is contended that Michael O'Hare, named in the residuary clause, cannot be the brother of that name to whom a specific legacy was given; that Martin O'Hare died before the will was made and executed, and that, therefore, his descendants could not rightfully take his portion under the will; that these children are not in any event entitled to their father's share "as though they were adults" (they being minors); and that the lower court erred in determining that the bequest to John O'Hare, who died in infancy without lineal descendants, should be distributed to the other residuary legatees. Not one of these contentions is or could be supported by the record before us. We must assume that the proof before the court was ample to uphold its conclusions. For instance, we are bound to assume that there was a showing that no nephew named Michael O'Hare ever existed, and that the surrounding circumstances proved the brother Michael to be the one intended. Upon his failure to get a bill of exceptions counsel for appellant must have known that there was no chance of success because no proof of the supposed facts supporting his contentions could be brought before this court.

Judgment affirmed.

We concur: WILBUR, J.; VICTOR E. SHAW, Judge pro tem.

SWEINHART v. PLANT INV. CO. et al. (L. A. 4161.)

(Supreme Court of California. April 12, 1918.) 1. WILLS \$==601(1)-DEVISE OF ABSOLUTE Es-

-Power of Sale-Limitation Over. Where absolute property in an estate is devised, or where an unrestrained power of sale is given to devisees, a limitation over to another is void as inconsistent with the first estate. 2. EXECUTORS AND ADMINISTRATORS \$\infty 315(6)\$
-Decree of Distribution - Collateral - COLLATERAL

ATTACK. Validity of decree of distribution of testa-Validity or decree of distribution of testa-tor's estate establishing a trust in realty in favor of testator's children and their heirs is not open to attack in suit to partition the real-ty involved by the devisee of one of the dev-isee children, the decree distributing the es-tate, and establishing the trust being an adjudi-cation of the trust's validity and the rights of the children in the property the children in the property.

3. WILLS 5-PROPERTY SUBJECT OF DIS-

POSITION.

Where decree of distribution of testator's estate distributed the whole of the realty to children, share and share alike, in trust to use the profits for life, or until such a time after ten years from testator's death as all his children or the survivors and the heirs of the body of decedents should mutually agree in writing of decedents should mutually agree in writing to sell the realty and divide the proceeds, when that should be done, and the proceeds divided equally among the children and the heirs of the body of decedents, etc., and provided that, if there was no agreement to sell, then, on the death of all of the children, the realty or proceeds should be divided among the heirs of their bodies, etc., and there was never any agreement to dispose of the realty during the life or where an unrestrained power of sale is of one of testator's sons, such son's wife never acquired any interest in it, though her husband devised to her.

Appeal from Superior Department 2. Court, Los Angeles County; Lewis R. Works, Judge.

Action by Minerva Sweinhart against the Plant Investment Company, a corporation, and L. P. Tweedy and others. From an adverse judgment, plaintiff appeals. Affirmed.

Hartley Shaw, of Los Angeles, for appellant. Anderson & Anderson, of Los Angeles. for respondent.

MELVIN, J. Plaintiff, here appealing from an adverse judgment, sued unsuccessfully to partition certain real property asserting that she is the owner of an undivided eighth of the realty involved, claiming as the devisee of her deceased husband, Roger Plant, Jr., who survived his father, Roger Plant, Sr., by more than ten years. The younger Roger Plant died childless, and by his will all of his property went to his widow, who is the plaintiff here. She has married since his death.

The sole question involved is the proper construction of the decree of distribution in the estate of Roger Plant, Sr., by which the whole of the real property is distributed as follows:

"To said William Plant, Susan Plant Tweedy, "To said William Plant, Susan Plant Tweedy, Roger Plant, Henry Plant, Phoebe Plant, David Walter Plant, George Washington Plant, Richmond Plant and Charles Plant, said children of deceased, all of whom are over 21 years old, the said real property is hereby distributed share and share alike, but in trust nevertheless, they to use the net rents and profits during their lives, or until such a time after ten years from the date of the death of said Roger Plant as that all of his said children or in case any of that all of his said children, or in case any of them shall be dead, then all said children then surviving and the heirs of the body of said deceased children, shall mutually agree in writing to sell said real property and divide the proceeds, when the same shall be sold and the proceeds divided equally among said children and in the event any of said children are dead, the heirs of the body of said deceased child or children shall succeed to the interest of their children shall succeed to the interest of their parent in equal proportions, and if they shall not agree in writing to sell said realty as afore-said, then on the death of all of said children, said real property or the proceeds thereof shall be divided among the heirs of the body of said children, each child's children to be entitled to share equally in the portions of its parent, and if any of said children shall die prior to distribution without issue, then the portion of such deceased child shall be equally divided among the surviving children and the heirs of the body of any deceased child, each deceased child's heirs to share equally in their deceased parent's por-tion of said child dying without issue."

Plaintiff's contention is that the distributees under this decree took an estate in fee simple absolute either at the date of the entry of the decree or ten years later, and that the trust provisions are repugnant to this estate. In this behalf her counsel cites many authorities to the effect that where

[1] Unquestionably that is the rule, but an examination of the trust clause of the decree here involved reveals the fact that there is no unrestrained power of disposition con-

[2, 3] The validity of the decree establishing the trust is not open to attack in this suit. Goldtree v. Allison, 119 Cal. 344, 51 Pac. 561. By the terms of that part of the decree none of the property could be sold without the written agreement of the surviving children of the testator and heirs of the body of those original distributees who had died. Before such division by agreement the interest of each distributee would, upon his death, pass to the heirs of his body or in default of any to the survivors of the trus-Such limitation upon the power of alienation may not be questioned by plaintiff, and under the terms of the trust, as there never was any agreement to dispose of the property during her husband's life, she never acquired any interest in it. A very similar trust has been upheld by the Supreme Court of Missouri. Dougal v. Fryer, 3 Mo. 40, 22 Am. Dec. 458.

The judgment is affirmed.

We concur: WILBUR, J.; VICTOR E. SHAW, Judge pro tem.

BRESEE v. DUNN et al. (L. A. 4132.) (Supreme Court of California. April 11, 1918.)

1. PLEADING \$\iff 8(8)\$—Conclusions.

Allegation that "said building restrictions upon said lots have been faithfully observed" is a mere conclusion.

2. COVENANTS \$\sim 51(2)\to BUILDING RESTRIC-TIONS-ENFORCEMENT.

Courts are slow to declare the existence of building restrictions, unless it clearly appears from the conveyances, not only that a general scheme of improvement is comtemplated, but also, if a grantee of the original covenantee seeks to enforce the restrictions, that it is not a mere personal covenant but passes with the land. land.

 COVENANTS = 114(1) — VIOLATI BUILDING RESTRICTIONS—PLEADING. - VIOLATION OF

In action to enjoin construction of a house in violation of building restrictions, the com-plaint was demurrable, where it failed to show that there was any reversion left in the original covenantee or that any penalty attached to disobedience of the restriction.

4. COVENANTS 57-PERSONAL COVENANTS NOT PASSING WITH REALTY.

Where the fee is passed to the covenantor and no reversion left in the covenantee, there is no privity of estate or tenure between the parties, and the burden of the covenant, though imposed upon the land conveyed, is solely for the personal benefit of the covenantee, not passing with the realty to his grantee.

5. COVENANTS \$\infty 51(2) — CONSTRUCTION - MARKS OF PUNCTUATION.

A reasonable construction of a deed conan absolute property in the estate is devised, taining a negative covenant that no building should be placed less than 35 feet from front line; and that no fence should be erected in front of the front line of any building "within five years from the date" of the deed—is, although the two parts of the sentence are separated by a semicolon, to apply the time limit to both, the authorities indicating a tendency on the part of the courts to read a restriction expressed in a deed as a whole, disregarding at times even the strict rules of punctuation.

6. COVENANTS 6=60(2) - CONSTRUCTION

BUILDING RESTRICTIONS.

Conveyance to plaintiff's predecessor contained covenant that no buildings should be placed upon the premises less than 35 feet placed upon the premises less than 35 feet from the front line, that no building to be used as a dwelling should be erected upon said prem-ises within five years from the date of deed which cost less than \$2,500, and that no fence should be erected in front of the front line of any building erected upon the premises. Conany building erected upon the premises. Conveyance of other lots fronting on the same street omitted covenant as to cost, and the inhibition regarding fences was followed by the words "within five years from the date of this deed." Held, that the variation in the deeds indicated that the grantor was merely seeking to put a personal covenant in each deed terminable as to all its parts after five years.

Department 2. Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by P. W. Bresee against R. J. Dunn and others. From judgment following an order sustaining general demurrer to amended complaint, plaintiff appeals. Affirmed.

Williams, Goudge & Chandler, of Los Angeles, for appellant. James, Smith & McCarthy and Hammack & Hammack, all of Los Angeles, for respondents.

MELVIN, J. Judgment followed an order sustaining a general demurrer to the amended complaint. From said judgment plaintiff appeals.

The action was one whereby plaintiff sought to enjoin defendants from constructing a house on their property in alleged violation of a certain building restriction. complaint avers substantially the following facts:

In October, 1901, Prudential Improvement Company, owner of a block of land in the city of Los Angeles, bounded by West Adams, Normandie. Twenty-Seventh and streets, caused said land to be resubdivided and filed for record a plat showing the division thereof into lots, of which there were 21 of substantially uniform size. It was and ever since has been (according to the complaint) the intention and plan of the owners that the tract should be occupied only by residences so erected that those fronting on West Adams street should be not less than 35 feet from the front line of the property and those fronting on Normandie and Anita streets not less than 25 feet. It is further alleged that the owner of the property "in conveying the same did so restrict said property by express provisions contained in the respective convey-

dential Improvement Company conveyed lot 2, one of the five lots fronting on West Adams street, to one Kennedy, and it is alleged in the complaint that:

The deed "for the benefit of the purchaser of said lot and for the benefit of the purchasers of the remaining lots of said tract, and the administrators, executors, heirs and assigns of each of them, and particularly of those lots fronting on West Adams street, contained the following covenants and restrictions: "That no building or buildings shall be erected, constructed or placed upon the premises hereby conveyed, the front line of which shall be less than thirty-five (35) feet from the front line of said premises, and that no building to be used as a dwell-ing house shall be erected, constructed or placed upon said premises within five years from the date of this deed which shall cost less than twenty-five hundred dollars (\$2,500.00) and that no fence shall be erected, placed or constructed in front of the front line of any building erected, constructed or placed upon the said premises."

In April, 1909, plaintiff by mesne conveyances became the owner in fee of lot 2, has ever since been the owner, and has his residence thereon.

In January, 1907, the Prudential Improvement Company (under a changed name) conveyed lots 3, 4 and 5 (also fronting on West Adams street) to one Hundley. The deed contained the following conditions, also alleged in the complaint to have been for the benefit of the purchasers of all of the lots:

"This deed is made subject to the following spress conditions, to wit: That no building express conditions, to wit: That no building or buildings shall be erected, constructed or placed upon the premises hereby conveyed, the front line of which shall be less than thirtyfive (35) feet from the front line of said premises on West Adams street; and that no fence shall be erected, placed or constructed in front of the front line of any building erected, constructed or placed upon the said premises within five years from the date of this deed."

Thereafter by mesne conveyances the defendants, in February, 1914, because the owners in fee of lot 3 which adjoins plaintiff's property, lot 2.

It is further alleged (but without the date being given) that lot 1 fronting on West Adams street was sold by the Prudential Improvement Company and conveyed by deed, which was duly recorded; said deed contoining restrictions similar to those in the deed to lot 2 which we have quoted above.

When defendants became the owners of the property here involved, they had knowledge and notice of the restrictions upon all the lots fronting on West Adams street.

[1] It is further averred that, et all times prior to the date of the acquisition of title by defendants in 1914, "the said building restrictions upon said lots have been faithfully observed" (an allegation which respondents very justly term a mere conclusion). Defendants were about to construct a building within 35 feet of the front line of their property. and plaintiff by this action sought to enjoin them from so doing. Appellant believes that ances of said lots." In November, 1901, Pru- he has sufficiently pleaded the existence of enforceable covenants entered into with the and it is a reasonable construction to apply design of carrying out a general plan for the development of real property subdivided into parcels, and he cites in this behalf many authorities, such, for example, as De Gray v. Monmouth Beach Club House Co., 50 N. J. Eq. 329, 24 Atl. 388; Brouwer v. Jones, 23 Barb. (N. Y.) 153; Korn v. Campbell, 192 N. Y. 490, 85 N. E. 687, 37 L. R. A. (N. S.) 1, 127 Am. St. Rep. 925; Allen v. City of Detroit, 167 Mich. 464, 133 N. W. 317, 36 L. R. A. (N. S.) 890.

[2-4] Undoubtedly. covenants imposing building restrictions have been frequently upheld, but the courts are slow to declare such burdens upon real property to exist unless it clearly appears from the deeds of conveyance, not only that a general scheme of improvement is contemplated, but also, if a grantee of the original covenantee seeks to enforce the restriction, that it is not a mere personal covenant but passes with the land. In the pleading now under consideration it does not appear that there was any reversion left in the original covenantee. The complaint shows neither by direct averment nor by quotation from the original conveyances that any penalty attached to disobedience of the building restrictions. It does contain allegations to the effect that the fee passed from the Prudential Improvement Company to the predecessors of plaintiff and defendants in the ownership of lots 2 and 3 and from them by mesne conveyances to these litigants respectively. The rule is that where the fee is passed to the covenantor and no reversion is left in the covenantee, there is no privity of estate or tenure between the parties, and the burden of the covenant, though imposed upon the land conveyed, is solely for the personal benefit of the covenantee, not passing with the realty to his grantee. Los Angeles Terminal Land Co. v. Muir. 136 Cal. 36-42, 68 Pac. 308; Berryman v. Hotel Savoy Co., 160 Cal. 559-565, 117 Pac. 677, 37 L. R. A. (N. S.) 5.

There is nothing in either of the quotations from conveyances set forth in plaintiff's pleading and nothing in the averments of the complaint to take the pleaded restrictions out of the category of purely personal covenants made for the original grantor's benefit. For this reason the demurrer was properly sus-

[5] Respondents also insist, and we think correctly, that the covenants were intended to and did expire by limitation of time. Inspection of the quoted portion of the deed to respondents' predecessor reveals the fact that it contains the negative covenant that no building shall be placed less than 35 feet from the front line of the property, and that no fence shall be erected in front of the front line of any building "within five years from the date" of the deed. It is true that the two parts of the sentence are separated by a semi-

the time limit as expressed by the words "within five years," etc., to both building restrictions, the one referring to houses as well as that applying to fences. The authorities indicate a tendency on the part of courts to read a restriction expressed in a deed as a whole, disregarding at times even the strict rules of punctuation. For example, the limitation for ten years was held to apply to all restrictions, including that with reference to the building line in the following covenant in a deed:

"That the said grantee or his heirs or assigns shall not for a period of ten years erect on the granted premises any buildings or parts thereof which shall be used or occupied for any other purposes than dwelling-houses, and private stables, and buildings usually appurtenant to dwelling houses, except the corner lots, which may be used for store purposes, and said dwellings to be occupied by none but respectable families, and that no building, or part of any shall be erected within fifteen feet of the front line of each lot." In re Welsh, 175 Mass. 68, 55 N. E. 1043.

In Best v. Nagle, 182 Mass. 495, 65 N. E. 842, a similar ruling was made with reference to the following provisions in a convey-

"That no building except the ordinary out-houses shall be placed upon said lots, or either of them, of less value than four thousand dolset back from the line of the several streets shown on said plan, at least twenty feet, nor shall any building erected on said land be used for a livery stable or tenement house, or for any manufacturing purposes, for the period of

Another instructive case upon this subject is Armstrong v. Griffin, 83 N. J. Eq. 599, 91 Atl. 1016; Id., 84 N. J. Eq. 196, 93 Atl. 1084.

[6] The quotations from deeds appearing in the complaint do not justify the pleading that there was a uniform plan for the benefit of all lots fronting on West Adams street. In the conveyance to appellant's predecessor, made in 1901, three prohibitions are expressed, one against erecting a building within 35 feet of the front line of the premises, a second forbidding the construction of a house costing less than \$2,500, and a third for the prevention of the placing of a fence in front of any building on the property. The phrase "within five years from the date of this deed," upon the strict grammatical construction for which appellant contends, might be held by reason of its place in the sentence to apply only to the limitation regarding minimum cost of any house, leaving the other two provisions enforceable for all time. Identical provisions were in the deed disposing of the Prudential Company's interest in lot 1. Yet in the deed to lots 3, 4, and 5, made in 1907, while the restriction upon lowest cost of any building is omitted as it would be very properly if a general and uniform plan of improvement were being carried out the inhibition regarding the erection of a fence colon, but they are conjunctively attached, in front of any building is followed by the

words "within five years from the date of this deed." This absolutely contradicts appellant's pleaded conclusion that the covenantee was pursuing a general and uniform plan of establishing a residence district with similar spaces in front of each dwelling. And it does more than that. It indicates that the grantor was merely seeking to put a personal covenant in each deed terminable as to all its parts after the lapse of five years.

The judgment is affirmed.

We concur: WILBUR, J.; VICTOR E. SHAW, Judge pro tem.

In re FISKE'S ESTATE.

CHAMBERS, Controller, v. PRINCETON UNIVERSITY et al.

(L. A. 5433.)

(Supreme Court of California. April 12, 1918.)

TAXATION \$\infty 876(6)\$—INHERITANCE TAX—EXEMPTION—FOREIGN CHARITABLE OF BENEVOLENT CORPORATIONS—STATUTE

LENT CORPORATIONS—STATUTE.
Foreign charitable corporations were exempt from inheritance tax on property left them by will under Inheritance Tax Law 1915 (St. 1915, p. 421) art. 1, § 7, exempting charitable corporations.

Department 2. Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

In the matter of the estate of Marie Antoinette Fiske, deceased. From a judgment exempting Princeton University and other corporations from paying an inheritance tax, John S. Chambers, Controller, etc., appeals. Affirmed.

John W. Carrigan and Edwin H. Pennock, both of Los Angeles (Robert A. Waring, Inheritance Tax Atty., of Sacramento, of counsel), for appellant. C. J. Willett and A. G. Allen, both of Pasadena, for respondents.

WILBUR, J. This is an appeal from a judgment declaring that certain foreign corporations, to wit, Princeton University, Cheshire Public Library, and Cheshire Cemetery, all existing for nonprofit purposes, are exempt from paying an inheritance tax upon the property left to them by the will of the decedent. The facts are stipulated, and the only question is whether, under the inheritance tax law of 1915 (St. 1915, p. 421), such foreign corporations are exempt from the payment of the tax. That statute (article I, § 7) reads as follows:

"All property transferred to societies, corporations, and institutions now or hereafter exempted by law from taxation, or to any public corporation, or to any society, corporation, institution, or association of persons engaged in or devoted to any charitable, benevolent, educational, public, or other like work (pecuniary profit not being its object or purpose), or to any person, society, corporation, institution, or

association of persons in trust for or to be devoted to any charitable, benevolent, educational, or public purpose, by reason whereof any such person or corporation shall become beneficially entitled, in possession or expectancy, to any such property or to the income thereof, shall be exempt."

It is difficult to conceive of any language by which a more direct exemption could be Authorities are cited from other states wherein exemptions of charitable corporations have been held, under the language of the particular statute construed, to apply only to domestic charitable corporations. Our attention is not called to any law which is as broad and comprehensive in its scheme of exemption as our statute. If this statute simply read, "All property transferred to corporations and institutions now or hereafter exempted by law from taxation," it might very well be argued, as it was in the cases in question, that the exemption "law" referred to was the law of this state, and that therefore we should look to its law to determine what societies, corporations, and institutions are exempt from taxation. As there are additional provisions in the statute concerning exemptions, we are not justified in any construction of the statute which depends upon such consideration alone. Some of the cases cited are based upon the general consideration that, where "corporations" are referred to in such legislation, it must be inferred that the Legislature was exempting such corporations only as it has jurisdiction over, namely, domestic corporations. Under the statute of this state there is no room for such construction, for the exemption is extended to a "society," an "institution," an "association of persons," and to "any person" as well, if engaged in the work described. It must beapparent that the Legislature intended to exempt from taxation all property devoted to certain purposes, namely, property "devoted to any charitable, benevolent, educational, or public purpose," "or any other like work." The fact that the devisee or legatee might be a corporation, foreign or domestic, was an entirely indifferent matter, for the exemption was made to apply to "societies," "corporations," "institutions," "association of persons," and to all "persons." It would seem to verge upon an absurdity to say that when the Legislature used the word "person" it meant any person, resident or nonresident of the state; but, when it used the word "corporation" in exactly the same connection and in the same sentence, it meant only domestic corporations. We are in entire accord with what was said in Re Frain, 141 La. 932, 75 South. 847, where the numerous decisions relied upon by the appellant were reviewed. court there pointed out that the decisions

guage of the particular statute under consideration, and added:

"Very true, these decisions are reinforced by considerations based on the policy of the law in granting exemptions; but their main and real basis is the text itself of the statute. And the text of the statute \* \* \* extends the exemption to religious institutions in general, without qualification.

We find it unnecessary to discuss the numerous decisions of other states, in which laws more or less similar to ours are construed to mean that domestic corporations are exempt and foreign corporations taxed. Nor is it at all necessary to discuss the conceded right of a state to discriminate between foreign and domestic corporations in the imposition of the inheritance tax. Estate of Speed, 203 U.S. 553, 27 Sup. Ct. 171, 51 L. Ed. 314.

The judgment is affirmed.

We concur: MELVIN, J.: VICTOR E. SHAW, Judge pro tem.

## HAMAKER et al. v. BRYAN et al. (L. A. 4164.)

(Supreme Court of California. April 13, 1918. Rehearing Denied May 9, 1918.)

TRIAL \$\iff 194(11)\$ — Instructions — Bad FAITH—Province of Jury.
 In an action for damages for breach of con-

tract to convey real estate in which damages for bad faith were claimed under Civ. Code, § 3306, an instruction defining bad faith as any unlawful or unjustifiable refusal on the vendors part to comply with the agreement would be sufficient to constitute bad faith, taking into consideration all the facts and circumstances surrounding the failure to convey, was errone-ous; the bad faith of the vendors being a jury question.

VENDOR AND PURCHASER \$\iiii 351(1) - BREACH OF CONTRACT—"BAD FAITH."

In an action for breach of contract to con-2. VENDOR

vey real estate, it was not bad faith, under Civ. Code, \$ 3306. providing measure of damages in case of "bad faith" of vendor, for the vendors to enter into the contract after having made arrangements to secure title to the land they agreed to convey.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Bad

Vendor and Purchaser \$35. Breach of Contract—"Bad Faith. 3. VENDOR **€**351(1)

In an action for breach of contract to convey real estate, a few days' delay by the vendors in securing title to the land does not constitute bad faith, within Civ. Code, § 3306, relating to measure of damages in case of "bad faith" of vendor.

Department 2. Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by W. M. Hamaker and others against E. P. Bryan and others. Judgment for plaintiffs, and defendants appeal. Reversed.

W. W. Butler and Anderson & Anderson,

Hollzer & Morton, Harry A. Hollzer, and C. B. Morton, all of Los Angeles (Jerome H. Kahn, of Los Angeles, of counsel), for respondents.

WILBUR, J. This is an action brought by the plaintiffs to recover damages for breach of contract to convey real estate, executed March 14, 1911. The Code prescribes the ordinary measure of damages in such cases, and then makes this special provision, "but adding thereto, in case of bad faith, the difference between the price agreed to be paid and the value of the estate to be conveyed," etc. The price agreed to be paid in the instant case was \$33,500, of which \$250 was paid and \$4,750 agreed to be paid in cash, the balance by mortgage and trust deed on the property. The verdict was for \$5,250. The principal question involved was whefner or not there was bad faith in the refusal, if any, to convey. On this subject, the court instructed the jury as follows:

"In order to charge the defendants with bad faith, it is not necessary that their conduct be shown to be fraudulent. It is sufficient to show that their conduct in failing to convey this property to the plaintiffs was by reason of any frivolous or unfounded refusal in law or in fact to comply with the terms of their agreefact to comply with the terms of their agree-ment. Any unlawful or unjustifiable refusal on their part to comply with their agreement would be sufficient to constitute bad faith; and in determining whether or not the conduct of the de-fendants in this case was such as to show bad faith, you should take into consideration all of the facts and circumstances surrounding their failure to convey the property as disclosed by the evidence."

[1-3] The jury were thus instructed that: "Any unlawful or unjustifiable refusal on their [the vendors'] part to comply with their agreement would be sufficient to constitute bad faith.

Every breach of a valid and subsisting contract for which damages may be recovered under section 3306, Civil Code, is "unjustifiable," and in a sense "unlawful," for the law requires that a person fulfill his legal obligations. The instruction was therefore clearly erroneous and prejudicial. The bad faith of the vendors was a question of fact to be determined by the jury. Appellate courts have been called upon to determine whether or not the evidence before the trial court was sufficient to justify a decision as to the fact of good faith or bad faith, but our attention has not been called to any case where a trial court, as a matter of law, has attempted to define "bad faith." In Morgan v. Stearns, 40 Cal. 434, 439, before the enactment of section 3306, Civil Code, the Supreme Court declined to disturb a judgment for damages based upon a difference between the market value and the contract price of land where the vendor "willfully refused to comply with the terms of the agreement to convey merely because the land has in the meantime considerably appreciated in value," but said:

"It is unnecessary to examine to what, if any, all of Los Angeles, for appellants. Morton, extent the rule of damages for failure to convey

ant appearing.

In Yates v. James, 89 Cal. 474, 26 Pac. 1073, the failure of the vendor to convey was due to the refusal of the vendor's wife to join in a deed, the property being covered by a homestead declaration filed by the vendor before the contract of sale, and yet it was held that "bad faith" was not "proved," and the judgment was reversed for that reason, although the inability of the defendant to convey was due to a defect in his title (if a homestead may be classed as such) existing at the time he made the contract of sale. In Clark v. Yocum, 116 Cal. 515, 48 Pac. 498, the vendee paid the full purchase price (\$4,-400) of certain land and appurtenant water right. The price of the water right was not segregated, but it was alleged to be of the value of \$2,000. A judgment for that amount was secured and affirmed. The vendors were the owners of said water right, and accepted the full purchase price therefor, and then, "without any just reason or excuse," refused to perform their contract. It was held that they were guilty of bad faith as a matter of law. In the instant case it was not bad faith for the vendors, having made some arrangement to secure title, to enter into a contract of sale. Yates v. James, supra. Nor would a few days' delay in securing such title be sufficient evidence of bad faith.

Judgment reversed.

We concur: VICTOR E. SHAW, Judge pro tem.; MELVIN, J.

FOSTER v. LOS ANGELES TRUST & SAV-INGS BANK. (Civ. 2113.)

(District Court of Appeal, Second District, California. March 4, 1918.)

1. Escrows \$\infty\$1-What may be Placed in "Escrow."

The term "escrow," ordinarily considered, applies to a deposit of deeds, etc., and not to money.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Escrow.]

2. Depositables -3-Rights and Obliga-

Where, under agreement between buyer and Where, under agreement between buyer and seller, money is deposited in a bank with instructions to deliver it to a seller on delivery of property, the bank is an agent for both parties, and must hold the same and pay it to the seller if there is a delivery, and the buyer if there is not.

3. Election of Remedies &=3(4) — Inconsistency of Remedies—Remedies Against DIFFERENT PERSONS.

In such case, the seller waives its rights against the depositary, where on refusal of buyer to accept delivery it sells the property at public auction and sues the buyer alone and gets judgment for the full amount of the difference between the amount realized from the sale and the amount of the contract price, making no account whatever of the sum on deposit; such action by the seller being inconsistent

land is affected by the good faith of the defend- with its further assertion of ownership of the sum deposited.

> Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

> Action by E. K. Foster against the Los Angeles Trust & Savings Bank, a corporation. Judgment for defendant, and plaintiff appeals. Affirmed.

> Isidore B. Dockweiler, of Los Angeles (W. D. Finch and Thomas A. J. Dockweiler, both of Los Angeles, of counsel), for appellant. Jones & Weller, of Los Angeles, for respondent.

> JAMES, J. This action was brought to recover the sum of \$840 and interest. The gist of the claim of the plaintiff was that this money had been deposited with the defendant by a third party for his benefit, and that, conditions precedent having been satisfied and demand made, plaintiff was entitled to collect from the defendant the sum mentioned. Answer was filed to the complaint, and among the defenses alleged was that of the bar of the statute of limitations. The case came on for trial, and before any witnesses were examined, defendant asked and was allowed to withdraw its plea of the statute of limitations. Thereupon plaintiff being called as a witness in his own behalf, defendant objected to the introduction of any evidence on the ground that plaintiff's complaint failed to state sufficient facts to constitute a cause of action. This objection was sustained, and the judgment of dismissal, from which this appeal is taken, followed.

> It will be necessary to a proper understanding of the legal question presented to state more particularly the facts relied upon by plaintiff to sustain his suit, as the same are expressed in the complaint. In March. 1907, the plaintiff and A. W. McCready entered into a contract executory in form as to both parties, by which McCready purchased from the plaintiff ten motorcars, to be thereafter shipped from St. Louis, Mo. The cars were to cost McCready in Los Angeles \$2,800 each. One car was to be shipped immediately on the making of the agreement and the remainder, in lots of three, were to be shipped in March, April, and June, respectively, of the same year. McCready deposited with the defendant on account of the purchase and for plaintiff's benefit the sum of \$2.800. which the defendant was instructed to pay over to the plaintiff in installments of \$280 for each car as the same was delivered. In May of the same year three of the cars contracted for were delivered to McCready and were paid for in full by McCready. Thereupon McCready and the plaintiff mutually released one another as to the sale and purchase of four of the cars referred to in the contract, and agreed further that McCready might draw down the sum of \$1,960 of the

For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

\$2,800 deposit. The defendant was advised [ of this change in the agreement of the parties by letter in the following form:

"May 24, 1907.

"Los Angeles Trust Co. Gentlemen: We agree to the releasing of \$1,960 of the \$2,800 deposit on the escrow on Moon motorcar, balance to be applied on the last three cars. Time of shipment of same to be extended to Aug. 15, 1907.

E. K. Foster.
"A. W. McCready."

Thereafter, and in August, the three motorcars agreed to be last delivered, arrived, and on August 31st the plaintiff notified Mc-Cready and the defendant that the cars had arrived and were ready for delivery in accordance with the contract, and an offer was then made to deliver the same. Cready refused to accept the cars, and this defendant refused to pay over the balance of the deposit, which amounted to \$840, being the same sum herein sued for. The refusal of defendant to pay over the money was based upon instructions given to it by Thereafter the plaintiff gave McCready. due notice that he would sell the three cars at public auction, and such a sale was held. The three cars were sold at this sale for an aggregate of \$6,020. The expenses of sale amounted to the sum of about \$400. Thereafter an action was commenced by this plaintiff in the superior court, in which action McCready and this defendant were made defendants and in which action plaintiff sought to recover from McCready the difference between the amount received by him for the motorcars at the auction sale, plus expenses of sale, and the price which McCready had agreed to pay for the cars. It is not stated whether in this action summons was served upon this defendant, but it is set forth in the complaint here that defendant McCready demurred to the complaint in the action last mentioned, which demurrer was sustained. Thereupon this plaintiff, being the plaintiff there, filed an amended complaint, in which this defendant was not named as party defendant. That action proceeded to trial, and judgment was recovered against McCready for the amount prayed for. The judgment was rendered in November, 1908. This action was commenced in March, 1915.

[1-3] It is appellant's contention that the money deposited by McCready with the defendant bank became due to plaintiff upon the performance of the conditions precedent, to wit, the offer to deliver the motorcars contracted for, and that upon the refusal of the bank to pay the same to him, there arose a cause of action in favor of the plaintiff, entitling him to recover the principal amount in suit. Respondent asserts in its brief that it was acting as a mere depositary, and under the provisions of section 1822 et seq., Civil Code, was obligated to return to Mc-Cready the money upon his making demand entered into an agreement with debtor unable

therefor. Respondent asserts that the conditions of the deposit were not like those attending an escrow wherein a release of the fund must be assented to by both the depositor and the other party in interest. Ordinarily considered, the term "escrow" applies to a deposit of deeds, etc. ever, there is no occasion for dispute as to terms in characterizing the situation which arose between the plaintiff and defendant. It is quite clear that the contract as made between Foster and McCready, and of which the bank had full instruction, required the depositary to pay over to Foster the remainder of the deposit when the last three cars were delivered. The depositary was the agent of both parties for the purpose of applying the money in the way contracted for. On the other hand, had Foster failed to deliver the cars or to offer to deliver them, it is equally clear that the money would then belong to McCready, and he would be entitled to recover it from the bank. We think, however, that the facts as stated in the complaint of plaintiff show that the plaintiff waived his right to recover this money from the bank. If upon the tender of the motorcars it may be said that the defendant held in its hands as agent for the plaintiff the \$840, then it must also be said that there was then paid upon the purchase price of the motorcars the sum of \$840, for the possession of the money by the agent of the plaintiff would be the possession of the plaintiff. However, plaintiff was not content to assert his right to the deposit and refused to so apply the deposit at that time. Plaintiff acted in a way which was inconsistent with the idea that he further asserted ownership of the remainder of the fund. After selling the motorcars at public auction, he proceeded to bring an action against McCready for the full amount of the difference between what plaintiff actually secured at the auction sale of the cars and the amount of the contract price, making no account whatever of the \$840 which he now alleges he is entitled to recover. In our opinion, after such action was taken by the plaintiff, the bank was justified, upon the demand of McCready, in refusing to turn over the money to the plaintiff.

The judgment appealed from is affirmed.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

A. P. HOTALING & CO. v. HAMILTON. (Civ. 1792.)

(District Court of Appeal, Third District, California. March 4, 1918. Rehearing Denied by Supreme Court May 3, 1918.)

1. Assignments for Benefit of Creditors \$\infty 295(8)\$—Specific Findings—Necessity. Where plaintiff and defendant, creditors

to pay his debts, whereby debtor assigned all his interest in his business to defendant, in trust for the benefit of all creditors, and plaintiff sued for breach of such agreement, defendant, to be protected against personal actions against him by creditors other than plaintiff for damages for violation of the agreement, was, notwithstanding the action purported to be one at law for damages, entitled not only to an accounting, but to clear and specific findings and a judgment based thereon adjudicating the respective rights of all the creditors.

2. TRIAL & 318—VERDICT TO SUPPORT JUDGMENT.

The general verdict not being determinative of the issues made by the pleadings and developed by the evidence, the judgment is without sufficient support.

Appeal from Superior Court, Siskiyou County; James F. Lodge, Judge.

Action by A. P. Hotaling & Co. against L. Hamilton. Judgment for plaintiff, and defendant appeals. Reversed.

Mason I. Bailey, and Taylor & Tebbe, of Yreka, for appellant. Samuel T. Bush, of Los Angeles, and B. K. Collier, of Yreka, for respondent.

HART, J. The action is for damages for the breach of a certain written agreement entered into and executed by the parties hereto.

The complaint alleges that prior to the 18th day of July, 1914, one R. F. Crist owned, operated, and conducted a saloon and retail liquor business in the town of Dunsmuir, Siskiyou county: that said Crist was indebted to the plaintiff and to numerous other creditors for goods, wares, and merchandise sold and delivered to him by said creditors; that said Crist was then and there unable to pay said indebtedness, and that "all of said indebtedness is still unpaid; that at the suggestion and by and with the consent of this defendant and this plaintiff, the said Crist, on or about said 18th day of July, 1914, transferred, assigned, and conveyed to the defendant all his rights, title, and interest in and to the said business and all the property of any kind connected with and appertaining thereto, including the saloon license granted by the town of Dunsmuir," in trust for the benefit of all of said creditors, with the understanding and agreement then and there expressly made and had between said Crist and this plaintiff and defendant that the said transfer, assignment, and conveyance was made and executed upon condition that the said defendant should occupy and conduct said business and conserve the assets thereof for the joint benefit of all of said creditors, and distribute the net proceeds and profits realized therefrom pro rata to all said creditors; that on said 18th day of July, 1914, the defendant entered into and took possession of all of said property under said agreement and upon the terms and conditions therein specified, and remained and continued in possession thereof thereunder until some

time in the month of December, 1914, when he, without the consent or the permission of the plaintiff or any of the other aforesaid creditors, transferred and conveyed all right, title, and interest in and to said business, including the town license to conduct the same, to one Toleman, "who ever since has been and is now in possession thereof, and who ever since and now claims to be the owner thereof." It is further alleged that the said saloon business and all the property appertaining thereto, including the said saloon license, were at all times mentioned in the complaint and are actually and reasonably worth the sum of \$2.750; that the defendant failed to exercise due and reasonable diligence in the performance of the terms of the said agreement, "and that if defendant had done so he could have sold said saloon and saloon property and license while it was in his possession as trustee as aforesaid for the sum of \$2,750;" that defendant "willfully, wrongfully, carelessly and negligently failed and refused to operate, conduct, conserve or dispose of said saloon in a businesslike, diligent or proper manner, and in violation of said agreement \* \* transferred and surrendered said saloon and all property \* \* \* and delivered possession thereof to the said Toleman for some unknown consideration," thus allowing and permitting said business and all property connected therewith and the proceeds thereof to become wholly lost, to the damage of said plaintiff and all other creditors of the said Crist in the sum of \$2,750. The complaint proceeds to say that, within the state of California there are numerous creditors of said Crist, the exact number of whom or the amount of their respective claims the plaintiff was at the time of the commencement of this action unable to ascertain, but that the plaintiff is informed and believes and therefore alleges that said claims exceed in the aggregate the sum of \$2.750, and that each and all of said creditors have a common and general interest with the plaintiff in the outcome of this action, and that the action is commenced, maintained, and prosecuted on behalf and for the benefit of all of said creditors in common with the plaintiff, as provided by section 382 of the Code of Civil Procedure; "that it is impracticable to bring all of the said interested parties before this court, and that this plaintiff does hereby consent to the intervention in this action of said creditors at any time that the court may grant them leave to intervene and does hereby agree to prorate to and with all of said creditors in a lawful manner the proceeds of any judgment obtained herein."

The prayer of the complaint is for "judgment against said defendant in the sum of \$2,750 damages" with legal interest and costs. A demurrer on general and special

the same being overruled, the defendant met the issues tendered by the plaintiff by specifically denying the vital averments of the complaint. The cause was tried before a jury and a verdict returned in favor of the plaintiff in the sum of \$950. Judgment was entered accordingly. This appeal is by the defendant from said judgment.

The action proceeds upon the theory that defendant was the trustee for the creditors of Crist; that the sale to Toleman was without the consent or permission or knowledge of the plaintiff or other creditors, and that the sum received by defendant from Toleman was greatly below the value of the property. The plaintiff contends that as to the remedy it had the right to elect between an action for an accounting in equity of the trust property and the proceeds derived therefrom and therefor and an action in tort for a wrongful breach of the trust agreement, and selected the latter remedy.

Appellant contends: (1) That the case is essentially one in equity, that the verdict of the jury was advisory only, and that the court should have found the facts; (2) that the evidence was insufficient to justify the verdict, the amount found by the jury as the value of the property being excessive.

The evidence discloses that for several years prior to the 14th day of July, 1914, said Crist owned and operated the saloon property and business in question; that, on that date, being unable to meet an indebtedness of approximately \$4,000 which he had incurred in the operation of said business, he sold the same, together with the stock of liquors and cigars then on hand and the fixtures, to the defendant, giving the latter a bill of sale as evidence of the transfer; that on the 18th day of July, 1914, one Rafferty, a representative of the plaintiff, having previously learned of said transfer, went to Dunsmuir and called upon the defendant and said to him that the plaintiff, to which Crist was indebted in a large sum of money, would not stand for the transfer of the saloon by Crist to him, and, after considerable conversation about the matter, the two men (Rafferty and the defendant) agreed to the proposition embraced within the written agreement upon which this action is founded. The evidence further shows that Crist was, at the time said agreement was made and executed, indebted to the defendant in the sum of about \$800 and to the plaintiff in the sum of \$1,200.

Crist testified that he was indebted to his several creditors in a sum amounting near to \$4,000. A Mr. Diggles, a wholesale liquor dealer, testified that Crist was indebted to him for liquors in the sum of \$32.50. There was no testimony showing who the other creditors, if any, were, or how much he owed to persons other than the plaintiff, the de-

grounds was interposed to the complaint, and that the business, while under his management, did not pay or return any profits, and that, as a matter of fact, during said time he paid out more than he took in by the sum of \$141.30. This testimony was not contradicted, except in the testimony of Attorney Bailey, of Dunsmuir, to whom it was agreed that all profits received by the defendant from the business should be turned over and by him distributed pro rata to the creditors, who testified that in one of the months during which the saloon was managed by Hamilton under the trust agreement the latter turned in to him \$102 as profits from the business.

> The transaction culminating in the agreement, while not strictly a technical assignment by Crist for the benefit of his creditors, amounted in practical effect to the same thing. But whether it was or not, the agreement nevertheless purports to be for the benefit of all the creditors of Crist, and the complaint, as we have shown, proceeds upon that That there were other creditors than the plaintiff, the defendant, and Diggles, is made manifest by the fact that, whereas the combined claims of these persons against Crist is or was approximately \$2,032.50 only, the aggregate indebtedness of Crist was approximately \$4,000. Both the complaint and the evidence show this to be There is no showing either in the complaint or by the proofs that the creditors other than the plaintiff and the defendant knew anything about or consented to or bound themselves by the agreement which is the basis of this action, or by any judgment that might be obtained herein.

[1,2] The defendant, to be protected against personal actions against him by creditors other than the plaintiff for damages for a violation of the trust agreement, was, notwithstanding that the action purports to be one in law for damages, entitled not only to an accounting of the trust property and funds, but also entitled to clear and specific findings of the facts by the court or by the jury under the order or direction of the court, and a judgment based upon those findings involving an adjudication of the respective rights of all the creditors of Crist. The general verdict and the judgment thereupon entered are uncertain as to many important facts essentially arising under the issues as made by the pleadings. It cannot be determined either from the verdict or the judgment who the creditors of Crist are, or who are entitled to partake of the fruits of the judgment, and to what extent. Then the further question arises: What is the effect or full scope of the judgment? Does it end or extinguish the trust so as to protect the defendant against the effect of actions by other creditors than the plaintiff for damages for breach of the trust agreement? These and a number of other matters which fendant, and Diggles. The defendant testified | could be suggested are of vital importance

to the defendant, and, whether the action be lant for the delivery to him of the stock he one at law or in equity, it should have been disposed of by special and distinct findings either by the court or by the jury under the order or direction of the court. We are of the opinion, however, that, although the plaintiff seeks relief by way of compensatory damages, the peculiar nature of the transaction on which the action is based and the averments of the complaint bring the action within the cognizance of equity, since an accounting was necessary to arrive at a just determination of the rights of the respective beneficiaries, and that special findings and conclusions of law were necessary to a specific and definitive adjudication thereof. See Wingate v. Ferris, 50 Cal. 105. At all events, as above stated, the general verdict is not determinative of the issues as made by the pleadings and developed by the evidence, and the judgment is therefore without sufficient support.

In view of the conclusion thus reached, the point that the evidence is insufficient to support the verdict, while possessing much force, need not be considered here.

The judgment is reversed.

CHIPMAN, P. J.; BUR-We concur: NETT, J.

FERGUS v. VENICE INV. CO. (Civ. 2093.) (District Court of Appeal, Second District, California. March 2, 1918.)

LIMITATION OF ACTIONS \$\&=\text{86}(15)\$—ACCBUAL OF CAUSE OF ACTION—REASONABLE TIME— DEMAND.

Where money was paid for treasury stock of a corporation to an agent who diverted the money, limitations did not start to run against a right of action for a return of the money until demand was made, providing such demand was made in a reasonable time, and where the cor-poration did not refuse to issue the stock for two years and two months, during which time a dispute was on between its officers, demand for return of the money and suit at that time was in time, under the two-year statute (Code Civ. Proc. § 339) because two months was not an unreasonable time to wait for delivery the stock under such peculiar circumstances.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by B. G. Fergus against the Venice Investment Company, a corporation. Judgment for plaintiff, and defendant appeals. Affirmed.

Geo. S. Hupp and Lynden Bowring, both of Los Angeles, for appellant. Birney Donnell, of Los Angeles, for respondent.

WORKS, Judge pro tem. The respondent paid to an agent of appellant, as the purchase price of certain shares of its stock, to be taken from its treasury, the sum of \$375. The agent diverted the money, applied it to his own use, and it never was paid to appel-

had bought, and the demand was refused. He then demanded a return of his money, and, that demand being also refused, he commenced this action for its recovery. trial court rendered judgment in his favor. The appeal is from the judgment.

The purchase price of the stock was paid on July 6, 1912, and this action was commenced on September 19, 1914, after demand made on September 16, 1914, for a return of the money. The appellant contends that the cause of action is barred by the provisions of subdivision 1 of section 339 of the Code of Civil Procedure, which fixes a limitation of two years for the commencement of actions upon a liability such as is here sued on.

A cause of action on such a liability ordinarily accrues only upon a demand made to the person upon whom the liability rests, requiring him to perform his obligation; but there is a long line of cases to the effect that one in whose favor such a liability exists cannot defeat the purpose of the statute by an unreasonable delay in the making of the demand, and those cases also decide that a reasonable time within which to make demand is, by the adoption of an analogy, the period which is fixed by the statute of limitations in similar cases, and that, if the demand is not made within that time, an action brought after the making of the demand is barred. Bills v. Silver King Min. Co., 106 Cal. 9, 21, 39 Pac. 43, concurring opinion; Vickrey v. Maier, 164 Cal. 384, 389, 129 Pac. 273; Jenkins v. Marsh, 22 Cal. App. 8, 132 Pac. 1051. However, this rule is not an absolute one, for it is said in one of the cases cited that it does not apply where "there are peculiar circumstances affecting the question" (Vickrey v. Maier); and, indeed, it could not in justice be absolute, as the principal rule announced by the decisions is that the demand must be made within a reasonable time, and appeal is made to the analogy furnished by the statute of limitations only as an aid to the determination of that principal question. In short, the line of decisions relied upon by appellant does no more than establish the rule that what is a reasonable time for making demand must depend upon the facts of each case, whenever those facts are such as to indicate that the analogy of the statute of limitations does not in justice apply.

It will be noted that there was an express agreement upon the part of appellant to deliver the purchased stock to respondent. That, however, is not the agreement for the enforcement of which this action is prosecuted, and it was only after a breach of the contract to deliver the stock that there could arise an implied agreement to return the money, upon which agreement the action is lant. Respondent made demand upon appel- prosecuted. Rose v. Foord, 96 Cal. 152, 30

Cal. 367, 373, 62 Pac. 39. And the breach of the express contract did not occur until after appellant had been allowed a reasonable time, after demand, within which to deliver the stock. Civ. Code, § 1753; Pinkiert v. Kornblum, 5 Cal. App. 522, 90 Pac. 969; Roughton v. Brookings Lum, & Box Co., 26 Cal. App. 752, 148 Pac. 539. Respondent's demand for the return of his money was made about two years and two months after the money was paid to the agent of appellant. If two months was a reasonable time for respondent to await a delivery of the stock-assuming, which we do not by any means decide, that he was bound to demand it immediately after the money was paidthen the demand for the return of the money was within two years, and the rule of Bills v. Silver King Min. Co., supra, and the other cases like it, is satisfied, even forgetting the saving language of Vickrey v. Maier, supra, about the "peculiar circumstances affecting the question" in particular cases.

Was two months an unreasonable time to wait for the delivery of the stock? In Pinkiert v. Kornblum, supra, this court declined to assume, in the absence of evidence upon the question, that 20 days was a reasonable time to be allowed for the issuance of stock in a corporation to one who had purchased it. See, also, Roughton v. Brookings Lum. & Box Co., supra. In the present case, evidently with the intention of bringing it within the rule stated in Vickrey v. Maier, supra, the trial court found that certain "peculiar circumstances" existed, and they are stated specifically in the findings of fact. Although respondent looks to them as a justification for a delay of two years and two months in demanding a return of his purchase money, they are established as facts in the case, and we may look to them for aid in determining whether two months was an unreasonably long time to await the delivery of the stock. Among the "peculiar circumstances" found were these: That a dispute arose between appellant and its officers who received respondent's money, and that those officers were friends of respondent, and that he was lulled into a sense of security by assurance from them that he would in due time receive his stock. The circumstance involved in the dispute mentioned is very generally stated, as we are not told what was the subject of the dispute; but taking all the circumstances together, taking the rule expressed in Pinkiert v. Kornblum, supra, and in Roughton v. Brookings Lum. & Box Co., supra, we are of the opinion that two months was not an unreasonably long time to await the delivery of the stock, and that therefore the demand for the money was made within two years

Pac. 1114; Richter v. Union Land Co., 129 after respondent reasonably first could have Cal. 367, 373, 62 Pac. 39. And the breach of made it.

There is an angle of the above discussion which we have not yet followed to its conclusion. If we overlook the necessity for a disposition of the rights of the parties under the express contract for the delivery of the stock, as a prerequisite to the arising of the implied agreement for the return of the purchase money, and regard the case as one in which the money became returnable at once after it was paid over to the agent of appellant, we may yet dispose of the question of the statute of limitations satisfactorily to the contention of the respondent, and along the lines evidently followed in the settlement of that point by the trial court. The question then is: Under all the circumstances of the case—and giving due regard to the rule of Bills v. Silver King Min. Co., supra, and cases like it-was two years and two months an unreasonably long time to elapse before the making of demand for the return of the purchase money? In addition to the "peculiar circumstances" stated above, the trial court also found that "plaintiff made repeated demands for the aforesaid stock; that said defendant did not finally refuse to deliver said stock until September 16, 1914, and plaintiff did not treat said refusal as final until said time, but until said time expected that said defendant would deliver said stock." It is shown by the evidence upon which these facts are found that there was continual argument among the officers of appellant-and that argument was continued as late as at a session of the directors of the appellant held on September 16, 1914-upon the question whether the stock contracted to be delivered to the respondent should be delivered by the agent who had received and used respondent's money, from his own holdings, or whether it should come out of the treasury of the appellant. The evidence shows that the respondent was justified in believing, until the date last mentioned, that his stock would be forthcoming from either the one source or the other, and the directors of the appellant never at any time formally refused to make delivery from the corporate treasury. These facts bring the case within the rule as to "peculiar circumstances," stated in Vickrey v. Maier, supra, and a delay of two years and two months in making demand for the money was justified.

There are certain other contentions made by appellant, but they do not merit a discussion.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

ANDERSON v. WILCOX et al. (Civ. 2101.) (District Court of Appeal, Second District, California. March 2, 1918.)

APPEAL AND ERROR \$\infty\$39-Record on Appeal-Briefs-Presumptions.

Under Code Civ. Proc. \$953c, providing that in filing briefs the parties must print in such brief or in a supplement such portions of the record as they desire to call to the attention of the court, it will be presumed that counsel have presented to the appellate court all portions of the record which they desire to have printed.

Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

Action by A. D. Anderson against H. W. Wilcox and another as constable. Judgment for defendants, and plaintiff appeals. firmed.

H. W. Scheld and William J. Carr, both of San Diego, for appellant. Shreve & Shreve, of San Diego, for respondents.

CONREY, P. J. Plaintiff appeals from the judgment. In the briefs the action is described by counsel for appellant as one in replevin to recover the possession of certain personal property, and by counsel for the respondents as an action to recover damages for alleged wrongful conversion of personal property. No part of the record has been printed in the briefs, except that the findings of fact and conclusions of law are printed in the brief of respondents.

The facts found are sufficient to sustain the judgment. Counsel for appellant say that the findings of fact are contrary to the evidence, but do not point out any particulars in which the evidence is not sufficient to support those findings. They further say in their brief that "the evidence in this case shows" certain facts stated by them, without setting forth any part of the record of such evidence. The only record on appeal consists of a typewritten transcript. It is presumed that by their briefs counsel have presented to us all portions of the record to which they desire to call our attention. Code Civ. Proc. § 953c. Many decisions concerning such defective presentations of the record are collected in Barker Brothers v. Joos. 171 Pac. 1085 (No. 2054), decided by this court February 19, 1918.

The judgment is affirmed.

We concur: JAMES, J.; WORKS, Judge pro tem.

NELSON v. THOMAS et al. (Civ. 2298.) (District Court of Appeal, First District, California. March 2, 1918. Rehearing Denied by Supreme Court April 29, 1918.)

1. Deeds \$\iff 208(1) - Evidence - Delivery -Intention to Make Will.

Evidence held to show that a deed was never delivered, but was intended as a testamentary disposition to take effect after death, and not as a present conveyance of property.

2. Parties \$\sim 93(2)\$—Substitution—Notice of Motion—Waiver.

On the substitution of a party plaintiff defendants stipulated in open court that the substituted plaintiff was to acquire no greater rights than the original plaintiff had in the rights than the original plaintiff had in the cause, and that the answer and cross-complaint should stand as like pleadings to the supplemental complaint, and all that defendants did while stipulating and tacitly consenting was to say on the order being made that they had an exception to the ruling of the court. Held, that they thereby waived notice of the motion.

3. Parties = 93(2) — Objections Below —
Substitution of Parties.

When defendants merely stated on an order for substitution of a plaintiff being made that they had an exception to the ruling of the court, objection that there was no notice of the mo-tion, not being seasonably and clearly present-ed to the trial court, was not reviewable.

4. Deeds & 54 — Undelivered Instrument —Title Conveyed.

An undelivered deed conveys no title legal or otherwise.

5. Quieting Title \$==10(2)-Right of Ac-TION-LEGAL TITLE.

Suit to quiet title for want of delivery of a deed from plaintiff to defendants under which the latter claim may be maintained; the legal title in such case being in plaintiff, and not in defendants.

Appeal from Superior Court, Humboldt County; Clifton H. Connick, Judge.

Action by John Nelson against Clarence G. Thomas and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Thos. H. Selvage, of Eureka, for appellants. Coonan & Kehoe, L. M. Burnell, and J. S. Burnell, all of Eureka, for respondent.

KERRIGAN, J. This was an action to quiet title. Judgment was rendered in favor of plaintiff, and the defendants appealed; Clarence G. Thomas being thereafter substituted for C. S. Thomas, one of the original defendants.

The defendants in the action claimed title to the property described in the complaint by virtue of an instrument dated December 30, 1913, purporting to be a deed from plaintiff Nelson to C. S. Thomas and Ella Thomas, his wife, and which property they claimed to have received from Nelson as a gift. Nelson, on the other hand, while admitting that he signed and acknowledged this paper, supported his claim of title by evidence that in signing it he supposed he was executing his will, and therefore denied that on December 30th, or at any other time, he either made or intended to make or deliver a deed of the property to the defendants. The court accepted this view of the transaction, and entered judgment accordingly quieting plaintiff's title.

[1] The circumstances attending the execution of the instrument in controversy are briefly these: About the year 1879 Nelson acquired a small ranch in the southern portion of Humboldt county, at a place known as Elk Ridge, where he engaged in cattle raising. From time to time he increased his holdings until he had acquired the property | fred Grey, who told him that Thomas was here involved, a tract of some 1,700 acres. About the year 1890 the defendants went to work for Nelson on his ranch. C. S. Thomas was a carpenter, and built barns, outhouses, and fences for Nelson, while his wife, Ella, was engaged there as cook and house-They were thus respectively employed for about a year, when they moved to Briceland, a place about 8 miles distant. The relationship between Nelson and Thomas became very close and strong, so much so that Nelson would sign without reading any paper that Thomas might present to him, according to a statement attributed by one of the witnesses to Thomas. At Briceland. Thomas, in addition to pursuing his regular calling, occupied the offices of justice of the peace and notary public, and for 4 or 5 years prior to the execution of the disputed deed he transacted Nelson's legal business for On December 28, 1913, Nelson was single, about 68 years of age, and in poor About a week before this date he had told Thomas that because of ill health he could no longer look after his stock, and had concluded to lease his property, whereupon Thomas offered to try to find a tenant for him, and in a few days sent to Nelson a prospective renter. This man failed to inspire confidence in Nelson, and no arrangement was arrived at with him. Thereafter Thomas called on his friend, and informed him that he would be willing to rent the ranch himself if the terms were reasonable, and in the course of the conversation invited Nelson to come to Briceland and live with him as one of the family if the ranch should The next morning Nelson rode he rented. into Briceland, called on Thomas, and announced that he had come to stay, and would let Thomas have the ranch for 5 years at an annual rental of \$550. The terms were accepted, and Thomas was told to prepare the lease, which he accordingly did. The document being completed, Nelson expressed a wish to make his will, and requested Thomas to prepare it. He indicated his desire that legacies of \$500 each should be given to two friends, \$1,500 to each of the defendants' children, and that the residue of his estate should go to Thomas and his wife, share and share alike. The will was accordingly prepared, being completed that evening.

Up to this point there is no material dispute between the plaintiff and defendants, nor of the fact that on the following evening Nelson executed several papers, one of which was a deed to his property in favor of Thomas and his wife, and left them with

The plaintiff was a witness in his own behalf, and testified that he did not know that he had signed a deed; that he had no intention to make a deed of the property; that he supposed he was making a will; claiming to have a deed to the property; that at that time he did not believe Thomas had deceived him, and apparently desiring not to give offense, said nothing to Thomas at the time of what he had heard from Grey; that later, however, becoming apprehensive, he asked Thomas for the paper, and learning that it was in a bank in Eureka he, although feeble, rode 90 miles on horseback to that city for the purpose of examining it and thus learn if Grey's statement was true; that on being denied an inspection of the document in Eureka he at once returned to Briceland and called on Harry Cowen, a notary public, who had taken his acknowledgments on the occasion of his executing the papers prepared by Thomas, and then learned from him that one of those papers was a deed. Nelson thereupon left the home of Thomas, where he had been staying for the past 15 months, employed counsel to advise him, and finally brought this action.

The notary Cowen testified that he took the acknowledgment of Nelson to a deed and a lease; that in doing so Nelson admitted to him that the signatures affixed to the deed here involved and the lease were his, but at that time that Nelson did not read the instruments in his presence nor participate in the conversation, but sat back and looked sick, bad, and distressed; that at some time between May 25 and June 5, 1915, Nelson called on him and inquired whether or not one of the papers acknowledged by him on December 30th was a deed; that upon being informed that such was the fact the color left the man's face, he staggered, made queer motions, and looked horribly shocked.

Another witness, Fred Fearrlen, testified: "A few days after December 30, 1913, I asked Thomas if there would be any chance to rent or lease the Nelson ranch, and he said, 'No;' that he had already leased it for five years. Later he [Thomas] told me that Mr. Nelson had willed the property to him and his folks and two other parties. I don't think he ever told me he had a deed."

It appears that this witness and Thomas were friends of 20 years' standing, and on intimate terms.

Witness Nathan Stansberry testified:

with C. S. Thomas. I came along and Thomas was working on the ranch. We got to talking, and I said jokingly, 'I guess you will give a man something now to kill Nelson for you.' Mr. Thomas said, 'No, Nelson has always been good to me, and I am going to be good to him, and maybe he will give me the place some day." "In the spring of 1915 I had a conversation with C. S. Thomas. I came along and Thomas

Witness Grothe testified:

"On April 6, 1915, I rode from Garberville to Briceland with Thomas. He told me Nelson wanted to come to Eureka, and wanted all his deeds and other papers that he [Thomas] had. He said he had them down in a safe in the Bank of Eureka. He was coming down in about two weeks and would get them for Nelson then; that they were Nelson's and he could have them; that they belonged to him. He said the deed that the supposed he was making a will, that they belonged to him. He said the deed that the first intimation he received that he and will were the only papers that he had of had made a deed was from a friend, one Al-Mr. Nelson's left at this time. Thomas said,

speaking of the lease, that he had read it over several times, and never noticed it before, but there was nothing in the lease to prevent him from selling all the cattle, and he could go ahead and sell the cattle. He said he had a notion to put the deed on record and sell the cattle, and use the money to fight the case, but that he was not going to do it.

Witness William Herman testified:

"The morning Mr. Nelson left Thomas's place he [Herman] called there, and Mrs. Thomas in Mr. Thomas's presence said that when Nelson left they asked him if, at the expiration of their lease, he would give them a new one, and that he said he did not know; that he might want to go back there and live himself. She also stated that it was not likely that Nelson would want to go back there and live any more by himself."

According to the story of Thomas, told by him on the witness stand, after the will had been thoroughly discussed and prepared, and after he and his wife had retired that night, his wife suggested to him that as long as Nelson intended to give them the place, it would be a good plan for Nelson to make a deed of it to them. The next morning at the breakfast table Thomas said to Nelson that he had been thinking the matter over, and that as he was giving them the place, why not make a deed instead of a will? That Nelson assented, and according to the plan then adopted a deed to Thomas and his wife was made conveying the real property to them, and a will was drawn disposing of the personal property as originally provided; that on the evening of December 30th the will was signed by Nelson with two witnesses; that the lease and deed of the ranch were signed and acknowledged by Nelson, and formally delivered to Thomas.

On May 10, 1915, Nelson conveyed the property to Lowrey, and the deed was recorded the next day. Ten days thereafter the defendants recorded their deed. This action was commenced May 25, 1915. think it is clear that the evidence abundantly sustains the findings of fact, including finding IV (which appears to be the one seriously attacked by the appellants), to the effect that the deed made by Nelson was never delivered to the defendants or either of them, and was intended by respondent as a testamentary disposition to take effect after his death, and not intended as a present conveyance of the property.

It is true, as asserted by appellants, that the deed was executed so far as signing and acknowledging it were concerned, and that it was left with the appellants by respondent. Still it does not follow under the circumstances of the case that there was a delivery of the instrument. On the contrary, the evidence establishes that there was no delivery, and without a delivery there could be no deed. In Williams v. Kidd, 170 Cal. 638, 151 Pac. 3, Ann. Cas. 1916E, 703, the court says:

"It is essential to the validity of a transfer of real property that there be a delivery of the conveyance with intent to transfer the title, and

termined is in ascertaining whether in parting with the possession of the conveyance the gran-tor intended thereby to divest himself of title. If he did, there was an effective delivery of the The soludeed. If not, there was no delivery. The solution of the question is grounded entirely on the intention of the grantor, and this essential matter of intention is a question of fact to be determined by the trial court from a consideration of all the evidence in a given case bearing upon the question." Cox v. Schnerr, 172 Cal. 371, 156 Pac. 509; Donahue v. Sweeney, 171 Cal. 388, 153 Pac. 708.

[2] Appellants also complain of the order of the court granting a motion substituting the respondent Nelson as plaintiff in the action for Charles Lowrey, the original plaintiff

At the beginning of the trial the attorney representing the plaintiff pressed a motion which had, it appears, theretofore been perhaps informally made, to substitute Nelson as plaintiff for Lowrey, and for permission to file a supplemental complaint alleging, in conformity with the fact, that the property had been retransferred from Lowrey to Nelson since the filing of the original complaint. Assuming that the defendants were entitled to notice of the motion (as we think they were), still it is plain from the record that they waived such notice. It was stipulated by the parties in open court that through this substitution Nelson was to acquire no greater rights than Lowrey had in the cause. It was also later stipulated that the answer and cross-complaint filed by the defendants should stand as the answer and cross-complaint to the supplemental complaint. court was painstaking and appeared anxious to proceed cautiously; and all that the defendants did, while entering into these stipulations and consenting, though tacitly, to the substitution, was to say, upon the order of substitution being made, "We have an exception to the ruling of the court."

[3] As before stated, notice was waived; and even if it were not, the objection was not seasonably and clearly presented to the court, and is therefore not available on appeal. Mott v. Smith, 16 Cal. 534. Moreover, it is very clear that the defendants suffered no prejudice as the result of the order, for which reason they cannot now be heard to complain.

[4, 5] The appellants say in their brief:

"Under the complaint and the foregoing facts, what evidence could the plaintiff, Charles Lowrey, introduce on the trial to prove the allega-tions of his complaint? There was no privity between himself and these defendants. The plaintiff was not in possession; he was not entitled to possession; All that he had was meretitled to possession. ly a paper title."

Continuing, they argue that being the holder of a paper title merely, Lowrey had to trace the chain thereof to the original patentee: that he could not do so because of the break in the chain by the deed to defendants; therefore that the legal title was in defendants, and that Lowrey had merely the true test under which delivery is to be de | an equitable estate; that an action to quiet title cannot be maintained by the owner of an equitable estate against the holder of the legal title under a complaint containing only the usual averments made in such actions; that under such a complaint Lowrey could not prove fraud or undue influence or deceit between his grantor and defendants, and therefore when he conveyed to John Nelson, his grantor, and the latter was substituted as plaintiff, a new cause of action This argument is based upon the assumption that at the date of the commencement of the action the legal title to the property was in the appellants by virtue of the deed of December 30th, but that deed, the court found, was never delivered, and hence conveyed no legal or any title. Cutler v. Fitzgibbons, 148 Cal. 562, 83 Pac. 1075.

Appellants further assume in their argument that the plaintiff is attempting in this action to set aside his deed to the defendants on the ground that it was procured through fraud and undue influence. Such is not the The position of the plaintiff is that since there was no delivery of the instrument there was no deed. The situation is well stated in Cutler v. Fitzgibbons, supra, which was a case in which the complaint contained two counts. The first count contained ordinary allegations in quiet title action. second count averred that the defendants base their claim to said land upon a certain written instrument purporting to be a deed, signed, acknowledged, and executed by plaintiff to defendant Fitzgibbons, dated January 14, 1890, conveying to him said land; that plaintiff did not on said day, or at any time, make, sign, acknowledge, or execute said instrument, or any deed conveying said land to Fitzgibbons or to any other person, and did not authorize any other person to execute it for her; that said alleged deed is false, fraudulent, and forged; that said deed has been recorded, and clouds plaintiff's title to said land. The prayer of the complaint was for a judgment quieting plaintiff's title to the land, adjudging that defendants have no estate or interest therein, and decreeing that said deed be canceled, etc. A judgment was rendered quieting plaintiff's title to the land and canceling the deed. The Supreme Court said:

"We see no reason for reversing or disturbing the judgment. Appellant's contention seems to be that respondent is in the position of one who is trying to overturn a legal title on ac-count of fraud, and that the complaint is de-ficient because it does not state with sufficient fullness the facts constituting the fraud; and he cites in support of his contention Burris v. Adams, 96 Cal. 664, 31 Pac. 565. But the facts in Burris v. Adams are different from those in the case at bar, and the principle applied there is not applicable here. The plaintiff in the case at bar is not trying to set aside a deed which conveyed the legal title on the ground that the deed was procured through fraud, mistake, undue influence, conspiracy, etc. During all the times mentioned in the com-

plaint the plaintiff had the legal title; it certainly did not pass out of her by a written in-strument which she did not execute and which was forged. Having the legal title to the land in contest she brings this action to have her title quieted against appellant, who asserts and proclaims an estate in the land which is without any right, and to have the forged deed under which he claims, and which was recorded, canceled."

For the reasons heretofore given, the judgment is affirmed.

We concur: LENNON, P. J.; BEASLY, Judge pro tem.

## PEOPLE v. SHAW. (Cr. 404.)

(District Court of Appeal, Third District, California. March 4, 1918.)

1. Homicide €==257(1) — Assault with Intent to Murder — Sufficiency of Evi-DENCE.

Evidence held to justify conviction of assault with intent to murder.

2. Homicide &==257(8) — Assault with Intent to Kill-Intent.

A wound producing instantaneously a complete relaxation of the muscular system and utter helplessness when deliberately inflicted carries with it the implication that the perpetrator intended to kill the victim.

CRIMINAL LAW \$\infty 825(2)\$—Instructions—Requests—Necessity.

There is no merit in the claim that the con-

viction of assault with intent to murder should be reversed because the court did not specifically instruct that intent to kill was essential, defendant having made no request for such instruction, sufficiently covered by given instruc-

4. WITNESSES \$\infty 287(3)\$—REDIRECT EXAMINATION—MEETING IMPEACHING TESTIMONY.

Where, upon cross-examination of a victim of an assault with intent to kill, who had stated at the trial that he could not recall incidents, it declared that he could not recall incidents, it developed that before the grand jury he attempted to give some details of the shooting, it was proper on redirect examination to ask how he came to give such testimony before the grand jury.

5. Criminal Law =361(1)-Evidence-Ex-

PLANATORY MATTERS.

Where experts had testified that the injury from an assault with intent to kill would likely cause the victim to accept the statements of others as his own, and it was developed on cross-examination that he had testified before the grand jury to details of shooting, which he could not recall at the trial, it was proper to question the assistant district attorney as to conversations which he had had with the vic-tim and how the victim's statements corresponded with defendant's, and that a change had been noticed in the victim's account.

Appeal from Superior Court, Shasta County; James G. Estep, Judge.

Robert W. Shaw was convicted of assault with intent to murder, and appeals. Affirmed.

M. G. Gill and Dean & Carter, all of Redding, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

BURNETT, J. [1] The defendant was convicted of the crime of assault with intent to commit murder. The evidence was ample to justify the verdict. Indeed, a careful examination of the entire record can hardly fail to produce the conviction that the assault was the result of a deliberate, premeditated, and brutal design on the part of appellant to take the life of his victim. The offense was committed in the afternoon of December 26, 1916, near the cabin of defendant and about 31/2 miles from the town of Shasta. In the forenoon of that day in said town appellant had an acrimonious controversy with one T. L. Cockrum who was about to go with a horse and buggy to deliver some groceries to a party at the Mount Shasta mine, some distance beyond said cabin. Appellant requested Cockrum to take some supplies to one Charles Paige. This Cockrum refused to do for the reason that he disliked Paige. The discussion which ensued developed a good deal of heat, and each became abusive and truculent. The defenuant repaired to an adjoining saloon, where he drank some liquor and made inquiries about a gun which he claimed was to have been left there for him. In reply to a question by one of those present, he said he expected to kill a couple of men and that he himself might be one of them, but he did not specifically mention any other. The jury herein were entirely warranted in believing that murder was then rankling in his mind, and that he had formed the intent and was then planning to take the life of Cockrum. There is other evidence which we need not recite, that he had a feeling of resentment and hostility toward the prosecuting witness. Shortly after the occurrence in the town, Cockrum, accompanied a part of the way by one Filmore Davis, drove from Shasta over to the mine, passing the said cabin of Shaw, and, after delivering the articles which had been sent, he started back alone between 3 and 4 o'clock in the after-

Shaw, in the company of two other men, walked to his cabin, which appellant entered; the other men going on to some other destination. What occurred between Shaw and Cockrum at the time of the shooting is the subject, as might be expected, of earnest dispute. It is the theory of the people that Cockrum was shot from ambush as he approached Shaw's cabin; the appellant firing, probably, from within the house. Circumstances are not wanting to support this view. There is, however, no direct testimony to that effect. Of the only eyewitnesses, Cockrum testified that he could recall nothing of the occurrence, that his mind was a blank as to what happened after he arrived at a point some 700 feet from Shaw's cabin until several weeks thereafter when he found himself in the county hospital.

The defendant attempted to give the details of the tragedy, seeking to justify him-

believable, and it would be surprising if the jury had accepted it as of exculpatory significance. In fact, the statement upon its face falls short of any justification for the overt act. He was standing, so he says, near his cabin when Cockrum drove up, renewed the quarrel, drew his pistol, and leveled it upon him. Thereupon he went into the cabin, obtained his shotgun, came out, and Cockrum was still standing at the same place and in the same position with his pistol still leveled. Immediately he fired, as he testified "to make him put his gun down and keep his mouth shut," because "I didn't like to see that thing pointed toward me particularly any more," "although a gun never scared me much." Accepting his statement as true, he was perfectly safe when he went into the cabin, and he was not warranted in coming out to shoot Cockrum.

Moreover, there are many circumstances that brand his story as false and incredible. The cold record even seems to compel the conclusion that his pretended self-defense was a pure fabrication. The spirit which animated him is not difficult to discern in the statement which he made to one Charles Gibson, the first man he saw after the shoot-

"Gibson, I would like to have you come over to my place. I shot a man all to hell. I shot that man, Cockrum, in the head. I expect he is dead by this time.

Not a word about self-defense until some time afterward, and then his statement was entirely at variance with his testimony on the stand. We will not dwell on the subject, beyond saying that his explanation to different persons was also conflicting with said testimony. His conduct in taking the pistol of Cockrum after the shooting and placing it on the seat of the buggy showed a disposition to simulate and create the appearance of self-defense, and his entirely incredible declaration that after such a wound Cockrum climbed into the buggy, in connection with other significant facts, must have led the jury to regard him not only as a cruel man but as a perjured witness.

We are led to believe that his conduct and attitude were characterized by inexcusable savagery, and we do not hesitate to say that seldom does a record present such persuasive and convincing evidence of guilt.

[2] It is hardly necessary to add that there is no merit in the contention that the intent to kill was not shown. According to appellant's testimony, he was standing about 30 feet from Cockrum when the shot was fired. The full charge struck the latter in the upper part of the face, destroyed his eyes, fractured his skull, and penetrated the brain. The effect of such a blow, according to the testimony of experts, is to cause immediate and total unconsciousness with the suspension of all the functions of the body except those of an elementary and essential self; but it is apparent that his story is un-character, such as respiration and pulsation. It produced instantaneously a complete relaxation of the muscular system and utter helplessness. Such a wound deliberately inflicted carried with it the implication that the perpetrator intended to kill the victim. Indeed, it is passing strange that Cockrum survived. That he lived was due, no doubt, to a vigorous constitution and to careful and skillful treatment. We may add that nowhere did Shaw deny that he intended to kill Cockrum and his actions show clearly enough that he had such purpose.

[3] There is no more merit in the claim that the cause should be reversed for the reason that the court did not specifically instruct the jury that they must find that the defendant had the intent to kill Cockrum in order to convict him of the crime charged. As to this, it may be said that if the defendant desired such instruction he should have requested it. Moreover, this very condition was covered by the instructions given. There was a general instruction that the plea of not guilty put in issue every material allegation of the indictment and that the burden was upon the prosecution to prove these allegations to justify a verdict of guilty. Again, the jury was told:

"The court further instructs the jury that if you believe from the evidence beyond a reasonable doubt that the defendant committed an assault upon the person of T. L. Cockrum with a deadly weapon as charged in the indictment, but without any specific intent to kill and murder the said T. L. Cockrum, then you should find the defendant guilty of assault with a deadly weapon" and also, if they believed that the defendant "committed an assault upon the person of T. L. Cockrum with a deadly weapon as charged in the indictment with intent to kill and murder said T. L. Cockrum, and that such assault was not committed in the necessary self-defense of the defandant, then you should find the defendant guilty of an assault with a deadly weapon with intent to commit murder as charged."

From the foregoing the jury would necessarily conclude that they could not find the defendant guilty of the higher offense unless they were convinced that he had the intent to kill Cockrum.

[4, 5] The only other point made in the opening brief of appellant—and the only one at all of any merit—is that the court erred in overruling objection to certain questions asked of the assistant district attorney and of Cockrum on his redirect examination. The questions propounded of the former called for the conversations which he had with Cockrum concerning the tragedy, and, particularly, how the latter's statements corresponded with Shaw's explanation of the affair, and, also, when the assistant district attorney noticed a change in Cockrum's account of the occurrences of that day.

The inquiry of Cockrum was as to whom he had stated he made a mistake in his testimony before the grand jury, and as to his sending for certain persons to inform them that he had made such a mistake. This examina-

tion grew out of the fact that on the cross-examination of Cockrum it developed that before the grand jury he attempted to give some of the details of the shooting, and here at the trial he declared, as we have seen, that he could not recall any of the incidents.

Appellant in support of his contention invokes the general rule, as thus stated in People v. Turner, 1 Cal. App. 420, 82 Pac. 397:

"Impeachment of a witness by showing that he has made statements in conflict with his present testimony cannot be met by the party calling such witness with evidence that at other and different times the impeached witness has made statements in harmony with his present testimony, and to permit introduction of testimony of this latter character is prejudicial to the party against whom it is received."

But it may be said that the rule is subject to modifications and exceptions as pointed out in volume 1, § 492, of Wharton's Criminal Evidence (10th Ed.); People v. Doyell, 48 Cal. 85; Barkly v. Copeland, 74 Cal. 1, 15 Pac. 307, 5 Am. St. Rep. 413, and it could be plausibly urged that we have here such an exception. However, the rulings can be supported on other grounds.

In the first place, the said questions asked of Cockrum were entirely proper in view of his cross-examination. After his attention was called to his testimony before the grand jury, he was asked by appellant whether such statements were true, and, "how did you come to give that testimony before the grand jury if it was not correct?" His answer was:

"Well, I was very nervous and had not slept any for some time and was in pretty bad shape, and I was thinking about losing my eyesight so much, and so much had been talked to me about Shaw's story about what he told about shooting me, and I come to think his story was true, or something to that effect. Seemed later I could not remember seeing him that day. I thought of that at nights when I could not know where I am at."

He was further interrogated about whether he had talked to any one in reference to his recollection of the affair. This was all brought out for the first time on the cross-examination, and the door was certainly thereby opened for the further inquiry by the people. Besides, it could hardly be said that the testimony to which objection was made added virtually anything to the force and effect of Cockrum's statements which were elicited by appellant.

Moreover, it is plain that the purpose of these questions was to throw light upon the mental condition of Cockrum at the time of his testimony before the grand jury and at the trial. The experts had testified as to the effect upon his mind produced by the frightful injury, and how his memory might be gradually or suddenly restored, and to his susceptibility to the influence of statements and suggestions made by others. In other words, these witnesses had testified that while his min<sup>A</sup> was impaired he would be likely to accept the statements of others as the product of his own recollection of the

events, but that when his memory was entirely restored he would be able to distinguish between what he was told and what he had himself observed. They also declared that. when he recovered his normal mental activity, he might not be able to recall any impressions whatever of the immediate circumstances of the shooting, although his memory might be accurate as to what happened a short time before. These experts had portrayed in the abstract the situation as to his mentality, and there was no better way than by recitals of the conversations with him on the subject to present a concrete view of the actual effect upon his memory and reasoning faculties of the dreadful physical and nervous shock. We may say, also, that if the form of some of the questions was objectionable no prejudice resulted. No doubt, it would have been better practice to ask the assistant district attorney to repeat what Cockrum said, than to inquire how it corresponded with what the former repeated to the latter; but the consideration is not of sufficient moment to demand serious attention.

Even if it should be held that the whole line of inquiry was improper, it could be demonstrated that it was more favorable than otherwise to appellant. Indeed, one can hardly avoid the conclusion from a careful reading of the transcript that Cockrum was trying as far as possible to favor the appellant.

We think the judgment is just and should be affirmed, and it is so ordered.

We concur: CHIPMAN, P. J.; HART, J.

HAMMOND LUMBER CO. v. KEARSLEY et al. (Civ. 2103.)

(District Court of Appeal, Second District, California. March 2, 1918.)

BILLS AND NOTES \$\infty 293\text{—Indorsement of All Interest and Title} - "Without Records"

Under Civ. Code, § 3118, providing that an indorser may qualify his indorsement with words "without recourse" or equivalent words, assignment of "all our interest in this promissory note" is equivalent to indorsement without recourse, and the assignors, on the maker's default, were not liable.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Without Recourse.]

Appeal from Superior Court, Los Angeles County; E. T. Zook, Judge.

Action on a note by the Hammond Lumber Company against F. T. Kearsley and others as makers, and Fred L. Stocks and others as indorsers. From a judgment for plaintiff against defaulting makers, and in favor of indorsers, plaintiff appeals. Affirmed.

R. L. Horton, of Los Angeles, for appellant. Harry M. Irwin, of Los Angeles, for respondents.

WORKS, Judge pro tem. The defendants Stocks, who are also the respondents, delivered to the appellant a certain promissory note secured by trust deed, after writing on the back thereof, over their signatures, the following:

"For value received we hereby assign all of our interest in this promissory note of \$757.66, dated April 23, 1913, signed by Francis T. Kearsley and C. B. Kearsley, to Hammond Lumber Company, a corporation."

Two of the respondents were payees of the note, and the third was the wife of one of the others. This action was commenced against the makers of the note and against the respondents upon their assumed liability as indorsers under the terms of the instrument above quoted. The makers defaulted and judgment was entered against them; but judgment was rendered in favor of the respondents. The plaintiff appeals.

The appellant contends that a liability as indorsers rests upon the respondents and cases are cited, in support of the position, to the effect that an assignment written on the back of a note by the payees named in it is not different from an indorsement by them in blank, and that they are liable as indorsers in the one instance as in the other. There are many cases which so decide, but they are cases in which the assignments were transfers, without words of qualification, of the instruments upon the backs of which they were written. The assignment in question here conveys "all of our interest in this promissory note," which is quite different from such an indorsement as, for instance, "we hereby assign the within note." respondents cite many cases which point out the difference, in legal effect, between two such indorsements. We do not present a citation of those cases, but content ourselves with quoting from one of them (Evans v. Freeman, 142 N. C. 61, 66, 54 S. E. 847, 849), in which the court, speaking of a section of the Negotiable Instruments Law of the state. said:

"A qualified indorsement may, by the express terms of that section, be made by adding to the indorser's signature the words 'without recourse, or any words of similar import.' It has been settled in commercial law that a transfer by indorsement of the 'right and title' of the payee or an indorser to a negotiable note is equivalent to an indorsement 'without recourse' and words such as were used in this case are therefore in their meaning or 'import' similar to such an indorsement, and this is their reasonable interpretation. 1 Daniel, §§ 700 and 700a; Norton on Bills and Notes (3d Ed.) 120; Hailey v. Falconer, 32 Ala. 536; Rice v. Stearns, 3 Mass. 225, 3 Am. Dec. 129; Randolph, Com. Paper (2d Ed.) §§ 721, 722, 1008; Goddard v. Lyman, 14 Pick. (Mass.) 268; Borden v. Clark, 26 Mich. 410; Eaton & Gilbert on Commercial Paper, § 61."

This decision, and the others cited by respondents, bring the presnt case within the terms of section 3118 of the California Civil Code, which, with our own italics, is as follows:

"An indorser may qualify his indorsement with the words, 'without recourse,' or equivalent words; and upon such indorsement, he is responsible only to the same extent as in the case of a transfer without indorsement."

The propriety of such a construction as we place on the assignment executed by respondents is plain. They conveyed all of their interest in the note. To permit the appellant to hold them as indorsers would be to allow it to exercise a right which was not within nor a part of that interest.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

# DROUILLARD V. SOUTHERN PAC. CO. et al. (Civ. 1778.)

(District Court of Appeal, Third District, California. March 4, 1918. Rebearing Denied by Supreme Court May 3, 1918.)

1. Railroads ⇔⇒350(13) — Crossing Accidents—Contributory Negligence.

A passenger riding in an automobile, driven by another, struck by train at a crossing, was not negligent as a matter of law, where the view of the approaching train was obstructed by a box car until within 50 feet of the track in by a dox car until within 30 feet of the track in which position an approaching train could have been seen 150 or 200 feet away, and the automobile had been stopped about 44 feet from the track; it being presumed that the passenger either attempted to warn the driver or to leave the car, in view of Code Civ. Proc. § 1963, making it a rule of evidence that a person takes ordinary care of his own concerns. dinary care of his own concerns.

2. RAILROADS \$\ightharpoonup 350(13) - Crossing Acci-DENTS - ORDINARY CARE - QUESTIONS OF FACT.

A passenger in an automobile driven by another across a railroad track must exercise ordinary care for his own safety, and whether he does so is a question of fact.

3. NEGLIGENCE 6 113(1)-PLEADING-NEGA-

TIVE DEFENSES.

In an action for wrongful death, plaintiff need only show that defendant's negligence was the proximate cause, and he need not negative the claim of contributory negligence.

4. Trial \$\infty 359(1)-Verdict and Findings-CONFLICT.

A general verdict and special findings should A general vertice and special minings should be reconciled, if possible, and no specific finding should overthrow the general verdict unless entirely inconsistent and irreconcilable thereto.

Railroads \$\iftharpoonup 352\to Crossing Accident-Verdict and Findings.

In an action for wrongful death of a passenger in an automobile struck by defendant's railroad train at a crossing, a special finding that if decedent had looked he could have seen the approaching locomotive was not inconsistent with a general verdict against the railroad comsany, since it does not compel a conclusion that

decedent was negligent. 6. RAILBOADS \$\iiii 348(1)\$—Crossing Accident -EVIDENCE.

In an action for wrongful death of a passenger in an automobile struck by defendant's raildecedent was leaning forward against the front seat, either warning the driver or in the act of jumping, held supported by the evidence.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by Edward Drouillard against the Southern Pacific Company and another. Judgment for plaintiff, and defendants appeal Affirmed.

A. F. Jones and George F. Jones, both of Oroville, and Roy G. Hildebrand, for appellants. J. Oscar Goldstein, of Chico, for respondent.

BURNETT, J. This action was for damages for the death of Edward Drouillard, a minor, and the verdict of the jury was for the plaintiff in the sum of \$7,000. The accident occurred at a grade crossing just outside the town of Durham while the deceased was in the employ of one Thomas Fimple, the former riding on the back seat of an automobile driven by the latter. The machine was struck by a detached locomotive in charge of and being driven by the defendant McKnight while on his way from Chico to Roseville. Fimple and young Drouillard were the only occupants of the machine, and they were both killed by the collision; the former's body being found about 150 feet from the point of the accident, and the latter being carried on the cowcatcher for a distance of 1,113 feet, and dying within a few minutes after being taken therefrom.

There is abundant evidence of the negli-Indeed, with comgence of appellants. mendable candor their able counsel concede that the finding of the jury in that respect is legally supported. The case seems to have been tried with unusual care, and not a single ruling of the court as to the admissibility of evidence, nor is its action in reference to the instructions challenged; the only contention herein being that, as a matter of law, it should be held that the deceased was guilty of contributory negligence, and, furthermore, that certain special findings of the jury are inconsistent with and control and render ineffective the general verdict.

To appreciate the significance of the question as to the contributory negligence of the deceased, it may be well to call attention to these facts disclosed by the evidence: There were two railroad tracks at the crossing where the accident occurred—one the main line track, and the other the house track which extended to certain buildings for freight purposes. The centers of these are There were certain about 44 feet apart. buildings near the house track which obstructed the vision of one coming from the west and looking north, and this condition was augmented at the time of the collision by the presence of a box car, 10 feet in width, standing upon said house track. At road train at a crossing, a special finding that | any rate, it may be said that the view of the occupants of the machine in the direction of the approaching locomotive was intercepted until they reached a point about 50 feet from the main track. There they stopped, and both were seen looking north up the track from which position they could see the main track for a distance of 150 or 200 feet, and it is fair to say from the evidence that, if it had not been for the obstruction of the view by the box car, they would have seen the track for a distance of probably 2 miles. Having stopped near the house track and not being apprised of any danger, they proceeded on till the collision occurred on the main track. There was a space of 35 or 40 feet over which they passed just prior to the accident wherein they had an unobstructed view of the approaching locomotive, and what occurred within this interval is really the subject of the whole controversy in the case. The time was exceedingly short -not over five seconds at the rate they were traveling, while the locomotive was coming at a tremendous speed of probably 50 miles an hour or 73 feet per second.

The direct evidence throws little light, if any, upon the question as to what during this interval the deceased did to protect himself against the impending menace and to secure his own safety. An important witness for the plaintiff, who was standing about 100 feet away where he had a clear view of the situation, testified:

"I noticed a man coming with an automobile, and I noticed he slowed down just before he started to pull down to the track, looking up the track and when he started he came over the track and just as he got on the track the engine struck the car and threw it"; that, when the driver stopped, the engine was over 1,000 feet away; that no bell was rung and no whistle was blown; and that "the old man was sitting in the front seat and the boy in the back seat

The only other witness who pretends to have seen the automobile and its occupants within the brief interval was the defendant McKnight, who had charge of the locomotive; but he admits that when he first saw the automobile it was right on the rail, and that he struck the machine as if in an instant, that he did not have a good view of the automobile, but that he saw Drouillard leaning over the front seat as if to talk to Mr. Fimple. "I saw him turn his face to the engine when we hit him; that was all there was to it. His eyes looked like two balls of fire. I couldn't say whether he was paralyzed or not-the expression looked that way to me."

[1, 2] In view of this situation, must it be said that Drouillard did not exercise that care which the law exacts of every one in a similar position? In deciding that question, we must, of course, distinguish between the driver and the guest. For the purposes of the case it might be conceded that, within the rule often announced in reference to railroad crossings, Fimple was chargeable the conduct of a decedent. It is sufficient

behalf would lie against the railroad company; but this concession would not militate against the view that the same defense is not available in this action. In other words, certain things are sometimes required of the driver to satisfy the requirements of ordinary care and prudence that it would be unreasonable to demand of the guest who has no control over the driver and who is not directing the movements of the machine. This is necessarily so, and we do not dwell upon it as it is sufficient to refer to Lininger v. San Francisco, etc., R. R. Co., 18 Cal. App. 411, 123 Pac. 235, Thompson v. Los Angeles R. Co., 165 Cal. 748, 134 Pac. 709, and Bryant v. Pac. Elec. Ry. Co., 174 Cal. 737, 164 Pac. 385, wherein the subject is fully discussed.

But, of course, it is true, as recognized by all the authorities, that Drouillard was required to exercise ordinary care for his own safety, and whether he exercised such care is a question of fact, and unless the evidence is all one way this question must be submitted to the jury. Parmenter v. McDougall, 172 Cal. 306, 156 Pac. 460.

"No one can be allowed to shut his eyes to danger in blind reliance upon the unaided care of another, without assuming the consequences of the omission of such care." Fujise v. Los Angeles Ry. Co., 12 Cal. App. 207, 107 Pac.

What, then, within the interval of four or five seconds should Drouillard have done to acquit himself in the eyes of the law? The contention of the appellants at the oral argument was that he should have looked up and down the track and discovered the approach of the locomotive and warned the driver to It may be debatable whether under the circumstances he was required to do even this much. It might be plausibly argued that he would be justified in believing that the driver would be apprised of the danger and would stop his machine before attempting to cross the track. But granting that appellants' contention is not unreasonable, even conceding that, when he became convinced that the driver did not intend to heed the warning, it was the duty of Drouillard to attempt to leave the machine: then, we must for the purposes of this appeal hold that Drouillard did just what appellants contend he should have done. The case would be no different if a witness had testified to such facts. This follows necessarily from the presumption-which is a rule of evidence -"that a person takes ordinary care of his own concerns." Section 1963, Code Civ. Proc. Of course, this is a controvertible presumption, but until controverted it is evidence which the jury is bound to accept. Crabbe v. Mammoth Channel Gold Mining Co., 168 Cal. 500, 143 Pac. 714.

There are other cases illustrating the application of the presumption to the question of with such negligence that no action in his to refer to Baltimore & Potomac R. Co. v. Landrigan, 191 U. S. 46 24 Sup. Ct. 137, 48 L. Ed. 262, wherein the court said:

"In the absence of all evidence tending to show whether the plaintiff's intestate stopped, looked, and listened before attempting to cross the south track, the presumption would be that he did. But that presumption may be rebutted by circumstantial evidence, and it is a question for the jury whether the facts and circumstances proved in this case rebut that presumption, and, if they find that they do, they should find that he did not stop and look and listen. \* \* In order to justify them in finding that he did not, all the evidence tending to show that should be weightier in the minds of the jury than that tending to show the contrary."

[3] Herein there was no evidence that the deceased failed to do what the most stringent rule of ordinary care demands, and therefore there can be no contention that said presumption was overcome. Indeed, if there were no such presumption, the implied finding of the jury that Drouillard was not chargeable with contributory negligence would demand concurrence for the reason that it is an affirmative defense which the defendants are called upon to establish. Having shown that his death was the proximate result of the negligence of the defendants, the task of the plaintiff was complete, and he was not required to negative the claim of contributory negligence. As is well known, the rule in this state, as to that matter, differs from some other jurisdictions.

[4] We can perceive no greater merit in the other contention of appellants that the special findings are inconsistent with the general verdict. Of course, the rule is that they should all be reconciled, if possible, and that no specific finding should operate to overthrow the general conclusion of the jury unless they are entirely inconsistent and irreconcilable.

The matter is thoroughly discussed in Antonian v. Southern Pacific Co., 9 Cal. App. 718, 100 Pac. 877, by the presiding justice of this court to which it is sufficient to refer. Among other cases that might be cited, we may add the recent decision of the Supreme Court in Law v. Northern Assurance Co., 165 Cal. 394, 132 Pac. 590.

[5] That no such inconsistency exists may be seen by exhibiting the three special interrogatories and their answers to which the argument is addressed:

"No. 4. Did William Drouillard do anything for his own protection or safety after the automobile passed the box car and before it reached a point where it could have been struck by the locomotive passing on the main track? Answer:

Yes.
"No. 5. If your answer to question No. 4 is 'Yes,' then what did William Drouillard do for his own protection? Answer: From defendants' testimony Drouillard was leaning forward against front seat, either warning Mr. Fimple of the approaching danger, or in the act of jumping.

jumping.
"No. 6. If William Drouillard had looked north toward the approaching locomotive at appoint after the locomotive passed the box car, and before it reached the point where it could be struck by the locomotive on the main track,

could he have seen the approaching locomotive? Answer: Yes."

DROUILLARD V. SOUTHERN PAC. CO.

In fairness to appellants, it should be remarked that they insist that only the last of these is inconsistent with the general verdict. But they are clearly mistaken in the contention. Indeed, the jury could not possibly have made a different answer to the interrogatory. That he could have seen the locomotive if he had looked is beyond question, since there was nothing to obstruct his view.

Appellants argue upon the theory that the finding necessarily implies that Drouillard did not look and therefore omitted a plain duty. But the answer to question No. 6 is not inconsistent with the contention that he did look and did observe the approach of the locomotive. From the form of the question you might infer that Drouillard neglected such duty, but it does not compel that conclusion.

[6] Nor can it be said that the jury was unwarranted in its answer to any of these interrogatories. The point is made, especially in reference to question No. 5. It is argued that the answer is not a fair inference from the testimony of Mr. McKnight. But it is apparent that his testimony is not necessarily opposed to the findings of the jury. Accepting as a fact the statement by him that Drouillard was leaning forward as if talking to the driver, it is, of course, no violent inference that he was warning Fimple of the approaching danger or even that he was about to attempt to leave the the machine. But in addition it must be borne in mind that McKnight was an interested witness, and it is not unfair to say that he would naturally favor appellants as far as possible. He would, indeed, be under great temptation to support the theory of appellants at the price even of the truth. At any rate, the jury was the exclusive judge of his credibility and might accept one and reject another portion of his testimony. Moreover, we may disregard the explanatory part of the answer if it be deemed an improbable inference from the testimony of Mr. Mc-Knight, and we shall have left the simple affirmative, which is supported by the presumption hereinbefore suggested. Again, if it be conceded that the whole answer must be disregarded because the testimony of Mc-Knight does not warrant it, the result is not affected, for the reason that the other findings are supported by the evidence and lead necessarily to the conclusion that plaintiff is entitled to the judgment.

It may be said that the case has been argued extensively and with ability by counsel, and, while their briefs have been examined with care, we see no necessity for more elaborate treatment of the questions involved or for the specific consideration of the distinguishing features of the various cases which have been cited. It seems clear that

we are called upon to determine the application of a few well-settled principles of law, and that there is no legal ground for interfering with the result reached by the lower court.

The judgment and order are therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

SMITH v. McCALLUM et al. (Civ. 1814.) (District Court of Appeal, Third District, California. Feb. 4, 1918. On Rehearing, March 6, 1918. On Rehearing in Supreme Court, April 5, 1918.)

1. Criminal Law == 1026 - Waiver of

RIGHT TO APPEAL.

One who gave his bond for the support of his minor child under Pen. Code, § 270b, and judgment was suspended, did not waive his right to appeal from an order denying his motion for a new trial.

2. CRIMINAL LAW \$== 1081 - Notice of Ap-PEAL

Notice of appeal to the clerk gives the appellate court jurisdiction in criminal cases, in view of Pen. Code, §§ 1246, 1247, 1247a, relating to duties of clerks in reference to criminal appeals.

3. CRIMINAL LAW 4 1023(13) - ORDERS AP-PEALABLE

Although Pen. Code, § 1239, makes no mention of an appeal from a motion for a new trial, in view of such right given by section 1237, and sections 1201, 1202, providing that motion for new trial must be made before judgment, an appeal may be taken where judgment has been suspended and not entered. has been suspended, and not entered.

#### On Rehearing.

4. Costs &=3-When Allowed.
Costs are allowable by statutory authority only.

5. MANDAMUS = 190 - COSTS - COURT RE-PORTERS.

In an original proceeding in the appellate court in mandamus to compel a court reporter to transcribe notes in a criminal case to the appellate court, the applicant, if successful, is entitled to costs under Code Civ. Proc. § 1095, although the judge of the superior court refused to order the transcribing of the notes.

Angellotti, C. J., dissenting.

Application by F. J. Smith for writ of mandate to compel Duncan C. McCallum and Anna D. Duffy, as court reporters, to transcribe certain notes and file them with the clerk of the appellate court. Writ granted.

R. Platnauer, of Sacramento, for petitioner. U. S. Webb, Atty. Gen., J. Charles Jones, Deputy Atty. Gen., Raymond A. Leonard, Dist. Atty., of Oroville, and H. R. Davids, Asst. Dist. Atty., of Chico, for respondents.

.CHIPMAN, P. J. Application for writ of It appears from the petition: That petitioner was informed against for omitting without lawful excuse to furnish his minor child with necessary food, and on December 14, 1917, he was convicted of the offense charged in the information. The court appointed December 17, 1917, as the that the order suspending sentence was

time for pronouncing judgment. On said day, and before judgment was pronounced, defendant in open court made and filed a motion and application in arrest of judgment, and also a motion and application for a new trial. Thereupon the court, at the request of the petitioner, continued the hearing of said motions until the 20th day of December, 1917, and extended the time for pronouncing judgment until said last-named day, on which day the court made an order denying petitioner's said application and motion in arrest of judgment, and also made an order denying petitioner's application and motion for a new trial in said action, and thereupon, at the time said orders were made, petitioner in open court announced that he appealed to the District Court of Appeal for the Third District from the order denying his application and motion for a new trial in said action. Thereafter, and on the same day, to wit, December 20, 1917, defendant appeared before the court and entered into an undertaking to the state, with two sureties, in the penal sum fixed by said court, conditioned that he would pay to the person having the custody of said minor child the sum per month fixed by said court in order to thereby provide for said minor child the necessary food, clothing, shelter, and medical attendance, which bond was approved by said superior court. "That thereupon said court suspended proceedings and sentence in said action." "That on said 20th day of December, 1917, and after proceedings and sentence had been suspended, petitioner filed with the clerk of said court and presented to said superior court an application for a reporter's transcript, which application stated in general terms the grounds of said appeals and the points upon which he relied, and designated the portions of the stenographic reporter's notes relied on, which application is in the words and figures following, to wit." Therein appears a recital of the proceedings relating to the notice of appeal, the grounds of the appeal, ten in all, and also a designation of the portions of the phonographic reporter's notes relied on. In the body of the application, as copied in the petition herein, it is stated that the notice of motion was given on December 20, 1917, and the motion was denied by the court on December 20. 1917, and it also appears that defendant gave notice of appeal from the judgment. In the concluding paragraphs the date of the notice of motion and the order made by the court is given as December 17, 1917. Since the argument a certified copy of the application on file in the action has been filed in this court, from which it clearly appears that the correct date at which the motion and order were made was December 20, 1917, and it was on that date and after the said order was made

made. It is then shown in the petition herein that on said December 20, 1917, "the said superior court refused to make an order directing the phonographic reporter to transcribe such portion of her notes as in the opinion of the court might be necessary to fairly and fully present the points relied upon by petitioner, and refused to make an order directing such phonographic reporter to transcribe any portion of her notes; that said superior court has never at any time made any order directing said phonographic reporter to transcribe any portion of said notes." It is further shown that respondent McCallum is the official reporter of said court, and took down the shorthand notes of the proceedings in said action on the said motions, and that respondent Duffy was the acting official reporter at the trial; that on December 28, 1917, petitioner demanded of respondents and each of them that within 20 days after said December 20, 1917, they and each of them file with the clerk of said court an original and three carbon copies "of those portions of their respective notes so required by petitioner and his application so filed and presented," but they and each of them refused so to do, "and they have and each of them has informed respondent [petitioner?] that they will not do so." It is further alleged that the said superior court "is of the opinion that petitioner is not entitled to prosecute his said appeals, and that the county of Butte should not be put to the expense of paying for said transcription, and has so informed petitioner."

The first point made by respondents is based on the assumption that petitioner in his petition refers to orders made on December 17, 1917, whereas "there are no such orders." The petition itself leaves little doubt that the true date is December 20th. However, the certified copy clears away all doubt, and shows that the date of the orders was December 20th, and also that there was no notice of motion of appeal from the judgment, and, had there been, it should be treated as superfluous, for judgment was in fact suspended.

Respondents' second point is that no appeal has been taken in the manner required by the provisions of section 1239 of the Penal Code. This section refers to an appeal from the judgment, and provides that it must be taken at the time judgment is rendered, and also that an appeal from an order after judgment must be taken at the time the order is made. It makes no provision as to when the appeal from an order denying motion for a new trial is to be taken. Section 1182, however, provides that the application must be made before judgment, and the order denying the motion must immediately be entered by the clerk in the minutes. The contention is "that an appeal can only be

and, as this section makes no mention of an appeal from the order denying the new trial, no appeal lies. But section 1237 of the Penal Code expressly provides:

"An appeal may be taken by the defendant:
1. From a final judgment of conviction; 2.
From an order denying a motion for a new trial; 3. From any order made after judgment, affecting the substantial rights of the party."

The right to appeal is thus clearly given. Section 1239 provides that the appeal may be taken from the judgment in open court at the time it is rendered and from an order made after judgment, but does not mention the order denying motion for new trial, and, of course, does not provide at what time such appeal is to be taken.

This brings us to the principal point urged by respondents, to wit, that no appeal lies from an order denying motion for a new trial until after judgment of conviction is entered.

[1] The right of appeal has been said by the Supreme Court to be guaranteed by the Constitution and to be as sacred as the right to trial by jury, and is one of the means provided by law to determine the guilt or innocence of the accused. Ex parte Hoge, 48 Cal. 3, 6; In re Adams, 81 Cal. 163, 167, 22 Pac. 547. Under sections 1201 and 1202 the motion for a new trial must be made before judgment is pronounced. Under subdivision 1, § 1203, the court may suspend sentence, and in cases arising under sections 270 and 270a (under which petitioner was convicted) the suspension may continue for five years. The bond given by petitioner for the support of his minor child was under section 270b, and by that section the court was also authorized to suspend sentence, but this bond, in our opinion, is not a waiver of petitioner's right to appeal from the order denying his motion for a new trial. In State v. Coolidge, 72 Wash. 42, 129 Pac. 1088, a bond was given by the defendant after conviction in a case such as we have here, and it was there claimed that the bond operated as a waiver of defendant's right to appeal. Said the court:

"It may be that a case might arise where the giving of a bond, conditioned for the performance of a judgment, would operate as a waiver of the right to appeal; but it cannot be so held in this case. The verdict still stands, and defendant is entitled to urge such legal defense as he may have thereto."

In the case cited no judgment had been entered, but the court made an order, as here, staying proceedings. A motion for a new trial had previously been made and denied.

when the appeal from an order denying motion for a new trial is to be taken. Section 182, however, provides that the application must be made before judgment, and the order denying the motion must immediately be entered by the clerk in the minutes. The contention is "that an appeal can only be taken under the provisions of section 1239," in criminal cases. Section 1247 of the Penal

order of the superior court to the District Court of Appeal in any criminal action where appeal is allowed by law the defendant must within a given time make application to the trial court, stating the grounds of the appeal and designate the portions of the stenographic reporter's notes upon which defendant relies. It is made the duty of the court, upon such application, to order the transcription made and also the duty of the reporter to file with the clerk such transcription. Everything which this section requires of the defendant was done in this case. Section 1247a makes it the duty of the clerk to deliver copies of the transcription to the parties named, including a copy to the court for its approval, and, if no objection is made to the transcription, it is made the duty of the court to approve it and deliver it to the clerk. Provision is made for hearing objections and for approval by the court thereafter. When finally approved and received by the clerk from the judge, the clerk "must immediately transmit the same to the court to which the appeal was taken, and thereupon it shall become a part of the record on appeal." Section 1246 provides that, "upon the appeal being taken, the clerk of the court from which the appeal is taken must," without charge, within 20 days thereafter, transmit to the clerk of the appellate court a typewritten copy of the following papers. The enumerated papers include "the proceedings on motion for arrest of judgment or new trial."

[3] The machinery seems to be amply provided for perfecting the appeal from the order in question, and is the same for perfecting the appeal from the judgment or any order made after judgment, without regard to the fact that no mention of such order is made in section 1239. It was held in People v. Thompson, 115 Cal. 160, 46 Pac. 912: that although there was no question raised on an appeal from the judgment as to the instructions, and the instructions were not in fact presented or passed upon, the instructions, nevertheless, may be reviewed upon an appeal from the order, notwithstanding that they might also have been reviewed on an appeal from the judgment, if presented on such appeal. Still, as was there held, the Penal Code provides for an appeal from an order denying a new trial (section 1237), and as the motion for a new trial is an independent proceeding, it may happen, as in civil cases, that a judgment is set aside on a motion for a new trial after it had been affirmed on appeal from the judgment, and such was the result in the case cited.

In the case of People v. Irish, 167 Pac. 900, a case such as this one, sentence was suspended and an appeal taken and heard and judgment affirmed. The opinion does not state from what the appeal was taken, but

Code provides that upon an appeal from an was from the order denying a new trial while the sentence remained suspended.

> The contention of respondents leads to this. that the defendant may rest under suspended sentence for a period of five years before he can have his motion for a new trial heard. He may not have been guilty of the offense charged or he may not have been legally convicted, but the law furnishes no remedy under which he can have these questions answered by an appellate court pending suspension of sentence.

> We think petitioner is entitled to have his appeal heard pending suspension of sentence. and it is therefore ordered that he have the writ prayed for.

We concur: HART, J.: BURNETT, J.

### On Rehearing.

Petitioner was granted a writ of mandamus compelling respondent Duffy to transcribe her notes of all the proceedings taken at the trial of petitioner, when as defendant in a criminal action he was convicted of failing to support his minor child, and also compelling respondent McCallum to transcribe his notes of the proceedings of the court on the motion of petitioner, defendant in the action, in arrest of judgment and for a new trial, it appearing that in said action respondent Duffy was acting as the official reporter at the trial and respondent McCallum was acting as official reporter at the hearing of said motion, and it further appearing that said transcripts were regularly demanded by the defendant in aid of his appeal from the judgment and the order denying his motion for a new trial. In the present matter petitioner seeks a rehearing for the purpose alone of having the judgment so amended as to allow him his costs herein. It is understood that, if costs are not legally allowable, the petition should be denied, and, if allowable and allowed by the court, that the judgment be amended accordingly.

[4, 5] Costs are allowable by statutory authority only. They are allowed to the plaintiff, of course, in the following cases:

"\* \* \* 4. In a special proceeding." Code Civ. Proc. § 1022. "In other actions than those mentioned in

section ten hundred and twenty-two, costs may be allowed or not, \* \* in the discretion of the court. \* \* " Code Civ. Proc. § 1025.

In an application for mandate, "if the judg-

ment be given for the applicant, he may recover the damages which he has sustained, together with costs; and for such damages and costs an execution may issue. \* \* \* " Code costs an execution may issue. Civ. Proc. § 1095.

In the case of Platnauer v. Superior Court, 33 Cal. App. 394, 165 Pac. 41, relied on by respondents, we held that costs were not allowable for the reasons there stated at some length. The application there, however, was for a writ of review, running against the court. The prevailing party relied upon sections 1027 and 1032, Code of Civil Procedure, an examination of the record shows that it but these sections were held to be inapplicable, and it was also held that costs could ed to read that the petitioner have the writ be recovered neither against the judge nor the county.

The statute as to writs of review makes no mention of costs, leaving the question to be determined under the general provisions as to costs. The reasons given for the decision in the Platnauer Case are not applicable here. Besides, in mandamus proceedings there is express authority given for recovering costs. The argument of respondents that "shorthand reporters are governmental agencies of the superior court, which is a governmental agency of the state," and hence should enjoy the immunity given the court in the matter of costs, does not strongly appeal to us. The court in the case cited was exercising a judicial function in a matter wherein it had jurisdiction of the person and subject-matter and could decide wrongly or rightly. Here respondents had no judicial function to perform: the duty which the defendant in the criminal action (petitioner here) called upon them to perform was ministerial and its performance was made mandatory by the statute. If it be conceded (and we make no such concession) that section 1095, Code of Civil Procedure, does not "take away, as is contended, the discretion of the court in allowing or denying costs," we should hesitate to exercise such discretion against petitioner for the reason that the policy and letter of the law give to the defendant in a criminal action the services of the courts and their officials free of expense at all stages of the proceedings, and in harmony with that policy he should have his costs when driven to the court to compel a court stenographer to perform a mere ministerial duty placed upon him by the statute, especially where the performance of this duty is indispensably necessary to enable the defendant in the action to perfect his appeal.

In Power v. May, 123 Cal. 147, 152, 55 Pac. 796, the Supreme Court held that sections 1022 and 1095, Code of Civil Procedure, applied where the writ of mandate was against a county treasurer, and that costs of the mandamus proceeding were chargeable against the defendant personally. It was held in Gould v. Moss, 158 Cal. 548, 111 Pac. 925. that:

Section 1095, Code of Civil Procedure, applies "to original proceedings of that character, whether begun in the superior court, in the Supreme Court, or in a District Court of Appeal. The point that this court is without power to award costs in such cases is without merit."

Our conclusion is that petitioner is entitled

It is ordered that the judgment be amend-

prayed for, and that he have judgment for his costs.

We concur: HART, J.: BURNETT, J.

Action of Supreme Court Denving Rehearing.

PER CURIAM. Motion for rehearing denied by the Supreme Court.

ANGELLOTTI, C. J. (dissenting). I am of the opinion that there should be a hearing of this matter in this court. Regardless of other questions involved, it seems clear to me that our law does not require the shorthand reporter to furnish a transcript of the proceedings in a criminal case for the purposes of an appeal upon the demand of the appellant and without payment of fee, where the trial judge to whom application is made for an order requiring such a transcript expressly rules that the appellant is not entitled thereto, and denies the application therefor. and no order for such a transcript is made by the court to which the appeal is taken. To my mind the intent is clear to vest in the trial court the power to determine to what extent the appellant is entitled to a transcript of the reporter's notes for the purposes of an appeal, the expense of which, when properly ordered, is a county charge, with the right in the court to which the appeal is taken to order a further transcription, if deemed essential to the appellant's rights. It is only where the trial court fails to take any action for a specified time regarding appellant's application that the shorthand reporter may be required to furnish the transcript as demanded; the idea apparently being that such failure of the court to act shall be taken as assent to the application as made. Here the trial court acted, and expressly refused to order the transcript, ruling that appellant was not entitled thereto. And the reporter, who doubtless felt himself bound by the ruling of the superior court in the matter, is held guilty of a breach of statutory duty for not having disregarded such ruling, and is also penalized in costs. seems to provide in effect that the compensation of the reporter for such a transcription is to be paid from the county treasury only when the same is, at least in effect, ordered by a court, and I do not see how the reporter here could have received any compensation in this case had he proceeded in the face of the ruling of the court refusing the transcript.

PILUSO v. SPENCER. (Civ. 1785.)

(District Court of Appeal, Third District, California. March 1, 1918. Rehearing Denied by Supreme Court April 29, 1918.)

1. CIVIL RIGHTS 5-HOTEL ACCOMMODA-TIONS-LODGERS FOR INDEFINITE PERIODS-"HOTEL"-"INN."

"HOTEL"—"INN."

Civ. Code, §§ 51, 52, providing for full and equal accommodations, advantages, etc., of inns, hotels, etc., and imposing liability in damages for the same, contemplates by the use of the term "hotel," a public resort for protracted accommodation as well as temporary refreshment, and the statute applies to lodgers for indefinite periods, there being a distinction between hotel and inn as regards guest and lodger for indefinite period, especially in view of rule as to civil liability changed by amendment of section 1859 of the Civil Code so as to include hotel keepers. IEd. Note.—For other definitions, see Words

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Hotel;

Inn.]

2. CIVIL RIGHTS \$\infty\$ 13—HOTEL ACCOMMODATIONS—ACTION FOR DAMAGES—COMPLAINT—"INCITED."

In a complaint in an action for damages under Civ. Code, §§ 51, 52, for causing plaintiff's removal from a hotel, alleging defendant incited the proprietor to discriminate against plaintiff, the term "incited" carries with it the idea of encouragement, persuasion, and inducement, and is sufficient for the purpose suggested in the is sufficient for the purpose suggested in the complaint of causing removal from the hotel, and hence the complaint shows a causal connection between the defendant's act and plaintiff's removal.

[Ed. Note.—For other definitions, see Words and Phrases, Incite.]

3. CIVIL RIGHTS \$\instructure{1}\$ 13—Hotel Accommodations—Action for Damages under Civ. Code, \$\frac{8}{5}\$ 51, 52, for causing plaintiff's removal from a hotel, evidence of defendant's treatment of plaintiff in other respects, such as interfering with pursuit of his business and possession as tenant of a cottage, was admissible in support of an allegation of malice and as indicative of empression. oppression.

4. CIVIL RIGHTS \$\infty\$ 13—HOTEL ACCOMMODATIONS—ACTION FOR DAMAGES—EVIDENCE.

A letter from defendant to the hotel proprie-

tor asking him to inform plaintiff that he would have to have the rooms he was occupying, and that board in the restaurant would be doubled thereafter, was admissible to show defendant's malice and hostility.

5. Trial \$\infty 233(3) - Instructions - Dibection to Construe Pleadings.

A direction to render a verdict for plaintiff if the jury found certain facts from admissions of the pleadings and evidence did not impose on the jury the responsibility of construing the pleadings when the court had already informed the jury what facts were admitted therein.

6. CIVIL RIGHTS €== 13 - HOTEL ACCOMMODA-TIONS—ACTION FOR DAMAGES—INSTRUCTIONS PUNITIVE DAMAGES.

In an action under Civ. Code, § 51, 52, for causing plaintiff's removal from a hotel, the jury might award punitive damages for malice or op-pression in excess of the \$50 minimum fixed by the statute.

CIVIL RIGHTS = 13 — HOTEL ACCOMMODA-TIONS — ACTION FOR DAMAGES — INSTRUC-

lic or any person a place of residence or business therein was subject to criticism as being too sweeping, since, if it were the practice and custom of the hotel to receive and entertain oth-er guests of that class, it would have no right to discriminate against plaintiff.

8. Trial @==260(6) - Charge as Covering REFUSED INSTRUCTION.

REFUSED INSTRUCTION.

In an action under Civ. Code, \$5 51, 52, for causing plaintiff's removal from a hotel, a statement in a refused instruction that the law only requires the keeper of hotel or inn to give accommodations alike to all who compose the traveling public, making no distinction on account of race or color or for any other reason not applicable alike to all persons, was covered by a part of the charge that, if plaintiff was permitted the ordinary and usual accommodations, and was not on account of his race or color, or for any other cause or reason other than such as was applicable to all denied such privileges and accommodations, verdict must be for defendant. for defendant.

Appeal from Superior Court, Siskiyou County; James F. Lodge, Judge.

Action by Frank G. Piluso against F. F. Spencer. From a judgment for plaintiff, defendant appeals. Affirmed.

Taylor & Tebbe, of Yreka, for appellant. H. R. Raynes and L. F. Coburn, both of Yreka, for respondent.

BURNETT, J. The action was brought under sections 51 and 52 of the Civil Code for the violation of the "personal rights" of plaintiff. After alleging that one H. W. Pollman was, and had been for some time, "the keeper and did keep a hotel for the accommodation of lodgers and travelers" in the town of McCloud, in the county of Siskiyou, and that plaintiff and his wife and child lodged in said hotel from August 14, 1914, until November 20th, paying all of said Pollman's demands in full for said lodging, the complaint proceeds:

complaint proceeds:

"That on or about the 20th day of November, 1914, said II. W. Pollman did wantonly, wrongfully, willfully, and maliciously, and without any good cause therefor, discriminate against and refuse to permit and did not permit said plaintiff to continue to lodge in said hotel, and did then and there wrongfully, willfully, and maliciously and without any good cause therefor discriminate against and remove and eject plaintiff from said hotel, all for the purpose of depriving said plaintiff of a place of abode in said town of McCloud and for the purpose of compelling plaintiff to leave and depart from said town of McCloud and for the purpose of harassing, of McCloud and for the purpose of harassing, annoying and vexing plaintiff."

The allegation as to the defendant's participation in the transaction is as follows:

"That on or about the 4th day of November, 1914, defendant herein did wrongfully. willfully, and maliciously and without any good cause therefor incite said H. W. Pollman to so discount of the service criminate against and to so refuse to permit said plaintiff to continue to so lodge in said ho-TIONS—ACTION FOR DAMAGES—INSTRUCTIONS.

In an action under Civ. Code, §\$ 51, 52, for causing plaintiff's removal from a hotel, a refused instruction that the law does not require the keeper of an inn or hotel to furnish the pub-



quote, is as follows:

"All citizens within the jurisdiction of this state are entitled to the full and equal accommodations, advantages, facilities, and privileges of inns. restaurants. hotels \* \* \* and all other inns, restaurants, hotels \* \* \* and all other places of public accommodation or amusement, subject only to the conditions and limitations established by law and applicable alike to all citizens.

We also quote from said section 52 as follows:

"Whoever violates any of the provisions of the last preceding section by denying to any citizen, except for reasons applicable alike to every race or color, the full accommodations, advantages, facilities, and privileges in said section enumerated, or by aiding or inciting such denial, or whoever makes any discrimination, distinction, or restriction on account of color or race, or or restriction on account of color or race, or except for good cause applicable alike to all citizens of every color or race whatever, in respect to the admission of any citizen to, or his treatment in, any inn, hotel \* \* \* or other public place of amusement or accommodation \* \* or whoever aids or incites such discrimor whoever aids or incites such discrimination, distinction, or restriction, for each and every such offense is liable in damages in an amount not less than fifty dollars, which may be recovered in an action at law brought for that purpose.

[1] The general intent and significance of the foregoing provisions are clear enough. The purpose, of course, is to compel a recognition of the equality of citizens in the right to the peculiar service afforded by these agencies for the accommodation and entertainment of the public. There is no doubt of the constitutionality of the provisions and of the sound, public policy of such legislation. Greenberg v. Western Turf Ass'n, 140 Cal. 363, 73 Pac. 1050.

This is not disputed, but it is urged here that the case does not fall within the inhibition of the statute, for the reason that plaintiff was not a "guest" at the hotel, but a "lodger" for an indefinite period. The contention is based upon the rule at common law as to inns, and upon certain decisions which discuss the nature of these places of public refreshment and accommodation. The California decisions to which appellant refers are Pinkerton v. Woodward, 33 Cal. 557, 91 Am. Dec. 657; Moore v. Long Beach Development Co., 87 Cal. 483, 26 Pac. 92, 22 Am. St. Rep. 265; Fay v. Pacific Improvement Co., 93 Cal. 253, 26 Pac. 1099, 28 Pac. 943, 16 L. R. A. 188, 27 Am. St. Rep. 198; Magee v. Pacific Improvement Co., 98 Cal. 678, 33 Pac. 772, 35 Am. St. Rep. 199.

In the Pinkerton Case, supra, the contention of the defendant was that he kept "a lodging house," and not an "inn," but the Supreme Court decided that he held himself out to the world as an innkeeper, and that he could not "be heard to say that his professions were false, and that he was not in fact an innkeeper." He was therefore held to the responsibilities for the property of his guests which by his representations he induced them to believe he would assume. "lodgers and travelers."

Said section 51, as far as is necessary to! Therein was not involved any such statute as the one before us here.

> In the Moore Case, also, the question was as to the liability of the defendant for the property of the patron, and the distinction as to such liability between the case of a boarder and of a guest was recognized. It seems that the complaint therein counted upon the fact of the plaintiff being a guest, but it was held that he was a boarder, and must therefore bear the loss of his personal effects caused by a fire.

> Again, in the Fay Case, the question of liability for loss of personal effects turned upon the consideration as to whether the place of entertainment was a "public inn" or a select boarding house, and the court held that it was the former, and that the general rule as to inns applied.

> In the Magee Case a similar question was involved, and the court there held:

> That there should have been a finding as to whether the plaintiff was a guest or a boarder, and it was declared that whether "the plaintiff made a special arrangement respecting her stay with the defendant was only evidence to be considered by the court in determining the ultimate fact whether she was a guest or a boarder. Even if the finding of the court that she had made a special arrangement with the defendant for board and lodging by the week had been sustained by the evidence, that fact would not be determinative of the issue whether she was a guest or boarder, but would be merely evidence to be considered in determining that issue."

> However, it may be said that the rule as to such liability has been changed in this state by the amendment (St. 1895 p. 49) of section 1859 of the Civil Code, so as to include a "hotel keeper, boarding and lodging house keeper," as well as "innkeeper."

The statute in question herein also recognizes inns and hotels as belonging to two distinct classes, and we think it cannot be said that the decisions in reference to inns are necessarily controlling in this case, involving, as it does, the duty of a hotel keeper. It may not be possible to make a clear distinction, that will apply to all cases, and, no doubt, sometimes the terms "inns" and "hotels" are used interchangeably, but we are entirely satisfied that in said section by the use of the term "hotel" the Legislature contemplated a public resort not only for temporary refreshment, but also for protracted! accommodation. It is a matter of common knowledge, indeed, that the places designated as hotels in this state are open to the accommodation of permanent as well as transient guests. And, unless it appears to the contrary, we would have a right to conclude that, having advertised the resort as a hotel, the proprietor intended to receive guests for an indefinite period as well as the traveling public. But, as far as the complaint is concerned, it may be added, it was expressly alleged, as we have seen, that the hotel was kept for the accommodation or

[2] Nor do we think that there is any merit in the contention that the complaint fails to show a causal connection between the act of the defendant and plaintiff's removal from the hotel: in other words, that defendant's conduct was effective to accomplish the purpose which he had in mind. The complaint alleges that defendant incited the proprietor to discriminate against the plaintiff. The term carries with it the idea of encouragement, persuasion, and inducement, and is sufficient for the suggested purpose. And it may be said that the evidence shows without any conflict that it was only by reason of said incitement of defendant that the proprietor ejected plaintiff from the hotel.

It does not appear in the complaint that plaintiff used his room therein for an office. Hence appellant's criticism upon that supposition is without significance.

Indeed, we are satisfied that the complaint is not substantially defective in any respect although it probably contains some unnecessary and evidentiary averments that might have been stricken out on the motion of appellant. However, the order denying it was without prejudice.

[3, 4] As to the evidence, appellant claims that the court erred in allowing proof of his treatment of respondent in other matters not alleged in the complaint. One of these instances was in relation to an automobile business in which plaintiff had embarked, and he was asked:

"Well, what caused you to cease your occupation there then, running this machine for hire?"

His answer was:

"Spencer stopped me from it. I ceased working for the McCloud River Lumber Company there in the store about May, 1914, May or June, I think, some time like that."

There were also introduced two letters complaining of his activity in said business, one of them signed, "The McCloud River Lumber Co. F. F. Spencer, Ass't to Pres't," and the other, "F. F. Spencer, Ass't to Pres't." A written notice to surrender possession of a cottage occupied by plaintiff and his family and belonging to said company and a notice of the termination of his tenancy signed in a similar manner were also received in evidence. We think this line of evidence was admissible to show the general course of conduct of appellant toward respondent in support of the allegation of malice contained in the complaint and indicative of oppression. Lyon v. Hancock, 35 Cal. 376; Davis v. Hearst, 160 Cal. 166, 116 Pac. 530. As to the contention that the signature indicated that the writing emanated from the company, it is sufficient to say that it appears that such matters were under the complete control and direction of the defendant. For the purpose of showing hostility and malice on the part of appellant, we think · also that this letter was admissible:

"Mr. Pollman: Will you please inform Frank | there is no difference as to the treatment Piluso that you will have to have the rooms he demanded "between a lodger and a guest in

is occupying in the hotel; also that board at the restaurant will be doubled after to-day. Yours truly, F. F. Spencer."

The following from the same source addressed to the clerk of the hotel stands on the same footing:

"11-20-14. Jack: All you have to do now is to move Piluso's effects from the room and lock the door. Nick will help you if you need assistance. F. F. S."

It may be stated that the Nick therein referred to was the deputy sheriff.

There is other evidence in support of the position that appellant was influenced by ulterior motives in his efforts to have respondent removed from the hotel, and that other guests received entirely different treatment. Indeed, the clerk testified that in obedience to Spencer's letter he doubled the price of meals for Piluso, but did not for any one else, because he had no instructions from Spencer, and that the sole reason for the ejectment was in consequence "of these letters received from Mr. Spencer," and that the Pilusos "were there a couple of months," and "I found no fault with their conduct; they were all right."

We deem it unnecessary to notice further the contention that the hotel was not for the accommodation of permanent lodgers, and that therefore there was no discrimination against respondent. It was a fair inference from the advertisement offered in evidence and from the testimony of plaintiff that he belonged to a class gladly received and entertained at this public place. Indeed, it abundantly appears that his ejectment was not by reason of the fact that his stay was to be indefinite.

There is some pretense that appellant incited the dismissal of respondent for the reason that he was using his room for an office, and also because his wife used an electric "toaster" in preparing breakfast for their son, but we are satisfied that the jury was warranted in finding that no such reason animated appellant in the matter. If such consideration had been regarded, he would undoubtedly have made complaint or notified plaintiff to discontinue such use of the room. \From the whole record the conclusion seems quite unavoidable that defendant's conduct arose from a desire to make it impossible for plaintiff to secure a place of abode in the town.

[5] As to the instructions, we find no prejudicial error. The court directed the jury to render a verdict for the plaintiff if they found certain facts from the admissions of the pleading and the evidence. This, however, did not impose upon the jury the responsibility of construing the pleadings, as claimed by appellant, since the court had already informed the jury as to what facts were admitted therein.

We think the court was right in declaring that under said provisions of the Civil Code there is no difference as to the treatment demanded "between a lodger and a guest in a public place of amusement or accommodation," and that "a hotel is a public place poration, against the J. M. Dunn Auto Comof accommodation."

[6] We find no fault with the instruction that the jury might award punitive damages for malice or oppression in excess of the \$50 fixed by the statute. The maximum recovery was declared to be \$2,500. The instruction clearly contemplated that this should include the \$50 as well as the other element, and was in harmony with the principle announced in the decision of the Greenberg Case, supra.

As to all the instructions given, it might be said that we could presume they were given at the request of the defendant, since it does not appear to the contrary, but in our consideration of them we have not fol-Lowed that presumption.

[7, 8] Of the four instructions refused by the court we consider the following worthy of specific notice:

"The court instructs you that the law does not impose upon the keeper of an inn or hotel the duty to furnish the public or any person a place of residence or a place of business in such inn or hotel, but only imposes upon the keeper of such hotel or inn the duty to give accommodations alike to all who compose the traveling public, making no distinction on account of race or color or for any other reason not applicable alike to all persons.

The first part of the instruction is subject to criticism. The statement is too sweeping. If it were the practice and custom of the particular hotel to receive and entertain other guests of that class, it would have no right to discriminate arbitrarily against the plaintiff. As to the latter part of the instruction, it was covered by this part of the charge:

"If you find that plaintiff was permitted the ordinary and usual accommodations at the Mc-Cloud Hotel, and was not on account of his race or color or for any other cause or reason other than such as was applicable to all denied such privileges and accommodation, then I instruct you that your verdict must be for the defendant."

We find no prejudicial error in the case, and the judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

S. C. SMITH ESTATE v. J. M. DUNN AUTO CO. (Civ. 2108.)

(District Court of Appeal, Second District, California. March 6, 1918. Rehearing Denied April 4, 1918.)

LANDLORD AND TENANT = 231(8)-Actions FOR RENT-ASSIGNMENT OF LEASE.

In action against assignee of a lease which had assigned it to another person who did not pay his rent, evidence held sufficient to sustain finding that defendant was an assignee of the lease for value, and was not a mere reorganization of the original lessee corporation.

Appeal from Superior Court, Kern County: J. W. Mahon, Judge.

Action by the S. C. Smith Estate, a corpany, a corporation. Judgment for defendant, and plaintiff appeals. Affirmed.

Wiley & Lambert, of Bakersfield, for appellant. T. N. Harvey and Geo. E. Whitaker, both of Bakersfield, for respondent.

WORKS, Judge pro tem. The appellant was the lessor under a lease made to the Mason & Flickinger Auto Company, which assigned the instrument to the J. M. Dunn Auto Company, the respondent. The latter corporation occupied the premises covered by the lease for more than two years and then, in turn, assigned it to one Lunceford. Rent was paid until some months after this last assignment, but a default in payment then followed and the present action was the result. Judgment went for the defendant, and the plaintiff appeals.

The action was commenced against the respondent as if it were the original lessee. under the claim that it was but the Mason & Flickinger Auto Company under another name; the contention of appellant being that the formation of the respondent was merely a reorganization of the older corporation: the one being substituted in the place of the other and taking up the business formerly conducted by it. As a matter of fact, the respondent did take a transfer of the business and assets of the Mason & Flickinger Auto Company.

The sole point presented by appellant is whether certain findings of fact are supported by the evidence. These findings were. first, that it was not true that the officers, directors, and stockholders of the Mason & Flickinger Company formed the respondent; second, that it was not true that the older corporation transferred to the new, without consideration, the leasehold interest under the lease from appellant, together with all its other assets; third, that it was not true that the new corporation continued the business of the older one. Another finding is also assailed, but it becomes immaterial. in view of the state of the evidence upon which the others mentioned are based. Those findings are supported by the record. There is some evidence to sustain each of the following assertions: There were some stockholders of respondent at its organization who had not been stockholders of the The organization of the older company. respondent was planned before its prospective incorporators took up negotiations for the acquisition of the assets of the older company, although that purchase took place before the actual formation of the respondent. The prospective incorporators of the respondent acquired the agency for the sale of two particular makes of automobiles before the commencement of the

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negotiations for the acquisition of the assets of the Mason & Flickinger Company, and the agency became the property of the respondent upon its formation. The incorporators of the respondent put cash into the business conducted by the respondent. consideration was paid by the respondent for the leasehold interest and for the other assets of the Mason & Flickinger Company which were taken over by it.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

DALLAS et al. v. SWIGAR1 et al. (No. 2037.) (Supreme Court of New Mexico. April 3, 1918.)

(Syllabus by the Court.)

Public Lands ==51, 55-Enabling Act-

PUBLIC LANDS & 51, 55—ENABLING ACT—GRANT OF SCHOOL SECTIONS.
Sections 6 and 11 of the Enabling Act of New Mexico (Act Cong. June 20, 1910, c. 310, 36 Stat. 557) and Act Cong. August 18, 1894, c. 301, \$1, 28 Stat. 394 (U. S. Comp. St. 1916, \$4876), interpreted, and held to operate as a present grant to the state of school sections, subject only to identification by survey, whereupon title vested in the state as of the date of the Enabling Act. Under the terms of the Enabling Act, as soon as such lands are surveyed in the field, the state acquires such an interest therein as entitles it to take possession thereof therein as entitles it to take possession thereof or to lease the same to private persons.

Appeal from District Court, Chaves County; McClure, Judge.

Contest before Commissioner of Public Lands by Harry Dallas and others, constituting the partnership of Dallas Bros., against R. E. Swigart and another. From a final judgment of the district court affirming the decision of the Commissioner of Public Lands in favor of contestees, contestants appeal.

R. C. Reid, of Roswell, for appellants. H. M. Dow, both of Roswell, for appellees. A. B. Renehan, of Santa Fé. for State Land Com'r.

PARKER, J. This proceeding originated in the form of a contest before the commissioner of public lands, wherein the validity of leases held by appellees covering certain school sections was attacked, and an appeal was taken from the decision of the commissioner to the district court of Chaves county, and this appeal is now taken from the final judgment of that court. The proceedings are under the authority of section 5247 et seq., Code 1915. The district court rendered judgment in favor of the validity of the leases by the commissioner of public lands to the appellees and against the contentions of the contestants, appellants here. It appears that a survey had been made in the field of the lands involved in the controversy, and that thereafter the appellees applied to the commissioner of public lands North Dakota, South Dakota and Wyoming to

and obtained leases upon certain school sections. At that time the surveys had not been approved by the general land office. surveys were thereafter approved, and thereafter the appellants applied to the commissioner of public lands for a lease upon the same lands and were refused: the leases of appellees then having run only a portion of the term for which they were given. From this decision, which was affirmed by the district court, this appeal was taken as heretofore pointed out.

1. Counsel for appellants contend that no title to school sections passes to the stare from the United States until after the land is surveyed, and that it is not surveyed land, within the meaning of the Enabling Act, until the survey is approved by the person charged with the duty of making the survey, and that the state cannot sell or lease such lands until it takes title. pellees contend that the Enabling Act (36 Stat. 557) effected a grant in præsenti to the state of sections 2, 16, 32, and 36 in each township in the state, and that title to said lands thereupon passed to the state as of the date of the Enabling Act, subject only to the subsequent identification thereof by the public surveys. The pertinent provisions of the Enabling Act are as follows:

"Sec. 6. That in addition to sections sixteen and thirty-six, heretofore granted to the territory of New Mexico, sections two and thirty-two in every township in said proposed state not otherwise appropriated at the date of the pressure of this act are hereby granted to the passage of this act are hereby granted to the said state for the support of common schools; and where sections, two, sixteen, thirty-two, and thirty-six, or any parts thereof, are mineral, or have been sold, reserved, or otherwise appropriated or reserved by or under the authority of any set of Congress or are wenting or fraction. any act of Congress, or are wanting or fractional in quantity, or where settlement thereon with a view to pre-emption or homestead, or improve-ment thereof with a view to desert-land entry has been made heretofore or hereafter, and be-fore the survey thereof in the field, the provifore the survey thereof in the field, the provisions of sections twenty-two hundred and seventy-enty-five and twenty-two hundred and seventy-six of the revised statutes are hereby made applicable thereto and to the selection of lands in lieu thereof to the same extent as if sections two and thirty-two, as well as sections sixteen and thirty-six were mentioned therein."

"Sec. 11. \* \* \*: and after its admission into the union said state may procure public lands of the United States within its boundaries to be surveyed with a view to satisfying any public-land grants made to said state in the same manner prescribed for the procurement of

same manner prescribed for the procurement of such surveys by Washington, Idaho, and other states by the act of Congress approved August eighteenth, eighteen hundred and ninety-four eighteenth, eighteen nundred and ninety-four (twenty-eighth statutes at large, page 394), and the provisions of said act, in so far as they relate to such surveys and the preference right of selection, are hereby extended to the said state of New Mexico."

The provisions of the act of Congress approved August 18, 1894, referred to in section 11, are as follows:

apply to the Commissioner of the General Land Office for the survey of any township or townships of public land then remaining unsurveyed in any of the several surveying districts, with a view to satisfy the public land grants made by vada, and Nebraska acts the words were the several acts admitting the said states into the Union to the extent of the full quantity of land called for thereby; and upon the applica-tion of said Governors the Commissioner of the General Land Office shall proceed to immediately notify the Surveyor General of the application made by the Governor of any of the said states of the application made for the withsaid states of the application made for the windrawal of said lands, and the Surveyor General shall proceed to have the survey or surveys so applied for made, as in the cases of surveys of public lands; and the lands that may be found to fall within the limits of such township or townships, as ascertained by the survey, shall be reserved upon the filing of the application for survey from any adverse appropriation by setbe reserved upon the filing of the application for survey from any adverse appropriation by settlement or otherwise except under rights that may be found to exist of prior inception, for a period to extend from such application for survey until the expiration of sixty days from the date of the filing of the township plat of survey in the proper district land office, during which period of sixty days the state may select any of such lands not embraced in any valid adverse claim, for the satisfaction of such grants, with the condition, however that the Governor of the state, within thirty days from the date of such filing of the application for survey shall cause a notice to be published, which publication shall be continued for thirty days from the first publication in some newsdays from the first publication in some news-paper of general circulation in the vicinity of the lands likely to be embraced in such township the lands likely to be embraced in such township or townships, giving notice to all parties interested of the fact of such application for survey and the exclusive right of selection by the state for the aforesaid period of sixty days as herein provided for; and after the expiration of such period of sixty days any lands which may remain unselected by the state, and not otherwise appropriated according to law, shall be subject to disposal under general laws as other public lands." U. S. Comp. St. 1916, § 4876.

A fine discussion of the nature of the grant of school lands to states is to be found in State v. Whitney, 66 Wash. 473, 120 Pac. 116. The language of the Enabling Act of Washington and of several other states authorized to form state governments at the same time, differs somewhat from the Enabling Act. That act is to be found in 25 Stat. 676. The only difference between that act and our Enabling Act consists in the following provision:

"Ruch land shall not be subject to pre-emption, homestead entry or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for school purposes only." Section 11.

Our Enabling Act does not contain this reservation, but provides that the reservation from entry under the general land laws shall come into operation only when the lands are surveyed in the field, whereupon they are withdrawn from entry. This divergence is of no importance under the facts in this case, because before any of the rights of the parties had been initiated these lands had been surveyed in the field. The court traces the history of the acts of Congress granting lands to states beginning with that of Indiana in 1816, and points out the differences in the language used. It is said nature of the grant to the Union Pacific Rail-

"shall be and are hereby granted." words in our Enabling Act are "are hereby granted." The Washington court held that the grant to that state was a grant in præsenti, and passed title to the state for the school sections, subject only to identification by survey, whereupon the title, by relation, passed as of the date of the act. The court cites and approves the reasoning of Balderston v. Brady, 17 Idaho, 567, 107 Pac. 493, which construed the Enabling Act of Idaho to the effect that the grant was a present one and passed title to the state as of the date of the act. In United States v. Southern Pac. R. Co., 146 U. S. 570, 13 Sup. Ct. 152, 36 L. Ed. 1091, a contest arose between the government and the Southern Pacific Railroad Company as to whether certain lands were included within its land grant. There had been in 1886 a grant of land to the Atlantic & Pacific Railroad Company, and the language used in the grant is "that there be, and hereby is, granted." In 1871 a grant in the same terms was made to the Southern Pacific Railroad Company. The lands in question were within the grant or place limits of both the Atlantic & Pacific Railroad Company and the Southern Pacific Railroad Company at the place where these lines crossed. The grant to the Atlantic & Pacific Company was afterwards forfeited, but at the time the grant was made to the Southern Pacific Company it was in full force. The question was whether the Southern Pacific Company took title under its grant as against the Atlantic & Pacific Company, or whether title had passed from the government to the Atlantic & Pacific Company, so that the Southern Pacific grant did not attach to the same. The court held in an opinion by Mr. Justice Brewer that title to the lands at the date of the grant to the Southern Pacific Company was in the Atlantic & Pacific Company, and that therefore the Southern Pacific Company took nothing under its grant. The court cites and quotes from St. Paul & Pacific R. Co. v. Northern Pacific R. Co., 139 U. S. 1, 11 Sup. Ct. 389, 35 L. Ed. 77, to the effect that such words as were employed in these two granting acts import a transfer of present title, and not a promise to transfer one in the future. The court also cites and quotes from Missouri, K. & T. R. Co. v. Kansas Pacific R. Co., 97 U. S. 491, 24 L. Ed. 1095, to the effect that it is always to be borne in mind in construing a congressional grant that the act by which it is made is a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of Congress, and that the rules of the common law must yield to the legislative will. In Deseret Salt Co. v. Tarpey, 142 U. S. 241, 12 Sup. Ct. 158, 135 L. Ed. 999, the

road Company was discussed. The court said:

"Those terms import the transfer of a present title, not one to be made in the future. They are that 'there be, and is hereby, granted' to the company every alternate section of the lands. No partial or limited interest is designated, but the lands themselves are granted, as they are described by the sections mentioned. Whatever interest the United States possessed in the lands was covered by those terms, unless they were qualified by subsequent provisions, a position to be presently considered.

in the lands was covered by those terms, unless they were qualified by subsequent provisions, a position to be presently considered.

"In a great number of cases grants containing similar terms have been before this court for consideration. They have always received the same construction, that, unless the terms are restricted by other clauses, they import a grant in præsenti, carrying at once the interest of the grantor in the lands described."

In Leavenworth L. & G. Co. v. United States, 92 U. S. 733, 23 L. Ed. 634, the court said.

"There be, and is hereby, granted are words of absolute donation and import a grant in præsenti. This court has held that they can have no other meaning; and the Land Department, on this interpretation of them, has uniformly administered every previous similar grant.

\* \* They vest a present title in the state of Kansas, though a survey of the lands and a location of the road are necessary to give precision to it, and attach it to any particular tract. The grant then becomes certain, and by relation has the same effect upon the selected parcels as if it had specifically described them."

Many other cases in the Supreme Court of the United States are to the same effect, and this may be said to be the uniform holding of that court.

A very late case in the Supreme Court of the United States discusses the nature of grants of this kind. Wisconsin v. Lane, 245 U. S. 427, 38 Sup. Ct. 135, 62 L. Ed. —. In that case the state of Wisconsin claimed title under a school land grant, and sought to enjoin the Secretary of the Interior, and through him the Indian occupants from cutting timber or committing waste thereon. The grant to Wisconsin contained the provision:

"That section 16, in every township of the public lands in said state, and where such section has been sold or otherwise disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to said state for the use of schools."

The court in discussing the nature of the grant to Wisconsin said:

grant to Wisconsin said:

"It is evident from a consideration of the terms of Enabling Act, § 7, that Congress did not make an unconditional grant in præsenti to the state of the school sections; the terms of the grant are that the section 'shall be' granted. Moreover, the grant contemplated that Congress might make other disposition of the land. The state of Wisconsin's right to the land in controversy was to be subordinate to such disposition, in which event the state should seek indemnity in other lands for the loss of school sections."

The court follows United States v. Morrison, 240 U. S. 192, 36 Sup. Ct. 326, 60 L. Ed. 599, which deals with a similar grant of lands for school purposes to the state of Oregon, and in which it is said:

"The designation of these sections was a convenient method of devoting a fixed proportion of public lands to school uses, but Congress, in making its compacts with the states, did not undertake to warrant that the designated sections would exist in every township, or that, if existing, the state should at all events take title to the particular lands found to be therein. Congress did undertake, however, that these sections should be granted unless they had been sold or otherwise disposed of; that is, that on the survey, defining the sections, the title to the lands should pass to the state, provided sale or other disposition had not previously been made, and, if it had been made, that the state should be entitled to select equivalent land for the described purpose."

The Oregon act contained the words "shall be granted" the same as the Wisconsin act.

In view of these principles, an examination of the Enabling Act convinces us that it was the intention of Congress in enacting the same to make a present grant of the school sections mentioned in the act. Provision is made for the speedy survey of all lands in the state upon the application of the state to satisfy the various land grants contained in the act. The provision is made that as soon as the lands are surveyed in the field they shall be withdrawn from entry under the public land law, and the further provisions of Act Aug. 18, 1894, 28 Stat. 394, above set out, provide for such survey. The conclusion is inevitable that the Enabling Act. construed as a statute, as it must be in this regard, evinces an intention on the part of Congress to pass an immediate title to the state to the school sections, subject only to identification by survey.

It follows that when the school sections in question were surveyed in the field all obstacles to the rights of the state in and to the same were removed, and no third persons could acquire any interest in the same. The only question was between the state and the government of the United States, and the only question in that regard was whether or not they were mineral or nonmineral in character. Counsel for appellants rely upon Middleton v. Low, 30 Cal. 596, 604, and United States v. Montana L. & M. Co., 196 U. S. 573, 25 Sup. Ct. 367, 49 L. Ed. 604. The reasoning of the California court does not commend itself to this court. So far as we are advised, it stands alone in holding that such a grant as the one in question does not pass a present title. In the case of United States v. Montana, etc., Co., supra, the question was whether the United States might recover from a vendee of the Northern Pacific Railway Company for timber cut upon lands within the grant limits to that railroad and prior to a survey of the lands. The court held that, in view of the fact that the railroad must pay the cost of surveying, and no conveyance should be made of the land until such cost should be paid, the title did not pass under that grant until such lands had been surveyed.

Even assuming that the full and complete legal title to school sections did not pass

to the state until approval of the surveys made in the field, it nevertheless remains clear from the provisions of the Enabling Act that it was the intention of Congress to pass to the state a present right as against every one else to those school sections as soon as it should apply for a survey thereof and as soon as the same were surveyed in the field. This being so, the state, even if it did not have at the time a complete legal title in the sense that the subject-matter of the grant was fully identified, had such an interest in the school sections as entitled it to possession of the same, and to protect them against trespass or to put private citizens in possession of the same under a lease for such purposes as the lands were suitable to subserve.

The judgment of the lower court will therefore be affirmed; and it is so ordered.

HANNA, C. J., and ROBERTS, J., concur.

STATE v. HITE. (No. 2093.) (Supreme Court of New Mexico. April 3, 1918.)

(Syllabus by the Court.)

1. IMPEACHMENT OF OWN WITNESS-STATUTE. Under the provisions of section 2180, Code 1915, the state, when a witness proves adverse in the opinion of the trial court, may prove that the witness made at other times a statement inconsistent with his present actions. consistent with his present testimony, provid-ing the circumstances of the supposed statement sufficient to designate the particular occasion are mentioned to the witness, and he is asked whether or not he did in fact make such statement.

2. WITNESSES \$\infty\$380(5), 382 — STATE'S IM-PEACHMENT OF OWN WITNESS—CONTRADIC-TORY STATEMENTS—STATUTE.

The mere fact that a witness has failed to

testify as expected does not warrant impeaching him by proof of prior statements in conformity nim by proof of prior statements in conformity to what he was expected to testify; but proof of prior contradictory statements of a party's own witness is admissible only where the wit-ness has given affirmative testimony hostile or prejudicial to the party by whom he was called; and in such case the proof must be confined to contradictions of the testimony of the witness which is injurious to the party seeking to im-peach him. peach him.

Appeal from District Court, Chaves County; McClure, Judge.

T. Lonnie Hite was convicted of killing a calf belonging to another, and he appeals. Reversed, and cause remanded for new trial.

The appellant, T. Lonnie Hite, with two others, was tried at the November term, 1916, of the district court of Chaves county on an information charging them with killing a calf belonging to the C. C. Slaughter Cattle Company on July 4, 1916. The appellant was found guilty, and his codefendants were acquitted.

O. O. Askren and J. C. Gilbert, both of Roswell, for appellant. H. L. Patton, Atty. Gen., for the State.

HANNA, C. J. [1] There is but one assignment of error which we find it necessary to consider, which is that the court committed error in permitting the state to impeach its own witness Don Sullivan. Appellant in this connection assigns two grounds in support of his contention: First, that the witness had not given affirmative testimony injurious to the state; and, second, that the district attorney was not surprised by the unwillingness of the witness, having had previous notice that the witness would prove adverse. It appears from the record that the witness Sullivan had on two occasions made statements concerning the alleged crime, and had subsequently thereto gone before the grand jury as a witness, but when introduced by the state as a witness, he developed a disposition to deny all knowledge of the material facts concerning the alleged crime and to most of the questions addressed to him contented himself with the reply, "I don't remember." A careful examination of the record does not disclose that he anywhere gave testimony favorable to the appellant or his codefendants. How far a party in civil litigation, or the state in criminal prosecutions. may go in attacking his or its own witness by proving prior statements of the witness to show contradiction of present testimony, is a matter which has given rise to a great variety of opinion on the part of the courts. The various forms of the different rules adopted by the courts are set out by Mr. Wigmore in his work on Evidence at section 904, and by Greenleaf in section 444.

In approaching a consideration of this matter it is first to be observed that the Legislature of New Mexico by an act of February 5, 1880, appearing as section 2180, Code 1915, legislated upon this subject in the following language:

"The credit of a witness may be impeached by general evidence of bad moral character not restricted to his reputation for truth and veracirestricted to his reputation for truth and veracity; but a party producing a witness shall not be allowed to impeach his credit by general evidence of bad moral character, but in case the witness, in the opinion of the judge, proves adverse, such party may prove that the witness made at other times a statement inconsistent with his present testimony; but before such last-mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mendesignate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he did make such statement.

It is only necessary to observe perhaps that our statute evidently seeks to broaden the common-law rule under which a party could not impeach his witness unless surprised thereby, or misled by the witness. It is apparent that our statute does not require that the element of surprise should be present; the matter being squarely put upon the proposition of whether or not the witness in the opinion of the judge should prove adverse, in which event, statements inconsistent with his present testimony may be proven to have been made. Our statute is evidently in line with the great weight of modern authority, under which a party or the state, when a witness proves adverse in the opinion of the trial court, may be permitted to prove that such witness had made prior statements contradictory to his testimony.

[2] Of course, due observation of the other provisions of the statute must be had, viz.: That before proof can be given the circumstances of the supposed statement sufficient to designate the occasion must be called to the attention of the witness, who must be given an opportunity to state whether or not he in fact made the alleged contradictory statement. This general rule, however, like so many principles of law, is subject to qualification. One of the principal qualifications of the rule is thus laid down in 40 Cyc. 2696, in the following language:

"The mere fact that a witness has failed to testify as expected does not warrant impeaching him by proof of prior statement in conformity to what he was expected to testify; but proof of prior contradictory statements of a party's own witness is admissible only where the witness has given affirmative testimony hostile or prejudicial to the party by whom he was called, and in such case the proof must be confined to contradictions of the testimony of the witness which is injurious to the party seeking to impeach him."

This statement of the text finds support in numerous authorities and meets with our final accord and approval. Measured by the general rule announced and as qualified by the statement of the text in Cyc., we find upon examination of the record that the witness Don Sullivan did not in any manner give testimony hostile or prejudicial to the state. He seems to have suffered from a strange lapse of memory, and for some unaccountable reason had apparently changed his attitude as a willing witness for the state. Had he given any testimony favorable to the appellant or his codefendants, without doubt his prior contradictory statements, if any, could have been shown, if material.

While we are inclined to believe that the trial court's ruling upon whether or not the witness had proven adverse under the provisions of section 2180, Code 1915, should not be disturbed, unless a clear abuse of discretion appears, and that it is fair to presume that the court might have regarded the attitude of the witness on the stand as well as his testimony, in passing upon the question of his adverse character, yet in the present case it is our opinion that the court did fall into error in the matter, and that the judgment of the lower court must be reversed and the cause remanded for a new trial; and it is so ordered.

PARKER and ROBERTS, JJ., concur.

HARVEY et al. v. BEARD. (No. 8911.) (Supreme Court of Colorado. Jan. 7, 1917. Rehearing Denied May 6, 1918.)

1. APPEAL AND ERBOR &==1015(5)—REVIEW—RULING ON MOTION FOR NEW TRIAL—ATTEMPT TO BRIBE JUROR.

Where the trial court investigated a report that an effort was made to bribe a juror and took evidence in connection therewith and on motion for new trial found that the attempted bribery did not affect the verdict, such finding will not be disturbed on appeal when supported by abundant evidence.

2. NEW TRIAL \$\infty\$=51 — ATTEMPT TO BRIBE JUROR IN BEHALF OF UNSUCCESSFUL PARTY. Defendants will not be granted a new trial on the ground that an attempt was made by a bystander to bribe a juror to hang the jury in behalf of defendants.

Error to District Court, City and County of Denver; A. Watson McHendrie, Judge.

Action by Charles L. Beard against Robert E. Harvey and another. Judgment for plaintiff, and defendants bring error. Affirmed.

John A. Deweese and Isham R. Howze, both of Denver, for plaintiffs in error. James J. McFeely and M. B. Waldron, both of Denver, for defendant in error.

TELLER, J. Defendant in error recovered a judgment against plaintiffs in error in an action for malicious prosecution.

Errors are assigned on the giving and on the refusing of instructions, but it appears from the statement of the trial court, in overruling a motion for a new trial, that these errors were not argued on the hearing of said motion. The error argued then, and the only one seriously urged and discussed in the brief, is the denial of a new trial, a right to which was claimed on the ground that an attempt had been made to bribe a juror.

[1] It appears that the foreman of the jury reported to the court that one of the jurors had disclosed the fact that he had been approached and offered a bribe to hang the jury. This report was made a short time before the jury agreed upon a verdict for the plaintiff. The court ordered an investigation to be made, heard the testimony of said juror, of counsel on both sides, and of several other persons. The juror testified that a man came to his house in the evening and said to him, "There is fifty in it if you can hang the jury, for we don't want that kid to have anything." The man told the juror his name, and it appeared by the testimony of others that he had been in court on that day, and had been seen and heard in conversation with counsel for the defendants in that action. A citation was issued for the man, but he was not found, and never appeared during the investigation. The foreman of the jury stated in the presence of the other jurors that they were agreed that the incident had not influenced them to any extent

whatever. The court found that the verdict [ a condition precedent to the vesting of the leasehad not been affected by the attempted bribery, that it had been made in the interest of the defendants-the unsuccessful party-and that it was not ground for a new trial. This court is committed to the doctrine that upon a question of misconduct by jurors, or of other persons with relation to jurors, the findings of the trial court are entitled to the same consideration as on other questions; and, unless it is manifest that the court came to a wrong conclusion, the findings will not be disturbed. Liutz v. Denver Tramway Co., 54 Colo. 371, 131 Pac. 258; Florence Co. v. Kerr, 59 Colo, 539, 151 Pac. 439. There is an abundance of evidence to support the court's findings

[2] The denial of the motion for a new trial on the ground above stated was right in another view of the matter. The attempt to corrupt the jury was clearly made on behalf of the defendants, the plaintiffs in error here, and, that being so, the authorities cited in support of a reversal do not apply. The true rule is laid down in Consumers' Coal Co. v. Hutchinson, 36 N. J. Law, 24-29, where it is said:

"Where both parties are innocent, a tainted verdict will, in general, be set aside without hesitation, on the application of either party; hesitation, on the application of either party; but the same principles of public policy, which require us to set aside the verdict in such a case, imperatively forbids our doing it on the application of one who has attempted, directly or indirectly, to influence the jury by improper means, or who has encouraged or prompted or knowingly permitted such an attempt, or even rests under any just suspicion of having done so." done so.

As the trial court pointed out, it would be a dangerous precedent to establish that a litigant, apprehensive of losing his case, might attempt to bribe a juror, and make that a ground for a new trial, if he were defeated in the action.

The judgment is affirmed. Judgment affirmed.

HILL, C. J., and WHITE, J., concur.

TRIMBLE v. COLLINS. (No. 8956.) (Supreme Court of Colorado. Feb. 4. 1918. Rehearing Denied May 6, 1918.)

CONTRACTS \$\infty 353(6)—INSTRUCTIONS—SUBMITTING QUESTION OF LAW TO JURY.

An instruction which submits to the jury the construction of a written contract is erroneous.

2. Trial \$\infty 242 - Instructions Tending to CONFUSE JURY.

An instruction which determines a question of law which has been erroneously left to the jury by a previous instruction tends to confuse the jury, and is improper.

3. LANDLORD AND TENANT \$== 158-LEASE-CONDITION PRECEDENT.

Where a lease provided that lessor was to make certain improvements and repairs, but did not specify time in which such work was to be done, the completion of such work was not

hold estate.

4. LANDIORD AND TENANT \$\infty 158 - ConSTRUCTION OF LEASE - IMPROVEMENTS AND REPAIRS.

Where lessor agreed to make certain improvements and repairs, but lease did not specify when they were to be made, he has a reasonable time in which to do the work.

5. LANDLORD AND TENANT \$==233(2)—ACTION ON LEASE—QUESTION FOR JURY.
In an action for rent under a lease provid-

ing for repairs, but not indicating the time for making them, whether such repairs were made within a reasonable time is a question for the

Department 1. Error to District Court, Larimer County; Neil F. Graham, Judge.

Action by Robert E. Trimble against William A. Collins. Judgment for defendant, and plaintiff brings error. Reversed.

Fred W. Stow, Russell W. Fleming, Herman W. Seaman, and Fred W. Stover, all of Ft. Collins, for plaintiff in error. L. R. Rhodes, of Ft. Collins, for defendant in error.

TELLER, J. Plaintiff in error brought suit against the defendant in error for rent under a lease in writing; verdict and judgment for The plaintiff brings the case defendant. here for review. The principal ground urged for reversal is that the court erred in giving and in refusing certain instructions.

The lease was executed June 3, 1913, and the term was to begin on June 15th. The lease provided that the plaintiff was to make some changes and improvements in the building leased: but no time was specified for the doing of the work. It was not completed on the 15th, and the defendant declined to take possession and pay rent.

[1] It is urged that the court erred in submitting to the jury in instruction No. 2 a question as to the construction of the lease. The instruction reads:

"If you find that by the terms of the contract the twas made the duty of the plaintiff to complete the improvements and repairs on the said building prior to the 15th day of June, 1913, his failure to complete said improvements and repairs prior to said time will defeat his right to recovery in this case.

The giving of this instruction was error. It is the province of the court to construe a contract, and of the jury to determine whether or not the facts proved show a compliance with the contract.

[2, 3] By instruction 6 the court instructed the jury that, if there was no time fixed for making the improvements, then they should have been completed by June 15th. This determines a question which by instruction 2 was left to the jury, and is bad because likely to be confusing. Not only that, but it is not a correct construction of the lease. There are no words used from which it may fairly be inferred that the making of the improvements was a condition the nonperformance of which would defeat the leasehold estate.

To operate as a condition precedent the words | used must import that the vesting or the continuance of the estate depends upon a named contingency.

[4. 5] No time being stipulated for the completion of the repairs, the law presumes an intent that they should be made within a reasonable time. Walling v. Warren, 2 Colo. 434; 9 Cyc. 611. It was for the jury to determine whether or not the repairs were in fact made within a reasonable time.

Because of these errors in instructions the judgment is reversed.

Judgment reversed.

HILL, C. J., and WHITE, J., concur.

INDUSTRIAL COMMISSION OF COLO-RADO et al. v. JOHNSON. (No. 9275.)

(Supreme Court of Colorado. March 4, 1918. Rehearing Denied May 6, 1918.)

1. MASTER AND SERVANT \$==417(5)-WORK-

MEN'S COMPENSATION ACTS — REVIEW OF AWARDS—POWERS OF COURT. Under Workmen's Compensation Act (Laws 1915, p. 515) as to review of awards of workmen's compensation by action in the district court, the district court cannot make new findings of fact, but must accept those of the commission if supported by credible and substantial aridans. tial evidence.

2. MASTER AND SERVANT €=385(1)—WORK-MEN'S COMPENSATION ACTS—RIGHT TO COM-PENSATION

Under Workmen's Compensation Act, the amount of the award is to be based upon the proportion of disability to normal ability, regardless of previous partial impairment of normal ability.

3. MASTER AND SERVANT ⊕348—WORKMEN'S COMPENSATION ACTS—CONSTRUCTION.

The Workmen's Compensation Act is high-

ly remedial and must be liberally construed.

MASTER AND SERVANT \$\infty\$385(11\frac{14}{4}) - Workmen's Compensation Acts - Construction-"Blind." 4. MASTER

One who by accident lost all vision except enough to enable him to recognize a form with-out distinguishing its outlines is "blind" within Workmen's Compensation Act.

MASTER AND SERVANT = 417(9) — WORKMEN'S COMPENSATION ACTS — REVIEW OF
AWARDS—POWERS OF COURT.
Under Workmen's Compensation Act, it is
within the power of the district court, in action to modify award of the compensation commission, to determine as a matter of law that
the award was not in accord with the findings the award was not in accord with the findings, and, having done so, to make an award supported by the finding.

In Banc. Error to District Court, City and County of Denver; John I. Mullins, Judge. Proceedings by Oscar L. Johnson to obtain workman's compensation, opposed by the Spratlen-Anderson Mercantile Company, employer, and the Standard Accident Insurance Company, insurer. There was an award for applicant, which was modified on rehearing, and applicant brought suit in the district court to set aside the award as modified and to reinstate the original award.

To review judgment as prayed, the Industrial Commission, the employer, and the insurer bring error. Affirmed.

Leslie E. Hubbard, Atty. Gen., and John L. Schweigert, Asst. Atty. Gen., for plaintiff in error Industrial Commission. Geo. P. Winters and Fillius, Fillius & Winters, all of Denver, for other plaintiffs in error. Henry E. May, of Denver, for defendant in error.

TELLER, J. The defendant in error filed with the Industrial Commission a claim for compensation under chapter 179. Laws of 1915, for injury to one of his eyes while in the employ of plaintiff in error the Spratlen-Anderson Mercantile Company. On a hearing on the complaint, the commission found that Johnson had become totally blind in one eye by reason of said injury, and awarded him \$7 per week for 104 weeks. Later, a rehearing was granted; the commission found that Johnson still had useful vision, and reduced the period during which compensation was to be paid to 95/11 weeks. It found also that claimant, having received \$147, was owing the respondents the sum of \$80.80. Thereupon the claimant filed suit in the district court of the city and county of Denver to set aside and modify the award on the second hearing, and to reinstate and confirm the award made on the first hearing. The court determined that the claimant's disability amounted to total blindness, and made an award on that basis. The case is now here for review under said statute.

[1] It is contended by the plaintiffs in error that the court's judgment is based upon new findings of fact, which, by the statute, it has no power to make. The several errors assigned are all based upon the proposition that, if the findings of the commission are supported by credible and substantial evidence, they must be accepted by the court; and that the court rejected findings which were thus supported.

That the rule of law is as counsel claim is not to be doubted, but that the trial court violated it is not established.

[2] The commission found that:

The claimant, prior to the injury, "had suffered a reduced vision to that eye of 6/66 or 1/11 of normal vision; \* \* that such dimfered a reduced vision to that eye or  $^{\circ}/_{68}$  or  $^{1}/_{11}$  of normal vision; \* \* \* that such diminution of vision, due to the accident, is not more than  $^{1}/_{11}$  of a total loss of vision in said eye, and that claimant still has useful vision in said left eye since the accident; \* \* that he is entitled to such proportionate amount of compensation at \$7 for 104 weeks, as the diminution of vision that he actually suffered, in this eye by reason of the accident, bears to total eye by reason of the accident, bears to total blindness, which "ecommission finds, as aforesaid, to be 1/11.

The award on that basis, for 95/11 weeks, is then made, as above stated. Counsel for plaintiffs in error treat this finding as being that Johnson lost 1/11 of what vision he had when injured, which would be 1/121 of normal vision. That, however, is not supported by anything in the record. Nowhere in the evidence is  $^{1}/_{11}$  of anything mentioned except as a fraction of normal vision, and Dr. Strickler, testifying for the plaintiffs in error, stated that he could not say what proportion of the vision, which claimant had at the time of the accident, had been lost because of the injury; but that it was more than 50 per cent. He had already testified that, because of trachoma, claimant had lost  $^{10}/_{11}$  of normal vision before the accident,

It clearly appears from the record that the commission was of the opinion that the amount of compensation is to be determined by ascertaining how much an injury contributes to a disability. That is, it is assumed that, if a claimant was partially disabled prior to the injury which forms the basis of his claim, and because of the injury he be found totally disabled, he is not to receive the compensation fixed for disability, because it was not all due to the injury. To illustrate: If claimant before the injury had only one-half of normal vision, and lost one-half of that, he would be entitled to onequarter of the compensation allowed for total It is hardly necessary to say blindness. that such is not a correct construction of the law. Hills v. Oval Dish Co., 191 Mich. 411, 158 N. W. 214; Duprey v. Maryland Casualty Co., 219 Mass. 189, 106 N. E. 686; and Hartz v. Hartford Faience Co., 90 Conn. 539, 97 Atl. 1020. That being the understanding of the commission, when the claimant is given 1/11 of the compensation for total disability, it is clear that the commission based its award on the loss of 1/11 of normal vision.

The evidence showed that at the time of the hearing Johnson was unable to count the fingers on one's hand at any point before the left eye, while before the injury he could distinguish them at a distance of about ten feet, and could read. After the injury, he could distinguish an object between himself and the light, but could not determine what it was. He had what the medical witness called "dodging vision"; that is, he might be able to get out of the way of an approaching object, though he could not tell what it was. On these findings the commission determined that the claimant still had "useful vision," and was not entitled to the compensation allowed for total blindness of one eye. It does not appear how he could have any vision left, if, having only  $\frac{1}{11}$  of vision, he lost  $\frac{1}{11}$ . Whether or not a condition found to exist amounts to total blindness, as used in this statute, is a question of law, in deciding which the spirit and purpose of the law must be considered.

[3, 4] The act is highly remedial, beneficent in purpose, and to be liberally construed. To say that a man who has only such vision as enables him to recognize a Manzoli v. People, 169 Pac. 144.

form before him, without being able to distinguish its outlines, is not blind within the meaning of this law, is to apply to it a strict rule of construction and defeat its evident purpose.

[5] The district court held that the award of the commission on the last hearing was "unlawful and unreasonable"; that the commission "acted without and in excess of its powers; and that the findings of fact \* \* \* do not support the award."

It was clearly within the powers of the court to determine, as a matter of law, that the award was not in accord with the findings, and, having done so, and made an award which is supported by the findings, there is no reason for disturbing the judgment. It is, accordingly, affirmed.

Judgment affirmed.

SCOTT, J., not participating.

DOURTE v. SHIREY. (No. 8999.)

(Supreme Court of Colorado. April 1, 1918. Rehearing Denied May 6, 1918.)

Assignments of error in giving instructions, in that the evidence did not support the judgment, and in overruling motion for new trial, will not be reviewed, where the record fails to show the reservation of any exceptions.

Error to Denver County Court; Herbert M. Baker, Judge.

Action by C. R. Shirey against George J. Dourte. Judgment for plaintiff, and defendant brings error. Affirmed.

William A. Cook and J. J. Laton, both of Denver, for plaintiff in error.

GARRIGUES, J. This was an action by Shirey as plaintiff, to recover judgment against defendant, Dourte, on a promissory note. Error is assigned upon the giving of certain instructions by the court; also on the point that the judgment is contrary to, and not supported by, the evidence, and that the court erred in overruling the motion for a new trial.

We have carefully examined what is denominated the "Abstract of Record and Synopsis of the Evidence," which, the trial judge certifies, "contains sufficient of the evidence, rulings, orders, instructions, objections, and exceptions at the trial, necessary or essential to the proper consideration of the errors assigned," and we find that it fails to show that a single exception was reserved to the giving of instructions, to the action of the court in overruling the motion for a new trial, or to the judgment. In these circumstances, we are precluded from reviewing the case on the evidence. McPhail v. City & County of Denver, 163 Pac. 861; Manzoli v. People, 169 Pac. 144.

The judgment of the lower court is affirmed.

Judgment affirmed.

HILL, C. J., and SCOTT, J., concur.

DRACH v. LECKENBY et al. (No. 9100.)
(Supreme Court of Colorado. April 1, 1918.
Rehearing Denied May 6, 1918.)

1. Officers ← 101—Compensation—De Facto Officer.

A de facto officer, having performed the duties of the office, could not, after a decree that another was the de jure officer, recover from the state the compensation for the period of his performance of the duties, although he might have recovered it prior to such decree, since he would then have been liable to the de jure officer therefor.

2. Appeal and Ereor \$=877(2)—Harmless Ereor—Immaterial Matters.

In mandamus by de facto officer to compel payment of salary to him, after another was declared the de jure officer, decree awarding compensation to the latter would not be disturbed.

Hill, C. J., and Teller and Scott, JJ., dissenting.

En banc. Error to District Court, City and County of Denver; Charles C. Butler, Judge.

Mandamus by E. E. Drach against Charles H. Leckenby, substituted as State Auditor for Harry E. Mulnix, and another. Decree for defendants and plaintiff brings error. Affirmed.

Barnett & Campbell, of Denver, for plaintiff in error. Goss & Kemp and Harold H. Healy, all of Boulder, for defendants in error.

BAILEY, J. The action was in mandamus by E. E. Drach to compel the State Auditor to issue warrants for salary earned while acting as State Bank Commissioner. In response to the alternative writ the Auditor filed an interpleader which set out that one McFerson claimed to be the de jure Bank Commissioner for the period in question and entitled to the salary, and prayed that he be brought in in order that the court might determine to whom the warrants should issue, and he was accordingly made a party.

In his answer to the alternative writ Mc-Ferson set up a final judgment in quo warranto which declared him to be the de jure Bank Commissioner, and to have been such officer from May 6th, 1915, to July 5th, 1916, the time for which petitioner demanded pay, and during which period Drach was held disentitled to the office. The court entered judgment against Drach, and the Auditor was directed to issue warrants for the salary during the period in question to Mc-Ferson. This decree is here for review on error. In the opinion the parties will be designated as in the trial court.

It will be necessary to consider only those ed case, which we have been able to find,

assignments which relate to the right of Drach as de facto Bank Commissioner to recover salary. The question is whether a de facto officer, who performs the duties of an office to which there is a judicially ascertained de jure claimant, can, after surrender of the position to such officer, recover salary.

It is urged that there is no property right in a public office; that it is not a franchise, and that the one who performs the duties is entitled to the pay. Cases holding that the salary of an officer may be increased or reduced at the will of the legislature, or that, in the absence of constitutional inhibition, it may lawfully abolish an office, or that the salary is deemed an equivalent for the services rendered, or that a person is not entitled to the salary unless he both hold and discharge the duties of the office, are cited in support of the claim of petitioner. These principles may be conceded to be correct, but they have not the remotest application to this case.

[1] Henderson v. Glynn, 2 Colo. App. 303. 30 Pac. 265, El Paso County v. Rohde, 41 Colo. 258, 95 Pac. 551, 16 L. R. A. (N. S.) 794, 124 Am. St. Rep. 134, and Thompson v. City of Denver, 61 Colo. 470, 158 Pac. 309, hold that payment to a de facto officer is a defense to the State in an action by the de jure officer to recover the salary. From this sound doctrine petitioner attempts to extract the premise that because he might have compelled payment of his salary while performing the duties of the office, he may after the de jure officer has been disclosed by court decree, still enforce his claim against the State. It is true, as urged by petitioner, that such payment to him while he occupied the office would have barred Mc-Ferson from recovery from the State, but he, however, ignores the proposition that McFerson, after having been declared the de jure officer, could have maintained an action against the de facto officer for the emoluments of the office even though the latter had discharged the duties attached to the place. Drach while serving might have compelled payment to him, not because the salary attaches to the person who performs the service, but because as matter of sound public policy, the business of the State must go forward in an orderly manner, and the question of the right to the office not having been determined the de facto officer, in the interest of the public, and because the question of title to the office cannot be determined in mandamus, is permitted to perform the service and get the salary. But when the de jure officer has been ascertained, the de facto incumbent must respond to him for such salary. That the de jure officer can compel such repayment is almost universally held. The only well consider-

For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

J. Law, 181, 43 Am. Rep. 353.

In Eubank v. Montgomery County, 127 Ky. 261, 105 S. W. 418, 128 Am. St. Rep. 340, reported in 16 Ann. Cas. 483, at page 484, it is said in discussing the rights of a de facto officer to salary:

"\* \* \* We are satisfied that in the case we are satisfied that in the case at bar Eubank was standing on his legal rights with notice that his right was disputed, and that he took the risk of his right being upheld. A man cannot be allowed to hold onto an office to which he is not entitled when he knows his right to the office is denied and then claim his right to the office is denied and then claim compensation for his services after it is held that he had no right to the office. By holding onto the office under such circumstances he takes the risk of his right being established.

\* \* \* We have held that he could not be punished for usurpation of office, and, if we should now adjudge him entitled to the emoluments of the office, he would be in the same status as if he had been adjudged the office. It is a sound rule of public policy that those who hold public offices without right are not entitled to the emolrule of public policy that those who hold public offices without right are not entitled to the emoluments of the office. Their acts are valid as to third persons for the protection of the public, but they are invalid as to themselves.

\* \* \* If their acts are invalid as to themselves, they cannot be adjudged compensation from the arbital for these days. from the public for these acts.'

In United States ex rel. Crawford v. Addison, 6 Wall. 291, 18 L. Ed. 919, the court passed upon the refusal to give an instruction to the effect that if the jury should find that the de facto incumbent of an office had received the salary thereof the de jure officer was entitled to recover from him that amount with interest, providing the jury also found the de jure officer was ready and willing to discharge the duties and was prevented only by the interference of the de facto incumbent. This instruction was declared to correctly state the law, and its refusal was adjudged reversible error.

In People v. Tieman, 30 Barb. (N. Y.) 193, it is said at page 195:

"The salary and fees are incident to the title and not to the usurpation and colorable possession of an office. An officer de facto may be prosolution of an office. An officer de facto may be protected in the performance of acts done in good faith in the discharge of the duties of an office under color of right, and third persons will not be permitted to question the validity of his acts by impeaching his title to the office. Public in-terests require that the acts of public officers Public inwho are such de facto, should be respected and held valid as to third persons who have an interest in them. terest in them, and as concerns the public, in order to prevent a failure of justice. (2 Kent's Com. 295.) It does not follow that a right can be asserted and enforced on behalf of one who be asserted and enforced on behalf of one who acts merely under color of office without legal authority, as if he were an officer de jure. When an individual claims by action the office, or the incidents to the office, he can only recover upon proof of title. Possession under color of right may well serve as a shield for deferred that the color of the co fense, but cannot, as against the public, be converted into a weapon of attack, to secure the fruits of the usurpation and the incidents of the

Speaking to the same question the Supreme Court of West Virginia in Bier v. Gorrell, 30 W. Va. 95, at page 97, 3 S. E. 30, at page 32 (8 Am. St. Rep. 17), said:

holding otherwise is Stuhr v. Curran, 44 N. intrusion of another person, may by action re-Law. 181, 43 Am. Rep. 353. by him, and that in such action the lawful perquisites which the plaintiff would have received if he had exercised the office are the proper measure of his recovery. \* \* It seems to be a principle of natural justice, as well as law, that where one person has injured another, or received the compensation which in equity and good conscience belongs to another, he may be good conscience belongs to another, he may be required by action to account to such other for the injury done him. In like manner will an intruder in office be required to account to the legal officer for injury done by the intrusion. The legal right to an office confers the right to receive and appropriate the fees and perquisites legally incident thereto. When such officer performs the duties of his office, he may demand and receive the compensation therefor allowed by law, and he is as fully entitled to such compensation as he would be in any other case entitled to pay for skill and labor done for another at his request. The legal fees and emoluments of an office are a part thereof, and belong to the rightful incumbent; and, where a person receives such fees and emoluments on the pretense of title to the office, the de jure officer may reof title to the office, the de jure officer may re-cover the profits from him by an action in ascover the profits from him by an action in assumpsit for money had and received to his use.

\* \* \* Where the office is one with a fixed salary attached to it, the officer will be entitled to recover the entire official salary, without any deduction for the services of the incumbent, or for what he may have earned himself while ousted."

> In discussing the right of a de facto officer to compel payment by the State of his claim for services while wrongfully in office, the court in Matthews v. Supervisors, 53 Miss. 715, 24 Am. Rep. 715, said:

> "The question at issue here is whether he can assert against the State, or against a county, which is the constituent part of a State, a demand for official fees, which he claims to have earned by a violation of her constitution. If he can do so, there is an end at once of all dis-tinctions between a de jure and a de facto offi-cer, since it is impossible to perceive how the cer, since it is impossible to perceive how the latter, while undisturbed by quo warranto, occupies a position at all inferior to the former. The acts of both are alike valid, both would be alike protected from the assaults of private persons, and each would have an equal claim upon the State for compensation. Such a construction of the law would be a direct encouragement to usurpation of office. The intruder or the incumbent wrongfully holding over would be tion of the law would be a direct encouragement to usurpation of office. The intruder or the incumbent wrongfully holding over, would be liable, indeed, to be ejected at the end of a long and costly litigation, but in the meantime he would have grown rich by the fees and salaries which he would have extorted from the State, whose laws he had violated in holding the position." the position.

> The principle that the emoluments of the office belong to the de jure officer is asserted and approved in Goughlin v. McElroy, 74 Conn. 397, 50 Atl. 1025, 92 Am. St. Rep. 224:

"The courts of this country that have had occasion to pass upon this last question have al-most unanimously answered it in the affirmaright to the office carries with it the right to the salary and emoluments thereof, that the salary follows the office, and that the de facto officer, though he performs the duties of the office, has no legal right to the emoluments thereof, are propositions so generally held by the courts as to make the citations of authorities in support of them almost superfluous. Nearly all, if not all, cases hereinbefore cited upon both page 32 (8 Am. St. Rep. 17), said:

"It seems to be well settled that a de jure officer, who has been kept out of his office by the the office received by him, is liable at common

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law to the officer de jure. So far as we are aware the only well-considered case taking a contrary view of the law is that of Stuhr v. Curran, 44 N. J. L. 181, 186, 43 Am. Rep. 353, and that was decided by a divided court standing seven to five. We think the able dissenting opinion of Chief Justice Beasley in that case shows conclusively that at common law, in a case like the present, the de jure officer is entitled to recover from the de facto officer. Another well-considered case directly in point in favor of this view is that of Kreitz v. Behrensmeyer, 149 Ill. 496 [36 N. E. 983, 24 L. R. A. 59]. \* \* \* That this law will at times operate harshly against the de facto officer, and that it will so operate in the case at bar, must be conceded; and the seeming injustice of it is forcibly stated in the majority opinion of the New Jersey court before cited; but the courts must enforce the law as it is and not the law as they think it ought to be. If the law requires to be changed that must be left to the legislature."

Speaking to the same question, Throop on Public Officers, at section 659, says:

"It is recognized in several of the cases hereinbefore cited, and directly in those contained in the note, which hold, that where an officer claims any right, by virtue of his office, he must show that he is an officer de jure, as well as officer de facto. \* \* Thus, as was said by a learned judge of the court of appeals of New York: 'Where a person sets up a title to property, by virtue of an office, and comes into court to recover it, he must show an unquestionable right. It is not enough that he is an officer de facto, that he merely acts in the office; but he must be an officer de jure, and have a right to act."

And at section 661:

"A person, who sues to recover from a municipality or other public body, the salary or other emoluments attached to an office which he claims to hold; or who sues a private person, to recover fees allowed by law for official services; must, if his right to the salary, fees or other emoluments, is put in issue, show, not only that he has acted as such officer, but also that he did so as an officer de jure."

And Mechem on Public Officers, section 331, states this:

"But while the acts of the de facto officer are thus valid as to third persons, he cannot himself acquire rights based upon his defective title. It is well settled, therefore, that he cannot maintain an action to recover the salary, fees or other emoluments attached to the office."

The rights and duties of de facto officers are discussed in 29 Cyc. 1393, as follows:

"As the rule regarding de facto officers has been adopted merely with the idea of protecting the public, the de facto officer is not permitted to benefit personally from what is technically a usurpation of the office. He thus has no claim to the emoluments of the office. As a necessary consequence the de facto officer is liable to the de jure officer for the emoluments of the office obtained during the time he has wrongfully occupied the office."

Henderson v. Glynn, supra, El Paso County v. Rohde, supra, and Thompson v. City of Denver, supra, are cited by petitioner in support of his claim. These cases are not in point. They hold only that payment by the State of the salary to a de facto officer is a defense in a suit by the de jure officer to recover the same salary from the State. Such payment by the State, and such defense, is permitted upon the principle of public emer-

gency and necessity as already pointed out in this opinion.

There are Colorado cases, however, directly supporting the doctrine that the emoluments of the office may be recovered from a de facto officer by the de jure claimant. Morris v. People, 8 Colo. App. 375, 46 Pac. 691; Church v. Mullins, 10 Colo. App. 318, 50 Pac. 1054. This principle is also affirmed in Arnold v. Hilts, 61 Colo. 8, 155 Pac. 316, which, although upon an entirely different state of facts from those here involved, is in principle authority for the views herein expressed.

That the salary is attached to the office. and is not the property of one who unlawfully holds the office and performs the duties thereof, is announced and approved in the following additional cases: Cobb v. Hammock, 52 Ark. 584, 102 S. W. 382; McCue v. Wapello County, 56 Iowa, 698, 10 N. W. 248, 41 Am. Rep. 134; Stott v. Chicago, 205 Ill. 281, 68 N. E. 736; Phelon v. Granville, 140 Mass. 386, 5 N. E. 269; Fylpaa v. Brown County, 6 S. D. 634, 62 N. W. 962; Dolliver v. Parks, 136 Mass. 499; State v. Schram, 82 Minn. 420, 85 N. W. 155: Luzerne County v. Trimmer, 95 Pa. 97; Com. v. Slifer, 25 Pa. 23, 64 Am. Dec. 680; Riddle v. Bedford County, 7 Serg. & R. 386; Vicksburg v. Groome (Miss.) 24 South. 306; Christian v. Gibbs, 53 Miss. 314; Ermston v. Cincinnati, 9 Ohio Sup. & C. P. Dec. 657; State v. Newark, 8 Ohio Sup. & C. P. Dec. 344; Dolan v. New York, 68 N. Y. 274, 23 Am. Rep. 168; In re Berger, 152 Mo. App. 663, 133 S. W. 96; Russell v. Lyon, 90 S. C. 5, 72 S. E. 496; Lawrence v. Wheeler, 90 Kan. 669, 136 Pac. 315; Mayfield v. Moore, 53 Ill. 428, 5 Am. Rep. 52; Kreitz v. Behrensmeyer, 149 Ill. 496, 36 N. E. 983, 24 L. R. A. 59; Douglas v. State, 31 Ind. 429; Sigur v. Crenshaw, 10 La. Ann. 297; Nichols v. McLean, 101 N. Y. 526, 5 N. E. 347, 54 Am. Rep. 730; Wenner v. Smith. 4 Utah, 238, 9 Pac. 293; Fulgham v. Lightfoot, 1 Call (Va.) 250: Booker v. Donohoe. 95 Va. 359, 28 S. E. 584; Rule v. Tait, 38 Kan. 765, 18 Pac. 160; Hogan v. County, 132 Tenn. 554, 179 S. W. 128; Sandoval v. Albright, 14 N. M. 345, 93 Pac. 717; State ex rel. Evans v. Gordon, 245 Mo. 12, 149 S. W. 638; Jones v. Dusman, 246 Pa. 513, 92 Atl. 707, Ann. Cas. 1916D, 472; Comstock v. Grand Rapids, 40 Mich. 397; Whitaker v. Topeka, 9 Kan. App. 213, 59 Pac. 668; Scott v. Crump, 106 Mich. 288, 64 N. W. 1, 58 Am. St. Rep. 478; Andrews v. Portland, 79 Me. 490, 10 Atl. 458, 10 Am. St. Rep. 280; Tanner v. Edwards, 31 Utah, 80, 86 Pac. 765, 120 Am. St. Rep. 919, 10 Ann. Cas. 1091; Kendall v. Raybould, 13 Utah, 226, 44 Pac. 1034; State v. Carr, 129 Ind. 44, 28 N. E. 88, 13 L. R. A. 177, 28 Am. St. Rep. 163; Meagher v. Storey County, 5 Nev. 244; O'Brien v. St. Paul, 72 Minn. 256, 75 N. W. 375; Stephens v. Campbell, 67 Ark. 484, 55 S. W. 856.

The leading case upon which petitioner re-

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lies is Stuhr v. Curran, supra, in which it | tained will stand the test of time, as the law was held that one who had received a certificate of election to a public office, and was subject to a statutory penalty, which distinguishes it from the present and other similar cases, if he failed to qualify and perform the duties thereof, might retain the salary of the office when he had performed the duties as against one who later was declared to be legally elected. This opinion, as pointed out in Coughlin v. McElroy, supra, was by a divided court, seven to five, with a strong and persuasive dissenting opinion by Chief Justice Beasley, in which four other Justices concurred. And it is to be further noted that in a recent case, Gaskill v. Atlantic City, 89 N. J. Law, 269, 98 Atl. 385, upon facts quite like those here involved, it was held by the same court that a de facto officer could not recover the emoluments of the office from the State.

It is conceded that petitioner occupied the office under a mistaken claim of right. But such mistake, even coupled with actual performance of the duties of the place, gives no right to the salary as against the de jure officer. The emoluments follow, and are inseparable from, the legal title. No motive, however worthy, can protect the de facto incumbent from the consequences of his intrusion, so far as payment for services be con-The fact that he labored under a mistake of law, and was free from bad intent, does not detract from the damage done to the rightful claimant. Drach took the risk of the validity of his title, and the loss should fall upon him rather than upon the one who holds the true title.

Upon practically unanimous authority it is settled that a de facto officer cannot recover compensation for services rendered, after the de jure claimant, as here, has been judicially ascertained and declared, and a plea by the Auditor in his return to the alternative writ that McFerson had been finally declared to be the de jure officer would have been a complete bar to recovery of salary by Drach from the State.

[2] The question of the right to the office having been determined against Drach, the matter of awarding the salary to McFerson by decree in mandamus becomes immaterial and will not be disturbed. Under a different state of facts this question might present legal difficulties of a serious nature.

The judgment of the trial court should be affirmed, and it is so ordered.

Judgment affirmed.

HILL, C. J., and TELLER and SCOTT, JJ.,

HILL, C. J. (dissenting). Regardless of the conclusion of the majority, which the opinion states is supported by the weight of authority. I am not convinced of its justness or that all the declarations therein con-

of this state. As I view it, Mr. McFerson has no place as a party in this action of mandamus. McAffee v. Russell, 29 Miss. 84. It is conceded that Mr. Drach, plaintiff in error, had possession of the office and performed the services during the period for which he sought the salary. It is also conceded that he was acting in good faith, and that, had this suit been instituted and tried during the period he was holding the office, the writ would have issued in his favor as a matter of course. Per former decisions of this court, as well as our Court of Appeals, the auditor has no right to question the de facto officer's right to the salary. son v. Denver. 61 Colo. 470, 158 Pac. 309; El Paso County v. Rohde, 41 Colo. 258, 95 Pac. 551, 16 L. R. A. (N. S.) 794, 124 Am. St. Rep. 134; Henderson v. Glynn, 2 Colo. App. 303, 30 Pac. 265. I do not think that the de jure officer, after having been so declared by this court, has the right to do so by intervening in a mandamus action between the de facto officer and the auditor. In making this declaration, I am not claiming that Mr. McFerson has no cause of action against Mr. Drach for damages on account of having been kept out of the office, or that be might not, in a proper proceeding, by showing that Mr. Drach was insolvent or attempting to place his property beyond the jurisdiction of the court or something that way, have the warrants withheld until the question of his damage was determined; but no such conditions are even hinted at here. However, as I view it, these questions of procedure are of but minor importance.

That portion of the opinion which I think is fundamentally wrong is the declaration. in substance, that under all such conditions the de jure officer is entitled to all of the emoluments of the office, even though its duties have been discharged by the de facto officer during the time the office was unlawfully held by him. This, as I take it, means all fees or salary, as the case may be. When I say "unlawful" I mean to distinguish it from wrongful so far as the moral viewpoint is concerned. There certainly have been many cases, and as certain will be many more, where an office is retained by the holder of a certificate of election pending the result of a contest and thereafter a review by this court thus held in the utmost good faith, yet where the ultimate outcome was against him, and in some cases where even then it was the incumbent's duty to thus continue. Take a case where the result hinges upon the right of certain electors to vote at that election in certain precincts, or counties, depending solely upon questions of fact: is it right to hold that the party holding the certificate must determine in advance of a judgment whether he was elected, or, at his peril, as a penalty for holding on to lose all compensation for the services rendered pending its determination, even though it can be

shown that the contestor during said period | action between Mr. Drach and the auditor earned a larger amount than the fees or salary of the office? To put it another way, suppose he holds onto the certificate of election, yet arranges with the contestor to take possession pending the decision with the understanding that the contest suit continue, and it is ultimately adjudged that the contestee was entitled to the office; should the contestor be thus penalized? If this illustration is not practical, suppose the contestor for a county office wins, and the contestee brings it to this court, but surrenders the office, and does not ask for a supersedeas, yet wins in the long run; is it just and right that the contestor be subject to this penalty for taking what is given to him by a judgment of a court of competent jurisdiction, although thereafter reversed? Likewise, as here, where able counsel and even members of this court disagree over the effect of an appointment by the Governor. If this rule announced by the majority is to remain as the law of this state, it means that, where any person runs, say, for a county office, receives the certificate of election, and thereafter a contest is filed against him and determined in his favor by the trial court, is brought to this court by writ of error and reversed, say, two years thereafter, and he is held not entitled to the office, that, although acting in the best of faith, he performs the duties during this entire period on the strength of the certificate of election and judgment of the trial court, nevertheless he is liable to the de jure officer for the entire amount of the salary or fees earned, and this regardless of the damage to the other person, and even though the de jure officer, during the entire time, was getting a salary elsewhere greater than he would have received had he held the office. To bring the facts within this case, the record discloses that Mr. Drach was regularly appointed on January 6, 1914, to fill a vacancy in the office of state bank commissioner, which appointment was approved by the Senate; that he qualified and continuously performed the duties until July 5, 1916. It is not claimed that he was not acting in the best of faith in assuming that the civil service law entitled him to the office, or that in any event he was entitled to hold under his appointment until the first Wednesday of April, 1916, as set forth in the quo warranto action. It is also conceded that he was acting under the advice of able counsel. In addition. this court, or at least some of its members, expressed a question concerning the correctness of this judgment, which is evidenced by granting him a supersedeas; yet, regardless of all this, the ruling is to the effect that the warrants are not to be issued to him, although he performed the services, but are to be issued to Mr. McFerson, whom, it is conceded, did not perform the services, without any credit being given to Mr. Drach

wherein Mr. Drach was given no opportunity to show anything in mitigation of Mr. McFerson's damages. Is it not proper to assume that one possessed of the ability of either of these gentlemen along banking lines has more than an average earning capacity? Our statute requires a bank examiner to give his time to the performance of the duties of the office, and who can say, when the question was not allowed to be litigated, what Mr. McFerson earned during this period, or that he may not have been earning a salary greater than what he would have received from the state had he devoted this time to the office? If such is the case, or in case he received any compensation for any part of his time during said period, in equity and good conscience ought not such fact to be taken into consideration in an adjustment of the matter between them?

Under my assumption that Mr. McFerson had an earning capacity during this period, and that he used it for at least a part of this time, or, if he did not, he ought to, is it fair, just, right, or equitable to allow Mr. Drach nothing for the services rendered, and thereby place Mr. McFerson in a better position financially than he would have been had he held the office? I do not think so, and cannot agree that this arbitrary declaration is supported by all the well-reasoned authorities. In Mayfield v. Moore, 53 Ill. 428, 5 Am. Rep. 52, the court followed the English rule in holding that the person entitled to the office has a property right in it, in the nature of a franchise, but when it came to a question of fees during the period it was held by the de facto officer, in good faith, it declined to follow the English doctrine by recognizing that the equities of the parties were entitled to be taken into consideration. In passing upon this phase of the case, at page 433 of 53 Ill., 5 Am. Rep. 52, the court said:

"Inasmuch, however, as appellee obtained the certificate of election, and a commission was issued to him, he was acting in apparent right, and, so far as this record discloses, he resorted to no fraudulent or improper means to produce that result; he does not occupy the position he would had he resorted to such a course. He should only be required to account for the fees and emoluments of the office received by him, after deducting reasonable expenses in earning them. This being an equitable action, it should be governed, in this respect, by the same rules that would obtain had this been a bill for an account, instead of an action for money had and received. He should have only a reasonable allowance for the necessary expense.

This principle is recognized in Auditors v. Benoit, 20 Mich. 176, 4 Am. Rep. 382. The same rule is laid down in Havird v. County Commissioners of Boise County, 2 Idaho (Hasb.) 687, 24 Pac. 542; Sandoval v. Albright, 14 N. M. 345, 93 Pac. 717; and Bier v. Gorrell, 30 W. Va. 95, 3 S. E. 30, 8 Am. St. Rep. 17. While these cases involved fees. and not salaries, in my opinion there is no for their performance, and in a mandamus | difference in principle between the two. In this respect, I agree with the Supreme Court of Washington in Samuels v. Harrington, 43 Wash. 603, at page 605, 86 Pac. 1071, at page 1072 (117 Am. St. Rep. 1075), wherein, in passing upon this question, the court says:

"On principle there can be no difference be-tween the fees of an office and the salary of an office with respect to the property rights of the officer de jure therein. If the right to an office omeer de jure therein. It the right to an omce carries with it a property right in the salary of the office, so does the right to the office carry with it a property right in the fees of the office, and the payment of the one to an officer de facto is no more a wrongful payment than is the payment of the other."

Inasmuch as my views are in the minority, I have not felt justified in giving to the damage phase of this question the time I otherwise would. As at present advised, I am of opinion that an office in Colorado is not a franchise or property right, but that the person duly elected or regularly appointed has a legal right to possession of such office, which includes the opportunity of earning and receiving its fees or salary, and that he has a cause of action against any one who prevents him from so doing, and that the measure of the damages, when applied to a case of this kind, should be the amount actually sustained, not exceeding the maximum amount of the salary, and that the proof should be the same as in any other case where a person has a contract of employment for a certain term and is ready and willing to perform, yet is unlawfully kept from doing so; this to include, as in other cases, the showing of seeking other employment, the success, if any, in so doing, the result and the deduction in damages, if any, as the result of such other employment. This would be fair and equitable, and would not tend to prohibit a timid person, or one who lacks finances, from honestly and in good faith asserting his right to an office given him by a certificate of election or by the judgment of a trial court, for fear of the heavy penalty to follow, per the rule announced by the majority, should the contest against him be ultimately sustained.

I appreciate that my views on this phase of the case are not in apparent harmony with People v. Miller, 24 Mich. 458, 9 Am. Rep. 131, and Comstock v. Grand Rapids, 40 Mich. 397; however, I cannot agree with the reasoning in the first of these cases upon which both are based. Of course, if this reasoning announced in 1872, which is to the effect that a public office is intended as a sinecure, that there are very few duties which cannot be performed by deputies to be paid by the county outside of the incumbent's salary, and that the salary is not dependent upon the work, and that the office does not require the personal services of the incumbent, and that he would not forfeit it or the salary by having the bulk or all of his duties performed by deputies and paid therefor by the county, are sound, and that an office is to be likened

elevated with the salary as a gift or donation by the people for the privilege of being allowed to elevate the incumbent to the office, then I might be compelled to concede that one would be entitled to all the salary, although earned by another; but such is not the case here. Per our statute, this office calls for the time and individual attention of the appointee; besides, according to former rulings of this court, there is nothing specially sacred about an office of this kind. It can be abolished, and the salary discontinued. In such case, as I view it, there is no reason for a rule which fixes the measure of damages any different concerning compensation for the performance of its duties than applies to any other case where one is unlawfully prevented from performing certain services which he has the right to perform and to receive the compensation therefor.

TELLER, J. (dissenting). I cannot agree with the majority opinion that the question presented on this record has, in principle, been determined in this state. It is, in my judgment, a case of first impression, and should be decided on sound principle. which statement I eliminate all precedents which are not founded on established legal principles, or which do not follow cases so founded.

A considerable part of the majority opinion is devoted to cases which hold that a de jure officer may recover from a de facto officer fees or salary which he has received, though that is not the question here presented.

This cause involves only the right to the salary of an office by one who has, in good faith, and under color of right, discharged for a time the duties of such office. It may be said, of course, that if a de facto officer cannot retain the salary paid him, it results that he had no right to it in the first instance. The cases on that point may, then, fairly be open for consideration in this case.

It is not to be questioned that the great majority of cases, in which the right of a de jure officer to the salary was in issue, support the majority opinion. My objection to following them is that they are based, either directly or indirectly, on English cases which do not apply in this country, or on an erroneous view of the ground on which the right is claimed.

In England public offices are incorporeal hereditaments, the subject of grant, and the holder has an estate in them to him and his heirs, for life, for a term of years, or at pleasure. 2 Blackstone's Com. 36. In other words, an office is property. From that fact it follows that one entitled to an office is entitled to the emoluments thereof. even though he does not have possession of it, as fully as the owner of land of which he has been wrongfully dispossessed is entitled unto a pedestal upon which a person is to be to the rents and profits of it. Many American

cases announce this doctrine, regardless of the facts which make it inapplicable here.

In this country a public office is an agency for public purposes, and cannot be sold or transmitted to heirs. It is not a matter of grant or of contract, and is in no sense property. The majority opinion concedes this, and then proceeds to cite and approve a line of cases based wholly on the English doctrine to the contrary. Take away the common-law ground of the rule which is announced in the majority opinion that "the emoluments follow, and are inseparable from the legal title," and there is nothing to support it.

The salary is no part of the office, as has been many times held, and the very word contradicts the assertion that it belongs to the holder of the title to an office, regardless of services. Salary is compensation for services rendered, and has no similarity to income and rents from property. It does not grow out of the office, but is attached to it upon a condition implied that the officer will perform the duties of his office. Constitution of this state (article 12, § 2) no person can hold a public office "without devoting his personal attention to the duties of the same." If an office cannot be held without a discharge of its duties, how can any right to the salary of it accrue to any one who has not discharged those duties? Before one entitled to an office has qualified and entered upon its duties he has only the right to obtain possession of it and earn the salary.

The rights of a de jure officer are thus defined in Nichols v. McLean, 101 N. Y. 526, 5 N. E. 347, 54 Am. Rep. 730, and that is the only reasonable definition that can be given. If one has no property in an office, he can derive pecuniary benefit therefrom only by doing something to earn it. This, however, is not to say that a de jure officer may not have a right to damages because excluded from the office and the opportunity to earn the salary. That rests upon other grounds.

The opinion rightly limits the decisions in this state to the rule that a de facto officer, while still in office, may recover his salary from the state, but fails to note that such rule is in conflict with many of the cases cited, which hold that to recover from the state the officer must establish his title as a basis of his right. So far as our cases throw any light upon this question, it would seem that they are against the conclusion of the majority opinion, since they recognize a right to compensation as resulting from possession and services in the office. Expressions not called for by the facts in those cases cannot be regarded as controlling.

This case well illustrates the danger of following precedents without considering the grounds upon which they are based. The majority opinion quotes at length from Peo-

on an application for a mandamus. matter quoted is pure dictum, since the office which the relator claimed to have exercised was found by the court to have been abolished by statute prior to the time of the alleged incumbency. It may be said in passing that this also was the ground for the decision by this court in the case of Arnold v. Hilts, cited in the majority opinion: that is, that the office had been abolished. This New York case is also the basis of the decision in People ex rel. Dorsey v. Smyth, 28 Cal. 21, which is itself the foundation of a line of decisions in that state and of other states. On such worthless foundation does the rule rest.

The next case from which quotation is made is Bier v. Gorrell, 30 W. Va. 95, 3 S. E. 30, 8 Am. St. Rep. 17, an action for damages against a de facto officer. This case cites as authority Boyter v. Dodsworth, 6 Term R. 681, Auditors v. Benoit, 20 Mich, 176, 4 Am. Rep. 382, and Mayfield v. Moore, 53 Ill. 428, 5 Am. Rep. 52. The English case involved an office held by patent, to which no fees were attached, and the right of recovery by the patentee was denied. Lord Kenyon there said:

"With regard to natural justice, the person who performs the duty is entitled to the money given for such duty. Here the defendant in fact performed the services, and on principles of natural justice he is entitled to the reward."

In the Michigan case the court, after citing with approval Smith v. Mayor, 37 N. Y. 518, and pointing out that an office is not one of contract relation, said:

"There can be no consistent theory, except that which regards official rewards as the recompense for actual or implied official work. would it be possible in most cases to have the work done without some certainty of pay for it. An officer is not to be expected to work for nothing, so long as it may please his enemics to assume to doubt his title. assume that the laborer is worthy of his hire. and the person who is required to be recognized for the time being as the legal incumbent for the purposes of doing the work should be recognized for \* \* \* remuneration also, so far as those are concerned with whom he deals officially, and who have no personal interest in the contest for the office."

In the New York case above mentioned it is said:

"An office in this country is not property, nor are the prospective fees of an office the property of the incumbent. Conner v. Mayor, 1 Seld. [5 N. Y.] 285. The incumbent cannot sell his office, or purchase it or incumber it. It will not pass by an assignment of all his property, nor will such an assignment affect his right to prospective fees. Id., and cases cited. \* \* \* The same authority holds, and it is concaded by the appellants here, that the right is conceded by the appellants here, that the right to fees or compensation does not grow out of any contract between the government and the officer, but arises from the rendition of the services [citing cases]. An office is simply an appointment or authority on behalf of the government to perform certain duties, usually at and for a certain compensation. \* \* There ple v. Tieman, 30 Barb. (N. Y.) 193, a case determined by a single judge, at nisi prius, and advantage of the government."

It was accordingly held that, since the plaintiff had no contract with the city, he had no right of recovery.

The Illinois decision is founded upon the English doctrine above discussed, quotes from Blackstone the definition of an office above given, and says:

"The fees of an office are incident to it as fully as are the rents and profits of land or the increase of cattle"

—a statement impossible of acceptance without holding that an office is property.

An examination of the large number of cases cited in support of the majority opinion discloses the fact that a great majority of them follow the English precedents regardless of their inapplicability under the conditions in this country. The rest of the cases are based upon the proposition that the principle which renders the acts of a de facto officer valid, as concerning the public and third parties, does not apply when he is claiming something for himself. If by this is meant that he cannot rely upon the principle when, for his own benefit, he asserts that some particular official act performed by him is valid because done while he was a de facto officer, there is no reason to question it. The right of a de facto officer to recover for his services does not, however, depend in the least degree upon the validity of his acts. The claim is for compensation for public services which are valid on grounds of public policy. He is making no claim upon any specific act whose validity is open to question. The right of a de facto officer to such compensation has been recognized many times, as is shown by quotations heretofore made, and it has often been indicially recognized that until one has performed the duties of an office he cannot recover the salary thereof.

In Steubenville v. Culp, 38 Ohio St. 18, 43 Am. Rep. 417, the court held that:

An officer, while wrongfully suspended, cannot recover salary, "for the reason that salary and perquisites are the reward of express or implied services, and therefore cannot belong to one who could not lawfully perform such services"—citing Smith v. Mayor, supra.

The court adds:

"Offices are held, in this country, neither by grant nor contract, nor has any person a vested interest or private right or property in them."

This case repudiates the English rule, because it recognizes that it does not apply here, and it also recognizes that salary results only from services, and not from title.

In Jayne v. Drorbaugh, 63 Iowa, 711, 17 N. W. 433, a state in which the English rule is adopted, and based upon English cases, it is recognized that a salary does not necessarily go with the title. The court said:

"The right to compensation depends upon the performance of the duties, or at least there must be possession of the office in fact, as distinguished from the mere right of possession."

In Farrell v. Bridgeport, 45 Conn. 191, the court said that, as a rule, those only are entitled to salary who both obtain and exercise their offices, and that payment follows the actual discharge of the duties.

In McAffee v. Russell, 29 Miss. 84, it is said that a claimant, having rendered no services, has no right to compensation.

The majority opinion finds the dissenting opinion of the Chief Justice in the New Jersey case (Stuhr v. Curran) very persuasive, regardless of the fact that it is avowedly based on English cases, which, as has been pointed out, cannot be authority on the question in this country. The Chief Justice says:

"These English adjudications are entirely uniform, and run through three or four centuries."

In many of the cases which form the basis of the rule adopted in the majority opinion it is held that one who holds an office to which he knows he has no title has no right to compensation, which must be conceded; but these cases are used as authority in cases in which it cannot be said that there is such knowledge, either actual or presumed.

The holder of an election certificate is not presumed to know the facts upon which his right to it rests; yet the rule is applied to such cases, as if he were willfully usurping the office. The injustice of so doing is recognized in Michigan, though the English rule has been adopted there (People v. Miller, 24 Mich. 459, 9 Am. Rep. 131), in Scott v. Crump, 106 Mich, 288, 64 N. W. 1, 58 Am. St. Rep. 478, where it is held that an officer with a certificate of election is not an intruder or usurper, so that his salary could be denied him. My objection is that a correct rule for some cases is made general, and applied to other cases when there is no reason for its application.

Neither is it just to assume that an officer holding over, or claiming to have been appointed, under circumstances in which there is fair ground for his action, knows or should be presumed to know that he has no title. This is illustrated in the instant case. The bank commissioner is a bonded officer, whose duties include the winding up of insolvent banks and the performance of other important duties, and the public interest requires him to withhold the office from any demandant of whose right there is any doubt. legal presumption is not indulged in to the injury of any one unless it be necessary to the advancing of justice, and there is here no ground for presuming that plaintiff in error knew that he had no title to the office. The hypothesis in this case is that the claim to the office is made in good faith, and that eliminates many of the cases whose basis is the bad faith of claimant.

In Stuhr v. Curran, supra, the New Jersey court recognized that the common-law cases were not authority, and made clear the propriety of Stuhr's action, the injustice of de-

nying him compensation, and the evil results in issue. Moreover, the state has the means, of a rule which denies to an incumbent in and may take the time, to determine the good faith all right to compensation, if another subsequently establishes title to the office. It shows that the evils suggested, in some cases, growing out of an allowance of fees to a de facto officer, are fairly offset by the dangers resulting from the contrary rule.

One of the grounds which has been given for holding a de facto officer entitled to recover for his services is that the public interest requires that the duties of an office be discharged: but, if an incumbent is subjected to the risk that, after having held the office in good faith, the compensation is going to another who has done nothing whatever, there would be little encouragement for a man to perform official duties in case of a dispute as to the right to the office.

If the right to compensation grows out of the title, regardless of everything else, it results that an officer de jure might with profit permit an officer de facto to perform the duties of the office. The former might engage in profitable business during the entire term, and be entitled to the salary in addition, while the other in good faith will have been acting in his official place.

This majority opinion calls attention to Gaskill v. Atlantic City, 89 N. J. Law, 269, 98 Atl. 385, the facts in which it says "are quite like those here involved," holding that a de facto officer could not recover from the state. That case is not in conflict with Stuhr v. Curran, nor does it support the majority opinion in this case. The facts are radically different. The ground of the decision, as stated by the court, was that:

"An unauthorized person, who gains possession of an office by force, and with full knowledge that his title thereto is disputed by the lawful incumbent, has no right of action against the public for the prescribed salary during such

If it is true, as the opinion states, that "emoluments follow and are inseparable from the legal title," how can the state refuse salary to the de jure officer on the ground that it has paid a de facto officer? If the right to salary is vested in the holder of the title, it cannot be divested by payment to any one else. It follows that our decisions repudiate the doctrine stated in this opinion and just quoted.

A public officer is an agent of the state. and his acts within the sphere of his official duties are valid upon the same basic principle as that upon which the acts of agents within the apparent scope of their authority are held binding upon their principals. The reasons which relieve the public from inquiry as to the title of de facto officers do not apply in the case of a demand of the state for salary. The principal must be presumed to know whether or not one acting as his agent has right to do so, if that question is of the classes within the exception to the gen-

question, the absence of which circumstances on the part of individuals is the principal ground of holding acts valid as to them. It has been said that:

"The de facto doctrine is one of those legal makeshifts by which unlawful or irregular corporate or public acts are legalized for certain purposes on the score of necessity." In the Matter of Ringler & Co., 204 N. Y. 30, 97 N. E. 593, Ann. Cas. 1913C, 1036.

Obviously there is no necessity for applying it in an action against the state for salary or fees. Therefore the only logical basis for paying salary to one in office, without determining his title, is that he has discharged the duties of the office. This is recognized in El Paso County v. Rohde, 41 Colo. 258, 95 Pac. 551, 16 L. R. A. (N. S.) 794, 124 Am. St. Rep. 134, where the court gives as the reason for holding that the de jure officer could not recover from the county the fees allowed to the de facto officer that "the people cannot be compelled to pay twice for the same services." Certainly there is here no recognition of any right to compensation without services, and merely because of title to office. Hence our cases sustain the principle for which I am now contending, and which many courts have recognized, as above shown.

I can conceive of no ground of public policy upon which, of two claimants for an office, the one who has in good faith and with reasonable basis for his claim discharged the duties of the office should be denied compensation, and it be given to the other who has done nothing. In every case, the question of good faith may be determined in an action by the de jure officer against the de facto officer for damages. A rule of law which punishes the innocent as well as the guilty, when the cases are easily distinguishable, ought not to be adopted, and this is especially true when the rule has no real foundation in either reason or authority.

The judgment should be reversed.

DICKINSON v. BRYANT. (No. 8815.) (Supreme Court of Oklahoma. April 23, 1918.)

(Syllabus by the Court.)

1. CARRIERS = 2S0(1), 281 — CARRIAGE OF PASSENGERS—DUTY—EXCEPTIONS.

Generally the contract of a carrier is that it will carry the passenger safely, and in a proper carriage, and afford him safe and convenient means for entering cars and alighting therefrom, but it does not contract to render him personal service or attention beyond that. The recognized exception to the general rule is passengers who by reason of illness, great age, or other infirmity are unable to help themselves.

2. Cabriers \$383-Necessity of Personal SERVICE OR ATTENTION - QUESTION FOR

eral rule is a question of fact, and in this case the same was properly submitted to the jury.

R. CARRIEGO OF PASSEN.

8. Carriers \$=253(1)—Carriage of Passengers—"Railroad Ticket."

The ticket issued by a railroad company to a passenger is not a contract, but only evidence of the right of transportation furnished to the passenger by virtue of the contract made by him with the company for transportation.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Railroad Ticket.]

4. CABRIERS \$\sim 355, 382(1 7)\to CARRIAGE OF PASSENGERS\to Ejection\to Evidence\to Damag-

ENCESSIVE DAMAGES.

Evidence in this case examined, and held, that the plaintiff below was entitled to be transported from Texola to Oklahoma City, upon the train on which she was riding, and that her ejection therefrom was unlawful, for which the company was liable to her for whatever damage she sustained. And this question of damage having been submitted to the jury, and the same not appearing excessive and within the issues and justified by the evidence, the judgment of the lower court is affirmed.

Commissioners' Opinion, Division No. 3. Error from District Court, Oklahoma County: W. C. Crow, Judge.

Action by Mrs. J. H. Bryant against J. M. Dickinson, receiver for the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

R. J. Roberts, C. O. Blake, W. H. Moore, and J. E. Du Mars, all of El Reno, for plaintiff in error. Vaught & Brewer, of Oklahoma City, for defendant in error.

HOOKER, C. Mrs. Bryant recovered a judgment in the lower court for the alleged wrongful ejection from one of the trains of the plaintiff in error, and to reverse which the company has appealed here. The facts are as follows:

On September 26, 1916, Mrs. Bryant purchased a ticket at the office of the company in Texola for passage to Oklahoma City, and also a half ticket for her ten year old boy for the same purpose. That the train upon which she had been waiting was late, and in her hurry to get aboard the train she left her purse on the platform at Texola, which contained all the money she had and her tickets, and immediately upon entering the train she was informed that some one on the outside was attempting to deliver to her her purse containing her tickets and her money, and while the train was standing still she requested the conductor to get her purse for her and explained to him that her purse contained all the money she had and the tickets for transportation for herself and son to Oklahoma City. She was induced to believe by the acts and conduct of the conductor that he would procure the same for her, and she made no further effort herself to obtain the possession thereof. That shortly after the train started en route to

came through the train collecting the tickets from the passengers, and she again told him that she had requested him to get her ticket for her at Texola, and explained the situation to him, but she was informed that she would be compelled to get off the train at the next station, which was Erick, and that she could not ride without either paying her fare or producing a ticket, and being told that fact she expressed a willingness to alight from the train, which she did at the station of Erick. Just as she was alighting from said train the ticket agent at Erick handed to the conductor in charge of said train a message from the ticket agent at Texola, which stated in substance that Mrs. Bryant had paid for a ticket for transportation from Texola to Oklahoma City upon that train, and that said ticket was in his possession at Texola, and that she was entitled to be transported to Oklahoma City upon that train. This the conductor refused to recognize and compelled her to alight and await the next train, which was some time the next day, and to procure the ticket itself from a party who brought it from Texola to Erick overland.

The evidence further discloses that the plaintiff below was a large fleshy woman, unwieldy in her movements, afflicted with rheumatism, and that it was with some difficulty that she moved from place to place, and it is asserted that this fact was known by the agents of the company in charge of said train, and that her condition was such that it was the duty of the company to render her assistance in traveling, and that on account of her physical condition it was the duty of the conductor, when requested to get her purse containing the tickets, to have procured the same for her.

The evidence further shows that the plaintiff below alighted from the train at Erick about 4 o'clock in the afternoon of September 26th, and was compelled to remain there until about 9 o'clock on September 27th before the next train coming to Oklahoma City arrived there, and most of which time she spent around the depot, and that she suffered some inconvenience, and she alleges that on account of her ejection from said train, the humiliation and mortification caused to her thereby, and the inconvenience and hardship which caused her physical pain, suffering, and sickness, that she was damaged in the sum of \$2,600.50.

The trial court gave to the jury two instructions, which were excepted to by the company, which instructions are as follows:

"You are instructed that if you find from a conductor that he would procure the same for her, and she made no further effort herself to obtain the possession thereof. That shortly after the train started en route to Oklahoma City the conductor or auditor

"You are instructed that if you find from a preponderance of the evidence that at or about the time mentioned in plaintiff's petition, she bought tickets at Texola, Okl., entitling her and her little boy to be carried on defendant's line of railroad from Texola, Okl., to Oklahoma City the conductor or auditor

Texola plaintiff boarded same, but mislaid her

pocketbook containing her tickets and money on the depot platform, and got on the train without them, but believing she had them, and upon entering the car was informed by a passenger in the presence and hearing of the conductor that she had left her purse lying outside, and if you further believe from the propoder. and if you further believe, from such preponderance of the evidence, that the plaintiff was in a feeble physical condition, and because of bodily infirmities could move about with great diffiknown by the desendant's conductor in charge of its train, and plaintiff informed him that she had left her purse outside, and that it contained her tickets and all the money she had, and did this while the train was standing at the depot, and asked the conductor if he would please get them for her, and there was time remaining before the time for the train to start, for him to have gotten them, or to have told for him to have gotten them, or to have told her he would not, so that others might do so, and such conductor, without saying that he would not get them, started down the aisle of the coach towards the depot as if to get the purse containing the tickets, and did not do so, and did not tell plaintiff he would not do so, and did not tell plaintiff he would not do so, and did not tell plaintiff he would not do so, but came back to where she was in the coach just as the train was ready to start, and was asked by her whether he had gotten the purse and tickets, it was then, under such circumstances, if you find they existed, the duty of the conductor in charge of the defendant's train to have then and there told plaintiff she would not be carried, and to have then and there put her off, or afforded her an opportunity to get off the train. And, if you further find that the circumstances mentioned occurred, as stated, and the said conductor did not advise plaintiff to get off there at Texola, but carried her on to Erick, Okl., and as the train stopped, defendant's station and ticket agent handed the to Erick, Okl., and as the train stopped, defendant's station and ticket agent handed the conductor a telegram from the defendant's ticket agent at Texola, stating in substance that plaintiff's purse, money, and tickets were in his possession, and to carry plaintiff and her little boy on to Oklahoma City, the destination named in the tickets, it would have been, under all these circumstances, if you find from a preponderance of the evidence, they all existed, the duty of the defendant to have carried plaintiff on to Oklahoma City, and it would have been a violation of defendant's duty to plaintiff, and negligence upon the part of the company, to eject her at Erick; and if you find that all these circumstances existed, and that, notwithstanding the same, the conductor ejected plaintiff at Erick, his act would have constituted negligence upon the part of defendant, and a negligence upon the part of defendant, and a violation of its duty toward plaintiff, and you should find the issues for plaintiff."

"You are instructed that, ordinarily, a carrier of passengers is under no duty to give to a passenger personal services or attention; but a passenger personal services or attention; but there is an exception to this general rule, in this, that if by reason of illness, great age, or other bodily infirmity, the passenger is unable to help herself, and this is known to the car-rier, a duty upon its part may arise, to render to the passenger such reasonable personal serv-ices and attentions as are commenced with ices and attentions as are commensurate with the circumstances, situation, and necessities of such passenger at the time existing and known to the carrier. And in this case, whether or not the evidence brings it within the exception stated is for you to determine from all the facts, circumstances, and evidence before you.

The plaintiff in error has assigned several reasons why this cause should be reversed: First, it is contended that no duty rested upon the conductor in charge of this train to procure for her her pocketbook or purse con-

carry her upon said train without her transportation; third, her injuries were not the proximate result of the negligence complained of; fourth, no proof of the value of any lost time, and that the damages are excessive as awarded to her by the jury; and, fifth, erroneous instructions given by the court and excepted to by the plaintiff in error.

[1] This court in St. L. & S. F. Ry. Co. v. Fick, 47 Okl. 530, 149 Pac. 1126, said:

"Generally, the contract of a carrier is that it will carry the passenger safely and in a proper carriage, and afford him safe and con-venient means for entering cars and alighting therefrom; but it does not contract to render him personal service or attention beyond that. The recognized exceptions to the general rule are passengers who, by reason of illness, great age, or other infirmity, are unable to help them-

And in 4 R. C. L. p. 1160, it is said:

"While, as a general rule, a carrier of passengers is not bound to anticipate or to guard against an injurious result which would happen only to a person of peculiar sensitiveness, yet there are numerous decisions to the effect that a sick or aged person, a delicate woman, a lame man or a child, or one not in full possession of his faculties, is entitled to more attention and care from a carrier than one in good health and under no disability, and that where physical or mental weakness or disability is apparent to, or is brought to the attention of the carrier, the high degree of care which the law imposes upon him requires the carrier to take notice of the disability and conduct himself accordingly."

[2] The defendant in error contends that she at the time was one of the classes of individuals within the exception to the rule. The evidence introduced by her sought to show that she was rheumatic and otherwise afflicted; that she moved with great difficulty, and on account of her physical size and her physical ailment, it became the duty of the company as a common carrier to show her more care than the ordinary passenger. This question was properly submitted to the jury, and the jury was in a better condition, having seen the plaintiff below, to determine that issue than this court. There being some evidence which would justify the conclusion that she was within the excepted class, and the jury having so found, and the verdict being approved by the court under our established rule, we cannot interfere with the verdict of the jury; there being some evidence to support it.

[3, 4] It is contended by the defendant in error that she believed at the time she informed the conductor that she had left her pocketbook upon the platform, and that some one on the outside was trying to deliver it to her, and requested him to get it for her, that he, by his conduct, led her to believe that he would do so, and in the light of the testimony here we cannot say that she was not justified in so believing; but, be that as it may, when the conductor was notified through the agent at Erick by means of this telegram forwarded by the agent at Texola taining her money and her tickets; second, that this defendant in error had purchased that no duty rested upon the company to a ticket which entitled her to transportation

from Texola to Oklahoma City, and that he was negligent in not doing so. It is the duty ticket was then in his possession as the agent of a conductor, when doubt arises as to a ticket, of the company in Texola, we are of the opinion that the conductor of the train had no right or authority to compel her to alight liber for an illegal expulsion." from said train at Erick, but she had the right to be transported to Oklahoma City on that train, and in removing her at Erick a wrong was inflicted upon her to recover which this action can be maintained.

This court in the case of St. L. & S. F. R. Co. v. Nichols, 39 Okl. 522, 136 Pac. 159, said:

"The payment of fare or the possession of a ticket or pass, although the usual evidence of the right of a person to ride on a train, are not the right of a person to ride on a train, are not absolutely essential to the creation of the relation of passenger and carrier, so far as relates to the carrier's liability for injuries to a passenger"—citing Simmons v. Oregon R. Co., 41 Or. 151, 69 Pac. 440, 1022; Hutchinson on Carriers, vol. 2, § 1019.

#### In 4 R. C. L. p. 1112, it is said:

"With regard to the nature of a ticket in the ordinary form issued by a common carrier, the authorities are, apparently at least, in irreconcilable conflict. According to numerous decisions such a ticket does not constitute the contract between the parties unless made so by express agreement. It is in the nature of a receipt for the passage money, and is generally only a token, the purpose of which is to enable the carrier to recognize the bearer as the person entitled to be carried. Such ticket is considered not to be the evidence of the terms of the contract of passage and not conclusive of the right to passage, but only a token that the ordinary contract implied by law has been entered into. \* \* \* According to this view one who makes a valid contract with a carrier is entitled. titled to passage according to its terms, even though the ticket or transfer given is defective in failing to express these terms." (Abundant authorities are cited in the text supporting the doctrine above announced. However, there are abundant authorities to the effect that as between a passenger and the carrier's conduc-tor, the passenger's ticket or transfer is conclusive evidence of the passenger's right to ride and constitutes the contract between himself and the carrier.)

# Also in 5 R. C. L. p. 125, it is said:

"While the decisions are in direct and palpable conflict on the question, the better rule, and that supported by the weight of recent authorthat supported by the weight of recent authority, appears to be that a passenger who is ejected because the ticket presented by him is invalid, where such invalidity is through the fault of the carrier, may recover for the injuries sustained by reason of the ejection. This is on the principle that it is the contract and not the ticket that gives the right to transportation, and that consequently a person who makes a and that consequently a person who makes a valid contract is entitled to passage according to its terms, though the face of the ticket fur-nished him may not in any true sense express the contract; and since the passenger is not required in law, nor allowed in fact, to print or write or stamp the ticket, but the carrier alone has that right, the authorities supporting this view hold that the passenger is authorized to believe and presume that such right will be properly exercised, and that the ticket when delivered is a faithful expression of the contract as made. He has, therefore, a right to rely on the statements and acts of the ticket agent, and is not bound, as a matter of law, to read or examine his transportation before taking

And in 5 Cyc. p. 570, it is said:

And in 5 Cyc. p. 570, it is said:

"There has been some diversity of opinion as to whether a railroad ticket, or other similar ticket, entitling the passenger to transportation, is to be deemed a contract. The ordinary ticket is not a contract, but is evidence of the right to transportation furnished to the passenger in consequence of a contract to carry, and intended to enable the passenger to secure transportation, under the rules and regulations of the carrier in performance of such contract.

\* \* \* As to the ordinary ticket, however, it has been held that it does not preclude parol evidence to show the contract of transportation. On the other hand, the ticket is prima facie evidence of the passenger's right to transportation.

\* \* \* "

Under the authorities above cited and quoted we are of the opinion that the ticket is merely evidence of the making of a contract, and that when the company knew of the existence of the facts here shown it was the duty of the company to transport the defendant in error to her destination at Oklahoma City.

The damages recovered here in the sum of \$750 we cannot say are unreasonable for the humiliation and wounded feelings suffered by her on account of this unlawful ejection. The fact that she went voluntarily from the train before being removed by force cannot affect her right to recover in this action. Taking into consideration her physical condition, the inconvenience suffered by one afflicted with rheumatism, and being so unwieldy in body, together with the other attendant circumstances, we do not feel at liberty to interfere with this verdict on account of the amount thereof. The damages here awarded are fully sustained by the evidence and the pleadings and are not excessive.

The instructions of the court complained of fairly present the law of the case to the jury as we view it, and finding no error in this record prejudicial to the rights of the plaintiff in error, this cause is affirmed.

PER CURIAM. Adopted in whole.

MUIRHEID v. NOELL et al. (No. 9528.) (Supreme Court of Oklahoma. April 16, 1918.)

(Syllabus by Editorial Staff.)

APPEAL AND EBROR & 781(1)—ABSTRACT OR HYPOTHETICAL QUESTIONS—DISMISSAL. Where the questions involved in a proceeding in error have become abstract and hypothetical, the proceeding will be dismissed.

Error from District Court, Kay County; William M. Bowles, Judge.

Action between J. F. Muirheid and William F. Noell and others. Judgment for the latter, the train, but it is for the jury to say whether and the former brings error. Dismissed.

Sam K. Sullivan and J. H. Hill, both of tawatomie County, the Board of County Newkirk, for plaintiff in error. G. A. Chappell, of Newkirk, for defendants in error.

PER CURIAM. A motion to dismiss this proceeding in error upon the ground that the question involved herein had become purely abstract and hypothetical was overruled by the court on the 26th day of March, 1918. Subsequently, in presenting another question in a proceeding growing out of the same transaction, wherein the same counsel appeared for the same parties, it was admitted by counsel for both sides that the question involved herein has become moot and hypothetical.

In pursuance of this admission and agreement of counsel, the former order overruling said motion to dismiss is vacated and set aside, and said motion to dismiss is hereby sustained, and said proceeding in error is dismissed at the cost of plaintiff in error, for the reason that the question involved has become abstract and hypothetical. All the Justices concur.

POTTAWATOMIE COUNTY et al. v. ALEX-ANDER, County Assessor. (No. 7991.)

(Supreme Court of Oklahoma. April 16, 1918.)

#### (Syllabus by the Court.)

1. STATUTES \$== 109 - AMENDMENT - CON-STRUCTION.

An act to amend a particular section of a general law is limited in its scope to the subject-matter of the section proposed to be amended. Such amendment ex vi termini implies merely a change of its provisions upon the same subject to which the opinion section relates. subject to which the original section relates.

2. STATUTES \$== 109-AMENDMENT-NEW MAT-

TER.

Though a particular section of a law may by amendment be broadened so as to bring within its provisions matter which could logically and legally have been placed in it originally, such new matter must be something which had not been already specially and differently provided for in another section of the same statute and to which section no reference is made in the amendatory law.

3. Statutes €==141(1)—Amendment—Refer-ENCE TO TITLE - CONSTITUTIONAL PROVI-

That portion of section 1, c. 210, Act of May 17, 1913 (Sess. Laws 1913, pp. 463, 464), which undertakes to limit the compensation of which undertakes to limit the compensation or county assessors to the value of the property assessed, excluding "values placed upon public service corporations, or other property assessed by the State Board of Equalization," being amendatory both in form and in fact, is repugnant to and violative of section 57, art. 5, of the Constitution, requiring that "no law shall be " amended " by reference to "the title only" but so much thereof as is " " its title only; but so much thereof as is shall be re-enacted and pub**a**mended lished at length."

Error from District Court, Pottawatomie County; Chas. B. Wilson, Jr., Judge.

From a judgment allowing a claim of H.

Commissioners prosecute error.

C. W. Friend, Co. Atty., of Shawnee, Clarence Robison, Asst. Co. Atty., of Tecumseh (W. H. Voyles, Co. Atty., of Vinita, amicus curise), for plaintiffs in error. Park Wyatt. of Tecumseh, for defendant in error.

SHARP, C. J. [3] The one question necessary to a determination of the proceedings in error brought here for review by the board of county commissioners of Pottawatomie county is the constitutionality of an act of the Legislature approved May 17, 1913, entitled "An act amending section 3 of chapter 152 of the Session Laws of Oklahoma, 1911. and declaring an emergency" (Sess. Laws 1913, pp. 463, 464). If the act is constitutional, the judgment of the trial court in allowing the claim of the county assessor based on the assessed valuation of public service corporations in Pottawatomie county must be reversed. If, on the other hand, the act violates section 57, art. 5, of the Constitution, requiring that no law shall be revived. amended, or the provisions thereof extended or conferred by reference to its title only, but so much thereof as is revived, amended, extended, or conferred shall be enacted and published at length, the judgment of the trial court should be affirmed.

But two sections of chapter 152 of the Laws of 1911 require consideration. These are section 3, fixing the duties and prescribing the power of the county assessor, and section 16, fixing the compensation of the county assessor and his deputies. As already seen, the amendatory act of 1913 purports only to amend section 3. The amended section differs from section 3 of the original act in three particulars:

(1) It omits therefrom the following immaterial words: "In the performance of his duties as provided in this act."

(2) It adds the following:

"And to compel the attendance of necessary witnesses and the production and inspection of necessary books and papers by the issuance of subpænaes therefor to properly perform his duties hereunder.

(3) It adds a new clause, in form a proviso, as follows:

"Provided the compensation herein enumerated shall not include values placed upon public service corporations, or other property assessed by the State Board of Equalization.

Neither the first nor second amendments are pertinent to the question here presented. The latter, or proviso, limiting the compensation of the county assessor, is relied upon by the board of county commissioners to defeat the assessor's claim for compensation. Under the law as it existed prior to the passage and approval of the amended statute, county assessors were entitled to compensation H. Alexander, County Assessor, against Pot- based upon the entire property valuation of

the county, including values placed upon public service corporations or other property assessed by the State Board of Equalization. This was determined in Thomas v. Commissioners of Hughes County, 43 Okl. 616, 143 Pac. 665. As seen at a glance, the proviso in the amended act is properly an amendment, not to section 3 of the original act, but to section 16. In its effort to amend the statute, the Legislature selected a restrictive title, in that it purported only to amend section 3 of the old act. In such circumstances, could the Legislature constitutionally introduce into the amendment, a subject formerly considered only under another section? The answer to the inquiry suggested determines the case.

Had the amended act been entitled generally as an act to amend chapter 152, any amendment germane and pertinent might have been made; but, being specifically limited to the section designated, the interpolation by proviso of a new subject dealt with in another section of the old act was not permissible. Any further changes than those designated in the title were precluded by the specific enumeration of those named.

As stated in Cooley's Const. Lim. (5th Ed.) 179:

"As the Legislature might make the title to an act as restrictive as they please, it is obvious that they may sometimes so frame it as to preclude many matters being included in the act which might with entire propriety have been embraced in one enactment with the matters indicated by the title, but which must now be excluded because the title has been made unnecessarily restrictive. The courts cannot enlarge the scope of the title; they are vested with no dispensing power. The Constitution has made the title the conclusive index to the legislative intent as to what shall have operation. It is no answer to say that the title might have been made more comprehensive, if in fact the Legislature has not seen fit to make it so."

The constitutional requirement prescribing the manner in which statutes may be revived or amended is found in the constitutions of many of the states. Its purpose is perhaps nowhere better stated than by Justice Cooley in People v. Mahaney, 13 Mich. 481, where the learned jurist, speaking to a similar provision of the Michigan Constitution, said:

"The mischief designed to be remedied was the enactment of amendatory statutes in terms so blind that legislators themselves were sometimes deceived in regard to their effect, and the public, from the difficulty in making the necessary examination and comparison, failed to become apprised of the changes made in the laws. An amendatory act which purported only to insert certain words, or to substitute one phrase for another in an act or section which was only referred to but not republished, was well calculated to mislead the careless as to its effect, and was perhaps, sometimes drawn in that form for that express purpose. Endless confusion was thus introduced into the law, and the Constitution wisely prohibited such legislation. But an act complete in itself is not within the mischief designed to be remedied by this provision, and cannot be held to be prohibited by it without violating its plain intent."

See, also, Mok v. Detroit Bldg. & Sav. Ass'n, 30 Mich. 511; Bush v. Indianapolis, 120 Ind. 476. 22 N. E. 422.

[1] It is held generally that, where the title of the amendatory act specifies the section or sections to be amended, the amendment must be germane to the subject-matter of the sections specified, and that amendments of other sections, not specified, will be void. Lewis' Sutherland, Stat. Const. § 139.

State v. American Sugar Ref. Co., 106 La. 553, 31 South. 181, is a case involving a state of facts very similar to the one under consideration. There, the act of the Louisiana Legislature under consideration purported to amend and re-enact sections 10, 12, and 14 of an act of 1898. At the close of section 10, as re-enacted, were the words:

"Provided further, that for carrying on the business of refining sugar and molasses or either of them, the annual state license shall be one-eighth of one per cent. upon the gross annual receipts of such business." Act No. 103 of 1900.

The title to the amended act did not name section 11 of the act of 1898. The amendment of section 10 transported out of section 11 of the original act into section 10 of that act the subject-matter there considered. The proviso to section 10 was declared unconstitutional. The opinion is an able one. From it we learn that the same rule and reasons which prevent the Legislature in enacting a general law on a particular subject, from inserting in the body of the law additional subjects not covered by the title, prevent that body, when it enacts a law directed by its title specially to the amendment of a particular section of a law (that is, to the alteration of the particular matters contained in that section), from putting for the first time into that section distinct matters not included in it before the amendment, when the matters so thrown in are, after being altered, those which had been specially and otherwise provided for in another section of the same law. That as the Legislature, in a law purporting to deal generally by amendment with a preexisting law, has to keep inside of the objects provided for in the original law, so it has in a law purporting to deal with a special section to keep within the things provided for in that section. It is not sufficient that these things should have been classed as matters falling legally and properly under the general title of the original law. It may be that a particular section of a law may, by amendment, be broadened so as to bring within its provisions some particular matter which could logically and legally have been placed in it originally; but this matter must be something which had not already been provided for in another section of the same statute which was proposed to be amended.

[2] Also, in Dolese v. Pierce, 124 III. 140, 16 N. E. 218, it was held that:

"An act to amend certain sections of a general law is limited in its scope to the subject-matter of the section proposed to be amended. In such case, the introduction of any new sub-

stantive matter not germane or pertinent to ings not inconsistent with the rule announc-that contained in the original sections cannot be ed in the above-entitled cause. All the Jusregarded as an amendment thereto, but must be regarded as independent legislation upon a matter not embraced in the title of the act, and therefore void. The amendment of an act in general, or of a particular section of an act, act in termini, implies merely a change of its provisions upon the same subject to which the act or section relates."

Other cases bearing upon the question at hand are City of Pond Creek v. Haskell. 21 Okl. 711, 97 Pac. 338; In re Lee, 168 Pac. 53; State ex rel. Atty. Gen. v. Bankers' and Merchants' Mut. Ben. Ass'n, 23 Kan. 499; Hicks v. Davis, State Auditor, 97 Kan. 312, 154 Pac. 1030; Board of Commissioners v. Aspen Min. & Smelt. Co., 3 Colo. App. 223, 32 Pac. 717; Ex parte Hewlett, 22 Nev. 333, 40 Pac. 96; State ex rel. Graham v. Tibbets, 52 Neb. 228, 71 N. W. 990, 66 Am. St. Rep. 492.

There would seem to be no reasonable doubt that the act in question is repugnant to section 57, art. 5, of the Constitution in so far as it sought to place a limitation upon the compensation of county assessors. One of the principle purposes of the amendatory act, if indeed not the main purpose, was to amend a section other than the one which it proposed to amend by transferring and inserting such amended matter as a proviso to the amended section which theretofore had no reference to the subject-matter of the proviso. This the Legislature could not constitutionally do.

The judgment of the trial court is affirmed. all the Justices concurring.

CARRELL, County Assessor, v. BOARD OF COM'RS OF HUGHES COUNTY. (No. 8014.)

(Supreme Court of Oklahoma. April 16, 1918.)

#### (Syllabus by the Court.)

AMENDMENT OF STATUTE.

Same as Pottawatomie County et al. v. Alexander, County Assessor, 172 Pac. 436, this day decided.

Error from District Court, Hughes County: George C. Crump, Judge.

From a judgment allowing a claim of N. A. Carrell, County Assessor, against Hughes County, the Board of County Commissioners prosecute error. Reversed and remanded.

W. T. Anglin, of Holdenville, for plaintiff in error. Tom H. Fancher and G. R. Stirman, both of Holdenville, for defendant in error.

SHARP, C. J. The proceedings in error in this case involve the identical question this day decided in County Commissioners of Pottawatomie County v. Alexander, 172 Pac. 436. Upon the authority of that case, the judgment of the trial court is reversed, On the trial of a case where former adjudi-and the cause remanded for further proceed-cation is relied on as a defense, it should be

ed in the above-entitled cause. All the Justices concur.

#### LITTLEFIELD v. GARNER et al. (No. 9784.)

(Supreme Court of Oklahoma. April 23, 1918.)

#### (Syllabus by the Court.)

APPEAL AND ERROR \$\sim 356-Time for Tak-

ING APPEAL—DISMISSAL.

Where plaintiff in error fails to file his apwhere plaintin in error falls to file his appeal in this court within six months from the date of the rendition of the judgment or order appealed from, as required by chapter 18, p. 35, Sess. Laws 1910-11, the same will be dismissed for want of jurisdiction.

Error from District Court, Caddo County; Will Linn, Judge.

Action by J. E. Littlefield against John D. Garner and others. From a final order sustaining defendant Garner's demurrer to a second amended petition, plaintiff brings error. Dismissed.

L. E. McKnight, of Anadarko, for plaintiff in error. Geo. T. Webster, of Clinton, and Dyke Ballinger, of Miami, for defendants in error.

RAINEY, J. The final order appealed from in this case is that of the district court of Caddo county, Okl., in sustaining the demurrer of the defendant in error John D. Garner to the second amended petition filed by the plaintiff in error, J. E. Littlefield, which order of the court was made on the 3d day of September, 1917. On that day the plaintiff in error gave notice of appeal, and on March 6, 1918, the petition in error and case-made were filed in this court. The defendant in error John D. Garner has filed a motion to dismiss the appeal, on the ground that the Supreme Court is without jurisdiction of the case, for the reason that the said petition in error and case-made were not filed in this court within six months from the date of the order appealed from. No response has been filed to this motion, doubtless for the reason that under the numerous decisions of this court the same would have been unavailing. Thomason et al. v. Champlin, 43 Okl. 86, 141 Pac. 411; Gaskin v. Simmons-Burk Clothing Co., 38 Okl. 228, 132 Pac. 821.

For the reasons stated, the appeal is dismissed. All the Justices concur.

JAMES McCORD CO. v. JOHNSON GRO-CERY CO. et al. (No. 8828.) (Supreme Court of Oklahoma. April 16, 1918.)

# (Syllabus by the Court.)

1. JUDGMENT €==948(1), 958(1) - RES JUDI-CATA-PLEADING.

made to appear by the pleadings, the verdict, and findings or judgment that the issues involved are res judicata.

2. ATTACHMENT & 374—WRONGFUL ATTACHMENT—ACTION FOR DAMAGES—EVIDENCE.

The evidence in this case examined, and

held to be sufficient to support the verdict and judgment of the court.

Commissioners' Opinion, Division No. 3. Error from District Court, Stephens County; Cham Jones, Judge.

Action by the Johnson Grocery Company and others against the James McCord Company. From a judgment of the district court in favor of the plaintiffs on appeal from a judgment of justice court in favor of the plaintiffs and from denial of motion for a new trial, defendant brings error. Affirmed.

J. L. C. Guest, H. W. Sitton, and Bond & Kolb, all of Duncan, for plaintiff in error. H. B. Lockett, of Comanche, for defendants in

SPRINGER, C. In this opinion the plaintiff in error will be referred to as defendant. and the defendants in error will be referred to as plaintiffs. The record in this case discloses that on the 3d day of November, 1915, the defendant instituted an action against the plaintiffs in the county court of Stephens county upon an open account, and at the same time sued out an order of attachment which was lawful upon a stock of merchandise belonging to the plaintiffs. Afterwards the plaintiffs successfully prosecuted a motion dissolving the attachment proceedings, and the defendant thereupon sued out a second attachment order in the same action which was also dissolved on the 21st day of December, 1915. The case then proceeded to trial upon the petition of the defendant and the answer of the plaintiffs; the plaintiffs claiming damage in their answer by reason of the wrongful issuance of the various attachment orders dissolved by the court. Upon the trial of the case the defendant recovered judgment against the plaintiffs for the sum of \$29.56.

Afterwards, and on the 1st day of April. 1916, the plaintiffs instituted suit against the defendant in the justice of the peace court of Comanche district, Stephens county, Okl., to recover judgment for damages for the sum of \$199.95 for the wrongful retention of the property levied on under the order of attachment after the order of attachment had been dissolved by the court. To the bill of particulars filed in the justice of the peace court defendant filed an answer pleading a former adjudication of the matters and things in dispute here, and alleging among other things that the question of damage arising out of the attachment proceedings were adjudicated in the judgment in the county court on the 21st day of December, 1915. On the trial of the case in the justice of the peace court the reason that the amount recovered is exces-

plaintiffs recovered a judgment for \$100, and the defendant appealed from the judgment to the district court of Stephens county where a trial was had to the court and a jury, which returned a verdict in favor of the plaintiffs for \$199.95, and judgment by the court was rendered upon the verdict of the jury. A motion for a new trial was duly presented and overruled and exceptions saved. and this case is now properly before us upon a petition in error.

[1] The record in this case discloses that after the attachment order was dissolved on the 21st day of December, 1915, the defendant failed and refused to deliver the goods. wares, and merchandise back into the possession of the plaintiffs for a period of 21 days, and this action in the justice of the peace court was brought for damages for the wrongful retention of the possession of the property during said time. It is plain from the record before us that the question of res judicata does not enter into this case. The defendant retained possession of the property for a period of 21 days after the attachment order had been dissolved and after judgment was rendered on the 21st day of December, 1915, in which all damages for the wrongful suing out of the various attachment orders was adjudicated. And if the question of former adjudication were involved in this proceeding, there was no evidence introduced in the trial court nor is there anything in the record before us which proves or tends to prove that fact. The question of former adjudication must be pleaded and proved by legal and competent evidence.

"The inquiry of res judicata is not limited to the mere formal judgment. It extends to the pleadings, the verdict or the findings, and the scope and meaning of the judgment is often determined by the pleadings, verdict, or findings." McDuffle v. Geiser Mfg. Co. et al., 41 Okl. 488, 138 Pac. 1029.

On the trial of this case there was absolutely nothing introduced that would prove or tend to prove former adjudication, except the verdict of the jury that was returned in the county, court in the trial there on the 21st day of December, 1915, nor were any of the pleadings or judgment attached to the answer as exhibits and none of them were offered in evidence.

"Neither the verdict of the jury nor the findings of the court \* \* \* upon the precise point \* \* \* constitutes a bar." Oklahoma City v. McMaster, 196 U. S. 529, 25 Sup. Ct. 324, 49 L. Ed. 587.

On the trial of a case where former adjudication is relied on as a defense, it should be made to appear by the pleadings, the verdict, and findings or judgment that the issues involved are res judicata.

[2] It is next contended in the brief of the defendant that the evidence in this case is not sufficient to sustain the judgment for the the defendant. The record in this case discloses the fact that about \$800 worth of property was taken and remained in the possession of the defendant the entire time covered by this action. The record in this case discloses that during the time covered by this action a great deal of the merchandise was destroyed by freezing; that the canned goods froze and practically all of the liquid goods froze; and that the damage to the goods by depreciation, etc., amounted to \$100. The evidence shows the rent on the building where the stock of goods was stored was \$25, and that during the time the goods were in the possession of the defendant, the plaintiffs lost an advantageous sale.

The action is for both actual and punitive damages, and we are of the opinion that the verdict of the jury and the judgment of the court is fully sustained by the evidence. Accordingly the judgment is affirmed.

PER CURIAM. Adopted in whole.

BRICKLAYERS', MASONS' & PLASTER-ERS' INTERNATIONAL UNION OF AMERICA et al. v. BRADLEY. (No. 9673.) (Supreme Court of Oklahoma. April 23, 1918.)

(Syllabus by the Court.)

APPEAL AND ERBOR \$\sim 356\to Commencement of Proceeding in Erbor\to Dismissal.

A proceeding in error in this court to reverse, vacate, or modify a judgment or final order commenced more than six months from the rendition of the judgment or final order complained of will be dismissed.

Error from District Court, Tulsa County; N. E. McNeill, Judge.

Action between the Bricklayers', Masons' & Plasterers' International Union of America and others and J. S. Bradley, administrator of the estate of W. H. Bradley, deceased. Judgment for the latter, and the former bring error. Dismissed.

Luther James, G. E. Warren, and D. F. Gore, all of Tulsa, for plaintiffs in error. P. H. Moroney and Gregg & Martin, all of Tulsa, for defendant in error.

MILEY, J. This proceeding in error was commenced on the 22d day of December, 1917, to reverse the judgment of the court below rendered on the 24th day of May, 1917, and the order overruling motion for new trial made and entered on the 11th day of June, 1917. More than six months had elapsed from the rendition of the judgment and order overruling motion for new trial when this proceeding was commenced, and the defendant in error moves to dismiss upon that ground. By chapter 18, Session Laws 1910-11, p. 35, it is provided that all proceedings for reversing, vacating, or modify-

sive. We do not agree with this contention of the defendant. The record in this case discloses the fact that about \$800 worth of property was taken and remained in the possession of the defendant the entire time covered by this action. The record in this case discloses that during the time covered by this Pac. 1092. All the Justices concur.

UNION TRUST CO. v. HENDRICKSON et al. (No. 8849.)

(Supreme Court of Oklahoma. April 16, 1918.)

(Syllabus by the Court.)

1. Corporations €=387(2) — Ultra Vires — Objection by State,

The state alone can question as ultra vires the acquiring title to and holding real property by a corporation.

2. Corporations €==544(6) -- Mortgage Validity.

A mortgage executed by a corporation to secure a loan in the absence of fraud is valid, notwithstanding the fact that the corporation at the time of the execution of such mortgage was insolvent.

The records of the office of the state insurance commissioner pertaining to the status of an insurance company are not constructive notice of the contents thereof to one dealing with such insurance company.

Commissioners' Opinion, Division No. 3. Error from District Court, Oklahoma County; W. C. Crow, Judge.

Action by W. B. Hendrickson and others against the Union Trust Company. Judgment for plaintiff Hendrickson, and defendant brings error. Reversed and remanded, with directions to enter judgment for defendant and against plaintiff.

Ames, Chambers, Lowe & Richardson, of Oklahoma City, for plaintiff in error. Embry, Crockett & Johnson, of Oklahoma City, for Oklahoma Fire Ins. Co. Stuart, Cruce & Cruce, of Oklahoma City, for Occidental Fire Ins. Co. West & Hagan, of Oklahoma City, for Mollie N. Hendrickson, adm'x, etc., M. C. Reddington, L. S. Johnson, General Bonding & Casualty Co., A. L. Welch, Ins. Com'r of Oklahoma, Marie Kimpel, and J. A. Baker.

PRYOR, C. This action was commenced by W, B. Hendrickson, one of the defendants in error, against the Union Trust Company, a corporation, plaintiff in error, in the district court of Oklahoma county, to cancel a certain mortgage executed by the Oklahoma Fire Insurance Company to the Union Trust Company, to secure the payment of a loan of \$56,000.

this proceeding was commenced, and the defendant in error moves to dismiss upon that ground. By chapter 18, Session Laws 1910-11, p. 35, it is provided that all proceedings for reversing, vacating, or modify-the Union Trust Company, and executed 56

negotiable notes in the sum of \$1,000 each. and executed the mortgage in controversy on lots 1 and 2, in block No. 20, Oklahoma City, Okl., to secure payment of said sum. The plaintiff Hendrickson is a judgment creditor of the Oklahoma Fire Insurance Company and seeks to have the mortgage canceled and the property covered by said mortgage rendered subject to his judgment claim. The plaintiff urges as grounds for cancellation of the said mortgage that the action of acquiring and holding title to said property by the said Oklahoma Fire Insurance Company was ultra vires; that at the time of the execution of said mortgage the said Oklahoma Fire Insurance Company was insolvent and in process of liquidation; that said mortgage was made for the purpose of defrauding the creditors of said Oklahoma Fire Insurance Company. It also appears that the Union Trust Company had a judgment against the fire insurance company, for the foreclosure of its mortgage, and was proceeding to sell said property. The plaintiff also asks that the sale of said property be enjoined and that a receiver be appointed to take charge of said property. The trial court rendered judgment in favor of the plaintiff Hendrickson, canceling and annulling the mortgage and appointing a receiver to take charge of the property. From this judgment the Union Trust Company appeals.

The questions involved on appeal may be stated, generally, that the judgment of the trial court is not sustained by the law and the evidence.

The principal grounds urged in the trial court by plaintiff to have the mortgage canceled were: (1) That the act of the Oklahoma Fire Insurance Company in acquiring and holding title to said real estate was ultra vires; (2) that the Oklahoma Fire Insurance Company was insolvent, and that the mortgage of said real estate to the Union Trust Company by the Oklahoma Fire Insurance Company was preferred credit; (3) that at the time of the execution of said mortgage said Oklahoma Fire Insurance Company was insolvent and in the process of liquidation; (4) that the records of the office of the insurance commissioner show that the Oklahoma Fire Insurance Company was insolvent and in the process of liquidation, and that such records were constructive notice to the defendant the Union Trust Company.

[1] It is hard to conceive the reason for the plaintiff's interposing the ground that the acts of the corporation the Oklahoma Fire Insurance Company in acquiring title to the real estate involved were ultra vires, and that the fire insurance company acquired no title to said property. To have such acts declared void by the court certainly would not be any benefit to the plaintiff, as it would have the effect of decreasing the assets of the company subject to the pay-

ment of the liabilities of said company rather than increasing its assets; but whatever the purpose of the plaintiff might be, or whether or not the acts of the fire insurance company in acquiring and holding the property affects his rights or are ultra vires, it is not necessary to determine, as this question can be disposed of on other grounds.

The law seems to be well established by the great weight of authority that, if a corporation is not authorized to acquire real estate except in a limited amount for prescribed purposes, the acquisition of additional property cannot be questioned by a private individual, but can only be questioned by the state. Thompson on Corporations (2d Ed.) §§ 2840, 2390; Russell et al. v. Tex. & Pac. Ry. Co., 68 Tex. 646, 5 S. W. 686; Southern Pac. R. Co. v. Orton (C. C.) 32 Fed. 457; Natoma Water & Mining Co. v. Clarkin, 14 Cal. 544; Louisville School Board v. King, 127 Ky. 824, 107 S. W. 247, 15 L. R. A. (N. S.) 379; Clark & Marshall on Corporations, § 228.

[2] The next contention is that said mortgage is invalid for the reason that the Oklahoma Fire Insurance Company was insolvent at the time of its execution.

It is undisputed that the Oklahoma Fire Insurance Company negotiated the loan and procured \$56,000, secured by mortgage, for the purpose of paying pressing obligations; but, giving the acts of the corporation the construction of preferring creditors, it would not render the mortgage invalid. In the absence of an express provision in its charter, or statutory restrictions, an insolvent corporation has the same right to prefer its creditors and to pay its obligations as an individual has, and, if this be construed as preferring creditors, it does not render the mortgage invalid. R. C. L. vol. 7, p. 755, § 771; Thompson on Corporations (2d Ed.) § 6169; Clark & Marshall on Corporations, § 780; Cook on Corporations, § 691; Gould v. Little Rock, etc., Ry. Co. (C. C.) 52 Fed. 680; Bank of Montreal v. J. E. Potts, 90 Mich. 345, 51 N. W. 512; Rollins v. Shaver Wagon & Carriage Co., 80 Iowa, 380, 45 N. W. 1037, 20 Am. St. Rep. 427; Alberger et al. v. National Bank of Commerce et al., 123 Mo. 313, 27 S. W. 657; Bergen v. Porpoise Fishing Co., 42 N. J. Eq. 397, 8 Atl. 523; Wilkinson v. Bauerle, 41 N. J. Eq. 635, 7 Atl. 514; American Exchange Bank v. Ward, 111 Fed. 782, 49 C. C. A. 611, 55 L. R. A. 356; Pyles v. Riverside Furn. Co., 30 W. Va. 123, 2 S. E. 909; Graham Paper Co. v. Sheridan Pub. Co., 172 Mo. App. 495, 158 S. W. 92; Grand De Tour Plow Co. v. Rude Bros. Mfg. Co., 60 Kan. 145, 55 Pac. 848; National Bank of Commerce v. Allen, 90 Fed. 545, 33 C. C. A. 169.

would not be any benefit to the plaintiff, as [3] It was urged by the plaintiff in the it would have the effect of decreasing the trial court that the Oklahoma Fire Insurassets of the company subject to the pay-

pany had knowledge of this fact. The evidence principally relied upon by the plaintiff to establish the knowledge on the part of the Union Trust Company that said insurance company was in the process of liquidation was the records of the state insurance commissioner. It was shown that, a few days before the mortgage was executed, the state insurance commissioner had investigated the assets and financial condition of the company, and the commissioner had transmitted a copy of his report and findings to said insurance company, demanding that it proceed at once to repair its assets in order to protect policy holders, or to cease doing business and proceed to liquidate.

The law is universally settled that constructive notice is a statutory creature, and, in the absence of a statute making the record of a public office constructive notice, such record is not notice to persons dealing with the subject-matter to which such records have reference, "but the matter of constructive notice from the record is entirely a creation of statute, and no record will operate to give constructive notice unless such effect has been given to it by some statutory provision." 24 Am. & Eng. Enc. of Law (2d. Ed.) 144. Rice Stix & Co. v. Sally, 176 Mo. 107, 75 S. W. 398; Dee Lassus v. Winn, 174 Mo. 636, 74 S. W. 635; Lewis v. Johnson, 68 Tex. 448, 4 S. W. 644; Bourland v. County of Peorla, 16 Ill. 538; Betser v. Rankin, 77 Ill. 293.

It must be held therefore that the Union Trust Company was not charged with the contents of the record of the office of the state insurance commissioner relative to the financial condition of the fire insurance company.

The plaintiff also relied upon the testimony of Mr. Galbreath in regard to his informing Mr. Johnson, who acted as agent for the Union Trust Company, in making said loan, as to the financial condition of the fire insurance company. The plaintiff sought to establish by this witness that the Union Trust Company had knowledge of the status of said insurance company at the time of the execution of the mortgage, by reason of certain conversations between the witness Galbreath and Mr. Johnson. The witness does not attempt to detail any particulars of the purported conversation and does not testify to any specific facts stated to Mr. Johnson which would convey any knowledge to Mr. Johnson as to the condition of said company. There is nothing certain or positive about his testimony.

On the other hand, Mr. Johnson testified positively that there was no conversation between himself and Mr. Galbreath concerning the financial conditions or status of said insurance company, or any intimation of the condition of said company which would lead | tract has been entered into.

of the mortgage to the Union Trust Com-, to an inquiry as to its financial condition, or that said company was in the process of liquidation.

> The evidence showed that, at the time of the execution of said mortgage, the Oklahoma Fire Insurance Company was still a going concern and ceased doing business subsequent to the execution of said mortgage. The evidence of the plaintiff clearly fails to establish the fact that the insurance company was in the process of liquidation at the time of the execution of said mortgage, and that the Union Trust Company had knowledge of the condition of said company, or that said company was in the process of liquidation. There is nothing in the record that tends in the slightest degree to show that the transaction between the Oklahoma Fire Insurance Company and the Union Trust Company, whereby the Union Trust Company loaned the fire insurance company \$56,000 and gave the mortgage in question to secure the payment of same, was fraudulent. On the other hand, the record affirmatively shows that the transaction was fair, and that the Union Trust Company made the loan in good faith, and that the funds derived from said loan were used for legitimate purposes, and that there was no bad faith on the part of either of the parties to the transaction, the fire insurance company or the loan company.

It must be held that the plaintiff failed to establish grounds sufficient to invalidate said mortgage and failed to sustain his cause of action to have same canceled and set aside.

Upon the record, this case should be reversed and remanded, with directions to the trial court to enter judgment in favor of the defendant the Union Trust Company, and against the plaintiff, denying the relief sought by plaintiff.

PER CURIAM. Adopted in whole.

BOWKER v. LINTON et al. (No. 8506.) (Supreme Court of Oklahoma. April 16, 1918.)

(Syllabus by the Court.)

1. Specific Performance 4 29(2)-Convey-

ANCE OF LAND.

To entitle one to specific performance of contract for conveyance of land based upon letters, which were attached as exhibits to the petition, such letters must control in determining the contract, and must show an enforceable contract, be certain in their terms, both as to description of land and estate to be conveyed.

2. Pleading \$=310-Letters.

The letters which are attached to the petition in the case as exhibits, showing the contract sought to be enforced, must control when in conflict with the averment of the petition, in determining whether or not an enforceable con3. Specific Performance === 114(2) - Con-VEYANCE OF LAND - SUFFICIENCY OF PETI-

The petition in this case carefully considered, and held not to set up an enforceable contract of sale.

(Additional Syllabus by Editorial Staff.)

4. Frauds. Statute of e⇒129(8) — Sale of Land—"Paet Performance" of Contract. Taking possession in pursuance of a contract, together with full or part payment of the

purchase price, is a sufficient part performance; the amount of the part payment being imma-

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Part Performance.

Commissioners' Opinion, Division No. 1. Error from District Court, Pawnee County; Conn Linn, Judge.

Action for specific performance by Flora Bowker against Taylor Linton and others. Demurrer to petition sustained, and judgment for defendants, and plaintiff brings error. Affirmed.

Clark & Armstrong, of Pawnee, for plaintiff in error. McCollum & McCollum, of Pawnee, for defendants in error.

COLLIER, C. The plaintiff in error, hereinafter styled plaintiff, seeks by this action to have specifically performed by the defendants in error, hereinafter designated defendants, an alleged contract for the sale of the land described in the petition. It is averred in the petition that this contract for the purchase of said land was made by correspondence, and several letters are exhibited in support of the allegation of the petition, and in addition it is averred that the said defendants executed to the plaintiff and sent to the bank two deeds to the land in controversy, both of which deeds were rejected by the plaintiff.

We have carefully considered the petition, and are unable to find that the averments of the petition, including the exhibits thereto attached, show that an enforceable contract of sale was never entered into by and between the plaintiff and defendants for the land described in the petition. In said correspondence it nowhere appears as to what land was the subject of said alleged contract. It is averred in the petition that all of the defendants, acting through their duly authorized agent, the defendant Richard Linton, did upon the 17th day of February, 1912, write this plaintiff stating that upon the following Saturday the heirs would all meet and sign the proper deeds conveying title to the above described premises to the plaintiff herein.

Exhibit B reads as follows, and does not support the allegation of the petition as to the writer thereof being the agent of the defendants:

Exhibit B. "Holliday Cove, Feb. 7, 1912.
"My Dear Mrs. Bowker: Dated Feb. 3d, we

found us all well. Hope when this comes to hand it may find you and yours enjoying good health. Mrs. Bowker, we have after a long time got all the heirs of Catherine Linton together. My sister that we had lost track of is here visiting my elder brother at this time and I seen all of them to-day and made arrangements for us all to meet in the city of Steubenville next Saturday morning at 9 a. m. and sign a paper conveying to you the place that you wanted to buy. We have the original land grant from the government that we made to Catherine Linton the twenty-fourth day of October, 1907. We will sign that and send to you with signa-tures of all the heirs. We will go before a notary and make affidavit to all the names if this will suit you. I have your article of agreement. Will not sign until we hear from you. Since we have all got together we would rather sell than to rent, but if you have changed your mind about buying we will rent. The balance of the heirs leave the business to me. I will forward the sworn signatures Saturday the 10th. Let me know by return mail your wishes.
"Richard Linton."

The defendants demurred to the petition, which demurrer the court sustained, and, the defendant having stood upon her petition, the court rendered judgment for the defendants, to which action of the court the plaintiff duly excepted, and brings error to this court.

[1,4] In order to sustain an action for specific performance of a contract for the sale of land, it must be shown that the contract was in writing, or that part of the purchase price was paid, and the purchaser put in possession under the contract, otherwise the statute of frauds interdicts the specific performance.

To take the case out of the statute of frauds, it is said in 36 Cyc. p. 654:

"That taking possession in pursuance of the contract, together with payment in full or in part of the purchase price, is recognized by nearly all of the jurisdictions as a sufficient part performance, and the amount of the part payment appears to be immaterial."

And said text is supported by numerous cases from nearly all of the states of the Union and the Supreme Court of the United States.

In Franchot v. Nash, 162 Pac. 935, it is held:

"A contract for the conveyance of land which a court of equity will specifically enforce must be certain in its terms and such certainty applies to both the description of the land and the estate to be conveyed; and where the property described in the contract, specific performance will be denied."

"A demurrer is good against a petition ask-ing for specific performance which shows on its face that the cause of action is based upon a contract for the sale of real estate, when the contract which is set out in the pleadings fails to describe or designate with reasonable certainty any particular tract of land."

[2, 3] The correspondence which is attached as exhibits to the petition does not show that an enforceable contract was entered into by the defendants, or any agent duly authorized to act for them for the sale of the lands for which specific performance is prayed. received your kind and welcome letter which This correspondence shows negotiations were

entered into and an effort made to reach a contract for the sale of the lands, but does not show that a completed contract was entered into.

The deeds executed by the defendants to the plaintiff, and sent to the bank by them, were rejected by the plaintiff. The execution of deeds to land is not proof that a contract has been entered into by the plaintiff and defendants for the sale of the lands described in the deeds. Especially is this true where the deeds made by the defendants for the lands in controversy, which were sought to be delivered by the defendants, were rejected by the plaintiff.

It is contended by the plaintiff that the correspondence which is attached as exhibits to the petition show that an enforceable contract was entered into by the plaintiff and defendants. These exhibits, it being averred that they constitute the contract, must control regardless of any conflicting averments in the body of the petition, and, as this correspondence does not show a complete contract, but, on the contrary, shows the contract was never consummated, we cannot agree with said contention of the plaintiff.

"The allegations of a petition challenged by a general demurrer must be construed in connection with the exhibits attached to the petition." Southern Surety Co. v. Municipal Excavator Company, 160 Pac. 617, L. R. A. 1917B, 558.

In First National Bank of Arkansas City v. Jones et ux., 2 Okl. 353, 37 Pac. 824, it is

"The demurrer admits everything alleged in the complaint to be true," as a rule; "but in a case of this kind, where the exhibits control, only that shown in the exhibits can be taken as true, because of the variance between the plead-ing and the exhibit."

In the instant case the contract was by correspondence, and the correspondence, so far as exhibited, shows that an enforceable contract was not entered into. If there was additional correspondence in regard to the sale which has not been set up in the petition, such additional correspondence cannot be considered, for the reason that we take the petition when challenged by demurrer, as it stands. In short, the letters attached as exhibits constitute the alleged contract, and the sole question presented for this court is: Does such correspondence disclose an enforceable contract by and between the parties for the sale of the land for which specific performance is sought?

In Plate v. Fullerton, 46 Okl. 14, 148 Pac. 87, it is held:

"In an action for specific performance of an alleged contract for the sale of realty, it is not the function of the court of equity to enlarge upon negotiations between, or complete a contract for, parties who have not themselves agreed fully upon its terms, but only to enforce ights arising out of a valid, existing agreement." ment.

In Atwood v. Rose et al., 32 Okl. 355, 122 Pac. 929, it is held:

"No contract is complete, without the mutual assent of all the necessary parties to all its terms.

An offer to sell imposes no obligations till it is accepted according to its terms. is accepted according to its terms. So long as the negotiations remain open, neither party is bound; the one may decline to accept, or the offer may be withdrawn by the other.

"A proposal to accept or an acceptance of an offer of sale on terms varying from those offered is a rejection of the offer"—citing numerous authorities

ous authorities.

Of course, a contract for conveyance of land, valid under statute of fraud, may be made by means of letters signed by parties to be charged. In order to have an averred contract executed by letters specifically performed, it must clearly appear from such letters that a complete enforceable contract is embodied in said correspondence.

We are of the opinion that the exhibits to the petition, which control in testing the petition by demurrer, do not plead an enforceable contract for the sale of the lands, and that the court did not err in sustaining the demurrer to the petition.

This cause is affirmed.

PER CURIAM. Adopted in whole.

ROSS et al. v. LEE. (No. 8609.) (Supreme Court of Oklahoma. April 16, 1918.)

(Syllabus by the Court.)

1. LIMITATION OF ACTIONS \$== 159 - PART PAYMENT.

A credit of a debt owing by the creditor to the debtor is sufficient to lift the bar of limitations when made with the consent of the debtor.

L. sued S. on promissory note and to foreclose a mortgage on certain lands. R. by plea of intervention claimed title to the land, supe rior to the mortgage under tax deed. The trial court rendered judgment foreclosing the mort-gage and decreeing sale of the land, refused to determine the issues made by the tax deed, but enjoined R. from thereafter asserting any interest in or claim to the lands. Held, reversiterest in or claim to the lands. ble error to foreclose interest without determining the issues presented by the tax deed.

Error from District Court, Harper County; W. C. Crow, Judge.

Suit by F. J. Lee against Anon H. Smith and another, in which R. H. Ross filed a plea of intervention. Judgment for plaintiff against defendants and against intervener, and the defendants and intervener bring er-Judgment against defendants affirmed, and judgment against intervener reversed, and cause remanded, with directions to grant intervener a new trial.

Dick & Lewis, of Buffalo, for plaintiffs in error. J. L. Griffitts, of Buffalo, for defendant in error.

For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

OWEN, J. F. J. Lee brought suit in the district court of Harper county against Anon H. Smith and Lizzie Smith on a promissory note and to foreclose a mortgage on certain land executed to secure the payment of the note. R. H. Ross filed a plea of intervention and was made a party defendant, claiming the land under a tax deed, and also claiming a judgment lien superior to the mortgage. Judgment was for Lee against the Smiths on the note and foreclosing the mortgage, and against Ross only to the extent of decreeing the mortgage lien superior to the judgment lien claimed by Ross. Ross and the Smiths bring the case here.

It appears the Smiths admitted the execution of the note and mortgage, but sought to defeat the same by the statute of limitations. The note would be barred by the statute of limitations but for two credits, \$2.60 on July 16, 1907, and \$2.50 on June 28, 1912. It appears that Smith owed Lee an amount on open account, and on July 16, 1907, paid \$2.60 in settlement of this account. amount was paid to one of Lee's employés and credited on the open account. A few days later, by agreement between Lee and Smith, this credit was transferred from the open account to the note. On June 28, 1912, Smith, at the instance and request of Lee, met with Lee at a place some distance from Smith's home; Lee's purpose being to collect the note. After learning from Smith that he was unable to pay at that time, but entirely willing to do so, it was agreed that Lee would allow Smith \$2.50 for his time and trouble in coming to that point to meet Lee, and by agreement the note was credited with \$2.50. The lower court held these payments to lift the bar, and with that conclusion we agree.

- [1] Counsel cite cases supporting the well-settled rule that a credit of a debt owing by the creditor to the debtor is not sufficient to lift the bar, when made against the consent of the debtor. That rule has no application to the facts here. The rule is equally well settled that, when the credit is made with the consent of and by agreement with the debtor, it will constitute payment and interrupt the statute. 25 Cyc. 1380; McKeon v. Byington, 70 Conn. 429, 39 Atl. 853; State Nat. Bank v. Harris, 96 N. C. 118, 1 S. E. 459; Eureka Cedar L. & S. Co. v. Knack, 95 Wash. 339, 163 Pac. 753.
- [2] The judgment so far as it relates to Anon H. Smith and Lizzie Smith must be affirmed. It appears from the record that the trial court refused to determine the issues presented by the tax deed pleaded and offered in evidence by Ross, but, notwithstanding this, enjoined and foreclosed Ross from any right, interest, estate, or equity in or to the land in question. In the journal entry appearing in the case-made, it is said:

"It is further ordered by the court that no action be had upon the answer and petition

OWEN, J. F. J. Lee brought suit in the strict court of Harper county against Anon. Smith and Lizzie Smith on a promissory of eand to foreclose a mortgage on certain and executed to secure the payment of the

The journal entry concludes, however, as follows:

"It is further ordered and adjudged by the court that from and after the sale of said lands and after the payment of this judgment and decree, that the defendants, Anon H. Smith. Lizie Smith, Andrew Hanson, and R. H. Ross, and all persons claiming under them since the commencement of this action be and are forever barred and foreclosed from all lien, right, title, interest, estate, or equity of, in, or to said lands and tenements or any part thereof."

The judgment of the trial court against Anon Smith and Lizzie Smith is affirmed, but reversed as to Ross and the cause remanded, with directions to grant Ross a new trial and proceed to determine the issues presented by the tax deed.

BRETT, MILEY, and TISINGER, JJ., not participating. The other Justices concur.

SARGENT et al. v. SHAVER et al. (No. 8433.)

(Supreme Court of Oklahoma. April 16, 1918.)

(Syllabus by the Court.)

GUARDIAN AND WARD €==71 — VENDOR AND PURCHASER €==233 — AUTHORITY TO MAKE LEASE—RECORDS.

The record in this case examined, and there being ample evidence to support the judgment of the court, the same is approved.

Commissioners' Opinion, Division No. 3. Error from Superior Court, Tulsa County: M. A. Breckinridge, Judge.

Action by J. S. Shaver and others against J. M. L. Sargent and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

John E. Lydecker, Charles A. Steele, and Edgar M. Lee, all of Tulsa, for plaintiffs in error J. M. L. Sargent, J. W. Leach, and R. E. Perry. Robinson & Mieher, of Tulsa, for defendant in error J. S. Shaver.

HOOKER, C. A judgment was had in the lower court in favor of defendant in error, Shaver, against plaintiffs in error for the possession of the real estate involved here, and also quieting his title thereto, and for damages for the unlawful use thereof by them for the year 1910.

It is urged that a reversal should be had because: First. The court erred in overruling demurrer of R. E. Perry to the evidence. Second. The court erred in assessing damages as same are excessive and not sustained by the evidence. Third. The court erred in finding for Shaver against Perry in the ejectment matter.

We will consider the objections as urged.

It is here claimed that Perry and Shaver ac- at the time of the institution of this action quired title from a common source; that the plaintiffs in error here and the defendis, that on August 13, 1912, Fred Chandler and the Colonial Trust Company, as guardians of Pink W. Watson, Jr., conveyed this property to one J. P. Evers, under and by deed duly authorized and approved by the county court of Tulsa county, and Evers conveyed same on August 31, 1912, to Shaver, and on July 3, 1912, before either of said deeds were executed, one of said guardians had made an agriculture lease thereon for the year 1913, to commence January 1, 1913. (This lease was made without any order of the county court or without any knowledge of the other guardian, and was not of record.) And inasmuch as the lease of Perry's was first made to him by one of the guardians, that being first in time, he was entitled to a judgment here. Young v. Chapman, 37 Okl. 19, 130 Pac. 289. Not so here. Perry never recorded his lease, and at the time Evers bought this land from the guardians by the approval of the county court, he had no knowledge of the Perry lease either actual or constructive, and neither Perry nor his tenant was in possession thereunder, for same was not to commence until months thereafter, and after Shaver purchased it the tenant in possession never informed him of the lease to Perry, but in December, 1912, made a lease to cultivate it for the year 1913. And then one guardian alone had no authority to make this lease to him without the consent of the other.

In 12 R. C. L. p. 1173, it is said:

"When both have qualified, the authority vested in them is joint and to be exercised by both together."

And then section 1154, Rev. Laws 1910, is as follows:

"Except as hereinafter provided, no acknowledgment or recording shall be necessary to the validity of any deed, mortgage or contract relating to real estate as between the parties thereto; but no deed, mortgage, contract, bond, lesse or other instrument relating to real estate other than a lease for a period not exceeding one year and accompanied by actual possession, shall be valid as against third persons unless acknowl-edged and recorded as herein provided."

It is therefore clear that the demurrer filed by Perry was properly overruled.

The court found and so adjudged that Perry and those holding under him occupied the premises for the year 1913, and that the damages suffered by the owner, Shaver, was the reasonable rental value of the land-This evidence discloses that Shaver leased the land in December, 1912, to one S. for the year 1913, and S. attorned to him until the spring of 1913, and then surrendered his lease, but remained thereon as the tenant of Perry, as did the others who cultivated the land, although Shaver tried in vain by suit and otherwise to acquire the possession thereof. The amount of the judgment is justified by the evidence.

ants below were holding possession of this property adverse to Shaver and not with his consent, and the judgment ejecting them was proper.

Judgment affirmed.

PER CURIAM. Adopted in whole.

McINTOSH et al. v. REASON et al. (No. 8737.)

April 9, 1918. (Supreme Court of Oklahoma. Rehearing Denied April 30, 1918.)

(Syllabus by the Court.)

DEEDS 4=203—COMPETENCY OF GRANTOR— ORDER OF COURT.

An order of the county court adjudging person incompetent, who has previous to such order transferred real estate, is incompetent and not admissible as evidence of the incompetency of such grantor at the time of the transfer of such real estate.

2. LIS PENDENS @==1-NATURE OF DOCTRINE.

The doctrine of lis pendens cannot be based upon a proceeding instituted after the conveyance in controversy was taken.

3. COMPETENCY OF GRANTOR-EVIDENCE.

Evidence examined, and the judgment of the trial court held not to be clearly against the weight thereof.

Commissioners' Opinion, Division No. 1. Error from District Court, Creek County: Ernest B. Hughes, Judge.

Action by Polly McIntosh and others against Isiah Reason and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

Miller & Dean, of Sapulpa, for plaintiffs in error. Burke & Harrison, of Sapulpa, for defendants in error.

RUMMONS, C. This action was originally commenced by Tom Robins, an incompetent, by his guardian, S. L. James, against the defendants. After the commencement of this action, Tom Robins died, and the action was revived in the name of the plaintiffs, his heirs at law. In this action the plaintiffs seek to have canceled a deed executed by Tom Robins to Islah Reason and a certain deed from Islah Reason to the other defendants, upon the ground that at the time of the execution of the deed to Isiah Reason the said Tom Robins was mentally incompetent and insane and because of fraud and want of consideration. The cause was tried to the court, resulting in a judgment for the defendants, to reverse which plaintiffs bring this proceeding in error.

Counsel for plaintiffs have made no assignments of error in their brief. Their argument, however, is addressed principally to the proposition that the judgment of the court is against the weight of the evidence. In-3. The evidence here fully discloses that | cidentally, there is discussed the question of Creek county adjudging Tom Robins incompetent and appointing a guardian of his person and estate. Although the brief of counsel for plaintiffs contains no assignments of error, we will consider the propositions argued in the brief.

Tom Robins, a Creek freedman, was allotted the land in controversy. On November 13, 1913, one J. L. Byrne filed a petition in the county court praying the appointment of a guardian for Tom Robins on the ground that he was incompetent. Notice of the hearing of the petition was duly served on Tom Robins on November 13, 1913, and the petition was set down for hearing on November 29, 1913. As far as the records disclose, no action was taken upon this petition. March 21, 1914, Tom Robins executed and delivered to Isiah Reason a warranty deed to his allotment, and thereafter on March 23, 1914, Reason conveyed a one-half interest in said allotment to the defendant Steinhorst. On October 9, 1914, the county court of Creek county, upon the petition of Polly McIntosh, one of the plaintiffs, notice of the hearing of which petition was served upon Tom Robins on September 19, 1914, made an order adjudging Tom Robins an incompetent and appointing S. L. James his guardian. Thereafter this action was commenced by S. L. James as guardian to cancel the deeds above mentioned.

[1] At the trial the plaintiffs offered in evidence the petition of J. L. Byrne for the appointment of a guardian, the notice of hearing on said petition and the order of the county court adjudging Tom Robins an incompetent and appointing S. L. James his guardian. The trial court sustained an objection to the offer of this evidence. In this he committed no error. In Duroderigo v. Culwell, 152 Pac. 605, this court says:

"But the plaintiff complains that the trial court refused to allow him to introduce in evicourt refused to allow him to introduce in evidence a finding of the county judge, who adjudged Duroderigo incompetent, which finding is to the effect that he was an imbecile from his birth. The court permitted the plaintiff to introduce the order for the purpose of showing that Duroderigo had been adjudged incompetent on July 26, 1912, and that Frank O'Savior was at that time appointed his legal guardian. This evidence was clearly competent for the purpose of showing that this action was properly prosecuted by guardian, but the district court could not be bound by the finding of fact made by county judge that he had been an imbecile from his birth, and the exclusion of this evi-dence was not error. That was the very question which had been made an issue by the plaintion which had been made an issue by the plain-tiff in the district court, and was then being tried to a jury, and they should have been left free to pass upon that question in the light of the evidence introduced in their hearing upon that question. And the offer of this finding of fact was an attempt to invade their province."

In the instant case the authority of the guardian to maintain the action was not in

the effect of an order of the county court of | tion revived in the names of the ward's heirs; therefore the adjudication by the county court of the incompetency of Tom Robins was incompetent for any purpose as against conveyances made by him before such adjudication.

[2] It is urged by counsel for plaintiffs that the order of the county court adjudging Tom Robins an incompetent is binding upon the defendants for the reason that this conveyance was taken between the filing of the petition and the appointment, and therefore the doctrine of lis pendens applies against the defendants. Without determining whether or not the doctrine of lis pendens will apply to a proceeding to adjudicate one an incompetent and to appoint a guardian of his person and estate, it is apparent that the doctrine can have no application to the instant case. The adjudication of the incompetency and the appointment of the guardian was made upon the petition of Polly McIntosh, the date of the filing of which does not appear; but notice of which was served upon Tom Robins on September 19, 1914, long after the conveyance upon which defendants rely had been taken. The petition of J. L. Byrne seems to have been abandoned, and the plaintiffs cannot invoke the doctrine of lis pendens upon a proceeding instituted after the conveyances in controversy were taken.

[3] The evidence is voluminous, and it would serve no good purpose to attempt to set it out in this opinion. From an examination of the entire record, it does not appear that the finding of the trial court is clearly against the weight of the evidence. judgment of the trial court will not therefore be disturbed.

The judgment should be affirmed.

PER CURIAM. Adopted in whole,

OSTRAN v. BOND et al. SAME v. HARRAH. (Nos. 8707, 9387.)

(Supreme Court of Oklahoma. April 2, 1918. Rehearing Denied April 30, 1918.)

(Syllabus by the Court.)

1. Limitation of Actions 4=100(12)—Fraud DISCOVERY.

O. and B. entered into an agreement for the exchange of real estate, and in furtherance thereof B. executed to O. a deed, dated Novem-ber 11, 1912, which deed contained a general warranty, except: "As to a \$2,000 mortgage ber 11, 1912, which deed contained a general warranty, except: "As to a \$2,000 mortgage due January 1st, 1915, which said second party (O.) agreed to assume and pay at 7 per cent." On January 11, 1915, O. instituted suit against B, to cancel and set aside the note and mortgage which O. had assumed in the deed to pay, on the ground of frond Held that these being the ground of fraud. Held that, there being no allegation in the petition of the illiteracy of O., he must be held to have had notice of the alleged fraud at the time he accepted the issue, since his ward was dead and the ac- deed, and, more than two years having elapsed

from the time of accepting said deed to the bringing of said action, said action is barred by the statute of limitations of two years, and the court did not err in sustaining a demurrer to the petition.

2. Limitation of Actions \$\infty\$=180(2)-Plead-ING-DEMURRER.

Where a petition upon its face shows that the action brought is barred by the statute of limitations, it is not error for the court to sustain a demurrer to the petition upon the ground that the petition does not state a cause of action.

3. MORTGAGES \$==275-Assumption of Mort-GAGE-DEFENSE AGAINST MORTGAGE.

Where one purchases land and accepts a deed containing a provision "that such land is subject to a mortgage, and assumes the payment of the debts secured by said mortgage," he will not be permitted to question the validity of such mortgage, and, where the only defense pleaded to an action of foreclosure of said mortgage is the invalidity of the mortgage due to alleged fraud practiced upon the purchaser by the deed accepted by him, such answer does not state a legal defense, and the court did not err in awarding judgment on the pleadings.

Commissioners' Opinion, Division No. 1. Error from District Court, Lincoln County; Chas. B. Wilson, Jr., Judge.

Action by Peter Ostran against Jesse W. Bond and another to cancel and set aside a note and mortgage, with interpleader by J. Harrah. Defendant's demurrer to petition sustained, and judgment rendered for defendant, and interpleader's motion for judgment on the pleadings sustained, and plaintiff brings error. Judgment in both cases affirmed.

F. A. Rittenhouse, of Chandler, for plaintiff in error. John H. Myers, of Oklahoma City, and Emery Foster and H. W. Harris, both of Chandler, for defendants in error.

COLLIER, C. While this cause comes here under two cases-made, and it is stated that said causes were consolidated in the trial court, there is in fact but one case, and the two so-called cases will be reviewed as one: both of said cases being submitted under the same briefs.

On January 11, 1915, Peter Ostran, hereinafter styled "plaintiff," brought an action against Jesse W. Bond and G. E. Bond, hereinafter styled "defendants," to cancel and set aside a certain note and mortgage made by Jesse W. Bond to G. E. Bond, covering lots owned by plaintiff, on the ground of fraud, to which petition was attached as an exhibit the deed which the plaintiff accepted from the defendant G. E. Bond, which deed was dated November 11, 1912, and contained the following:

"To have and to hold said described premises unto the said party of the second part (referring to Peter Ostran) his heirs and assigns forever, free, clear and discharged of and from all former grants, charges, taxes, judgments, mortgages, and other liens and incumbrances of whatsoever nature except a two thousand (2, 000) dollar mortgage due January 1, 1915, which second party (who is Peter Ostran) agrees that date in the sum of \$2,000, due and pay-

to assume and pay at seven per cent." (The words inclosed in the parenthesis are added by the writer of the opinion for explanation.)

An amended petition was filed, which said amended petition in substance averred that the plaintiff and defendant entered into a contract partly verbal and partly written, for the exchange of property in Kansas for a certain hotel building and lots upon which the building is located in Davenport, Okl., and attached to said petition said written contract, which is as follows:

"This contract made this the 15th day of November, by and between Peter Ostran, party of the first part, and Jesse W. Bond, party of the second part, witnesseth:

"The party of the first part agrees to exchange his farm the N. E. quarter of 29-29-11 in Elk county, Kansas, for the second party's hotel at Davenport, Oklahoma, and also furniture as per list attached.

"It is hereby mutually agreed that the properties above described are to be exchanged Jan. 1st. equity for equity.

1st. equity for equity.

"Party of the first part is to pay all taxes for year 1912 and interest on \$4,500.00 loan to March 1st, 1913.
"Possession of farm Jan. 1st, but second par-

ty is given the privilege to rent same at once.

"Party of second part is to pay all taxes for year 1912, and interest on loan to Jan. 1st, 1913, possession given Jan. 1st, 1913, each party to furnish abstract for examination as soon as possible deeds to be left in escrow at the First National Bank in Howard, Kansas, to be delivered to each party upon approval of abstracts showing them to be merchantable abstracts.

Peter Ostran.

"Jesse W. Bond."

The petition, in substance, further averred that during the negotiations the said Jesse W. Bond, with intent to deceive this plaintiff, and as an inducement to plaintiff to enter into said contract, willfully and fraudulently with intent to defraud this plaintiff, represented to said plaintiff that the said hotel property above described was located upon the above-described lots, and that said lots were each 50 feet in width, and that the two lots were 100 feet wide, which representation was false and was well known by the defendant Jesse W. Bond at the time, the lots being 25 feet in width, and that the two lots were only 50 feet wide; said plaintiff believed said statements represented by the defendant were true, and, relying upon the good faith and representations of the defendant as aforesaid, was induced to exchange his Kansas property, which the plaintiff at the time was the absolute owner in fee simple, for said hotel property; that on the 11th day of November, 1912, four days before the said properties were exchanged, the defendants Jesse W. Bond and G. E. Bond confederated and conspired together for the purpose of defrauding the plaintiff in the following man-

interest at the rate of 7 per cent. per annum; that at the time and place and as a part of the same transaction, and for the purpose of securing the payment of said note, the defendant Jesse W. Bond made, executed, and delivered unto the defendant G. E. Bond his certain mortgage in writing, upon said hotel property: that on the 11th day of November. 1912, the said lots in the town of Davenport were transferred by the defendant Jesse W. Bond by a warranty deed to the plaintiff, and the plaintiff transferred to the defendant by warranty deed, the foregoing farm in Elk county, Kan., as a consideration for the Davenport property; that the plaintiff did not discover for some time after said deal was consummated and the deed to said Davenport property sent back to the bank that the said deed showed that a \$2,000 mortgage had been assumed by him; that said plaintiff relied entirely upon the representations made to him by the said defendant Jesse W. Bond that there was no mortgage on said lots and hotel, believing said defendant was reliable: that the plaintiff, after learning of said mortgage, demanded of said defendant Jesse W. Bond rescission of their said contract, and that said Kansas property be returned to him by deed from the said Jesse W. Bond. and then and there offered to return the deed to said Jesse W. Bond to said Davenport property, which the said Jesse W. Bond refused to do; that said mortgage as aforesaid is wholly void, and was secured by fraud and misrepresentations; that the plaintiff is not indebted to the defendant in any sum; that said lots in Davenport, with the 50 feet added as represented, would have been of the reasonable value of \$2,500.

The petition shows that the deed executed to the plaintiff by the defendant for the hotel property was executed November 11, 1912, and delivered to him prior to January 1. 1913, and more than two years prior to the 11th day of January, 1915, the time action was commenced to cancel said mortgage.

On February 24, 1915, J. Harrah, hereinafter styled "interpleader." moved to be allowed to interplead in said cause upon the ground that he was the owner by assignment of the mortgage sought to be canceled in plaintiff's action, which motion was granted. and thereupon on March 1, 1915, the said interpleader filed his answer and interplea to the petition of the plaintiff, and sought a foreclosure of the mortgage in the sum of \$2,000, which mortgage is prayed to be canceled in the petition of the plaintiff.

To the amended petition the defendants interposed a demurrer upon the ground:

"That the petition does not state facts suffi-cient to constitute a cause of action in favor of the plaintiff, and against the defendant."

The court sustained the demurrer to the petition, and, the defendant failing to plead further, judgment was rendered for the de- tions, the same is properly reached by a gen-

able on the 1st day of January, 1915, with | fendant. Thereafter the plaintiff filed an answer to the cross-petition of the interpleader, and as a part of his said answer made his amended petition a part of said answer by reference. A demurrer was interposed by the plaintiff to the answer and cross-action of the intervener, which was overruled and excepted to, and thereupon the said plaintiff filed an answer to said cross-action, and made his amended petition a part thereof. To said answer to said cross-petition said interpleader demurred upon the ground that the answer does not state facts sufficient to constitute a defense to the cross-action, which said demurrer was in part sustained, and a part overruled. On the 30th day of March, 1917, said intervener filed a motion for judgment on the pleadings, which motion was sustained by the court, and a judgment awarded in favor of the interpleader for the sum of \$2,330.36, with interest thereon at the rate of 7 per cent. per annum from the 7th day of April, 1917, and decreed a foreclosure of the mortgage for the satisfaction of said judgment, to which the plaintiff excepted and perfected an appeal to this court.

The assignments of error are as follows:

"In case No. 8707, we contend that the court erred: First, in sustaining the demurrer of the defendants to the second amended petition of the plaintiff Peter Ostran; and, second, in the rendering judgment in favor of the defendants and against the plaintiff, dismissing said action.

"In case No. 9387, we contend that the court erred: First, in sustaining the motion of J. Harrah for judgment on the pleading and in rendering judgment for J. Harrah and against plaintiff

ing judgment for J. Harrah and against plaintiff in error on the pleadings."

[1] There are but two questions involved in this appeal: First. Action of the court in sustaining the demurrer of the defendant to the second amended petition of the plaintiff. Second. Action of the court in sustaining motion of the interpleader for judgment on the pleadings, and in rendering judgment for the interpleader against the plaintiff on the

Having exhibited, as a part of his petition, the deed executed herein, in which it is set up "the assumption by the plaintiff of the payment of the mortgage," which he seeks by this action to have canceled, the plaintiff is held to have had notice of the fraud-if fraud was practiced upon him-from the time that he accepted the deed, as it is not averred that the plaintiff was an ignorant man or could not read or write, and therefore must be charged with having notice of such alleged fraud from the time he accepted the deed, and, having accepted the deed for more than two years prior to the time of filing his petition for a cancellation thereof, the action was barred by the statute of limitations (section 4657, subd. 2, Revised Laws 1910). and the court did not err in sustaining a demurrer to the petition. Where, as in the instant case, the petition upon its face shows that it is barred by the statute of limitaeral demurrer to the petition. Froage et al. v. Webb, 165 Pac. 150.

[2] Where the exhibits attached to plaintiff's petition show upon their face that the cause of action set out therein is barred by the statute of limitations, and there are no allegations in the petition to show that the cause of action is not barred, 'a demurrer to the petition should be sustained. Fox v. Ziehme, 30 Okl. 673, 120 Pac. 285; Grimes v. Cullison, 3 Okl. 268, 41 Pac. 355; Whiteacre v. Nichols, 17 Okl. 387, 87 Pac. 865; Territory v. Woolsey, 35 Okl. 545, 130 Pac. 934.

The plaintiff, in answer to the cross-action of the interpleader, having set up as a part thereof his amended petition, and it appearing by said amended petition that "the deed the plaintiff had received from the defendant contained a provision for the payment of a \$2,000 mortgage," and basing his defense alone upon the invalidity of said mortgage due to fraud practiced upon him in the deed executed to him, said answer failed to set up a defense to the cross-action of the interpleader for the foreclosure of the mortgage, and the court did not err in sustaining a demurrer to that part of the answer.

[3] Having assumed by the deed, which he accepted from the defendant, payment of the mortgage which by his petition he seeks to have canceled, the plaintiff was estopped to set up the invalidity of the mortgage.

In the well-considered case of United States Bond & Mortgage Co. v. Keahey et al., 155 Pac. 557, L. R. A. 1917C, 829, it is held:

"Where one purchases land subject to a mortgage thereon, the land conveyed is effectually charged with the incumbrance to the same effect as if the purchaser had expressly assumed the payment of the debt, or had himself made a mortgage on the land to secure it; and, under such circumstances, the purchaser will not be permitted to question the validity of the mortgage on the ground that it was void as to his grantor."

In Jones v. Perkins, 43 Okl. 734, 144 Pac. 183, it is said:

"The purchaser is not allowed to defend against the mortgage he has assumed to pay, on the ground that it was made without consideration, or that the consideration has failed, and therefore is not valid against his grantor; for the latter having appropriated a portion of the purchase price of the land to the payment of a sum of money to a third person, and made it a charge upon the land, it does not matter whether there was any legal obligation upon him to pay it, or whether it was at the time of the sale a lien upon the land; his grantee, having undertaken to pay it, is precluded from assailing its validity " "citing in support of this doctrine, among others, the cases of Freeman v. Auld, 44 N. Y. 50; Trusdell v. Dowden, 47 N. J. Eq. 396, 20 Atl. 972; Gowans v. Pierce, 57 Kan. 180, 45 Pac. 586."

In Johnson v. Thompson, 129 Mass. 398, it is held:

"A grantee of land is estopped to deny the validity of a mortgage to which his deed recites that the conveyance to him is subject."

It therefore clearly appears that the plaintiff was estopped from setting up the only defense attempted to be pleaded by his answer to the cross-action, "the invalidity of the mortgage sought to be foreclosed by the interpleader on account of the alleged fraud practiced on the plaintiff by the defendant in the execution of the deed," and, the answer not setting up any legal defense, the court properly entered judgment on the pleadings for the amount for which judgment was rendered, and properly decreed a foreclosure of the mortgage for the satisfaction of said judgment-a canon of the law so well established as not to need a citation of authority in support thereof.

Finding no error in the record, both cases Nos. 8707 and 9387 are affirmed.

PER CURIAM. Adopted in whole.

HINTON v. TROUT. (No. 8460.)
(Supreme Court of Oklahoma. Feb. 26, 1918.
Rehearing Denied May 7, 1918.)

(Syllabus by the Court.)

LIMITATION OF ACTIONS \$= 72(1)—DISABILED

—INFANTS.

Where a statute of limitations excepts persons laboring under disabilities from its operation, without mentioning infants specifically, infants are within the saving clause of the statute, and the statute does not run against them during such disability, even where such infant has a guardian who might maintain the action in his or her name, provided the title or right of action is in the infant.

Error from District Court, Jefferson County; Cham Jones, Judge.

Action by Catherine Trout against George W. Hinton. Judgment for plaintiff, and defendant brings error. Affirmed.

H. A. Ledbetter and F. M. Adams, both of Ardmore, for plaintiff in error. Guy Green and Bridges & Vertrees, all of Waurika, for defendant in error.

KANE, J. This was an action upon a promissory note, commenced by the defendant in error, plaintiff below, against the plaintiff in error, defendant below. The petition alleged in substance that John W. Jones, J. J. Berry, and G. W. Hinton executed their certain promissory note on the 12th day of April, 1902, payable to Mrs. M. A. Stillwell, who at that time was the guardian of the plaintiff, Catherine Trout; that the money loaned upon said promissory note belonged to the estate of the plaintiff, Catherine Trout, who at that time was a minor; that said Mrs. M. A. Stillwell as guardian of said plaintiff failed and neglected to file suit to recover the amount due said estate upon said note; that said plaintiff became of full age within a year prior to the com-

For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

mencement of this action, and she now wishes to prosecute the same in her own name.

G. W. Hinton was the only one of the makers of the note who was served with summons in said action, and he filed an answer to the effect that the alleged cause of action of the plaintiff did not accrue at any time within the five years next preceding or before the commencement of said action, and therefore it was barred by the governing statute of limitations, to wit, section 4483, Mansf. Dig. Ark., which, it is agreed, was in force in the Indian Territory at the time the alleged cause of action accrued. The reply of the plaintiff was a general denial. Upon trial to the court there were findings of fact and conclusions of law in favor of the plaintiff, upon which judgment was duly entered, to reverse which this proceeding in error was com-

Among the findings of fact by the trial court is the following:

"The court further finds that shortly after the maturity of the note, defendant, G. W. Hinton, and the guardian M. A. Stillwell, entered into an agreement without consideration and in fraud of the rights of said minor, this plaintiff, that she, the said guardian, would not look to him for any part of said note, and in fact said guardian has never made any effort to collect said note from any of the signers thereto, and has wholly failed from the maturity of said note to the commencement of this action to take any action whatever to protect the rights of said minor."

The only ground for reversal relied upon by counsel for plaintiff in error in their brief is to the effect that the alleged cause of action of the defendant in error was barred by the statute of limitations, as contained in section 4483, Mansf. Dig. Ark., which provides:

"Actions on promissory notes, and other instruments in writing not under seal, shall be commenced within five years after the cause of action shall accrue, and not afterward."

Whilst it is conceded by all parties that the Arkansas statute above quoted is controlling, the saving clause of the statute is not set out in the briefs on file. But from the arguments of counsel for both parties, we take it that it is similar to the saving clause of the statute of limitations as now in force in this state. Assuming this to be true, we find that this court has recently passed upon the precise question now presented for consideration. Title Guaranty & Surety Co. v. Burton, Minor, etc., 170 Pac. 1170, just handed down, and not yet officially reported. In that case it was held:

"Where a statute of limitations excepts persons laboring under disabilities from its operation, without mentioning infants specifically, infants are within the saving clause of the statute, and the statute does not run against them during such disability, even where such infant has a guardian who might maintain the action in his or her name, provided the title or right of action is in the infant."

As this case seems to be decisive of the question presented for review, upon the authority thereof the judgment of the court below must be affirmed. All the Justices concur.

COLE et al. v. INDUSTRIAL SAV. SOC. (No. 8617.)

(Supreme Court of Oklahoma. April 9, 1918. Rehearing Denied May 7, 1918.)

(Syllabus by the Court.)

BUILDING AND LOAN ASSOCIATIONS \$\( \sigma 39(8) \)
—MORTGAGE—FORECLOSURE—EVIDENCE.
Evidence examined, and held not sufficient

Evidence examined, and held not sufficient to support the judgment rendered by the trial court.

Error from District Court, Logan County; A. H. Huston, Judge.

Action to foreclose a mortgage by the Industrial Savings Society, a corporation, against W. H. Cole and others. Judgment for plaintiff, and defendants bring error. Reversed and cause remanded, with directions to grant a new trial.

T. C. Whitely and O. R. Fegan, both of Guthrie, for plaintiffs in error. Tibbetts & Green, of Guthrie, for defendant in error.

KANE, J. This was an action to foreclose a mortgage, commenced by the defendant in error, plaintiff below, against the plaintiffs in error, defendants below.

The plaintiff purported to be a building and loan association which loaned money only to its members, and the mortgage was upon one of its forms. The defendants in the trial court pleaded usury, and alleged that there was no competitive bidding for the loan in question, and that by reason thereof the transactions between the plaintiff and the original mortgagee created only the relation of lender and borrower, and that upon this basis the present owners of the mortgaged premises had overpaid the plaintiff the amount justly due it. There were allegations by way of cross-petition that the contract was usurious, and that, instead of the defendants being indebted to the plaintiff, the plaintiff was indebted to the present owners of the mortgaged premises. The reply of the plaintiff was a general denial. Upon trial to the court the plaintiff, to establish the issues in its behalf, introduced in evidence a money bond in the sum of \$2,500, which was deposited to secure the payment of the original mortgage and proved the assignment of the stock in said association issued to Cole, the original mortgagee, to his assignors, the present owners of the mortgaged premises, and also introduced the following itemized account which purports to be a correct statement of the

For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

plaintiff and the present holder of the Cole stock:

#### Exhibit E.

Cert. No. 1584. Date, Feb. 2, 1903. No. shares, 25. Loan No. 197. Amount, \$1,250.00. Computed to Nov. 30, 1912. F. M. Collar, Guthrie, Okla. Original mortgagor, W. H. Cole. In Account with Industrial Savings Society of Detroit, Michigan.

To amount of loan	\$1,250.00	
April 12 to Nov. 12, inclusive, payments in arrears	125.04	
Interest on deferred payments balance	22.35	
Insurance paid Extension of abstract	5.40 4.70	
Int. on insurance	1.22	
		\$1,408.71

Cr. By amount paid on stock and included in above ar-737.50 rears ...... 202.20 Profits ..... 939.70

To repay Dec. 1, 1912..... \$ 468.81

In addition to this, counsel for plaintiffs admitted that the defendants have made a total of 111 payments, amounting to \$1,734.-42, whereupon the defendants called several witnesses in support of the issues in their behalf. At the close of the evidence the court rendered judgment for the plaintiff against M. M. Meek, M. Collar, and Julia Collar in the sum of \$468.81, together with an attorney's fee of \$45, costs of suit, and accrued interest, and rendered decree foreclosing and ordering that said property be sold to satisfy said judgment, to reverse which this proceeding in error was commenced.

Counsel for plaintiffs in error in their brief present their grounds for reversal under numerously numbered propositions, all of which under our view of the case, may be summarized into one, to wit, that the decision of the court is not supported by, and is contrary to, the evidence produced at said trial. This ground for reversal seems to us to be well taken. The trial court undoubtedly entered judgment in favor of the plaintiff for the amount due it, as shown by the foregoing itemized account which was introduced in evidence by the plaintiff, without objection. It will be observed that one of the credit items of this account shows the total payments on stock to be \$737.50. The statement further shows that, computing the amount due upon this basis, the result would be as found by the court. But we are unable to harmonize this part of the itemized account with the subsequent admission of counsel for plaintiff, to the effect that the defendants have made a total of 111 payments, or in the total sum of \$1,734.-42. It seems to us that the trial court must have disregarded this admission in render-

present standing of the account between amount due the plaintiff was \$1,408.71, as shown by their statement, and the defendants, as counsel admit, had paid \$1,734.42, it requires but a simple mathematical computation to show that, instead of the defendants being indebted to the plaintiff, the plaintiff was indebted to the defendants.

Counsel for plaintiffs in error in their brief present several computations based upon the various views which may be taken as to the nature of the contract between the parties for the purpose of showing that, if the admission of counsel as to the total number and amount of the payments is considered, the evidence shows the claim to be overpaid, whether the instrument involved is held to be purely a building and loan contract or merely a mortgage to secure the payment of a loan, and say that in view of this they are entitled to judgment over against the plaintiff upon their cross-petition. Ordinarily this would be true, but inasmuch as we are unable to gather from the record before us the view entertained by the trial court as to the nature of the contract, or the precise rate of interest allowable under such view, we are disposed to reverse the cause and remand it for a new trial, in order that these points may more clearly appear if the case comes before us again for decision.

For the reason stated, the judgment of the court below is therefore reversed and the cause remanded, with directions to grant a new trial. All the Justices concur.

BEAN et al. v. RUMRILL. (No. 8229.)

(Supreme Court of Oklahoma. Feb. 5, 1918. On Motion for Rehearing, April 30, 1918.)

### (Syllabus by the Court.)

USURY €==56 - USUBIOUS TRANSACTION -CONTRACT.

Where a money lender engages an agent to Where a money lender engages an agent to make loans of money, and such agent procures a contract with the borrower by which the borrower agrees to pay 10 per cent. per annum interest from the time the money is lent, and in addition thereto, as a part of the same transaction, the agent requires the borrower to contract for or to pay an additional sum for the use of the money under the guise of a so-called commission, the entire contract is construed together and is usurious.

2. Principal and Agent ==178(1)—Act of AGENT-NOTICE TO PRINCIPAL.

The lender of money is charged with notice of the acts of his agent within the scope of the agent's authority.

Limitation of Actions \$\infty 87(3) - Run-NING OF STATUTE-NONRESIDENT.

A statute of limitation does not begin to run against a cause until the case is brought under its operation, and does not run in favor of a nonresident of the state until summons can be served within the state and a valid personal judgment had which can be enforced ing judgment for the plaintiff. If the total in a mode provided by law.

4. Limitation of Actions €==59(2)-Usury =186-RECOVERY OF TWICE THE USURIOUS - CONSTITUTIONAL AND STATU-INTEREST -

TORY PROVISIONS.

The constitutional provision and subsequent legislative enactment of this state authorising the recovery of twice the usurious interest paid on a usurious contract in "an action in the nature of an action for debt" is an enlargement of the common-law remedy authorizing the re-covery in an action for debt of interest paid in excess of the lawful rate, and the evident intention of the lawmakers was that the limitation prescribed within which the action must be brought was subject to the same tolling pro-visions of the statute that apply to other actions for debt.

5. USURY 6=139—RIGHT OF ACTION.

The fact alone that usurious interest was paid by sale of the borrower's property pursuant to a judgment of mortgage foreclosure does not prevent the borrower from afterwards maintaining an action to recover twice the usurious interest so paid.

6. LIMITATION OF ACTIONS \$\infty\$59(2)—USURY.

An action to recover twice the amount of the interest paid on a usurious contract may be brought within two years from the payment and discharge of such contract or from the last payment of interest thereon.

7. LIMITATION OF ACTIONS \$\infty\$58(1)\to STATUTORY ACTION\to TOLLING OF STATUTE.

The fact that a cause of action is created

by statute and did not exist at common law does not necessarily prevent the limitation as to time within which same may be brought from being subject to the tolling provisions of the statute.

8. Limitation of Actions \$\infty 87(1)\to Tolling Statute\text{-Construction.}

The provision of section 4660, Rev. Laws 1910, tolling the statute of limitation on account of absence from the state applies to an action for the recovery of twice the amount of interest paid on a usurious contract.

9. JUDGMENT & 735-RES JUDICATA-USURY.
A judgment for the full amount of the principal and interest contracted for in a usurious transaction is not res adjudicata as to an ac-tion brought afterwards for the recovery of twice the usurious interest paid in satisfaction of such judgment.

# (Additional Syllabus by Editorial Staff.) 10. TRIAL €==156(3)—DEMURBER TO EVIDENCE

-Admissions.

A demurrer to plaintiff's evidence admits for the purpose of the demurrer all the material facts in evidence, including legal presumptions and admissions, either in the pleadings or oth-erwise in the most favorable light of the plain-

11. APPEAL AND EBBOR \$== 1169(1)--ERRONE-

OUS SUSTAINING OF DEMURER-REMAND.

If a demurrer to plaintiff's evidence is wrongfully sustained, the cause, on appeal, may be remanded for new trial, or judgment, either rendered or directed as the record warrants.

12. USURY \$== 75, 107-CONTRACT-EFFECT.

When a contract is originally usurious, the taint of usury attaches to all subsequent transactions in connection therewith, and even to a judgment founded upon such usurious transaction.

### On Motion for Rehearing.

13. APPEAL AND ERROR @= 916(4)-VERIFICA-TION OF ANSWER-ASSUMPTION.

In view of Supreme Court rule 26 (165 Pac. ix), requiring defendant, if the abstract of plaintiff is incomplete to set forth a counter

was not verified, where neither of the briefs filed showed that it was verified.

Commissioners' Opinion, Division No. 1. Error from District Court, Oklahoma County; Geo. W. Clark, Judge.

Action by A. W. Bean and Mamie Bean against George H. Rumrill. Judgment for defendant, and plaintiffs bring error. Reversed and remanded, with directions to render judgment for plaintiffs.

W. A. Smith, of Oklahoma City, for plaintiffs in error. George A. Fitzsimmons, of Oklahoma City, for defendant in error.

STEWART, C. It is alleged in plaintiffs' petition that defendant is and was a nonresident of the state, and absent continuously from the state at all times mentioned in the petition; that John A. Burt was the agent of the defendant, the agency being set forth in the following words:

"That at the times hereinafter mentioned, and for a long time prior thereto, John A. Burt was the general agent of defendant in the coun-ty and state of Oklahoma, with authority from ty and state of Oklahoma, with authority from said defendant to negotiate loans of money of defendant and collect the sums due thereon for the use and benefit of said defendant, and that said John A. Burt acted in such capacity and with the authority aforesaid in the matters and things hereinafter set forth."

It is alleged that, through such agency, the defendant on May 22, 1909, contracted to lend and did lend to the plaintiffs for a period of three years the sum of \$2,500, for which the plaintiffs were required to make note and mortgage to the defendant for the sum of \$2,650, drawing interest at 10 per cent. per annum from date, and also note and mortgage to the said John A. Burt for \$150, with 10 per cent. per annum interest from date, and that the plaintiffs were required to pay the defendant and did pay said sum of \$2,500, and in addition thereto the sum of \$1,180 usurious interest in pursuance of such usurious contract whereby the defendant became liable to the plaintiffs in the sum of \$2,361.42 being double the amount of usurious interest paid, for which sum the plaintiffs pray judgment, with interest thereon at the rate of 6 per cent. per annum.

The defendant answered, denying the usurious contract and the payment of any usurious interest, denying that John A. Burt in such transaction was the agent of the defendant, and alleging that defendant furnished to plaintiffs the sum of \$2,650, contracting for only 10 per cent. interest thereon, and that any sum received or contracted for by John A. Burt was for services rendered by John A. Burt for the plaintiffs and without defendant's knowledge; that plaintiffs' claim was barred by the statutes of limitation, in that the action was not brought within two years after the maturity of the alleged usurious contract. Defendant also sets forth in his answer copies of the original notes and abstract, the court may assume that the answer mortgages involved and copies of the pleadings and proceedings in a foreclosure suitjed the money in a bank, keeping it for severbrought by defendant against the plaintiffs on the contract in which John A. Burt is intervener, and wherein judgment was rendered for defendant as plaintiff in such proceedings and John A. Burt as intervener for the full amount of principal and interest due as per face of such notes and mortgages, less amounts paid thereon by plaintiffs. defendant's pleadings show judgment of foreclosure, sale of mortgaged property, and payment of such judgment. The defendant avers that such judgment was and is res adjudicata as to plaintiffs' alleged cause of action.

Plaintiffs filed reply denying the allegations in the answer and setting up matters in explanation of such ailegations.

The cause came on for trial before a jury, and the plaintiffs introduced evidence fully supporting all of the allegations contained in the petition, including the allegations as to Burt's agency for the defendant, which was not necessary, for the reason that the defendant did not verify his answer nor in any other manner deny such agency under oath. Among other things, the evidence showed, without dispute, that the defendant was a resident of the state of Wisconsin, and carried on through Burt and other agents an extensive loan business in this state; that shortly before making the loan to the plaintiffs he visited Oklahoma City to see Burt about his loans and collections; that before the visit the plaintiffs, who are negroes, had been negotiating with Burt for a loan on valuable Oklahoma City real estate for the purpose of finishing a building thereon which was in the process of construction; that Burt had told them he was not loaning his own money, but was making loans for Mr. Rumrill; that, when Mr. Rumrill came to Oklahoma City, I. E. Bean, acting for the plaintiffs, visited him and inquired about the loan, to which inquiry the defendant replied:

"Mr. Burt is handling my business here in Oklahoma City, and whatever is done between you and Mr. Burt is all right with me. I am not acquainted with you people at all, so you will have to transact your business with Mr. Burt, because I don't know you."

The loan was afterwards made by Burt. He was sworn as a witness, and, though not frank in his testimony, evidently trying to protect the defendant, corroborated the other testimony as to the transactions had afterwards, such testimony showing that the plaintiffs were to receive \$2,500, for which they were to make and execute the notes mentioned in the petition and set out in uefendant's answer, the loan to run for a period of three years; that Rumrill delivered \$2,650 to Burt, out of which Burt retained \$150, the note and mortgage for \$2,650, with interest at 10 per cent. from date, being delivered to Rumrill, and Burt receiving an additional note and mortgage for \$150, drawing 10 per cent. from date; that Burt looked after the of fact involved as would enable the defend-

al months, paying off mechanics' liens and other incumbrances against the property, not permitting the plaintiff to make checks unless approved by him, finally paying the plaintiffs the balance of the \$2,500 after deducting the amounts paid out in removing liens from the property. He testified that he had been making loans for Rumrill; that, when he was acting as agent for Rumrill, he was paid by Rumrill, but, when he acted as agent for the borrower, he was paid by the borrower; that he collected for Rumrill; and that, as to the particular loan in question, Rumrill did not agree to pay him, but he was to get his "commission" out of the other parties.

The evidence shows that the plaintiffs filed answer in the foreclosure suit mentioned, but on October 5, 1912, by written stipulation between the parties filed in the cause, it was agreed that judgment should be rendered on October 7, 1912, the property to be sold after the expiration of six months from the date of the judgment, Rumrill agreeing to bid and pay the full amount of the judgment and costs for the property and sell it back to the negroes on monthly payment plan; that the property was sold, and Burt acted with Rumrill's attorney in managing the sale and making the bids, and the property was permitted to sell on bid made by some nonresident bidder, all the circumstances showing that such bidder was an agent of Rumrill, for barely a sufficient sum to satisfy the judgment, costs, and accrued interest; that Rumrill and Burt received in satisfaction of the judgments rendered the proceeds of such sale, less costs and attorney's fees, the amount which plaintiffs were thus compelled to pay being fully \$1,-180.71 in excess of the costs, attorney's fees. and the \$2,500 furnished them; that Rumrill did not comply with the agreement to resell the property to the plaintiffs in this case, offering the excuse that he was not the purchaser.

The defendant demurred to the sufficiency of plaintiffs' evidence. The court sustained the demurrer, on the theory that the defendant did not receive any of the \$300 "commission," discharged the jury, and rendered judgment for the defendant. The plaintiffs duly appeal.

[18, 11] A demurrer to plaintiffs' evidence admits, for the purpose of the demurrer, all the material facts in evidence, including legal presumptions and admissions, either in the pleadings or otherwise, in the most favorable light toward the plaintiff. If the demurrer is wrongfully sustained on appeal, the cause may be remanded for new trial or judgment either rendered or directed as the facts and circumstances presented by the record may warrant. If, under the facts proved, construed favorably toward the plaintiffs, it appears that there are no such issues mortgages and title for Rumrill, and deposit- ant to defeat the recovery by further proof,

not inconsistent with admissions made and legal presumptions indulged, the appellate court may render the case or direct a judgment as, in its discretion, is deemed proper. Ordinarily the plaintiff ought not to be compelled to undergo the burden and expense of another trial merely because of an error of the trial court brought about by the acts of the defendant. However, where it is probable that substantial injustice may be done by finally disposing of the case, a new trial may be awarded on such terms as to costs that may be equitable and just. As this case must be reversed, we will bear in mind these principles in disposing of the appeal.

[1, 2] The presumption in this case is that the allegations of plaintiff as to the agency of Burt are true, not being denied under oath as required by statute. If the defendant, under his unverified denial, had proceeded and introduced evidence without objection on the part of the plaintiff that Burt was not such agent of the plaintiff, and the case had been tried without objection on the theory that the question of agency was properly in issue, it might be held that the matter of verification of the denial of agency was waived, but such course the defendant did not adopt. However the undisputed testimony of Bean, the admissions of Burt, and all the circumstances in the case established that Burt was the agent of the plaintiff in the way and manner alleged in the petition.

In Langley v. Ford et al. (No. 7392) 171 Pac. 471, not yet officially reported, Mr. Justice Hardy, speaking for this court, says in the syllabus:

"One who, on behalf of a loan company, takes an application for loans, which applications are required to contain a detailed description of the property and the occupancy thereof, with the applicant's statement as to the condition of his title, which application, accompanied by an abstract showing the condition of the records concerning the title of the applicant to the property offered as security for the loan, is forwarded to the company, where the application and abstract is submitted to its attorney for an opinion as to the title of the applicant, and the necessary papers prepared and sent to the person taking the application to secure the execution thereof by the prospective borrower, is agent of the loan company, and notice of all knowledge acquired by him affecting the subject-matter of the agency, while acting within the scope of his authority, will be imputed to the company."

In the body of the opinion the court says: "Plaintiff must be deemed to know what his agent knew, and cannot retain the benefits of that agent's acts without accepting the consequences of his knowledge. He cannot be permitted to obtain any greater rights from the acts of his agent than if he did the thing himself, knowing what the agent knew; that is, he cannot ratify the acts of the agent so far as beneficial to him, and repudiate the remainder. If he accepts any benefit flowing from the acts of the agent after he knows and appreciates what his agent has done, or with notice which the law imputes to him, he will not be permitted to say that the agent acted for him in procuring the note, and repudiate the agency when it is sought to impute to him knowledge of facts affecting the note acquired by the agent within the scope

not inconsistent with admissions made and of his authority and concerning the subject-legal presumptions indulged, the appellate matter of the agency."

In addition to the failure to deny the agency under oath, the facts in the case at bar show that Burt was clothed with even greater authority than contemplated by the facts recited by Justice Hardy in the syllabus quoted. Following the precedent cited, we must hold that the defendant was charged with notice of Burt's acts, and further that, having ratified such acts so far as beneficial, he cannot now escape responsibility and consequent liability for the remainder.

The plaintiffs received \$2,500 in cash, and were compelled to execute notes running three years in the sum total of \$2,800, drawing on their face the highest legal rate of interest. The note of \$2,650 to Rumrill also contains the following stipulation:

"The makers hereof agree to pay on the principal sum of this note the sum of \$50.00 per month after seven months from date hereof and credit of such payments to be made at the end of each year from the date of the first payment."

The plaintiffs made several of such monthly payments before the beginning of foreclosure proceedings. This was another ingenious scheme to extort more for the forbearance or use of money than the law contemplates. If the monthly payments had been made at the time agreed upon, it being stipulated that they were payments of principal, the same, as paid, should have been credited on the principal, and consequently would have reduced the sum upon which interest thereafter might rightfully have been collected. The credits for monthly payments were to be made at the "end of each year from the date of the first payment." The payments were to begin after the expiration of seven months, which would leave two years and five months for the contract to run. The first payment for each year would be credited at the expiration of 12 months, the next payment after 11 months. and so on down to the last payment of each year. In the meantime the entire principal, though paid in part each month, would be drawing interest at the rate of 10 per cent, as expressed in the notes. Summing up the periods of time that would elapse in each of the 2 years before the respective monthly payments would be credited, we find that the defendant would reap each of the 2 years after the first payment, as the result of his cunning, what would be equivalent to interest on \$50 for 78 months in addition to the lawful rate on the unpaid balance of principal. For the 2 years the excessive interest so contracted for would amount to the interest on \$50 for 156 months. Now, assuming that a proper construction of the stipulation under discussion would result in the monthly payments of principal, during the remaining months being credited at the expiration of the term of the contract, we find that during such 5 months the defendant would be rewarded, under the terms of the contract,

with the equivalent of 10 per cent. interest | quired to return from time to time parts of on \$50 for 15 months in excess of the legally authorized amount. The sum total would be an amount equaling the interest on \$50 for a period of 171 months, or 14 years and 3 months, which sum is \$71.25. Thus, on the face of the note made payable to Rumrill, it appears that he contracted with the plaintiffs to pay \$71.25 more than the legal rate to which he was entitled. We are aware that interest not to exceed the amount for one year may be required in advance. We do not think, however, that, even by construction, such provision of the law can be made applicable to the facts in this case. The note specifically provides that the monthly payments are principal, not interest, and further provides for "interest from date at the rate of 10 per cent. per annum, payable semiannually until paid; any interest unpaid and past due shall draw interest at 10 per cent. per annum from maturity until paid." Neither the law authorizing the reservation of interest in advance for one year nor any other theory could make the monthly payments lawfully apply to interest, and manifestly such could not be done, in view of the foregoing positive provisions in the note to the contrary and for the further reason that such payments would far exceed the interest.

It is the uniform policy of the courts not to permit an act forbidden or penalized by statute to be done either directly or indirectly. This court will not uphold any shift or device by which the lender may receive more than 10 per cent, per annum for the use or forbearance of money. The Supreme Court of Missouri very aptly and briefly defines the test of usury in Kreibohm v. Yancey, 154 Mo. 85, 55 S. W. 266:

"The test of usury in a contract is whether it would, if performed, result in securing a greater rate of profit on the subject matter than is al-lowed by law."

If the note, payable to the defendant, does not show a contract for usurious interest on its face, then our schooling is at fault, and we are unable, when given both the major and minor premises, to write out the conclusion. The defendant cannot say that he did not authorize the stipulation. It was in the note received and accepted by him. Ætna Building & Loan Ass'n v. Harris et al. (No. 6791) 170 Pac. 700, not yet officially reported.

The note just discussed shows conclusively on its face that the contract was usurious, and we have held that the defendant cannot escape responsibility for the other acts of his agent in connection with the loan. We now proceed to discover just how much above the lawful amount the defendant, under the entire contract made through Burt, was expected to pay, if he complied with the letter of the notes and mortgages. If by the contract it had been agreed for the plaintiffs to use the whole of the \$2,500 for three years, the defendant could lawfully have contracted for \$750 interest, but, plaintiffs being re-

the original principal, the defendant, as we have shown, could not lawfully contract for interest to be paid on such amounts after the time for their payment except in case of default in such payments. We have found the unauthorized interest so contracted for to be \$71.25, which, deducted from \$750, leaves \$678.75 as the interest which defendant could have lawfully collected in case the principal had been repaid pursuant to the con-We are assuming that only \$2,500 was furnished plaintiffs, as we have held that plaintiffs were under no legal obligation to pay to the agent of defendant "commission" which should have been paid by defendant. Of course, whether \$2,500 or \$2,650, the face of the note, was furnished, would not affect the question of such note being usurious on its face. Holding, as we do, that the \$150 reserved by Burt and the note and mortgage to Burt for \$150 were parts of one usurious transaction, we find that, for the use of the \$2,500 for seven months and for the use of the balances thereon for the respective periods of time up to the expiration of three years, the plaintiffs contracted to pay interest for a period of three years at 10 per cent, per annum on two notes aggregating \$2,800, and also to pay the "commission" of \$300 included in such notes. The interest on \$2,800 for the time and at the rate named is \$840, which, added to the "commission" of \$300, makes a total for the use of the money of \$1,140. From this last sum subtract \$678.75, the amount which we have shown to be lawful, and we have \$461.25 as interest contracted for above the lawful The renowned loan merchant of olden Venice, if living, would find that his quondam despised calling had reached the distinction of a fine art. The ancient Shylock openly demanded his pound of flesh; his modern successors, none the less grasping, are more covert, but betray the same consummate cupidity, disguised, however, as a refinement of our present civilization.

While some of the courts have upheld reasonable charges for actual services performed by the agent of the lender, none, so far as we are advised, have gone to the extent of permitting charges unreasonable and unfair. though under the guise of "commission." to stand, but in all such cases have construed the entire negotiations as one contract, and held the same to be usurious when their effect was the contracting to pay more than the highest lawful rate of interest. We think that each business should bear its own expenses, and that money paid for services of the agent of the lender, in procuring a loan, is money paid to the lender or for his benefit, and if, in paying for such services, the borrower contracts to pay a sum or sums in excess of the highest lawful rate of interest. the contract is usurious.

It is urged by the defendant that, where

the interest is paid by the sale of the property through legal process, the same does not constitute payment by the borrower. This contention is unsound. If the interest is paid, either voluntarily or from the proceeds of the sale of the borrower's property, it cannot logically be said that the same was not paid by the borrower. The law does not require a showing that the interest was voluntarily paid. If, indeed, it were necessary to show voluntary payment, we may say that the defendant's pleadings set up the written agreement, mentioned hereinbefore. for judgment and sale of the property. This agreement shows that, though the property was sold at sheriff's sale, yet it was sold to pay the judgment and with the consent of the plaintiffs.

[12] It is well settled that, when a contract is originally usurious, the taint of usury attaches to all subsequent transactions in connection therewith, and even to a judgment founded upon such usurious transaction: that, where a statute authorizes the recovery of interest paid on a usurious contract, the same may be recovered, notwithstanding the payment was made in pursuance of a judgment into which the usurious contract had become merged. The fact that the defendant had agreed to the judgment does not matter. Such an agreement is but another transaction in furtherance of the original unlawful contract. In Wood v. Todd, 3 Baxt. (Tenn.) 89, it is said:

"It follows, that, when a judgment was confessed by Todd, the question of usury was not, in fact, involved, nor was he bound to make the question, but he had the right to let the judgment go, and reserve the right to resort to a separate action of debt for the amount of usury already paid."

In Kendig v. Marble, 55 Iowa, 386, 7 N. W. 630, it is said:

"The law will permit no device to cover and protect a usurious contract. If a judgment by confession, or otherwise, be a part of such device intended to prevent the disclosure of the real character of the contract, it will not bind the parties. If the law were otherwise, the usurer could with little trouble defeat the statute," etc.

Also see Long v. Moore, 59 Tex. Civ. App. 579, 126 S. W. 345; Sherley v. Trabue, 85 Ky. 71, 2 S. W. 656; Equitable Loan & Inv. Co. v. Smith (Ky.) 65 S. W. 609; Richter v. Burdock, 257 Ill. 410, 100 N. E. 1063.

From the principles just enunciated and under the authorities cited, it follows that defendant's contention as to the judgment in the foreclosure proceedings being res adjudicata also falls. The action for twice usurious interest paid is independent, and exists irrespective of whether or not a suit is brought on the usurious contract by the holder of the same. Even if such interest is paid prior to the complete extinction of the indebtedness and before a suit is brought thereon, such right of action would not be lost by failure to set up the same by way of cross-action. Like any other cause of action, it can be

brought at any time within the limitation imposed by statute. It has been held in an opinion of this court by the late Mr. Justice Brown, Miller v. Oklahoma State Bank, 157 Pac. 767, that where usurious interest has been paid before suit, the same cannot be set off in an action upon such contract, but must be the subject of an independent action. Such has been the undeviating holding of this court. The Session Laws of 1916 appear to change the rule laid down by Mr. Justice Brown to the extent of permitting the defendant in an action brought by the holder of a usurious contract to plead interest paid as a set-off, but the defendant is not required to do so by the statute. A further and complete answer to such contention of the defendant lies in the axiomatic proposition that no action or cross-action can accrue for twice the usurious interest paid until such interest is actually paid. In the case at bar, only a small part of the interest was paid before the rendition of the judgment in foreclosure proceedings. The plea of res adjudicata is altogether without merit.

[3-8] We next consider the proposition of the defendant that plaintiffs' cause of action is barred by limitation. The original action in this case was begun January 6, 1915. The notes were due May 26, 1912. The judgment was paid by proceeds of sale of the property May 12, 1913. The Constitution with reference to usury, among other things, provides:

"In case a greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover from the person. firm, or corporation taking or receiving the same, in an action in the nature of an action of debt, twice the amount of the interest so paid: Provided, such action shall be brought within two years after the maturity of such usurious contract." Article 14, § 3.

In section 1005, R. L. 1910, will be found the same language and such is at present both the constitutional and statutory law of this state. Section 4660, R. L. 1910, reads:

"If, when a cause of action accrues against a person, he be out of the state, or has absconded or concealed himself, the period limited for the commencement of the action shall not begin to run until he comes into the state, or while he is so absconded or concealed; and if, he depart from the state, or abscond, or conceal himself, the time of his absence or concealment shall not be computed as any part of the period within which the action must be brought."

It is admitted that the defendant is a non-resident of the state, being absent from the state at the time the cause of action accrued, and since continuously absent. It is contended by defendant that the contract matured May 26, 1912, the date when the notes became due, and that, the action of the plaintiffs not being lodged until January 6, 1915, limitation had run against the action. The plaintiffs respond by saying that no cause of action accrued until the contract was discharged and the usurious interest paid; that it was not the intention of our lawmakers to make it impossible for one

who has paid usurious interest after the expiration of two years from the time the note evidencing the contract was due to maintain an action for the recovery authorized by statute. They also urge that the discharge of the contract is its maturity as contemplated by the statute. Plaintiffs further contend that, even if it should be held that limitation runs from the due date of the note, the limitation is tolled by the provisions of section 4660, supra, on account of the absence of the defendant, and does not begin to run until he comes under the operation of the statute by coming into the state. fendant urges that the limitation is a part of the remedy, and that, notwithstanding absence and nonresidence, the action is absolutely barred.

Assuming for the present that by "maturity of the usurious contract" is meant the due date of the notes, it is apparent that in this case the cause of action is barred unless the time is tolled on account of the absence of the defendant from the state. However, it has been held in a number of cases by the Supreme Court of Oklahoma Territory, on principle, and with the support of the highest judicial authority, including the Supreme Court of the United States, that a statute of limitation does not run in favor of one against whom a cause of action exists until the case comes under the operation of the laws of the jurisdiction in which the statute is invoked, and hence does not run in favor of a nonresident until he comes into such jurisdiction and under the operation of such laws. Richardson v. Mackey, 4 Okl. 328, 46 Pac. 546; Keagy v. Wellington National Bank, 12 Okl. 33, 69 Pac. 811. In the cases cited the causes of action arose in other jurisdictions. It may be urged that, when a cause of action arises in this state the case is under the operation of our laws, notwithstanding nonresidence of the person against whom the cause arises, but we think that it cannot be said that such a case is entirely under the operation of our laws unless the courts of this state have the means of acquiring jurisdiction of the parties. True, our courts would have jurisdiction of the cause, but, under the comity of states and under the federal Constitution, the courts of any other state could hear and determine the same, if jurisdiction of person of the defendant could be obtained. This court has also held that nonresidents as well as residents come under the provisions of section 4660, supra, and that absence from the state shall not be computed in time allowed for bringing actions, notwithstanding that such absence is due to nonresidence. St. L. & S. F. Ry. Co. v. Keiffer, 48 Okl. 434. 150 Pac. 1026; St. L. & S. F. Ry. Co. v. Taliaferro (No. 5629) 168 Pac. 788, not yet officially reported. In the case last cited Mr. Justice Kane holds that the statutes of limitation begin to run from the time when such limitation should be modified by the

summons can be served within the state and a valid personal judgment had which can be enforced in a mode provided by law. The principle announced was applied to a nonresident railway corporation having agents in the state upon whom, under our statute, summons could be served having the effect of personal service on such railway corporation. In the instant case, the defendant being a nonresident, and at all times absent from the state, with no agents in the state upon whom, under the law, service could be had, the statute of limitation was never in operation as to the cause of action against him.

But it is urged that the cause of action in the present case arose because of a special statute providing a remedy which did not exist at common law, and that therefore the limitation is a part of the remedy, and follows it into any forum where action may be lodged. At common law an action of debt could be maintained to recover interest paid in excess of the legal rate. Our enactment merely enlarges the common-law remedy. The nature of the remedy is specifically preserved; it being provided that the remedy is by "an action in the nature of an action for debt." The reasonable inference is that it was the intention of the lawmakers that the same rules with reference to tolling the statute of limitation should apply as obtains in any other action for debt. In this connection we call attention to section 2948. R. L. 1910, which reads:

"The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to the laws of this state, which are to be liberally construed with a view to effect their objects and to promote justice."

It is evident that the statute in question is to be construed, not strictly, but liberally, with a view to effect its objects and to promote justice. The common law is not such a monarch that the duly accredited representatives of the people must stand in awe of its stern mandates. It deserves respect as the garnered wisdom of the ages, but its principles came by gradual development and as a result of progressive departures from existing customs. Must our lawmakers and the courts, with oriental devotion, live only by worship of the ancestral glories of the law? If so, then stagnation follows, and the stream of progress must cease to flow

[7-8] It is urged by defendant that the law authorizing the recovery of twice the amount of usurious interest paid is constitutional, and does not contemplate the modifying provisions of section 4660, supra, tolling the limitation in case of absence from the state. The remedy is authorized by the Constitution, and is now both constitutional and statutory, but we have a right to assume that, in naming the time within which the action shall be brought, it was contemplated that same tolling provision which applied to other causes of action. Added force is given to this suggestion by section 2 of the Schedule to the Constitution, which reads:

"All laws in force in the territory of Oklahoma at the time of the admission of the state into the Union, which are not repugnant to this Constitution, and which are not locally inappli-cable, shall be extended to and remain in force in the state of Oklahoma until they expire by their own limitation or are altered or repealed

Section 4660, supra, was a part of the law of the territory at the time of adopting the Constitution, and has remained a part of the law of the state since such time and up to the present. It is not repugnant to the Constitution in any respect. The section is general, and by its terms applies to any cause of action, to a statutory as well as a common-law action. The limitation provided for actions for the recovery of usurious interest is not dissimilar to, and is in pari materia with, other provisions as to time within which other actions may be brought. The object of the usury law was to promote justice among men and to protect necessitous citizens from the avarice of those who are more fortunate in the possession of money, from nonresidents as well as residents of the state. Would its beneficent objects be served and justice be promoted by giving nonresident lenders of money an advantage over residents engaged in the same business or by refusing relief to citizens of the state, when the opportunity is presented, against nonresidents on the same terms as against residents? If this court should so hold, it would result that those, bent on evading the usury laws, would procure so-called nonresident principals in whose names loans would be made, and the objects of the law would be defeated.

Section 5281, R. L. 1910, creates a remedy for wrongful death which did not exist at common law, and provides that "the action must be brought within two years." Such section, we believe, has not been construed by this court in relation to the tolling of the time, because of absence from the state, within which such action may be brought. This identical question was, however, presented and passed upon by the Supreme Court of Minnesota in an able opinion by Mr. Chief Justice Start of that court. Casey v. American Bridge Co., 116 Minn. 461, 134 N. W. 111, 38 L. R. A. (N. S.) 521.

The plaintiff in that case brought action against the bridge company on account of death of her husband, alleged to have resulted from the wrongful act of the defendant while constructing a bridge in Oklahoma. More than two years had elapsed since the death, and the defendant, a corporation, nonresident of Oklahoma, set up the limitation in the section as to time within which the action might be brought as a bar. The court construed the section of our statute which

tion 4660 supra, and held that the limitation was modified by the tolling provisions of section 4660, and that the cause of action was not barred. The court said that the two sections were each parts of our Code of Civil Procedure, but the decision, in the main, hinged on other reason showing that the respective sections were in pari materia. Sections 4660 and 5281, R. L. 1910, are identical with paragraphs 21 and 435, respectively, of the Code of 1893. The court, in rendering the opinion, cited the Code of 1893. We quote as follows:

"It is true that, where a right of action is given by statute, which did not exist at common law, and the statute giving the right of action also fixes the time within which it may be enforced, such time limit is a condition or limitation upon the right, which will control, no matter in what form the action is brought.

Negaulaguer & Great Northern R. Co. 22 Minn. matter in what form the action is brought. Negaubauer v. Great Northern R. Co., 92 Minn. 184, 104 Am. St. Rep. 674, 99 N. W. 620, 2 Ann. Cas. 150. The conclusion, however, that the condition is not qualified by the provisions of section 21 does not logically or otherwise follow from the premises for the conclusion assumed the very execution to be decided: that is sumes the very question to be decided; that is, whether section 21 qualifies the time limit or condition of section 485.

Continuing, the court further says:

"There is, then, nothing in the language of the respective sections indicating any reason why the tolling provision of section 21 should not apply to section 435. Why, then, should not apply to section 250. Why, then, shows an exception be added, by construction, to section 21, so as to exclude from its express provision the cause of action given by section 435? Why should not the widow have the same fair opportunity to bring her action for damages sustained by the death of her husband by the wrongful act or neglect of another after the defendant comes into the state as she would have if her cause of action were for the loss of a mule killed by the wrongful act or neglect of another? The fact that the action for the death of her husband is a statutory one, and the action for loss of the mule is a common-law one, does not answer the question, for it relates, not to the creation of the cause of action, but to the construction of the tolling provisions of section 21.

Under the admitted facts in this case as to nonresidence and absence, the action was not barred by limitation. This holding would render it unnecessary, so far as a final determination of this appeal is concerned, to decide whether or not the time of the limitation in this case would run from the date of the discharge of the usurious contract, but, as the question is properly raised and is important, we will consider the same.

It is provided by the Constitution, and also by section 1005, R. L. 1910, that the action arising from the payment of usurious interest "shall be brought within two years after the maturity of the usurious contract." Our usury law is fashioned after the federal act with slight departures, among which is the provision concerning the limitation of time, the federal statute providing for the action to be brought within "two years from the time the usurious transaction occurred." It was well known at the time of the framing of our Constitution that under the federal creates the remedy, in connection with sec- law it was held by the courts that each pay-

ment of usury constituted a separate transaction, and was barred in two years from the time of each respective payment. This matter is discussed in Ardmore State Bank v. Lee, 159 Pac. 903, and we indorse the conclusion in that case that one of the objects of this departure was to allow an action. after the last payment of usurious interest, to be maintained for the entire amount paid, irrespective of the fact that more than two years had elapsed since some of the payments were made. In that case the note had been extended, and a new due date fixed. It was paid before the expiration of such extension, and it was held that the two-year limitation began to run from the date of such payment. It is said, as a matter of dictum, however, that "if the note had not been paid before its maturity, the limitation would have set in from the date of the expiration of the last extension." It strikes us that. if the act of the borrower in paying the note before it was due matured the contract, the conduct of the lender in waiting till after the date expressed in the note and then receiving the payment thereof would merge the original due date into the time of actual payment, and the contract could be said to have actually matured at such time. If the departure from the federal statute was for the benefit of the borrower, it cannot be said that, in a case where the borrower paid the note in full after the expiration of two years from the date it was due, it was the intention of the law to bar him of the remedy given. Such a construction would work a greater hardship than the construction placed on the federal statute, as, under such statute, the debtor would have the right to sue for any interest paid within two years after the particular payment. It is said in Citizens' State Bank v. Strahan et al., 158 Pac. 378:

"The defendants in error having failed to institute a suit within two years from the date of said payments, the cause of action to recover double the usury paid on account of said two payments is therefore barred by the statute of limitations of two years as provided by the act creating the remedy."

In neither of the cases cited was the question being now considered squarely presented and passed upon, as the determination of the particular question was not in either case necessary.

Ordinarily we speak of the time when a note is due as the maturity of the note. Speaking precisely, however, it is the time that matures, and not the note. Maturity in such case is the fullness or completeness of the time. We speak of the maturity of plans when they are complete, have borne fruit, or are ended. A man's maturity is when he has become full grown, physically or mentally, or both. The maturity of our hopes refers to the realization of their objects. It would not be inaccurate to say that a contract had reached its maturity receiving such payment.

when its objects had been attained, the benefits to be derived therefrom received.

The constitutional provision does not read "within two years after the time when the note or instrument evidencing the usurious contract becomes due." If such had been the intention, it could have been so express-In construing the provision, we must look to the words themselves, to the object of the law, and to the facts and circumstances surrounding its adoption. If two constructions may be placed upon the language used, that construction more nearly in consonance with the objects in view and the circumstances which called forth the enactment should be followed. Before the adoption of the Constitution our people were without adequate protection from the avarice of exacting money lenders. The demand for such protection was widespread. Under such circumstances the Constitution makers engaged to shape our organic law to meet the demands. If we hold that the maturity of the usurious contract refers necessarily to the due date of the note, then, if a debtor were so unfortunate as not to be able to discharge the obligation for more than two years after such date, and the creditor refused to make extensions, the debtor, though he afterwards discharged the contract in full, could not avail himself of the remedy given. Thereby the law would be made to discriminate in favor of the more prosperous, those who happen to be able to meet their obligations promptly, and against those whom misfortune had overtaken and for whose benefit the relief primarily was intended. No cause of action can accrue until the usurious interest is actually paid in money or its equivalent. Each payment on the usurious contract is a partial realization thereon; hence maturity to the extent of the amount paid. After payment in full there would be full realization and complete maturity. If interest were included in any payment, an action for twice the amount thereof could be brought within two years from the time of such payment; but, in case of subsequent payments of interest, all former payments would merge with the last made. A full discharge of the contract, therefore, merges all payments of usurious interest, the contract wholly matures, and a cause of action at once accrues for twice the whole amount of interest so paid. The limitation under consideration is one running in favor of the lender, and is somewhat analogous to a limitation running in favor of the debtor, the analogy being that, in the case of a debtor, each payment made is a recognition of the debt, and the limitation runs afresh from the time of such payment, and, in the case of a lender, each payment received is a recognition of the usurious contract with the attendant liability, and the limitation starts anew from the time of

We think, and so hold, that an action for twice all the interest paid on a usurious contract can be brought within two years from the time of the full payment and discharge of the contract or from the time of the last payment of interest thereon. Such being our holding, the action in the instant case was brought within less than two years after the maturity of the usurious contract.

The plaintiffs ask judgment for \$2,361.42. with interest at 6 per cent. per annum from May 12, 1913, the date of the final payment of the principal and interest of the usurious contract. Under the facts, as admitted by the parties, the plaintiffs, before the filing of the foreclosure suit by the defendant, paid \$350 on the principal and \$396.40 on the inturest of the note made to the defendant. In discharge of the judgment, the defendant received \$2,899.08, exclusive of taxes paid by him, costs, and attorney's fees. Therefore the total paid on such note, exclusive of taxes, costs, and attorney's fees, is \$3,645.48. We have held that the note for \$2,650 to defendant is usurious on its face. Assuming that the plaintiff received the full amount of \$2,650 principal, shown in the face thereof, and subtracting such sum from \$3,645. 48. we have \$995.48 interest paid. The plaintiff would be entitled to recover twice such interest, or \$1,990.96. The pleadings of the defendant show that Burt received \$431.95 from the sale of the property on the note made to him. Add to this \$150 retained by him out of the \$2,650 originally sent to him by the defendant, and the sum is \$581.95. If we hold as a matter of law that, for the purpose of this appeal, Burt's agency for the defendant is conclusively established, the defendant, if the amount of relief asked for justified it, could also recover twice this sum or \$1,163.90, which, added to \$1,990.96, would make \$3,154.86 which plaintiffs were entitled to recover, if they had not asked for a less sum in their petition. The only possible theory, upon which we should remand this cause for new trial, instead of directing judgment, is that the defendant should be permitted to rebut the proof of Burt's agency. This agency is so well established that it is not likely that the same could be satisfactorily disproved. However, the note made to the defendant being usurious on its face, the plaintiffs clearly are entitled to have judgment rendered for twice the usurious interest paid on that particular note, without regard to the question of Burt's agency. As the expenses and burdens of a new trial will bear heavily upon each of the parties, we have decided that substantial justice may be done by the rendition of such a judgment.

This cause is reversed and remanded, with directions to the trial court to render judgment for the plaintiffs and against the defendant in the sum of \$1,990.96, with interdid not consider the commission paid to the

We think, and so hold, that an action for est at the rate of 6 per cent. per annum from vice all the interest paid on a usurious conact can be brought within two years from of the trial court.

### On Motion for Rehearing.

The defendant in error in the motion for rehearing presents no controlling decision or statute which is in conflict with the views expressed in the opinion, and each question decisive of the case submitted by counsel was passed upon by this court.

Counsel calls our attention to Talbot v. First National Bank, 185 U.S. 172, 22 Sup. Ct. 612, 46 L. Ed. 857, as supporting the proposition that a sale on execution of the debtor's property is not a payment of usury as contemplated by the statute. In the case cited a foreclosure suit was brought against the debtor, and the court, finding that illegal interest had been contracted for, deduced the excess over the legal rate and rendered judgment for the principal sum and interest at the legal rate. The property sold was applied to the payment of the judgment for such principal and lawful interest. It was held that interest in excess of the lawful amount "may be relinquished and recovery be had of the legal rate." The court further observed:

"Indeed, it is a contradiction to say that interest may be recovered back which has not been paid, and whether it is relinquished before suit or deducted by order of the court before judgment, it is in neither case paid by the judgment or by the satisfaction of the judgment."

It is nowhere hinted in the opinion relied upon that, if the judgment had been for more than the principal and interest at the lawful rate, the satisfaction of the judgment from the proceeds of the sale of the debtor's property would not have constituted payment of usurious interest. In the case at bar the unlawful interest was included in the judgment, and was paid through sale of property of the plaintiffs in error.

[13] The defendant in error further complains because this court, in its opinion, assumed that the answer denying agency was not verified. Neither of the briefs filed show the answers to be verified. brief of the defendant in error purports to set out in totidem verbis the answer filed, but does not show verification. Under rule 26 of this court (165 Pac. ix) it was his duty, if the abstract of plaintiff in error was incomplete, to set forth a counter abstract correcting omissions or inaccuracies. court therefore had the right to assume that the answer was not verified, but whether or not the defendant in error should be held strictly to the rule is immaterial. The undisputed evidence establishes the agency alleged, and, further, the opinion shows that in directing judgment this court agent of the defendant, but directed judg- upon which judgment was duly entered, to ment on the ground that the original note which was received and accepted by the defendant in error, thus brought to his knowledge, was usurious on its face; the judgment directed being only for twice the interest paid by plaintiffs in error on such

The petition for rehearing should be de-

PER CURIAM. Adopted in whole.

# OKLAHOMA STATE BANK OF CADDO v. **AIRINGTON.** (No. 8058.)

(Supreme Court of Oklahoma. March 5, 1918. Rehearing Denied May 7, 1918.)

# (Syllabus by the Court.)

1. Appeal and Error \$\isin 1001(1)\$—Question of Fact—Verdict—Review.

The verdict of the jury on a disputed question of fact in an action at law, and the judgment of the court thereon, will not be disturbed on appeal, where there is evidence reasonably tending to support the same.

2. EVIDENCE \$\infty 244(4)\$\—\text{Statement of Bank}\$
Cashies—Admissibility Against Bank.

The statements made by the cashier of a banking corporation in response to timely inquiries properly addressed to him by a bank examiner, and relating to matters under his charge and in respect to which it is his duty to give and in respect to which it is his duty to give information to the bank examiner, may be given in evidence against the corporation.

Error from District Court, Bryan County; Jesse M. Hatchett, Judge.

Action by Noah Airington against the Oklahoma State Bank of Caddo, Okl. Judgment for plaintiff, and defendant brings error. Affirmed.

McPherren & Cochran, of Durant, and James S. Summers, of Kansas City, Mo., for plaintiff in error. W. F. Semple, of Durant, for defendant in error.

KANE, J. This was an action commenced by the defendant in error, plaintiff below, against the plaintiff in error, defendant below, for the purpose of recovering a certain sum which it was alleged was due the plaintiff from the defendant as a depositor of the bank. The defendant, by way of answer, alleged that the balance claimed to be due the plaintiff was withdrawn from his account in due course upon checks of the plaintiff made payable to one McBride, who at that time was the president of the bank, pursuant to an agreement by the terms of which it was agreed that McBride could use this money in his individual capacity and pay the said plaintiff a higher rate of interest than he could get from the bank on a time deposit. The reply of the plaintiff denied that he had any such agreement with McBride. Upon trial to a jury there was a verdict for the

reverse which this proceeding in error was commenced.

The record discloses that on a former trial a verdict to the same effect was returned by the jury, which was set aside upon motion for new trial, and a new trial granted; so, as the case now stands, two separate juries have found the facts in favor of the plaintiff, the last finding to that effect being approved by the trial court. The assignments of error relied upon for reversal are stated by counsel for defendant in their brief as follows: (1) That the verdict is not supported by sufficient evidence: (2) error in the admission of incompetent, irrelevant, and immaterial evidence.

[1] On the first proposition it is sufficient to say that we have carefully examined the record and are convinced that there was evidence adduced at the trial reasonably tending to support the verdict of the jury and the judgment of the trial court. This being purely an action at law, the Supreme Court is not at liberty to disturb the verdict of the jury and judgment of the trial court entered thereon, where there is any evidence reasonably tending to support the same.

[2] The next assignment of error relates to error in the admission of the testimony of Mr. Pratt, a state bank examiner, relating to certain admissions made to him by Mr. Marple, the cashier of the bank, with reference to the Airington account. The defense of the bank, as we have seen, was that the balance of his deposit, which the plaintiff claimed remained unpaid, had been withdrawn from the bank by Mr. McBride upon checks drawn by Mr. Airington pursuant to the arrangement between Airington and McBride hereinbefore mentioned. Mr. Marple, on behalf of the bank, testified that the books of the bank showed the Airington account to have been fully checked out; that he balanced Mr. Airington's bank book himself, and filed it, together with all canceled checks, including those payable to McBride, with a lot of other balanced accounts in the vault of the bank; and that he supposed that this bank book, together with the canceled checks. were mailed out to Mr. Airington in due course of business. He says, however:

"I would not swear that it was [mailed to Airington], because 40 or 50 accounts were mailed out at one time, and I did not take the trouble to see whose accounts were mailed out and whose were not."

Mr. Airington testified that he never received from the bank any canceled checks payable to McBride, nor any canceled checks, except certain checks, none of which were payable to McBride, which he exhibited at the trial, and which he contends were the only checks he ever drew on his account. Without charging the McBride checks against plaintiff for the amount claimed to be due. Airington, the books showed the balance

due him that he claimed. At the time of tional Bank, 20 Okl. 768, 95 Pac. 220. In Mr. Pratt's visit to the bank the Airington account was still unsettled and still in controversy between Mr. Airington and the bank, and the bank examiner was inquiring concerning it as a part of his official duty as a bank examiner. Mr. Pratt testified that he asked Mr. Marple to exhibit the canceled checks payable to McBride, and Mr. Marple answered that they were not in the bank. Whereupon the following questions and answers relating to these checks were allowed:

"Q. State what, if anything, he said to you about not being able to make a statement of the Airington account. A. He said he did not have the canceled vouchers. Q. Where did he say the canceled checks and vouchers were? A. He use canceled checks and vouchers were? A. He did not know, but said he thought Mr. McBride had them. Q. State by whom the vouchers were sent to Mr. McBride, if you know. A. I don't know who sent them. Q. What did Mr. Marple say to you at that time with reference to who sent the checks and vouchers to Mr. McBride? A. He said they were sent to him. Bride? A. He said they were sent to him. Q. What was said, if anything, with reference to Mr. McBride's authority to check or draw on the account of Mr. Airington? A. Mr. Marple stated that he understood that Mr. McBride had authority as to the handling of this account.

As the balance of Mr. Pratt's testimony in relation to the statements made by Marple tended to corroborate defendant's theory of the case, we do not deem it necessary to notice it here, but will confine ourselves to a consideration of the part set out above, which, if inadmissible, probably would be harmful. The contention of counsel for the bank as to the admissibility of this evidence is disclosed by the following statement taken from his brief:

"The statements made by Marple to the bank examiner as to the handling of the Airington account and the whereabouts of the canceled checks are also inadmissible as admissions of the bank, because these statements were not made within the scope of his authority as cash-ier of the bank, nor while performing the transaction about which the statements were made.'

On this proposition we are unable to agree with counsel. In our opinion the statements made by Marple to the bank examiner were clearly within the scope of his authority; it being the duty of the cashier of the bank to explain its affairs to the bank examiner, particularly when the admission was made concerning a pending transaction between the bank examiner and the cashier of the bank, acting for his principal. The bank examiner, in his official capacity, was endeavoring to straighten out the Airington account, and in pursuance of this duty asked Marple about the canceled checks, which, the bank alleged, were drawn by Airington and made payable to McBride. This was the transaction that was there under consideration and Marple's answers to the proper questions of the bank examiner were certainly within the scope of his authority as cashier of the bank. The case at bar is not ruled by the principle announced in Gillesple v. First Na-

that case, in an endeavor to support a denial of the claim of the bank that it held the note bona fide, the defendant offered to prove by Boland, one of the defendants, that in two conversations he had with the cashier of the plaintiff bank such cashier made statements which tended to show that the bank was not such holder in due course. In that case Boland was not entitled to the information he sought in relation to a past transaction, and the cashier of the bank, whilst authorized to give such information in a proper case, was not required or authorized to give it to Boland. In these circumstances, the court very properly excluded the evidence as mere gossip or hearsay. The applicable principle in that case is that, whilst the agent may have authority to transact the business of his principal and make statements in relation thereto while so engaged, after the business is ended he is without authority to gossip about it, and thereby bind his principal. Wigmore on Evidence, 1078; Chamberlayne on Evidence, § 1346. On the other hand, the rule applicable to the situation presented by the record before us is stated in First Nat. Bank of Xenia, Ohio, v. Stewart et al., 114 U. S. 224, 5 Sup. Ct. 845, 29 L. Ed. 101, as follows:

"The declarations made by an officer or agent of a corporation, in response to timely inquiries, properly addressed to him, and relating to mat-ters under his charge, in respect to which he is authorized in the usual course of business to give information, may be given in evidence against the corporation."

For the reasons stated, the judgment of the court below is affirmed. All the Justices concur.

DUNN ▼. STATE. (No. A-2500.) (Criminal Court of Appeals of Oklahoma. Nov. 7, 1917. Rehearing Denied May 9, 1918.)

(Syllabus by the Court.)

1. Indictment and Information == 119 - Labceny == 28(1) - Sufficiency of Information-Surplusage.

An information charging the larceny of live stock, which alleges an unlawful and felonious taking and asportation of the property without the consent of the owner, and with the felonious intent to deprive the owner thereof and to convert the said property to the use and benefit of the taker, contains all the essential elements of said crime. Matters of surplusage not misleading nor contradictory of the meterial not misleading nor contradictory of the material elements as pleaded will not vitiate an information.

8. Criminal Law (\$\infty\)170\(\frac{1}{6}\) — Appeal — Examination of Witnesses—Argumentative Questions.

Where objection is made to certain questions asked of the defendant by the prosecuting officer, and the court sustains such objections because said questions are argumentative, this court will not reverse a judgment of conviction merely because several argumentative questions were asked of the defendant where the matters inquired about were proper subjects of inquiry had the question been put in the proper form.

Appeal from District Court, Blaine County; Thomas A. Edwards, Judge.

Elmer Albert Dunn was convicted of larceny of live stock, and he appeals. Judgment affirmed.

Woolman & Wishard, of Watonga, for plaintiff in error. R. McMillan, Asst. Atty. Gen., for the State.

MATSON, J. Elmer Albert Dunn was convicted in the district court of Blaine county of the larceny of two black mares, the property of one Wm. Fletcher, and sentenced to serve a term of eight years' imprisonment in the state penitentiary. From this judgment he has perfected an appeal to this court, and sets out three alleged errors, on account of which it is contended that the judgment should be reversed:

[1] First. It is contended that the information upon which defendant was tried is insufficient and defective and indefinite. and does not inform the defendant with sufficient certainty of the crime charged against him. The information is subject to criticism on account of its prolixity. In order to make the allegations exceedingly specific the county attorney pleaded matters which were unnecessary surplusage, but all the necessary elements of the offense are pleaded with certainty and sufficient definiteness to make the information good under the decisions of this court, and of the territorial Supreme Court in the following cases: Hughes v. Territory, 8 Okl. 28, 56 Pac. 708; Sullivan v. Territory, 8 Okl. 499, 58 Pac. 650; Shires v. State, 2 Okl. Cr. 89, 99 Pac. 1100; Crowell v. State, 6 Okl. Cr. 148, 117 Pac. 883.

[2] It is next contended that the trial court erred in not permitting the defendant to introduce in evidence in this case the testimony of his brother-in-law, Erman Riley, given on a former trial of this case. The record discloses that the witness Riley was a resident at that time of Hughes county, Okl. His whereabouts had been known to the defendant long before the trial, and on a former trial he was able to obtain his attendance merely by telegraphing him to come. On this occasion, however, about six days before the trial he had a subpœna issued directed to the sheriff of Hughes county to obtain the attendance of said witness on the day set. The witness, however, failed to appear, and an application for a continuance based on his absence was presented to the court and overruled. The case then proceed-

ed to trial, and as a part of his defense the defendant requested the court to permit him to introduce the testimony of the said Riley given on a former trial. The request was properly overruled. There is no showing made that the witness was without the jurisdiction of the court, that his whereabouts was unknown, or that he was dead, or any showing such as is required before the testimony of such witness given at a former hearing or trial is permitted to be used on a subsequent trial. On the contrary the showing is positive that the witness was alive and within the jurisdiction of the court: that by proper proceedings compulsory process would have obtained his attendance had proper diligence been used. Neither the ruling of the court in refusing the continuance, nor in permitting the testimony given by the witness on a former trial to be introduced in this case, were erroneous.

[3] Lastly, it is contended that certain alleged conduct on the part of counsel who assisted in the prosecution was prejudicial to the substantial rights of this defendant. Upon cross-examination of the defendant counsel for the state asked several questions which were largely argumentative, but the rulings of the court relative to these questions were at all times favorable to the defendant. It was the form of the questions rather than the substance thereof that was objectionable. No question was asked or answer permitted which was of itself prejudicial according to the previous rulings of this court. The case was hotly contested, vigorously prosecuted, and ably defended. The rulings of the trial court were fair and impartial, and after a careful examination of the record it is the unanimous opinion of this court that the defendant received a fair and impartial trial, and that the evidence is amply sufficient to sustain the conviction.

The judgment of the district court of Blaine county is therefore affirmed.

DOYLE, P. J., and ARMSTRONG, J., concur.

WESTBROOK v. STATE. (No. A-2756.) (Criminal Court of Appeals of Oklahoma. April 30, 1918.)

(Syllabus by the Court.)

1. Depositions ← 6 — Nonresident Witnesses—Criminal Case.

The right to take and use depositions of nonresident witnesses in behalf of the defendant in a criminal case is statutory. Penal Code, art. 17. The statute regulates the practice in such cases, and its provisions must be substantially complied with.

2. CRIMINAL LAW \$\infty\$595(1), 1183\top-Depositions \$\infty\$12\top-Application for Commission \top-Continuance\top-Modification on Appeal.

The information charged two defendants with the crime of murder. On the day they entered their pleas of not guilty, defendants served the statutory notice on the prosecuting attorney, and on the day named in the notice

filed application for a commission to take the deposition of a nonresident witness, which application was overruled. They also filed motion for continuance by reason of the absence of material witnesses, which motion was denied, and the case was called for trial the severable arraignment. nied, and the case was cause for the severance enth day after their arraignment. A severance was demanded and granted. Held, that the court erred in overruling the application for a commission to take the deposition, and erred in the severance. Held. commission to take the deposition, and erred in denying the motion for continuance. Held, further, that the defendant upon his separate trial having failed to renew the application and motion, and his guilt having been established by facts admitted or so clearly established as to be beyond controversy, this court will not consider the erroneous rulings, such as demand a reversal of the conviction, but, in the exercise of its power to modify any judgment appealed from by reducing the sentence, the judgment and sentence of death is modified to that of imprisonment in the state penitentiary at hard labor for life, and as thus modified the judgment labor for life, and as thus modified the judgment is affirmed.

Appeal from District Court, Latimer County; W. H. Brown, Judge.

Roswell Westbrook was convicted of murder and adjudged to suffer death, and he appeals. Modified and affirmed.

The plaintiff in error, Roswell Westbrook, and Jack McKennon, were jointly informed against for the murder of Calvin Tomlinson, alleged to have been committed in Latimer county on the 7th day of February, 1916, by shooting him with a pistol. When the cause was called for trial, a severance was demanded. The state elected to try Westbrook The jury returned a verdict finding the defendant Roswell Westbrook guilty of murder, and fixing his punishment at death. From the judgment and sentence pronounced and entered in pursuance of the verdict, the defendant appeals.

The evidence shows that Calvin Tomlinson. the deceased, 21 years of age, resided with his aged parents on a rented farm in the northeastern part of Latimer county; the place being about 14 miles southwest of the town of Sutter, sometimes called Calhoun, in Le Flore county. The family lived in a single-room house with a shed kitchen. On the night of the tragedy they went to bed about 7 o'clock; the old folks occupying a bed on one side of the fireplace, and the young man a bed on the other side. Shortly after they retired the front door was forced open by two men, who fired three or four shots at the young man, two of which struck him, from the effects of which he died the next evening. They then forced his father to give them his money, amounting to \$60.

Mary Tomlinson testified: That she was 69 years old. That when she went to bed that evening she threw a pine knot in the fireplace and it gave a good light. That two men forced the door and broke the latch. they came in her son raised up, and they shot him. One of the men had a scarf around his face, and the other one had a cape ever his face. That she lit the lamp robber that shot him over the head with it and knocked his mask off. He then hit her with his six-shooter and knocked her down, and her son said: "Come on, Mama! He will kill you, for he has shot me." And she went out the back door with him. That the other robber held a six-shooter in the old man's face, and said, "Give up your money." That she with her son went to the smokehouse, and he said: "Mama, they have kill-That was Jack McKennon. I saw him in Sutter Christmas." That she knew McKennon and recognized him. When the robbers left, she took her son back into the house and put him in bed, and then knocked on the plow with a hammer and hallooed.

W. S. Tomlinson testified. That they went to bed about 7 o'clock, and shortly after the door of his house was forced open and two men came in. Their faces were covered, and they fired three or four shots. One of them held a pistol in his face and said, "Give up your money!" and he gave them \$60 That his son and his wife had left the room, and he ran out while the robbers were counting the money.

The undisputed facts are that the defendant, Westbrook, lived at Sutter, and on the 7th day of February he borrowed a horse from Finis Herron, commonly called "Skin Herron," and a saddle from W. J. Sterling, saying that he wanted to ride out to a saw-He was then carrying a big pistol stuck in the waistband of his pants. About the same time Jack McKennon went to Johnson & Embrey's livery barn in Sutter and hired a sorrel blaze face pony to ride out into the country, saying that he preferred to ride his own saddle. He went to John Green's, about 300 yards from the livery barn for his saddle. They met in the street in the west part of Sutter, near the home of Ben Priest, and from there rode out of town in a westerly direction. Westbrook had a package tied to the horn of his saddle.

Jesse Johnson testified: That about noon, February 7th, Jack McKennon came in his livery barn and hired a sorrel bald face pony to ride out into the country. He said he would use his own saddle. That McKennon's saddle was in the barn the next morning. That the pony had crooked ankles, and his shoe tracks were deeper in the ground on the outside than on the inside.

Frank Harris testified: That he lived about seven miles from Sutter, and about six miles from old man Tomlinson. That he was making rails the afternoon of the 7th of February, and saw two men on horses passing along the road at the foot of the mountain. One was riding a sorrel blaze face pony, and the other was riding a large dark brown horse, and they were going in the direction of old man Tomlinson's. That it was then about 3 o'clock. That the next day he examined the tracks of the horses which showed that not far from where he saw and grabbed her son's shoe and hit the them they left the road and turned off

through a buckbush and brier thicket, and he found the same tracks in the road on the other side of his place, going the other way towards Sutter.

Seven or eight farmer neighbors to Tomlinson's testified: That they were at the Tomlinson place shortly after the shooting, and the next morning they made an examination of the surrounding country, and found where the fence had been cut in a pasture near Tomlinson's home, and they found tracks of a large horse and a pony. That they followed these tracks to within a mile or two of Sutter. When they reached Sutter that day, they took the blaze face pony that was rode by McKennon and Herron's horse that was rode by Westbrook out to the trail, and there compared the tracks they had followed and those made by the horse and pony, and found them to be identical.

Charity Covey and her mother, Mrs. Bertha Priest, testified that on Sunday evening, February 6th, at their home in Sutter, Roswell Westbrook said that he was going to rob an old man of his money.

Mrs. Bertha Priest testifled: That about 1 o'clock on February 7th Westbrook came to her house and asked, "Where is Charity?" and she told him over at McClains, "That he looked like he had been drinking," and she said, "What is the matter with you?" and he said: "Oh, hush, kid. We have got to make some money. We are going to have \$900, and if we can't get \$900 we will take \$300 or kill somebody." And she said. "You will get into trouble," and he said, "You don't know what you are talking about." her husband was working at the wood pile, and about that time Jack McKennon rode along on a sorrel blaze face pony, and as he passed the house Westbrook got on his horse and they rode off together.

Ben Priest testified that he noticed Westbrook had a pistol stuck in the waistband of his pants. Frank Taylor testified: That he boarded at Bidwell's boarding house in Sutter: and Westbrook had been boarding there about three weeks before the homicide. and they slept in the same room: that there were three beds in the room, George Williams and Bidwell's deaf and dumb boy occupied one of the beds, and Roswell Westbrook, another, and witness the other; that he went to bed on the night of February 7th about 8 o'clock and was up during the night between 2 and 3 o'clock, and Westbrook did not occupy his bed that night.

G. B. Kimbrough testified that he lived near Norris, a town near the old Walls post office in Le Flore county; that his home was about two miles from old man Tomlinson's place; that he was there about midnight after Calvin Tomlinson was shot, and he heard the boy say, "I am killed," and he asked him if he knew who did it, and he said, "There was two men in the house, and one of them was Jack McKennon"; that the doctors were there at the time.

Several other witnesses testified that they heard him say before he died that one of the men was Jack McKennon.

It appears that Westbrook was arrested the next day, and Jack McKennon was arrested at Ft. Smith on February 9th. That on the night of February 10th they were placed in the same cell where a dictaphone had been adjusted between the cots on which the prisoners were to sleep. The wires from the dictaphone connected with the sheriff's office, about a hundred feet away from the cell. The prisoners' conversation was taken by the operators, and their testimony shows that the prisoners talked about the way the homicide was committed, and that the officers said the neighbors tracked their horses to the Tomlinson place and from there back to the town of Sutter. That Westbrook said to McKennon:

"One of them got killed; maybe both of them. I shot through that wall. These people didn't have any money in the house. I hit the old lady. I got him the first shot, I think, maybe, if I didn't the second. If we don't stay together we are all in. I promise you one thing, the old man won't recognize anybody. I heard the old lady would swear that one of us shot at the old man too. You acted too damn fast. When they said, 'What do you want?' I said, 'We want your money, that's all.'"

#### For the Defense.

Owen Herron testified that he lived at Calhoun and knew Roswell Westbrook for about two years, during which time he lived in Sutter; that Ben Priest lived about a half mile west of Sutter, and on Sunday evening. February 6th, he went there with Westbrook, and they stayed there about an hour; that he did not hear Westbrook say anything there that night about robbing anybody. On cross-examination he stated that Jack Mc-Kennon often stayed at his brother Finis Herron's house.

Finis Herron testified that about 1 o'clock on the 7th day of February he loaned Roswell Westbrook a large dark brown horse; that the next time he saw the horse was that night about 8 o'clock, at which time the horse was loose in his yard. On cross-examination he stated that he was commonly called "Skinny Herron"; that Westbrook told him that he wanted the horse to go out in the country and get something to drink; that Jack McKennon had been staying at his place for some time before that; and that he himself had worked in a sawmill for Jack McKennon off and on for five or six years.

Henry Kennedy testified that he saw Jack McKennon on the 7th day of February, about 4 o'clock in the afternoon, and another fellow with him, on the road about three miles from Sutter, and they were going towards Sutter.

Mrs. Molly Bidwell testified that with her husband, George Bidwell, she ran a boarding house in Sutter; that Frank Taylor was a boarder, but he did not stay in the house on

the night of the 7th day of February; that | tion contained all the formal allegations re-Roswell Westbrook boarded with them, but she could not say whether or not he stayed at her place that night. On cross-examination she stated that Roswell Westbrook's wife lived in the same neighborhood, but they had separated; that there were three beds in the room where Frank Taylor sleeps, one for George Williams and her son Johnny, one for Roswell Westbrook, and the other for Frank Taylor; that she did not see Roswell Westbrook from dinner time on the 7th, until he came to breakfast on the morning of February 8th.

Johnny Bidwell, the deaf and dumb boy. testified he slept with George Williams the night of February 7th in one bed, and that Roswell Westbrook went to bed about 9 o'clock; and that he saw him in the room the next morning about 5 o'clock and Roswell Westbrook slept there that night.

George Williams testified that he worked at the Bidwell boarding house and slept with Johnny Bidwell the night of February 7th, but did not see Frank Taylor in the room there that night; that when he woke up the next morning Roswell Westbrook was lying there on his bed, but he did not hear Westbrook come into the room that night.

Sim Hamlin testified that he lived at Calhoun and saw Jack McKennon on the street near Brown's drug store about 4 o'clock in the evening of February 7th, and spoke to him

The defendant Westbrook did not testify as a witness, neither did his codefendant, Jack McKennon, who it appears entered a plea of guilty and was sentenced to life imprisonment in the penitentiary.

Neal & Fleming, of Poteau, and J. W. Callahan, of Wilburton, for plaintiff in error. S. P. Freeling, Atty. Gen., R. McMillan, Asst. Atty. Gen., and Jones & Lester and H. T. Church, Co. Atty., all of Wilburton, for the State.

DOYLE, P. J. (after stating the facts as above). The plaintiff in error, Roswell Westbrook, and Jack McKennon, were jointly charged by information duly filed in the district court of Latimer county on February 28, 1916, with the murder of Calvin Tomlinson, alleged to have been committed in said county on the 7th day of February, 1916, by shooting him with a pistol. Upon their arraignment on the 6th day of March, they took 24 hours to plead. On the 7th day of

quired by law, and concludes as follows:

"That Bill Cole is a material witness in their defense, without whom they cannot safely go to-trial; that said witness, Bill Cole, saw this peti-tioner in the town of Calhoun, Le Flore county, about 16 miles from the place of the alleged killing, about 7 o'clock on the 7th day of February, 1916, and remained with the defendant, Jack McKennon, from about 7 o'clock p. m., on said day, all night in Calhoun. And further defendants say that the testimony of said with the cause of the said water and material in this cause since ness is true and material in this cause, since it is alleged in the information that the deit is alleged in the information that the defendants acting conjointly and together committed the crime of murder upon the person of Calvin Tomlinson in Latimer county, Okl., on said date, and the state relies upon proving that said crime was committed between 7 and 8 o'clock that evening. Affiants further say that said witness is a resident of the state of Arkansas and resides at No. 1008½ on Gar. Ave. Street, in the city of Ft. Smith, Ark.

"[Signed] Jack McKennon.

"Roswell Westbrook."

The record shows, on the same day, the fol-

lowing proceedings: "The Court: I understand from you, Mr. Church, that last Tuesday which was the 7th day of this month, after Mr. Neal had served notice on you of his intention to make application for a commission to take depositions, that you at that time told him that you would waive the statutory notice to take the depositions, and that you would go with him at any

tions, and that you would go with him at any time to take the depositions of this witness. "Mr. Church (Prosecuting Attorney): Yes, sir; your honor. I told him that after he serv-ed the notice on me. "The Court: Wasn't it understood between-you and Mr. Neal that all process was to be taken out for to-morrow, and every witness in-this case was subpectaed to be here to-morrow by the state and the defense?

this case was supported to be here to-morrow by the state and the defense?

"Mr. Neal: Now, after this notice had been-served upon Mr. Church, he came to me and said, 'Neal, I will waive that notice,' and I says: 'I don't ask you to waive anything. We want those depositions taken, and we want it done legally.'

done legally. "The Cour

"The Court: I have a number of reasons for

denying the application, and I don't think it is

necessary to state them.

"Mr. Neal: We save an exception to the ruling of the court."

Thereafter, on the 15th day of March, the case was called for trial, and the defendants: filed their motion for continuance. joint affidavit for continuance contained allthe formal allegations required by law, and among others the following statements:

That T. L. Herron is a resident of Calboun, Le Flore county. That on the 6th day of March, 1916, these defendants by their attor-neys of record, Neal & Flemming, filed with the clerk of the district court of Latimer county a March, they filed a general demurrer to the information, which was overruled. Thereupon the defendants entered pleas of not guilty, and at that time the court fixed the time for trial for March 14, 1916. On the 13th day of March, the defendants filed in open court their application for a commission to take the deposition of one Bill Cole, a nonresident of the state of Oklahoma. Their joint affidavit filed in support of said applicacase. That said T. L. Herron is not present, but is confined to his room in the city of Ft. Smith, suffering from inflammation of the bowels, as is shown by the certificate of T. E. Jeffery, a regular practicing physician of the city of Ft. Smith, which certificate is attached hereto and made a part hereof. That said witness would testify, if present, as follows: That on the evening and night of February 7, 1916, he was in the town of Calhoun, Okl., and saw the defendants Jack McKennon and Roswell West-brook about 7 o'clock p. m. on said day, and brook about 7 o'clock p. m., on said day, and remained with the defendant Jack McKennon remained with the defendant Jack McKennon from about 7 p. m. in the evening until some time the next morning, sleeping in the same bed with him the night of the 7th, and knows and will testify that the defendants were not at the home of W. S. Tomlinson in Latimer county between 7 and 8 o'clock on the night of the 7th day of February, 1916.

That there is absent from attendance of the court one Mrs. Covey, who is a resident of Calhoun, and for whose attendance a subpœna duly issued indorsed by the district judge, compandings of the court one Mrs.

issued indorsed by the district judge, commanding the attendance of said witness, and the sheriff of Le Flore county served said subpœna upon the said Mrs. Covey by delivering a copy there-of to her in Calboun on the 7th day of March, 1916, a copy of which subpoens and the return thereto is hereto attached. That said witness, thereto is hereto attached. That said witness, if present, would testify: That she was present all the time during the conversation as is claimed by the state between Charity Covey and Ros-well Westbrook, and that Roswell Westbrook at no time in her presence told Charity Covey that he (Westbrook) and the defendant Jack McKennon intended to rob any person. That McKennon intended to rob any person. That said witness is sick and unable to attend the trial of this case, as is shown by certificate of physician hereto attached. That the testimony of said witness is true, and that defendants can prove these facts by no other witness in their power to procure, and that there is every rea-son to believe that the testimony of said wit-ness may be procured by the next term of this court if this case is continued.

On the same day witnesses were called and testified in support of and against said motion for continuance.

The court in overruling the motion in part

"It seems, from the undisputed evidence in this case, that this woman (Mrs. Covey) has been suffering from pellagra for several months; and that it was known at least to one of the defendants that she was confined to her bed. When he was arraigned in this case, he must have known at that time that it was unreasonhave known at that time that it was unreasonable to think that she would be here; that is, he couldn't reasonably expect that she would be here at this trial. If he was interested in getting her testimony before this court, it was his duty at that time to make an application for a commission to take depositions, and try to secure this woman's deposition, if she was able to give her testimony. There is no diligence shown to get this woman's testimony before this court at this time. Taking all things into consideration in this case and all of the into consideration in this case and all of the evidence that has been introduced before me in the hearing, I will overrule the motion for continuance." (Exceptions allowed.)

Thereupon the defendants each demand a severance, which is by the court granted, and the state elects to try the defendant Westbrook at this time.

On March 23, 1916, the jury returned their verdict finding the defendant Roswell Westbrook guilty of murder and assessing his punishment at death.

ror, but the foregoing transcript of the record presents the only errors assigned which we deem of sufficient merit to require discusgion.

[1] Counsel for the defendant insist "that the court erred in refusing to grant to the defendant a commission to take depositions."

The statutory provisions for the taking of depositions by the defendant in a criminal case are, in part, as follows:

Section 6086, Rev. Laws. "When an issue of fact is joined upon an indictment or informa-tion, the defendant may have any material witness residing out of the state examined in his behalf as prescribed in this article and not oth-

"Sec. 6037. When a material witness for the defendant resides out of the state the defendant may apply for an order that the witness be examined on a commission to be issued un-der the seal of the court, and the signature of der the seal of the court, and the signature of the clerk, directed to some party designated as commissioner, authorizing him to examine the witness upon oath or interrogatories annexed thereto, and to take and certify the deposition of the witness and return it according to the instructions given with the commission.

"Sec. 6038. Application must be made upon affidavit stating: First. The nature of the offense charged. Second. The state of the proceedings in the action and that an issue of the fact has been joined therein. Third. The name

fact has been joined therein. Third. The name of the witness and that his testimony is material to the defense of the action. Fourth. That the witness resides out of the state.

the witness resides out of the state.

"Sec. 6039. The application may be made to the court or judge himself, and must be upon five days' notice to the county attorney.

"Sec. 6040. If the court or the judge to whom the application is made, is satisfied of the truth of the facts stated and that the examination of of the facts stated and that the examination of the witness is necessary to the attainment of justice, an order must be made that a commis-sion be issued to take his testimony, and the court or judge may insert in the order a di-rection that the trial be stayed for a specified time reasonably sufficient for the execution of the commission and return thereof, or the case may be continued."

Counsel for the state contend that under section 6040, above quoted, the issuance of a commission to take the deposition of a nonresident witness rests in the discretion of the trial court or judge, and that no abuse of discretion appears in this case.

[2] From the record it appears that the defendants, on the day they entered their pleas, served notice on the county attorney that they would make application to take the deposition of a nonresident witness, which application was supported by their affidavits, averring the facts required to be shown under the statute. The county attorney offered to waive notice and the issuance of a commission, and offered to appear at any time to take the deposition of said witness. Counsel for the defendants refused to accept this proposition, as we think very properly. There is no inherent power in a court of record to issue commissions to take depositions to be read in behalf of a defendant in a criminal case. The right to take and use the deposition of a nonresident witness in behalf of a defendant in a criminal case is The petition alleges 54 assignments of er-statutory, and the procedure prescribed for taking and returning the same must be substantially complied with in order to make such deposition competent and admissible. We think the record shows a manifest abuse of judicial discretion in overruling the application of the defendants for a commission to take the deposition. In cases of this kind, where the defendant is on trial for his life he should have the advantage of every right which the law secures to him upon his trial, and in a capital case, when notice is given and a proper affidavit for the taking of a deposition is made by the defendant and filed as soon as issue is joined by entering plea, it would be an abuse of discretion to deny an application properly made.

However, we think it is apparent from the record in this case that the errors complained of are not such as demand a reversal of the conviction. The application for the commission to take the depositions was made before the severance was demanded, and it appears that the testimony of said nonresident witnesses was material only for the defendant McKennon.

It is also insisted that the court erred in overruling the motion by the defendants for a continuance. We are inclined to think that, if counsel for the state refused to consent that the facts alleged in the affidavit for a continuance should be read and considered as the depositions of the absent witnesses, the trial court in the exercise of a sound judicial discretion should have postponed the trial until a later day in the term in order to give the defendants the necessary time to take the depositions of the absent witnesses. It appears that, after the severance was granted, this defendant did not renew the application and motion made jointly, and there was testimony upon the hearing tending to show that the witnesses were absent by the procurement and consent of the defendants. However, technical objections should not ordinarily prevent the granting of a motion for a continuance in a capital case, if necessary to a proper presentation of the defendant's case. It is the right of every person accused of crime to have a fair trial and compulsory process to compel the attendance of his witnesses, and this involves as a matter of course the time reasonably necessary to prepare for trial. The statute prescribes that civil cases in the district court shall not stand for trial until ten days after the issues are made up and no felony case should be set over the objection of the defendant within ten days after his plea is entered. Under the provisions of our Procedure Criminal (section 6003, Rev. Laws), this court, in the furtherance of justice, has the power and authority to modify any judgment appealed from by reducing the sentence. However. that power should not be exercised unless

taking and returning the same must be substantially complied with in order to make Pac. 548; Fritz v. State, 8 Okl. Cr. 342, 128 such deposition competent and admissible.

To reverse the judgment of conviction in this case on the facts which are either admitted or so clearly established as to be beyond controversy would be not only to delay justice, but to give no force to the statute which prescribes that such judgments may only be reversed when upon the whole record the court is satisfied the substantial rights of the defendant have been prejudiced. However, if the guilt of the defendant was in any way left in doubt, or if we could believe that the defendant was prejudiced, we should feel it our duty to give him a new trial.

For the reasons stated, and taking into consideration the fact that the defendant McKennon, who it appears was the arch-conspirator, was upon the recommendation of the prosecuting attorney sentenced to life imprisonment upon his plea of guilty, we are of the opinion that in the furtherance of justice the judgment and sentence in this case should be modified to imprisonment for life at hard labor.

The judgment of the district court of Latimer county herein will be modified to the extent that the sentence will be changed from the infliction of the penalty of death to that of imprisonment in the state penitentiary at hard labor for life, and as thus modified the judgment is affirmed.

ARMSTRONG and MATSON, JJ., concur.

HARKINS v. STATE. (No. A-2792.) (Criminal Court of Appeals of Oklahoma. May 4, 1918.)

(Syllabus by the Court.)

1. CRIMINAL LAW 4 6271/2 DISCRETION OF TRIAL COURT—PHYSICAL EXAMINATION.

In a case of statutory rape in the first degree, where the trial court made an order that the prosecutrix submit to a physical examination to be made by two physicians selected by the defendant and at his expense, it is not a manifest abuse of discretion to refuse to modify said order to provide that said examination shall be made at the expense of the county; it being shown that a physical examination of the prosecutrix had already been made by two reputable physicians at the expense of the county at the request of the county attorney, the necessity of a second examination at the expense of the county not having been made apparent. Walker v. State, 12 Okl. Cr. 179, 153 Pac. 209, distinguished.

2. CRIMINAL LAW 6=11701/2(5) — IMPROPER CROSS-EXAMINATION — PREJUDICIAL ERROR.

The fact that the county atterney on area.

The fact that the county attorney, on crossexamination of the defendant, asked a few questions which called for incompetent answers, does not of itself establish prejudicial error.

3. CRIMINAL LAW \$\infty 730(3), 919(2)\infty Motion for New Trial\infty Denial\infty Reversal.

A motion for a new trial on the ground that

that power should not be exercised unless the county attorney asked the defendant quesit is apparent that an injustice has been tions calling for incompetent answers was prop-

erly overruled, where it is not clear that prejudice resulted to the defendant therefrom, and the trial judge promptly sustained objections to such questions. This court would not be authorized to reverse a judgment of conviction solely on this ground, where evidence of guilt is clear and convincing, and the punishment was not prescribed by the jury.

Appeal from District Court, Rogers County; W. J. Campbell, Judge.

C. L. Harkins was convicted of rape in the first degree, and sentenced to serve a term of 50 years in the penitentiary, and he appeals. Affirmed.

This alleged offense occurred in Nowata county, Okl., on the 3d day of September, 1915, at a public picnic held near the post office of Childers in that county. The defendant was a married man past 50 years of age. The prosecuting witness was a girl between the ages of 12 and 13 at the time.

The prosecuting witness had been staying most of the time during the 3 years immediately preceding this occurrence at the rooming house of the defendant and his wife in the city of Nowata, known as the Valley House. Her mother, a widow, had also been staying at that place until her marriage to a man by the name of Lockhart, which occurred a few months before this picnic. When the mother of the prosecutrix married Lockhart, they moved to the city of Claremore in Rogers county adjoining Nowata county, and it had been the practice of the prosecutrix, at the request of the wife of the defendant, after her removal to Claremore, to make visits with defendant's family at the Valley House in Nowata. The relationship of the defendant and this little girl grew to be intimate. She called him "Uncle Lum," and he displayed apparent affection toward her, and frequently was seen with her upon his lap.

A few days before this picnic, Mrs. Harkins wrote to the prosecutrix and asked her to make her a little visit. She came from Claremore to Nowata on the last Saturday in August, 1915, and on the Wednesday following was taken by the defendant to the scene of the picnic, some 10 or 12 miles northeast of Nowata. They rode out on an ordinary farm wagon loaded with coal, and on the way out stopped at a country grocery store to get some provisions. Both prosecutrix and the defendant got out of the wagon at this store, and the manner in which the defendant handled the prosecutrix when he put her back into the wagon on that occasion was so vulgar as to attract the attention of the storekeeper.

After their arrival at the picnic grounds on Wednesday afternoon, arrangements were made with a man and his wife by the name of Crockett to let the little girl sleep in their tent, which was some 10 or 20 feet away from the tent in which defendant slept. The defendant was operating a merry-go-round, and permitted the prosecutrix to ride on the merry-go-round, and also to help him sell off of one of the horses on the merry-go-

tickets. The prosecutrix was not in very good health at that time, and apparently had been suffering from chills. The defendant took along some medicine to doctor her with, and gave her several doses of this medicine during the time they were at the picnic. Everything seemed to run along all right until the afternoon of Saturday, the 3d day of September, when prosecutrix was seen to leave the picnic grounds in a south direction, to go upon the public road running east and west, and to turn east on said road. A short time thereafter the defendant was seen to do the same thing. In about threequarters of an hour they were seen to return from that direction together. The prosecutrix was walking peculiarly and crying, and the defendant was walking along beside her and apparently trying to get her to quit crying. The state produced five or six witnesses who testified to seeing these parties leave the picnic grounds, and to return thereto. The prosecutrix testifies that the defendant took her a short distance from the grounds into some underbrush and high weeds, and there asked her to "be his little girl," and accomplished an act of sexual intercourse with her. The defendant denies absolutely that he left the grounds with her, or accomplished any such act.

The prosecutrix stayed upon the picnic grounds until Sunday evening, when she was taken into the city of Nowata after having complained to certain ladies on the grounds that she was sore and stiff. Her conduct and appearance aroused the supicion of these ladies and caused the subsequent investigation by the prosecuting officers of that county. On Monday morning early a physical examination of the condition of the prosecutrix was made by the city physican of the city of Nowata and by the health officer of Nowata county, commonly called the county physician. As a result of such investigation, and from the facts above detailed, this prose-The investigation discution was lodged. closed that there was swelling in the private parts of the prosecutrix, abrasions of the skin at the opening of the vagina, and that the hymen was completely ruptured, and that there was some indication of recent deposits of blood in the private parts; that the prosecutrix was very sore, and that her abdomen was considerably distended; that it was such a condition as would occur after the perpetration of an act of sexual intercourse.

After absolutely denying any unlawful relationship between himself and the prosecutrix, the defendant introduced several witnesses who testified that the prosecutrix was seen frequently in the company of two boys about 13 or 14 years of age during the time she was out at the picnic. Both prosecutrix and each of these boys denied ever having any illicit relationship with prosecutrix. Defendant also testified that the prosecutrix fell herself in the region of her private parts, but the prosecutrix testified that while she did slide off of the side of the horse that she was not injured or ruptured in any way by such action, and that the condition she complained of was caused wholly by the illicit relation between herself and the defendant.

A change of venue was granted defendant from Nowata to Rogers county, and there the trial occurred in January, 1916, resulting in the jury finding defendant guilty of rape in the first degree, but failing to prescribe the punishment. Whereupon the court sentenced defendant to serve a term of 50 years in the state penitentiary, and from this judgment of conviction he has appealed and asks this court to reverse same upon two grounds of alleged error.

Charlton & Farrell, of Bartlesville, and E. P. Hill, of McAlester, for plaintiff in error. S. P. Freeling, Atty. Gen., and R. McMillan, Asst. Atty. Gen., for the State.

MATSON, J. (after stating the facts as above). [1] The first ground of error relied upon is the alleged refusal of the court to appoint two physicians at the expense of Nowata county to make a physical examination of the prosecuting witness. The entire record upon this matter is as follows:

"By the Court: In this case the defendant asks the court to appoint two physicians to make an examination of the prosecuting witness, Inez Greenleaf, or the person upon whom it is alleged this rape was committed. It appears from the information in this case that the state has indorsed upon the information the names of two physicians, who are reputable physicians, and who, as the record of the preliminary examination discloses, made an examination of Inez Greenleaf immediately after the time of the alleged commission of the crime, and that these witnesses are in attendance as witnesses for the state. The court now is of the opinion that the defendant should have the right to have two physicians to make such examination as they may deem necessary in order to qualify themselves properly to give this testimony. In this case, on behalf of the defendant, the court now asks the defendant to name the two physicians whom he desires to have.

"By Counsel for the State: We would like to

have our physicians present at the same time.
"By the Court: All right; the examination to be made by the two physicians in the presence of the physicians in attendance upon court as witnesses for the state; and at such examination, the county attorney or some one repre-senting the county attorney and the defendant's counsel may have and are given by the court the right to be present at such examination. (Counsel for defendant now indicate to the court

"By the Court: At the request of the defendant and upon his selection the court appoints Drs. J. F. Means and W. F. Hayes.

"Inez Greenleaf, of lawful age, being first duly sworn, the truth to testify, the whole truth, and nothing but the truth, on examination testified

as follows:
"Direct Examination: Q. What is your

name?
"By Counsel for the Defendant: Now if the court please, the defendant objects to the testimony offered by this witness until after the ex-

round in such a manner as likely to injure | amination has been had by the physicians as ordered yesterday.

"By the County Attorney: If this is going to be argued we ask that (interrupted by counsel

"By Count: The court, in its discretion, now rules that the examination which was asked for yesterday may be had as ordered, but not until after the direct examination of the witness in question. Immediately after the direct examination, if counsel for defendant desires, the examination asked for may be had, or the defendant may cross-examine the witness in question, and then the examination may be had which was ordered yesterday, and after the examination any further cross-examination which may be deemed necessary may be had by the defendant, but the examination ordered yesterday is by the court not allowed until after the direct examination of the witness now on the stand and the objection of the defendant is

overruled.
"By Counsel for the Defendant: To which we except. \* \* \*
"By the Court: Any further testimony on be-

half of the state. "By the County Attorney: If the court please,

"By County Attorney: It the court please, "By Counsel for the Defendant: The court please, before making the opening statement, there is one matter I desire to take up—that is, concerning the order that was made for the appointment of two physicians to make this examination. Your honor made that (interrupted

"By the County Attorney! We would like the Jury excused if you are going to take that up at

"By the Court: There is nothing in this mat-

ter that the jury cannot hear.

"By Counsel for the Defendant: Nothing in the world. Everything that has been done has been done in the presence of the jury.

"By the Court: Go ahead.

"By the Court: Go ahead.

"By Counsel for the Defendant: Here is the situation. That order was made that this examination be made at the expense of the defendant. Now I have talked with the defendant and with the physicians that were put in the order, and it is impossible for Mr. Harkins to raise the money to pay for this examination. He simply cannot do it, and we would like to ask, in view of that fact, and I will file an affidavit and put it in the record if the court wants me to, that this examination be made at the expense of Nowata county. Of course I know you want to keep expenses down all you can, but at the same time the defendant would have been entitled to file an affidavit and ask can, but at the same time the defendant would have been entitled to file an affidavit and ask attendance of three witnesses at the expense of the county. We did not do that. This would not be a great expense to the county, and yet an expense of \$40 or \$50 is something the defendant cannot pay at this time, and we will make an affidavit to that effect. We would like to have the order made, 'at the expense of the county,' and we feel as though we would be entitled to it and ought to have it. Unless you do, it will be impossible for us to have this exdo, it will be impossible for us to have this examination.

"By the Court: The court cannot modify that order. There is no provision of law for the state paying for an examination of this kind. The court has given the defendant permission and has made an order that the defendant may have the right to have two physicians make an examination of the girl, and that order would be made in favor of the state as well as the defendant. If the state didn't have a witness who had already made an examination, the court could not change the order to require this examination to be paid for by the state.
"By Counsel for the Defendant: Well, of

course I do not mean to argue the point with the court, but it seems to me in a case of this kind it might be amended. Of course, I leave the matter with the court. Does the court overrule (interrupted by the court)—
"By the Court." I overwise the request for a

"By the Court: I overrule the request for a modification of the order,

By Counsel for Defendant: Give us an exception.

"Thereupon counsel for the defendant starts his opening statement to the jury on behalf of the defendant.

By Counsel for the Defendant: May it please

By Counsel for the Defendant: May it please the court, and you gentlemen of the jury:
"By the Court: Just a minute. Let the record further show the defendant is now offered an opportunity to have any reputable physician that he may desire to make an examination of the prosecuting witness, Inez Greenleaf, with a view of preparing himself to testify in this case.
"By Counsel for the Defendant: Let the record show, if the court has no chiection that the

ord show, if the court has no objection, that the defendant does not accept that opportunity because of the fact that he is unable to pay the expense of the examination."

In Walker v. State, 12 Okl. Cr. 179, 153 Pac. 209, in an opinion rendered by this court on the 11th day of December, 1915, it was held to be manifest abuse of discretion on the part of the trial court to refuse to make an order for a physical examination of the prosecutrix by a competent physician upon proper demand by the defendant in a case of rape of this character. The decision of the court in that case was based upon the peculiar circumstances of the case, and the fact that the proof of the corpus delicti in that case was of a very doubtful and inconclusive character. However, it was established to be a matter within the discretion of the trial court, and a reversal, therefore, upon this ground can only be had where there is shown to be a manifest abuse of discretion. The facts upon which the court reversed the Walker Case are as follows:

"It appears from the record that when the case was called for trial the defendant demanded that a physical examination of the prosecutrix by a competent physician should be made, which demand was denied by the court, and exception allowed. It will be seen from the statement of the testimony that the evidence adduced to establish the corpus delicti is of a very doubtful and inconclusive character; it consists exclusively of monosyllable answers by the child by the county attorney, and on her cross-examination she unhesitatingly states that her uncle Oliver Walker promised to buy her new shoes and her uncle Billy Brady promised to buy her a new dress if she would tell this story to the grand intry and that hefore the trial thay told grand jury, and that before the trial they told her again they would get her a new dress and shoes if she would tell this story. In view of the unsatisfactory character of the testimony of the child witness and the fact that there is a direct conflict in her testimony, and that of the only other witness produced by the state we think that the court erred in refusing the defendant's demand that a physical examination of the child be made by a competent physician. While 'any sexual penetration, however slight, is sufficient to complete the crime' (section 2416, Rev. Laws), there must be proof of some degree of entrance of the female organ, and the practice seems to be not to permit a conviction in those cases in which it is alleged violence was done, without medical proof of the fact, whenever such proof is attainable. If the private parts of the defendant entered those of the child, then only

seven years of age, as the testimony of the state tends to show, the marks of penetration would be permanent and would be the best evi-dence of the actual commission of the crims charged."

How different are the facts of that case from the facts in this. In that case the state produced no physician who had made a physical examination of the prosecutrix. In this case a physical examination was had within 48 hours of the time of the commission of the alleged offense by two reputable physicians of Nowata county in the presence of three women, and the examination thus had clearly and convincingly corroborated the testimony of the prosecutrix as to the commission of the offense.

The prosecutrix in this case is a girl 12 years of age, and her answers show her to be of unusual intelligence for that age, while in the Walker Case the prosecutrix was at the time of testifying some 3 years younger and of a lesser degree of intelligence. In this case there was no refusal to make an order that the prosecutrix be examined, although two reputable physicians had theretofore examined her, but the error complained of is that the court refused to allow such an examination to be made at the expense of Nowata county. In this ruling we think the trial court did not abuse its discretion. It was known to the court at that time that an examination had already been made by two reputable physicians at the expense of Nowata county, and even admitting that the defendant was unable to pay for another examination, there are no facts shown in this record that any such examination was necessary, or that the result of such an examination would be any different from that of the two physicians who had already testified. It is our opinion, therefore, that this assignment of error is without merit.

[2] Among other grounds assigned for a new trial by the defendant was the misconduct of the county attorney in asking defendant improper questions which tended to bring to the attention of the jury matters which were collateral and not proper for their consideration. An examination of the record discloses that the trial court very promptly sustained objections to the questions as asked, but it is no doubt true that persistence of the county attorney or other prosecuting officer in asking improper questions, where it is clear that the purpose is to prejudice the minds of the jury by suggesting improper matter for their consideration, may amount to such misconduct as to require the granting of a new trial, and in some cases judgments of conviction have been reversed by this court solely on account of such misconduct. Pickrell v. State. 5 Okl. Cr. 391, 116 Pac. 957; Watson v. State, 7 Okl. Cr. 590, 124 Pac. 1101; Rogers v. State, 8 Okl. Cr. 226, 127 Pac. 365: Scott et ux. v. State, 13 Okl. Cr. 225, 163 Pac. 553, and others.



[3] But it is equally true that the control! of examination of witnesses is under the direction of the trial court, and before this court would be authorized to reverse a judgment of conviction solely upon the ground that there had been alleged misconduct on the part of the prosecuting attorney in examining witnesses, where the evidence is as clear and convincing as in this case, there must have been such a flagrant abuse of discretion on the part of the trial judge in overruling motion for new trial on that ground as to have amounted clearly to prejudice the substantial rights of the defendant. We are not satisfied or convinced after an examination of the record in this case that any such prejudice resulted to the defendant. The trial judge ruled promptly and correctly when objections were made, and instructed the prosecuting attorney to abandon the objectionable line of examination. county attorney did not persist in repeating the objectionable questions after the court sustained the objections. A question or two was asked the defendant which called for manifestly incompetent answers, but this court would not be authorized to reverse this judgment of conviction merely on this ground where the evidence of guilt is so convincing and the punishment was not prescribed by the jury. We are firmly of the opinion that the record does not establish that the defendant was prejudiced by any ruling of the trial court in this respect, or that the misconduct complained of was so persistent or malicious as to require a reversal of the judgment.

After a careful examination and consideration of this entire record, we find no error therein sufficient to authorize a reversal of this judgment. The judgment is affirmed.

DOYLE, P. J., and ARMSTRONG, J., concur.

WALTERS V. UNITED GROCERY CO. (No. 3146.)

(Supreme Court of Utah. March 27, 1918.)

SALES =274—RETAIL DEALER IN FOOD—IM-PLIED WARBANTY OF WHOLESOMENESS. Where a retail dealer in bakery and delica-

Where a retail dealer in bakery and delicatessen products, such as ments, salads, and foodstuffs, sold to plaintiff potato salad for immediate table consumption, which salad was unwholesome and unfit for consumption, so that plaintiff, upon eating it, became sick and was confined to her bed, the dealer was liable to plaintiff for breach of its implied warranty of wholesomeness and fitness for human consumption.

Appeal from District Court, Salt Lake County; J. Louis Brown, Judge.

Action by Bertha C. Walters against the United Grocery Company. From a judgment for plaintiff, defendant appeals. Aftermed.

Frank B. Stephens, of Salt Lake City, for appellant. Bagley & Ashton, of Salt Lake City, for respondent.

GIDEON, J. The defendant company, on or about the 12th day of December, 1915, was engaged in the preparation for sale and vending to the public bakery and delicatessen products, such as meats, salads, and foodstuffs of divers kinds, at Salt Lake City, Utah. On or about the said 12th day of December the plaintiff purchased from the defendant certain prepared foods, to wit, potato salad and other eatables for immediate table consumption. That such food was for immediate table use was known to the defendant at the time of sale. thereafter, at their noonday meal on the same day, plaintiff and other members of her family partook of such salad and other foods so purchased. During the afternoon and the days following the plaintiff became seriously sick and was confined to her bed as the result of eating the potato salad. While it is charged in the complaint that the defendant was guilty of negligence in the preparation of such food, that question was withdrawn from the jury by the court.

The defendant answered, denying generally the allegations of the complaint, but admitted that on the date in question the defendant was engaged in the business charged in the complaint. At the close of the case the defendant requested the court to instruct the jury that, where one sells food for immediate consumption, he must exercise due care in the preparation of the foods sold: that he was not an insurer of the quality of the food, and could be held liable only by reason of negligence. The court refused that instruction, and gave an instruction, in substance, charging the jury that where a dealer prepares food for sale for immediate consumption, he impliedly represents the same as wholesome and fit for human consumption, and that if they found that the dealer, defendant herein, sold foods as fresh to its customers which at the time were stale and defective, and injury resulted, the plaintiff would be entitled to recover.

The matter was thus submitted to the jury, and judgment rendered in favor of the plaintiff, and from that judgment defendant appeals.

The refusal of the court to give the requested instructions and giving the instruction complained of are assigned as error. It will therefore be seen, as stated in respondent's brief, that the "only question of law involved in this appeal is as to whether or not a vendor of food for immediate consumption may only be held liable on proof of negligence." In other words, the plaintiff not having established that the defendant was guilty of negligence in the preparation of the potato salad, whether the fact alone

that the salad was stale and not fit for human consumption would entitle the plaintiff to recover. There seems to be no question in the record but the eating of the salad caused the sickness of the plaintiff as well as other members of her family.

While the authorities are not uniform, and there does not seem to be any well-defined universal rule governing the liability of vendors in the sale of food of all kinds for human consumption, still I think it is fairly deducible from the adjudicated cases, where the facts are such as in the case at bar, that the vendor must be held liable when injury results from the consumption of such food. There is a well-defined line of cases that holds that retail dealers in selling canned goods for immediate use are not liable unless they can be charged with negligence in the purchase of such food, or with knowledge that the contents were unfit for human consumption. Those cases are determined upon the well-recognized fact that the dealer is not the manufacturer of the goods sold, and is not in a position to know the contents any better than the purchaser, neither the purchaser nor the vendor having had any opportunity to examine and know the condition of the goods contained in the cans sold. To that effect are the following authorities: Tomilson v. Armour & Co., 75 N. J. Law, 748, 70 Atl. 314, 19 L. R. A. (N. S.) 923; Julian v. Laubenberger, 16 Misc. Rep. 646, 38 N. Y. Supp. 1055; Mazetti et al. v. Armour & Co. et al., 75 Wash. 622, 135 Pac. 633, 48 L. R. A. (N. S.) 213, Ann. Cas. 19150, 140.

But, as indicated, the weight of authority is to the effect that in a case such as the one under consideration, where the seller has prepared the goods, and there is nothing in the appearance of the goods or the odor to indicate either to the seller or to the buyer that the combination is not fit for human consumption, the seller is liable. The opportunities and means of knowing the contents of the different ingredients that go to make up the salad, and the sources from which such ingredients are obtained, are exclusively in his possession and knowledge, and cannot in any way be known to the purchaser. True, the food was seen by the purchaser, plaintiff herein, as well as the defendant; but, as stated, there was nothing about its appearance to indicate its impurity. Not only was the means of knowing the impurity of the food within the knowledge of the compounder and seller of such food, but it seems that he ought to be charged with the responsibility for the injury resulting, for the reasons indicated. The Supreme Court of Illinois in Wiedeman v. Keller, 171 Ill. 93, 49 N. E. 211, says:

"As a general rule, we think the decided weight of authority in the United States is that, on all sales of meats or provisions for immediate domestic use by a retail dealer, there is an im- to the manner of levying the tax by the

plied warranty of fitness and wholesomeness for consumption.

Mechem on Sales, par. 1356, vol. 2, while admitting that the question of implied warranty upon a sale of articles for food seems to be involved in some uncertainty, further states:

"It is, practically everywhere, agreed that, where a dealer or ordinary trader sells goods for immediate consumption by the buyer, an implied warranty arises that the goods are wholesome and fit for human food."

See, also, Malone v. Jones, 91 Kan. 815, 139 Pac. 387, L. R. A. 1915A, 328; Bishop v. Weber, 139 Mass. 417, 1 N. E. 154, 52 Am. Rep. 715; Craft v. Parker, Webb & Co., 98 Mich. 245, 55 N. W. 812, 21 L. R. A. 139.

I have discussed this case upon the theory of an implied warranty applicable to the particular facts as they appear in this record. Questions of fraud, neglect, or knowledge of the impure condition of the food render the seller liable upon a different principle or rule than the one upon which this case is determined.

It follows that there was no prejudicial error, and the judgment of the lower court is affirmed. Respondent to recover cost.

FRICK, C. J., and McCARTY, CORFMAN, and THURMAN, JJ., concur.

LOS ANGELES & S. L. R. CO. v. RICH-ARDS, County Treasurer. (No. 3160.)

(Supreme Court of Utah. April 5, 1918.) 1. TAXATION \$=301(1) - COUNTY TAXES -FORM OF LEVY - GENERAL AND ROAD PUB-

POSES.

In view of Comp. Laws 1907, \$\frac{1}{8}\$ 511x22, 511x24, 511x27, as amended by Laws 1911, c. 119, authorizing expenditure of money for construction, maintenance, and repair of county roads, a separate levy for county roads, although not authorized by Comp. Laws 1907, \$\frac{1}{2}\$ 2593, as amended by Laws 1915, c. 111, is not invalid, where the total amount levied for general county purposes, plus the road tax, did not exceed 3.5 mills, the maximum allowed for general purposes in such statute, since there is no form for making such tax levy established by law.

2. Statutes &==245 - Taxation - Construction POSES.

2. Statutes €⇒245 — Taxation — Construc-TION.

Laws relating to taxation should be strictly construed against the taxing power.

Appeal from District Court, Iron County; Joshua Greenwood, Judge.

Suit for injunction by the Los Angeles & Salt Lake Railroad Company against Morgan Richards, as Treasurer of Iron County. Judgment for plaintiff, and defendant appeals. Reversed with directions.

O. A. Murdock, of Beaver, for appellant. Dana T. Smith, of Salt Lake City, for respondent.

THURMAN, J. This is an action to enjoin the collection of a tax alleged to be illegal. The only material question involved relates

county commissioners of Iron county, hereinafter called the commissioners.

On the 7th day of August, 1916, the commissioners passed the following resolution:

"Be it resolved by the board of county com-missioners of Iron county, state of Utah, con-vened in regular session of Monday, August 7, 1916, that there be and is hereby levied upon all of the property in Iron county for the year 1916, for the purposes hereinafter set forth, the 1916, for the purposes hereinafter set forth, the amounts defined as follows: 4.4 mills on each dollar for state and state school purposes. 5.5 mills on each dollar for county school purposes. 1.5 mills for general county purposes. 1.3 mills for county road purposes. 2 mills for county indigent purposes, and dependent mothers."

The remainder of the resolution being immaterial is omitted. The language quoted indicates the form adopted in making the levy. The tax thus levied was extended on the assessment roll, and the defendant authorized to collect the same. Plaintiff paid all the taxes thus levied, except the item of 1.3 mills for county road purposes, and refused to pay that on the alleged grounds that the levy as to that was illegal and void. Sale of its property for the payment of the tax being threatened by the defendant, plaintiff commenced this action to enjoin the collection. The facts were stipulated, from which it appears that the only material question involved is the validity of the item of tax which plaintiff refused to pay. The case was tried to the court without a jury. Judgment was rendered for plaintiff. Defendant ap-Deals.

Defendant assigns many errors, none of which need be considered, except the third and fourth, alleging that the court erred in its decision and in rendering judgment for the plaintiff.

[1] Comp. Laws Utah 1907, \$ 2593, as amended in Sess. Laws 1915, at pages 192, 193, authorizes the commissioners, when the assessed valuation of property in the county is less than \$2,000,000, to levy not exceeding 3.5 mills on the dollar for general county purposes, and not exceeding .7 mills on the dollar for the care, maintenance, and relief of the indigent sick and otherwise dependent poor. Nothing is said in this section concerning county roads. Respondent concedes that money for county road purposes could be taken from the receipts of the levy for general county purposes, but contends that the commissioners have no right to make what respondent calls a special levy for that pur-This admission by respondent simplifies the issues tendered and renders it unnecessary to expatiate at length upon the scope and meaning of Comp. Laws Utah 1907, # 511x24, 511x27, and 511x22, as amended in Sess. Laws 1911, at pages 198, 199. These sections undoubtedly authorize the commissioners to expend money for the construction, maintenance, and repair of public roads in the county, and such money can be had alone from revenue arising from taxation.

construction, maintenance, and repair of county roads is a county purpose.

But the concrete question at the bottom of this controversy between the parties is: Can the commissioners, in the order making the levy, designate a certain number of mills for general county purposes, and in another item of the levy designate a certain number of mills for county road purposes; the aggregate sum not exceeding the amount the commissioners may levy for general county purposes? In other words, it is conceded that the construction, maintenance, and repair of county roads is a county purpose for which the county commissioners may expend money arising from the levy made for general county purposes, and that the amount of the levy in this case for general county purposes, and the amount levied for county road purposes, in the aggregate, do not exceed the amount the commissioners, under the law, might have levied for general county purposes. The controversy, then, in the last analysis, is: Can the commissioners, in making the levy for general county purposes, separate it into two or more items, designating in each item the particular county purpose for which the levy is made?

Respondent insists such levy is illegal and void as to the item designating the special purpose. Appellant resists this contention, and insists that such levy is at most a mere informality, harmless in its effect, and therefore not illegal and void. In this state there is no form for making a tax levy established by law. The limit for which the levy may be made for certain purposes is fixed and established, beyond which the commissioners may not go. As long as they keep within the limit fixed for the purposes named, and no one is substantially prejudiced by the form of the levy, we cannot understand why the levy should be considered void, in whole or in part, simply because it separates the levy into two or more items, one or more of which designates the specific purpose intended. Of course, if the statute of the state provided a specific form for making a levy, even though we might not be able to conceive a good reason therefor, we would in all probability feel bound by the terms of such statute, for we agree with counsel for respondent that laws relating to taxation are generally strictly construed against the authority levying the tax; or if statutes similar to ours had been construed by reputable authority showing that what appellant contends for here is recognized law in other states, such authority would at least have persuasive influence with us in arriving at a determination of the question under review. But, as before stated. we have no form for a levy prescribed by statute, neither have we been cited to any authority which in our judgment supports respondent's contention. Such authorities as have been cited and relied on by respondent will receive brief notice before we corr It is therefore, in effect, conceded that the clude this opinion. If the levy in this case

had read "2.8 mills for general county purposes," and omitted "county road purposes" altogether, respondent would have had no fault to find with the levy thus made, notwithstanding its taxes would have been exactly the same as under the levy complained of. We do not wish to be understood as commending the form of levy adopted by the commissioners in this case, nor do we intend to prescribe what we may think would be a proper form. We only suggest that the segregation of general county purposes into two or more items as was done in this case, which was wholly unnecessary in making the levy, led to this litigation and expense without any corresponding benefits, for without such segregation in the levy the commissioners were authorized by law to expend upon the roads such sum as in their judgment the purpose demanded.

[2] The authorities cited by respondent, to the effect that laws relating to taxation should be strictly construed against the taxing power, are acknowledged and approved. We recognize that as the law, and would readily apply it in the present case, if there was anything in the case to which it could be applied. As long as there is no form of levy prescribed by our statutes and the levy is plain, intelligible, capable of being understood, made at the proper time, and does not transcend the limit or purposes prescribed by law, we do not feel authorized to declare the levy void. In addition to authorities relating to a strict construction in this class of cases, respondent calls our attention to the following: St. Louis, I. R. & C. R. Co. v. People ex rel. Kinzie, 177 III. 78. 52 N. E. 364; Hough v. North Adams, 196 Mass. 290, 82 N. E. 46; Railroad v. Hamblen Co., 115 Tenn. 526, 92 S. W. 238; Sullivan v. Yow. 125 Ga. 326, 54 S. E. 173; Chicago & A. R. Co. v. People, 155 Ill. 276, 40 N. E. 602; Com. et al. v. United States Fidelity, etc., Co., 121 Ky. 409, 89 S. W. 251; Cincinnati, I. & W. R. Co. v. People, 213 Ill. 197, 72 N. E. 774; Wabash R. Co. v. People ex rel. Patterson, 187 Ill. 289, 58 N. E. 254.

It is not necessary to consider these cases in detail. We have carefully examined them and are unable to apply them to the question involved in this appeal. They are generally cases in which the taxing power has clearly exceeded its authority, either as to the amount of the tax or the purpose defined by law. As to such cases, there can be no legitimate controversy. If in the present case the aggregate amount of the levy of the two items referred to had exceeded the limit allowed by law for general county purposes, the levy as to the excess would unquestionably be illegal, or if either item was for an unauthorized purpose, the levy as to and GIDEON, JJ., concur.

such purpose would be void. But, as we have seen, no such condition is found in the case at bar. Here both the amount and purpose of the tax levied are authorized by law, and were therefore within the power of the commissioners.

There seems to be a dearth of authority concerning the exact question before the court. Appellant, however, cites one case from Nebraska which seems to be in point. B. & M. R. R. Co. v. Co. Commissioners of Lancaster Co., 12 Neb. 324, 11 N. W. 332, was an action to enjoin the collection of a The case was referred to a referee, who heard the evidence and reported conclusions of fact and of law to the trial court, which rendered judgment in favor of the commissioners. Plaintiff appealed. In that case the commissioners had power to levy a tax of 10 mills on the dollar for general county purposes, which included support of the poor. In making the levy they designated 714 mills on the dollar for general county purposes and 21/2 mills for "poorhouse fund." The plaintiff objected to the item denominated "poorhouse fund," for the same reasons that plaintiff here objects to the item for "county road purposes." The opinion of the appellate court is very brief. The following excerpt illustrates the views of the court:

"The 'general fund' of a county, as its name implies, is one devoted to a variety of uses, and its expenditure is left mainly to the discretion of the board of county commissioners. The amount which may be raised for this fund the Legislature has wisely restricted; the limitation being, as we have seen, 10 mills on the dollar of taxable property. Now in the performance of the duty of determining the amount that should be raised within this limit, the commissioners must necessarily make an estimate of the probable needs of the county for the cur-rent year in the way of legitimate expenditures. Having done this, and the total rate being as-certained, suppose that, in making the levy, instead of grouping the several items under the comprehensive head of 'general fund,' as is usually done, and as the statute above quoted evidently contemplates, they are set forth in detail. giving the amount estimated for each, would the tax therefore be illegal? We think not; so long, at least, as no item is included not proper to be satisfied from the general fund of the county. It would be at most but an informality, in no way invalidating the levy. The ruling of the referee was correct, and was properly sustained by the court."

We heartily indorse the views of the Nebraska court as expressed in the opinion referred to. The contention of respondent in this case is without merit. The judgment is reversed, and the trial court directed to set aside the restraining order issued in the case and dismiss the action. Appellant to recover costs.

FRICK, C. J., and McCARTY, CORFMAN,

for determination.

RAMPTON v. COLE. (No. 8143.)

(Supreme Court of Utah. April 10, 1918.)

1. EVIDENCE 400(2) - To VARY WRITTEN CONTRACT.

Testimony tending to vary terms of written contract for exchange of realty, the execution of which was admitted by both plaintiff and defendant, was erroneously admitted.

APPEAL AND ERROR @== 1001(1)-QUESTIONS Decided Adversely by Verdict—Review.
Questions raised on defendant's appeal,
which were determined adversely to him by
verdict, are not when sustained by substantial evidence, properly before the appellate court

3. Exchange of Property \$==8(1)-Meas-URE OF DAMAGES-INSTRUCTIONS.

In an action for damages for breach of contract for exchange of realty, an instruction that, "if you find the issues in favor of the plaintiff, then you are to assess his damages in such amount as will fully compensate for any losses sustained by reason of the failure of the defendant to perform the terms of said contract correctly stated the law and was not subject to the objection that it did not leave it to the jury to determine whether plaintiff had sustained damages.

4. Exchange of Property €==8(1) - Meas-URE OF DAMAGES-INSTRUCTIONS.

In action for damages for breach of contract to exchange realty, an instruction which in effect told the jury that they might, in estimating damages, consider value "between" the dates of execution and for performance of the contract, was faulty for failure to confine question of damages to said dates.

5. Trial &=281 — Exception to Instruction Good in Part.
Where the first paragraph correctly stated the law, an exception taken to the whole instruction was insufficient and will be disregarded on appeal. 1

6. APPEAL AND ERROR == 1004(2)-PROVINCE OF JURY.

In an action for damages for breach of contract to exchange property, although there was a sharp conflict in the testimony as to values of the property, it was wholly within the prov-ince of the jury to determine the ultimate fact, so long as their verdict found support in the testimony.

Appeal from Third District Court, Salt Lake County; P. C. Evans, Judge.

Action by Charles H. Rampton against S. N. Cole. Judgment for plaintiff, and defendant appeals. Affirmed.

Marks & Jensen and J. E. Pixton, all of Salt Lake City, for appellant. Bagley & Ashton, of Salt Lake City, for respondent.

CORFMAN, J. Plaintiff commenced this action in the district court of Salt Lake county to recover damages against the defendant for breaching a written contract entered into between plaintiff and the defendant on the 5th day of August, 1915, for the

ant on the 5th day of August, 1915, for the exchange of real estate.

So far as material here, the contract provides: The plaintiff agrees to exchange certain real estate known as the "Rampton Building" on Main street, Bountiful, Utah,

for 220 acres of land, commonly known as the "Mule Ranch," in Corinne precinct, Utah. Plaintiff assumes a mortgage of \$6,500 on said Corinne property. Defendant assumes a mortgage of \$5,300 on the Bountiful property. Plaintiff gives defendant a third mortgage of \$2,000 on said Corinne property subject to said \$6,500 mortgage, and a second mortgage of \$2,600 is given by plaintiff to Bountiful State Bank. "Both parties agree to deliver title to and possession of the parcels of land each is conveying, on or before January 1, 1916."

It is alleged in the complaint that the plaintiff on and prior to January 1, 1916, made, executed, and tendered to the defendant a good and sufficient conveyance of the property to be by him conveyed to defendant under the contract, and the plaintiff's ability, readiness, and willingness to perform and carry out any and all covenants as in said agreement provided he shall do; that the defendant on and prior to January 1, 1916, and ever since, has wholly failed, neglected, and refused to make, execute, and deliver to the plaintiff a deed of conveyance as in said agreement provided for, and that thereby plaintiff has suffered damages in the sum of \$10,000; that plaintiff has in reliance upon the said contract expended \$50, for all of which judgment is prayed, including interest and costs of suit.

The answer admits the execution of the contract; affirmatively alleges, as a defense, that the contract was not intended to be final between the parties; that the time the contract was signed an oral agreement was entered into between the parties that plaintiff should examine defendant's property and, if found satisfactory, then the parties should draw a final contract containing terms identical with those orally agreed upon and the former written agreement should become null and void. The answer also alleges fraud and misrepresentation on the part of the plaintiff; that the contract was signed through mistake and inadvertence on the part of defendant; and denies that plaintiff has sustained any damage. The reply denies the affirmative allegations of the answer.

The trial was to a jury, and the issues found in favor of the plaintiff. Judgment was entered accordingly. Motion for new trial was made and denied. Defendant ap

On appeal defendant has assigned 36 errors. In his brief and argument, however, he summarizes and states his theory of the case on appeal in the following language:

ed by plaintiff before plaintiff could put de-fendant in default. \* \*

fendant in default. \* \* \*

"(C) That both parties failed to perform their alleged covenants in the document sued upon within the time stipulated. \* \* \*

"(D) That plaintiff was not on the 1st day of January, 1916, or at any time prior to the time of bringing his suit, ready to perform his alleged agreement with defendant. \* \*

"(E) And that if there was a valid agreement and it was breached by defendant, plaintiff sustained only nominal damages."

tiff sustained only nominal damages.

[1, 2] We have reviewed the testimony, as disclosed by the record, with care, and we find testimony was received pro and con and submitted to the jury under instructions of the court bearing on each one of the foregoing propositions of the defendant. Some of the testimony, we think, was admitted erroneously by the court over the objections of the plaintiff, particularly the testimony of defendant's witness tending to vary the terms of the written agreement between the parties, relied on by the plaintiff, the execution of which was admitted by both plaintiff and defendant. Of the admission of that evidence, the defendant has no cause to and does not complain. Many of the questions raised on the appeal by the defendant were determined adversely to him by the verdict of the jury, in plaintiff's favor, and are not therefore, when sustained by substantial evidence, properly before this court for determination. As we view the case after a very careful reading of the entire record, primarily there are but two questions for this court to here pass upon: (A) Did the trial court commit error in its instruction to the jury, as to the measure of damages? (B) Was the verdict of the jury, fixing the amount of plaintiff's damages at \$1,786.50, excessive?

The court instructed the jury as follows: "(21) If you find the issues in favor of the plaintiff, then you are to assess his damages in such amount as will fully compensate him for any losses sustained by reason of the failure of the defendant to perform the terms of said

contract. contract.

"In estimating the damages, you are to take into consideration the increase in value, if any, of the Mule Ranch, between August 5, 1915, and January 1, 1916, or the decrease in value, if any, of the Bountiful property between the 5th day of August, 1915, and the 1st day of January, 1916, or both; also, any necessary expenses to which the plaintiff was put by reason of the default of the defendant in making preparation for the carrying out of the contract preparation for the carrying out of the contract on the plaintiff's part, not exceeding the sum of \$10,050."

[3] The defendant complains that the trial court, by the first paragraph, in effect told the jury that it was their duty to assess damages against the defendant, without leaving it for the jury to determine whether the plaintiff had sustained damages, and if so how much, citing in support of his contention section 199, Brickwood-Sackett, Instructions to Juries, and Chicago & N. W. R. R. Co. v. Chisholm, 79 Ill. 584. We do not think the instruction in the particulars compretation, is susceptible of the construction placed upon it by the defendant. The language used by the court very plainly left it for the jury alone to determine whether the plaintiff had sustained damage, and, if so, for them to say how much and to assess the damages against the defendant. Moreover, we think the instruction in that regard correctly stated the law applicable to the issues in the case. Black on Rescission & Cancellation. § 705.

[4] The second paragraph of the instruction complained of by plaintiff, wherein the court told the jury that, "in estimating the damages, you are to take into consideration the increase in value, if any, of the Mule Ranch, between August 5, 1915, and January 1, 1916, or the decrease in value, if any, of the Bountiful property between the 5th day of August, 1915, and the 1st day of January. 1916, or both," we think was a faulty instruction. While the record shows that the testimony of witnesses, bearing on the question of values of the property to be exchanged, was properly confined and directed to the dates of execution and for performance of the contract, and therefore the language employed by the court may not have been, for that reason, highly prejudicial to the defendant, yet we think the court in effect told the jury they might in estimating the damages, if any, to the plaintiff, consider values between the dates of execution and for performance of the contract. Doubtless the court had in mind and intended to confine the jury in their consideration of the question of damages to the date of the execution of the contract and the date when the contract was to be performed by the parties. However, as pointed out, the jury might have erroneously believed they were privileged to take into consideration values upon any date between August 5, 1915, the day of the execution of the contract, and January 1, 1916, the day when the contract was to be performed by the parties.

[5] Conceding the instruction under consideration to be erroneous in that regard, yet as we have pointed out, the first paragraph was proper and correctly stated the law. The exception taken was to the instruction as a whole, and therefore, for that reason, was insufficient and must be disregarded. Farnsworth v. Union Pac. Coal Co., 32 Utah, 112, 89 Pac. 74.

(B) As we view the record, there was ample testimony produced at the trial, in plaintiff's behalf, to support the verdict and judgment for the amount rendered.

[6] Some of the witnesses testified that the ranch lands near Corinne were worth 20 per cent. more on January 1, 1916, than when the contract for exchange was entered into; others testified that the business property at Bountiful had, on January 1, 1916, decreased in value from 25 to 30 per cent. Acplained of by defendant, by any fair inter-cording to the testimony of these witnesses,

the values of the property to be exchanged; were such that the jury might have found a verdict against the defendant for a much greater sum than they did find without this court having the right to disturb their verdict. While there was a sharp conflict in the testimony bearing on the values of the property, it was wholly within the province of the jury to determine the ultimate fact, so long as their verdict found support in the testimony of the witnesses.

What we have said in regard to the complaint of the defendant as to the damages awarded plaintiff being excessive also applies to many of the alleged errors assigned by the defendant on this appeal. The verdict of the jury precludes our reviewing them on appeal.

After review and due consideration of the entire record, we have been unable to find any reversible error assigned on the appeal. Therefore it is ordered that the judgment of the district court be affirmed. Costs to plaintiff.

FRICK, C. J., and McCARTY, THURMAN, and GIDEON, JJ., concur.

DENVER & R. G. R. CO. v. PUBLIC UTILI-TIES COMMISSION OF UTAH. (No. 3164.)

(Supreme Court of Utah. April 5, 1918.)

1. RAILBOADS &= 97-PUBLIC SERVICE COM-MISSIONS - POWERS - STATUTES - CON-STRUCTION.

In view of Public Utilities Act (Laws 1917, c. 47) art. 5, § 34, repealing all acts or parts of acts inconsistent therewith, the Public Utilities Act provides the exclusive method of regulation, control, and license of the use of grade crossings by railroads, regulated in article 4, § 14, thereof.

2. Railroads \$37 - Public Service Commissions - Powers - Statutes - Con-STRUCTION.

In view of Public Utilities Act, art. 4, § 14, giving the commission exclusive power to prescribe manner and terms of installation operation, maintenance, use, and protection of a crossing of a public road by a railroad or of a street by a railroad, the commission had power and it was its duty to act on an application of a railroad to cross a city street, although the commission had made a rule against granting a license to cross a street, unless the municipality had granted its franchise therefor, and no such franchise had been acquired.

Original proceedings in mandamus by the Denver & Rio Grande Railroad Company against the Public Utilities Commission of Utah. Writ granted.

Van Cott, Allison & Riter, of Salt Lake City, for plaintiff. Wm. H. Folland, City Atty., and H. H. Smith and Walter Little, Asst. City Attys., all of Salt Lake City, for defendant.

McCARTY, J. The Denver & Rio Grande

tioner, filed in this court a petition for an alternative writ of mandamus against the Public Utilities Commission of Utah, hereinafter called commission. The petition recites that petitioner is a railroad corporation organized under the laws of Utah and Colorado and is the owner and operator, as a common carrier of freight and passengers for hire, of numerous lines of railroad in each of the states named and is about to construct a new standard gauge railroad track about 11/4 miles in length from its yards immediately south of Twenty-First South street in Salt Lake county, Utah, to its freight yards in Salt Lake City; that it already has a double main line track between these points, one designated the east-bound and the other the west-bound track: that these tracks are inadequate, and that a new track is necessary to enable petitioner to carry on its business; that the proposed new track will be laid parallel to and west of the present east-bound main line at a distance of 16 feet from center to center; that it will cross at grade and at right angles Twenty-First South street in Salt Lake county, and Thirteenth and Seventeenth South streets in Salt Lake City. The petition further recites that petitioner already owns property used as a right of way fronting on the streets mentioned where its present two tracks and its proposed new track cross; that its frontage on the north side of Thirteenth South street is 185 feet and on the south side 200 feet; that both on the north and south sides of Seventeenth South street its frontage is 200 feet, and on the north side of Twenty-First South street 100 feet, while on the south side of the last-named street its frontage is 2,620 feet; that the present tracks cross these streets within the limits of the frontage mentioned and the proposed new track will also cross these streets within the limits of the frontage; that the new track will be used for the movement of freight trains between the yards above mentioned. It is further recited that freight trains moving to Salt Lake from the direction of Denver, Colo., will first enter the yards south of Twenty-First South street, where they will be broken up and cars reclassified and rearranged; that the cars will then be made up into new trains and moved over this track to Salt Lake City freight yards, and that, vice versa, trains moving from Salt Lake City in the direction of Denver will enter the yard south of Twenty-First South street. and, after reclassification and rearrangement, will move on to final destination. It is further recited in the petition that "petitioner has neither secured nor applied for a franchise from the board of county commissioners of Salt Lake county to construct the proposed new track over and across Twenty-First South street, and has neither secured Railroad Company, hereinafter called peti- nor applied for a franchise from the board

of commissioners of Salt Lake City to construct the same over and across Thirteenth and Seventeenth South streets"; that on October 5, 1917, petitioner made written application to the commission for a permit to construct at grade the proposed new track over and across said streets at right angles thereto under chapter 47, § 14, art. 4, Laws Utah 1917, commonly called the "Public Utilities Act"; that the commission refused to assume jurisdiction and declined to pass upon the application one way or the other, taking the position that a franchise from the local authorities is necessary.

An alternative writ of mandamus was issued on the petition, and the commission answered admitting that petitioner had applied to it for a grade crossing permit as stated in the petition, but alleged; (a) That "this commission has adopted a rule to the effect that before grade crossing permits will be issued a copy of the franchise or consent of the local authorities authorizing the construction of the railway track, whether spur track or main, must be submitted in connection with the petition"; (b) that "petitioner, on presenting its petition before the Public Utilities Commission of Utah, failed and refused to attach any copy of franchise or consent of local authorities to its petition in compliance with the rule of said commission, and continued so to refuse when advised by said commission that no permit would be issued until such time as a copy of the franchise authorizing the construction of such railroad track was filed with said petition."

The Public Utilities Act reads, so far as material here, as follows:

Sec. 1. (Art. 2.) " \* \* \* (m) The term 'common carrier' when used in this act, includes every railroad corporation; \* \* \* (aa). The term 'public utilities,' when used in this act, includes every common carrier."

Sec. 1. (Art. 4.) "The commission is hereby vested with power and jurisdiction to supervise and regulate every public utility in this state, as defined in this act, and to supervise all the business of every such public utility in this state, and to do all things, whether herein specifically designated, or in addition thereto, which are necessary or convenient in the excepts of such power and jurisdiction."

specifically designated, or in addition, which are necessary or convenient in the exercise of such power and jurisdiction."

Sec. 14. (Art. 4.) "(a) No track or any railroad shall be constructed across a public road, highway or street at grade, \* \* \* without having first secured the permission of the commission: Provided, that this sub-section shall not apply to the replacement of lawfully existing tracks. The commission shall have the right to refuse its permission or to grant it upon such terms and conditions as it may prescribe. (b) The commission shall have the exclusive power to determine and prescribe the manner, \* \* and the terms of installation, operation, maintenance, use and protection of each crossing of one railroad by another railroad or street railroad, and of a street railroad by a railroad and of each crossing of a public road or highway by a railroad. \* \* and of a street by a railroad. \* \* "

Sec. 34. (Art. 5.) "Sections 454, 455 and 456, Compiled Laws of Utah 1907, and all acts or parts of acts inconsistent with the provisions

of this act are hereby repealed." (The repeal of these sections is important.)

It will be noticed that the act confers on the commission the exclusive power to prescribe the manner and the terms upon which railroad tracks may be constructed, maintained, and operated across a public road, highway, or street, and that "no track or railroad shall be constructed across a public road, highway or street at grade \* \* \* without having first secured the permission of the commission."

[1,2] Counsel for the respective parties have confined their consideration of the case to a review of the history of the legislation and to a discussion of the construction which they claim should be given the statutes giving railroad companies the right to construct. maintain, and operate railway lines and tracks in the state, and of the power heretofore conferred on municipal corporations by statute to regulate the use of streets and to withhold or grant franchises to railroad companies to lay, maintain, and operate railroad tracks on and across the public streets within the municipalities. The scope and extent of the power of the commission under the act, and the effect of the act on the statutes referred to, is not discussed or even referred to in their briefs. Counsel seem to take it for granted, and to have discussed the case on the theory, that no parts of the statutes in force at the time the act went into effect, giving railroads the right to occupy and cross roads, highways, and streets, are repealed or abrogated by the act except the sections specifically mentioned in the repealing clause. Not only are the sections of the statute specifically mentioned in the act repealed, but "all acts and parts of acts inconsistent with the provisions of this act" are repealed. Since the act, in language so plain that it will admit of but one construction, confers on the commission the exclusive power to determine and prescribe the manner, and the terms upon which railroad companies may construct, maintain, and operate railroad tracks across public roads, highways, and streets within the state and repeals all acts and parts of acts inconsistent with the provisions conferring such power, but little need or can be said on the subject, except that the commission erred in declining to act on the application made by the petitioner for crossing permits. This decision is not intended to, and does not, declare or establish any rule regarding the course necessary for street railroad companies to take in order for them to get permission and to entitle them to construct, maintain, and operate street railway lines on and across the public streets of cities and incorporated towns.

It is ordered that a peremptory writ of mandamus issue requiring and directing the commission, after making, within a reasonable time, such investigation, if any, as it may deem necessary in the premises, to act 7. Chiminal Law 6573(2)—Instruction—on petitioner's petition for crossing permits

Limiting Evidence.

Where evidence is admissible only for a control of the and to either grant or refuse them.

FRICK, C. J., and CORFMAN, THUR-MAN, and GIDEON, JJ., concur.

STATE v. McCURTAIN et al. (No. 3157.)

(Supreme Court of Utah. April 12, 1918.)

1. Criminal Law == 371(1)-Intent-Evi-DENCE.

In a prosecution for abortion, the defense being that the operation was necessary to save life, testimony of another than prosecutrix that about the same time a like operation was performed upon her by defendants for a criminal purpose was admissible to prove intent.

2. Chiminal Law \$==507(6)—Prosecutrix as "Accomplice."

Prosecutrix is not an accomplice of defendant charged with abortion, though the criminal operation was performed at her request or with

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Accomplice.]

3. Criminal Law \$\infty 780(2)\$—Instruction-Testimony of Accomplice.

In a prosecution for abortion, where the alleged father of the child with which prosecutrix was pregnant was present at the operations, and testified respecting them, defendants were entitled to an instruction defining an accomplice, and telling the jury that if the witness was such within the statute they should not convict unless his testimony was corroborated as required, and the refusal of such charge was prejudicial error.

4. CBIMINAL LAW \$\infty 423(1)\$—Codefendants
— Declarations and Statements of Ad-MISSIONS.

Where defendants charged with abortion conspired together or acted in concert in committing the criminal act, the acts, declarations, and conduct of one in furtherance of the object in view were admissible as against the other, but, if the acts charged had been committed and had ended, the statements or admissions of one defendant were not admissible as against the other, unless made in his presence.1

5. Criminal Law \$== 1056(1)—Instruction-DUTY TO REQUEST AND EXCEPT.

If counsel desire to have the court charge upon a particular phase of the case, or on a collateral issue or subject, they must offer a proper request, and, if it is refused, save an exception, otherwise the question may not be re-

6. Criminal Law \$== 1173(2) -- Instruction-FAILURE TO REQUEST-PROMISE OF COURT.

In a prosecution for abortion, where, when the state offered to prove the statements of one defendant, counsel for defendants objected, and requested the court to inform the jury that the admissions and statements of such defendant could not be considered as against the other, and the court overruled the objection and stated the jury would be instructed fully at the conclusion of the case, and counsel excepted to the ruling and did not prepare and offer any request on the subject, the court's omission later to charge the jury as promised, thus permitting them to consider the statements of the one defendant as against the other, as well as against herself, was prejudicial error.

where evidence is agmissible only for a certain purpose or as against a particular defendant, it is the better practice for the court, when the evidence is received, to instruct the jury of the purpose for which it is received, and tell them not to consider it for any other.<sup>2</sup>

8. Criminal Law \$\sim 807(1)\to Instructions\to ARGUMENTATIVENESS.

Argumentative requests to charge, every legal proposition being supported by argument, were faulty and properly refused.

Appeal from District Court, Salt Lake County; J. Louis Brown, Judge.

Dr. A. McCurtain and Mrs. Dora Arden were convicted of abortion, and they appeal. Reversed, and case remanded, with directions for new trial.

M. M. Warner and R. R. Wedekind, both of Salt Lake City, for appellants. Dan B. Shields, Atty. Gen., and Jas. H. Wolfe and O. A. Dalby, Asst. Attys. Gen., for the State.

FRICK, C. J. The defendants were jointly charged with having produced an abortion upon a young unmarried woman, hereinafter called the prosecutrix. They were jointly tried and convicted, and appeal.

The statute under which the conviction was had (Comp. Laws 1907, § 4226) is as fol-

"Every person who provides, supplies, or administers to any pregnant woman, or procures any such woman to take any medicine, drug, or substance, or uses or employs any instru-ment or other means whatever, with intent thereby to procure the miscarriage of such wo-man, unless the same is necessary to preserve her life, is punishable by imprisonment in the state prison not less than two or more than ten veara!

The only matter contested at the trial was that the operation upon the prosecutrix was necessary to save her life. The pregnancy of the prosecutrix was therefore not denied; nor was the operation to expel the fetus from her womb denied, but it was contended that the operation was necessary to save her life, and therefore that the act was not criminal. Practically the only issue, therefore, was whether the acts with which the defendants were charged were criminal or otherwise. Much evidence, both for and against the defendants, upon that proposition was adduced. The jury, however, found the facts against the contention of the defendants.

The first assignment of error which is urged with much vigor by defendants' counsel, is that the evidence is insufficient to justify the verdict, and that the district court erred in refusing to so charge the jury at the request of the defendants; and, further, that the court erred in refusing to grant a new trial upon that ground. We remark that in view that the judgment must be reversed upon

<sup>&</sup>lt;sup>2</sup>State v. Greene, 33 Utah, 497, 94 Pac. 987; Groot v. Railroad, 34 Utah, 164, 96 Pac. 1019.



<sup>&</sup>lt;sup>1</sup> State v. Inlow, 44 Utah, 485, 141 Pac. 530, Ann.

other grounds, and that the case must be remanded for a new trial, we shall refrain from discussing the evidence except where necessary to illustrate a point of law. After a careful examination of the evidence we have no hesitancy to state that it was sufficient on the part of the state, if believed by the jury, to carry the case to the jury, and therefore is also sufficient to sustain the verdict of guilty. The district court therefore did not err in refusing to direct a verdict for the defendants as requested by them; nor did it err in refusing to grant a new trial upon that ground.

[1] It is next insisted that the court erred in admitting the evidence of another young woman who testified that at or about the time the operation was performed on the prosecutrix a similar operation was also performed upon her by the defendants, and and that she, by reason of such operation, gave premature birth to a child and that the operation was performed while she was in perfect health and for the sole purpose of relieving her of the child with which she was then pregnant. As pointed out before, the only defense in this case is that the operation which was performed on the prosecutrix was necessary to save her life. This contention the state vigorously contested at the trial, and it there insisted and now exists that the operation was performed for the sole purpose of procuring a criminal abortion upon the prosecutrix. The question of intent was therefore the most prominent feature of the case. It has frequently been held in prosecutions of this character that for the purpose of proving that the operation was in fact criminal, and as showing the intent of the accused, the state may show that other similar operations were performed upon other pregnant women. Among the numerous cases in which the courts have so held we refer to the following: People v. Seaman, 107 Mich. 348, 65 N. W. 203, 61 Am. St. Rep. 334; State v. Brown, 26 Del. 499, 85 Atl. 797; People v. Hodge, 141 Mich. 312, 104 N. W. 599, 113 Am. St. Rep. 525; People v. Schultz-Knighten, 277 Ill. 238, 115 N. E. 140; 1 C. J. § 96, p. 329.

In People v. Seaman, supra (quoting from page 334 of 61 Am. St. Rep.), the Supreme Court of Michigan in passing upon this question in a prosecution for criminal abortion, said:

"Upon principle and authority, it is clear that where a felonious intent is an essential ingredient of the crime charged, and the act done is claimed to have been innocently or accidentally done, or by mistake, or when the result is claimed to have followed an act lawfully done for a legitimate purpose, or where there is room for such an inference, it is proper to characterize the act by proof of other like acts producing the same result, as tending to show guilty knowledge, and the intent or purpose with which the particular act was done, and to rebut the presumption that might otherwise obtain."

In People v. Schultz-Knighten, supra, the Supreme Court of Illinois in passing upon this identical question said:

"Though a single abortion may have been committed for a sufficient reason and with no criminal intention, repeated acts of that character may create a reasonable presumption that they were not done to preserve life or ignorantly, but with criminal intent and knowledge, and the more numerous the acts the stronger, ordinarily, will be the presumption."

In 1 C. J. § 96, p. 329, the law is stated thus:

"Acts of the defendant tending to show his knowledge of the woman's pregnancy and his intention to commit an abortion upon her may be proved whether they were prior or subsequent to the particular act charged in the indictment; hence evidence of other operations performed by defendant before or after the operation charged is admissible for the purpose of showing the intent with which the act charged was done."

No error was committed by the court in admitting the evidence of the young woman.

[2] It is further contended that the prosecutrix is an accomplice and that the court should have so charged the jury. The contention is not tenable. It has often been held that the person on whom the criminal operation is performed although at her request or with her consent, is, nevertheless, not an accomplice. Such is the holding in the following cases: People v. Vedder, 98 N. Y. 630; Dunn v. People, 29 N. Y. 523, 86 Am. Dec. 319; Watson v. State, 9 Tex. App. 237; Commonwealth v. Wood, 11 Gray (Mass.) 85; Commonwealth v. Follansbee, 155 Mass. 274. 29 N. E. 471; 1 R. C. L. § 4, p. 71. While. no doubt, the female who requests or consents to a criminal operation with a view of producing an abortion is morally in fault. yet she is not guilty of the offense, and cannot be prosecuted under the statute. therefore is not an accomplice.

[3] It is, however, further contended that one James Rostege, who was with the prosecutrix when the alleged criminal acts producing the abortion were committed, and who, it is contended by the defendants and admitted by the state, was the father of the child with which the prosecutrix was pregnant, and who apparently was interested in having the abortion performed, and who testifled respecting the operation and the acts of the defendants, was an accomplice and that the court erred in not charging the jury to that effect as requested by them. It is conceded that Rostege was with the prosecutrix when she went to Dr. McCurtain to consult him respecting the operation; that he was with her when the first operation was performed by the doctor, and was also with her when the final operation was performed by both Dr. McCurtain and the defendant Mrs. Dora Arden at her home, where the doctor directed the prosecutrix to go after the preliminary operation upon her had been performed. While in view of all the evidence

it might not have been proper for the district court to declare Rostege an accomplice as a matter of law, yet it is quite clear that the court should have instructed the jury what under our statute constitutes an accomplice, and should have told them that if they found that Rostege was an accomplice within the purview of the statute they should not convict the defendants unless Rostege's testimony was corroborated as required by our statute. Moreover, while upon the authority of People v. Watson, 21 Cal. App. 692, 132 Pac. 836, People v. Wah Hing, 15 Cal. App. 195, 114 Pac. 416, and People v. Balkwell, 143 Cal. 259, 76 Pac. 1017, there was ample corroborating evidence in the case at bar to support the testimony of Rostege, yet neither we nor any one else can say what weight or effect the jury gave to his testimony. His testimony was direct, and, if the jury believed it, was quite convincing. They may thus have convicted the defendants upon his The defendants were testimony alone. therefore entitled to an instruction defining an accomplice and the weight and effect that should be given to the testimony of Rostege if they found he was an accomplice. defendants offered such an instruction, but the court refused to give it and omitted to charge the jury at all upon that subject. This constituted error which, in view of all the circumstances of this case, was prejudicial to the substantial rights of the defend-

It is next urged that the district court erred in admitting in evidence certain statements made by the defendant Mrs. Arden as against both the defendants; such statements having been made after the alleged criminal acts were committed: and, further, that the court erred in not instructing the jury that the statements or admissions made by either of the defendants, if made after the alleged criminal transactions had ended, should be considered only as against the defendant who made them.

[4-6] The record discloses that the defendant Mrs. Arden did make certain statements to the officers, and perhaps others, some time after the alleged criminal transactions had terminated. While the evidence in the case at bar is sufficient to justify a finding that the defendants conspired together, or acted in concert, in committing the acts charged against them, and that therefore the acts, declarations, and conduct of one in furtherance of the object in view were admissible as against the other (State v. Inlow, 44 Utah, 485, 141 Pac. 530, Ann. Cas. 1917A, 741; 12 Cyc. 435), yet after the acts charged had been fully consummated and had ended, then the statements or admissions of one were no longer admissible as against the other unless such statements or admissions were made in the presence of each other as in other cases where such statements are permitted. 12 statements of the defendant Mrs. Arden, counsel for defendants objected and requested the court to then and there inform the jury that the admissions and statements of Mrs. Arden could not be considered by them as against Dr. McCurtain. The court overruled the objection and said: "The jury will be instructed fully, Mr. Warner, at the conclusion of the case." Counsel excepted to the ruling. It is now insisted that in view of the promise to properly charge the jury counsel were misled, and for that reason did not prepare and offer any request upon that subject; further, that because the court omitted to charge the jury as promised, but permitted them to consider the statements of Mrs. Arden as against Dr. McCurtain as well as against herself, the failure of the court to charge as promised constitutes prejudicial er-

A similar question arose in the case of Carleton v. State, 43 Neb. 373, 61 N. W. 699. In that case the defendant Carleton was convicted of murder in the first degree and was sentenced to death. During the trial evidence was offered by the state which, by a jury of laymen, might be considered for various purposes, while as a matter of law it was admissible only for a particular purpose. Counsel for defendant in that case, as did counsel in this case, objected to the evidence. and on it being admitted they requested the court to charge the jury to consider the same only for the purpose for which it was legally admissible. The court promised to so charge and counsel for the defendant, relying on the court's promise, omitted to prepare an instruction limiting the evidence as before stated. The court, however, failed to limit the evidence and failed to instruct the jury upon the subject, precisely as in the case here. The Supreme Court of Nebraska, in passing upon the question, said:

"A statement made by the court in ruling upon the evidence, that an instruction of a certain character would be given in relation to such evidence, does not excuse a party from properly requesting such instruction at the proper time. The failure or refusal of the court proper time. to instruct the jury must be excepted to in the trial court in order to be availed of on error."

The question is not free from doubt nor from difficulty. The general rule is that if counsel desire to have the court charge upon a particular phase of the case, or upon a collateral issue or subject, they must offer a proper request, and if it is refused save an Without this the question may exception. not be reviewed. Moreover, counsel are supposed to be thoroughly familiar with every phase of the case, and are therefore better prepared than the court to meet special or collateral questions. Courts are no more infallible than others, and it is not to be expected that in the haste of a trial they can keep in mind every collateral question that may arise in a case. It is counsel's duty, there-Cyc. 439. When the state offered to prove the fore, to remind the court of such matters, and urged as error. Circumstances, however, alter cases, and for that reason alter the rules that should be applied. While no hard and fast rule can be laid down upon matters of this character, yet where, as here, counsel timely objected and requested the court to inform the jury respecting the effect of certain evidence, and the court then refuses to so inform the jury, but unequivocally promises counsel that it will charge the jury to the effect requested by counsel, and counsel then except to the ruling, and where it is clear that counsel, in reliance on the court's promise, omitted to present a proper charge, then, in our judgment, if it is made to appear that prejudice has resulted to the accused, the trial court should grant a new trial, and in case it refuses to do so this court should direct that a new trial be granted.

Let it be remembered, however, that where a question like the one before us arises in any case it should be determined upon the facts and circumstances of the particular case, and if it is apparent that no prejudice has resulted, or that counsel were not actually misled and hence not excused from performing their full duty, then the judgment should be permitted to stand. To follow the procedure outlined above cannot work a hardship on any one. It does no more than to protect the court, the counsel, and the accused. It is not necessary in any case for the court to promise counsel to charge upon any collateral issue or special matter arising in a case. The court can easily protect itself by asking counsel to present a proper request or at least to call its attention to the matter either before or at the time the jury is instructed. If counsel then fail, it is their fault and not the fault of the court. In the case at bar, however, the promise of the court is clear-cut, and under all the circumstances we think counsel had a right to rely on the court's promise and to govern themselves accordingly.

[7] Before leaving this subject we desire to add, however, that it is by far a better and safer practice in any case where evidence is admissible only for a certain purpose or as against a particular defendant that the court, at the time the evidence is received, instruct and admonish the jury of the purpose for which the evidence is received and tell them that they should not consider it for any other purpose. If that be not done the jurors will be very apt to consider the evidence for every purpose, and the matter will be thus fixed in their minds which will not easily be eliminated by an instruction given at the conclusion of the trial which, in many cases, the jury will not receive until many days after the evidence has been received. An instruction may thus fail to produce the desired effect. As a matter of course, it is always proper to also charge the jury at the conclusion of the trial of the purpose for which certain evidence was ants appeal. Decree modified.

if they fail such failure ordinarily cannot be received and may be considered. It will be more likely, however, to produce the desired effect if the jury is told at the time the evidence is received the purpose for which it is received and may be considered by them. To follow the course just outlined will also obviate the very error which is insisted on in this case. Let it be distinctly understood. however, that by anything we have said herein it is not intended to, and we do not, modify the general rule laid down by this court in State v. Greene, 33 Utah, 497, 94 Pac. 987, and in Groot v. Railroad, 34 Utah, 164, 96 Pac. 1019. Upon the contrary, we reaffirm the general doctrine there stated. The case at bar, for the reasons before stated, is, however, in our judgment, clearly distinguishable from the two cases to which we have just referred.

[8] It is also insisted that the court erred in refusing to charge the jury as requested by the defendants. Counsel offered 24 separate requests to charge. The substance of many of the requests is covered in the court's charge. While many of the requests offered contained sound propositions of law, yet there is hardly one that is free from the fault of being argumentative. Indeed, every legal proposition is supported by argument. Such requests are always faulty. If the court therefore had charged the jury in the precise language contained in the requests, it, in our judgment, would have committed error. In view of this it committed no error in refusing to give the requests as presented.

The court, however, erred in refusing to charge in the particulars we have hereinbefore pointed out, and for that reason the judgment must be, and it accordingly is, reversed, and the case is remanded to the district court of Salt Lake county, with directions to grant the defendants a new trial.

CORFMAN, THURMAN, and GIDEON. JJ., concur. McCARTY, J., concurs in the result.

TURNER et al. v. HARTOG et al.

(Supreme Court of Oregon. April 80, 1918.)

REFORMATION OF INSTRUMENTS \$\infty\$ 19(1) — MISTAKE—TERM OF LEASE.

To reform a contract, as a lease, on the ground of mistake, as for mistake respecting the time for which the lease shall run, the mistake respecting the time for which the lease shall run, the mistake respective to the state of the stat take must be mutual, and it does not suffice that one of the parties understood the con-tract should be one way, while a different un-derstanding was entertained by the other party.

Department 2. Appeal from Circuit Court, Marion County; William Galloway, Judge. Suit by L. H. Turner and Cornelia A. Davis against John N. Hartog and the Willamette Valley Irrigated Land Company, a corporation. From a decree for plaintiffs, defend-



This is a suit to reform three certain leases | and agreements on the ground of mutual mistake. The complaint alleges that at the time of the execution of the agreements the number of acres in the premises leased was not exactly known to either of the parties thereto, and that the same was stated therein in each instance as approximately only "more or less," aggregating in the three leases 1,680 acres, more or less, it being understood and agreed at that time that a survey of the premises should be made and that the number of acres actually contained therein should govern and be paid for by the lessee according to the terms of the agreements; that thereafter the premises were surveyed and it was ascertained that the same contained 1,736.42 acres; that at the time of the execution of the agreements or leases it was mutually understood and agreed by and between the plaintiffs and the defendant John H. Hartog that the latter should take and have the possession of the premises described in the agreements from the date of the execution thereof, to and including the 1st day of October, 1914; that it was likewise mutually understood and agreed that the leases should be considered to run for four years, and that John H. Hartog should have the crops growing upon the premises at that time and for a period long enough to harvest such crops and the three succeeding crops, and that he should pay as rental for the premises at the rate of \$3 per acre per annum for four years; that by the mutual mistake of the plaintiffs and John H. Hartog these provisions were omitted from the leases, on account of which omission the leases do not show the true intent of the parties thereto, to wit, that John H. Hartog should take the premises in their then condition and have and hold the same to and including the 1st day of October, 1914, paying as rental therefor the sum of \$3 per acre per annum for four years; that the said leases contained the following provisions:

"To have and to hold the above-described premises with the appurtenances unto the said party of the second part and his executors, adparty of the second part and his executors, administrators, and assigns from the 22d day of December, 1910, for, during, and until the 1st day of October, 1914, he paying therefor as herein stated. And the said party of the second part in consideration of the terms of this agreement does covenant and agree with the said party of the forth party of the pa agreement does covenant and agree with the said party of the first part, his executors, administrators, and assigns, to pay the party of the first part the sum of three dollars (\$3.00) per acre per annum, payable semiannually in advance, and in consideration of said payment, party of the first part hereby grants to the party of the second part, his executors, administrators, and assigns, the privilege or right of purchasing from the said party of the first part purchasing from the said party of the first part the premises herein mentioned at a price of ninety dollars (\$90) per acre \* \* \* during ninety dollars (\$90) per acre during the life of this agreement.

They allege in substance that the provision as to the commencement of the term of the leases was inserted in each contract by the mutual mistake of the parties and does not state their true intent or agreement,

should have and hold the premises for a period commencing October 1, 1910, for, during, and until the 1st day of October, 1914; that by the mutual mistake of the parties the provision referred to was inadvertently inserted in the leases instead of the provision that the second parties should have and hold the premises from the 1st day of October, 1910, for, during, and until the 1st day of October, 1914, to which the parties had actually agreed; that thereafter John H. Hartog duly sold and assigned the leases mentioned herein to the defendant Willamette Valley Irrigated Land Company, in consideration of which assignment it agreed to carry out the leases and to pay plaintiffs therefor in accordance with the terms thereof; that defendants have neglected and refused to pay the same or any part thereof, save and except the sum of \$19,280.04, and that there is now due and owing from the defendants to the plaintiffs on account of such rental the sum of \$1,552. The defendants denied that there was any error in the written agreements and averred that the amount named in the complaint was in full settlement of the sums due according to the agreements, and that the same was paid by checks and accepted by the plaintiffs with the notation thereon "in full for rent" to certain dates. The trial court decreed a reformation of the instruments as to the number of acres. declared the leases as for a term of four years, and rendered judgment for \$1,552, the difference. defendants appeal.

Thos. Brown, of Salem, and M. W. Seltz, of Portland (Carson & Brown and Arthur J. Reinhart, all of Salem, on the brief), for appellants. W. C. Winslow and S. M. Endicott, both of Salem, for respondents.

BEAN, J. (after stating the facts as above). We approve the finding of the trial court as to the number of acres, which is admitted to be 1,736.42, according to the survey made. Taking as receipts some of the cancelled checks used in paying the rent, there is no question that a receipt can be contradicted. The letter of J. H. Hartog, the manager of the Willamette Valley Irrigated Land Company, dated April 16, 1912, stated, "We are willing to pay the \$3.00 rental for the actual number of acres we have under option," and urged that plaintiffs abide by the survey then to be made.

The terms of the leases expressly provided that the lessee should hold the premises from December 22, 1910, until October 1, 1914. The controversy in regard to the time is from October 1 to December 22, 1910. The dates are plain in the leases, and the lessee paid for the first six months from December 22d to June 22d. The parties therefore put their own construction upon the agreement. From the writing and from the evidence it appears that the plan was for the irrigation company to improve the land and sell the which was that the party of the second part same under the terms of the options contained in the leases. It would seem that this was the main part of the privileges for which the consideration was paid. The time for which the consideration or rent is claimed had already elapsed when the instruments were executed. It is not shown that the lessee understood or agreed to pay for the privilege during a time for which it was not granted. The land was subleased, and the leases existing at the time of the execution of the agreements in question were taken over by the defendants. Plaintiffs collected a small portion of rent from a former lessee for the time for which the claim is now made. According to the assertion of defendant Hartog the subtenants to whom the land was sublet paid as rental about one-third of the consideration paid by the optionee. agreement appears to have been made as to what portion of the stipulated sum should be paid as rent and what part for the option. To change the time of the lease would in effect be making a new contract for the parties. Whatever the lessors understood in regard to the matter, it is clear that the minds of the lessors and lessee never met on the proposition of a lease for the full term of four

It is well settled in this state that, in order to reform a contract on the ground of mistake, it must be alleged and clearly proved that the mistake was mutual, and that it does not suffice that one of the parties understood the contract should be one way, and a different understanding was entertained by the other party. Suksdorf v. S., P. & S. Ry. Co., 72 Or. 401, 143 Pac. 1104; Smith v. Interior Warehouse Co., 51 Or. 578, 94 Pac. 508, 95 Pac. 499; Hughey v. Smith, 65 Or. 323, 133 Pac. 68.

The defendants answered to the merits, and no question is raised as to the jurisdiction of a court of equity to determine the controversy. The decree of the trial court will therefore be modified so as to exclude the requirement for the payment for the leases and options from October 1 to December 22, 1910, and deducting the sum of \$1,157.60, thereby reducing the amount to which plaintiffs are entitled to the sum of \$394.40. The trial court heard all the particulars and allowed neither party costs. Each party will pay his own costs in this court.

McBRIDE, C. J., and MOORE and BUR-NETT, JJ., concur.

YETT v. OREGON SURETY & CASUAL-TY. CO.\*

(Supreme Court of Oregon. April 30, 1918.) Insurance \$\sim 388(4)\to Payment of Premiums WAIVER AS TO TIME.

Under accident policy providing that premiums are due on the first of each month, and that acceptance of a renewal premium shall be

in effect from month to month, the company need not accept a premium after the 1st of the month and after insured has been killed, though the company's collector had for several months been in the habit of calling at insured's office later than the 1st of the month, and collecting the premium for the month; this not proving a waiver of the provision of the policy as to future premiums.

Department 2. Appeal from Circuit Court, Multnomah County; J. P. Kavanaugh, Judge.

Action by Lillie Yett against the Oregon Surety & Casualty Company. Judgment for defendant, and plaintiff appeals. Affirmed.

This was an action to recover upon an insurance policy. Attached to the complaint was a copy of the policy which, among other things, contained the following stipulation:

things, contained the following stipulation:

"Premiums are due on the 1st day of each month, in advance, and must be so paid either at the home office of the company, or to such persons as may be designated by the company in writing to receive them. In consideration of the policy fee of five dollars and of the premium of \$1.50, and of the application which is made a part hereof, a copy of which is indorsed hereon, does hereby insure Mr. Charlie E. Yett, an office manager by occupation, subject to all conditions and limitations hereinafter contained, from 12 o'clock noon, standard time at the place and of the day this contract is countersigned, until 12 o'clock noon, such standard time, of the 1st day of January, 1916, and for such further periods, stated in the renewal agreements, as the premiums paid will maintain this policy in force. The acceptance of any renewal premium shall be optional with the company. ments, as the premiums paid will maintain this policy in force. The acceptance of any renewal premium shall be optional with the company. If a past-due premium shall be accented on this policy by the company, or by a branch office, or by a duly authorized agent of the company in the city, town, or county in which the assured shall reside or by a duly authorized agent of the city, town, or county in which the assured shall reside, or by a duly authorized agent of the company who accepted the last premium on the policy, if so authorized at the time of acceptance of the past-due premium, such acceptance shall reinstate the policy in full as to death, disabilit or loss resulting from 'such injury' thereafter sustained, but shall only reinstate the policy as to disability from illness which begins more than 10 days after the date of such acceptance. The payment of any past-due premium shall not continue this insurance in force beyond the 1st day of the succeeding month. Under the payment of any claim hereunder, any written pay order may be deducted therefrom. written pay order may be deducted therefrom. No assignment of or change in this policy, or waiver of any of its conditions, shall be valid, unless agreed to in writing by the president, a vice president, or general manager of the accident department of the company, and attached hereto or indorsed hereon.

The complaint contained, inter alia, the following allegations:

"That the said Charlie E. Yett was killed on the 3d day of July, 1916, in Portland, Or., solely through external, violent, and accidental means. That it was and is the business usage and custom of the defendant, from the time of the inception of the said policy to the death of the said Charlie E. Yett, to receive and receipt for the monthly payments of \$1.50 at such times as the collector of said company should call for the same from the said Charlie E. Yett at the office of the said Charlie E. Yett at the place named in the application for said policy. to wit, the office of the Cit. Motor Trucking Company, optional with the company, the insurance being | in Portland, Or., whether during the month for

business usage and custom of the defendant the defendant was accustomed to receive, and the said Charlie E. Yett was accustomed to pay, the monthly payments of \$1.50 to and through an officer of said company, bearing the title of 'field manager,' at the office of the said City Motor Trucking Company, in Portland, Or. That it manager, at the omce of the said Only Musical Trucking Company, in Portland, Or. That it was the usage and custom of the defendant to have its said field manager call to make collections at the office of the said City Motor Trucking. ing Company, and there receive payment of the monthly sums of \$1.50. That during the months of December, 1915, and January, February, March, April, May, and June, 1916, payments were made for said months respectively by the said Charlie E. Yett to Chester Drake, as such field manager and collecter such paired to receive field manager and collector authorized to receive the same for and on behalf of the company, purthe same for and on behalf of the company, pursuant to such usage and custom. at the office of the said City Motor Trucking Company, on the following dates, to wit: For December, 1915, on November 30, 1915. For January, 1916, on January 10, 1916. For February, 1916, on February 12, 1916. For March, 1916. on March 11, 1916. For April, 1916. on April 10, 1916. For May, 1916, on May 15, 1916. For June, 1916, on June 5, 1916. That the said Chester Drake was authorized by the defendant to make such collections, and was authorized to collect at such collections, and was authorized to collect at such times, and did so collect and receive and receipt for said payments monthly after the 1st of each month, as aforesaid, which payments were received by the defendant. That on or about the 9th day of July, 1916, the plaintiff notified the defendant company of the said ac-cident and demanded payment of the sum of \$400, designated in said policy as the amount to be paid for loss of life, to the beneficiary. That the defendant at said time refused to make payment, and specincally denied liability on the ground that the premium had not been paid for the month of July, 1916. That it is provided in said police as follows: '(3) The acceptance of any renewal premium shall be optional with the company'—and it is further provided therein: 'Upon the payment of any claim hereunder any premium then due or unpaid or covered by any written pay order, may be deducted therefrom.'
That defendant has by its acts aforesaid in the
matter of collecting the said monthly premium at the times and dates and in the manner here-inbefore pleaded, intentionally and deliberately led the said Charlie E. Yett to believe that the acceptance of the renewal premium would con-tinue to be made in the manner aforesaid, and that upon the payment of any claim under said policy the premium then due or unpaid or covered by a written pay order, might be deducted therefrom." therefrom.

A general demurrer to the complaint being sustained, and plaintiff declining to plead further, there was judgment for defendant, from which plaintiff appeals.

Sanderson Reed, of Portland, for appellant. S. C. Spencer, of Portland (Wilbur, Spencer & Beckett, of Portland, on the brief), for respondent.

McBRIDE, C. J. (after stating the facts as above). The policy sued upon is practically an insurance from month to month. On December 2, 1915, the first premium was paid, and by virtue of such payment deceased stood insured until January 1, 1916. Upon that date the contract of insurance expired, unless the insured person chose to re-January 1, 1916, the sum of \$1.50, which pay- terms of his policy.

which insurance was paid by said \$1.50 or the ment renewed the policy for another month. month following. That in accordance with such in effect, a payment of \$1.50 on the 1st day In effect, a payment of \$1.50 on the 1st day of each month was equivalent to the taking out of a new policy for that month. company was not bound to accept a renewal premium, even if tendered, upon the 1st day of the month, any more than it would have been bound to insure the deceased in the first instance. This is made clear by a clause of the policy which reads: "The acceptance of any renewal premium shall be optional with the company." In the exercise of this option the company might accept the renewal premium on the 1st of the month, or at any time during the month, and such acceptance would renew the policy for that month; but such acceptance could not give the insured, or his beneficiary, any rights beyond those accruing for the remainder of the current month. The fact that for several months the defendant's collector had been in the habit of calling at the office of the insured at dates later than the 1st of the month, and collecting the premium for the current month, does not prove a waiver of any provision of the policy as to future premiums. Unless some agreement to that effect is shown, which is not the case here, the insured would not have been technically in default by failure to pay \$1.50 on the 1st of each month. A default arises when a party fails to do something which he has bound himself to perform. Here the insured had not bound himself to pay any sum at any time. The renewal of his policy, which, in legal effect was the purchase of further insurance, was optional with him. He could extend his insurance from month to month by payment of the premium on the 1st of each month; but he was under no contract so to do, and, as already shown. the defendant was not bound by any contract to continue his policy in force from month to month, even upon the tender of the usual premium upon the 1st of the month. fact that the company has accepted payments after the 1st of the month in several instances could not impose upon it the duty of doing so indefinitely, and to so hold would be to contradict the plain terms of the contract, and to make obligatory upon defendant a duty to renew the policy from month to month, whether the premium was paid upon the 1st or later. Had the company agreed with insured that it would dispense with payments upon the 1st of the month, and that a payment at any time during the month for any number of months in the future should operate to renew the policy, an estoppel might arise against it; but no such agreement is pleaded, and the fact that in several instances it had collected the premium after the 1st of the month, and thereby allowed the deceased to reinsure, when it might have refused him that privilege, does not argue that such leniency on the part of the insurer conferred upon the insured funew it for another month, by paying upon ture rights beyond those arising from the

The judgment of the circuit court is af- 19. Municipal Corporations 4-447-Paving tirmed.

MOORE, McCAMANT, and BEAN, JJ., concur.

# MANLEY et al. v. CITY OF MARSHFIELD

(Supreme Court of Oregon. April 30, 1918.)

APPEAL AND EBROB ← 750(7) — ASSIGNMENT OF ERROB—SCOPE.

An assignment that "the court erred in failing to decree the said assessments void, and in failing to remove the cloud thereof from the title of plaintiffs' real property," was sufficient was sufficient to raise the question of the validity of such assessments on any ground set up in the complaint.

2. MUNICIPAL CORPORATIONS \$== 294(3)-PAV-

ING—NOTICE—SUFFICIENCY.

A notice, the council "deems it expedient and necessary to improve, \* \* \* " was sufficient notice that paving was "proposed" within Marshfield City Charter, \$\$ 49, 50, providing for notice of improvements proposed to be made.

3. MUNICIPAL CORPORATIONS \$== 513(1) - Lo-CAL ASSESSMENTS-INJUNCTION-RELIEF.

In suit by several property owners to en-join collection of local assessments, only matters affecting all of them can be litigated, and an injunction will not be granted on the ground that the lot of one of them is shorter than the others, and that the front foot rule was unfair.

4. MUNICIPAL CORPOBATIONS & 488, 489(8)—
Local Assessments—Time for Objections.
A property owner who did not appear at a meeting called on due notice to equalize assessments—

ments for paying cannot afterward object that the front foot rule used was unfair to him, in that his lot was shorter than the others.

5. Pleading =127(2)—Admissions in An-SWER.

An admission in an answer that an ordinance provided for improvement of the entire width of a street, and that certain owners had been permitted to have their property approached by a gradual slope from the inner line of the sidewalk to the lot line was not an admission of an allegation in the complaint that the street had been improved for only a portion of the prescribed width.

6. MUNICIPAL CORPORATIONS \$\infty 294(2), 365, 513(1)—PAVING—NOTICE—ASSESSMENTS—IN-JUNCTION.

A notice that paving is to extend a certain distance is jurisdictional, and where a material part is abandoned property owners may enjoin collection of assessments, and the city council cannot accept the work.

7. MUNICIPAL CORPORATIONS \$== 506 - PAV-ING ASSESSMENTS-ABANDONMENT-CANCEL-

LATION.

Where action was brought to enjoin part of paving, and the city unreasonably delayed liti-gating the matter, or in doing the work promptly on removal of legal obstacles, assessments i the completed part should be canceled on the ground of abandonment, and granting of an injunction only until the city should complete the work was insufficient, because if the city should never do the work the assessments would remain a cloud on the title.

8. MUNICIPAL CORPORATIONS \$\iiii 328 - Improvements—Contracts.

In the absence of statutory direction to the contrary, a city may make an improvement through more than one contract.

ABANDONMENT - AVOIDANCE OF ASSESS-MENT.

If by reason of error or mistake a city is unable to complete a part of proposed paving called for by ordinance and notice, it will be held to have abandoned it, and the collection of assessments levied for the work done will be enioined.

Department 2. Appeal from Circuit Court, Coos County; John S. Coke, Judge.

Suit by A. B. Manley and others against the City of Marshfield and others. the decree, plaintiffs appeal. Modified.

This is a suit brought to enjoin the city of Marshfield and its recorder and marshal from enforcing some municipal liens for the improvement of Fourth Street South, in that city, from the south line of Elrod avenue to the south line of Railroad addition to Marshfield. The decree of the circuit court enjoined such enforcement "until the completion of the improvement."

Harry G. Hoy, of Spokane, Wash., for appellants. James T. Brand, of Marshfield, for respondents.

McCAMANT, J. [1] Defendants contend that plaintiffs' assignments of error are insufficient to raise the questions relied on. The ninth assignment is as follows:

"The court erred in failing to decree the said assessments void, and in failing to remove the cloud thereof from the title of plaintiffs' real property described in the complaint.

This assignment is sufficient within the rule announced in 2 R. C. L. 163, 3 C. J. 1349, and Hayden v. Astoria, 84 Or. 205, 210, 211, 164 Pac. 729.

[2] It is next contended that the notice of intention to improve is insufficient. The requirements of the charter on the subject of this notice are as follows:

"Section 49. No grade or improvement men-tioned in the preceding section can be under-taken or made without ten days' notice thereof being given by publication in some newspaper published in the city of Marshfield, or by post-ing notices thereof in three public places in said

city, except as herein otherwise provided.
"Section 50. Such notice must be given by the recorder or order of the council, and must specify with convenient certainty the street or part thereof proposed to be improved, or of which the grade is proposed to be established or altered, and the kind of improvement which is proposed to be made.'

The notice posted is objected to only on the ground that it stated, "the common council of the city of Marshfield, Coos county, Or., deems it expedient and necessary to im-Plaintiffs contend that prove. this language is not equivalent to a notice that the council proposes to improve. While the notice given must comply with the statutory requirements, no particular form is essential. Bank of Columbia v. Portland, 41 Or. 1, 7, 67 Pac. 1112. The language used was sufficient to apprise a man of ordinary intelligence that the specified improvement

was contemplated and this is all that was required.

[3] It is objected on behalf of the plaintiff A. B. Manley that his assessments are unfair because they are based on the front foot rule and Manley's property has a depth of 60 feet only, which is less than that of most other property owners who are charged with liens for the improvement. It is held in Hendry v. Salem, 64 Or. 152, 154, 129 Pac. 531, and Smith v. Jefferson, 75 Or. 179, 196, 146 Pac. 809, that, where a number of plaintiffs come into equity for relief against local assessments levied for municipal improvements, the city will be enjoined only on grounds which all the plaintiffs are entitled to urge. The above contention is pertinent only to the controversy between the plaintiff Manley and the city; it cannot be litigated in this suit.

[4] It appears, furthermore, that on May 8, 1913, the council resolved to meet on June 2, 1913, to equalize and adjust these assessments and that on May 21, 1913. notice of such meeting was posted in three public and conspicuous places in the city and remained so posted for 10 days thereafter. The meeting for purposes of equalization was held, but the plaintiff Manley failed to appear. No remonstrance was filed, and the objection now urged was not presented until this suit was brought on November 28, 1913. In the meantime the work had been completed. except as hereinafter stated. The plaintiff Manley cannot now be heard to say that the cost of the improvement has been unfairly apportioned among the property owners interested. Wilson v. Salem, 24 Or. 504, 511, 34 Pac. 9, 691; Wingate v. Astoria, 39 Or. 603, 604, 65 Pac. 982; Houck v. Roseburg, 56 Or. 238, 243, 108 Pac. 186; Rogers v. Salem, 61 Or. 321, 338, 122 Pac. 308.

[5] The next objection urged is based on the following allegations of the complaint:

"The said ordinance also provided for the improvement of the said street for the entire width thereof, whereas the same was and is improved only for a portion of the width and certain of the property owners owning property abutting thereon have been permitted to cause their property to be approached by a gradual slope from a point about twenty feet from the west line of the street, to the great damage of these plaintiffs and other persons owning property abutting upon said Fourth Street South."

The answer denies all portions of the complaint which are not affirmatively admitted. The admission applicable to the foregoing allegations is as follows:

"That the said ordinance provided for the improvement of the said street for the entire width thereof and that certain of the property owners owning property abutting thereon have been permitted to cause their property to be approached by a gradual slope."

Plaintiffs have offered no evidence to sustain the issue raised by this branch of the case and rely wholly on the admissions of the improvement as defined in the pleadings. The answer does not admit that the street has been improved for a por-

tion only of the prescribed width. It appears that the street in question is 80 feet wide. The smooth surface paving and concrete curbs cover 24 feet of this width. On each side of the street are 3 feet of parking and 6 feet of sidewalk. Between the inner line of the sidewalk and the property line there is therefore a space of 19 feet. The property owners may have used this space for a gradual approach to their property without interference with the improvement in any manner. Plaintiffs have failed to establish that in this respect a part of the contemplated work has been abandoned.

[6] The remaining contention of plaintiffs is that on which they chiefly rely. At the suit of Southern Pacific Company, an interested property owner, the city was enjoined June 30, 1913, from proceeding with so much of the improvement as lay between the south line of Kruse avenue and the south line of Railroad addition to Marshfield. It is admitted that this portion of the work has not been done, and, although the injunction issued is a temporary one, it seems to have been in force when the case was tried February 4, 1916. There is evidence that certain owners of property north of Kruse avenue would have remonstrated against an improvement terminating at that point. The notice posted described an improvement extending from the south line of Elrod avenue to the south line of Railroad addition. This notice was jurisdictional. Rubin v. Salem, 58 Or. 91, 94, 112 Pac. 713; Jones v. Salem, 63 Or. 126, 131-132, 123 Pac. 1096; Johns v. Pendleton, 66 Or. 182, 196, 133 Pac. 817, 134 Pac. 312, 46 L. R. A. (N. S.) 990, Ann. Cas. 1915B, 454; Fry v. Salem, 84 Or. 184, 191, 164 Pac. 715. The improvement as made did not conform to the notice. A material part of it had been omitted up to the time when the case was tried.

It is well settled that a street improvement is an entirety. While the council has power to accept work as a compliance with the contract (Duniway v. Portland, 47 Or. 103, 112, 81 Pac. 945; Hughes v. Portland. 53 Or. 370, 385, 100 Pac. 942; Rubin v. Salem, 58 Or. 91, 97, 112 Pac. 713; Hendry v. Salem, 64 Or. 152, 129 Pac. 531; Lawrence v. Portland, 85 Or. 586, 594, 167 Pac. 587), the council cannot accept work which palpably and confessedly does not cover the ground prescribed by the contract (Berwind v. Galveston Company, 20 Tex. Civ. App. 426, 50 S. W. 413). An abandonment of a material portion of the improvement specified will avoid the assessments. 28 Cyc. 1008, 1009; Hamilton's Law of Special Assessments, 463; People v. Grover, 203 Ill. 24, 67 N. E. 165; St. John v. East St. Louis, 136 Ill. 207, 27 N. E. 543. A substantial departure from the scope and extent of the improvement as defined in the

Dougherty v. Hitchcock, 35 Cal. 512, 523; this question has not been briefed or ar-Stockton v. Whitmore, 50 Cal. 554; McBean gued, and there may be matters relevant to v. Redick, 96 Cal. 191, 31 Pac. 7; Fry v. its determination which are not presented Salem, 84 Or. 184, 188, 164 Pac. 715. The by this record. parties interested may favor an improvement as an entirety and be opposed to the making of a part of the improvement. It is unfair to give notice of an improvement which will appeal to property owners as likely to enhance the value of their property and to abandon a part of the improvement after the time for remonstrance has expired.

[7-9] The circuit court was impressed with the importance of these considerations. Its decree restrained the collection of these assessments until the completion of the improvement. Is this relief adequate to the rights of plaintiffs? Can it be said on this record that the city has abandoned the improvement of that portion of the street lying south of Kruse avenue? In the absence of statutory direction to the contrary, the city may make the improvement through more than one contract. 28 Cyc. 1038, 1039; 1 Page & Jones on Taxation by Assessment,

We think the relief granted plaintiff falls short of that to which they are entitled. The decree empowers the city to keep the proceeding in its present situation indefinitely. While the city cannot collect these assessments, the title of plaintiffs remains clouded by them. They interfere with the sale and incumbrance of plaintiffs' property. The record in the suit brought by Southern Pacific Company is not before us. If the claims of this litigant are meritorious, they are based on some error or mistake for which the city is responsible. If by reason of such error or mistake the city is unable to complete the improvement called for by its ordinance and by the notice posted pursuant thereto, it should be held to have abandoned the portion of the improvement not carried out. In any event it was the duty of the city to litigate the injunction suit with the Southern Pacific Company within a reasonable time. The courts are open for the transaction of business, and it was within the power of the city to press this suit to decree without undue delay. The city is also chargeable with the duty of completing the improvement promptly on the removal of the legal obstacles thereto. If the city is in default in either of these respects it should be held to have abandoned the improvement south of Kruse avenue. If this portion of the improvement has been abandoned, plaintiffs are entitled to the cancellation of the assessments. No reason is suggested by the record which would excuse the city from disposing of the injunction suit and completing the work within the time which elapsed between June 30, 1913, when the pre-

The decree of the circuit court will therefore be modified so as to provide that the decree is without prejudice to the right of plaintiffs to move for the cancellation of the assessments in question on proof that a reasonable time has expired to terminate the litigation and complete the improvement specified. Plaintiffs will recover costs in this court.

McBRIDE, C. J., and MOORE and BEAN, JJ., concur.

KENNEY v. HURLBURT, Sheriff, et al.\* (Supreme Court of Oregon. April 30, 1918.)

1. CHATTEL MORTGAGES @== 187-VALIDITY.

Where the lender to the purchaser of a stock of goods made the loan in good faith and took a on goods made the loan in good tatth and took a chattel mortgage on the stock as security, believing that the mortgage was security, and such mortgage was not given for the benefit of the purchaser of the stock of goods, the proceeds of any sales to be paid to the mortgage or used in purchase of new stock to come under the mortgage and to replace that sold at the inception of the transaction the mortgage was valid tion of the transaction the mortgage was valid as between the lender and the purchaser.

2. CHATTEL MORTGAGES \$\infty\$=18-FUTURE-ACQUIRED PERSONALTY-FLUCTUATING STOCK-VALIDITY.

A chattel mortgage upon future-acquired personal property or a fluctuating stock of goods is valid as between mortgagor and mortgagee.

3. CHATTEL MORTGAGES \$== 198-FUTURE-AC-QUIRED PERSONALTY—FLUCTUATING STOCK— PERFECTION OF LIEN.

Though a chattel mortgage, executed in good faith by the purchaser of a stock of goods to the person who lent him money to enable him to make the purchase was invalid as against the creditors of the purchaser, it being upon a fluctuating stock of goods, the lender's mortgage lien was perfected when he was put in possession of the merchandise by the purchaser, the mortgage operating as an executory agree-ment which subjected after-acquired goods to the mortgagee's lien on his taking possession before the rights of third persons intervened.

4. CHATTEL MOBTGAGES 6=198-FUTURE-AC-QUIRED PERSONALTY—FLUCTUATING STOCK— SUBJECTION TO LIEN.

Mere existence of claims of creditors of the mortgagor, without attachment or seizure upon execution, was not an intervention of the rights of third persons, preventing subjection of after-acquired goods to the lien of a chattel mortgage on the mortgagee's taking possession be-fore the rights of third persons intervened.

5. CHATTEL MORTGAGES \$\infty\$=198\top-Future-Acquired Personalty\top-Fluctuating Stock\top-Rights of Mortgagee.

Where money was lent to enable the borrower to purchase a stock of goods, and the lender took a chattel mortgage on the fluctuating stock, authorizing him, in case of default, to take possession of the goods and sell them at private sale without notice to pay the borrower's note, the fact that the lender, when he took elapsed between June 30, 1913, when the pre-liminary injunction was granted, and Febru-ary 4, 1916, when the case was tried. But not unmindful of the claims of unsecured creditors and offered and proposed to get all he could ( out of the property for them, did not lessen nor defeat his security.

Department 2. Appeal from Circuit Court, Multnomah County; Robert G. Morrow,

Suit by G. W. Kenney against T. M. Hurlburt, Sheriff of Multnomah County, Or., H. J. Pulfer, R. L. Sabin, individually, as receiver, and as trustee in bankruptcy, and the Pulfer Mercantile Company. From a decree for plaintiff, Sabin, individually, as receiver, and as trustee, appeals. Decree affirmed.

This is a suit to foreclose a chattel mortgage on the fixtures and stock of goods and merchandise executed by H. J. Pulfer to plaintiff, and to enjoin the sheriff from selling the property on execution, pursuant to a judgment rendered against the Pulfer Mercantile Company, a corporation. All the defendants, except R. L. Sabin, in the several capacities in which he appears, defaulted, so that the only issues to be tried are those existing between the plaintiff, Kenney, and the defendant Sabin. Plaintiff holds a promissory note for \$3,500 executed to him on August 10, 1914, by H. J. Pulfer, and a chattel mortgage securing the same executed on that date, covering the stock and fixtures of the business.

On May 24, 1915, while a balance of the note remained unpaid and Pulfer was in default, he, being then in possession of the property, surrendered up the personal property to the plaintiff under the chattel mortgage.

The complaint alleges the execution of the note and mortgage and the breach of the conditions thereof. Sabin's answer alleges that the Pulfer Mercantile Company, a corporation, prior to August, 1914, acquired the stock of goods and fixtures mentioned from H. J. Pulfer, and that the business of buying and selling was conducted by the corporation; that after the execution of the mortgage different creditors sold goods to the corporation which became part of the stock; that such sales were made without the knowledge of the mortgage made by Pulfer; that Sabin, as assignee, instituted an action against the company for \$1,484.93, and attached the personal property. The answer shows his appointment as receiver of the Pulfer Mercantile Company, a corporation, a bankrupt, and his election as trustee. It further avers that the chattels mentioned in the exhibits to the complaint do not comprise the list of goods in the hands of either H. J. Pulfer, or Pulfer Mercantile Company, at the time of the execution of the chattel mortgage, and that the larger portion of the goods on hand in August, 1914, were subsequently disposed of. The reply put in issue many of the allegations of the answer.

The court found that the goods when delivered to the plaintiff under his mortgage were the property of Pulfer, and not of the compapointed receiver and they were attached; that afterwards, in August, 1915, R. L. Sabin, as such trustee, sold the remaining personal property of which he had taken possession for the sum of \$2,400, so that the entire fund realized therefrom and now in the hands of defendant Sabin, as such trustee, is the sum of \$2,452.20, which is made up of the following items: Perishable property, \$52.20; store fixtures, \$529; and stock of merchandise, \$1,-871; that it was agreed in open court between the parties that this fund should be treated and considered in the hands of the trustee as the personal property itself; that on February 25, 1915, defendant Pulfer and plaintiff entered into an agreement whereby the former was to transfer to the latter from time to time certain accounts or choses in action against customers to whom goods had been sold on credit, and that as they were collected by plaintiff the proceeds thereof were to be applied in part payment of his note, pursuant to which Pulfer did transfer certain of the accounts to plaintiff; that plaintiff has realized from these accounts and choses in action and from the sale of a team of horses, harness, and wagon the sum of \$1,729.26, which should be credited on plaintiff's note as of February 25, 1915, at which time there was due on the note the sum of \$3,500 principal, and \$140 interest; that on February 25, 1915, after the application of this sum so realized, there remained due and unpaid on the note the sum of \$1,910.74, no part of which has been paid. The circuit court decreed that plaintiff's chattel mortgage be foreclosed as a first lien upon the goods to satisfy the balance, \$1,910.74, with interest at 8 per cent. per annum from February 25, 1915. The sum of \$400 was allowed as attorneys' fees, and a further sum for costs of bringing suit.

Roscoe C. Nelson and Sidney Teiser, both of Portland (Beach, Simon & Nelson, of Portland, on the brief), for appellant. Milo C. King, of Gresham, and E. B. Seabrook, of Portland (Malarkey, Seabrook & Dibble, of Portland, on the brief), for respondent.

BEAN, J. (after stating the facts as above) The vital question in the case is as to the ownership of the personal property at the time of the execution of plaintiff's chattel mortgage and at the time of the taking possession thereof by Kenney under the terms of such mortgage. Upon this point the rights of the plaintiff and defendant must stand or fall.

In February, 1914, H. J. Pulfer entered into the general mercantile business in the town of Gresham, purchasing of Bragg & Duncan, a retiring concern, their stock invoiced at approximately \$1,900, and fixtures at about \$1,200. In order to buy the property and practically as one transaction, Pulfer obtained \$1,000 from his wife and negotiated a loan from plaintiff, Kenney. To secure the ny, and were so owned when Sabin was ap- payment of the latter loan Pulfer executed

a chattel mortgage on the stock of goods and fixtures to Kenney. On August 10, 1914. Kenney loaned Pulfer an additional \$1,000. taking a new mortgage on the merchandise and fixtures. The mortgage described the chattels as "that certain stock of general merchandise consisting of \* \* \* and all additions which shall hereafter be made to such stock similar in kind to those above set forth, or otherwise," and the same were located, "together with all of the fixtures of every kind and nature, in said buildings, being the stock and fixtures formerly owned by Messrs. Bragg & Duncan, of Gresham, county of Multnomah, state of Oregon, and all additions made thereto." Then follows the proviston:

"It is understood and agreed, however, that the said H. J. Pulfer shall hold and retain the possession of said chattels as the agent of G. W. Kenney, of Gresham, county of Multnomah, state of Oregon; that none of the chattels shall be sold unless the said H. J. Pulfer, as the agent of said G. W. Kenney, shall keep a strict account thereof and render a strict accounting thereof to the said G. W. Kenney, applying all the proceeds received from said sale either in payment of the obligation secured by this instrument or in purchasing new stock to take the place of that sold, which said new stock shall thereby come under the operation of this mortgage."

The chattel mortgage was duly placed upon the records of Multnomah county. Pulfer operated the business under the name of Pulfer Mercantile Company, selling goods and purchasing others. No strict account thereof was rendered to Kenney until February, 1915. when he insisted upon being paid a portion. and several accounts due Pulfer for goods sold were transferred to Kenney to be collected and credited on the mortgage debt. Other accounts were also turned over to him in like manner from time to time, and the money realized therefrom credited on the note. On May 24, 1915, Kenney took possession of all the stock of goods and the fixtures then in the store, and posted a notice of foreclosure on the store door. On February 14, 1914, H. J. Pulfer, his wife, C. B. Pulfer, and D. M. Roberts signed articles of incorporation of Pulfer Mercantile Company. H. J. Pulfer subscribed for one share of the stock thereof; Mrs. Pulfer subscribed for 98 shares, and D. M. Roberts for one share, making 100 shares total capitalization. These parties held a stockholders' meeting. The papers were prepared in Portland, and the minutes of a directors' meeting were written up and delivered to Pulfer, with instructions that after the articles of incorporation were filed with the corporation commissioner a meeting of the directors should be held at Gresham, and the minutes then utilized. It does not appear that any such meeting was afterward held. About April, 1914, it was proposed by Pulfer that Kenney would consent to turning over to the corporation the personal property mortgaged to him, and that in lieu of the chattel mortgage the 98 shares of the corporate stock

subscribed for by Mrs. Pulfer should be pledged to secure the payment of his note. Kenney was urged to agree to this plan, and the articles of incorporation were filed in Salem and in the county clerk's office in May. The organization fee and license fee to July 1, 1914. were paid and a contract was prepared for plaintiff to sign to effect the proposal. Kenney considered the matter for a time, and after consulting his banker refused to make the change. The stock of goods and fixtures was never transferred to the corporation, nor was there ever any attempt to do so or pretense that the same had been done. change was made by Pulfer in the method of doing business. On May 29, 1915, defendant Sabin, as the representative of various creditors, procured an attachment on the stock of goods and fixtures in an action against Pulfer Mercantile Company, a corporation. suant to such attachment the sheriff took possession of the personal property. A trial of the rights of the property as between Pulfer and the corporation by a sheriff's jury resulted in a verdict that the property belonged to the former, and not to the latter. Defendant Sabin furnished a bond to protect the sheriff, and directed a sale of the merchandise and fixtures upon execution upon the judgment. This suit was then commenced. On July 1, 1915, bankruptcy proceedings were instituted in the federal court against Pulfer Mercantile Company, a corporation, and Sabin was appointed receiver. Application was made to the federal court for leave to make said receiver and any trustee who might afterwards be appointed parties to this suit, and the federal court ordered that the same might be done, and that the issue of ownership of said property be determined in the state court; it having first obtained jurisdiction over the said personal property. Thereupon, Sabin, as receiver, and as trustee. was made a party defendant herein, and supplemental complaints were filed against him. The property was sold, and the proceeds are held in lieu thereof.

The defendant Sabin contends that the chattel mortgage of plaintiff was invalid for the reason that the stock of goods was left in the possession of the mortgagor with power of disposition thereof, under the rule followed in Orton v. Orton, 7 Or. 478, 481, 483, 33 Am. Rep. 717, Aiken v. Pascall, 19 Or. 493, 24 Pac. 1039, and Sabin v. Wilkins, 31 Or. 450, 456, 458, 48 Pac. 425, 37 L. R. A. 465. Sabin further asserts that the property at the time of the attachment was owned by Pulfer Mercantile Company, a corporation. We find that the title to the stock of goods and fixtures at the time of the execution of plaintiff's first chattel mortgage passed from Bragg & Duncan to H. J. Pulfer, and was never transferred to the corporation, and that H. J. Pulfer was the lawful owner of the property at the time of the execution of both of plaintiff's mortgages.

[1] In regard to the question of the force

Pulfer was by the terms thereof not given an 71 Mich. 497, 39 N. W. 734; Louden v. Vinunqualified right to sell the goods, but only unless he should "keep a strict account," render the same to Kenney, and apply the proceeds to the payment of the mortgage debt or in purchasing new stock to take the place of that sold. It must be conceded that there was no actual fraud in the transaction. Kenney loaned the money to Pulfer in good faith, and took the mortgage believing that it was security. It was not given for the benefit of Pulfer in any sense of the word. Therefore at the inception of the transaction the chattel mortgage was valid as between Kenney and Pulfer. On May 24, 1915, Kenney, the mortgagee, took complete possession of the mortgaged property with the intention of holding the same, and continued in such possession until the time of the attachment. The right of Pulfer to hold possession of or to sell any of the goods ceased at that time. There was then no other lien upon the merchandise. The creditors for whom the claim is made by the receiver are, strictly speaking, those of Pulfer Mercantile Company, a corporation, and not of H. J. Pulfer.

[2] Viewing the matter in the light most favorable to such creditors, a chattel mortgage upon future-acquired personal property or a fluctuating stock of goods is valid as between the mortgagor and mortgagee. Flanagan Bank v. Graham, 42 Or. 403, 71 Pac. 137, 790; Peterson v. Sabin, 214 Fed. 234, 130 C. C. A. 608; Morton v. Williamson, 72 Ark. 390, 81 S. W. 235; Trust Co. v. Clay Co., 70 N. J. Eq. 550, 67 Atl. 1078; R. R. Co. v. Mercantile Co., 31 Tex. Civ. App. 196, 71 S. W. 797; Export Co. v. Lee, 193 Fed. 647, 113 C. C. A. 515.

[3, 4] Although the chattel mortgage executed by H. J. Pulfer to plaintiff in good faith was invalid as against the creditors of the mortgagor, it being upon a fluctuating stock of goods, the lien was thereby perfected when the mortgagee Kenny was put in possession of the merchandise on May 24th by Pulfer, the mortgagor. The mortgage operated as an executory agreement which subjected the after-acquired goods to the lien of the mortgage upon the mortgagee taking possession of the goods before the rights of third persons intervened. The existence of claims of creditors without attachment or seizure upon execution was not such an intervention. 6 Cyc. 1051; Wasserman v. McDonnell, 190 Mass. 326, 76 N. E. 959; Allen v. Goodnow, 71 Me. 420; Deering v. Cobb. 74 Me. 332, 43 Am. Rep. 596; Williamson v. Nealey, 81 Me. 447, 17 Atl. 404; Williams v. Noyes Mfg. Co., 112 Me. 408, 92 Atl. 482, Ann. Cas. 1916D, 1224; In re Nat. Valve Co. (D. C.) 140 Fed. 679; In re Nat. Grocer Co., 181 Fed. 33, 104 C. C. A. 47, 30 L. R. A. (N. S.) 982; In re Hurley (D. C.) 185 Fed. 851; Johansen Bros. Shoe Co. v. Alles, 197 Fed. 274, 116 C. C. A. 636; In re

of the mortgage it will be noticed that H. J., ple v. Bristol, 35 Mich. 28; Eddy v. McCall, ton, 108 Mich, 313, 66 N. W. 222; Little v. Mena Nat. Bank, 97 Ark. 57, 133 S. W. 166; Burford v. First Nat. Bank, 30 Ind. App. 384, 66 N. E. 78; Campbell v. Quinton, 4 Kan. App. 317, 45 Pac. 914; Petring v. Chrisler, 90 Mo. 649, 3 S. W. 405; Francisco v. Ryan, 54 Ohio St. 307, 43 N. E. 1045, 56 Am. St. Rep. 711; Cooper v. Rouse, 130 N. C. 202, 41 S. E. 98.

> In Currie v. Bowman, 25 Or. 364, 381, 35 Pac. 848, 852, in discussing the validity of a similar mortgage, Mr. Justice Lord said:

> "To avoid a mortgage or other conveyance as fraudulent and void, there must be a real design on the part of the mortgagor, in which the mortgagee participated, to withdraw his property from the claims of his creditors. \* \* \* A debtor has a right to secure a creditor, and, if he does so by giving a mortgage, it is what the law admits to be rightful, although the effect will be to hinder other creditors, and he so intends; yet, if such mortgage is accepted in good faith, it is not a fraudulent hindrance, because the debtor has not disposed of his property. fraudulent and void, there must be a real design because the debtor has not disposed of his prop erty in a way to prevent its application to the satisfaction of his bona fide debts"—citing Sabin v Columbia Fuel Co., 25 Or. 15, 34 Pac. 692, 35 Pac. 854, 42 Am. St. Rep. 756.

> In Sabin v. Wilkins, 31 Or 450, 457, 48 Pac. 425, 426 (37 L. R. A. 465), Mr. Justice Wolverton said:

> "The intent and purpose of the parties in giving and receiving a chattel mortgage is the test of its validity at its inception, but, as it is test of its validity at its inception, but, as it is a thing capable of modification by subsequent agreement, either expressed or implied, by cooperative and willful disregard of its terms and conditions, it is a prerequisite to its continuing validity that good faith and fair dealing be maintained toward those whose interests may be affected by it. A chattel mortgage given priaffected by it. A chattel mortgage given primarily for the benefit of the mortgagor is void as against creditors from the beginning.

In Little v. Mena Nat. Bank, 97 Ark. 57, 133 S. W. 166, it was held that a mortgage of a stock of lumber authorizing the mortgagor to continue sales, but requiring him to keep the stock up to a stated value, is valid between the parties, and constitutes a lien on the property against every person, except subsequent purchasers and creditors acquiring a specific lien on the property. In Allen v. Goodnow, supra, we find that, where the parties to the mortgage contract that the mortgagor may sell from the stock of goods mortgaged in the regular course of trade, replenishing the stock with new goods which shall be subject to the same lien, as between them the title to the newly acquired stock in trade vests in the mortgagee. In Re National Valve Co. (D. C.) 140 Fed. 679, 681, affirmed in 149 Fed. 54, 79 C. C. A. 76, we find it is definitely decided that a stipulation in a chattel mortgage that it shall be a lien on any goods the mortgagor may thereafter purchase and place in stock to supply the place of those he should sell, while not creating a present lien, nor a lien when and as the goods are purchased, constitutes a valid contract for a lien on such acquired Mantle, etc., Co. (D. C.) 202 Fed. 275; Peo-property, and that possession thereof, laweffect of protecting it in his hands from the claims of the mortgagor's creditors as has possession taken of property owned by the mortgagor at the time of the execution of the mortgage. See, also, Francisco v. Ryan, supra.

"In equity, while a chattel mortgage of afteracquired property passes no title to such property, it operates to create an equitable interest in the mortgagee under the maxim that equity considers that as done which ought to be done; the mortgage being deemed to be an executory agreement which attaches to the property when acquired." 5 R. C. L. § 27.

See Borden v. Croak, 131 Ill. 68, 22 N. E. 793, 19 Am. St. Rep. 23; Wright v Birchner, 72 Mo. 179, 37 Am. Rep. 433; McCaffrey v. Woodin, 65 N. Y. 459, 22 Am. Rep. 644; Akers v Rowan, 33 S. C. 451, 12 S. E. 165, 10 L. R. A. 705; Horner-Gaylord Co. v. Fawcett, 50 W. Va. 487, 40 S. E. 564, 57 L. R. A. 869; Holroyd v. Marshall, 10 H. L. Cas. 191, 33 L. J. Ch. 193, 9 Jur. N. S. 213, 7 L. T. N. S. 172, 11 W. R. 171, 10 Eng. Rul. Cas. 426; notes to 46 Am. Dec. 717, 76 Am. Dec. 731, 109 Am. St. Rep. 514; and 18 L. R. A. 300 et seq.

In Jones on Chattel Mortgages (4th Ed.) § 178, it is stated thus in part:

"Delivery of possession under a mortgage, be-fore rights have been acquired by others, will cure any invalidity there may be in the instrument, whether arising from an insufficient description of the property, an insufficient execution of the instrument, the omission to record it, or from its containing a provision which makes it void except as between the parties; as, for instance, an agreement that the mort-gagor may retain possession and sell a stock of goods in the usual course of trade."

We do not deem it necessary to consider what was the status of the Pulfer Mercantile Company as a corporation. Suffice it to say that if it was a corporation it never owned the property mortgaged to Kenny. The receiver, Sabin, is claiming a right to the property under the Pulfer Mercantile Company, a corporation, as owned by it. If the mortgage in question had been actually fraudulent in its inception, a different result would have been effected. The entire cash that went into the business consisted of the original \$2,500 borrowed from plaintiff, the \$1,000 borrowed from Mrs. Pulfer, the \$1,000 borrowed from plaintiff on August 10, 1914, and the \$1,000 borrowed from one Middleton in March or April, 1915, all of which was Pulfer's money for which ne was individually indebted, and not the corporation. It appears that between August, 1914, and May, 1915, Pulfer paid out some \$16,000 or \$17,000 in the purchase of goods.

[5] in view of the facts that the rulings of the state courts upon the question are not harmonious, and that there is an apparent conflict in the opinions of the lower federal courts, and further because this particular phase of the question is practically new in this state, it becomes of interest to note

fully taken by the mortgagee, has the same | States as expressed in Etheridge v. Sperry, 139 U. S. 266, 11 Sup. Ct. 565, 35 L. Ed. 171, where a chattel mortgage executed in Iowa was under consideration. In the concluding part of the opinion Mr. Justice Brewer says:

> "Indeed, if this were an open question, we could not be blind to the fact that the tendency of this commercial age is towards increased facilities in the transfer of property, and to uphold such transfers so far as they are made in good faith; and it is at least worthy of thought, whether the rulings made by the Supreme Court of Iowa do not tend to make chattel mortgages more valuable for commercial purposes, without endangering the rights of unsecured creditors. endangering the rights of unsecured creditors. The law now generally requires a record of all such instruments, and that, like the recording of a real estate mortgage, gives notice to all parties interested of the fact and extent of incumbrances. Why should a transaction like this be condemned, if made in good faith and to secure an honest debt? The owner of a stack of goods may make? In shecolute sale of stock of goods may make an absolute sale of them to his creditor, in payment of a debt. If an absolute, why not a conditional, sale, with such conditions as he and his creditor may agree upon? As between the parties no court would question this right, or refuse to enforce the conditions. The interests of the general public conditions. The interests of the general public are not prejudiced by any such transaction between debtor and creditor. Indeed, they are rather promoted by any arrangement under which the mortgagor can continue in business, for in 99 cases out of 100 the taking of possession by a creditor results in closing the business. ness, and turning the debtor out of employment. The only parties who can claim to be injuriously affected are unsecured creditors. But they are notified by the record of the exact relations between the mortgagor and mortgagee; and surely subsequent creditors have no right to comsurely subsequent creditors have no right to com-plain if they deal with the mortgagor with full knowledge of such relations. Existing credi-tors may, of course, challenge the good faith of the transaction, but if they cannot disturb an absolute sale when made in good faith, why should they be permitted to challenge a condi-tional sale if made in like good faith? The fact that fraudulent relations are possible is hardly a sufficient reason for denouncing transactions which are not fraudulent."

it is apparent that the modern trend of judicial decisions is to uphold chattel mortgages upon a commercial stock of goods taken in good faith where the instrument is placed upon the public records. This is clearly indicated by the comments of the United States Supreme Court quoted above. The mortgagee was authorized by the terms of the instrument, in case of default, to take possession of the mortgaged goods "and sell and dispose of the same at private sale without notice" to pay the note. He took possession under the stipulation, and was proceeding in good faith to sell the property at private sale to satisfy the debt. The fact that he was not unmindful of the claims of the unsecured creditors and offered and proposed to get all he could out of the property for them would not lessen nor defeat his security. At the time he so took possession there was nothing to prevent him from enforcing a lien upon the property if he had had no mortgage. There is no good reason why he should be considered in a less favorable position by reason of taking a chattel mortgage in entire good the view of the Supreme Court of the United | faith to secure the money loaned to Pulfer to

pay for the stock of goods. Pulfer testifies that he informed the principal creditors of the chattel mortgage. He is out of the business in any event, and seems inclined to state the matter fairly. Many of the present managers of the concerns with whom he dealt have apparently not remembered the matter or never had actual cognizance thereof. The public record, however, disclosed the true state of affairs as to H. J. Pulfer. In this respect the present case differs from the facts in Scandinavian Bank v. Sabin, 227 Fed. 579, 142 C. C. A. 211. There is the further distinction between these cases, in so far as it appears from the opinion in Scandinavian Bank v. Sabin, supra, that there was no taking possession by the mortgagee in the last-named case as in the case at bar. The rights of the defendant Sabin as against the Pulfer Mercantile Company, a corporation, accrued on May 29, 1915. The claim made by the receiver on behalf of the creditors is in effect that they had a lien upon the stock of merchandise for goods sold, without any mortgage or contract providing therefor before the attachment was levied. In Fisher v. Kelly, 30 Or. 1, at page 8, 46 Pac. 146, 148, Mr. Justice Moore said:

"The general creditor is in no position to raise the question that the mortgage is void as to him until he has seized the property covered by the chattel mortgage, or secured some lien thereon"—citing Union National Bank v. Oium, 3 N. D. 193, 54 N. W. 1034, 44 Am. St. Rep. 533.

In the Fisher Case a chattel mortgage was given by a merchant tailor on his stock of goods which he retained possession of and dealt with in the usual course of trade. The mortgagee agreed with the mortgagor, as the lower court found, that the existence of the chattel mortgage should not be made public. and that no creditors of the mortgagor should be advised thereof; that they knew nothing about it until they attached the goods; that such understanding was intended to deceive creditors and hinder and defraud them. The mortgage was never filed, nor was possession thereunder ever taken by the mortgagee. It was held to be "void as to attaching creditors without reference to the issue that the mortgagees gave the mortgagor power to dispose of the goods for his own use and benefit."

Whatever may be stated as a conclusion by Mr. Kenney or any one else in regard to the accounts transferred to him, it is clear that the same were taken by him as collateral and anything he realized therefrom was to be credited upon the Pulfer note. It is not be lieved that Kenney desires more than a sufficient amount to pay the debt due him. It is a very simple matter for him to account for any balance of the miscellaneous bills or other collateral, if any, that may remain after his mortgage is satisfied. This matter, therefore, need not be further considered here. There is no complaint in regard to the amount found due upon plaintiff's note.

It follows that the decree of the lower court should be affirmed; and it is so ordered.

McBRIDE, C. J., and HARRIS and McCAMANT, JJ., concur.

GRESS et al. v. WESSINGER et al.\*
(Supreme Court of Oregon. April 30, 1918.)

1. Mortgages \$\infty\$37(2) — Assignment of Land Contract.

An assignment of a contract for the sale of land may be shown by parol evidence to be a mortgage.

2. Pledges \$\infty\$16(2)-Parol Evidence.

An assignment of a land contract as collateral to a note, and the note, may be shown by parol to be merely security for the performance of a contract.

3. Bills and Notes ==48v(5)-Defenses-

PLEADING.

Where the condition upon which a promissory note was to become operative never happened, such fact need not be specially pleaded, but is a failure of consideration provable under the general issue.

4. PLEDGES \$== 16(3)—EVIDENCE.

Evidence held to show that an assignment of a contract for sale of land securing a note, and the note, were merely executed to guarantee return of property.

5. APPEAL AND ERROR \$\infty\$ 1009(1) — EQUITY CASES—FINDINGS OF FACT—REVIEW.

Where it cannot be determined in equity case whether decree for defendant was based on assumption that plaintiff's evidence was incompetent, or that testimony preponderated in favor of defendant, that the trial judge saw the witnesses will not be given weight in considering the evidence.

Department 2. Appeal from Circuit Court, Multnomah County; W. N. Gatens, Judge. Suit by George Gress and another against Paul Wessinger and another to redeem a contract for the sale of land. Decree for defendants, and plaintiffs appeal. Reversed and rendered.

This is a suit by George Gress and Minnie Brakebush against Paul Wessinger and Henry Wagner to redeem a contract for the sale of land made by Charles E. Halstead. the owner of the premises, to Gress, and assigned by him to the defendants. The complaint states in effect that at all the times mentioned therein the plaintiffs were and are the holders of a contract to purchase 41/2 acres of land in Multnomah county, Or., particularly describing the premises; that, though Gress is the only obligee named in such contract, the plaintiff Minnie Brakebush was at all times the owner of an undivided one-half of the land: that on February 10, 1912, Gress executed to the defendants his promissory note for \$800, and at the same time also assigned to them the contract of purchase as a pledge for his redelivery to them of the furniture then used in the Enterprise Hotel at Portland, Or., upon the surrender of which household goods the defendants were to return to him the promissory

note and reassign to him the contract of estate dealer, to secure a purchaser for them. purchase; that Gress has delivered all such furniture to the defendants, who are in the possession thereof, but upon a demand therefor they refuse to comply with the terms of their agreement to return the note and reassign the contract; that the defendants knew that Minnie Brakebush was the owner of a moiety of the land at the time the contract was assigned to them; that the plaintiffs have kept and performed all the covenants and agreements respecting the purchase of the land; and that the assignment of the contract having been recorded in that county casts a cloud upon the plaintiffs' title to the real property. The answer denies the material averments of the initiatory pleading for a cross-complaint substantially alleges that the promissory note for \$800 was executed to the defendants by Gress to evidence a loan of that sum of money by them to him, and in order to secure the payment thereof he assigned to them the contract of sale, which memorandum was duly recorded; that no part of that sum has been paid; that \$100 is a reasonable sum as attorney's fees as provided for in the note in case suit were instituted thereon; and that the defendants are entitled to a foreclosure of the security thus given. The reply denies the averments of new matter in the answer, and the case having been tried the court, without making any findings of fact, gave a decree for the defendants as prayed for in the cross-complaint, and the plaintiffs appeal.

A. M. Crawford and W. C. Campbell, both of Portland (Crawford & Crawford, of Portland, on the brief), for appellants. M. M. Matthiessen, of Portland (Wood, Montague & Hunt, of Portland, on the brief), for respondents.

MOORE, J. (after stating the facts as above). The evidence shows that on September 14, 1910, the plaintiff George Gress entered into a written contract with Charles H. Halstead to purchase 41/2 acres of land in Multnomah county, Or., for \$3,150, on account of which \$200 was then advanced and the remainder was to be paid in installments of \$50 and interest thereon on the 15th of each subsequent month until the entire consideration was paid, when a deed was to have been executed to him by the vendor. The defendants are the executors of the last will and testament of Henry Weinhard, who at the time of his death was the owner at Portland, Or., of a large brewery, the operation of which was thereafter continued by them. The firm of Mills & Splawn was, on February 9, 1912, and for some time prior thereto had been, conducting in that city and and were the lessees of the Enterprise Hotel, consisting of about 50 furnished rooms, a restaurant, a poolroom, and a saloon. These partners, desiring to assign their interest in

This broker, learning that the plaintiff George Gress and his father-in-law, Fred Brakebush, desired to lease the hotel, went with them to the brewery where they met Lewis H. Hamig, the defendants' agent, with whom a bargain was concluded, whereby Gress & Brakebush stipulated to pay \$2.800. the remainder due the city for an assignment of the unexpired liquor license. \$333.35 for money advanced by Mills & Splawn on account of such license for the then current half year, which latter sum was evidenced by a promissory note executed by Gress & Brakebush to the defendants, and the further sum of \$800, represented by a promissory note given to them by Gress, payable on demand with interest from date until paid at 6 per cent. per annum. Thereupon a writing was subscribed by the defendants, who were designated therein as the parties of the first part and by Gress as the party of the second part, the material parts of which memorandum reads:

"Whereas, under date of February 10, 1912, "Whereas, under date of February 10, 1912, the parties of the first part have advanced to the party of the second part the sum of eight hundred dollars (\$800) as witnesseth that certain promissory note of which the following is substantially a copy [setting forth a duplicate thereof], express reference being made to said note for more certainty; and whereas, the party of the second part has under date of February 10, 1912, made an assignment of a certain con-10, 1912, made an assignment of a certain con-10, 1912, made an assignment of a certain contract to sell real property, which contract was made and entered into by and between Charles E. Halstead, the first party therein, and George Gress, the second party therein, under date of September 14, 1910, express reference being made to said contract for sale of real property for more certainty:

"Now, therefore, in consideration of the sum of one dollar moving from the parties of the first part to the party of the second part, and in consideration of a like amount moving from the party of the second part to the parties of the first part, receipt whereof is hereby acknowledged, it is hereby agreed by and between the

the first part, receipt whereon is nevery accurate edged, it is hereby agreed by and between the parties hereto that should the party of the second part well and truly pay unto the parties of the first part the sum of eight hundred dollars (\$800) together with interest at the rate of six per cent. per annum from February 10, 1912, on or before six (6) months from the date of this agreement, then in that event the parties of the first part will reassign to the party of the second part the above-mentioned contract for sale of real property.

In order to evidence the payment of \$2,-800, when the semi-annual installments thereof severally matured to the city of Portland for the unexpired liquor license which had been issued to Mills & Splawn and by them assigned with the consent of the municipality to Gress & Brakebush, and to guarantee the payment of \$2,000, the rent subsequently to accrue for the use of the hotel by the latter, a promissory note for \$5,000 was given to the defendants by Caroline Janecke and secured by her mortgage of a farm in the Willamette Valley. The defendants were compelled to pay \$4.55 more than the \$1,133.35, evidenced by the promisthe hotel, engaged James Gentemann, a real sory note executed to them by Gress and by

him and Brakebush in paying Mills & Splawn and in liquidating the indebtedness which they had incurred in conducting the Enterprise Hotel, the possession of which was surrendered to Gress & Brakebush.

.[1,2] The promissory note for \$800. executed by Gress, the assignment of the land contract, and the defeasance, though evidenced by separate writings were executed at the same time, and should be construed together and when so interpreted the transfer of the contract to purchase should be regarded as constituting an equitable mortgage. 1 Jones Mort. (7th Ed.) \$ 172; Lovejoy v. Chapman, 23 Or. 571, 32 Pac. 687. "Parol evidence," says a text-writer, "is admissible to show the true character of a mortgage, and for what purpose and what consideration it was given. Although it is for a definite sum, and secures the payment of notes for definite amounts, it may be shown that it is simply one of indemnity, or for future advances." 1 Jones, Mort. (7th Ed.) § 384. The consideration expressed in an equitable mortgage of land is no more sacred than a statement thereof in a deed of real property, in which latter conveyance the true inducement to the contract may, upon proper averment, become the subject of judicial inquiry and be determined by parol Velten v. Carmack, 23 Or. 282, evidence. 31 Pac. 658, 20 L. R. A. 101. The assignment of the land contract was collateral to the execution of the promissory note for \$800, thereby rendering such pledge subject to parol evidence to explain the condition upon which the contract was transferred. Lewis v. First Nat. Bank, 48 Or. 182, 78 Pac. 990. In La Grande Nat. Bank v. Blum, 26 Or. 49, 37 Pac. 48, it was ruled that as between the original parties to a promissory note the maker might show by extrinsic evidence that the instrument was executed as security for the performance of a contract, the terms of which had been complied with, since such evidence did not change the stipulations of the writing, but disclosed a failure of consideration. To the same effect see also the notes to the case of Beach v. Nevins, 162 Fed. 129, 89 C. C. A. 129, 18 L. R. A. (N. S.) 288.

[3] If the plaintiffs' theory of this case is correct, then the condition upon which the promissory note for \$800 was to become operative never happened, and, this being so, that fact is not like payment or other discharge of the obligation which must be specially pleaded, but is a failure of consideration which may be established under the general issue. 4 Cyc. 355; Dollar Savings & Trust Co. v. Crawford, 69 W. Va. 109, 70 S. E. 1089, 33 L. R. A. (N. S.) 587; Craig v. State of Missouri, 4 Pet. 410, 7 L. Ed. 903.

Based upon these rules, the testimony will be examined respecting the averments of the complaint, that the promissory note for \$800 ing the hotel, if he left the furniture there? was given and the land contract assigned, to

guarantee the return to the defendants of the furniture in the Enterprise Hotel. Mr. Gress, referring to Mr. Brakebush, to the real estate agent, and to Weinhard's Brewery, testified as follows:

"Me and my father-in-law intended to rent the Edmondson Hotel, we couldn't raise the money, so Mr. Gentemann, he says, 'I know a better place,' he says, 'you will make better money and it won't cost, won't be no expense,' so we looked at it (the Enterprise Hotel) and seen Mills & Splawn, and asked the price. We had to buy the license, and buy the furniture, and he (the broker) says, "The brewery owns the whole thing."

This witness stated that Lewis H. Hamig, the defendants' credit agent, demanded that the \$800 note should be given as security for the return of the furniture in the hotel, and that upon the return thereof he would reassign the land contract and note; that Mr. Hamig in consummating the bargain with the witness and Mr. Brakebush never said a word about their payment of the debts due from Mills & Splawn to their creditors; that the value of the furniture in the hotel was about \$100; and that the ½ acres of land was worth about \$5,000, and the entire consideration therefor, \$3,150, had all been paid but about \$300.

Mrs. Minnie Brakebush testified that when the \$800 note was submitted for execution Mr. Hamig said he wanted security so we could not dispose of the furniture in any shape or form, and Mr. Gress gave the security.

Fred Brakebush testified that in negotiating for the occupancy and use of the Enterprise Hotel Mr. Hamig stated that the furniture in that building was owned by the Weinhard Brewery; that Mills & Splawn never represented they owned any of it; that no bill of sale therefor was ever obtained by Mr. Gress or himself; and that they did not purchase any furniture.

James Gentemann, the real estate agent, testified: That in Mr. Hamig's presence objection was made to the furniture, whereupon the witness stated to Mr. Gress: "You just give the security. It is just to show you are not going to run away with it in case he left and couldn't run the saloon any more. That is what he gave the security for." That Mr. Gress remarked: "The furniture is worth not so much. I told him that makes no difference, you just give security and leave it the way it is." "Q. Did Mr. Hamig tell you that the furniture was to be held as security? The witness also stated that the A. Yes." furniture was worth about \$100 and was no part of the sale between Hamig and Gress other than security. In rebuttal Mr. Gentemann testified that Hamig told him Gress would have to put up some security for the furniture. "Q. Did Mr. Hamig tell you to tell George Gress that any security he would put up would be returned to him on his leaving the hotel, if he left the furniture there? time it was the understanding. Q. That was your understanding? A. Yes. \* \* \*"
The plaintiffs' counsel referring to Mr. Gress, inquired: "He wasn't buying the furniture?"
This witness replied: "No." On cross-examination this witness was asked: "Did you understand the hotel and furniture and all those things were for sale?" He answered: "Yes. Q. Did you understand the furniture was for sale? A. Yes. Q. Did you understand it was to be sold? A. Yes."

Lewis H. Hamig, the defendants' credit agent, testified that Mr. Splawn, of the firm of Mills & Splawn, brought to him Mr. Gentemann, who stated that Gress & Brakebush wanted to secure the Enterprise Hotel; that a bargain was concluded with the latter firm whereby they stipulated to give \$2,800 for the unexpired portion of the liquor license which had to be paid to the city, \$333.35 which Mills & Splawn had advanced on account of the license to June 30, 1912, and the further sum of \$800, amounting to \$3,933.35. The defendants' counsel referring to such total consideration inquired: "That is composed of what?" The witness answered: "The liquor license \$2,800, furniture and fixtures in the saloon, rooming house, and restaurant, excepting the bar outfit and pump outfit which belonged to the Weinhard Brewery, and were not included in the bill of sale."

Mr. Hamig, referring to the clause in the assignment of the land contract which provided that if Gress should pay \$800 and interest from February 10, 1912, on or before "ninety (90) days" and explaining why the quoted words were changed so as to read "six (6) months," testified as follows: "They were made by me in the presence of Mr. Gress and the others for the reason that he objected to 90 days' time in which to pay the \$800; stated that it was not sufficient time, something might go wrong." The defendants' counsel adverting to the payment by their clients of \$1,137.90, or \$4.55 more than was evidenced by the note for \$333.35 given by Gress & Brakebush and the note for \$800 executed by Gress, inquired: "And what are those items? What do they cover?" The witness answered: "They cover the indebtedness of Splawn & Mills; they cover payment which it was agreed by Gress & Brakebush to pay to Splawn & Mills for their interest in the hotel, and the commission of Joseph Gentemann, the rent to date, and the indebtedness owing to the Weinhard Brewery; also an attachment levied by some one against the property of W. F. Mills in the hotel part of the building to satisfy that attachment." An itemized statement of the sums of money so paid out was given by Mr. Hamig and canceled checks therefor were also received in evidence.

In compliance with the requirements of sections 6069-6072, L. O. L., known as the Bulk Sales Law, Mr. Splawn and Mr. Mills on February 9, 1909, made and delivered to the defendants separate affidavits, giving the names of the creditors and the amounts due each for goods, wares, merchandise, etc., sold and delivered to them and used in conducting the business of the Enterprise Hotel.

[4] The negotiations for securing possession of that building were made by Gress & Brakebush with Mr. Hamig, and neither Mr. Wessinger nor Mr. Wagner knew anything about the transaction, except as they were informed by their agent, Mr. Hamig. That the defendants paid out \$1,137.90 in liquidating the debts which had been incurred and sums of money that had been paid by Mills & Splawn there is not even a shadow of doubt. Several very careful examinations of the entire testimony given at the trial, when considered in connection with the presumption which arises from the execution of the promissory note for \$800, and the inference to be deduced by the change in the assignment of the land contract from "ninety (90) days" to "six (6) months" do not in our opinion overcome the testimony of Mr. Gress and Mr. Brakebush that such note was executed to guarantee the return of the furniture in the hotel, corroborated as such testimony is by the sworn statements of Mr. Gentemann, who appears to be a disinterested witness.

[5] It is argued, however, that as the trial judge saw all these witnesses, and observed their manner and bearing while testifying. the conclusion which he reached ought not to be disturbed. At the trial all testimony objected to by defendants' counsel was received without any ruling having been made thereon. When the cause was ready to be submitted a motion was made to exclude the evidence so objected to, but no decision on that subject was rendered. From an examination of the decree brought up for review, it is impossible to determine whether the final adjudication was based upon the assumption that the defeasance stipulation could not be contradicted by parol evidence, or whether the testimony received preponderated in favor of the defendants, and for these reasons the decision of the trial court upon the very conflicting evidence is not considered controlling herein.

The conclusion we have reached makes it unnecessary to consider what interest, if any, Mrs. Brakebush has in the land contract. The decree is therefore reversed, and one will be entered here granting to the plaintiffs

McBRIDE, C. J., and McCAMANT and BEAN, JJ., concur.

the relief prayed for in the complaint.

### SCALES v. FIRST STATE BANK.

(Supreme Court of Oregon. April 30, 1918.)

1. Contracts @==176(1) - Construction

DUTY OF COURT.

Where the language of a contract introduced in evidence is plain and unambiguous, it is, under L. O. L. § 136, the province of the court to determine its legal effect.

2. Principal and Agent €=3(2) - "Inde-PENDENT CONTRACTOR"-INTERFERENCE WITH

EMPLOYER.

Where a bank hired one to move wood within a specified time at a price per cord, assuming no control over the means of transportation of the wood, but only agreeing to identify that portion of the wood to be moved, the relationship of employer and independent contractor obtained.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Independent Contractor.]

3. Principal and Agent €=3(2)—Independent Contractor — Contract — Construc-TION.

Where a bank hired one to move wood, neither the absence of a provision requiring him to give bond, nor the presence of provisions requiring care in moving the wood, and protection from damage by fire, and that the employer could take control upon breach, militated against relationship of employer and independent contractor.

4. Principal and Agent \$\sim 3(2)\$—Liability for Supplies Furnished — Independent

CONTRACTOR.

The presence in a contract between an employer and an independent contractor of stipufations to hold the employer harmless from liens for labor and material, and exempting the employer from liability for personal injuries, without a clause exempting from liability for labor and supplies, neither makes the contractor a mere agent, nor admits liability for labor and supplies furnished him.

5. EVIDENCE \$\infty 424 - Proof of Agency - Third Parties Not Bound by Written

CONTRACT OF AGENCY.

Where the pleadings authorize evidence of Where the pleadings authorize evidence of express or implied contract of agency, of agency by ratification, and by estoppel to establish employer's liability for goods sold to independent contractor, the plaintiff not being a party to agreement creating relationship of employer and independent contractor, nor at time of sales having knowledge thereof, is not bound by the contract of agency, but may introduce other evidence of agency without pleading modification of the contract.

APPEAL AND EBROB \$\infty\$1056(3)\to Harmless Ebrob-Exclusion of Evidence.

Where proof of agency that was wrongfully excluded was insufficient, if introduced, to establish the relation, the error was harmless.

7. Principal and Agent \$\sim 3(2)\$—Independ-ENT CONTRACTOR - PAYMENT OF WORKMEN BY EMPLOYER.

he payment of workmen by an owner or does not necessarily transform an independent contractor into an agent.

Department 1. Appeal from Circuit Court, Multnomah County; C. U. Gantenbein, Judge.

Action by Alice Scales against the First State Bank, a corporation. From a judgment of nonsuit, plaintiff appeals. Affirmed.

Alice Scales brought this action against the First State Bank, a corporation, to re-payable between the 1st and 10th days of

cover the price of groceries, meats, and other supplies. The plaintiff prosecuted the action on the theory that the goods were purchased by Harry J. Ewing as an agent of the defendant. The bank asserted that Ewing was an independent contractor. At the conclusion of the testimony for the plaintiff the court allowed the defendant's motion for a nonsuit, and the plaintiff appealed from the consequent judgment.

The defendant had caused to be cut, ricked, and corded about 6,000 cords of red fir wood on a tract of land located about onehalf mile from the Sandy river. On April 14, 1915, Harry J. Ewing entered into a contract with the bank to transport to Troutdale all the wood except such sticks as were doty, soggy, or otherwise unfit for the market, and also except such portions as the bank might reserve. The portions reserved were to be marked in some appropriate manner. The contract required Ewing to place all the cordwood not excepted or reserved, in the Sandy river at a designated point and then to drive the wood down the river in a careful and prudent manner to Troutdale where he was properly and securely to boom the wood. Ewing agreed that immediately after booming the wood he would remove it from the river by means of a conveyor and load it on cars or wagons to be provided by the defendant, or, if the bank so directed, rick and cord the wood on certain premises. Ewing specifically agreed to construct all roadways and chutes necessary for moving the wood to the river and at his own expense to construct all booms and dams necessary for driving the wood or for holding it in the river. The contract obligated Ewing to pay the defendant \$3 per cord for all the wood left on the bars and banks of the river, and to exercise "the greatest of care and precaution" so as to prevent any wood from escaping from the boom. The defendant agreed to furnish and install the conveyor and an engine to drive it, but it is also stipulated in the writing that the First State Bank does not assume or retain any control or supervision over the same while being operated and used by Ewing. It is also agreed that Ewing shall make all repairs to the conveyor and engine while in use, and that he "will furnish all wagons, sleds, horses and all materials and labor of every kind and description which shall be used by" him "in complying with and carying out the terms and conditions of this contract, all at the expense of" Ewing and without cost and expense to the First State Bank. The bank agreed to pay Ewing \$1.15 per cord for all wood delivered by him at Troutdale; but advance payments were to be made as follows: 40 cents per cord "as . soon as all said cord wood is placed in" the river, and an additional 50 cents per cord

May, June, and July, 1915, for every cord, ricked for storage or loaded on cars and wagons at Troutdale "during the preceding month." Ewing agreed to place at least 2,000 cords in the river on or before May 10, 1915, and to place all the wood in the river on or before June 1, 1915. The contract obligated Ewing to make two drives. He was to start the first drive on or before May 10, 1915, and finish it on or before May 20, 1915; and he was to start the second drive June 1, 1915, and finish it on or before June 15, 1915. Time is declared to be of the essence of the contract and the writing states that "all the terms and conditions herein stated must be completed on or before July 15, 1915." Ewing also agreed to save the bank "harmless from any and all labor and materialmen's liens," to pay "all railroad demurrage which may be incurred because of any fault, negligence, or carelessness on his part," and to "exercise the greatest of care and precaution in avoiding any and all fires in and about the premises which would in any way cause the wood" to be damaged or destroyed. The writing contains a paragraph which states that the bank shall not be held responsible for any personal injuries sustained by any person employed by Ewing in transporting and delivering the wood. The concluding stipulation empowers the bank "to take full control and possession," and to prosecute the work to completion in the event Ewing fails to comply with any of the terms or conditions of the contract.

Ewing entered upon the performance of his contract on April 15, 1915. Three different camps appear to have been established. John Dellis was the foreman of one camp, one Bosh was the foreman of the second camp, and Daugherty, Garthers, and Habbard seem to have been the persons who acted successively as foreman of the third camp. Ewing continued with the work until June 23, 1915, when he had placed about 3,000 cords in the river, and the bank then terminated the contract and took charge of the wood.

After reciting that the defendant owned about 6.000 cords of wood which it undertook to transport to Troutdale, the complaint avers that Ewing was at all times the agent of the defendant, with authority to supervise the transportation of the wood, to establish camps, to employ men, and to purchase supplies. It is then alleged that at the "request of the defendant and of defendant's said agent" J. Scales sold and delivered groceries and supplies "unto the defendant and said agent" at each of the three camps, and that E. R. Leaf sold and delivered meats "unto defendant and said agent" at the Dellis camp. There are appropriate allegations showing the assignment of the claims to the plaintiff: and, after crediting certain payments, the Wrightman, 36 Or. 120, 125, 58 Pac. 1100;

judgment against the defendant for the balance due.

The answer denies that Ewing acted as an agent of the bank; and for an affirmative defense the defendant alleges that Ewing was an independent contractor.

The plaintiff replied by averring that the defendant is estopped from claiming that Ewing was an independent contractor, because: (1) The bank held Ewing out as its agent in all matters appertaining to the removal of the wood, inquired about the bills. examined the statements of articles sold and delivered at the camps, required all checks to be approved by A. Myers, the president of the bank, employed, discharged, and paid men who worked under the supervision of Ewing and the plaintiff's assignors relied upon the bank for payment when selling the goods: (2) the bank was guilty of fraud in causing and permitting the goods to be sold, and then receiving and retaining all the benefit of the goods, when it knew that Ewing was insolvent and the sellers were not aware of his insolvency; (3) by taking control of the work on June 23, 1915, and undertaking to complete it and by retaining the benefit of the work done by Ewing as well as the benefits resulting from the use of the goods sold by the plaintiff's assignors, the bank ratified Ewing's purchase of the meats, groceries, and supplies so as to make the bank liable for the acts of Ewing.

Henry S. Westbrook, of Portland, for appellant. J. E. Bronaugh, of Portland (Bronaugh & Bronaugh and Carl M. Little, all of Portland, on the brief), for respondent.

HARRIS. J. (after stating the facts as above). Harry J. Ewing was the first witness called by the plaintiff. After asking a few preliminary questions the attorney for plaintiff handed the witness the written contract, signed by Ewing and the bank, and asked him to "state whether or not that is the agreement you said you made." witness answered thus, "Yes, sir; that is it;" and he subsequently added that he entered upon the work about April 15th "under that agreement." The writing was offered in evidence by the plaintiff and received by the court, and for the sake of brevity will be called Exhibit A. The bank contended, and the court ruled, that Exhibit A created the relation of employer and independent contractor, and not that of master and servant or principal and agent. The plaintiff contends that Exhibit A "by its terms makes Harry J. Ewing no more than a foreman, overseer and agent of the defendant."

[1-4] The language of Exhibit A is plain and unambiguous; and it is therefore the province of the court to determine its legal effect. Section 136, L. O. L.; Simonds v. complaint concludes with a demand for a Sharp v. Kilborn, 64 Or. 371, 374, 130 Pac.

735; Good v. Johnson, 38 Colo. 440, 88 Pac. admits a liability for labor and materials by 439. 8 L. R. A. (N. S.) 896; 14 R. C. L. 78; 2 C. J. 964: 1 Mechem on Agency (2d Ed.) § 294. An examination of the writing will disclose that, standing alone and by itself, it indisputably creates the relation of employer and independent contractor. In Powell v. Construction Co., 88 Tenn. 692, 13 S. W. 691, 17 Am. St. Rep. 925, 928, Mr. Justice Lurton says that:

"An independent contractor is one who, exercising an independent employment, contracts to do a piece of work according to his own methods, and without being subject to control of his employer, except as to the result of his work."

While it is not always easy to frame a definition which accurately states essential elements, and at the same time is capable of being applied to all cases, the one just given has the merit of being concise, and also has the prestige that follows from frequent judicial approval. Pottorff v. Fidelity Coal Mining Co., 86 Kan. 774, 122 Pac. 120; Humpton v. Unterkircher et al., 97 Iowa, 509, 66 N. W. 776; Good v. Johnson, 38 Colo. 440, 88 Pac. 439, 8 L. R. A. (N. S.) 896. Stated broadly, the test for determining whether a person employed to do certain work is or is not an independent contractor is the control which the employer reserves over the work and has the right to exercise. Where the person doing the work is an independent contractor, the will of the employer is represented in the result contracted for while the general control over means and methods is given to the contractor. Macdonald v. O'Reilly, 45 Or. 589, 600, 78 Pac. 753; 1 Mechem on Agency (2d Ed.) §§ 40, 336; 16 A. & E. Ency. Law (2d Ed.) 187; 2 C. J. 424; 14 R. C. L. 67; Messmer v. Bell & Coggeshall Co., 133 Ky. 19, 117 S. W. 346, 19 Ann. Cas. The delivery of the wood within a fixed time is the result contracted for. It is true that the contract provides for placing the wood in and driving it down the river, but the means and methods to be employed in placing the wood in the river and for driving it to Troutdale were under the control of the contractor. Ewing had the right to employ. pay, and discharge men. The bank had no control over the men to be employed, or the amount of wages to be paid to them. The bank stipulated for a certain result, and Ewing agreed to accomplish it within a certain time. The only construction that can reasonably be placed upon Exhibit A is that it created the relation of employer and independent contractor.

The plaintiff argues that Exhibit A should be construed as a contract of agency because: (1) No bond was required of Ewing, although one was required of the person who cut and corded the wood; (2) the bank reserved the right to say how much of the 6,000 cords was to be moved; (3) Ewing agreed to exercise the greatest of care and

requiring Ewing to save the defendant harmless from liens for labor and material: (5) Ewing agreed to exercise the greatest care and precaution to prevent damage by fire; (6) the contract expressly exempts the defendant from liability for personal injuries, while "no provision is made about defendant's liability for labor, supplies, and materials"; and (7) a breach of the contract by Ewing permits the bank "to take full control and possession" and prosecute the work to completion.

The presence or absence of a provision requiring Ewing to give a bond does not in the slightest degree tend to determine the nature of the relation created by the writing. The bank had 6,000 cords of wood: it desired to move some but not all the marketable wood to Troutdale. The agreement required the bank to mark the wood so as to enable Ewing to know what portions were not to be moved by him. The parties to the contract merely provided a means for identifying the wood to be handled by Ewing, without reserving to the bank any control over the means or methods to be employed in handling the wood after its identification. The parties had a right to fix the degree of care to be exercised by Ewing in moving the wood, and they had the same right with reference to the care to be exercised in preventing loss by fire. Manifestly, the presence of these two provisions argues against rather than for the creation of the relation of principal and agent.

The stipulation obligating Ewing to save the bank harmless from liens for labor and materials has no tendency to create an agency. The presence of a provision exempting the bank from liability for personal injuries and the absence of a provision exempting the bank from liability for labor, supplies. and material does not constitute an implied admission of liability for labor, supplies, and materials. Ewing did not place all the wood in the river within the time fixed by the agreement, nor did he drive all the wood down the river to Troutdale within the prescribed time, and apparently for these and possibly for additional reasons the bank terminated the contract and took charge of the wood under the stipulation empowering it "to take full control and possession" whenever Ewing breached the contract. This stipulation does not necessarily make the contractor a mere servant or an agent. The contractor does not lose his independence merely because the employer is empowered to terminate the employment if the contractor breaches his contract; but the relation is to be determined from all the indicia of control. Solberg v. Schlosser, 20 N. D. 307, 127 N. W. 91, 30 L. R. A. (N. S.) 1111; United Printing & Decorating Co. v. Dunn, 137 Ga. 307, 73 S. E. 492; State v. Coe, 72 Me. 456; Kuehn v. precaution in moving the wood; (4) the bank | Milwaukee, 92 Wis. 263, 65 N. W. 1030. Every element necessary for the existence of the relation of employer and independent contractor is found in Exhibit A, and if the rights of the litigants are to be measured by the writing alone, the conclusion is inevitable that Ewing was an independent contractor.

[5] After Exhibit A was received in evidence the plaintiff attempted to offer testimony relating to the acts and conduct of the bank on the theory that such testimony tended to show an actual agency as well as an estoppel. The defendant took the position that Exhibit A was conclusive, and that since the plaintiff had not alleged either a rescission or a modification of Exhibit A she could not offer evidence which would have the effect of showing a relation at variance with the relation created by the written contract. The court ruled that Ewing was bound by the writing, and that therefore the plaintiff could not offer evidence varying the terms of the written contract without pleading a modification of the written agreement.

The plaintiff alleges in her complaint that Ewing was the agent of the bank, and that the goods were sold to Ewing as such agent and to the defendant. The bank is liable for the acts of Ewing if he was in truth the agent of the bank, or if, though not in fact an agent, he nevertheless acted as an agent and afterwards the bank ratified his acts with knowledge of the facts, or if the seller of the goods dealt with Ewing as an agent after having been led by the bank's conduct to believe that he had authority to act as an agent. In other words, the plaintiff can recover upon proving an express or implied appointment, or a ratification, or an estoppel. Rumble v. Cummings, 52 Or. 203, 208, 95 Pac. 1111. The allegations of the complaint permit the introduction of evidence showing that the bank either expressly or impliedly appointed Ewing as its agent; and the pleading also permits the plaintiff to prove ratification, because ratification, subject to certain exceptions, has a retroactive efficacy, and is equivalent to an original authority. Mahon v. Rankin, 54 Or. 328, 343, 102 Pac. 608, 103 Pac. 53; 2 C. J. 516 and 906; Mechem on Agency (2d Ed.) § 394. Assuming that an estoppel is sufficiently pleaded in the reply, the averment of agency in the complaint plus the allegations relating to an estoppel in the reply authorized the introduction of evidence to prove an estoppel.

The written contract between the bank and Ewing is not necessarily conclusive upon third persons. Neither the plaintiff nor her assignors were parties to the writing, nor did either of them have knowledge of the agreement or of its terms when the goods were sold; the law did not require the controverted authority to be in writing, and therefore, even though the terms of Exhibit A created an agency, a third person would not be compelled to resort to the writing to prove

the agency, but the existence of the agency could be proved by any available evidence, such as admissions, course of dealing, and the like, or liability could also be established by evidence of an estoppel; and moreover, even though the writing be produced, the instrument is not necessarily conclusive, because the bank would be bound to third persons to the extent that it caused authority to appear to third persons, even though such apparent authority be different from the authority actually created by the writing. The liability of the bank would be measured by the apparent rather than the real authority. notwithstanding the fact that the apparent authority is greater than or different from the real authority. Kaskaskia Bridge Co. v. Shannon, 1 Gilman (6 Ill.) 15; Curtis v. Ingham, 2 Vt. 287; Bryer v. Weston, 16 Me. 261; Campbell v. Hood, 6 Mo. 211; Walsh v. Pierce, 12 Vt. 130; Rawson v. Curtiss, 19 Ill. 456; Griffin v. Doe, 12 Ala. 783; 10 Ency. of Ev. 13; 1 Mechem on Agency (2d Ed.) 259. The plaintiff was entitled to offer parol evidence to show that the bank appointed Ewing as its agent, or that the bank ratified acts done by Ewing as agent, or that the bank is estopped to deny agency.

[6] It is not necessary to give a detailed statement of the facts which the plaintiff attempted and offered to prove, but it is enough to say that even though the plaintiff had been permitted to introduce all the evidence offered by her, nevertheless it would have been the duty of the court to grant a nonsuit. There would have been an utter want of evidence to show that Ewing had been in fact appointed as an agent. The fact that the bank took charge of the wood when Ewing breached his contract did not operate as a ratification because the bank merely took what it owned; and moreover. the essential elements of ratification were absent. 2 C. J. 495. Nor would the evidence have been enough to raise an estoppel, for the reason that some of the necessary elements of an estoppel, if not all the elements. would have been lacking. 2 C. J. 444, 461. 464: 1 Mechem on Agency (2d Ed.) \$\$ 245, 246.

[7] Inasmuch as there may be further litigation between the parties, and in view of the fact that it was contended that a check signed by Ewing and approved by Myers, the president of the bank, made Ewing an agent of the bank, we direct attention to the following authorities which hold that payment of workmen by the owner does not necessarily transform an independent contractor into an agent: Smith v. Belshaw, 89 Cal. 427, 26 Pac. 834; Bellamy v. F. A. Ames Co., 140 Ky. 98, 130 S. W. 980; Houghton v. Loma Prieta Lumber Co., 152 Cal. 574, 93 Pac. 377: Good v. Johnson, 38 Colo. 440, 88 Pac. 439, 8 L. R. A. (N. S.) 896; Miller v. Minnesota. etc., Ry. Co., 76 Iowa, 655, 39 N. W. 188, 14 Am. St. Rep. 258; 14 R. C. L. 77.

Although the trial court erred in holding

that the writing was conclusive, nevertheless the result of the trial would have been the same, even though the plaintiff had been permitted to introduce all the evidence offered by her, and the judgment appealed from is therefore affirmed.

McBRIDE, C. J., and BURNETT and BEN-SON, JJ., concur.

## OGDEN et al. v. HOFFMAN.

April 30, 1918.) (Supreme Court of Oregon.

1. APPEAL AND ERROR \$== 14(1)-EXHAUSTION

of RIGHTS-RIGHT OF APPEAL.
Where plaintiffs' rights under their first notice of appeal had expired, the appeal having been perfected by service of notice and filing the required undertaking, plaintiffs' rights were exhausted and they could not take another appeal.

2. APPEAL AND ERROR 4 424 NOTICE—SERV-ICE ON ATTORNEY.

Plaintiffs' service of notice of appeal to the Supreme Court upon one of defendant's attorneys was sufficient.

Appeal from Circuit Court, Clackamas County; J. U. Campbell, Judge.

Action by Ida E. Ogden, F. S. Hoffman, Curtis Hoffman, Cora Oens, and Ida E. Ogden as assignee of W. H. Hoffman, deceased, heirs of Geo, Thomas Hoffman, deceased, against Emaline Jane Hoffman, administratrix of the estate of Geo. Thomas Hoffman, From decree dismissing appeal deceased. from the probate court, plaintiffs appeal. On motion to dismiss. Appeal dismissed, with judgment against plaintiffs and their sureties for costs.

This is a motion to dismiss an appeal. The facts are as follows: The plaintiffs, deeming themselves aggrieved by a decree of the county court sitting in probate, appealed to the circuit court where, upon motion of the defendant, their appeal was dismissed, said order being made December 27, 1917. On January 31, 1918, plaintiffs served upon John N. Sievers, one of defendant's attorneys, a notice of appeal to this court, which notice was filed with the clerk with due proof of service on February 1, 1918, and also filed on the same date their undertaking on appeal. No exception was taken to the sufficiency of the sureties, so that on February 7, 1918, the plaintiffs' appeal became perfected, and it was their duty, if they desired to be heard here, to file their transcript with the clerk of this court within 30 days from that date. L. O. L. § 554. Failing to do this or to obtain an extension of time, they must be deemed to have abandoned the appeal. L. O. L. § 554, subd. 3.

The plaintiffs, on February 13, 1918, served and filed a new notice of appeal and uncepted service. In the second notice of appeal appears the following statement:

"This notice of appeal is now given for the reason that the notice of appeal heretofore given was given before judgment for costs was entered and was served upon John N. Sievers only. This notice of appeal will be relied on by the appellants herein."

On March 12, 1918, the transcript on appeal was filed in this court.

C. D. Purcell, of Sandy, and Henry S. Westbrook, of Portland, for appellants. Chas. T. Sievers and John N. Sievers, both of Oregon City, for respondent.

McBRIDE, C. J. (after stating the facts as [1, 2] Plaintiffs' rights under the first notice of appeal expired March 10, 1918, and, that appeal having been perfected by service of notice and filing the required undertaking, the plaintiffs' rights were exhausted and they could not take another appeal. Schmeer v. Schmeer, 16 Or. 243, 17 Pac. 864; Hill v. Lewis, 170 Pac. 316, and many other cases. The service of the first notice upon one of the attorneys for defendant was sufficient.

The judgment for costs and disbursements was a separate proceeding arising upon an objection to the cost bill. It was heard separately and a separate judgment entered sustaining all plaintiffs' objections thereto, so that plaintiffs had no right to appeal in that behalf and indeed have not attempted to do so.

The appeal will be dismissed, with judgment against plaintiffs and their sureties for the costs of this proceeding.

## LYTLE et ux. v. RAMP.

(Supreme Court of Oregon. April 30, 1918.)

1. CONTRACTS \$==54(1)—LEGALITY OF OBJECT TESTAMENTARY CONTRACTS.

Contract, in consideration of care and support, to give land and cancel note and mortgage for money loaned to build on the land, on full performance by the mortgagors, is enforceable.

2. Contracts \$==349(2) - Evidence - Suffi-CIENCY.

In suit to cancel note and mortgage, dence held insufficient to warrant cancellation on ground of contract to give lot and cancel. note in consideration of care and support.

Department 1. Appeal from Circuit Court, Marion County; William Galloway, Judge.

Suit by Charles A. Lytle and wife against B. F. Ramp, as executor of Mary A. Ramp, deceased. Decree for plaintiffs, and defendant appeals. Modified.

This is a suit for the cancellation of a note and mortgage. The substance of the complaint is that plaintiffs are husband and wife, the husband being a grandson of Mary A. Ramp, now deceased; that during the dertaking. The appeal being from the same lifetime of the latter she entered into a condecree, both the attorneys for defendant ac- tract with plaintiffs wherein it was agreed

that plaintiffs should move to a place adjoining the premises occupied by Mrs. Ramp and live there and look after, care for, and help her during the remainder of her life; that in consideration of such services, at the death of Mrs. Ramp, plaintiffs should become the owners of the premises so occupied by them, free from all incumbrances; that Mrs. Ramp advanced them money to the extent of \$1,800 with which to build the house in which they lived while looking after and caring for Mrs. Ramp, who was a helpless invalid; that as evidence of such indebtedness, for the money so advanced, plaintiffs executed their promissory note, and a mortgage upon the premises referred to, and delivered the same to Mrs. Ramp; that the mortgage covers the property which Mrs. Ramp had agreed to give to plaintiffs as compensation for their services; that the note and mortgage were executed and received merely as evidence of the amount of money so advanced, it being agreed that, if plaintiffs fully complied with the terms of the foregoing agreement, the note and mortgage should be canceled. is also alleged that plaintiffs fully performed their part of the contract, but that Mrs. Ramp failed to cancel the note and mortgage, and that the defendant, who is the executor of the last will and testament of Mrs. Ramp, refuses to cancel or satisfy the

The answer is to the effect that Mrs. Ramp sold the lot to plaintiffs for \$500, advanced money for building the house, and that the note and mortgage represent this indebtedness, together with other moneys due from plaintiffs to decedent for certain personal The contract reproperty and small loans. lied upon by plaintiffs is denied. It is admitted that plaintiffs rendered services to Mrs. Ramp, but that they were fully paid by her before her death. There are other affirmative defenses pleaded, but, as they are not essential to the discussion here, they are not set out. A reply having been filed, there was a trial resulting in a decree for plaintiffs in accordance with the prayer of the complaint, and defendant appeals.

Carey F. Martin and Rollin K. Page, both of Salem, for appellant. Walter C. Winslow, of Salem (S. M. Endicott, of Salem, on the brief), for respondents.

BENSON, J. (after stating the facts as above). [1] That such a contract as that set out in the complaint is enforceable is too well settled to require a citation of authority. The only question for our consideration, therefore, is the weight and sufficiency of the evidence. Whatever agreement was had in the matter was between the plaintiff Charles A. Lytle and Mrs. Ramp, and, since it rests entirely in parol, we must look exclusively to the testimony of Mr. Lytle to discover its terms. The record discloses the fact that Mrs. Ramp was a helpless invalid, whose only means of moving around was a wheeled

chair, into which she must be lifted by oth-The plaintiffs for some time prior to the incidents involved herein had been living in rented apartments reasonably near to the home of Mrs. Ramp, to whose interests and welfare they were admittedly alert and faithful. However, circumstances developed which seemed to make it necessary for them to seek a different residence, and Mrs. Lytle told Mrs. Ramp that they were seriously considering the purchase of a lot in South Salem and the building of a house thereon upon the installment plan. This appeared to give the old lady great concern, since it would remove her grandson and his family so far from her residence as to render communication with them inconvenient and difficult. She therefore suggested that they build a house on the ground in controversy, and asked Mrs. Lytle to send her husband over to discuss the matter with her. Mr. Lytle then visited his grandmother, and his account of the conversation is as follows:

"I said: 'I haven't the money to build, and haven't the money to buy the lot.' She said: Well, some one is going to get the lot anyway.

I have to have some one that is kin to me to look after and take care of me. I am thrown among strangers to look after me and attend to in the hands of strangers.' She said some one was going to get it. She said: 'You may just as well have it as any one else.' I said I didn't have the money she set on the price of the lot, but she said: 'It is not for sale, but, if you want to come here. I will let you have the lot: some to come here, I will let you have the lot; some to come nere, I will let you have the lot; some one is going to get it, and you and Julia might as well have it.' Q. Who is Julia? A. That is my wife. So I talked to her about the lot and house, and she said: 'What did I think it would require, how much money to build on to the granary and build the house?' I said: 'I haven't any idea.' She said: 'You could figure and find out how much it will be. I have some haven't any idea.' She said: 'You could figure and find out how much it will be. I have some money, and I have to have some one here to look after me; you might just as well have it as some one else.' I got figures, and had different contractors figure what it would be, and no one got within the amount of money she seemed to be willing to let me have. She thought \$500 should be enough to build on the granary, to build on, and \$500 wouldn't reach the required amount; so I got figures and told her what they were: I didn't say whether I was going to take it; and she sent for me again. She said: 'What have you made up your mind?' I said: 'Grandma, I don't know what to do.' I says: 'We hate to get in debt for a house and build when I ain't got only my work. The only way I have is my hands to make this money. That is a whole lot to get in debt.' She says: 'I know it is, but I think you can make it.' And she encouraged me in it. I didn't say anything but and the say anything but and the say anything but any thing but any anything but anything but any anything but anything bu in it. I didn't say anything, but got their figures, and come in the means she would let me have to build the house; I got figures so it made it possible to build the house if she would let me have that amount of money. We let the con-tract for the house. That is practically the conversation in regard to the building of the house; every time I was there she spoke about the money, but she never said any more than that some one would get the lot, and we might just as well have it as some one else; for she had offered to people coming there that she would give them the lot to look after her.'

terms. The record discloses the fact that Mrs. Ramp was a helpless invalid, whose only means of moving around was a wheeled of Mrs. Ramp to give plaintiffs the lot upon



which the house was subsequently built, but ! falls very far short of anything like a contract to give them the money for the erection of the building. The \$1,800 for which the note and mortgage were executed, included other obligations besides the value of the lot and the money advanced for the construction of the dwelling. It is agreed throughout the record that the lot was valued at \$500, and as to the contract in relation thereto Lytle's testimony is abundantly corroborated by other witnesses, and we therefore conclude that plaintiffs are entitled to a credit of \$500 upon the note in question, and a decree will be entered here to that effect; neither party to recover costs.

McBRIDE, C. J., and BURNETT and BEAN, JJ., concur.

HAINES V. FIRST NAT. BANK OF ROSE-BURG.

(Supreme Court of Oregon. April 30, 1918.) 1. EVIDENCE \$== 244(4)-LETTERS AND CIRCU-

LARS. A depositor suing a bank for an alleged balance may not introduce a printed circular mailed to him, announcing defendant's consolidation with the D. bank, or letter on letter head of the D. bank signed by its president, making such announcement and stating continuance in the business of defendant's former president; it not being shown that D.'s president was agent of or authorized to speak for defendant, or that the circular was mailed by its authority.

2. Trial =252(1)-Instructions-Conform-ITY TO EVIDENCE.

An instruction framed on a theory of facts of which there is no evidence is properly refused. 3. Principal and Agent 🖘 14(3) — Crea-

TION OF RELATION. Merely because a national bank cannot act as broker for loaning for a depositor money which it has on deposit, arrangement by him with its president, that it should do so, does not make the president as an individual his

agent

4. Principal and Agent 6==60(1)—Author-ITY TO LOAN.

Authority to agent to loan money does not authorize him to borrow the money for himself. 5. Principal and Agent \$== 166(2)-Ratifi-

CATION—KNOWLEDGE.
Ratification of an agent's act, in exceeding his authority to loan by borrowing the money for himself, cannot be imputed to the principal merely because he was told that a loan was made, without being informed of the facts.

6. ACCOUNT STATED \$== 12-IMPEACHMENT. One to whom a statement of account was rendered, though having made no objection, may impeach it for fraudulent concealment of facts.

7. Banks and Banking \$\infty\$=154(7) - With-DRAWAL OF DEPOSIT-EVIDENCE.

Statement by a depositor in a bank that he had loaned his money to its president is competent evidence for the bank that he had withdrawn his money from the bank.

8. Banks and Banking \$\infty\$ 106 — Liability of Bank—Acts of President as Individ-

UAL.

The president of a bank may as an individual borrow money for his private account from a depositor in the bank; dealing with one who is president of a bank not necessarily making his acts those of the bank.

9. Limitation of Actions 66(9) - Action BY BANK DEPOSITOR.

The statute of limitations does not begin to run against claim of a depositor in a bank till his demand has been refused.

Department 1. Appeal from Circuit Court, Douglas County; J. W. Hamilton, Judge.

Action by E. E. Haines against the First National Bank of Roseburg. Judgment for plaintiff, and defendant appeals. Reversed. and remanded.

The plaintiff grounds his cause of action on the statement, in substance, that on April 6, 1908, he had on deposit in the defendant bank \$2,221.71, since which time the defendant has paid to him \$221.71, and no more, leaving a balance of \$2,000 which has not been paid by the defendant, although the plaintiff has demanded the same.

Among other things, the answer contains this language:

"Denies that the plaintiff withdrew from said bank on the 6th day of April, 1908, and since that date, the sum of \$221.71 only, but alleges the fact to be that the plaintiff on said 6th day of April, 1908, withdrew from said bank the sum of \$2,000 and thereafter continued as a superior and the sum of \$2,000 a depositor and patron of said bank, withdrawing and depositing different sums of money; all of the sums of money so deposited by the plaintiff have been withdrawn by him.

This allegation was traversed by the reply. For further answer the defendant avers, in substance, that about April 6, 1908, at the special instance and request of the plaintiff, T. R. Sheridan, then president of the defendant bank, loaned to R. S. Sheridan for the plaintiff \$2,000 and for the purpose of effecting the loan withdrew that amount of money from the plaintiff's deposit with the defendant bank; that being the identical sum demanded herein. Again, in substance, the defendant answers to the effect that the sum of \$2.000 of the plaintiff's money was withdrawn from his account by T. R. Sheridan and loaned for the plaintiff; that on or about April 6, 1908, the bank rendered and stated an account between the plaintiff and the defendant which showed the withdrawal of the \$2,000 in question, with a balance remaining due the plaintiff in the sum of \$221. 71; and that the plaintiff never made any objection to, but always acquiesced in, the correctness of that account. Finally, the transaction is again rehearsed in substantially the same language, including a statement of the account showing the withdrawal of \$2,000 on April 6, 1908, and that the plaintiff received the account so stated, retained the same, acquiesced in and approved the same, and that more than six years have elapsed since the withdrawal of the sum of \$2,000, on account of all of which the defendant urges that the demand of the plaintiff has been barred by the statute of limitations.

For affirmative matter in the reply the

plaintiff alleges, in effect, that T. R. Sheridan, as president of the bank, represented to him that his funds could be loaned by the bank on interest; that while plaintiff did not authorize either the bank or its president to loan any of his money, it did render him the statement of account showing that \$2,000 was charged against the plaintiff which Sheridan, acting on behalf of the defendant, as its president and actual manager, represented to plaintiff was a loan on his account upon which he would draw interest, and that his money was subject to withdrawal from the bank by him at any time; that on belief of the plaintiff that the bank was solvent, and having full confidence in the integrity of Sheridan, he made no objections to the account; that on the contrary, as the event proved, the bank never did loan the money, but that Sheridan, its president, took that amount for his own use without plaintiff's authority and caused the same to be charged to the account of the latter, using his position as president of the bank for that purpose.

The essence of the new matter in the reply is that the representations of the defendant's president to the effect that the bank had loaned the money were designed to deceive, and did deceive, the plaintiff, causing him apparently to acquiesce in the account stated; but that in fact the statements of the defendant's president and manager were false and were uttered for the purpose of concealing his personal appropriation of the plaintiff's funds, and so the latter, relying upon the same, was defrauded. A jury trial resulted in a verdict and judgment for the plaintiff, and the defendant appeals.

O. P. Coshow, of Roseburg, for appellant. B. L. Eddy, of Roseburg, for respondent.

BURNETT, J. (after stating the facts as above). The record contains many assignments of error, some of which we find it unnecessary to consider. Having testified, admitting that he had received the statement of account mentioned and that he had not made objection to it, the plaintiff introduced in evidence a printed circular of date June 17, 1911, announcing the consolidation of the defendant bank with the Douglas National Bank and the purpose to carry on banking business under the name of and in the rooms of the Douglas National Bank. The plaintiff testified that he had received this through the mail, but nothing appeared in evidence about who sent it or by whose authority it was issued. He also introduced a letter dated August 9, 1911, on the letter head of the Douglas National Bank and signed by J. H. Booth, president. It is addressed to the plaintiff, and, aside from mere formal expressions, reads thus:

"We have forwarded check books of this bank to you as requested in your favor of the 7th and thank you for your expressions of continuing

your business with the consolidated bank as formerly done with the First National. We appreciate it and we assure you that we shall always be ready to care for your wants as called upon and shall extend just the same courteous treatment as given in times past by the other bank which we have now absorbed. Mr. Sheridan continues right along actively with us as he did in the other bank but he wants some of us younger men to take the burden of the work from him a large share of which the writer will undertake."

[1] The defendant objected to the introduction of both these documents on the ground that they were incompetent, immaterial, irrelevant, and in no way affecting the issues involved in this action, which objection was overruled and the instruments were read in evidence over the exception of the defendant. There was no testimony tending to show that the defendant sanctioned either of the papers in question. So far as the allusion to Sheridan's continuing in the banking business with the Douglas National Bank is concerned, it was pure hearsay and not admissible. order to charge the defendant with any of the statements contained in those documents or the deductions to be drawn therefrom, it would be necessary to show that they were authorized by the defendant. In principle it is like the Goodhart letter alluded to in nearly all the cases against the defendant. cited at the close of this opinion. Goodhart was a national bank examiner, and in auditing the books and accounts of the defendant in his official capacity he found entries where the president of the bank had drawn memorandum checks against the accounts of depositors diminishing their deposits by so much, even as in the present case. In such instances, he addressed a letter to the depositor stating that such memorandum checks of the president had been honored and the amount charged to the account of the depositor and called upon the latter to state whether he authorized or approved the action thus narrated. In some of those cases the depositor answered avowing the action of Sheridan in so doing, and attempts were made to predicate estoppels upon the correspondence; but, as held in Doerstler v. First National Bank of Roseburg, 82 Or. 92, 161 Pac. 386, the bank examiner was in no sense the agent or authorized to speak for the defendant, and hence no estoppel could be grounded upon his letter and the answer thereto. So, here, it is not shown that the president of the Douglas National Bank was the agent of or had authority to speak for the defendant. Neither does it appear that by its authority the printed circular was mailed to the plaintiff; and hence by a parity of reasoning, as employed with reference to the Goodhart letters, it was error to receive in evidence the letter and circular here involved.

[2] The defendant requested a variety of instructions too numerous and lengthy to be quoted at large in this opinion. One element apparent in them is that they were framed



upon the theory that Sheridan withdrew the money and loaned it for the plaintiff; but, although this is alleged, there is nothing in evidence even tending to show that T. R. Sheridan loaned the money to anybody. In this state of the testimony an instruction involving that feature was properly refused.

[3] Again, another element of the denied instructions is to the effect that Sheridan acted as agent for the plaintiff; but it leaves out of view the necessary ingredient that his agency must have been with the plaintiff's previous consent or subsequent ratification with knowledge of all the facts pertaining to his action. Of course, as stated in the Doerstler Case, if, indeed, the plaintiff appointed Sheridan individually to be his agent to draw the money out of the bank for any purpose whatsoever, and, acting under such authority Sheridan had taken out the money. the bank would not be responsible for the same. The argument of the defendant in the present juncture is that the plaintiff must be charged with a knowledge of the law that no national bank can act as broker or agent for another person in loaning money which it has on deposit, and that, being so legally informed, he must be held to have dealt with Sheridan as an individual. It does not follow, however, that because Sheridan could not as a matter of law commit his bank to an agency for the plaintiff for any purpose of the kind mentioned, negotiations to that end would constitute an appointment of Sheridan the individual to be such agent. Under the circumstances, no legitimate result in favor of the bank could grow out of an attempted illegal transaction such as would result if the bank undertook to act as the broker for the purpose of effecting a loan for any one. However contrary to the law it would be to arrange for the bank to loan money for the plaintiff, the scheme cannot be pruned of its illegality without his consent so as to make Sheridan, the individual, an agent for him.

[4] As stated, there is no evidence in the record that Sheridan loaned any of the money. On the contrary, the construction most favorable to the defendant is that he borrowed it. Indeed, there is the testimony of two witnesses who declare that the plaintiff told them that he had loaned his money to Sheridan. Then, too, even if he was appointed by the plaintiff to be the agent of the latter to loan the money, it would not be authority to Sheridan to borrow the money for himself. The reason is that an agent cannot assume a position where he is at once acting for himself and adversely to his principal. His duty to his principal in such a case would require him to act as lender, and he could not at the same time act as borrower, for the two relations are inconsistent with each other. True it is that if the principal was aware of all the facts, it would be competent for him to ratify the transaction. But the evidence is all one way that the plaintiff had no knowl- Sheridan, the individual, borrowing money

edge that Sheridan himself had taken the money for his own purposes until about the time he commenced this action.

[5, 6] Among the refused instructions was one containing this language:

"If you find from the evidence that the defendant bank rendered to the plaintiff a state-ment of account, and if you find that said state-ment credited the plaintiff's account with a certain sum of money as interest on said loan, and if you find that the plaintiff with knowledge of said loan retained said interest, then I instruct you that the plaintiff cannot now repudiate the said loan and at the same time retain the benefit of said loan; and, if you find that plaintiff has retained such interest, I instruct you that the plaintiff's conduct would constitute a ratification of said loan and plaintiff cannot recover in such action."

This instruction omits the necessary element of knowledge of all the facts upon which the account was predicated. On the theory that Sheridan, the individual, was indeed the agent of the plaintiff, the mere statement that a loan had been made, when, in fact, unknown to the plaintiff, Sheridan had borrowed the money, would not be sufficient to impute ratification to the plaintiff. He had a right to presume that Sheridan had indeed loaned the money to somebody instead of borrowing it himself, and he would have a right to impeach the stated account by reason of the fraud of Sheridan in stealthily exceeding his authority as agent.

[7] The defendant excepted to an instruction given by the court in which the following language was used:

"There is no evidence here before you which would permit you to find under the issues and the evidence in this case that the money was loaned either to T. R. Sheridan or R. S. Sheridan, and the defendant cannot be excused from the payment of the amount of the deposit of the plaintiff on account of a loan either to T. R. or R. S. Sheridan.

As before pointed out, there was the testimony of two witnesses to the effect that the plaintiff had told them he had loaned his money to Sheridan. This was competent testimony in support of the averment in the answer that the plaintiff on April 6, 1908, withdrew the sum of \$2,000 from the bank and that all sums of money deposited by him had been withdrawn by him. If, in truth, he loaned the money to Sheridan, as these witnesses state, and which he denies indeed, the jury would be authorized to find that he had withdrawn it from the bank. He could not well loan that money to any one without withdrawing it from his bank account.

[8] Again, in an instruction the court stated this:

"As to the transaction between the plaintiff and the defendant bank, I instruct you that the acts of the president of the defendant bank are to be deemed the acts of the bank itself."

This is a mandatory sanction of the plaintiff's theory notwithstanding the testimony about his admissions that he had loaned the money to Sheridan. There is no law against from the plaintiff with his consent and for Chapman v. First National Bank, 72 Or. the private account of the former, and there is nothing to prevent the plaintiff from loaning Sheridan the money without necessarily making the transaction an act of the bank. It does not unavoidably follow as a matter of law that dealing with a man who happens to be the president of a bank makes his acts those of the bank. There are two sides to this question, dependent upon whether the plaintiff was dealing with the bank through its president, as he now claims, or whether he dealt with him as an individual and loaned the money to him in his private capacity as the two witnesses testify he related to them.

[9] The court instructed the jury thus:

"If you find that the plaintiff has a claim against the defendant and that defendant bank gave plaintiff credit on account of any payment of interest, then six years would have to elapse from the said payment before plaintiff's claim can be barred by the statute of limitations, even though the statute of limitations would begin to run against the plaintiff prior to his demanding payment of claim he had against the defendant.

It is not clear what a credit of interest on the deposit would have to do with tolling the statute of limitations under conditions disclosed by the record. It does not begin to operate against one who deposits money in a bank until his demand for the same has been refused. It is common knowledge that individuals leave money on deposit in banks for long periods of time beyond the six years prescribed in which an action for money may be instituted; yet no one would pretend that the statute of limitations had barred a claim for a deposit unless a demand for the same had been refused and the period had afterwards expired. The instruction in that respect is harmless, for it does not disturb the principle that a demand must be shown before the statute begins to run.

In brief, it was error to admit in evidence the circular and the Booth letter because it was not shown that they were authorized by the defendant. Neither would they excuse the plaintiff from his duty either to avow or reject the account provided he had knowledge of the facts upon which it was based. It was error to state to the jury as a matter of law that the transactions between Sheridan and the plaintiff were necessarily binding upon the bank, because it omits the possibility that the plaintiff dealt with Sheridan as an individual, of which there was some evidence. It is elementary that, where there is testimony supporting the theory of either party, it is incumbent upon the court to leave the question to the jury under proper instructions, and a charge which ignores such a situation and directs attention only to the theory of one party under such circumstances is erroneous.

The principal questions involved in this appeal have been settled in the cases of independent advice.

492, 143 Pac. 630, L. R. A. 1917F, 300; Byron v. First National Bank, 75 Or. 296, 146 Pac. 516; De War v. First National Bank, 80 Or. 260, 156 Pac. 1038; Wells v. First National Bank, 80 Or. 329, 157 Pac. 145; Carlon v. First National Bank, 80 Or. 539, 157 Pac. 809; Verrell v. First National Bank, 80 Or. 550, 157 Pac. 813.

The conclusion is that the judgment must be reversed, and the cause remanded for further proceedings.

McBRIDE, C. J., and BENSON and HAR-RIS, JJ., concur.

### ROWE v. FREEMAN et al.

Supreme Court of Oregon. April 30, 1918.)

Deeds &==211(1) — Understanding of Grantor—Sufficiency of Evidence. GRANTOR-

In suit by a daughter to cancel her mother's deed to a son on the ground of undue influence, evidence held to show that the mother understood the purport of her deed when she executed it, and that she realized thereafter that her son had title to the property.

APPEAL AND EBBOR \$== 1008(1)-REVIEW-FINDINGS.

Some weight must be given to the fact that the lower court which saw the witnesses deter-mined the issues in favor of defendants.

DEEDS \$\infty 196(3) - TRUST RELATIONSHIP -BUBDEN OF PROOF.

If a fiduciary relation existed between mother and son, in suit by a daughter to cancel the mother's deed to the son the burden of proof devolved on the son to sustain the transaction.

TRUSTS \$==283(2)--Conveyance to Trus-TEE-INDEPENDENT ADVICE.

The principle that a deed from cestui que trust to trustee will be upheld only when the former has acted under independent advice, applies only to cases where, by ill health, mental infirmity, immaturity, or otherwise, the party whose deed is attacked is one not likely to act wisely without disinterested advice, for a party of normal mentality is entitled to dispose of his own as he sees fit.

5. Deeds == 211(4) - Thust Relationship -EVIDENCE.

In a daughter's suit to cancel a deed executed by her mother to a son on the ground of undue influence and trust relationship, that the mother executed a power of attorney to the son was a circumstance to be given weight in deter-mining whether a trust relation existed between them, but the circumstance does not, of itself, establish a fiduciary relation.

6. Deeds €=196(3) - Conveyance to Trus-TEE - INDEPENDENT ADVICE - BURDEN OF PROOF.

Where a mother constituted her son her attorney in fact by giving him power of attorney, but the only use he made of such power was the ministerial act of withdrawing a deed to the mother's land deposited in escrow, the power of attorney did not create such relation of trust between the mother and son that in a daughter's suit against him to cancel his mother's deed to him, executed after revocation of the power, he had the burden to prove his mother acted under 7. DEEDS \$== 72(3)—CONVEYANCE TO TRUSTEE | INDEPENDENT ADVICE - TERMINATION OF

If son's power of attorney from his mother created a relationship of trust between them, laying upon him the burden, in his sister's suit to cancel his mother's deed to him, to uphold the good faith of the transaction the termina-tion of the relation by revocation of the power of attorney destroyed the son's disqualification to deal with his mother unadvised.

8. Deeds =72(3)-"FIDUCIABY RELATION"-

ABSENCE OF TRUST OR AGENCY.
Fiduciary relationship may exist in the absence of a trust or agency, being found, with its accompanying burdens and disqualifications, wherever there is confidence reposed on one side and resulting superiority and influence on the other.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Fiduciary Relation.1

9. DEEDS \$\infty\$=196(3) -- FIDUCIARY RELATIONSHIP-PARENT AND CHILD.

The relation of parent and child, accompanied by the affection and companionship incident thereto, does not make the child a fiduciary within the rule casting the burden upon him to justify a deed in his favor, from his parent.

10. DEEDS \$\infty 196(3) — Undue Influence Burden of Proof.

In a daughter's suit to cancel her mother's deed to a son, where the daughter failed to show the existence of a fiduciary relationship between mother and son, the burden of proof was on her to establish the undue influence and other matters relied on to set aside the deed.

11. DEEDS \$\infty 72(7) - Undue Influence - Execution on Request.

The execution of a deed at the suggestion or request of the grantee, the grantor, his mother, reserving a life estate and revenues adequate to her necessities, did not constitute undue influence nor vitiate the conveyance.

DEEDS == 196(3)-DEED FROM PARENT TO CHILD-PRESUMPTION OF INVALIDITY.

No presumption of invalidity attaches to a deed from mother to son wherein the mother reserves a life estate and revenues adequate to her necessities, though executed without monetary consideration at the suggestion or request of the son; the mother being mentally competent and no trust relation existing.

Department 2. Appeal from Circuit Court, Columbia County; James A. Eakin, Judge. Suit by Celia M. Rowe against Daniel E. Freeman and Mariah Freeman. From decree for defendants, plaintiff appeals. Affirmed.

This is a suit brought to set aside a deed to 634 acres of land near Scappoose, executed by Bridget M. Freeman in favor of Daniel E. Freeman, February 16, 1912. Plaintiff sues as one of the heirs at law of the grantor, who died intestate October 26, 1912. The deed in question reserved to the grantor a life estate in the property. deed recites a consideration of \$1 and other valuable considerations, but it is conceded that no money consideration passed at the time of its execution. At the date of the deed Bridget M. Freeman had three children Freeman, and Carrie Freeman, who died April 9, 1912. She also had a grandson, Lester Dowling, the child of a deceased daughter. The evidence is in conflict as to the age of Bridget M. Freeman. Plaintiff testifles that she was about 80, and her testimony is corroborated by that of another witness. Daniel E. Freeman testifies that his mother Other witnesses think she was was 68. about 70.

The property in question is a dairy farm on which Bridget M. Freeman and her husband, since deceased, had resided prior to 1891. In that year they moved to Portland, leaving the farm in charge of Daniel E. Freeman and his brother William, who died in 1897. A written lease was given these two William left the farm in 1894, and thereafter the defendants Daniel E. Freeman and Mariah Freeman, his wife, resided on and farmed the property continuously except from 1898 to 1900. Although no written lease was executed subsequent to that above referred to, Daniel E. Freeman paid his mother a rental of \$50 a month. This with a small pension she received was adequate to her necessities.

Plaintiff left the home of her parents in 1900. Within the next two years she wrote two letters from Baker City to the defendant Mariah Freeman. She found her way to California and was living at Healdsburg when her mother died in 1912. Except for the two letters above referred to, she had not communicated with the family in any manner since 1900. The testimony as to Lester Dowling is meager, but it sufficiently appears that he also was out of touch with the family. A son, Jack, died in 1911 and after his death Bridget M. Freeman moved from Portland to Scappoose, remaining there until her death. At the date of the deed in question Carrie Freeman was in the last stages of tuberculosis which took her away less than two months thereafter.

The amended complaint on which the case was tried charges that the defendant Daniel E. Freeman procured the execution of the deed in question with intent to deprive plaintiff of a share of the property of her mother; that the deed was prepared at his instance in the absence of his mother; that the reservation of a life estate therein was for the purpose of plausibly representing to his mother that the instrument was only a lease; that he did so represent and that the deed was executed by Bridget M. Freeman in the belief that she was executing a lease; that the deed was executed without independent advice as to its purport and without being read to the grantor, who could neither read nor write; that the name of the grantor was written by the defendant Daniel E. Freeman; and that the grantor was induced to make living; plaintiff, the defendant Daniel E. her mark thereon "because of her said confidence and trust in her son and by his undue influence and persuasion upon her." Issue of Mrs. Freeman, except only Carrie Free-is joined on these allegations. The decree of the lower court was for the defendants and plaintiff appeals.

only member of the family who saw anything of Mrs. Freeman, except only Carrie Free-man. This daughter died six months before her mother, after a lingering illness, during the latter part of which she was help-

John Manning and W. T. Slater, both of Portland (Manning, Slater & Leonard, of Portland, on the brief), for appellant. W. A. Harris, of St. Helens, and W. M. Cake, of Portland (Cake & Cake, of Portland, on the brief), for respondents.

McCAMANT, J. (after stating the facts as above). [1] It appears that Bridget M. Freeman was illiterate, but the preponderance of the evidence is that she was abundantly competent and that she had a mind of her own. She was in normal health when the deed was executed; she died of pneumonia eight months thereafter.

Grant Watts, the notary public who took the acknowledgment of the deed, testifies that he had previously advised Mrs. Freeman to execute a deed to this effect; that on the day when the deed was executed Mrs. Freeman was in her right mind and seemed to know what she was doing. He further testifies that he read the deed, told Mrs. Freeman that "it was a deed with a life lease in it;" that he (Watts) wrote Mrs. Freeman's name as a signature and made her mark, while she held the top of the pen.

E. W. Price, one of the subscribing witnesses, corroborates this testimony in part. He says, "They told me it was a deed to Dan;" and that this remark was made in the presence of Mrs. Freeman. This was the only real estate which the grantor owned and she must have understood the remark as applicable to the property in question.

A. Bonser testifies that in April, 1912, Mrs. Freeman told him she had conveyed the property to Dan. On May 21, 1912, Mrs. Freeman joined with the defendants in a mortgage of the property to the Investors' Mortgage Security Company, Limited. O. M. Washburn, who took her acknowledgment of the mortgage, explained to her that her signature was necessary because of her interest in the place. Mr. Washburn testifies that Mrs. Freeman said she understood the transaction.

On the other hand, Mrs. H. A. Ehlers testifies that in August, 1912, Mrs. Freeman told her, "Dan has no deed; he has only a lease." Whatever the explanation of this testimony, the preponderance of the evidence is to the effect that Mrs. Freeman understood the purport of her deed when she executed it, and that she realized several months thereafter that her son Daniel E. had a title to the property.

There is evidence that Mrs. Freeman was dissatisfied with the conduct of the defendant Daniel E., but it nevertheless appears that in the last year of her life he was the 103; Shane v. Gordon, 84 Or. 627, 630, 165

of Mrs. Freeman, except only Carrie Free-This daughter died six months before her mother, after a lingering illness, during the latter part of which she was helpless. Mrs. Freeman seems to have doubted whether plaintiff was still alive. In a letter written by plaintiff after the death of her mother she admits that she was at fault in failing to write her mother during the last 12 years of the latter's life. In another letter plaintiff intimates that she had been advised of the death of her brother Jack, who died in 1911, and that of her sister Carrie, who died in April, 1912. Plaintiff sent no message of condolence to her mother on either of these occasions. The excuses offered for this long silence are that Mrs. Freeman was illiterate, and that plaintiff's relations with her sister Carrie were not cordial. There is evidence that Mrs. Freeman did not regard these excuses as adequate.

On January 17, 1911, Mrs. Freeman gave a power of attorney to Daniel E. Freeman. This instrument was recorded in the records of Columbia county January 25, 1911. the advice of counsel who drew the deed in controversy, the power was revoked by Mrs. Freeman immediately prior to the execution of the deed. The powers granted by this instrument were very broad, but it appears by uncontroverted testimony that it was executed in order to empower Daniel E. Freeman to withdraw a deed which his mother had left in escrow with a Portland bank at a time when the sale of the property was contemplated. There is also some testimony that the power of attorney was given with a view to "some road matters down on the farm." This last circumstance explains the fact that the power of attorney was placed of record. It does not appear that the power of attorney was used except for the purpose of withdrawing the deed from the bank.

[2] There is testimony to the effect that Daniel E. Freeman, prior to the bringing of this suit, offered plaintiff \$10,000 for her interest in the property if she would wait till he could sell the property. This was in the nature of a compromise offer, which was not accepted. Apart from the fact that Daniel E. Freeman denies making the offer, the circumstance is unimportant. This denial is in conflict with the testimony of five witnesses, and we cannot doubt that the fact is as contended by plaintiff. In this and in other respects the testimony of Daniel E. Freeman is unsatisfactory, but the controlling facts in the case are established by testimony other than that of this defendant. Some weight must be given to the fact that the lower court which saw the witnesses determined the issues in favor of the defendants. Scott v. Hubbard, 67 Or. 498, 505, 136 Pac. 653; Hurlburt v. Morris, 68 Or. 259, 272, 135 Pac. 531; Goff v. Kelsey, 78 Or. 337, 348, 153 Pac.

Pac. 1167; Tucker v. Kirkpatrick, 86 Or. 677, 679, 169 Pac. 117.

[3, 4] It is contended by plaintiff that a relation of trust and confidence subsisted between Daniel E. Freeman and his mother, and that therefore the burden of proof devolved upon him to sustain the deed made in his favor. It is also contended that in order to sustain the deed it is essential for him to show that in executing the deed his mother acted pursuant to independent advice. If a fiduciary relation existed as contended, the burden of proof devolved on the defendants to sustain the transaction. Jenkins v. Jenkins, 66 Or. 12, 17, 132 Pac. 542; Clough v. Dawson, 69 Or. 52, 60, 133 Pac. 345, 138 Pac. 233; Baber v. Caples, 71 Or. 212, 224, 138 Pac. 472, Ann. Cas. 1916C, 1025. Plaintiff's contention as to the necessity of independent advice finds some support in Jenkins v. Jenkins, supra. Plaintiff also cites on this point Rhodes v. Bates, 1 Ch. App. 252, 257; Haydock v. Haydock, 34 N. J. Eq. 570, 575, 38 Am. Rep. 385; Slack v. Rees, 66 N. J. Eq. 447, 59 Atl. 466, 69 L. R. A. 393; Post v. Hagan, 71 N. J. Eq. 234, 65 Atl. 1026, 124 Am. St. Rep. 997; Hensan v. Cooksey, 237 Ill. 620, 86 N. E. 1107, 127 Am. St. Rep. 345. The principle that a deed from cestui que trust to trustee will be upheld only when the former has acted under independent advice must be limited in its application to cases where by reason of ill health, mental infirmity, immaturity, or otherwise, the party whose deed is attacked is unlikely to act wisely in the premises without disinterested advice. A party of normal mentality is entitled to dispose of his own in such manner as he sees fit. Carnagie v. Diven, 31 Or. 366, 368, 49 Pac. 891; Dean v. Dean, 42 Or. 290, 299, 70 Pac. 1039; Reeder v. Reeder, 50 Or. 204, 206, 91 Pac, 1075; Deckenbach v. Deckenbach, 65 Or. 160, 165, 130 Pac. 729; Wade v. Northup, 70 Or. 569, 578, 140 Pac. 451. While courts of equity are vigilant to redress fraud and imposition, the rules adopted for that purpose must not trench on the power of disposition which is incident to the right of private property.

[5] Did Daniel E. Freeman sustain a relation of trust to his mother? The chief reliance of plaintiff on this branch of the case is on the power of attorney executed in his favor. We agree with the California Court of Appeals that this is a circumstance to be given weight in the determination of the question. Nobles v. Hutton, 7 Cal. App. 14, 93 Pac. 289. We also agree with the Pennsylvania Supreme Court that this circumstance does not of itself establish a fiduciary relation. Crothers v. Crothers, 149 Pa. 201, 205, 206, 24 Atl. 190.

The law applicable to the question in dispute is all based on the principle that no man can serve two masters. Where one owes a duty to another, he will not be permitted to take a position in which his interest conflicts with his duty. He who is obligated

to secure a maximum price for property will not be permitted to buy it, because of the conflict between duty and interest created by the purchase. An attorney must give disinterested service to his client, as must an agent to his principal. If, while the relation subsists, the attorney or agent secures an advantage to himself in his dealings with the client or the principal, equity will lay on him the burden of proving the transaction free from fraud and imposition. The purpose of the rule is to insure disinterested service, to protect against the misuse of a position of trust and confidence for purposes of spoliation.

[6, 7] As attorney in fact for his mother, the evidence fails to charge Daniel E. Freeman with any such duty as makes the foregoing principle applicable. The only use made of the power of attorney, so far as the record shows, was the ministerial act of withdrawing a deed deposited in escrow. This act was done more than a year prior to the execution of the deed in question. The power of attorney was revoked just prior to the execution of the deed. It the relation had constituted a disqualification, its termination destroyed the disqualification. O'Reiley v. Bevington, 155 Mass. 72, 76, 77, 29 N. E. 54; Munn v. Burges, 70 Ill. 604; Bush v. Sherman, 80 Ill. 160, 171, 172; Watson v. Sherman, 84 Ill. 263, 266; Silverthorn v. McKinster, 12 Pa. 67, 71; First National Bank v. Bissell (C. C.) 4 Fed. 694, 698; Chatham Bank v. McKeen, 24 Can. Sup. Ct. 348.

[8-10] A fiduciary relation may exist in the absence of a trust or agency. It is found with its accompanying burdens and disqualifications wherever there is confidence reposed on one side and resulting superiority and influence on the other. Walker v. Shepard. 210 Ill. 100, 71 N. E. 422; Irwin v. Sample. 213 Ill. 160, 72 N. E. 687; 2 Pomeroy's Eq. Jur. (3d Ed.) § 956. The evidence indicates that Bridget M. Freeman transacted very little business. Grant Watts cashed her pension checks for her. She lived simply at Scappoose on this pension and the rent paid by Daniel E. Freeman. The latter visited her from time to time, kept her supplied with fire wood and ministered to her in other respects as a son would ordinarily do for his mother. The evidence fails to show that he had an ascendancy over her mind or that his mother looked to him for counsel in respect to her property. The relation of parent and child, accompanied by the affection and the companionship incident thereto, does not make the child a fiduciary within the rule invoked. Bonsal v. Randall, 192 Mo. 525, 531, 532, 91 S. W. 475, 111 Am. St. Rep. 528; Jones v. Thomas, 218 Mo. 508, 536, 117 S. W. 1177; Gibson v. Hammang, 63 Neb. 349, 352, 88 N. W. 500; Burwell v. Burwell, 103 Va. 314, 316, 49 S. E. 68; Mackall v. Mackall, 135 U.S. 167, 172. Plaintiff has failed to show the existence of a fiduciary relation,

her to establish the facts relied on to set aside the deed.

[11] This case is distinguished in important respects from most of the authorities relied on by plaintiff. Bridget M. Freeman did not strip herself of her property; she reserved a life estate, the revenues of which were adequate to her necessities. The importance of this circumstance is emphasized in Post v. Hagan, 71 N. J. Eq. 234, 242, 65 Atl. 1026, 124 Am. St. Rep. 997; and Oliphant v. Leversidge, 142 Ill. 160, 170, 30 N. E. 334. The deed was promptly placed of record and immediately after Daniel E. Freeman got in communication with plaintiff he advised her of its existence. The circumstantial evidence is strongly against plaintiff's contention that Daniel E. Freeman procured the execution of the deed with the fraudulent purpose of depriving plaintiff of her inheritance. The fact is that plaintiff had not been heard from for 10 years; she had dropped out of the life and thought of the family. The grantor in the deed was in good health and of normal mentality at the time when the deed was executed. Mrs. H. A. Ehlers, a witness for plaintiff, testifies "She was bright enough for her age." The grantee was not living in the same house with the grantor. In view of the circumstances the deed was a natural one for the grantor to execute. It is true that SON, JJ., concur.

the grantee employed the attorney who drew the deed. This has been held to be a circumstance of but little significance. Teter v. Teter, 59 W. Va. 449, 463, 53 S. E. 779. It is probable that the deed was executed at the suggestion or request of the grantee. But this does not constitute undue influence, nor does it in any wise vitiate the conveyance. In re Blair's Will, 16 N. Y. Supp. 874, 876; Doran v. McConlogue, 150 Pa. 98, 116, 24 Atl. 357; Schoffeld v. Walker, 58 Mich. 96, 106, 24 N. W. 624; Yoe v. McCord, 74 Ill. 33, 44; Teter v. Teter, 59 Wl Va. 449, 460, 53 S. E. 779.

"It is true that a court of equity is by the settled law of this and other states required to, and it will, scan a transaction of the kind here in question with the utmost vigilance and scrutiny. But that is an entirely different thing from presuming the existence and actual exertion of undue influence from the circumstances mentioned." Slayback v. Witt, 151 Ind. 376, 382, 50 N. E. 389, 391.

[12] No presumption of invalidity attaches to the deed in question. Sawyer v. White, 122 Fed. 223, 225, 58 C. C. A. 587. Plaintiff has failed to prove the allegations on which she relies.

The decree of the circuit court was right, and it is affirmed.

McBRIDE, C. J., and BEAN and BENSON, JJ., concur.

EMERSON-BRANTINGHAM CO. v. LYONS et al. (No. 21200.)

(Supreme Court of Kansas. April 6, 1918. Rehearing Denied May 16, 1918.)

(Sullabus by the Court.)

1. EVIDENCE \$==441(9) - PAROL EVIDENCE-CONTRACT OF SALE.

A written contract between a manufacturer of tractors and the distributors that either pary might terminate the contract relation at any time by giving the other 30 days' notice in writing of his intention to do so, which is definite and complete, cannot be contradicted, altered, or added to by parol evidence of concurrent or prior negotiations or understandings.

2. CONTRACTS \$\infty\$\text{271}\to Termination\to Notice.

The notice given by one of the parties to the contract in question is held to be sufficient and effective to end the contract relation, and the contract relation, and the contract relation. such party did not become liable to the other such party did not become hable to the other for damages through the exercise of the option provided for in the contract.

3. Assignments 58— Contracts 74— Contract to Pay Debt of Another—Lia-

BILITY.

A party may bind himself in writing to pay the debt of another, and may make a binding promise to a debtor to pay his debt to a third person; but a written order by an employé to his employer to pay his creditor a sum of money out of the salary account of the employer does not create a liability against the employer and in favor of the creditor, unless the employer as to honor the order, or to make the payments. the payments.

Appeal from District Court, Douglas

Action by the Emerson-Brantingham Company against Jerry Lyons and W. D. Gwin, copartners, etc. Judgment for plaintiff, and defendants appeal. Affirmed.

Ord Clingman, of Lawrence, for appellants. Ellis, Cook & Barnett, of Kansas City, Mo., for appellee.

JOHNSTON, C. J. The defendants were sued for the contract price of a farm tractor and upon an indebtedness due upon a secondhand tractor. As to the latter claim there is no controversy on this appeal. In answer to plaintiff's demand defendants set up several counterclaims alleged to have arisen out of the breach by plaintiff of a written contract originally entered into by the defendants and the Gas Traction Company to whose rights and liabilities the plaintiff has succeeded. These claims involved expenses incurred in reliance upon the contract, the value of their services up to the time of the alleged breach, and the consequent loss of profits. Another counterclaim was upon what is referred to as the Lang transaction. demurrer to an answer was sustained, and this order was reversed. Emerson-Brantingham Co. v. Lyons, 94 Kan. 567, 147 Pac. 58. The case was afterward submitted to the court on the evidence, and no special findings were made. From the judgment in plaintiff's favor, defendants appeal.

appointed distributors of traction engines in Kansas, and were to thoroughly canvass the state and sell the tractors at a retail price of \$2,800, while they were to receive them at a price of \$2,400 for the first ten tractors; for the next five, \$2,300; and for all over fifteen, \$2,250. The defendants were not authorized to conduct business or act in the name or on behalf of the company, and their appointment as distributors was "for a period of one year beginning April 1, 1912, and ending March 31, 1913, unless previously terminated, as hereinafter provided." The provision in the contract principally concerned in this appeal follows:

"It is mutually agreed that this contract may be terminated at any time either by the company or distributors, giving thirty days' notice in writing to the other of their intention so to do."

Another provision in the contract was to the effect that if there was a failure of the defendants to accept an engine that had been ordered or to pay for it within 30 days after shipment the company had the option to terminate the relationship upon giving defendants 20 days' notice in writing. The sale of its interest by the traction company to the plaintiff was consummated in August, 1912. In October, 1912, the plaintiff in a letter gave the defendants notice of its intention to terminate the contract in accordance with its terms, which was to take effect 30 days thereafter, and in it the company stated that if they had "deals pending which you expect to close within the near future, we will be glad to give them consideration, and of course would expect to make it right with you."

[1] In the trial testimony was offered by the defendants tending to show that prior to and at the time of the execution of the written contract they were informed by the officers of the traction company that it was about to effect a sale to the plaintiff company then about to be organized, adding that in case of sale defendants' contract would be protected, and it probably could be renewed at the end of the year. The defendants contend that by the oral statements so made and the fact that they had faithfully performed their part of the contract the company could not terminate it except for cause, and that as no cause was stated or existed the notice given was without effect. The plaintiff contends that the conditions under which the contract might be terminated, having been embodied in a writing, all prior and concurrent negotiations, if any were made, were without effect. The contract appears to be complete and the stipulation in it respecting the right to terminate the relationship is definite, and hence it must be conclusively presumed that all of the undertakings of the parties as to termination are embraced in the writing. The general doctrine is that the terms of such a con-Under the contract the defendants were tract cannot be contradicted, altered, or added to by parol evidence of prior or concurrent negotiations or understandings. Milich v. Armour, 60 Kan. 229, 56 Pac. 1; Ehrsam v. Brown, 64 Kan. 466, 67 Pac. 867; Railway Co. v. Truskett, 67 Kan. 26, 72 Pac. 562; Van Fossan v. Gibbs, 91 Kan. 866, 139 Pac. 174.

The prior statements and understandings are wholly inconsistent with the written provision. To give force to them would be the substitution of a provision relating to the termination of the contract directly in conflict with the one deliberately placed in writing at the end of the negotiations. The stipulation allowing a termination may be drastic in its effect, but it was so specific as to leave no doubt as to its meaning, and it was one which was equally available to each of the contracting parties. When the transfer of the assets, rights, and liabilities of the Gas Traction Company was made to the plaintiff, it stepped into the shoes of the former and became entitled to exercise the option stipulated in the contract as fully as the latter might have done if no transfer had been made. The oral statements relied on are no more effective as a waiver of the stipulation than they were to contradict it, and nothing in the negotiations between the Gas Traction Company and the plaintiff for the transfer approaches a waiver of the provision.

[2] A claim is made that the notice given was insufficient to terminate the relationship in that the letter did not expressly give notice of termination of the contract, nor state that it would end at a fixed time. In the letter the plaintiff stated:

"We wish to advise you herewith that it will be advisable for us in the future to work the territory direct, and as per the terms of the contract are notifying you thirty days in advance of our intention to terminate the contract."

In another part of the letter, after expressing appreciation of the loyalty of defendants, it was said that it was not with a feeling of dissatisfaction "that we serve notice on you relative to the cancellation of the contract within 30 days." The letter certainly carried information to the defendants of the intention of plaintiff to terminate the contract 30 days after the letter was written. Under the terms of the contract a notice of that intention for a period of 30 days was all that was required to end the relation, and defendants appear to have so interpreted the letter. Under the findings of the trial court there was no breach of the agreement by the plaintiff, and hence there was no basis for a claim for damages by reason of a breach.

The plaintiff expressed a willingness to pay, and the case appears to have been tried upon the theory that plaintiff should pay, for anything done by the defendants to induce sales of tractors before the termination of the contract, and which were subsequently completed by the plaintiff. It does not appear that any of the sales subsequently made within the state were the results of the ef-

forts of the defendants, nor that they contributed in any way toward the making of such sales.

[3] The Lang claim was based on a note given by Lang which Jerry Lyons had signed as security and had been compelled to pay. Lyons obtained a writing from Lang requesting the Gas Traction Company to pay Lyons \$50 per month for 4 months, and to charge the same to his salary account, but no payments were ever made upon this request. Lang was an employé of the Gas Traction Company, but it does not appear that the company ever promised to pay the debt of Lang, nor that anything occurred which rendered it liable to pay the debt. A party may bind himself by writing to pay the debt of another, or he may make a binding promise to a debtor that he will pay his debt to a third person, but it does not appear that the Gas Traction Company or the plaintiff ever promised in writing or otherwise to pay the debt of Lyons. The request was left with the company for some time, but it appears that the account of Lang was always overdrawn, and perhaps that is the reason that no payments were ever made.

We find no error in the record, and therefore the judgment is affirmed. All the Justices concurring.

SMITH v. FENNER. (No. 21447.) (Supreme Court of Kansas. April 6, 1918. Rehearing Denied May 16, 1918.)

#### (Syllabus by the Court.)

1. Rewards \$\infty 15(3) - Apprehension of Criminal—Contract—Evidence.

Evidence examined, and held sufficient to prove a contract to pay a reward for discovering, locating, and apprehending a criminal.

2. REWARDS =11-RIGHT TO CLAIM REWARD
-PUBLIC OFFICER-PUBLIC POLICY.
The right of a public officer to claim a re-

The right of a public officer to claim a reward for doing his duty discussed.

3. REWARDS \$\infty\$11-Right to Recover Re-WARD-NONPAY DEPUTY SHERIFF.

A nonpay deputy sheriff who was under no official duty to discover and apprehend a thief is not barred by any rule of public policy from claiming a reward offered for the capture of the thief.

4. Rewards ⇐== 15(5) — Action — Findings—Inconsistency.

Findings of a jury examined, and no material inconsistency disclosed therein.

5. REWARDS \$\infty 15(3) — EARNING REWARD - SUFFICIENCY OF EVIDENCE.

Evidence examined, and held sufficient to support the finding, verdict, and judgment that plaintiff had earned the reward offered by defendant.

Appeal from District Court, Leavenworth County.

Action by R. J. Smith against Elijah B. Fenner. Judgment for plaintiff, and defendant appeals. Affirmed.

completed by the plaintiff. It does not appear that any of the sales subsequently made within the state were the results of the ef-

DAWSON, J. The plaintiff, R. J. Smith, obtained a judgment against the defendant, Elijah B. Fenner, for the amount of a reward offered by the latter

"for work done and performed for him [Elijah B. Fenner] at his request and with his knowledge and consent, in the matter of arresting the thief or thieves charged with picking the pockets and taking from the person of Elijah B. Fenner, and stealing therefrom a large sum of monev."

The bill of particulars in part recited:

"And plaintiff avers that on or about the 3d day of July, A. D. 1916, in the city and county of Leavenworth, state of Kansas, Elijah B. Fenner, the defendant herein, said to this plaintiff. R. J. Smith, 'that some one stole from him tiff. R. J. Smith, 'that some one stole from him nine hundred dollars (\$900.00) out of his pocket while he was at the baseball game yesterday' and promised and agreed with plaintiff that 'if he would get the fellow or fellows who got his money he would pay to him the sum of \$150.00'; that the words he used were about as follows: If you get the fellow who got my money I will give you \$150.00. That plaintiff accepted the promise and agreement of defendant and ed the promise and agreement of defendant and went to work immediately to get the fellow or fellows, which he did. And plaintiff avers that he arrested the following named persons. Calvin Young, John Jacobson and Jessie Young, in Leavenworth county, Kansas, and that two of the said parties, Calvin Young and John Jacobson, have already been found guilty of stealing the defendant's money." ing the defendant's money

Certain special questions were answered by the jury:

"(3) Who served the state warrant on Calvin Young at the Soldier's Home? Answer: Rube Smith.

Smith.

"(4) Was Calvin Young the only person who was ever arrested for and convicted of picking the pockets of the defendant? Answer: Yes.

"(5) What, if anything, did the plaintiff do for the defendant, in connection with the arrest of the thief or thieves who had picked the processes of the defendant that entitles said pockets of the defendant, that entitles said plaintiff to a reward of \$150.00 in this case? Answer: He assisted in locating and making the arrest of Calvin Young.

After the verdict was rendered, various motions were filed by defendant, including one for judgment for defendant for the reason:

"That the plaintiff admitted in his testimony that he was and is a regularly appointed deputy sheriff of Leavenworth county, Kan., and that the arrest of one Calvin Young was made in Leavenworth county, Kan."

Defendant's motion being overruled, and judgment being entered against him, he appeals, and urges several errors, which will be noted

 It is first contended that the demurrer to plaintiff's evidence should have been sustained; and to justify this it is urged that plaintiff did not prove a contract with defend-The court discerns no failure of evidence on that point. The evidence of various witnesses was to the effect that defendant said, "If you get the fellow that got the money, I will give you \$150." It was with defendant's knowledge, assistance, and cooperation that plaintiff immediately went to work to discover and locate the thief, and to have him taken into custody. These facts established the contract.

[2, 3] The important question presented by defendant arises from the fact that plaintiff was a deputy sheriff of Leavenworth county, defendant contending that public policy forbids a public officer to demand or receive a reward in addition to his official compensation for doing his duty. This rule is a familiar and salutary one, and it is particularly well stated in Matter of Russell's Application, 51 Conn. 577, 579, 580, 50 Am. Rep. 55:

"And it is now well settled that a public of-ficer whose compensation is fixed or whose fees are prescribed by law cannot legally contract for or demand a larger compensation or higher fees, in the form of a reward or in any other form, for services rendered in the line or scope of his official duties." Cases cited.

The rule and its qualifications are cited and discussed in Marsh v. Express Co., 88 Kan. 538, 541, 129 Pac. 168, 169 (43 L. R. A. [N. S.] 133), where it is said:

"It is contrary to public policy to allow an officer to recover a reward for the performance of an official duty. Matter of Russell's Application, 51 Conn. 577 [50 Am. Rep. 55]; Bank v. Edmund, 76 Ohio St. 396, 81 N. E. 641, 11 L. R. A. (N. S.) 1170, 10 Ann. Cas. 726; United States v. Mathews, 173 U. S. 381 [19 Sup. Ct. 413, 43 L. Ed. 738]; 34 Cyc. 1753. "On the other hand, no rule of public policy forbids such recovery where the officer is under no obligation arising from his official character to perform the service. Smith v. Vernon County, 188 Mo. 501, 87 S. W. 949, 70 L. R. A. 59, 107 Am. St. Rep. 324; Russell et al. v. Stewart et al., 44 Vt. 170; 34 Cyc. 1755; 24 A. & E. Encycl. of L. 953."

See, also, Hartley v. Granville, 216 Mass. 38, 102 N. E. 942, 48 L. R. A. (N. S.) 392, Ann. Cas. 1915A. 725.

In another Kansas case which was here three times, the reward was not withheld because the claimants, both public officers, could not lawfully accept or collect it, but only because the party offering the reward did not know to whom it should be paid. Elkins v. Wyandotte County, 86 Kan. 305, 120 Pac. 542, 46 L. R. A. (N. S.) 662; Id., 91 Kan. 518, 138 Pac. 578, 51 L. R. A. (N. S.) 638, Ann. Cas. 1915D, 257; Id., 92 Kan. 299, 140 Pac. 896, 51 L. R. A. (N. S.) 639.

The case before us comes to this: Was it the official duty of plaintiff to discover, locate, and apprehend the thief? The evidence shows that the plaintiff was a nonpay deputy sheriff of the county where the crime was committed and where the criminal was apprehended. What are the duties of a nonpay deputy sheriff? So far as they are expressly defined by the statute, his duties are:

"To keep and preserve the peace, \* \* \* and to quiet and suppress all affrays, riots and unlawful assemblies and insurrections." Gen. Stat. 1915, § 2750.

Any other official duty of a nonpay deputy sheriff could only relate to such as he is commanded to perform by a warrant or order of court, or by direction of his superior officer, the sheriff of the county.

When plaintiff's contract of employment was made with defendant he was under no official duty to discover and apprehend the He had not been detailed for any such duty by the sheriff, nor charged with such duty by a warrant or order of court. The task did not fall into the category of duties imposed on all deputy sheriffs by the statute. Plaintiff could not have been punished or ousted from office for official dereliction if he had wholly ignored this crime and had refrained from doing anything towards the capture of the criminal. And so when he was engaged by the defendant "to get the man who got his money," plaintiff was at that time as free as any private citizen to undertake to earn the reward. Moreover, the rule which bars a public official from claiming a reward for doing his duty proceeds in part, at least, upon the theory that his official compensation is his lawful reward for his services. Matter of Russell's Application, supra. As the plaintiff is a nonpay deputy sheriff, one of the reasons for the rule wholly fails when applied to him. Yet it may be conceded that if the reward were claimed by plaintiff for preserving the peace or quieting an affray-these duties being imposed upon him by law-or for executing a warrant or performing a specific duty imposed on him by the sheriff, he probably could not collect the reward, although he was serving without pay.

[4, 5] Did the plaintiff earn the reward? The reward was sufficiently earned, as shown by the jury's fifth finding and the evidence which supported that finding. It is immaterial whether plaintiff had any part in the mere formality of making the arrest. When plaintiff, pursuant to defendant's offer, accompanied defendant to the place where the thief was expected to be found, and assisted in locating the thief, and caused or co-operated in causing him to be detained until a warrant could be procured for his formal arrest, and the thief was effectually brought to justice through plaintiff's assistance and co-operation, and no other person claims the reward or a share of it-there being no intimation that any other thief not brought to justice took part in the robbery-it seems that plaintiff is justly entitled to the reward.

The third finding of the jury is to the effect that plaintiff made the arrest of the thief, while the return on the warrant showed that the arrest was made by the sheriff himself. That is not important. The controlling fact turns on the question as to whose efforts led to the discovery and apprehension of the thief. The evidence justifles the jury's special finding that it was effected through the efforts of the plaintiff, and justifies the general verdict and judgment in his behalf. Stone v. Dysert, 20 Kan. 123; Elkins v. Wyandotte Co., 86 Kan. 305, syl. par. 2, 120 Pac. 542, 46 L. R. A. (N. S.) 662. See, also, note in 8 Ann. Cas. 860.

Affirmed. All the Justices concurring.

MENTZE v. RICE. (No. 21459.)

(Supreme Court of Kansas. April 6, 1918. Rehearing Denied May 16, 1918.)

#### (Syllabus by the Court.)

1. Thover and Conversion 4-66-Question

FOR JURY.

A demurrer was sustained to the plaintiff's evidence, which entitled him to go to the jury. Held, error.

(Additional Syllabus by Editorial Staff.)

2. TRIAL \$\sim 150-Demurrer to Evidence.

A demurrer to plaintiff's evidence should not be sustained, unless there is an entire absence of proof tending to show a right to recover.

3. TRIAL \$\infty\$156(3)\to Demurrer to Evidence ADMISSIONS.

A demurrer to the evidence admits every fact and conclusion which the evidence most faadmits, not only the fruth of the facts directly proven, but also all that may properly be inferred therefrom.

4. Trial \$\infty 156(3)\to Demurrer to Evidence -Effect.

On a demurrer to plaintiff's evidence the court must view the evidence in the light most favorable to the plaintiff, and allow all reasonable inferences in his favor.

Appeal from District Court, Harper County.

Action by A. W. Mentze against F. J. Rice. From an order sustaining a demurrer to plaintiff's evidence, he appeals. Reversed, and cause remanded.

George E. McMahon and Vernon Day, both of Anthony, and Leslie L. Anderson, of Harper, for appellant. Noble & Tincher, of Medicine Lodge, and James G. Washbon, of Harper, for appellee.

WEST, J. The plaintiff sued to recover for the conversion of certain wheat, and from an order sustaining a demurrer to his testimony he appeals.

On or about September 3, 1914, he deposited in the grain elevator of the E. A. Wales Milling Company at Harper 735 bushels of wheat, taking the following receipt therefor:

"E. A. Wales, Sec'y, Treas., and Gen. Man'gr. Prices subject to change without notice. E. A. Wales Mill Company, Ltd. Capacity: 300 barrels flour, 100 barrels meal. Harper, Kansas, Sep. 3, 1914. Reed of Mr. A. W. Mentze 628 bushels, test 57 pounds, and 1075/60, at test 59 pounds, for storage at the rate of one-half cent per bu. per month, and if sold to the mill there is no storage. E. A. Wales Mill Co., by E. A. Wales."

About a week later the milling company was incorporated, E. A. Wales becoming its general manager and the defendant its president and a member of the board of directors. The allegation was that afterwards, and before the 8th of February, 1915, Wales and other officers, agents and servants of the corporation, "did willfully and wrongfully convert the said wheat of said plaintiff to the use of said corporation, with the knowl-

edge, acquiescence, and consent of said defendant, F. J. Rice. \* \* \* " At about the last-named date plaintiff tendered to Wales at the office of the corporation charges due on the wheat, and demanded its return, which was refused. The answer admitted the incorporation on September 9th, and that the defendant was the president and a member of the board of directors. There was also an averment that any business done before that date was by Wales individually, and not by the corporation. Many of the facts were before us in State v. Wales, 98 Kan. 790, 160 Pac. 204. The only question is whether or not the plaintiff's evidence was such as to require its submission to the jury. Counsel for the defendant say in their brief that there were no facts or circumstances shown there from which "any reasonable inference could be drawn, either that the plaintiff's wheat was converted to the use of the corporation, or that the defendant had any knowledge of its disposition, and much less that he consented to or acquiesced in any disposal which was made of it." The plaintiff, who has received nothing out of the transaction except experience, takes a different view of the evidence.

[2-4] The rule is that a demurrer to the plaintiff's evidence should not be sustained. unless there is an entire absence of proof tending to show a right to recover. Brown v. Cruse, 90 Kan. 306, 133 Pac. 865. Such demurrer admits every fact and conclusion which the evidence most favorable to the other party tends to prove. Christie v. Barnes, 33 Kan. 317, 6 Pac. 599. And it admits not only the truth of the facts directly proven, but also all that may properly be inferred from those facts. City of Syracuse v. Reed & Co., 46 Kan. 520, 26 Pac. 1043. The court must view the evidence in the light most favorable to the plaintiff, and allow all reasonable inferences in his favor. Rogers v. Hodgson, 46 Kan. 276, 26 Pac. 732; Buoy v. Milling Co., 68 Kan. 436, 75 Pac. 466; Carl Hoffmeier v. Kansas City-Leavenworth Railroad Co., 68 Kan. 831, 75 Pac. 1117.

[1] The plaintiff testified: That on February 8, 1915, he tendered the storage money and made a demand for his wheat or the money. That before that he had been to see Mr. Wales, who told him to give him a few days' time; that he was trying to make arrangements to get the money. "I was at the mill when Wales was gone and talked to Mr. Rice about it. He said of course Mr. Wales would be back." When he went through the mill and elevator he found it empty.

Mr. Oller testified that he entered into conversation with Mr. Rice in the fall of 1914, who said he was going to start at the ground floor and work up; that he alloustices concurring.

ways wanted to be a miller; that while the witness was delivering his wheat there Mr. Rice weighed one load and went to the elevator with him and dumped it into the elevator; that he had wheat there deposited which he was to take out in flour, and Mr. Rice gave him the flour. In the heading to the receipt witness received Mr. F. J. Rice was named as president. Another witness testified that he had a conversation with Mr. Rice about the 27th of January. He and the witness last referred to went to see if they had any wheat in the mill, and asked permission of Mr. Rice to go through, and he said they could not do so with his consent; that the next day Mr. Rice met him up town and told him there were about 400 or 500 bushels in the mill. Another witness testified that he was employed by the milling company in the fall of 1914 for about three months, and that Mr. Rice was around most of the time.

The defendant himself testified that when the corporation was organized the wheat that was in the mill was not to be taken out and disposed of by Mr. Wales or anybody. "Mr. Wales was to open up an account with himself. The wheat that was in the mill wasn't taken out. Q. Just remained there? A. Yes, Q. It was there when you took possession of the mill-remained there? A. I believe so. Q. You know so, do you not? A. Yes, sir. \* \* \* Q. Was there any arrangement made there between you as to how Mr. Wales was to take his wheat out of the mill, if he had any in there? A. He was to credit himself for it: he was to open up a new set of books. I couldn't say whether he done it or not."

Without quoting any further testimony, the foregoing appears to furnish fair grounds for the conclusion or at least for the inference that when Mr. Rice went into the elevator and became president of the corporation the plaintiff's wheat was in storage, and that the defendant was the active man. or at least one of the active men, in charge of the concern for several months. It appears that the corporation went into bankruptcy, and Sweet v. Trust Co., 69 Kan. 641, 77 Pac. 538, is invoked in support of the doctrine that the defendant should not be held liable unless he had actual knowledge, but it is not at all probable that during the months he took so active a part he was without knowledge as to what became of the wheat stored in the elevator.

The plaintiff may or may not be entitled to recover in this action. It is simply and only held that his evidence entitled him to go to the jury, and that it was error to sustain a demurrer thereto.

The judgment is reversed and the cause remanded for further proceedings. All the Justices concurring.

LILLARD et al. v. BOARD OF COUNTY COM'RS OF JOHNSON COUNTY. (No. 21445.)

(Supreme Court of Kansas. April 6, 1918. Rehearing Denied May 16, 1918.)

(Syllabus by the Court.)

1. ESTOPPEL €=58-CONDUCT.

The doctrine of estoppel requires of a party consistency of conduct, when inconsistency would work substantial injury to the other party.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Estoppel.]

DEMNATION MONEY—ESTOPPEL.

A landowner, entitled to a warrant for cer-

A landowner, entitled to a warrant for certain condemnation money, instead of demanding its delivery, submitted to the county board the question whether he or his grantee was entitled to such warrant, stating, among other things, that he felt "sure that, when the facts are known by you, no better tribunal can be found to decide our relative rights than your honorable body." Thereafter the vendee appeared before the board, and upon his showing 'the warrant was delivered to him. Later the vendor sued the board to recover the amount and value of the warrant. Held, that he is estopped.

Appeal from District Court, Johnson County.

Action by R. I. McQuiddy, revived after his death by Rachel Lillard and another, as executors, against the Board of County Commissioners of Johnson County. From an order overruling a motion for judgment on the pleadings, plaintiffs appeal. Order affirmed, and cause remanded.

I. O. Pickering, of Olathe, for appellants. C. L. Randall, of Olathe, for appellee.

WEST, J. A road was ordered opened across the land of R. I. McQuiddy, who presented his claim for damages and was allowed \$600. On October 30, 1915, the board of county commissioners ordered a warrant to be drawn and issued to him for this amount. The petitions set out the warrant, and alleged that when it was drawn there was sufficient money in the treasury to pay, but that before the action was begun he demanded payment, which was refused. board answered by general denial, admitted the execution of the warrant, and alleged that it was held by the clerk, to be delivered to the party legally entitled thereto; further, that about December 16, 1915, Mc-Quiddy sold the property and executed a general warranty deed therefor, of which fact the board had no knowledge until some time after the execution of the warrant, and until the grantee appeared and demanded that it be delivered to him. The board further alleged its clerk communicated with Mc-Quiddy, advising him of the claim of his grantee, whereupon McQuiddy authorized the board to ascertain and decide who was entitled to the warrant and dispose of it accordingly, setting out a copy of his letter, in which he said:

"After due deliberation, I have concluded to submit the question of ownership to the six [\$600] awarded me for damages. \* \* \* After a fair and true statement of all the essential facts, I desire the said honorable board to decide who should have the money, and so dispose of it."

Then followed a statement as to the price and profit on the sale and the expression:

"I feel sure that, when the facts are known by you, no better tribunal can be found to decide our relative rights than your honorable body."

It was alleged that, after receiving this letter, the grantee, with his attorney, appeared before the board, and that the latter in good faith, after hearing the matter, delivered the warrant to such grantee, and did so upon the direction contained in the letter referred to. To this answer a demurrer was filed and overruled. Thereupon a motion was made for judgment on the pleadings, which was also overruled. McQuiddy having died, the case was revived in the name of the plaintiffs as executors, who appeal.

The plaintiffs contend that the county board was the proper tribunal to establish the road and determine to whom the damages were due, and that this determination was in favor of the decedent; that "the board had no power to review and revise that decision and award, or to sit in judgment in a controversy between rival claimants of a fund in its possession." The board, Duvall not having been made a party as requested, contends that it is protected in its action by the direction in the McQuiddy letter; that, having thus directed, he could not repudiate his action and he is estopped so to do. It is said that:

"What he did was voluntary on his part, not even suggested by the commissioners; having on his own motion voluntarily waived his right to demand payment, surely must be bound by his selection of methods."

[1,2] We have examined the record and the briefs, as well as the reply brief, and to this complexion must it come at last: When the warrant was drawn, McQuiddy was entitled to it: before this suit was brought, he had sold the land to Duvall, who appeared before the board and claimed that the warrant should be delivered to him. On receiving this information from the board, McQuiddy recognized that there was a question between him and Duvall as to the ownership of the warrant, and substantially requested the board to ascertain the facts and decide accordingly, making it a sort of referee or arbiter to investigate and determine the rights of the grantor and grantee. It appears that the board did exactly what he suggested, and decided in favor of the other party. There is no showing or claim that the board did not ascertain the real facts, or that it did not act in good faith, or do exactly what the grantor had suggested that it should do. While McQuiddy was under no compulsion to submit this matter to the arbitration of the

county board, and while that body had no jurisdiction to decide it, and none could be conferred by the act of the parties, still he voluntarily did so submit it, and the other claimant, acting thereon, made a showing and won. It does not lie in the grantor's mouth under these circumstances to ignore the action of the board, which he thus invoked, and compel it to pay the warrant to him. In other words, under the circumstances shown, the decedent estopped himself by his own conduct to acquire the relief which the executors demand in this case. One who submits a matter to one known to be incompetent to act as arbitrator, and takes the chances of a favorable decision, cannot after the award raise the question of incompetency. Anderson v. Burchett, 48 Kan. 153, 29 Pac. 315. Likewise of one who has waived the oath of the arbitrators and the swearing of witnesses who appear before them. Russell v. Seery, 52 Kan. 736, 35 Pac. 812. The doctrine of estoppel requires consistency of conduct. Powers v. Scharling, 76 Kan. 855, page 859, 92 Pac. 1099; Stark v. Meriwether, 99 Kan. 650, page 657, 163 Pac. 152.

"Estoppel arises when one by his conduct so misleads another that the former is not permitted. or, as we say, is estopped from asserting a right which he might otherwise assert. In theory the person estopped still has the right, but cannot assert it." 14 M. A. I. 174.

"The doctrine of estoppel is frequently applied to transactions in which it is found that it would be unconscionable to permit a person to maintain a position inconsistent with one in which he has acquiesced or of which he has received any benefit." 10 R. C. L. 694, § 22.

"An estoppel may be used as a defense against a party who is thus precluded from [by] his act or statement from maintaining his ection: or

or statement from maintaining his action; or it may be used by the plaintiff to prevent or avoid a defense which is open to a similar objection." 1 Herman on Estoppel, § 19.

The order overruling the motion for judgment on the pleadings is affirmed, and the cause remanded for further proceedings. All the Justices concurring.

ATCHISON, T. & S. F. RY. CO. v. WAGNER. (No. 21443.)

(Supreme Court of Kansas. April 6, 1918. Rehearing Denied May 16, 1918.)

(Syllabus by the Court.)

1. CARRIERS \$\sim 30\text{-Interstate Carriage of Goods-Bill of Lading -- Payment of FREIGHT.

Where an interstate bill of lading contains Where an interstate bill of lading contains any provision authorizing the consignee to pay the freight, an implied contract by the consignee to pay the freight charges arises from his acceptance of the delivery of the goods under the bill, into which contract there will be read the provisions of the Elkins Act (Act Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. 1916, § 8597-8599]), requiring payment of the full charges in compliance with the duly established rate: and where the consignee pays the charges demanded, which are less than the established rate, the carrier may maintain an action against rate, the carrier may maintain an action against

2. Carriers \$1.30—Interstate Carriers -Rates—Presumption of Publication.

in a suit by a carrier to recover from a con-signee the unpaid balance due for freight charges, where it is admitted that a schedule of rates has been duly filed with and approved by the Interstate Commerce Commission, the presumption, in the absence of any showing to the contrary, is that the rates were duly published, and not that the carrier has violated the provisions of the Elkins Act, subjecting him to severe fines and penalties for failure to publish the same.

West, J., dissenting.

Appeal from District Court, Chase County. Action by the Atchison, Topeka & Santa Fé Railway Company against H. Wagner. Judgment for defendant, motion for new trial overruled, and plaintiff appeals. Reversed, and cause remanded, with directions to render judgment for plaintiff.

W. R. Smith, O. J. Wood, and A. A. Scott, all of Topeka, for appellant. Hamer & Ganse, of Emporia, and Charles E. Davis, of Cottonwood Falls, for appellee.

PORTER, J. The appellant sues to recover an undercharge of freight amounting to \$34 on a car of cotton seed cake shipped from Bastrop, La., to Bazar, Kan., and delivered to the appellee who was the consignee. The agreed statement of facts, upon which the case was submitted to the court, is that the appellant and its connecting lines upon which the shipment was handled had filed with the Interstate Commerce Commission a schedule of rates, which had been approved, and which required the payment of \$114 on this shipment; that the charges actually paid by the appellee were \$80; that the merchandise was consigned shipper's order, and appellee was to receive it at Bazar, freight paid by the consignor; that he accepted delivery and at the request of the consignor paid the \$80. which was the full amount of charges demanded by the appellant, and remitted the balance of the purchase price of the merchandise to the consignor. Upon these facts the court rendered judgment against appellant for costs and overruled a motion for a new trial.

[2] Two reasons are suggested by the appellee in support of the judgment. The first one to be noticed is the claim that the appellant was not entitled to recover, because there was no showing that it had caused the rate filed with the commission to be published. On the other hand, the appellant relies upon the presumption that it took all the necessary steps required by law in establishing the rate. By the Elkins Act of February 19, 1903 (32 Stat. 847), a willful failure of the carrier to publish the tariff of rates and charges as filed is made a misdemeanor, and the act declares that upon conviction "the corporation offending shall be subject to a fine of not less than \$1,000 nor more than him for the unpaid balance of the legal charges. \$20,000 for each offense." In Cincinnati &

Tex. Pac. Ry. v. Rankin, 241 U. S. 319, 36 Sup. 1 Ct. 555, 60 L. Ed. 1022, L. R. A. 1917A, 265, it was said:

"It cannot be assumed, merely because the contrary has not been established by proof, that an interstate carrier is conducting its affairs in violation of law." 241 U. S. 327, 36 Sup. Ct. 558 [60 L. Ed. 1022, L. R. A. 1917A, 265].

See, also, New York Cent., etc., R. R. v. Beaham, 242 U.S. 148, 37 Sup. Ct. 43, 61 L.

We think the presumption is one upon which the appellant was entitled to rely until it was met by some evidence to the contrary. Besides, the contention is technical; there is no claim that the facts, if shown, would disclose that the schedule of rates had not been duly published. In Railroad Co. v. Thisler, 90 Kan. 5, 133 Pac. 539, some countenance was given to the technical rule which the appellee is now invoking; but there the cause was sent back for a trial of the sole question whether the rate had been duly published. The effect of the presumption that the railway company had not violated the penal statutes was not referred to in the opinion.

[1] The principal contention of the appellee is that the judgment should be sustained. because the consignee is not primarily liable for the freight charges, and only becomes liable at all by reason of his acceptance of the shipment, and that the extent of his liability in this case was to pay the amount demanded by the carrier. There are a number of authorities which sustain the contention. The Supreme Court of Alabama in Central of Georgia Ry. Co. v. Southern Ferro Concrete Co., 193 Ala. 108, 68 South. 981, reported with a note in Ann. Cas. 1916E, 376, held:

"That the mere acceptance and removal of the goods by the consignee, with the knowledge that the carrier is giving up a lien upon the goods for a stated amount, does not create an obligation on the part of the consignee to pay the charges beyond the amount stated"—citing Hutchinson on Carriers, and Central R. Co. v. MacCartney, 68 N. J. Law, 165, 52 Atl. 575.

A number of cases are cited in the note above referred to, which are to the same effect. In one of the cases (Pennsylvania R. Co. v. Titus, 156 App. Div. 830, 142 N. Y. Supp. 43) the reasons stated seem at first glance persuasive. We quote from the opinion:

"Of course, if the consignee accepts the goods, with notice that the carrier has a lien for a specified amount, thereby depriving the carrier of its lien, he becomes obligated by an implied contract to pay the charges. \* \* \* But. if contract to pay the charges. \* \* But, if the carrier induces him to accept the goods on the theory that the freight charges are as stated. there is no principle upon which he thereby be-comes liable to the carrier for the difference bewhich the carrier by law was required to charge." tween the freight charges thus paid and those

These cases concede the rule that, generally, the carrier may look either to the consignor or the consignee for payment of the freight charges, but draw a distinction between a

ment with knowledge of the undercharges (in which case he is held liable, because his act deprives the carrier of its lien on the goods), and those where he is induced to accept the goods on the theory that the freight charges are correctly stated by the carrier. As between the consignee and the carrier, the reasoning would appear perfectly sound: but over and above the rights of either the consignee or the carrier are the rights of the public, which require that all shippers shall be treated alike. We think the decisions quoted lose sight of the policy of the Elkins Act, which compels the carrier in every instance to collect the full amount of the established rate, and which in effect makes the consignee, who receives the goods, for all purposes the owner, and liable to the same extent as the consignor. To hold otherwise would merely open a door to evasion and unjust discrimination. We may not lose sight of the fact that the carrier does not usually bring actions of this character for the mere purpose of collecting the undercharge, but because the law imposes upon him a severe penalty in case he fails to use every means the law affords to collect the undercharge. In New York, New Haven & Hartford R. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 391, 26 Sup. Ct. 272, 277 (50 L. Ed. 515), the present Chief Justice said in the opinion:

"It cannot be challenged that the great purpose of the act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all and to destroy favoritism; these last being accomplished by requiring the publication of tariffs and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences and all other forms of undue discrimination. and all other forms of undue discrimination.

The all-embracing prohibition against the discriment of the state of the sta either directly or indirectly charging less than the published rates shows that the purpose of the statute was to make the prohibition appli-cable to every method of dealing by a carrier by which the forbidden result could be brought about."

In Armour Packing Co. v. United States, 209 U. S. 56, 28 Sup. Ct. 428, 52 L. Ed. 681. it was said in the opinion:

"It is not so much the particular form by which or the motive for which this purpose was accomplished, but the intention was to prohibit any and all means that might be resorted to to obtain or receive concessions and rebates from the fixed rates, duly posted and published." 209 U. S. 72, 28 Sup. Ct. 432 (52 L. Ed. 681).

To the same effect, see Railway Co. v. Stannard & Co., 99 Kan. 720, 162 Pac. 1176, L. R. A. 1917C, 1124; an action, however, to correct undercharges from a consignor.

The law is well settled that, where the bill of lading contains any provision authorizing the consignee to accept the goods and pay the freight, an implied contract by him to pay the charges arises from his acceptance of the delivery. The contract is implied "because the consignee knows that the carrier looks to him for the charges and by delivery waives his lien therefor in case where the consignee accepts the ship- the faith that the consignee will pay them."

versal.

Union Pac. R. Co. v. American Smelting & Refining Co., 202 Fed. 720, 121 C. C. A. 182, and cases cited in the opinion. We think that in all interstate shipments the Elkins Act must be read into the implied contract of the consignee, and that the contract must be held as obligating him to pay the full amount of the legally established rate. In the case last cited the consignee paid less than the legal charges. It was said in the opinion:

"The legal presumption is that the plaintiff intended to charge, and the defendant intended to pay, a legal, and not an illegal, amount for this transportation." 202 Fed. 722, 121 C. C. A.

In Texas & Pacific Railway v. Mugg, 202 U. S. 242, 26 Sup. Ct. 628, 50 L. Ed. 1011, the syllabus reads:

"One obtaining from a common carrier transportation of goods from one state to another at a rate specified in the bill of lading, less than the schedule rates published and approved and in force at the time, whether he does or does not know the rate is less than schedule rate, is not know the rate is less than schedule rate, is not entitled to recover the goods, or damages for their detention, upon tendering payment of the amount specified in the bill of lading, or of any sum less than the published charges. Whatever may be the rate agreed upon, the carrier's lien on the goods is, by force of the Interstate Commence and the amount fixed by the arbitish Commerce Act, the amount fixed by the published schedule of rates and charges, and this lien can be discharged, and the consignee become entitled to the goods, only by payment or tender of such amount."

The effect of the Elkins Act appears to be that it makes the consignee, who accepts the shipment, the owner for all purposes, and liable to the same extent as the consignor.

The judgment is reversed, and the cause remanded, with directions to render judgment for the appellant.

JOHNSTON, C. J., and BURCH, MASON, MARSHALL, and DAWSON, JJ., concur.

WEST, J. (dissenting). The petition alleged that the freight charges, which should have been legally collected, based on a certain rate, as shown by the published tariffs on file with the Interstate Commerce Commission "and in force and effect and controlling as a legal rate," were those sued for. If this be deemed equivalent to an allegation that the posting had been properly made, because otherwise the tariff could not have been in effect as alleged, it was, however, met by the verified general denial of the defendant, and there was nothing in the agreed statement of facts amounting to an admission that the alleged rate was posted or in effect. In the Thisler Case it was expressly denied that the rate had been filed as required by law and also expressly denied:

"That they had caused any schedules to be printed and copies for the use of the public posted or kept accessible to the public as required by law."

This denial was ignored in the instruc-

the sole question as to whether or not the rate sought to be recovered was legally in force.

There is nothing in the cited Rankin Case inconsistent with the Thisler decision. Rankin had signed a bill of lading which recited that lawful alternate rates based on specific values were offered, and the court said (241 U. S. 327, 36 Sup. Ct. 558, 60 L. Ed. 1022, L. R. A. 1917A, 265):

"And as no interstate rates are lawful unless duly filed with the Commission, it may become necessary for the carrier to prove its schedules in order to make out the requisite choice. where a bill of lading, signed by both parties, recites that lawful alternate rates based on specified values were offered, such recitals constitute admissions by the shipper and sufficient prima facie evidence of choice. If in such a case the shipper wishes to contradict his own admissions, the burden of proof is upon him."

It was further observed that the bill of lading contained "the conspicuous provisions concerning published rates, tariff regulations. The state courts had given no force to this bill of lading, and hence the re-

WARNER v. SNOOK et al. (No. 21442.) (Supreme Court of Kansas. April 6, 1918. Rehearing Denied May 16, 1918.)

(Syllabus by the Court.)

APPEAL AND ERROR \$== 1015(1)-Review-

GRANT OF NEW TRIAL.

In an appeal from an order granting a new trial the appellant contends that the ruling was based solely on the ground that error was committed in giving a particular instruction. It is held that upon the whole record it appears that the new trial was ordered because the trial judge disagreed with the jury in their view of the facts, and therefore the decision is not reviewable.

2. APPEAL AND ERROR \$== 1175(1)-FINDINGS JUDGMENT

The fact that the trial court in granting a new trial specifically and formally sets aside as without any support in the evidence only a part of the special findings which are attacked, and states that there was some evidence to sup-port the others, does not necessarily show that such approval was given to the latter findings as to justify this court in ordering judgment on them, even if they would be in themselves, if regarded as establishing the facts to which they relate, conclusive of the rights of the parties.

Appeal from District Court, Ford County. Claim to land as open to settlement as school land by Glenn A. Warner protested by E. O. Snook and another. General verdict for protestants or defendants, and from the granting of a new trial, they appeal. Af-

L. A. Madison and Carl Van Riper, both of Dodge City, for appellants. Horace Foster, of Garden City, and Edgar Foster, of Dodge City, for appellee.

MASON, J. In 1914, under the provision of the statute (Laws of 1913, c. 295), which tions, and the cause was remanded upon has since been repealed (Laws of 1915, c.

322, § 14), Glenn A. Warner settled on a was to the effect that no part of the land in tract of land which he claimed to be open to settlement as school land on account of having formerly been an island in the bed of the Arkansas river. E. O. Snook and George Reigl protested the claim on the ground that the tract was an accretion to their riparian land. A trial was had in which a jury returned a general verdict in favor of the protestants or defendants, and made a number of special findings. court granted a new trial, and the defendants

[1] 1. The plaintiff invokes the rule that the decision is not open to review because it rested so largely in the discretion of the trial court. City of Sedan v. Church, 29 The defendants insist that the Kan. 190. decision is reviewable because it turned upon an unmixed question of law, namely, whether error was committed in the giving of a particular instruction, relating to the effect of avulsion upon land titles. In ruling on the motion for a new trial the judge went over the special findings and announced that several of them were not supported by the evidence, and on that account would be set aside. He then added:

"I think that instruction No. 6 might have misled the jury in finding that that island didn't exist at a certain time. I think it is pure speculation, but would that be material? \* \* I feel that probably the jury was misled by that sixth instruction that was given without any evidence to base it on, and I think a new trial ought to be granted in this case. It will be granted." "I think that instruction No. 6 might have

We do not interpret the record as showing that the new trial was granted solely because of error supposed to have been committed in the giving of the instruction referred to. It seems rather to indicate that the judge could not approve the verdict and findings of fact made by the jury, and by way of explanation as to how they might have formed such mistaken beliefs, or a part of them, suggested that they were probably misled by an instruction which was given without a sufficient basis in the evidence. Even if upon examination of the evidence we should conclude that it justified giving the instruction, we could not order judgment on a verdict which has not received the approval of the trial court. Kansas City, W. & N. W. R. Co. v. Ryan, 49 Kan. 1, 30 Pac. 108. There is an intimation in the language quoted that the court did not regard the effect of the instruction as vital. In this situation, it appearing that the court set aside the verdict because he felt that it was not in accordance with the facts, we can only affirm the order granting a new trial.

[2] 2. The defendants argue with considerable plausibility that judgment in their favor should be ordered upon the special findings which the court did not set aside, because these findings were in themselves fatal to a recovery by the plaintiffs. One of them ecution a sheriff's sale of real property is made,

dispute originated as an island. That finding, if regarded as establishing the fact to which it relates, would seem to be conclusive against the plaintiff, and might in some circumstances form the basis of a judgment, although other findings were set aside. Goff v. Goff. 98 Kan. 201. 158 Pac. 26. In the statement made by the trial judge preliminary to the ruling on the motion for a new trial, he at first said that the evidence clearly showed that the land had been an island at some time. Later he said that he had overlooked the fact that the jury might have reached the conclusion they did in this regard from a comparison of the soil, and that therefore he would allow the finding to stand. The defendant's argument involves the assumption that what was said amounted to an approval of the finding. Upon the entire record we think it must be treated only as indicating that in the opinion of the judge there was some evidence tending to sustain In the course of his oral remarks he designated three findings as not being supported by the evidence, seeming to mean that there was no evidence whatever to support them. These were the only ones which he specifically and formally set aside. Of another he said:

"Now there is evidence both ways on that. I think it is sustained by some evidence, and that will not be disturbed."

Of two others he said that there was sufficient evidence to sustain them, apparently meaning that there was some evidence in There is no statement that their support. any of the findings received the affirmative approval of the trial court. A judgment cannot be rendered upon special findings that have not received such approval (Swan v. Salt Co., 86 Kan. 260, 119 Pac. 871), which must be something more than a mere determination that they were sustained by some Butler v. Milner, 101 positive evidence. Kan. 264, 166 Pac. 478.

The order granting the new trial had the effect of setting aside the findings which had not already been vacated.

The decision is affirmed. All the Justices concurring.

DUNCAN v. BENTON & HOPKINS INV. CO. et al. (No. 21170.)

(Supreme Court of Kansas. April 6, 1918. Rehearing Denied May 16, 1918.)

(Syllabus by the Court.)

1. Execution \$\infty\$59, 256(1)\(-\text{Sale}\)-Validity\(-\text{Conveyance by Purchaser.}\)

ONVEYANCE BY PUBCHASER.
Where a judgment is rendered by a justice of the peace of one county, and a transcript of the judgment is filed with the clerk of the district court of that county, and a copy of that transcript is filed with the clerk of the district court of another county, and an execution is issued thereon in the latter county on which contains the county of the county of which contains the county of the cou issued thereon in the latter county, on which ex-



and the sale is confirmed, and the sheriff's deed is afterward issued, the execution, sheriff's sale, confirmation, and sheriff's deed are void for the reason that the district court of the latter county is without any jurisdiction in the matter; and, where the grantee in the sheriff's deed afterward conveys the real property to other par-ties, the execution, sale, confirmation, sheriff's deed, and subsequent conveyance may be attacked and set aside in an action brought for that purpose. A petition which alleges the facts above described states a cause of action. 2. EXECUTION = 102-SALE AND DEED-RAT-

IFICATION. An attempt to redeem real property from a sheriff's sale, made under an execution that is void for want of jurisdiction in the court to issue the same, does not ratify the proceedings nor cure the defect in the jurisdiction.

Appeal from District Court, Sheridan County.

Action by Elias Duncan against the Benton & Hopkins Investment Company and others. From a judgment sustaining defendants' demurrer to the petition, plaintiff appeals. Reversed, with direction to overrule the demurrer and to proceed with the

C. L. Thompson, of Hoxie, for appellant. A. C. T. Geiger, of Oberlin, and R. W. Hemphill, of Norton, for appellees.

MARSHALL, J. This action comes to this court on an appeal from a judgment sustaining the defendants' demurrer to the plaintiff's petition. The purpose of the action is to set aside the confirmation of a sheriff's sale, the sheriff's deed made under that sale, and other deeds subsequent

The plaintiff alleges that on February 7, 1914, he was the owner of certain described real property in Sheridan county, and that:

"On the 7th day of February, 1914, W. J. Nichols, sheriff of Sheridan county, Kan., sold the above-described real estate to the defendant the Benton & Hopkins Investment Company for \$187.90, under authority of an execution issued out of the district court of Sheridan county, Kan., by virtue of a judgment entered in the district court of Sheridan county, Kan., upon a transcript from a justice of the peace court in Decatur county, Kan."

The plaintiff further alleges that the sale was confirmed on February 24, 1914; that a certificate of purchase was issued by the sheriff on February 26, 1914; that on September 21, 1914, the sheriff executed and delivered to the Benton & Hopkins Investment Company a sheriff's deed for the real property; and that on November 30, 1914, the Benton & Hopkins Investment Company executed a deed conveying the property to W. R. McCalla, Jr., who afterwards executed a deed to defendant Leora A. Wilcox, the wife of defendant Sherman Wilcox, the plaintiff's tenant. Sherman Wilcox was in possession of the real property under a lease which expired September 1, 1914.

The plaintiff charges that the Benton &

McCalla, Jr., acted fraudulently in order to deprive the plaintiff of his title to the real property, and charges that Leora A. Wilcox was not the purchaser from W. R. McCalla, Jr.; that, instead thereof, Sherman Wilcox was the purchaser; and that he was not an innocent purchaser of the property. The petition is not verified.

[1] 1. A transcript of the judgment rendered by a justice of the peace may be filed in the office of the clerk of the district court of the county in which the judgment was rendered. Such judgment becomes a lien on the real estate of a judgment debtor, the same as if the judgment had been rendered by the district court. Execution may be issued on such judgment, and the same proceedings shall be had on the execution as if the judgment had been rendered in that court. Civ. Code, §§ 517, 518, and 519 (Gen. St. 1915, \$\$ 7421-7423).

"An attested copy of the journal entry of any judgment, together with a statement of the costs taxed against the debtor in the case, may be filed in the office of the clerk of the district be filed in the omice of the clerk of the district court of any county, and such judgment shall be a lien on the real estate of the debtor within that county from the date of filing such copy. The clerk shall enter such judgment on the appearance and judgment dockets in the same manner as if rendered in the court of which he is clerk. Executions shall only be issued from is clerk. Executions shall only be issued from the court in which the judgment is rendered." Civ. Code, § 416 (Gen. St. 1915, § 7320).

Although the petition does not so allege, it is assumed that a transcript of the judgment rendered by the justice of the peace was filed with the clerk of the district court of Decatur county, and that a copy thereof was filed in Sheridan county.

The district court of Sheridan county had no control over the judgment; it was without jurisdiction, and no execution could be issued from that county. While the sheriff of Sheridan county could sell the property under an execution issued from Decatur county, yet he must make his return to the clerk of the district court of the latter county, and the district court of that county must confirm or refuse to confirm the sale. Civ. Code, \$\$ 469, 470 (Gen. St. 1915, \$\$ 7373, 7374). There was no judgment in Sheridan county on which execution could The execution and all proceedings under it were void for want of jurisdiction. The sheriff's deed was therefore void, and no subsequent deed depending on the sheriff's deed conveyed any title. The confirmation could have been set aside on a motion filed under section 598 of the Code of Civil Procedure (Gen. St. 1915, § 7502), but the plaintiff was not restricted to proceeding under that section. Steele v. Duncan, 47 Kan. 511, 28 Pac. 206.

[2] 2. After the sheriff's deed had been issued, the plaintiff attempted to redeem the property from the sheriff's sale. The de-Hopkins Investment Company and W. R. I fendants argue that by that attempt the

plaintiff waived the question of jurisdiction. That argument is without force. The plaintiff's attempt to redeem the land from the sheriff's sale did not ratify that sale nor confer jurisdiction on the district court of Sheridan county.

The petition states a cause of action. The judgment is reversed, and the district court is directed to overrule the demurrer and to proceed with the cause. All the Justices concurring.

# RUCKER v. ALLENDORPH et al. (No. 21407.)

(Supreme Court of Kansas. April 6, 1918. Rehearing Denied May 16, 1918.)

(Syllabus by the Court.)

INDEMNITY \$\infty 13(2) - Joint Tort-Feasors - Contribution.

A person who voluntarily commits an actionable wrong, either at the instigation of others, or by acting jointly with them, for which wrong a judgment is afterward rendered against him, cannot recover from those who induced him to commit the wrong, or with whom he acted in its commission, any loss or damage sustained by him by reason of the rendition of the judg-

Appeal from District Court, Shawnee County.

Action by Bert Rucker against C. W. Allendorph and others. Judgment for defendants upon the pleadings, and plaintiff appeals. Affirmed.

J. M. Stark and Waters & Waters, all of Topeka, for appellant. Monroe, Roark, Mc-Clure & Monroe, of Topeka, for appellees.

MARSHALL, J. The plaintiff appeals from a judgment rendered against him on the pleadings. These consisted of the plaintiff's petition, the defendants' answer, and the plaintiff's reply. The material facts established by the pleadings are, substantially, as follows:

For some years the defendants had been engaged in fraudulent real estate transac-These transactions consisted of the execution and delivery of purported warranty deeds pretending to convey the real property therein described, and of delivering with such deeds spurious and forged abstracts of the title to the real property. These deeds and abstracts impliedly represented that the defendants had good title to the property. and the deeds and abstracts were delivered for the purpose of defrauding those to whom the defendants effected a sale of the property. For some years the plaintiff had been a real estate agent in Topeka. In 1911 he received from defendant H. A. Miller, a real estate agent of Kansas City, Mo., a purported warranty deed pretending to convey certain real property in Missouri from the defendants C. W. Allendorph and Martha S. Allendorph. That deed was blank as to grantee, and did

described. Marion A. Tatlow owned an equitable interest in real property in Morris county. W. E. Bacon was a subagent of the plaintiff. The deed received from the Allendorphs was, by the plaintiff, delivered to Bacon with instructions for Bacon to go to Tatlow, who lived at White City, and effect an exchange of the land described in the deed for an assignment of Tatlow's interest in the Morris county land. The exchange was made, and the deed was delivered to Tatlow by Bacon. When the deed was delivered to Tatlow, a purported abstract of the title to the Missouri land was also delivered to him. The abstract did not correctly represent that title. Neither the deed nor the abstract was examined by Rucker. Afterward Tatlow prosecuted an action in the district court of Shawnee county against the plaintiff and Bacon to recover the damages that he had sustained by reason of the fraud practiced on him in making the exchange of property, and recovered a judgment in that action against Rucker for \$3,117. The jury made special findings of fact in substance as follows: That Bacon fraudulently represented to Tatlow that the deed to the Missouri land was a valid instrument; that it conveyed a good title to the Missouri land; that the abstract of title was genuine; that these representations were made at the instigation of Rucker; that both he and Bacon knew that the representations were false; and that Tatlow relied on the representations and made the exchange

In his petition in the present action, the plaintiff charges that the defendants practiced a fraud on him, and thereby induced him to make the exchange of lands with Tatlow. The petition does not allege that any false representations were made by the defendants, except those that were impliedly made in the papers delivered to the plaintiff. He seeks to recover the damages sustained by him on account of the fraud practiced on him by the defendants. The damages alleged are all consequent, or hinge, on the judgment in favor of Tatlow.

The papers did not make any representations to the plaintiff for the reason that he did not examine them, and, therefore, did not know what they contained. If he had examined the papers, he would have seen that the deed was blank as to grantee, and, possibly, would have learned that the abstract was defective. Notwithstanding the fact that he did not know what the papers contained, he, through his subagent, made the representations found by the jury. These representations were made when, according to the allegations of his petition, Rucker did not know whether they were true or false, although he alleges that he acted in good faith. In Bank v. Hart, 82 Kan. 398, 108, Pac. 818, this court said:

That deed was blank as to grantee, and did | "False representations are actionable when not convey any title to the land therein made fraudulently—that is, to induce another



to part with his money or property-if believed to part with his money or property—if believed and acted upon and made with knowledge of their falsity, or when made for such purpose by one who has no knowledge upon the subject, but who intends to convey, and does convey, the impression that he does have actual knowledge that they are true, and thereby deceives the other to his injury." 82 Kan. 398, 108 Pac. 818, syl. par. 1.

See, also, Breeding Association v. Scott, 53 Kan. 534, 36 Pac. 978; Refrigerator Co. v. Pert, 3 Kan. App. 364, 42 Pac. 943; 20 Cyc. 24, 27.

This principle of law controls the circumstances now being considered by the court.

Another principle that will assist in reaching a correct conclusion is that where one of several wrongdoers has been compelled to pay damages for a wrong committed, the general rule is that he cannot compel contribution from the others who participated in the commission of the wrong. 9 Cyc. 804; 6 R. C. L. 1054-1056. If Rucker did not make the false representations found by the jury, that fact would have been a defense in the action of Tatlow v. Rucker. If he, in fact, did not make the false representations, judgment was wrongfully rendered against him; but the fact that judgment was wrongfully rendered against him does not of itself, give him a cause of action against the defendants. If Rucker made the representations, he made them voluntarily, and he cannot recover from the defendants for his voluntary wrong. In either event, on the facts established by the pleadings, he cannot prevail against the defendants in this action.

The judgment is affirmed. All the Justices concurring.

McKEOWN v. CARROLL et al. (No. 21446.) (Supreme Court of Kansas. April 6, 1918. Rehearing Denied May 16, 1918.)

(Syllabus by the Court.)

1. WILLS \$\sim 58(2)\$—Contract to Devise or

BEQUEATH—EVIDENCE.

The evidence did not prove the contract alleged in the plaintiff's petition.

2. FINDINGS OF FACT—EVIDENCE.

The findings of fact made by the trial court were supported by the evidence, and no sufficient reason is advanced by the plaintiff for striking out any portion of any finding or for adding anything thereto.

Appeal from District Court, Leavenworth County.

Action for specific performance by Kate C. McKeown against Frank Carroll, as executor, and others. Judgment for defendants, and plaintiff appeals. Affirmed.

J. K. Cubbison & William G. Holt, of Kansas City, Mo., and Arthur M. Jackson, of Leavenworth, for appellant. A. E. Dempsey, of Leavenworth, and McAnany & Alden and Thomas M. Van Cleave, all of Kansas City. Kan., for appellees.

MARSHALL, J. The plaintiff seeks to compel the specific performance of a contract by which Cornelius Kelly, as alleged by the plaintiff, agreed that if she would live with Cornelius Kelly and Jane Kelly, his wife, as their daughter, all the property owned by Cornelius Kelly should be the plaintiff's, and that she would be the only heir of Cornelius Kelly, and would receive all of his property at his death. Judgment was rendered in favor of the defendants, and the plaintiff appeals.

The trial court made special findings of fact and conclusions of law, as follows:

(1) The plaintiff is the daughter of Jeremiah "(1) The plaintin is the unusual 12, 1869, leaving the plaintin and her three brothers orphans; the plaintin and her three brothers orphans the plaintin and her three brothers orphans. ing the plaintiff and her three brothers orphans; their mother having died previously. Cornelius Kelly was a sergeant in the United States Army at Ft. Leavenworth, Kan., about that time, and about the year 1873 said Cornelius Kelly and his then wife, Jane Kelly, being childless, took the plaintiff and her brother, Jerry Denny, to raise. Where the plaintiff and her said brother were before being taken into the family of said Cornelius Kelly, is not shown in the evidence, but Cornelius Kelly, is not shown in the evidence, but in the argument of the case it was conceded that they were taken from a local orphan asylum. On what terms or conditions the plaintiff was

On what terms or conditions the plaintiff was taken into the family of Cornelius Kelly, or whether there were any conditions whatever, is not shown in the evidence. However, Cornelius Kelly and his wife took the plaintiff into their home, reared her, sent her to the parochial school at Ft. Leavenworth, Kan., and later on, after they moved to the city of Leavenworth in 1889, sent her to St. Mary's Academy, where she graduated in the year 1892.

"(2) Cornelius Kelly and his wife, Jane Kelly, were kind to the plaintiff and referred to her as 'Katie' and 'our Katie' and sometimes as 'Katie Kelly'; but she was also known by the earlier residents of Ft. Leavenworth as 'Katie Denny' and was sometimes called 'Katie Denny' and her brother was called and known as 'Jerry Denny.' The plaintiff also referred to and called Cornelius Kelly and his wife 'father' and 'mother,' and they treated her with considerable kindness and affection, which in her younger years was reciprocated by her affection, which in her younger years was recip-

rocated by her. "(3) After retiring from the army, Cornelius Kelly and his wife moved to the city of Leavenworth, Kan., the exact date not being clearly shown. The plaintiff came to Leavenworth with Mr. and Mrs. Kelly and lived with them and ontinued to be treated as a member of the family until about 1889, when Cornelius Kelly sent the plaintiff to St. Mary's Academy for further education. Upon her entrance into the academy she was registered as 'Katie C. Denny.' She graduated from the academy in 1892. During her attendence at the academy she made family she academy sh ing her attendance at the academy she made frequent visits to the home of Mr. and Mrs. Kelly and continued to treat and regard it as her home, and Cornelius Kelly received and signed the reports made by the teachers on printed forms for that purpose, and under the line on which his signature was to be written were the printed words 'parent or guardian.' He signed these reports, but he did not write the words 'parent or guardian' or either of them, but only signed his name, 'Cornelius Kelly,' on the report sent him by the teachers at the academy. "(4) After her graduation, she returned to the home of Mr. and Mrs. Kelly, in Leavenworth, Kan., and remained there for several months, living with Mr. and Mrs. Kelly as a member of their family, until about 1893. Up to this time friendly and affectionate relations existed being her attendance at the academy she made fre-

tween the plaintiff and Mr. and Mrs. Kelly. She his wife, Margaret Kelly, one of the defendants had not been required at any time to do any in this action, insisted that he leave her some-bard or laborious work, and both Mr. and Mrs. thing, and he therefore willed her the \$100 above tween the plaintiff and Mr. and Mrs. Kelly. She had not been required at any time to do any hard or laborious work, and both Mr. and Mrs. Kelly had stated at different times that they expected to leave their property to her; that they had no one else to leave it to; that she would get all their property when they were gone—meaning when they were dead.

"(5) About 1893 the plaintiff obtained employment as secretary of All Saints' Hospital, at Kansas City, Mo., receiving good wages, where she remained for perhaps two or three years, during which time she often visited Mr. and Mrs. Kelly. She then took a course in a busi-

Mrs. Kelly. She then took a course in a business school, learned stenography, and obtained employment in the office of a law firm in Kansas City, Kan., where she remained until about sas City, Kan., where she remained until about 1898, when she was married to William Mc-Keown. During her employment in this law firm in Kansas City, Kan., she often visited Mr. and Mrs. Kelly, and their relations were friendly and affectionate. There was no objection on the part of Mr. Kelly or Mrs. Kelly to the marriage of the plaintiff to William McKeown, and after her marriage the plaintiff and her husband visited at the home of Mr. and Mrs. Kelly, and they expressed and showed a continued friendship and affection for plaintiff and a kindly regard for her husband.

ship and affection for plaintiff and a kindly regard for her husband.

"(6) After her marriage, the plaintiff removed with her husband to Colorado, where she has since resided. In the year 1907, Mrs. Jane Kelly was taken sick. The plaintiff came from her home in Colorado and stayed with Mrs. Kelly about a week, when Mrs. Kelly seemed much better and the plaintiff returned to her home in Colorado. In a short time thereafter, Mrs. Jane Kelly became worse and shortly died. Plaintiff returned to Leavenworth and attended her funeral and remained a few days at the her funeral and remained a few days at the Kelly home. At or about the time of the funeral of Mrs. Jane Kelly, some unpleasantness occurred between Cornelius Kelly and the plaintiff because of the plaintiff's interference with the funeral arrangements, and this incident seems to have caused Cornelius Kelly some embarrassment with his friends and occasioned some

barrassment with his friends and occasioned some resentment on his part towards the plaintiff.

"(7) After the funeral of Mrs. Jane Kelly in June, 1907, and before her return to her home in Colorado, Cornelius Kelly gave plaintiff some money and jewelry amounting to the sum of about \$1,000, and stated to some of his friends that he was done with her. Plaintiff returned to her home in Colorado and continued to write to Cornelius Kelly and he answered some of her letters. In one of his letters, dated August 9. 1907. he said, among other things: 'Made my her letters. In one of his letters, dated August 9, 1907, he said, among other things: 'Made my will did not forget you.' In another letter, dated December 12, 1910, he said, among other things, 'I deeded my property to orphan asylum and willed my other assets to you. Have nothing now but my pension; it meets my wants.' "(8) Cornelius Kelly continued to reside in his home on North Eighth street, in the city of Leavenworth, Kan., and on the 15th day of November, 1911, he was united in marriage to Margaret Sullivan, one of the defendants in this action. On November 20, 1911, he wrote plaintiff advising her of his marriage, and after that

tiff advising her of his marriage, and after that time there seems to have been little communica-

time there seems to have been little communication between him and the plaintiff.

"(9) On April 27, 1915, Cornelius Kelly made and executed his last will and testament, which has been duly admitted to probate, and in which will and testament the plaintiff was willed \$100. Various other bequests were contained in said will, some for charitable and religious purposes, and the remainder of his estate was willed to his second wife Margaret Kelly one of the defendand the remainder of his estate was whited to his second wife, Margaret Kelly, one of the defendants in this action. At and before the making of his will, Cornelius Kelly stated that he had never adopted the plaintiff, that he had raised and educated her and that he was under no and educated her, and that he was under no obligations to her whatever, and that he did not wish to leave her anything in his will, but inclusive. The plaintiff says:

"(10) The evidence does not prove that Cornelius Kelly or his wife, Jane Kelly, ever entered into any agreement of any kind with the plaintiff, or with any other person or persons, by which there was ever any understanding agreement of any kind or nature that the plainagreement of any kind or nature that the plain-tiff, under any circumstances, conditions, or consideration, was to have or receive any of their property at the time of their death, or the death of either of them, and therefore the alle-gations in the plaintiff's petition in that regard have not been proven."

## Conclusion of Law.

"1. The prayer of the plaintiff's petition should be denied and judgment entered in favor of the defendants for costs."

1. The plaintiff presents five specifications of error, three of which are as follows:

of error, three of which are as follows:

"First. The trial court erred in not awarding plaintiff judgment for specific performance as prayed for in her amended petition."

"Third. The trial court erred in refusing to sustain plaintiff's motion to vacate and set aside the tenth finding of fact and the conclusion of law, made by the court, and to substitute therefor a different finding and conclusion, as set forth in her motion so to do.

"Fourth. The trial court erred in refusing to sustain plaintiff's motion for judgment in her behalf on the grounds set forth in her motion therefor."

therefor.

The plaintiff states that "these three specifications all have to do with the tenth socalled finding and the sole conclusion of law made by the trial court," and argues that:

"The trial court evidently based its so-called tenth finding and its sole conclusion of law on the erroneous theory that plaintiff has to prove a specific, express contract between herself and Cornelius Kelly by direct evidence."

The plaintiff also says:

"The case is brought before this honorable court because it is evident, from this tenth finding and its conclusion of law, that the trial court either entirely misconceived or wholly disregarded the law of this state in cases of this character, as laid down by a long line of decisions of this court entirely in harmony with each other." each other."

[1] To support her contention, the plaintiff cites a number of cases decided by this court. In each of these cases a contract was clearly and definitely established.

Under her petition, it was necessary for the plaintiff to prove a contract between herself and Cornelius Kelly, but it was not necessary to prove that contract by direct evidence. Circumstantial evidence would have been sufficient, but the contract should have been clearly and definitely established. derson v. Anderson, 75 Kan. 117, 127, 88 Pac. 743, 9 L. R. A. (N. S.) 229. The evidence, as abstracted, has been carefully examined, and no evidence is disclosed by which to establish that a contract was ever made. The tenth finding of fact was correct.

[2] 2. Another specification of error is that the trial court erred in refusing to sustain the plaintiff's motion to modify certain findings of fact. These were numbered 1 to 9.

ings made by the trial court was favorable to plaintiff; therefore she could not ask that the plaintin; therefore she could not ask that they be modified so as to conform and adhere to the material evidence and testimony and that such portions of them as were not material or were not supported by material testimony be left out of them.

It was the duty of the trial court to find the facts from the evidence introduced. The court made complete findings, and those findings were supported by the evidence. sufficient reason is advanced by the plaintiff for striking out any portion of any finding, nor for adding anything thereto. An examination of the evidence does not disclose any The plaintiff's motion was such reason. properly denied.

The judgment is affirmed. All the Justices concurring.

LANTRY CONTRACTING CO. v. ATCHI-SON, T. & S. F. RY. CO. (No. 21438.)\*

(Supreme Court of Kansas. April 6, 1918. Rehearing Denied May 16, 1918.)

### (Syllabus by the Court.)

1. APPEAL AND EMBOR NEW TRIAL—REVIEW. APPEAL AND ERBOR \$\iiii 351(1)\to Motion for

The defendant, having filed a motion ad-dressed to the district court within three days after the decision of the referee, which motion was overruled less than six months before the appeal was taken, is entitled to a review of the rulings mentioned in that motion, although the referee previously disposed of a motion for a new trial filed before him more than six months prior to the taking of the appeal.

2. ABBITRATION AND AWARD &=64 — FUNCTION OF ARBITRATOR—DECISION.

An arbitrator is the agent of both parties concerned, and, where he misconceives the functions of his agency and proceeds on the theory that he is the special agent of one of them and and appears to seewer a result favor. them and endeavors to secure a result favorable to that one at the expense of the other, his decision is not binding, however honest his motives may have been.

3. Contracts \$\infty\$=199(2)—Building Contract
—Construction—"Extra."

The contract for building a tunnel provided that, if extras were furnished for which prices were not fixed in the contract, no payments should be made for them unless they had being the prices of the snould be made for them unless they had been ordered in writing by the chief engineer of the defendant. Under the plans, the framework of the roof of the tunnel was to be supported by posts resting on the floor. The parties decided that it would be better to have short posts niched into the walls of the tunnel, instead of using longer ones resting on the floor of the tunnel; it being agreed that the cost of the work of cutting the niches for the short posts was equal to the difference between the cost of the long and the short posts and of the long and the short posts and should be paid for as lumber. *Held*, that such work was not an "extra" within the meaning of the con-

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Extra; Second Series, Extras.]

"A very large portion of nine of the ten find-gs made by the trial court was favorable to aintiff; therefore she could not ask that the requirement that extra work must be done on a written order.

5. Contracts \$==286-Building Contract-

FINAL ESTIMATE—OBJECTION

One of the provisions of the contract was that, if the contractor claimed that the chief engineer in his final estimate had failed to consider or allow for work or material, objections should be presented by the contractor in writing within ten days after the estimate was made, and it is held that, in view of the things said and done by the chief engineer, the failure of the contractor to present formal objections in writ-ing within the ten-day period does not preclude a recovery on such items.

6. Accord and Satisfaction \$==7(1)-Pay-

MENT ACCORDING TO ESTIMATE.

A final estimate with a voucher attached was sent by the chief engineer of the defendant to the contractor without any accompanying statement, which voucher was signed by the contractor as "received on account." No check or money was tendered with the statement, and after the indersement of the contractor qualiarter the indersement of the contractor quantifying the acceptance the defendant paid and the contractor received the amount named in the estimate. Held, that the payment and acceptance of the money cannot be regarded as an accord and satisfaction.

TION.

The several breaches of the entire contract upon which the action was brought constitute only a single cause of action, and an amendment to the petition made more than five years after the tunnel was finished setting up an additional item furnished under the contract is not barred by the statute of limitations.

8. EVIDENCE 45450(7) — CONSTRUCTION OF BUILDING CONTRACT.

The terms of a contract being ambiguous and open to more than one interpretation, testimony of the circumstances surrounding the execution of the contract may be admitted to aid in its interpretation and in ascertaining the intended meaning.

CONTRACTS €=322(5) — ACTION FOR EXTRA COMPENSATION-FINDINGS-EVIDENCE

The evidence examined, and held to be sufficient to support the special findings upon which the judgment is founded.

Appeal from District Court, Shawnee County.

Action by the Lantry Contracting Company against the Atchison, Topeka & Santa Fé Railway Company. Judgment for plaintiff upon a referee's report, motion for new trial denied, and defendant appeals; and plaintiff takes a cross-appeal. Affirmed.

W. R. Smith, O. J. Wood, and A. A. Scott, all of Topeka, and William Osmond, of Great Bend, for appellant. R. F. Hayden, of Topeka, and F. Dumont Smith, of Hutchinson, for appellee.

JOHNSTON, C. J. This was an action by the Lantry Contracting Company against the Atchison, Topeka & Santa Fé Railway Com-4. Contracts &=232(4) — Building Contract—Extra Work—Order.

When the chief engineer ordered that posts should be reset in trenches with concrete foundations instead of on the floor of the tunnel and struction of the Raton tunnel on the defend-

ant's railroad, for which payment had not lowed by the referee, and upon this ruling been made. The case was tried by a referee, and on February 21, 1916, he returned findings of fact and conclusions of law. which were in favor of plaintiff as to three items of its claim. After overruling defendant's motion for a new trial and certain exceptions made by each party to the findings, the referee on February 22, 1916, filed in the district court his report of the proceedings before him, including his decision. The next day defendant filed in that court its motion for a new trial, as well as certain exceptions to the findings and conclusions of the referee, and on the following day plaintiff filed certain exceptions to the findings and conclusions of the referee. These pended in the district court until January 15, 1917, when the motions were all denied, the report of the referee was confirmed, and judgment was rendered thereon in favor of plaintiff. Two days later the defendant filed another motion for a new trial, which the court denied, and on May 21, 1917, the defendant appealed to this court. A cross-appeal is taken by plaintiff from the order of the trial court overruling certain of its exceptions to the findings and conclusions of the referee.

[1] Plaintiff contends that the questions presented are not open to review because the appeal was not taken within six months after the motion for a new trial was decided. The original abstract failed to show the filing of the motion for a new trial addressed to the court on February 28, 1916, two days after the decision by the referee. When attention was called to the omission, a supplemental abstract was filed showing the filing of the motion on the day stated, and further that it had been presented to the court and taken under advisement on July 6, 1916, and a decision overruling the motion was made on January 15, 1917, about four months prior to the taking of this appeal. The grounds of that motion include all the questions that are raised on this appeal, and hence they may be reviewed.

[2] The referee found and the court adjudged that the plaintiff was entitled to recover \$15,646 over and above the allowance made and paid by the defendant, with interest from July 10, 1909, amounting in all to \$22,895.16. This award included an item of \$2,443.22, with interest thereon, for the setting of stulls, as to which there was an agreement. Another was for \$3,140.50 for resetting posts on new foundations of the tunnel lining, which was done on orders and plans given and provided by the chief engineer of the defendant. Then there was still another item of \$10,063, with interest, for lumber used in the tunnel beyond that allowed in the final estimate of the chief engineer. A claim was also made by the plaintiff for a large sum expended by it in the transportation of coal, and which it insists should have been carried by the defendant without charge; but this claim was disal-

the cross-appeal is based.

The contention of defendant is that the claims for extra work and material were to be left to the decision of the chief engineer, who was appointed by the parties to give a final decision upon any disputes that might arise, and who, under the contract, was required to make a final estimate of the amount, quantity, and character of all work and material performed and furnished by the contractor, including extra work and material, and that his decision should be final and conclusive and have the effect of an award, and further that, if the contractor should claim that a mistake had been made in the estimate or decision of the chief engineer, the contractor should present its objections in writing within ten days after the final estimate was made. It is contended that the plaintiff had failed to comply with these requirements as to disputed items or toprove that they had been waived by the defendant. The plaintiff, on the other hand. insists that the action of the chief engineer in disallowing its claims was not effective because he acted as the agent of the defendant and not as an impartial arbiter between the parties: that his decisions were the result of partisanship, and therefore were not binding. There is no claim that the chief engineer acted fraudulently, but merely that he misconceived the functions of an arbiter and failed to understand the duties incumbent upon him, but proceeded on the theory that it was still his duty to act as agent for the defendant and to secure the best terms of settlement that he could obtain for it. The referee found, and we think upon sufficient evidence. that:

He "mistook his position as that of an agent of the defendant for the purpose of securing a settlement in its interest. He did not in all matters exercise his own judgment, but as to some advised with the legal department of de-fendant, and held himself subject to the or-ders of defendant's superior officers, and dictated terms of settlement conditional on the plaintiff beginning or abstaining from suit; but there is no evidence that in so doing or in passing on any of plaintiff's claims the engineer was actuated by any fraudulent intent."

An arbiter is the agent of both parties alike and should be as much concerned in the protection of the interests of one party as of the other, giving his decisions with absoluteimpartiality. Because of his relation to the defendant, the chief engineer seemed to feel that it was incumbent upon him to act as the agent of the defendant in the settlement much as he would if he had not been named. as the arbiter. Although conscientiously honest in his motives, his mental attitude was inconsistent with the state of mind which an impartial arbiter should have. The decision of an arbiter who fails to understand his functions and duties and who acts as a partisan of one of the parties is not binding, however honest his motive may be.

[3] An attack is made on the findings that the plaintiff was entitled to recover on its claims for setting stulls and resetting posts. It is based on noncompliance with the provision of the contract that, if extra work is done for which prices were not fixed in the contract, the chief engineer should give a written order for the doing of such work and should fix the prices to be paid, and that the obtaining of the engineer's certificate for such work and the prices therefor should be a condition precedent to the contractor's right to be paid therefor, and that nothing should be deemed extra work which could be measured or estimated under the terms of the contract. It appears that part of the construction of the tunnel consisted of upright posts or piles supporting the timbers upon which rested the framework for the roof of the tunnel. In places it was decided to be more convenient and better to substitute in place of these posts short pieces of timber called "stulls," which, instead of resting upon the floor of the tunnel, were placed in a slanting position and rested in a niche cut in the wall. It was agreed that the stull answered the purpose of a post and that the work of cutting the niche in the rock on which the stull rested was the equivalent of the difference in the amount of lumber between a stull and a post. This difference was treated as lumber and was thereafter carried in the estimate as lumber down to the final estimate. The substitution of one kind of support for another by agreement cannot be treated as an extra, since the plan did not increase or in any way affect the price to be paid for the supports. There was not only the agreement that the work of cutting niches should equal the difference between the short and the long posts and should be carried as lumber in the estimates, but for months it was so carried in the regular estimates and payment thereon was partly drawn by the plaintiff.

[4] In respect to the item allowed for resetting posts, it appears that after the timbers of the tunnel had been placed it was decided that there should be a concrete foundation along the sides of the tunnel in order to support the concrete lining of the tunnel. The chief engineer ordered the work and submitted a blueprint directing how it should be done, and afterwards caused the work to be done under the superintendence of a local engineer. In the contract it was agreed that plaintiff should receive \$45 a thousand for all lumber placed in the tunnel, and after the work was commenced the defendant notifled the plaintiff that it would only allow \$25 a thousand for lumber reset or used a second time. A trench along each side of . the tunnel had to be made for the foundation for the posts, and as the work proceeded it was necessary to remove and then reset the ing officers of the defendant, calling for the

Downey v. Railroad Co., 60 Kan. 499, 57 Pac. | posts. On the basis of \$25 a thousand feet for lumber used a second time, the plaintiff submitted its claim for the work, and, while defendant did pay for the excavation and cement work done under the plan, it refused to pay for the resetting of the posts. formal writing ordering this extra work was not made, but the blueprint set forth the details of the work and is deemed to be sufficient, under the circumstances, to meet the requirement that extra work must be done under a written order. An explanation of the blueprint was doubtless necessary to a complete understanding of it, and this was furnished by the oral directions of the chief engineer and his assistant under whose supervision the written plans were executed.

> [5] There was much contention as to the final estimate and the conduct of the parties with reference to it. It was stipulated that. when the chief engineer made a final estimate at the completion of the work, any objections of the contractor to it were to be presented in writing within ten days after the estimate had been made and certified, and objections not so made should be deemed to be waived. The plaintiff never presented any written objections to the final estimate; but, in view of the conduct of the parties, the defendant is not in a position to claim a waiver on account of the absence of a formal objection. The tunnel was completed in June, 1908, and up to that time 16 monthly estimates had been made and proportional payments made thereunder. Several disputes had arisen between the contractor and the chief engineer as to the amount due to the contractor, and correspondence and conversations were frequently had between them on these matters. It appears that the chief engineer did not prepare a final estimate until November 11, 1908, about five months after the completion of the work, and it was not signed nor certified by any one, nor was it given to or shown to any officer of the plaintiff, until in January, 1909. At that time it was sent to Mr. Kelly, the chief officer of the plaintiff. Following these transactions, conferences were had, and an effort was made to adjust the differences between the parties, and some time after the presentation of the final estimate one claim in dispute amounting to \$2,400 was adjusted and paid. In a conference with Mr. Kelly prior to the receipt of the final estimate, the chief engineer who had made out two estimates, in effect, told Mr. Kelly: Here is the final estimate I am going to make if you are going to sue the company; and if you do not intend to sue, here is the final estimate I am going to make. There was about \$10,000 difference between the two estimates. On June 4, 1909, the defendant sent to Mr. Kelly a paper entitled "Seventeenth Monthly and Final Estimate," with a voucher attached which had been O. K.'d by the chief engineer and the audit

payment of \$33,072.21 as the balance due the contractor. This was much less than the amount claimed by the plaintiff, and Mr. Kelly signed and returned the estimate and voucher to the treasurer of the defendant on June 8, 1909, but he inserted in the receipt the words, "Received on account." Shortly afterwards the defendant paid the plaintiff the amount named in the voucher with the qualified acceptance less \$6,000 withheld on account of a garnishment proceeding and the further sum of \$6,000 that had been paid in January, 1908, to a bank in Paola. Subsequently, the garnishment was dissolved, and the \$6,000 withheld on that account, and which had been placed in a special deposit, was paid to the plaintiff. In view of the facts stated, and the important one, that the chief engineer had abandoned his function as an arbitrator and was acting as the representative or agent of the defendant, the plaintiff was not bound to present his objections on matters in dispute to him within ten days after the receipt of the final estimate or at any other time. The misconception of duty and partisanship of the chief engineer, although innocent, released the plaintiff from any obligation to recognize and treat him as an arbitrator. Downey v. Railroad Co., 60 Kan 499, 57 Pac. 101; Orme v. Burney, 95 Ga. 418, 22 S. E. 633; Grosvenor v. Flint, 20 R. I. 21, 37 Atl. 304; Wheeling Gas Co. v. City of Wheeling, 5 W. Va. 448; 3 Cyc. 625.

[6] One of the contentions of defendant is that a final settlement was made, and that, when the final estimate with a voucher attached was signed by Mr. Kelly and payment thereon accepted, it constituted an accord and satisfaction which is conclusive on plaintiff. The sending of the estimate and voucher was only a step in the numerous negotiations between the parties as to the amount due for the work. In signing the voucher the defendant was distinctly informed by plaintiff that it would not accept the amount named in the estimate as the amount due but would accept it as a partial payment. With this qualification and warning the defendant subsequently paid the money specified in the estimate. Under the circumstances, the money was paid and received on account and not as a final and complete satisfaction of the debt. No check or money accompanied the estimate, nor was there any statement with it that the subsequent acceptance of payment would be regarded as payment in full. Nothing connected with the sending of the estimate and the qualified signing of the voucher amounted to an acknowledgment that the payment was to be regarded as a full discharge of defendant's obligation. Besides, the payment was not made or received on the estimate until the fact that plaintiff would only receive the amount as partial payment had been clearly brought to the attention of the defendant. The case was quite unlike one where a check or money is tendered in

creditor is informed and bound to understand that if the tender is accepted he will take it as a complete settlement of the claim. The facts herein do not bring the case within the rule of the cited case of Neely v. Thompson, 68 Kan. 193, 75 Pac. 117, where the tender was accompanied with acts and declarations which amounted to a condition that if the money be accepted it would be accepted in full satisfaction. Here, as we have seen, the estimate and voucher were not presented on the condition that payment must be accepted in full, if at all, and the money was subsequently paid with a notice that plaintiff did not accept the estimate nor payment as satisfaction of its claim, and therefore there was no accord and satisfaction.

[7] There is a contention that the item for lumber, brought into the case by an amendment of the petition, and for which an allowance was made, was barred by the statute of limitations. The amendment was filed more than five years after the completion of the tunnel. Objection was made to the amendment on the theory that it set up a distinct claim or cause of action not included in the original petition and that it could not be tied to the original by the doctrine of relation. The general rule is that, when an amendment does not set up a new cause of action, the statute of limitations is arrested at the date of filing the original petition. In the original pleading the contract was set forth and its performance by the plaintiff, followed by allegations of the failure of the defendant to comply with its requirements in several particulars, including the failure to furnish transportation of coal and lumber, a failure to pay for extra work and extra lumber for supports made necessary by changes of plans, and also the value of lumber under an agreement as to the stulis already described. Later and after the trial had commenced the plaintiff in its amendment alleged that the defendant had not allowed or paid for 227,000 feet of lumber which was used in the construction of the tunnel, and it was asked that this item be added to the judgment. The action was based upon the contract and the pleading did not purport to contain more than one cause of action. The contract provided for the construction of a tunnel as an entirety and an action to recover for noncompliance with its terms states only a single cause of action. The fact that the defendant failed to pay for a number of the items in the contract does not make it necessary to set up each item as a separate cause of action. Under the contract the defendant became liable for all work and material furnished in the building of the tunnel, and noncompliance with its provisions, although made up of many items, constitutes one cause of action. This was decided in Com'rs of Barton Co. v. Plumb, 20 Kan. 147, an action brought upon a bond given to . secure the performance of a building confull satisfaction of a claim and where the tract, in which it was alleged that one of the

parties failed to build the structure within | period of limitation by setting out the stat the agreed time and also failed to provide suitable material in its construction and to do the work in a specified way. The court held that, although the action involved numerous details and many items of noncompliance, the petition stated only one cause of action. It was said that the plaintiff possessed one grand primary right to have the house built according to contract, within which were innumerable subordinate and secondary rights such as the furnishing of lumber, glass, nails, locks, hinges and the like, and the failure with respect to any of them would be a violation of the plaintiff's rights; "but" it was said, "the violation of each of these special and subordinate rights is also a violation of the more general and primary right, and altogether they constitute only one violation of this grand primary right." 20 Kan. page 151. The amendment in question did not present a new cause of action, but only asked an allowance for another item used in the making of the tunnel under the violated contract. The original pleading had asked a recovery of some lumber and the amendment expanded the cause of action by adding an omitted item in the lumber account, and therefore it relates back to the commencement of the action. In the cited case of Kansas City v. Hart, 60 Kan. 684, 57 Pac. 938, it was said that:

"It is true, as a general rule, that amended pleadings relate back to the commencement of the action, but this rule never obtains where a separate and distinct cause of action is set up by way of amendment." 60 Kan. page 691, 57 Pac. page 940.

Here, however, the amendment does not allege a new cause of action, nor is the item asked for founded on a new right. In such cases the rule as to amendments is liberally applied in this state. For instance, an amendment was allowed of an allegation of an express warranty under a petition which claimed damages because the property proved to be unfit for the purposes intended. Culp v. Steere, 47 Kan. 746, 28 Pac. 987. So. also was one specifying new grounds of negligence in a personal injury case. Railway Co. v. Moffatt, 60 Kan. 113, 55 Pac. 837. The substitution of a new plaintiff by amendment, it was held, did not change the cause of action and the statute of limitations did not run against the substituted party during the pendency of the action. Service v. Bank, 62 Kan. 857, 62 Pac. 670; Harlan v. Loomis, 92 Kan. 398, 140 Pac. 845. It was also held that an amendment charging the conversion of the proceeds of personal property where the original charged the conversion of the property itself was allowable. Bank v. Layfeth, 63 Kan. 17, 64 Pac. 973. Some of these and a number of other like authorities are mentioned in Cunningham v. Patterson, 89 Kan. 684, 132 Pac. 198, 48 L. R. A. (N. S.) 506, in which an allegation that a death was negligently caus-

ute of the foreign state authorizing a recovery. In Madden v. Smith. 28 Kan. 798, it was held that where there is a single contract only one action can be maintained for a breach thereof, and a subsequent action for an additional item under the same contract cannot be maintained. In Whitaker v. Hawley, 30 Kan. 317, 1 Pac. 508, it was held that all the several breaches of a single and entire contract, after such breaches had actually occurred, constitute only one cause of action and this although an action might be main tained upon each of such breaches as it oc curred and before any subsequent breach occurred. It was held, in an action for dam ages to specific articles of personalty, resulting from a tort, that an amendment may be made by setting forth damages to other ar ticles of personalty caused by the same tori and at the same time. City Council of Augusta v. Lombard, 99 Ga. 282, 25 S. E. 772. Where damages were asked for digging up the bodies of plaintiff's parents and removing them from a cemetery lot and then burying other bodies on the lot, an amendment was permitted after the limitation had run claiming \$400 damages as the cost of returning the bodies to the lot and restoring the monument and shrubbery on the lot. Anderson v. Acheson. 132 Iowa, 744, 110 N. W. 335, 9 L. R. A. (N. S.) 217. In Coxe v. Tilghman, 1 Whart, (Pa.) 282, an amendment, assigning new breaches of a contract on which an action had been brought and making an alteration in the grounds of recovery on that instrument and the modes in which the defendant had violated it, was held to be permissible. In Wilhelm's Appeal, 79 Pa. 120, it was held that a petition asking an account of ores taken from a tenancy in common might be amended seven years afterwards by alleging that ores had been taken from other lands, and it was held that a new cause of action was not alleged and the amendment was not barred. See, also, Bond v. Sewing Machine Co., 23 Kan. 119; North Shore St. Ry. Co. v. Payne, 192 Ill. 239, 61 N. E. 467; Cooper, Adm'r, v. Mills County, 69 Iowa, 350, 28 N. W. 633; Sullivan v. Owens (Tex. Civ. App. 1905) 90 S. W. 690; Bentley v. Insurance Co., 40 W. Va. 729, 23 S. E. 584; notes, 3 L. R. A. (N. S.) 259; 33 L. R. A. (N. S.) 196.

Defendant insists that the evidence was insufficient to sustain the finding of the referee making an allowance for the lumber item and also as to the other items that were allowed: but, after a critical examination of the evidence, we have no hesitation in saying that the findings of the referee have sufficient support. It is manifest from the findings that the referee gave careful attention to the evidence and that his conclusions were drawn with discriminating judgment.

[8, 9] Plaintiff in its cross-appeal contends that coal is material, and that under the coned in another state was amended after the tract defendant was to furnish free transportation of material required in carrying out right of privacy and entitles her to recover the contract. The meaning of the term "ma- without proof of special damage. the contract. The meaning of the term "material" as used in the contract is not free from doubt: but it is insisted that the exceptions enumerated in the contract as to materials, to wit, feed for teams and men, commissary supplies and explosives, indicate that all other materials than these were to be carried free. In Philadelphia, Appellant, v. Malone, 214 Pa. 90, 63 Atl. 539, a contractor who had undertaken the construction of a reservoir gave a bond which required that all materials furnished for the work should be paid for, and it was held that coal used to generate steam for the operation of a steam shovel and a locomotive in making the excavations was not within the obligation of the bond. Of like import, see Lyman Coal Co. v. U. S. Fidelity & Guar. Co., 82 Vt. 94. 71 Atl. 1106. Regardless of these interpretations, however, there was ambiguity in the contract as to whether coal to be used in the digging of the tunnel was intended to be included in the term "material," and therefore testimony was rightfully received to aid in ascertaining the intention of the parties. It has been said:

"The intention of the parties to a contract is to be determined primarily by the language employed therein, construed in its ordinary meaning. If a provision be fairly susceptible of two meanings, then the general scope and purpose of the entire transaction and all the surrounding circumstances are to be considered in determining which meaning was intended."
Brick Co. v. Gas Co., 82 Kan. 752, syl. par. 2,
109 Pac. 398.

See, also, Brown v. Shields, 78 Kan. 305, 96 Pac. 351; Royer v. Silo Co., 99 Kan. 309, 161 Pac. 654.

The testimony introduced was sufficient to satisfy the referee that the term used was not intended by the parties to include the coal used in the excavation. In the negotiations between the parties the bid appears to have been made upon the theory that coal sufficient for the purpose would be found as the excavation of the tunnel proceeded. The evidence was sufficient to sustain the finding of the court that free transportation for coal was not within the contemplation of the parties in the making of the contract.

Other objections are not deemed to be material, and, finding no error in the record, the judgment is affirmed. All the Justices concurring.

KUNZ v. ALLEN et al. (No. 21478.) (Supreme Court of Kansas. April 6, 1918. Rehearing Denied May 16, 1918.)

(Syllabus by the Court.)

RECOVERY.

The exhibition in a moving picture theater of the photograph of a person taken without the photograph of a person taken without the instincts of nature. It is recognized intuitively, consciousness being the witness that can the publisher's business is a violation of the be called to establish its existence.

Appeal from District Court, Wyandotte County.

Action by Stella Kunz against W. H. Allen and Charles H. Bayne, partners as Allen & Bayne. Demurrer to plaintiff's evidence sustained, and she appeals. Reversed, with directions to overrule the demurrer.

Winfield Freeman, of Kansas City, for Thomas J. White and J. H. appellant. Reeder, both of Kansas City, for appellees.

PORTER, J. While plaintiff was in the dry goods store of defendants for the purpose of making some purchases, the defendants without her knowledge caused moving picture films to be taken of her face, form, and garments, and afterwards procured the films to be developed, enlarged, and used to advertise their business by public exhibition in a moving picture theater in the neighborhood where she lived, by reason of which the petition alleged she became the common talk of the people in the community; it being understood and believed among the people generally that she had for hire permitted her picture to be taken and used as a public advertisement. The answer was a general denial. The court sustained a demurrer to the plaintiff's evidence, and she appeals.

The principal ground upon which it is claimed the demurrer was sustained is that the plaintiff failed to prove any actual damages. This was not necessary. Schaap v. Hayes, 99 Kan. 36, 160 Pac. 977; Pavesich v. New Eng. Life Ins. Co., 122 Ga. 190, 50 S. E. 68, 69 L. R. A. 101, 106 Am. St. Rep. 104, 2 Ann. Cas. 561. In the first case cited, the action was for damages on account of an assault and battery. It was held not necessary in order to make a cause for the jury that any witness should estimate in dollars and cents the extent of plaintiff's suffering. The opinion quoted with approval the following extract from 8 R. C. L. 653:

"It is unnecessary to submit any evidence as to the value of mental and physical pain and suffering and humiliation, and the amount of damages to compensate therefor, since this is a question exclusively for the jury.

Other authorities cited in the opinion are: 8 A. & E. Encycl. of L. 659; 1 Sedgwick on Damages (9th Ed.) § 171a; 1 Bouvier's Law Dictionary (3d Ed.) p. 751.

In the other case cited, the Supreme Court of Georgia ruled:

"The publication of a picture of a person, without his consent, as a part of an advertisement, for the purpose of exploiting the publisher's business, is a violation of the right of privacy of the person whose picture is reproduced, and entitles him to recover without proof of special damage." Syl. 11.

In the opinion it was said:



Each individual as instinctively resents any encroachment by the public upon his rights which are of a private nature as he does the withdrawal of those of his rights which are of a public nature. A right of privacy in matters purely private is therefore derived from natural law." 122 Ga. page 194, 50 S. E. page 69, 69 L. R. A. 101, 106 Am. St. Rep. 104, 2 Ann. Cas. 561.

In another place in the opinion it was said:

"If one's picture may be used by another for advertising purposes, it may be reproduced and exhibited anywhere. If it may be used in a newspaper, it may be used on a poster or a placard. It may be posted upon the walls of private dwellings or upon the streets. It may ornament the bar of the saloon keeper, or decorate the walls of a brothel. By becoming a member of society, neither man nor woman can be presumed to have consented to such uses of be presumed to have consented to such uses of the impression of their faces and features upon paper or upon canvas." 122 Ga. page 218, 50 S. E. page 80, 69 L. R. A. 101, 106 Am. St. Rep. 104, 2 Ann. Cas. 561.

In Munden v. Harris et al., 153 Mo. App. 652, 134 S. W. 1076, the Missouri Court of Appeals held:

"One has the exclusive right to his picture as a property right of material profit, and, unless he has expressly or impliedly consented to its use by others, he may sue at law for damages for the invasion of the right." Syl. 3.

"Where one's exclusive right to his picture is invaded, special damages, though recoverable, if demanded, are not necessary in an action at law for damages, and general damages are re-coverable without a showing of specific loss." Syl. 4.

Some of the witnesses for the plaintiff on cross-examination admitted that the publication of the plaintiff's picture did not have the effect to lessen their esteem for her. It is seriously argued that this evidence conclusively established the fact that plaintiff had not sustained any damage. On the contrary, it merely proved the sincerity of the friendship the witnesses entertained for plaintiff. The court seems to have unduly limited the proof offered by the plaintiff for the purpose of showing that the publication of the picture caused her to be talked about commonly in the neighborhood, but this can be corrected on another trial.

The judgment is reversed, with directions to overrule the demurrer. All the Justices concurring.

KNIGHT v. COSSITT. (No. 21377.) (Supreme Court of Kansas. April 6, 1918. Rehearing Denied May 16, 1918.)

(Syllabus by the Court.)

MASTER AND SERVANT \$\sim 330(3)\to Injury to Third Person\text{-Relation}\text{-Evidence}.

On the trial of an action for damages caus-

ed by a collision between automobiles, the evi-dence introduced proved that a father and his 23 year old son, with the wife of the father, lived together as one family, and that the father

Each individual as instinctively resents any mobile in his private business; that in the encroachment by the public upon his rights absence of the father, and without his knowledge, the son took the automobile to make a trip of his own; that the mother got into the automobile to ride with him; and that an accident then occurred which resulted in an injury to the party bringing the action. Held, that the evidence was not sufficient to establish the relation of master and servant between the father and the son.

> Appeal from District Court, Sedgwick County.

> Action by Clyde E. Knight against Fred J. Cossitt. Judgment for plaintiff, and defendant appeals. Reversed, and judgment rendered for defendant.

> David Smyth and J. W. Smyth, both of Wichita, for appellant. P. D. Gardiner, H. C. Castor, Kos Harris, and V. Harris, all of Wichita, for appellee.

> MARSHALL, J. The defendant appeals from a judgment against him in favor of the plaintiff, for damages sustained by the plaintiff in an automobile collision. The vital question presented is the sufficiency of the evidence to sustain the verdict in favor of the plaintiff. Fred J. Cossitt, with his wife, Carrie C. Cossitt, and his son, Bruce Cossitt, who was 23 years old, lived together as a family. Fred J. Cossitt and Bruce Cossitt together owned an automobile. The automobile was used for family purposes, and was also used by Bruce Cossitt in his business of delivering newspapers in the city of Wichita. When used for family purposes, the automobile, was ordinarily driven by Bruce Cossitt, but it was sometimes driven by Fred J. Cossitt. On October 14, 1915, Bruce Cossitt started with the car to go to the post office to get some mail which he was expecting. His mother went out and got into the car to ride down town. On the way down town the accident occurred for which this action was brought. Fred J. Cossitt was out of the city at the time of the accident, and did not learn anything about it until after his return. He knew nothing about the use of the car on that occasion.

> If Fred J. Cossitt is liable to the plaintiff. it is because Bruce Cossitt was, at the time of the accident, the servant of Fred J. Cossitt. In Halverson v. Blosser, 101 Kan. 683, 168 Pac. 868, this court said:

> "An owner of an automobile is not liable for injuries caused in its operation by others, unless such others were servants or agents of the owner, and acting in furtherance of his business." Par. 1, Syl.

See, also, notes found in 41 L. R. A. (N. S.) 775; 50 L. R. A. (N. S.) 59; L. R. A. 1916F, 223.

Joint ownership of the automobile did not make Bruce Cossitt the servant or agent of his father. "Where one of two partners or and son jointly owned an automobile, which was used for family purposes, and, when so used, was ordinarily driven by the son. The evidence also proved that the son used the autoball of or within the reasonable scope of any partnership business, the other owner is | 4. Homestead &==164-Husband's Interest not liable for damages sustained in a collision through the negligent driving of his co-owner." Par. 1, Syl., Hamilton v. Vioue, 90 Wash. 618, 156 Pac. 853, L. R. A. 1916E, 1300.

A note on the liability arising out of the joint ownership of automobiles is found in L. R. A. 1916E, p. 1301. Bruce Cossitt had the right to use the automobile without his father's consent. When Bruce Cossitt was using the automobile in his own business, he was not the servant of his father. The evidence and the eighth finding of the jury show that Bruce Cossitt was using the automobile for his own purposes when the accident occurred. He started to town on his own business, not for the pleasure or convenience of his mother; she went with him. The only evidence to show that the relation of master and servant existed was that which proved that the mother got into the car to ride down town with Bruce Cossitt. That evidence was not sufficient to establish that fact. Bruce Cossitt's part ownership of the car gave him the right to use it as he saw fit; he could take his mother in the car with him, and not thereby become the servant of his father. It was therefore necessary for the plaintiff to do more than prove the family relation existing between Bruce Cossitt and his father and mother, and to do more than prove that the mother was riding with Bruce Cossitt at the time of the accident. There was no evidence to establish the relation of master and servant, and therefore there was not sufficient evidence to sustain the verdict.

The judgment is reversed, and judgment is rendered in favor of the defendant. All the Justices concurring.

THOMPSON v. MILLIKIN. (No. 21169.) (Supreme Court of Kansas. April 6, 1918. Rehearing Denied May 16, 1918.)

(Syllabus by the Court.)

1. Homestead \$== 118(5) - Conveyance - Join-DER OF HUSBAND.

Upon the facts stated in the opinion, it is held that the instruments relied on by the defendants, affecting the plaintiff's homestead, are void because executed by her alone; the husband not joining therein or consenting thereto.

2. FINDING-EVIDENCE.

The finding that on account of the defend-ant's absence from the state the plaintiff's action was not barred held to be supported by the evidence.

3. HOMESTEAD === 161 - TITLE AND POSSES-

3. HOMESTEAD & 161 — TITLE AND POSSESSION OF WIFE—ABSENCE OF HUSBAND.

The homestead provided for by the Constitution is one occupied as a residence by the family of the owner. The title being in the wife, who remained in possession with her children, the homestead character of the property in question was not destroyed or impaired by the voluntary absence of the husband.

ABANDONMENT.

The fact that the husband entered and proved up on a homestead in Oregon, describing himself as single and unmarried, the law of that state requiring that a homestead be occupied only by some member of a family, did not of itself have the effect to deprive him of his husband's interest in the homestead occupied by the wife and children so as to validate the instruments in question.

5. Homestead 4 122-Action to Establish

ESTOPPEL.

Having in good faith explained to the grantees concerning the long absence of her husband, the plaintiff is not estopped, either by such instruments or by her conduct or acquiescence. from maintaining this action.

6. Cross-Appeal-Error.

The cross-appeal of the plaintiff examined, and found to present no substantial error.

West and Dawson, JJ., dissenting.

Appeal from District Court, Chautauqua County.

Action by Melissa Thompson against William H. Millikin. Judgment for plaintiff, and defendant appeals. Affirmed.

See, also, 93 Kan, 72, 143 Pac, 430,

T. A. Kramer and Geo. J. Benson, both of El Dorado, and W. H. Sproul, of Sedan. for appellant. H. E. Sadler, of Memphis, Tenn., and Tomlinson & Shukers, of Independence, for appellee.

WEST, J. From the findings of fact it appears that the plaintiff, with five children by her first husband, one by her second, and four by her third, resided on lots 7 and 8 of the land in question, a tax deed to lots 5 and 6 being acquired by her in 1897, with her husband, who in 1894 left ostensibly to seek a new location. Correspondence ceased after a year and a half, and she heard nothing further from or of him until 1908, when she learned from a relative his post office address, and sent him by registered mail some photographs of their children, receiving a The registered letter registered receipt. sent thereupon was returned uncalled for-She heard nothing further from him until 1915, when her attorney located him in British Columbia. She was in correspondence with relatives, some of whom knew her husband's address, from 1895 to 1904. but appears to have learned, or attempted to learn, nothing from them concerning his whereabouts. In 1903 she executed an oil and gas lease covering all of the land to L. A. Lockwood, fully informing him as 10 the absence of her husband. In the same year Lockwood gave to Millikin an option for the purchase of the lease, and on the same day Millikin told the plaintiff he was negotiating for this purchase, and at his request she agreed to be at Sedan the next morning and see his attorney. This she did. and fully and frankly answered all the inquiries, stating, in substance, that she did not know where her husband was, and bad

not heard from him for more than seven likin's absence from the state, her action years, that they had had no trouble before he left, and that she knew of no reason why he should leave her. Millikin bought an assignment of the lease, informing Lockwood of what he had learned from the plaintiff touching the absence of her husband. January, 1904, plaintiff executed a quitclaim deed for lots 5 and 6 to G. W. Goss for \$1,000. Goss being advised as to the absence of the husband and accepting the deed without his signature. He afterwards deeded to D. E. Rathbun, retaining an interest in the lease. In April, 1914, Rathbun by warranty deed acquired the rights of the patent holders, if any they had, to these lots, and gave Millikin a lease thereof. In the summer of 1903 Millikin drilled a dry hole on lot 6 about 1,800 feet deep. Before November, 1904, he drilled and equipped 11 wells on the two lots, the equipment being removed before this action was begun. From these wells a large amount of oil was produced, amounting in value, while Millikin erated the property, to about \$57,000. During the first year of development and operation the fences were down, but at the opening of the pasture season of 1906 plaintiff repaired the fences, and has ever since remained in the actual, open, notorious, hostile, and exclusive possession, except as interfered with by the pumping operations and the final junking of the property in 1909. She also kept the taxes paid up when not paid by some one else. March 1, 1900, the husband made a settlement on an Oregon homestead, and lived thereon until 1901, making improvements, and on November 9, 1906, made final proof, receiving a patent on May 22, 1907. The statute of Oregon requires only that some member of the family shall reside upon the homestead. During all the operations on the plaintiff's land she was personally present, had knowledge thereof, made no objection thereto, and boarded some of the men in the employ of Millikin in such operations, and knew that he was expending a large sum of money therein. She never paid or tendered the repayment of the \$1,000 received by her for her deed to lots 5 and 6 of the land in question, nor did she ever question Rathbun's title or right of possession until about the time this suit was begun. In her reply she offered to repay or credit the \$1,000. was expressly found that the plaintiff, the defendant, and his assignee all acted in good faith.

The court reached the legal conclusion that sufficient inquiries were not made to justify a presumption that the husband was dead; that the land was the plaintiff's homestead, and its character as such was not destroyed or impaired by any act or declaration of her or her husband prior to the beginning of this action (June 6, 1910); that the plaintiff is not estopped; that, owing to Mil- and it would certainly be a lamentable re-

was not barred as to time, and that she should recover a fair compensation for the oil taken from the land by Millikin before selling his interests in 1907; that, considering the expense of production, one-tenth of the value of the oil, amounting to \$5,709.15, with interest, less a credit of the \$1,000, should be allowed her, and the plaintiff was given judgment for \$6,415.45.

The defendant appeals, and urges that the land was not the plaintiff's homestead, because it was not the homestead of her husband, who was the head of the family, and who obtained another homestead in 1907; that the plaintiff is estopped by reason of her conduct; that the equities of the case are against her; that the action is barred, and improper evidence was received touching the running of the statute of limitations.

[1-3] We do not find any merit in the last point, and hence must hold that the finding of the court as to bar of the statute was well supported.

The remaining questions to be considered are those of homestead and estoppel, the latter of these embracing the question of the equities of the case.

It is argued that the land is not the plaintiff's homestead because the head of the family acquired another, and one family cannot have two homesteads at the same time. The land from which the oil was produced was that acquired by the plaintiff several years after her husband left, and was added to and became a part of the land on which she continued to reside with her nine children. While it is true that one person or one family may not have two homesteads at one time, it is of importance to note that the homestead provision of our Constitution relates to property "occupied as a residence by the family of the owner." Const. art. 15, § 9; Gen. Stat. 1915, § 3825. Of course it is ordinarily the duty of the wife to take her children and follow the husband when he desires to change the place of family residence, but here we have no evidence that he either requested or desired that the wife follow him to any new location, From the plaintiff's testimony it appears' that after the loss of her first husband and the divorce of the second she bought lots 7 and 8 and moved on the land with her children, and two or three years thereafter she married E. F. Thompson, and shortly after the birth of her fourth child by him he went away. He had frequently gone away for a while and come back. When he left "he said that he was going out West to hunt a home for us, and when he got located that he would send for us." But he neglected to do so. During all the years of his absence the widow with her children occupied the land she had originally purchased, and after 1897 that which she acquired by tax deed,

sult if we were compelled to hold that this, peripatetic husband could by such absence destroy the homestead character of the family residence. In Koons v. Rittenhause, 28 Kan. \*359, it was said:

"In many states the homestead exemption is given to the owner who has a family, or to the head of the family; but in Kansas it is given with special reference to the family, and must be occupied by the family as a residence." 28 Kan. 363.

In Withers v. Love, 72 Kan. 140, 83 Pac. 204, 3 L. R. A. (N. S.) 514, in deciding the homestead rights of a husband who after his wife became insane had been confined in the penitentiary, some of his children still remaining on the land, it was said:

"His voluntary absence would not constitute an abandonment while the homestead continued to be occupied by the family. \* \* " 72 Kan. 150, 83 Pac. 207, 3 L. R. A. (N. S.) 514.

The court repeated what was said in Morris v. Ward, 5 Kan. 239:

"The homestead was not intended for the play and sport of capricious husbands merely, nor can it be made liable for his weaknesses or mis-fortunes. It was not established for the benefit of the husband alone, but for the benefit of the family and of society, to protect the family from destitution and society from the danger of her citizens becoming paupers." 72 Kan. 151, 83 Pac. 208, 3 L. R. A. (N. S.) 514.

Also from Helm v. Helm, 11 Kan. 19:

"The occupation and enjoyment of the estate is secured to her against any act of her husband or of creditors without her consent. If her husband abandons her, that use remains to her and the family. With or without her husband, the law has set this property apart as her home." 72 Kan. 151, 83 Pac. 208, 3 L. R. A. (N. S.) 514.

Again, from Chambers v. Cox, 23 Kan. 393: "Neither is the presence of both husband and wife essential to the existence of a homestead. Though one may have abandoned the other, yet either may have the children to care for and be the head of a family, and occupy a homestead."

22 Kan. 152, 83 Pac. 208, 3 L. R. A. (N. S.) 514.

When this case was here before (93 Kan. 72, 143 Pac. 430) it was pointed out that in the syllabus in Withers v. Love it was ruled that:

"So long as the wife is living nothing the husband alone can do or suffer to be done will estop either of them from claiming the homestead."
72 Kan. 141, 83 Pac. 204, 3 L. R. A. (N. S.) 514.

[4] But we are confronted with the finding that the husband had obtained another homestead in another state, and 21 Cyc. 606, is quoted:

"If the debtor acquires a new domicile or homestead, he thereby loses his homestead rights in the former place of residence. \* \* \*"

Also Atchison Savings Bank v. Wheeler, 20 Kan. 625:

"This is on the theory that a man or the head of a family can have but one homestead at the same time." 20 Kan. 630.

The trouble about this argument is that it is not Eugene F. Thompson who is claiming a homestead right in this land, but the wife, who remained there with her children and and complains that the expense of drilling actually occupied it as a residence. But it is the dry hole was counted in fixing the amount

said that in all his Oregon land proceedings Thompson said he was a single man, and "divorces are too easily obtained to make it necessary, for him to have sworn falsely." It is urged that if his statements were true. and he was a single man, then the plaintiff was no longer a married woman, and his signatures to the leases and deed were not necessary. But competent proof of his divorce is not before us. It is suggested that while an agent and the attorneys of the plaintiff found him and visited and talked wita him, he was not produced, neither was his testimony taken. It might also be observed that the plaintiff did not evince rery much solicitude about learning his whereabouts from his relatives who could have given her information. The one clear fact remains, however, that during the time covered by the transactions involved herein this land was the actual homestead of the plaintiff and her children. It was never abandoned as in Shay v. Bevis Rock Salt Co., 72 Kan. 208, 83 Pac. 202, and in most of the cases therein cited. A homestead cannot be alienated without the joint consent of husband and wife, while that relation exists, and that such relation has in this case ceased to exist has not been shown. Hence so far as the homestead question is concerned there is nothing in the record to overturn the conclusion of the trial court in reference to the land in controversy.

[5] It is forcibly argued that, having been personally cognizant of all the investments made upon the strength of her conveyances and familiar with all the operations thereunder, and having received her price for the instruments she executed, she is equitably estopped now to demand anything further by way of consideration for the oil produced as a result of her lease and deed. To this it is responded that there was no intent to mislead, and that the grantees in the instruments dealt with their eyes open, having inquired of the plaintiff, who told them frankly about her husband's long absence. The claim that she was defrauded was not supported, and the trial court, as already indicated, found that all parties acted in good They were simply left, therefore, in faith. the attitude of buying and selling instruments which were void under the Constitution and statute, and, being void, could convey no rights, and, having no rights, the oil was taken by the defendant wrongfully, or at least without legal compensation. Withers v. Love, 72 Kan. 140, 83 Pac. 204, 3 L. R. A. (N. S.) 514.

The trial court deemed it equitable, in view of the expenditures made and the cost of production, to allow the plaintiff but one-tenth of the value of the oil produced by Millikin, and under the circumstances it is held that this ruling constituted no error of which the defendant can complain.

[6] The plaintiff has filed a cross-appeal,



to be allowed the plaintiff, and for the refusal | 2. NUISANCE -32—PRIVATE NUISANCE—ACto make additional findings and to grant a new trial. We have examined the record. and find no error covered by the cross-appeal of which the plaintiff can justly complain. The judgment is affirmed.

JOHNSTON, C. J., and BURCH, MASON, PORTER, and MARSHALL, JJ., concur. DAWSON, J., dissents.

WEST, J. (dissenting). The plaintiff occupies the anomalous position of asking to recover for what she has already sold the defendant and been paid for. If she were presenting a question of homestead occupancy or right of possession, or even one for the cancellation of a lease or deed, the essential unfairness would not be so apparent. She voluntarily executed the conveyances, she received all she asked therefor, year after year she watched with full knowledge the investment of the defendant's capital on the strength of such conveyances, and because the thing turned out more prosperously than was foreseen, she now seeks to make him pay her all the proceeds, and has been given judgment for a portion thereof. When she executed the instruments she said in effect and in equity that, although they might be void in law, she would treat them as valid. During every day she watched the work she added to such agreement the weight of her acquiescence, a continuing reassurance to the defendant that she would keep her word. Of course the husband might return and sue, or she might die and the children sue, but as for herself the merest and commonest honesty should impel, as the courts should compel, her to keep faith. Neither the doctrine of clean hands nor the decisions of this court hold out a reward under such circumstances. McAlpine v. Powell, 44 Kan. 411, 24 Pac. 353; Sellers v. Gay, 53 Kan. 354, 36 Pac. 744; Adams v. Gilbert, 67 Kan. 273, 72 Pac. 769, 100 Am. St. Rep. 456; and especially Shay v. Bevis Rock Salt Co., 72 Kan. 208, 83 Pac. 202. In the former opinion it was said (93 Kan. 77. 143 Pac. 432):

"Upon a full trial of the facts in this case it may develop that the plaintiff is estopped by her conduct.'

That prophecy has, to my mind, become a reality.

WINBIGLER v. CLIFT.

STATE ex rel. DAY, Co. Atty., v. SAME. (Nos. 21460, 21461.)

(Supreme Court of Kansas. April 6, 1918. Rehearing Denied May 16, 1918.)

(Syllabus by the Court.)

1. Nuisance €==1 - Conduct of Business PRIVATE AND PUBLIC NUISANCE.

A business may be conducted under conditions which will constitute it a private as well as a public nuisance.

TION FOR INJUNCTION-DEMURRER TO PETI-TION.

On the facts stated in the opinion, it was error to sustain a demurrer to the petition in a suit brought by an individual to enjoin the keeping of a horse and mule market in close proximity to his residence.

S. Nuisance & 84 — Public Nuisance — Horse and Mule Market.

In an action by the state on the relation of the county attorney, it is held that the evidence was sufficient to justify a finding that a horse and mule market conducted by the defendant constituted a public nuisance.

Appeal from District Court, Harper County.

Action by C. W. Winbigler against John Clift to enjoin a private nuisance. Demurrer to petition sustained, and plaintiff appeals. Reversed and remanded, with directions to overrule the demurrer. Action by the State. on the relation of Vernon Day. County Attorney, against John Clift, to enjoin a public nuisance. Judgment for plaintiff, and defendant appeals. Affirmed.

Donald Muir and E. C. Wilcox, both of Anthony, for appellants. George E. McMabon, of Anthony, and Donald F. Reed, of Harper, for appellees.

PORTER, J. These cases involve substantially the same facts, and have been submitted together. In the first Dr. C. W. Winbigler seeks to enjoin as a private nuisance the maintenance of a horse and mule market across the street from his residence in the city of Harper. The court sustained a demurrer to his petition, and he appeals. The second suit was brought by the state on the relation of the county attorney to enjoin the defendant from maintaining the place on the ground that it constitutes a public nuisance. The court found against the defendant, and ordered the nuisance abated, from which judgment he appeals.

The petition of Dr. Winbigler to which the court sustained a demurrer alleges that he owns and resides in a dwelling house on three lots in the city of Harper situated in one of the desirable residence districts; that the defendant is the owner of a half block immediately east of the plaintiff's residence. separated by a street 60 feet wide, upon which the defendant maintains a horse and mule market, and that for several months he has maintained a corral or pen extending to the street in the direction of the plaintiff's residence, in which he keeps and feeds from 50 to 150 mules and horses, permitting them to remain there for such a length of time that manure and filth accumulates in great quantities, causing a noxious stench to permeate plaintiff's dwelling, injuring the health of the plaintiff and his family, and depriving them of the comforts of his home; that the filth attracts large swarms of flies, which infest plaintiff's home; that the horses and mules are visible from the living room of the plaintiff's residence, and are constantly indulging in unsightly practices, by reason of which plaintiff's home is rendered almost uninhabitable.

[1] The demurrer was sustained solely upon the ground that the petition shows a public nuisance, and that the plaintiff has no right to maintain a suit to abate it. The principal case relied upon in support of the ruling is Jones v. Chanute, 63 Kan. 243, 65 Pac. 243, which was an action to abate a nuisance caused by filth flowing from a hotel into an open sewer, and where it was held that owners of property along the sewer could not maintain an injunction. A more recent case relied upon by defendant is Dryden v. Purdy, 97 Kan. 59, 154 Pac. 221, where the plaintiff sought to enjoin the proprietor of a livery stable from placing buggies in the street in front of his house; his contention being that he suffered annoyance and inconvenience in a manner different from that of the general public, because the vehicles interfered with his view of the public street. It was held that he failed to show that he suffered inconvenience different in kind from that of the public, and that the action could not be maintained.

In Venard v. Cross, 8 Kan. 248, the opinion quotes from Ashby v. White, 1 Smith, Lead. Cas. 364, where it was said:

"There are cases in which the act done is a grievance to the entire community, no one of whom is injured by it more than another in the kind of injury, though one may be much more injured than another in degree. In such a case the mode of punishing the wrongdoer is by indictment, and by indictment only. Still, if any person has sustained a particular injury therefrom, beyond that of his fellow citizens (and differing in kind), he may maintain an action in respect of that particular damnification." Page 255

Nuisances are sometimes private as well as public, and we think the nuisance complained of here was both.

"The number of persons who are specially injured by a nuisance does not affect the right of action for such injury, or make their injury identical with that of the public at large, but any of such persons may maintain an action for the nuisance; and the fact that several persons join in a suit to abate a public nuisance does not show that each of them may not have sustained such special injury as entitles him to relief." 29 Cyc. 1213.

In Stotler v. Rochelle, 83 Kan. 86, 109 Pac. 788, 29 L. R. A. (N. S.) 49, the plaintiff sought to enjoin the maintenance of a cancer hospital on property adjacent to her residence, and because her family was frequently subjected to the annoyance of seeing patients afflicted with the disease walking about the premises, and because there was evidence that offensive odors resulting from the disease itself, and from disinfectants used on account of it, might reach the occupants of neighboring dwellings, it was held that the plaintiff had such a peculiar interest in the relief sought as to enable her to maintain the action. It was said in the opinion:

"The injury need not extend beyond annoyance, if in view of all the facts it is unreasonable. For instance, offensive odors, although not injuries to health, have often been held to constitute sufficient ground for injunction." 83 Kan. 88, 109 Pac. 789, 29 L. R. A. (N. S.) 49.

See, also, State v. Lindsay, 85 Kan. 79, 116 Pac. 207, 35 L. R. A. (N. S.) 810, where the court enjoined the maintenance of a private hospital for insane on the ground that the character of the inmates caused fear, and disturbed the quiet and peace of the community.

[2] There is some conflict in the decisions upon the question, but each case depends largely upon its own facts. Broadly speaking, in order to constitute a private nuisance the individual complaining must suffer annoyance or inconvenience different in kind from that sustained by the public generally, and not merely in a different degree. In this case the petition alleged facts which, in our opinion, showed the existence of a private nuisance as well as one that might upon the same facts constitute a public nuisance. By reason of the close proximity of plaintiff's residence to the place where the defendant carried on the business in the manner alleged in the petition, not only the health of plaintiff and his family was endangered, but unbearable conditions were shown which must naturally have caused the plaintiff's family to suffer annoyance differing not alone in degree, but in character, from that sustained by the public generally. The petition stated a cause of action, and it was error to sustain the demurrer.

[3] In the case brought by the state on the relation of the county attorney, the court made findings of fact. No good purpose would be served by setting out the findings in full. The court finds the conditions to be practically the same as those alleged in the petition in the case brought by Dr. Winbigler, and finds that a large number of people residing in the vicinity are injuriously affected by the maintenance of the corral, and that the stench arising therefrom is distributed over the neighborhood. The findings show there are no residences on the east half of the block in which defendant's business is conducted; but that immediately west of his property there are four residences, including that of Dr. Winbigler, and in the block north of that there are four others. The findings show that the conditions resulting from the manner in which defendant's business is carried on constitute a public nuisance. There was abundant evidence to sustain the findings. As already observed, notwithstanding the fact that a business may be conducted in a manner so that it constitutes a private nuisance to one or more individuals, it may at the same time constitute a public nuisance.

The defendant objected to the introduction of an affidavit made by Dr. Hays, county health officer, which was intended for use

in the Winbigler Case. Dr. Hays was confined to his house with sickness at the time the affidavit was made, and died before the case brought by the county attorney was tried. While not taken for use in this particular case, it related to the facts about which the court was investigating, and was used on the motion for a temporary injunction, where affidavits are competent. We do not regard the matter as of much importance, for the reason that the case was tried by the court. and there was sufficient evidence aside from the affidavit to support the findings and judgment. It is claimed the court erred in allowing the probate judge to testify in rebuttal and state the testimony given by the defendant on the hearing for a temporary restraining order in the other case. The testimony which the defendant gave in the other case was competent against him as showing declarations or admissions against interest; and besides, the testimony of the probate judge which related to the number of mules kept at the place was largely cumulative.

Before the court announced its decision the defendant requested additional findings and submitted a number of special interrogatories, asking the court to answer them. Of course, the court was not required to answer special interrogatories. Lumber Co. v. Russell, 93 Kan. 521, 144 Pac. 819. The findings made were very full and complete, and the refusal to state the additional findings could not have been prejudicial to defendant.

In the Winbigler Case the judgment is reversed, and the cause remanded, with directions to overrule the demurrer. The judgment in the case brought by the state is affirmed. All the Justices concurring.

STATE ex rel. BRASHEAR v. DISTRICT COURT OF SECOND JUDICIAL DISTRICT IN AND FOR SILVER BOW COUNTY et al. (No. 4200.)

(Supreme Court of Montana. April 19, 1918.) 1. Intoxicating Liquors \$\infty 279-\text{Nuisance} -Injunction-Contempt-Proof.

In contempt proceedings for violation of an injunction pendente lite against a liquor nuisance, issued ex parte on an allegation in the complaint on which issue has not been joined that defendent was the owner of the contempt of the conte that defendant was the owner or manager of the place, the order for injunction cannot be taken on certiorari, as adjudication of the fact alleged.

-INTOXICATING LIQUORS &= 279-NUISANCE
-INJUNCTION-CONTEMPT-EVIDENCE.
In contempt proceedings for violation of an injunction restraining defendant, as owner of a saloon, from selling liquor to women therein, evidence held insufficient to show defendant was owner or manager or in authority over the place.

Original proceedings by the State, on the relation of Pansy Brashear, against the District Court of the Second Judicial District in and for Silver Bow County and Jeremiah J. for, any drinks. She directed nothing, suf-

Lynch, judge thereof, to annul an order of such court finding relatrix guilty of contempt for violating an injunction. Order annulled.

Canning & Geagan, of Butte, for relator. Jos. R. Jackson, N. A. Rotering, Frank L. Riley, and A. C. McDaniels, all of Butte, for respondents.

SANNER, J. Under and by virtue of chapter 95, Session Laws of 1917, the district court of Silver Bow county issued an injunction pendente lite, restraining Pansy Brashear, as owner, agent, or manager, Thomas L. Carson, as record owner, and J. A. O'Neil. as reputed owner, from suffering or permitting the use of a certain saloon and dance hall near Butte, known as "O'Neil's Place." as a place where female persons are permitted to be and remain for the purpose of being there supplied with intoxicating liquor. This order was made without notice upon a verified complaint filed on behalf of the state of Montana by the county attorney of Silver Bow county, and together with the summons and a copy of the complaint was served upon Brashear. Thereafter an affidavit was filed, averring that Brashear, notwithstanding said order which was then in full force and effect, did on January 27, 1918. suffer and permit female persons to be and remain in said place for the purpose of being supplied with liquor, and who were so supplied, and asking that she be cited to show cause why she should not be punished for contempt. A citation issued. Brashear appeared and entered a plea of not guilty. A hearing was had, witnesses were sworn and examined, and it resulted in a final order, made on March 4, 1918, adjudging that Brashear had been guilty of contempt as charged, and that she should pay a fine of \$200, or, in default of such payment, be confined in the county jail of Silver Bow county one day for each \$2 of such fine.

[1, 2] This order Brashear seeks to have annulled, upon the ground that no substantial evidence was presented to support it. We think her contention is sustained by the record, and in effect admitted by the briefs of respondents. The injunction order issued ex parte upon the allegation of the complaint. still subject to joinder of issue, that she was an owner or manager of the place, was not and could not be an adjudication of that fact for the purposes of this proceeding. She was enjoined from "suffering or permitting" the use of the place for the prohibited purpose. and by no stretch of the imagination could she be guilty of violating the order, that is, of "suffering or permitting" such use unless, as a person in authority over the place, she had the power to "suffer or permit." That this was the case does not appear. She nelther solicited, sold, served, or received pay

fered nothing, permitted nothing, so far as | the conduct of the place was concerned. She was there apparently as others were there, and drank as others drank. One witness. asked: "Who runs the place, if you know?" answered, "Why, so far as I know, Miss Brashear runs it." How far he knew we are not advised, further than that he says, "I saw her buy a drink, and she didn't offer to give any money in payment for it." This is absolutely all, and to call it "clear proof" sufficient to justify adjudication in contempt would require a different standard of judgment than any that has yet found favor with courts.

The order complained of is annulled.

BRANTLY, C. J., and HOLLOWAY, J., concur.

STATE ex rel. VAN et al. v. DISTRICT COURT OF FOURTEENTH JUDICIAL DISTRICT IN AND FOR WHEATLAND COUNTY et al. (No. 4196.)

(Supreme Court of Montana, April 19, 1918.)

1. Ball. \$\leftharpoonup 77(1)\text{-Bonds-Powers of Court.} Since the Code contains no other provisions regarding forfeiture of bail bonds and proceedings for collection of penalties than Rov. Codes, \$\$ 9467-9478, those alone define the court's power, and are the exclusive guide as to mode of exercising it.

2. Bail \$\sim 82 - Bonds - Collection from SURETIES,

Under Rev. Codes, \$\$ 9468, 9471, authorizing summary judgment of forfeiture of bail bond, and authorizing proceedings to be taken to re-cover judgment against the sureties, the court is wholly without power to render judgment summarily against sureties on bail bonds.

3. CEBTIORARI \$\infty\$5(1)—EXISTENCE OF OTHER REMEDY—"JUDGMENT IN ACTION OR SPECIAL PROCEEDING IN DISTRICT COURT."

Certiorari is the proper remedy of sureties on a bail bond against whom summary judgment has been entered, since, though the judgment is final, it is not "a judgment in action or special proceeding in the district court," appealable under Rev. Codes, § 7098, and there is no other plain, speedy and adequate remedy, which, under section 7203, would preclude certiorari. tiorari.

Certiorari by the State, on relation of Oliver and Anna Van, to the Fourteenth Judicial District Court of Wheatland County and John A. Matthews, Judge, to annul a judgment. Judgment annulled.

Thos. M. Murn, of Baker, for relators. L. D. Glenn, of Harlowton, for respondents.

BRANTLY, C. J. Certiorari. On July 11, 1917, one Roderick K. McLeod was charged by information by the county attorney of Wheatland county with the crime of arson in the first degree. He was then confined in the county jail. Later he was released on bail in the sum of \$2,000; the relators herein becoming his sureties. After one or more postponements, his trial was fixed for January 16, 1918, but he failed to appear according to the condition of his bond. Thereupon the court declared his bond forfeited and summarily rendered and caused to be entered judgment against the relators for the amount thereof. This proceeding was thereupon instituted by them to have the judgment annulled on the ground that the court was without jurisdiction to render it.

[1, 2] The procedure for the forfeiture of bail bonds, the fixing of the liability of the sureties, and the enforcement of the collection of the amount of the penalty are found in article 7, of chapter 1, title 12, of part 2 of the Revised Codes. Since the Codes contain no other provisions on the subject, those found in this chapter must be looked to by the courts as defining the extent of their power and as the exclusive guide as to the mode of exercising it. The provisions pertinent here are found in sections 9468 and 9471, which are as follows:

"Sec. 9468. When any person under bond or undertaking in any criminal action or procoeding, either to appear and answer, or to prosecute an appeal, or to testify in any court, fails to perform the condition of such bond or undertaking, his default must be entered in the mintaking, his default must be entered in the min-utes, and judgment entered against him for the amount of such bond or undertaking, and pro-ceedings may be taken to recover judgment against any or all of the sureties thereto in any court having jurisdiction."

"Sec. 9471. If the forfeiture is not discharged,

as provided in this article, the county attorney may at any time proceed by action only against the bail upon their undertaking."

The former section in express terms authorizes the summary entry of judgment against the person under bail when he has incurred forfeiture, but with regard to the sureties goes no further than to authorize proceedings in any court having jurisdiction. The latter authorizes the county attorney to proceed against the sureties by action only, if the forfeiture has not in the meantime been discharged as provided elsewhere in the chapter. Section 9469. In view of these explicit provisions, the court was wholly without power to render the judgment summarily.

[3] No question is presented as to whether the relators have invoked the proper remedy. It is clear, however, that an appeal does not lie, because, though the judgment is final, it is not "a judgment entered in an action or special proceedings commenced in a district court, or brought into a district court from another court." Revised Codes, § 7098. Neither is there any other plain, speedy, and adequate remedy. Rev. Codes, § 7203. Certiorari is therefore the proper remedy.

The judgment is annulled.

For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

SANNER and HOLLOWAY, JJ., concur.

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CHICAGO, M. & ST. P. RY. CO. v. POLAND, County Treasurer, et al. (No. 3882.)

(Supreme Court of Montana. March 25, 1918.)

1. Railboads €⇒178—Special Assessments
—Railway Easements—Sale.

If railway right of way easement or the land subservient thereto could be lawfully assessed for adjacent street paving, the character of its use would not necessarily prevent sale

for failure to pay the assessment. 2. MUNICIPAL CORPORATIONS \$\infty 425(3)\$—Assessments — Railroad Right of Way — "Lot or Parcel of Land."

A railroad right of way is subject to assessment for special improvements under Laws 1913, c. 89, for, under section 14, the term "lot or parcel of land" is deemed to include a railroad right of way held as an easement.

A railroad right of way easement over a public street is a mere incorporeal hereditament, or naked right of passage shared by the rail-road with the general public, because impressed upon an open street, the fee to which is in the public.

4. MUNICIPAL CORPORATIONS 4-429 - SPE-CIAL ASSESSMENTS—RAILWAY EASEMENTS—"ABUTTING UPON STREET."

That part of a railroad right of way easement crossing diagonally over public street was not assessable for paving such street, under Laws 1913, c. 89, § 14, by the foot frontage method of assessment, since the easement could not abut upon anything.

5. Municipal Corporations 429-Special ASSESSMENTS—RAILWAY RIGHT OF WAY-

"ASSESSMENTS—RAILWAY RIGHT OF WAY—
"ABUTTING UPON STREET."

That part of a railroad right of way crossing diagonally over public street was not assessable for paving such street, under Laws 1913, c. 89, § 14, by the foot frontage method of assessment, since the land did not abut on the street, but was a part of it.

6. MUNICIPAL CORPORATIONS 425(3)—SPECIAL ASSESSMENTS—RAILWAY EASEMENTS—"PROPERTY OWNED OR CONTROLLED."

That part of a railroad right of way crossing disoppelly over public street was not as

ing diagonally over public street was not assessable for paving such street, under Laws 1913, c. 89, § 14, since the land was not "property owned or controlled" by the railroad, as is prerequisite to assessment, but by the public.

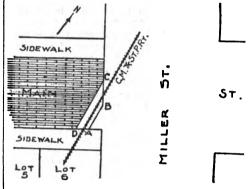
Appeal from District Court, Fergus County; Roy E. Ayers, Judge.

Suit by the Chicago, Milwaukee & St. Paul Railway Company against Rufus G. Poland. Treasurer of Fergus County, and another. Decree for plaintiff, and defendants appeal. Affirmed.

Oscar O. Mueller, of Lewistown, and I. B. Kirkland, of Spokane, Wash., for appellants. Rudolf Von Tobel, of Lewistown, for respondent.

SANNER, J. Appeal from a judgment enjoining the sale of certain property for a delinquent special improvement district assessment. The material facts are: That under the authority of chapter 89, Session Laws 1913, the city of Lewiston created special im-

paving Main street to where it intersects Miller street and the Chicago, Milwaukee & St. Paul Railway crossing at that point; the exterior boundaries of the district include such intersection and they mark the end of the paving in that direction; the basis adopted for apportioning the cost of the improvement was front footage, and the respondent declined to pay the assessment levied against the property here involved; that property is in and is a portion of Main street, but it is impressed with an easement in favor of the respondent, for railway right of way, and the question presented is whether this tract is subject to the sale herein proposed. The situation is shown by the following sketch, the tract A. B. C. D. being the bone of contention:



A noticeable feature of the case is that the subject of the proposed sale is the tract A, B, C, D itself, not the easement or right of way enjoyed by the respondent, and the respondent contends, as the district court held, that the sale is not permissible because: (a) Neither the tract itself nor the respondent's interest therein borders or abuts upon the street; (b) the property assessed and sought to be sold is not owned or controlled by the respondent; (c) the continuous service of a railroad is of such paramount public importance that a portion of the right of way cannot be sold to pay an assessment of this kind.

[1] By section 14 of the act relating to special improvement districts (chapter 89, supra) one of two methods of assessment for paying the cost of the improvements may be pursued, viz. by area, the city assuming or not, as it chooses, the cost of the street and alley intersections, or by foot frontage, apportioning the cost to each lot or parcel of land within the district "bordering or abutting upon street or streets whereon or wherein the improvement has been made." city chose the latter method, and if, pursuing it, the property here involved could be lawfully assessed, we see nothing in the fact that it is occupied by a railway which would necessarily prevent its sale upon failure to provement district No. 9 for the purpose of pay the assessment. Northern Pac. Ry. Co.

v. Richland County, 28 N. D. 172, 148 N. W. 545, L. R. A. 1915A, 129, Ann. Cas. 1916E. 574. What use the purchaser could make of it need not be considered.

[2-4] The choice allowed the municipality by the provisions of section 14 is apparently unrestricted; but in reality this is not so. For the purposes of the act, the term "lot or parcel of land" is deemed to include a railroad right of way held as an easement: so doubtless, the respondent's right of way was subject to assessment. But the easement, assuming that it and not the tract is offered for sale, is not and cannot be anything more than a mere incorporeal hereditament, a naked right of passage which the respondent shares with the general public, because it is impressed upon an open street, the fee to which is in the public; hence to say that this easement could be assessed is an altogether different thing from saying that it could be assessed in the particular mode here pursued. The available method of assessing any "lot or parcel of land," however defined, is of necessity limited by its character or situation; and just how an easement such as this can be said to border or abut upon the street or anything else, it is impossible to conceive. Its situation is similar to that of a lot located away from Main street. Such a lot could have been included in the district and assessed for part of the cost of paving, but not in this way; so here the nature of the property subject to the assessment precluded the use of the front foot method. South Park Com'rs v. C., B. & Q. Ry. Co., 107 Ill. 105.

[5] Considering, however, that it was the tract itself, not the easement, which was assessed and assuming that it could be assessed upon some basis, then to support this particular levy we should be obliged to hold that part of the street itself abuts upon the street, and this involves, as the trial judge remarked, "a legal solecism." South Park Com'rs v. C., B. & Q. Ry. Co., supra; Holt v. City of East St. Louis, 150 Ill. 530, 37 N.

[6] Finally, realizing that the tract itself is assessed and offered for sale, the fact that it is part of the street becomes an insuperable obstacle. As such it is not and cannot be "property owned or controlled" by the respondent; it is owned by the public, under the exclusive control of the city and thus not the kind of "lot or parcel of land" authorized by the act to be assessed. Nor is there anything in the act to warrant the view that the city can be authorized to sell a part of its own street for the purpose of paying an assessment of this character.

We are convinced that the conclusion of the district court was correct, and, accordingly, the judgment is affirmed.

Affirmed.

BRANTLY, C. J., and HOLLOWAY, J., concur.

KELLEY et ux. v. SMITH et al. (No. 14476.) (Supreme Court of Washington. April 26, 1918.)

1. Reformation of Instruments €==23 -MORTGAGES-ESTOPPEL.

Where the owner of lots contracted to pay a lump sum for their excavation to contractors who had excavated the adjoining streets for the city, giving mortgages on the lots in payment for their excavation, the owner is estopped to show, in a suit to reform the mort-gages, that he thought he was contracting with reference to the established grade, whereas he was being charged for a more expensive excavation ordered by the city, but unauthorized by the ordinance and contracts.

2. EVIDENCE 4319(10)—PAROL EVIDENCE—MORTGAGES—CONSIDERATION.

Under a mortgage given upon lots in payment for their excavation, parol evidence is inadmissible to diminish the stated amount of the indebtedness, in the absence of allegations of fraud or mistake.

Department 2. Appeal from Superior Court, King County; John S. Jurey, Judge. Action by James T. Kelley and wife against Grant Smith and another. Judgment for plaintiffs, and defendants appeal. Reversed.

Preston & Thorgrimson, of Seattle, for appellants. James Kiefer, of Seattle, for respondents.

HOLCOMB. J. This action is waged by respondents to adjust, settle, and determine the amount due upon two certain mortgages alleged to have been executed in ignorance on the part of the mortgagors of the correct and legal amounts for which the mortgagors were liable at the time the mortgages were given. In effect the action is for the purpose of reforming and altering the mortgages upon the grounds stated. The court granted the relief prayed.

Respondents are the owners of two parcels of lots on two block corners about three blocks apart in the Denny-Hill regrade district in Seattle. In August, 1917, the city of Seattle entered into a contract with the Rainier Development Company for the grading down of the streets in this district, which also provided for the excavation of private lots at the same time as the streets were cut down, contracts for such work to be entered into on demand of the contractors. This contract was afterwards assigned by the Rainier Development Company to Grant Smith, W. E. Hauser, E. V. Hauser, and S. J. Stillwell, co-partners doing business under the firm name of Grant Smith & Co. & Stillwell, who started work on the regrade in 1908. At the time of commencing work the contractors mailed notices to the various property owners, requesting them to enter into contracts for the excavation of their respective parcels of property, the proof showing that such notice was mailed to respondent James T. Kelley, who at that time lived in the Yukon Territory near Dawson. On



March 12, 1909, a form of contract was sent owner of private property within the district Mr. Kelley for signing, which he refused to be assessed for this improvement who may desire said property to be excavated, that said owner shall have the right and privilege to demand that the contractor for this improvement around his respective pieces of property, leaving them standing some 100 feet above the street grades. In September, 1910, about a year after the contractors had finished excavation in the neighborhood of respondents' part of the land, Kelley came to Seattle. Contracts were then entered into for the excavation of the property, which, as shown by the copy attached to respondents' bill of particulars, provided, among other things, as follows:

"The said owners shall pay the contractors, as payment in full for the work herein provided for, the sum of \$6,200."

The two contracts were the same, excepting that the other one was for the sum of \$6,100, and covered the other parcel of lots. Work was immediately prosecuted under these contracts, and the excavation completed on one piece in December, 1910, and on the other in January, 1911. Statements of the amounts due were then sent Mr. Kelley, who had returned to Dawson, and mortgages for the respective sums of \$6,100 and \$6,200. in settlement of the amounts due, were executed by himself and wife under an option in the contracts providing therefor, the contracts containing a provision that, if the property owners did not desire to pay cash, they could, within 30 days, give mortgages payable in ten annual installments, with 7 per cent. interest per annum.

To the complaint as amplified by bill of particulars, a demurrer was interposed and overruled, and thereupon an answer was filed, which, after making certain admissions and denials, pleaded three affirmative defenses: (1) A defect of parties, in that all the parties to the original contracts were not made parties to the case; (2) the statute of limitations as to all payments made on the mortgages prior to December 1, 1913; and (3) estoppel.

[1] Without noticing the first two affirmative defenses urged by appellants, we will pass to the right of respondents to recover at all. The theory of respondents is that they are entitled to the relief which certain property owners obtained by virtue of the decision of this court in the case of Atwood v. Smith, 64 Wash, 470, 117 Pac. 393, holding that it was ultra vires for the city of Seattle to attempt to change the established slopes under the ordinance and contracts for the regrading of the streets and abutting property of which respondents' property is a part. The ordinance requiring the work to be done was upon a property owner's petition, and the petition and the ordinance ordering the work to be done contained the provision:

"That the city of Seattle in entering into a contract for the performance of said improvement shall insert therein a provision, for and for and shall excavate said property at the same time as the abutting streets are excavated and at a cost per cubic yard not to exceed the price paid by said contractor for excavating the streets and avenues embraced in the contract, and said contractor shall be required to enter into a con-tract with said private owners for the performance of said excavation in accordance with the terms and conditions herein provided."

Subsequent to the making of the contract the city endeavored to change the slopes of the public excavation from a 1 to 1 slope to a 1 to % slope; the effect of such action being to increase the cost of the private excavation. It is alleged and shown by evidence that, at the time the change was attempted and at the time the litigation was begun in the Atwood Case in May, 1910, and up to the time of signing the contracts and mortgages and thereafter, the respondents were residents of Yukon Territory, and knew nothing of the change of slope or litigation: that at the time the contracts were entered into, September, 1910, the case of Atwood v. Smith had not been tried in the lower court, much less decided by this court, and that little or no publicity had been given to the attempted change of slope. It is therefore the contention of respondents that they contracted for the excavation of their lots at a price which is substantially that of the 1 to % slope price; that it was the intention of the property owners who petitioned for this work, and of the municipal authorities, to place all property owners in the district whose property should require excavation to bring it down to a practicable and usable level upon the same basis. They further contend that the property owners' petition operated as a contract between the city and the property owners, as to the manner and method of doing the work and particularly as to the amount of the excavation under the contract; and the respondents, having contracted in ignorance of the attempted change in their rights, are entitled, before final payment of the mortgages securing the contract price, to maintain this action to assert their rights under the petition and ordinance and general city contract. They contend that it is settled and established law in this state that no one can be estopped of his rights unless he acts in knowledge of such rights, citing Stahl v. Schwartz, 67 Wash. 25, 120 Pac. 856, and Bardsley v. Sternberg, 17 Wash. 243, 49 Pac. 499. We are of the opinion that the situation brought about by the decision of Atwood v. Smith, supra, has no bearing whatever upon this case. To grant the relief prayed by respondents means nothing else than to reform and modify, not only the mortgages, but the previous contracts which had been fully executed and performed by appellants and merged in the mortgages. on behalf of and to the use and benefit of any Respondents, acting through James T. Kelhis wife, made the contracts on which these mortgages are based in Seattle after having been there at least a day or two, contracting for lump sums to be paid for the excavation of all of the parcels of lots instead of unit prices for so much yardage as might be required to be removed. He had refused to contract in any way for the excavation of their property at the same time as the abutting streets were excavated, as provided by the ordinance and the original property owners' petition. At that time he would have had the right to have the contract provide for "a cost per cubic yard not to exceed the price bid by the contractor for excavating the streets and avenues embraced in the contract," and as decided in Atwood v. Smith, supra, on the plans and specifications adopted by the city requiring a 1 to 1 slope.

[2] A very similar case is that of Union Mach. & Supply Co. v. Darnell, 89 Wash. 226, 154 Pac. 183, where it was held that, where a mortgage, complete and unambiguous in its terms, was given by a failing debtor to secure four certain notes specifically described in the mortgage, the recital of the amount and character of the debt is unvulnerable to parol attack in the absence of fraud or mistake, and it is incompetent to show by parol that, as additional consideration for giving the mortgage, the mortgagee by a contemporaneous parol agreement undertook to pay the sum of \$1,000 upon the indebtedness of the mortgagor to a third person, since it varies the written contract by adding new terms and creating new burdens. It was there said:

"We have been cited to no authority, and know of none, holding that, where a mortgage is given to secure a certain indebtedness spe-cifically described therein, the character and cifically described therein, the character and components of which are known and admitted, it is competent, without any allegation of fraud or mistake, to prove that, by a contemporaneous parol agreement, it was intended to secure a debt of a wholly different origin and character, or an additional sum to be advanced by the mortgagee as an additional consideration for the mortgage. Much less is it competent to prove that, by such an oral agreement, an additional sum was to be paid as an additional consideration without any intention that it should be secured by the mortgage. Such proof in either case would not be proving the consideration. ther case would not be proving the considera-tion merely, but varying and enlarging the contract by adding new terms and conditions and creating new burdens."

So in this case the object of respondents is to diminish the amounts stated to be the indebtedness of their mortgages, varying the contract, and without any allegation of fraud or mistake. "It is a universal rule that the written contract itself must be resorted to as the source of authority for receiving parol evidence; and where, as here, the contract shows a deliberate agreement complete in itself and formally executed, parol evidence to enlarge its scope or vary its terms is never admissible." Allen v. Bank, 76 Wash. 51,

ley for himself and as attorney in fact for | 135 Pac. 621. See, also, Gordon v. Parke & Lacy Mach. Co., 10 Wash. 18, 38 Pac. 755; Costello v. Bridges, 81 Wash. 192, 142 Pac. 687, L. R. A. 1915A, 853; Farley v. Letterman, 87 Wash. 641, 152 Pac. 515; Tacoma Mill Co. v. N. P. R. Co., 89 Wash, 187, 154 Pac. 173. "Reformation of an instrument for mutual mistake will not be granted unless the evidence is clear and convincing that the writing was not what the parties intended and that the mistake was mutual." Moore v. Parker, 83 Wash. 399, 145 Pac. 440 (syllabus). See, also, Anderson v. Freeman, 88 Wash. 608, 153 Pac. 307; Bruce v. Grays Harbor Drug Co., 68 Wash. 668, 123 Pac. 1075. "If the ground upon which its exercise is invoked be a mistake, as in the present case, a mistake on one side will not be sufficient. It must be a mutual one. Not only must a mutual mistake be shown, but the precise agreement which the parties intended, but failed, to express, must be proven" by evidence clear and convincing. Miller v. Stuart, 107 Md. 23, 68 Atl. 273.

The pleadings do not allege any mutual mistake or fraud, and none was proven. Respondents have no more right to recover in this form of action than they would have to recover the payments which they made: or. if they had paid the entire amount of the contracts in cash instead of availing themselves of the option to give mortgages for the amounts due thereunder, to recover the cash paid for the performance of the contract.

The decree must be reversed.

Reversed.

ELLIS, C. J., and CHADWICK, MOUNT, and PARKER, JJ., concur.

## STATE v. MURPHY.

(Supreme Court of Washington. April 25, 1918.)

1. CRIMINAL LAW 1036(2) — APPEAL — PRESERVATION OF EXCEPTIONS.

No objection having been made to cross-examination at the time of the trial, the question whether it extended beyond proper limits can-not be raised for the first time on appeal.

2. CRIMINAL LAW \$\infty\$=1036(2) — APPEAL — PRESERVATION OF EXCEPTIONS.

In the absence of objection to impeachment of the accused upon a collateral matter, alleged error in permitting such impeachment cannot be reviewed on appeal.

Arson \$=12-Criminal Law \$=814(20)-

DEGREES OF OFFENSE—INSTRUCTIONS.

One accused of setting fire to a building in the nighttime, while more than one person was in such building, if guilty, was guilty of arson in the first degree, so that it was not error to refuse to submit arson in the second degree. as the law does not warrant an instruction covering an included crime, when there is no evidence to sustain it.

Appeal from Superior Department 1. Court, King County; Mitchell Gilliam, Judge. James Murphy was convicted of arson in the first degree, and from such judgment, and

an order overruling a motion for new trial, he appeals. Affirmed.

Thomas Byron MacMahon and Tucker & Hyland, all of Seattle, for appellant. Alfred H. Lundin, Everett C. Ellis, and Joseph A. Barto, all of Seattle, for the State.

MAIN, J. The defendant in this case was charged by information with the crime of arson in the first degree. The trial in the superior court resulted in a verdict of guilty as charged. A motion for new trial being made and overruled, the defendant appeals.

From the evidence in the case the jury had a right to believe that about the hour of 10:30 o'clock on the night of August 17, 1916. the appellant was seen in front of Pier 2 in Seattle, Wash. He was observed to throw something against a window in the front of the building. Immediately thereafter the sound of crashing glass was heard and a flash of flame was seen. The building took fire, but before any great damage was done this was extinguished. After throwing the missile, appellant started away at a rapid walk, and had proceeded but a short distance when he was called upon by a police officer to halt. After being summoned to halt, the appellant pulled a loaded revolver from his pocket and aimed it at the officer. After placing appellant under arrest, the officer caused him to proceed into the building into which the missile had been thrown, where the officer directed a person then in the building to telephone the fire and police departments of the city.

[1] Upon the trial no witness testified in behalf of the appellant, except himself. His testimony was brief, consisting of only a few questions, in the course of which he denied throwing anything against, or doing any damage or injury in any way to, Pier 2. The cross-examination of the appellant was somewhat extensive and covers a considerable range. The first assignment of error is based on the claim that the court erred in permitting this cross-examination. In the answer brief of the respondent it is stated that there was no objection in the lower court to such cross-examination. No reply brief has been filed, and the statement in the answering brief relative to there being no objection to the cross-examination has not been challenged. Notwithstanding this fact, we have searched the record diligently, and find that the record contains no objection that the cross-examination was extending beyond its proper limits. This being the condition of the record, the question whether the crossexamination was too broad is not here for review. No objection having been made to it during the trial, the question cannot be raised for the first time on appeal. In State v. Paysse, 80 Wash. 603, 142 Pac. 3, the court considered the necessity of making objection | superior court in probate, directing the pay-

to the introduction of evidence in the trial court, and it was there said:

"It is a principle, applicable to criminal as well as civil cases, that objections to evidence or matters or proceedings occurring at the trial, not going to the jurisdiction of the court, must be presented to and ruled upon by the trial court before they can be made available upon appeal."

[2] It is next claimed that the court erred in permitting the state to impeach the appellant upon a collateral or immaterial matter. Upon this question the record is in like condition as upon the previous question. No objection was made in the lower court upon the ground now asserted, which is that the impeachment was upon a collateral or immaterial matter. Like the first question considered, there being no proper objection, the question cannot be here reviewed.

[3] The other assignments of error relate to the failure of the trial court to define in the instructions and submit to the jury the crime of arson in the second degree as well as the first degree. Had there been any evidence which would sustain a finding by the jury that the appellant was guilty of arson in the second degree, and had the court been requested to give such an instruction, it doubtless would have been proper to give it. Under the evidence in this case, however, the appellant was either guilty of arson in the first degree or he was not guilty. The building was set on fire in the nighttime. and there was in the building at the time one or more human beings. The law does not warrant an instruction covering an included crime, when there is no evidence to sustain it. State v. Kruger, 60 Wash. 542, 111 Pac. 769; State v. Harsted. 66 Wash. 158, 119 Pac. 24; State v. Hart, 79 Wash. 225, 140 Pac. 321; State v. Reynolds, 94 Wash. 270, 162 Pac. 358.

The judgment will be affirmed.

ELLIS, C. J., and FULLERTON, PAR-KER, and WEBSTER, JJ., concur.

In re SPARK'S ESTATE.

SUGG et al. v. GRIDLEY. (No. 14441.)

(Supreme Court of Washington. 1918.) April 26,

EXECUTORS AND ADMINISTRATORS \$= 222(1), 263-FILING CLAIMS-PRIORITY.

Where administrator agreed with mortgagee that, if he would waive his mortgage and permit the property to be sold, the note secured by the mortgage would be first paid, it was not nec-essary for the mortgagee to file a formal claim; and, even after the time for filing claims expired without his having filed, he was entitled to payment as a preferred claimant.

Department 2. Appeal from Superior Court, Clarke County; R. H. Back, Judge. Proceedings in the matter of the estate of Edna R. Spark, deceased, concerning the claim of C. C. Gridley. From an order of the ment of the claim, R. C. Sugg, administrator, and others appeal. Affirmed.

R. C. Sugg, of Vancouver, and W. L. Cooper, of Portland, Or., for appellants.

MOUNT, J. This appeal is from an order of the superior court in probate, directing an administrator to pay a claim of the respondent for \$300 and interest as a preferred claim against the estate of Edna R. Spark, de-

The facts are stipulated. It appears therefrom that Edna R. Spark owned three-sevenths of her father's estate, having acquired one-seventh thereof under a will and twosevenths by purchase from other heirs. Edna R. Spark was executrix under her father's will. During her lifetime she executed for value a note to the respondent for \$300 and interest. This note was secured by a mortgage upon her distributive share of her father's estate. Before the note was paid and the mortgage satisfied she died. R. C. Sugg was thereupon appointed administrator de bonis non of her father's estate and administrator of her estate. Her estate consisted of the distributive three-sevenths share of her father's estate. Mr. Gridley filed no claim with the administrator of the estate of Edna R. Spark, relying of course upon his When the original estate was mortgage. ready to be distributed the administrator promised Mr. Gridley that if he would permit the estate to be sold his mortgage would be first paid out of the proceeds of the sale. He agreed to this before the time expired for filing claims against the estate; and afterwards an order of the superior court was made, permitting the estate to be sold. It was sold for \$2,500, \$500 of which was paid in cash, and a first mortgage was given to the administrator for \$2,000. The agreed facts do not state that Mr. Gridley released his mortgage of record, but we assume this was done because it is agreed that the purchaser gave back upon the sale a first mortgage for \$2,000. After the sale Mr. Gridley demanded payment of his note and mortgage as he had been promised by the administrator. All the interested parties were thereupon brought before the court, a hearing was had, and the court ordered the administrator to pay Mr. Gridley the amount of his note with interest. The administrator and the creditors of the estate appeal from that order.

It is argued by the appellants that because Mr. Gridley filed no claim against the estate within time, his claim should not be allowed as a preferred claim. We think it is plain, under the facts stated, that he was not required to file his claim. The agreement between the administrator and Mr. Gridley that he should waive his mortgage and that the property be sold in consideration of the payment of his note out of the first money re-

the mortgage, which was of course a prior lien upon the estate. It was not necessary under these circumstances for Mr. Gridley to file a formal claim against the estate, because he had agreed with the administrator that the property be sold upon condition that his claim should be satisfied out of the first money received from the sale. To hold otherwise would permit the administrator to perpetrate a fraud upon the respondent.

The order appealed from was just and properly made, and is therefore affirmed.

ELLIS, C. J., and CHADWICK and MAIN, JJ., concur.

STATE v. GREAT NORTHERN RY. CO. et al. (No. 14468.)

(Supreme Court of Washington. April 26, 1918.)

INTOXICATING LIQUORS 6=247-SHIPMENTS-PERMITS.

Under Laws 1915, p. 12, § 17, providing that druggists desiring to ship intoxicating liquors into the state shall first secure a permit therefor which shall be void 30 days from the date of issue, a permit to a druggist to ship intoxicating liquors into the state was absolutely void after 30 days and liquor was contraband, although permit was good when shipment started.

Department 1. Appeal from Superior Court, Spokane County; R. L. McCroskey, Judge.

Proceedings by the State against J. W. Reely to forfeit intoxicating liquors, to which the Great Northern Railway Company, the Northern Pacific Railway Company, and B. K. Bloch, doing business as the Empire Distilling Company, filed claims. Claims were disallowed, and liquor ordered destroyed, and claimants appeal. Affirmed.

Folman, King & Way, Charles S. Albert, and Thomas Balmer, all of Spokane, for appellants. John B. White and F. B. Danskin, both of Spokane, for the State.

WEBSTER, J. This proceeding was begun by the filing of a complaint with a justice of the peace for Spokane precinct, Spokane county, Wash., and the issuance of a search warrant thereon, pursuant to the provisions of chapter 2, Laws 1915, commonly known as the state-wide prohibition law. Under the authority of the search warrant the sheriff seized a quantity of whisky at the Northern Pacific freight depot in the city of Spokane. Before the return day fixed in the warrant claims to the liquor were filed by B. K. Bloch, as owner, and the Great Northern Railway Company and the Northern Pacific Railway Company, as carriers. A trial in the justice court upon stipulated facts resulted in judgment declaring the liquor forfeited, and ordering its destruction. The cause was appealed to the superior court, and there tried upon the same ceived was in the nature of a settlement of stipulated facts, resulting in a judgment that the liquor be forfeited and destroyed forth- homish county, state of Washington, authoriz-with by the sheriff, from which judgment the ling the shipment of said four crates of whisky with by the sheriff, from which judgment the claimants have appealed. No testimony was introduced upon the trial below, the parties having stipulated in writing that the cause be submitted to the court for decision and judgment upon the following agreed facts:

"That on the 15th day of March, 1917, on complaint of Clarence Long, for a search warcomplaint of Clarence Long, for a search warrant, a search warrant directed to the sheriff was issued out of the justice court of the state of Washington in and for Spokane precinct and county, by S. C. Hyde, justice of the peace, and was executed by the sheriff of Spokane county, who made search of the freight depot of the Northern Pacific Railway Company and seized four crates of intoxicating liquors, which contained approximately 575 quarts of whisky. That on November 26 and 28, 1916, the county auditor of Snohomish county, state of Washingauditor of Snohomish county, state of Washington, issued to the Optimus Pharmacy, at the ton, issued to the Optimus Pharmacy, at the town of Index, state of Washington, four permits, authorizing the shipment of four crates of whisky from the city of Maysville, Ky., to said Optimus Pharmacy at the town of Index. That the said Optimus Pharmacy were and are registered druggists and pharmacists, actually in business as such at Index in the state of Washington. That the liquor described in the sheriff a return was shipped on the order of the ington. That the liquor described in the sheriff's return was shipped on the order of the claimant B. K. Bloch by the H. E. Pogue Distillery Company from Maysville, Ky., in four separate crates to said Optimus Pharmacy. That there was attached to each of said crates one of said permits, issued as aforesaid by the county auditor of Snohomish county. That at the time of said shipment said permits were unexpired and in full force, and that at the time the time of said shipment said permits were unexpired and in full force, and that at the time said four crates of whisky, so shipped from Maysville, were transported into the state of Washington by the Great Northern Railway Company more than 30 days had expired from the date of the issuance of said permits. That said liquor reached Index over the line of the claimant Great Northern Railway Company, but was not delivered to the Optimus Pharmacy. That the agent of the Great Northern Railway Company and B. K. Bloch of such nondelivery, and said Bloch requested said Great Northern Railway Company to consign and ship said liq-Railway Company to consign and ship said liq-uor from Index, Wash., to J. W. Reely at Mis-soula, Mont.; the intention of Bloch being to soula, Mont.; the intention of Bloch being to have said liquor placed in the storage warehouse of said Reely at said point, to be there held subject to his order. That on the 22d day of February, 1917, the Great Northern Railway Company issued a bill of lading for said liquor to B. K. Bloch as consignor, in which it was agreed with the shipper to carry said whisky to its usual place of delivery at destination, if on its road, otherwise to deliver to another carrier on the route to said destination, and in which bill of lading it was provided, among other things, that said shipment was 'consigned to J. W. Reely, destination Missoula, state of Montana, route N. P. delivery,' and the original bill of lading so issued was mailed to the consignor, B. K. Bloch. Thereafter the said intoxicating liquor was transported via the Great Northern Railway company's line from Index to Spokane, in the state of Washington. That the Great Northern Railway lines did not extend to Missoula, and at Spokane it was necessary to transfer said intoxicating liquor from the Great Northern Railway lines du not ex-tend to Missoula, and at Spokane it was neces-sary to transfer said intoxicating liquor from the Great Northern Railway Company to the Northern Pacific Railway Company in order for said shipment of four crates of whisky to be transported to its destination at the city of Missoula. That on the 22d day of February, 1917, at the time said four crates of whisky were shipped from Index, considered as aforesaid, with its destination Missoula, no permits whatsoever held that the clause making tickets void aft-were obtained from the county auditor of Sno- er a certain date must be construed as fix-

or any other point within the state of Washington, or to Missoula, Mont. That said four crates of whisky had no permits attached thereto, authorwhisky had no permits attached thereto, authorizing a common carrier to carry and transport said four crates of whisky to Spokane, the state line, or any other point within the state of Washington, or to Missoula. That each of said crates of whisky was labeled on the outside cover so as to plainly show the name of the consignee, and each of said crates had attached thereto one of the printed permits, hereinbefore referred to, issued by the county auditor of Snohomish county on November 26 and 28, 1916." homish county on November 26 and 28, 1916."

Many other facts appear in the stipulation which for the purpose of this opinion it will not be necessary to notice.

A number of interesting questions are raised and discussed in the briefs; but, since we have reached the conclusion that the liquor was contraband and subject to confiscation as such, from the time it entered the state of Washington, only such matters as are essential to that feature of the case will be considered.

Section 17, chapter 2, Laws 1915, provides that any registered druggist or pharmacist actually engaged in business within the state. desiring to transport or ship any intoxicating liquor within the state, shall first secure from the county auditor a permit therefor, which permit can only be used for one shipment, "and shall be void after thirty days from the date of issue." Section 18 makes it unlawful for any transportation company to knowingly transport or convey any intoxicating liquor within this state, without having a permit issued by the county auditor for the transportation of such liquor affixed in a conspicuous place to the parcel or package containing the liquor. Provision is made for search and seizure of the liquor, and for judgment of forfeiture and destruction in the event it shall be determined that the liquor is being kept or possessed in violation of the provisions of the act. Since it is admitted that when the shipment reached the state of Washington more than 30 days had elapsed from the date the permits were issued, it necessarily follows that the shipment was transported within the state to Index, and from thence to the place of its seizure, under a void permit, which in legal effect was no permit at all. Such being the case, the liquor was contraband, subject to seizure, forfeiture, and destruction at any place within the limits of the state of Washington.

it is insisted by appellants that, inasmuch as the permits had not expired when the shipment initiated, it was the carrier's duty to transport the shipment to its destination, even though the permits expired while the goods were in transit and before they entered this state. In support of such contention numerous cases are cited involving limited passenger tickets, wherein the courts have held that the clause making tickets void aft-

than for completing, the journey. The principle upon which those authorities rest has no application to the case in hand. duty of a carrier with respect to its passengers who become such by virtue of tickets, limited or otherwise, is one that arises out of contract, express or implied; and it may well be that the carrier who has received the consideration and accepted the passenger may not relieve itself of the duty of transporting him to his ultimate destination, even though the time limit fixed by the ticket expires before the end of the journey is reached. No such duty devolves upon a carrier to transport intoxicating liquor, where the right to such transportation depends upon the existence of a lawful permit issued pursuant to legislative authority. Manifestly is this so where the Legislature, in the exercise of the police power, has made it unlawful for the carrier to transport the shipment without a valid permit. The right here given does not arise out of contract, express or implied. It is merely a privilege granted by the statute to the shipper and to the carrier, conditioned upon its being exercised in accordance with the legislative intent. It is incumbent, therefore, upon those who would avail themselves of the privilege to bring themselves within the terms and conditions which the Legislature has seen fit to impose, one of which is that the shipment may not be made within the state without a lawful permit, the other, that the permit shall be void after 30 days from the date of its issue.

The language of the statute is plain-too plain to admit of construction or interpretation. It simply means that the life of the permit is 30 days, and that when the time limit has expired its function ceases. It requires no argument to demonstrate that under the provisions of this statute it is unlawful for a carrier to transport intoxicating liquor into or within this state without the permit prescribed by the statute. Neither does it require a reference to any authority other than common sense to support the statement that a void permit is no permit at all.

The evident purpose of the statute, requiring that the permit shall be affixed in a conspicuous place to the parcel or package containing the intoxicating liquor, was to enable the officers charged with the duty of enforcing the law to ascertain by reference to the permit whether the liquor was being lawfully transported. To hold that the date of the shipment, and not the date of its apprehension by the officer, shall determine whether the goods were being transported within the period of time fixed by the permit would be to shift upon the officer a burden that would effectively prevent in most cases a seasonable enforcement of the law. For example, shipments with expired permits attached are interrupted in transit, some of which in fact may have been initiated during the life of

ing the latest time for commencing, rather the permit, others after the permit had expired. The consignments may have moved from different points over diverse routes to a connecting carrier within the state where the goods were apprehended. The facts concerning the date of the shipment, the length of time in transit, and the lines over which it had been routed, all rest with the shipper and the carrier. The officer has no means of acquiring them, but under the principle contended for by appellants, must make the seizure at his peril, notwithstanding the selfevident fact that the goods were in transit by virtue of a permit that prima facie afforded the carrier no lawful authority for their transportation. Under such circumstances it is just as unreasonable to assume that the officer could effectually enforce the law as it would be unjust to censure his dereliction of duty. Clearly it was the purpose of the Legislature, in making the permit void when the allotted time had elapsed, to facilitate, rather than to hinder and delay, the enforcement of the law.

> Being of the opinion that the permit was void when the shipment was brought into the state of Washington, and that its movement thereafter while within the state was without authority of law, the goods were therefore necessarily contraband and subject to seizure, forfeiture, and destruction as such according to the method prescribed by the statute.

The judgment is affirmed.

ELLIS, C. J., and MAIN, PARKER, and FULLERTON, JJ., concur.

COLKETT et al. v. HAMMOND. (No. 14519.) (Supreme Court of Washington. April 25, 1918.)

1. RECEIVERS @== 199-Ex PARTE ORDERS AP-PROVING RECEIVER'S PAYMENTS.

In corporation insolvency proceedings, orders, purporting to be final, approving expenses incurred and payments made by the receiver to himself and attorneys as compensation, were void, where rendered ex parte and with-out notice to any one interested other than the receiver and his attorneys.

2. RECEIVERS \$\infty 199 -- APPROVAL OF ACCOUNTS-APPEAL-EX PARTE ORDERS.
On appeal from ex parte orders as to compensation of a receiver and attorneys, the Supreme Court will not determine upon the merits the amount of compensation allowable, but, upon reversing the orders as being ex parte, will remand the question of compensation and approval of accounts to the trial court for determination upon due notice to interested parties. 3. Costs \$\infty 256(1) - Appeal - Voluminous

RECORD. Where appellant's record is unnecessarily voluminous, he may be allowed costs for only a portion thereof.

Department 1. Appeal from Superior Court, Pacific County; Edward H. Wright,

Proceedings in insolvency of the Raymond

Trust Company. From orders allowing compensation, etc., to former receiver, A. W. Hammond, E. E. Colkett, receiver, and others appeal. Reversed and remanded.

Robert G. Chambers and Martin C. Welsh, both of Raymond, for appellants. S. M. Lockerby and F. D. Couden, both of Seattle, for respondent.

PARKER, J. The Raymond Trust Company having become insolvent the Attorney General commenced an action in the name of the state in the superior court for Pacific county, which resulted in an order of that court being entered on October 6, 1914, appointing A. W. Hammond, receiver of the company, to take charge of its property and wind up its affairs. Hammond promptly qualified by taking his oath of office and giving bond as required by the order of appointment, and entered upon the discharge of his duties, continuing to administer the trust until January 6, 1917. What occurred in the receivership during that period is a long story which does not need to be told in detail here. It is sufficient for our present purposes to say that several reports were filed in court by Hammond, as receiver, and orders made by the court approving expenses incurred by and payments made to the receiver himself towards his compensation for services as such. These orders, in so far as they relate to the compensation of Hammond and his attorneys, were all made ex parte, without notice to any of the other interested parties. On January 6, 1917, Hammond tendered to the court his resignation as receiver, filing therewith an account of his doings as receiver up to that date. Without notice to or opportunity given to any one interested, other than Hammond and his attorneys, to be heard thereon, the court entered orders purporting to finally approve this account; purporting to finally determine the amount of Hammond's compensation as receiver; purporting to finally determine the amount of compensation of his attorneys rendering services in the receivership; and accepting the resignation of Hammond as receiver. It so happened that the term of office of the presiding judge of the superior court for Pacific county expired very soon after the entering of these orders, when his newly elected successor became the duly qualified and acting judge of that court. Thereafter, on January 9, 1917, the new judge presiding, the court appointed E. E. Colkett as receiver to succeed Hammond. Thereafter Colkett promptly qualified as such, and has ever since been the duly qualifled and acting receiver of the company, in charge of its property and affairs. On January 20, 1917, on application of Colkett as receiver, an order was entered by the superior court, permitting him, as receiver, to appeal from all of the ex parte orders

ary 6, 1917, other than the order accepting the resignation of Hammond as receiver, and thereafter Colkett, as receiver, duly appealed to this court from each of those orders.

[1] It is contended in appellant's behalf, in substance, that the orders appealed from, purporting to be final orders approving Hammond's final account as receiver, determining his compensation as receiver and that of his attorneys are void, and should be set aside because entered ex parte and without notice to any one interested other than the receiver and his attorneys. We see no escape from sustaining this contention.

In the early case of Thompson v. Huron Lumber Company, 5 Wash. 527, 32 Pac. 536, it was held that the determination of a receiver's compensation up to a given date, though the trust was then only partially administered, when such determination was made upon notice to those interested, became final, and appeal would lie therefrom as from any other judgment. This holding suggests the thought that no ex parte order, interlocutory or final in form, allowing a receiver compensation in whole or in part, would be final or conclusive upon those interested in the trust property as creditors or distributees. These orders not only purport to be final determinations of the compensation of Hammond as receiver and his attorneys and a final approval of his account, but it was an appropriate time for the final determination of all those questions, since Hammond had resigned as receiver. It is apparent, therefore, that these orders were intended to be final determinations of those questions, and were not made as mere interlocutory orders subject to review upon a future final hearing of those questions. The one thing which, in any event, calls for a reversal and setting aside of these orders is that they were entered ex parte and without notice to those interested. In Re Sullivan's Estate, 36 Wash. 217, 78 Pac. 945, wherein orders had been made by the superior court making partial allowances towards compensation of an administrator, but without notice, Judge Hadley, speaking for the court, said in part:

the term of office of the presiding judge of the superior court for Pacific county expired very soon after the entering of these orders, when his newly elected successor became the duly qualified and acting judge of that court. Thereafter, on January 9, 1917, the new judge presiding, the court appointed E. E. Colkett as receiver to succeed Hammond. Thereafter Colkett promptly qualified as such, and has ever since been the duly qualified as such, and has ever since been the duly qualified and acting receiver of the company, in charge of its property and affairs. On January 20, 1917, on application of Colkett as receiver, an order was entered by the superior court, permitting him, as receiver, to appeal from all of the ex parte orders above noticed, entered by the court on January when all parties should be before it.

If an administrator shall pay money to himself for his own services pending the course of administration, without due hearing upon no-tice, he must do so at his peril, for the court can enter no orders or judgment that will protect him until the interested parties are before it, or until they have been properly notified. If the court assumes to act in an ex parte manner, it can amount to no more than a mere advisory act, and the administrator who pays money to himself in pursuance thereof must do so knowing that the matter cannot be finally and judicially determined until all interested persons are before the court, or until they have been duly notified. The same principle applies to payments made to the administrator's attorney."

Our decision in Re Doane's Estate, 64 Wash. 303, 116 Pac. 847, wherein is noticed the question of the finality of orders approving executors' and administrators' accounts upon notice. other than the final account, pending administration, is of interest in this connection. The authorities therein cited and reviewed seem to render it plain that the flnality of such orders and their binding effect upon all persons interested depends upon such orders having been made after hearing upon due notice. This rule seems to us of equal force whether the order is made during the course of the administration or at the close of the administration of the trust, and whether in the administration of the estate of a deceased person or in a receivership of an insolvent corporation.

[2] Counsel for appellant in their brief ask that we not only set aside and annul the orders appealed from, but also that we determine what compensation the receiver Hammond and his attorneys are entitled to, and also the question of the approval of Hammond's account as receiver, upon the merits, in the light of the record before us; while counsel for respondent ask that we review the case upon the merits and affirm the orders appealed from, or make orders of the same import, should we hold the orders void for want of notice. To so proceed would be, in effect, for this court to determine questions which have never been determined upon due notice by the superior court. This, we think, would be exercising original rather than appellate jurisdiction, and it is difficult to see how the decision of this court so rendered upon this record would be any more conclusive against those who were not given an opportunity to be heard in the superior court than the orders made by that court and here sought to be set aside. We are quite clear that we should not now proceed to determine these questions upon the merits, but that the orders appealed from should be reversed and set aside upon the ground that they were rendered ex parte and without notice to those entitled to be heard, and that the question of the amount of compensation Hammond as receiver and his attorneys are justly entitled to, and the question of the approval of his account, should be remanded to the trial court for

of those interested an opportunity to be heard thereon. It is so ordered, and the superior court is directed to proceed accordingly.

[3] We note that appellant has brought here a voluminous record, a large part of which, it seems to us, is unnecessary to the determination of the only question which this court can rightfully determine. We conclude therefore that appellant shall recover costs against respondent Hammond in this court for 100 pages of the transcript prepared at his instance by the clerk of the superior court, and that he shall not recover any costs for the preparation of the statement of facts or the abstract prepared by his counsel. He shall recover other costs as by statute provided.

ELLIS, C. J., and FULLERTON, MAIN, and WEBSTER, JJ., concur.

SEVIER v. HOPKINS. (No. 14405.) (Supreme Court of Washington. April 25, 1918.)

1. Sales \$38(5)—Fraud—Concealment of DEFECTS.

Where seller under contract to sell hay in first-class condition, finely cut, mixed wet hay and snow with the rest of the hay, causing it to spoil while in transit, he perpetrated a fraud on buyer, who had no knowledge thereof until after payment and acceptance of hay.

. TRIAL \$==177-MOTION FOR DIRECTED VER-DICT

Where both parties to an action tried be-fore a jury move for a directed verdict, thereby waiving their right to have a question of fact passed on by the jury, they admit that the evi-dence is free from conflict, and submit the cause for determination by trial court.

3. Principal and Agent 6=103(6)-Accept-

ANCE OF GOODS BY DRAYMAN.

A drayman employed by buyer of hay to cart the hay to be turned over to him by seller has no authority to refuse to accept the hay be-cause of its condition and acceptance by dray-man of hay for carting purposes does not constitute acceptance by buyer.

Department 2. Appeal from Superior Court, Yakima County; Geo. B. Holden, Judge.

Action by Mark J. Sevier against G. W. Judgment for defendant, and Hopkins. plaintiff appeals. Reversed and remanded.

H. J. Snively and I. J. Bounds, both of North Yakima, for appellant. Bonsted & Wight, of Toppenish, for respondent.

HOLCOMB, J. This action was brought by the appellant, Mark J. Sevier, against the respondent, G. W. Hopkins, for damages of \$437. The controversy arose out of a verbal contract for the sale of hay and the facts are as follows:

In the latter part of February, 1915, the parties met in Toppenish, Wash., and respondent verbally offered to sell to the apits determination upon notice and the giving pellant some 65 to 70 tons of first-class al-

additional for chopping the hay. The hay was in stacks on the Britton place about onehalf mile from Toppenish. It was to be weighed on the Farmers' Union scales at Toppenish, and was to be hauled away from the chopper by appellant. On the day of this offer the appellant went to Portland. Or.. and told respondent that he would wire him if he would take the hay. On the next day appellant wired from Portland, "I will take the hay; have it chopped fine at once." The respondent had the hay chopped by one Hake, who then had his machine on the Britton place. Hake started to work and commenced stripping the hay by removing the snow and wet hay on the outside of the stack, whereupon respondent's son and foreman appeared and directed Hake not to strip the hay, but to cut it all and mix the wet hay and snow with the rest of the hay. Appellant wired one Bratton to haul the hav. who got Johnson Bros., draymen, to haul it and load it into cars, to be shipped to Portland, Or. Appellant inspected the hay for the first time when it arrived in cars at Portland, and found that it had been heated or burnt, and that steam and water drops were in the car as though it had rained on the Appellant therecars and leaked through. upon made a claim against the railroad company for damages. Thereafter he paid the respondent \$437, the price of the hay at \$6.-50 per ton. The appellant learned that the railroad company removed the cars to Albany, Or., for inspection, and claimed that the railroad company was not at fault as at first contended. Appellant then went to Toppenish and investigated the matter there, and found that the wet hay and snow had been mixed while the hay was being chopped, upon orders of the respondent's son and foreman.

Appellant brought his action upon the theory that respondent had misrepresented the hay, and that a fraud had been practiced on him by mixing the wet hay and snow in with the rest of the hay, which fraud appellant had not discovered until after payment of the \$437. The evidence in the record shows that the hay was a total loss to appellant. and this is not disputed by respondent. At the conclusion of the trial the respective parties moved for a directed verdict. The court denied plaintiff's motion, took the case from the jury, and dismissed the action. The trial court was of the opinion that the contract was a severable one, and that the plaintiff tried it on that theory. The record does not show it, and the plaintiff claims otherwise in his brief.

[1] Appellant assigns as error failure of the court to direct a verdict for the plaintiff at the conclusion of all the testimony. The evidence shows that the hay was to be in first-class condition, finely cut, and that the appellant never saw the hay until it reached causing the whole lot to spoil, to appellant's

falfa hay at \$6.50 per ton and \$1.25 per ton, Portland, from where his order of acceptance was sent by telegram before the hay was chopped and shipped. Respondent was in entire charge of the hay until after chopping. If all the hay had been in first-class condition before chopping, or if the wet hay and snow had been separated from the good hay the condition of which the respondent had knowledge, the hay would not have spoiled in transit. "It is generally held in this country that the intentional nondisclosure of a latent defect by the seller, when he knows that it is unknown to the buyer, is fraudulent." 35 Cyc. 69. "Any device, however, used by the seller to conceal defects or to induce the buyer to omit inquiry or examination is as much a fraud as active concealment." 85 Cyc. 69. "According to the weight of authority the buyer cannot, in the absence of fraud, rescind an executed contract of sale for a breach of warranty, his remedy in such case being on the warranty. The breach of warranty neither rescinds the sale nor gives the vendee a right to rescind, but merely a right of action for damages." 35 Cyc. 138.

> It seems that there is some question as to whether the contract herein is severable. The decision of this point is unnecessary, as the appellant is not asking for a rescission, but has brought his action for damages caused by respondent's misrepresentation and fraud.

> [2] This brings us to the point whether the appellant's evidence will sustain a judgment. Both parties having asked for a directed verdict and reserving no question of fact to be submitted to the jury, they admitted that the evidence was free from conflict. Lindquist v. Northwestern F. H. Co., 22 S. D. 298, 117 N. W. 365; Knox v. Fuller, 23 Wash. 34, 62 Pac. 131. The Knox Case was followed in the case of Easterly v. Mills, 54 Wash. 356, 103 Pac. 475, 28 L. R. A. (N. S.) 952, where the court said:

> "When the two motions were interposed, there being no conflict in the evidence as to any ma-terial fact, the parties in effect waived a verdict of the jury, and submitted the cause for determination by the trial judge, who was then authorized to enter such judgment as the evidence war-ranted, and we will on this appeal dispose of the case on the same theory."

> [3] We cannot sustain the contention of respondent that the draymen had authority to accept and did accept delivery of the wet hay and snow, as agent of appellant, thus constituting acceptance of the hay, as delivered, by the purchaser. The authority of the draymen was simply to cart the hay turned over to them by the respondent to the cars. No one had been given such authority by appellant to act as his agent either to accept or refuse the hay no matter what its condition when delivered.

A wrong was committed in this case by the respondent's attempting to palm off upon appellant the wet unmerchantable hay, thus

damage. As to who committed this wrong appellant had no knowledge until after payment and acceptance of the hay. To allow respondent to profit by his wrong would be unjust and unconscionable. The appellant was overreached and defrauded and is entitled to recover his entire damage therefor. This is indisputably shown to be the sum of \$437.

Reversed and remanded, with instructions to enter judgment for appellant for the sum of \$437, with his costs and legal interest from date of trial.

ELLIS, C. J., and FULLERTON, MOUNT, and CHADWICK, JJ., concur.

THAYER v. SNOHOMISH LOGGING CO. (No. 14385.)

(Supreme Court of Washington, April 26, 1918.)

1. APPEAL AND ERROR \$\sim 704(2)\$—FINDING OF FACT—REVIEW.

A finding of fact by the trial court is conclusive on appeal, where the evidence is not brought up.

2. STATUTES 2211—CONSTRUCTION—TITLE.

The language of an act should be construed in view of its title and lawful purposes, since the subject expressed in the title fixes a limit

3. Statutes \$== 109—Expressing Subject in Title.

upon the scope of the act.

The object of the constitutional requirement that the subject of an act shall be expressed in its title is that no person may be deceived as to what matters are being legislated upon.

4. Railboads &=411(10½) — Injubus to Stock—Fence Law.

In view of the fact that Rem. Code 1915, §§ 8731, 8732, as to railroad fences, are taken from Acts 1903, p. 332, and Acts 1907, p. 169, the titles of which refer to "stock injured by moving railway trains," and declare the law of negligence as to "stock injured by railway trains" and the third sections of which refer to "injury to stock by collision with moving railway trains," section 8731 does not render a railroad liable for injury to stock because of an unfenced right of way, not caused by a moving train, such as a fall of stock through a trestle, although in terms it provides that a railroad shall be liable for all damages to stock from failure to fence.

5. Appeal and Error \$==171(1)—Theory of Case Below.

Where appellant's case below was found by the trial court to be wholly unsupported by evidence, appellant could not change the theory of his case in the Supreme Court.

Department 2. Appeal from Superior Court, Snohomish County; Guy C. Alston, Judge.

Action by Charles E. Thayer against the Snohomish Logging Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Louis A. Merrick, of Everett, for appellant. Cooley, Horan & Mulvihill, of Everett, for respondent.

HOLCOMB, J. The action is one to recover damages, and the appeal is taken upon the findings of fact, conclusions of law, and judgment. Appellant assigns three errors: (1) That the conclusions of law do not follow from the findings of fact and are not supported thereby; (2) that the judgment is not supported by the findings of fact; (3) that the conclusions of law and judgment are not supported by the findings of fact.

In the complaint the negligence charged against the respondent is set forth in paragraph 4 as follows:

"That on or about the 5th day of July, 1916, the said horse, because of the neglect of the defendant to fence his right of way along the track of said railway, wandered upon the track and the train of said defendant came along and drove the said horse upon a bridge upon said right of way, and said horse being unable to get over said bridge the said train struck the horse and killed it, to the damage of the value of \$850."

[1] The court found that there was no evidence that a train or other vehicle operated by the defendant struck the horse or frightened or interfered with the horse in any way. Since the evidence is not here, this finding is conclusive upon appellant and upon this court.

Appellant, however, contends that the respondent is liable because of the unfenced right of way and trestle, without any affirmative action upon the part of respondent or its agents even though there were no trains operated on the road. He argues that the damage suffered by him is the same whether the horse fell through the trestle upon the respondent's right of way which was unfenced or was killed by collision with a moving train upon the right of way which was unfenced, and that the Legislature so intended in enacting sections 8731 and 8732, Rem. Code. These provisions were taken from the acts of the Legislature of 1903 and 1907. The title of Acts 1903, c. 158, is as follows:

"An act compelling railroads to fence their rights of way and to protect the owners of stock injured by moving railway trains, declaring a law of negligence with regard to stock injured by railway trains."

Section 3 of that act provides that in all actions against persons, etc., operating steam railroads, for injuries to stock by collision with moving trains, it is prima facie evidence of negligence on the part of such railway to show that the railway track was not fenced with a substantial fence or protected by a suitable cattle guard at the place where the stock was injured or killed. The title of Acts 1907, c. 88, is as follows:

"An act compelling railroads to fence their rights of way and to protect the owners of stock injured by moving railway trains, declaring a law of negligence with regard to stock injured by railway trains."

This act is the same as the act of 1903, except that it includes electric railroads and

trains, while the former refers only to steam N. E. 48, 37 L. R. A. (N. S.) 1181; Knight v. railroad trains. The second section of each of the acts cited provides that every such railroad shall be liable for all damages sustained in the injury or killing of stock in any manner by reason of the failure of such person, company, or corporation to construct and maintain such fence or crossing or cattle guard, etc. This provision of the enactment in question is the basis upon which appellant forms his theory. But the title of each of the two acts referred to "stock injured by moving railway trains," and declared the law of negligence with regard to "stock injured by railway trains." The third section of each of the acts declared the rule of evidence making it prima facie evidence of negligence, "for injury to stock by collision with moving railroad trains," if it was shown that the railway track was not fenced with a substantial fence and cattle guard.

[2-4] The language of an act should be construed in view of its title and lawful purposes, since the subject expressed in the title fixes a limit upon the scope of the act. State ex rel. Swan v. Taylor, 21 Wash. 672, 59 Pac. 489. The object of the constitutional requirement that the subject of an act shall be expressed in its title is that no person may be deceived as to what matters are being legislated upon. Seymour v. Tacoma, 6 Wash. 138, 32 Pac. 1077. Therefore, from the title and the third section of each act we are convinced that it was not the intention of the Legislature to declare the law of negligence with regard to stock injured other than when injured in some way by railway trains. Under similar but somewhat broader statutes than ours there are authorities which hold that if the right of way was unfenced, and the injury was caused by moving railway trains, it would not be necessary that the stock come in actual collision with the moving train, but the moving train would have to have some relation to the injury and damage. Here, under the finding of the court, there was no such relation.

[5] Appellant based his case below upon the specific negligence of the failure of the respondent to fence its right of way, the driving of the horse upon the bridge, the inability of the horse to get over the bridge, and its being struck by the train and killed. This being wholly unsupported by the evidence as found by the court, appellant would have no right to change its theory in this court in any event. Nonliability in such cases as this and under such statutes is directly and inferentially held in: Asbach v. C., B. & Q. R. Co., 74 Iowa, 248, 37 N. W. 182; Liston v. Central Iowa Ry. Co., 70 Iowa, 714, 29 N. W. 445; Maher v. W. & St. P. R. Co., 81 Minn. 401, 18 N. W. 105; Chicago, K. & N. R. Co. v. Hotz, 47 Kan. 627, 28 Pac. 695; N. Y., L. E. & W. R. Co., 99 N. Y. 25, 1 N. E. 108; A., T. & S. F. R. Co. v. Edwards, 20 Kan. 531; Young v. St. L., K. C. & N. R. Co., 44 Iowa, 172.

The judgment is affirmed.

ELLIS, C. J., and MOUNT, MAIN, and CHADWICK, JJ., concur.

## ROBINSON v. KITTITAS COUNTY. (No. 14528.) ·

(Supreme Court of Washington. 1918.) April 25,

Taxation &= 539 — Voluntary Payment — MISTAKE OF LAW-RECOVERY.

The grantee of an Indian homesteader, or his heirs, could not recover back from the county money voluntarily paid for taxes assess-ed on the land under mistake of law by the county, acting under a claim of right and without fraud; there having been no ignorance or mistake of fact.

Department 2. Appeal from Superior Court, Kittitas County; Ralph Kauffman, Judge.

Action by Hannah Robinson, in her own right and as guardian of the estate of Earl Robinson, a minor, against Kittitas County. From judgment dismissing the action, plaintiff appeals. Affirmed.

J. N. Streff, of Ellensburg, for appellant. Arthur McGuire, of Ellensburg, for respond-

FULLERTON, J. The appellant, in her own right as widow of John Robinson, deceased, and as guardian of her minor son, began an action in the year 1914 to recover from respondent the sum of \$761.53, which had been paid as taxes on certain lands for the years 1904 to 1913, inclusive. The court sustained a demurrer to her complaint on the ground that it failed to state a cause of action. On the appellant's election to stand on the complaint and refusal to plead further, judgment was rendered, dismissing

The complaint shows that a homestead entry had been made on the lands by an Indian on May 19, 1881, under an act of Congress of 1862 as amended March 3, 1875. A final receiver's certificate was issued to the Indian on December 13, 1887, under the act of Congress of July 4, 1884, and patent issued to the Indian on January 25, 1892.

The Indian was entitled to a patent in accordance with the act of July 4, 1884, under which for a 25-year trust period the land was "nonalienable, nonassessable, nor subject to taxation by the state or county or other quasi municipality within whose limits said lands may be situated, and any attempt to alienate the same, or tax the same or levy or assess taxes against the same by any county, state, or quasi municipal division of Jimerson v. Erie R. Co., 203 N. Y. 518, 97 the state is void, illegal and fraudulent, and

officers of municipal or civil division of any state." The patent issued by the executive officer of the United States was erroneously executed pursuant to the act of Congress of January 18, 1881, relating to transactions with Winnebago Indians of Wisconsin, and did not contain the provision of the act of 1884, excepting the land from taxation for a period of 25 years. On May 23, 1903, the lands in controversy were deeded by the Indian to John Robinson, under whom the widow and minor son now claim as heirs. From and including the year 1904 to the year 1913 the respondent assessed and collected taxes thereon totaling the sum of \$761.53. It is further alleged that these taxes were illegally assessed, and that they were levied, collected, and paid by mutual mistake of the parties as to the ownership and title of the lands; that prior to the conveyance of the land by the Indian an attorney was consulted by John Robinson, and he was advised and believed that the Indian had title in fee and was competent to make good title; that the taxes were paid under the mistake and belief that title vested in the grantee, that respondent assessed and collected the taxes under the belief that they were legal and valid; that the mistake was not discovered until within three months before the institution of the action; and that a claim for refund of the moneys was presented to respondent and rejected prior to the bringing of this action.

The question of legal title to the land is in our opinion, immaterial, and the sole matter for determination is: What right of recovery has one who voluntarily pays taxes illegally assessed under mutual mistake of law of the taxpayer and the assessing officers? It will be observed that the complaint does not show any compulsion or duress in the collection of the tax, nor that it was paid under protest. There is no showing of fraud in the assessment and collection other than a conclusion to that effect from the mere fact of a mistaken right of assessment.

In the recent case of Childs v. Spokane County, 100 Wash. ---, 170 Pac. 145, the governing principle in such cases is stated as follows:

"It is settled law that money paid in satisfaction of an illegal tax to a municipal corporation, acting under claim of right and without fraud cannot, in the absence of a statute authorizing it, be recovered back, where the payment was not compelled by duress or coercion and there was no ignorance or mistake of fact on the part of the one making such payment"—citing Pittock & Leadbetter Lumber Co. v. Skamania County, 98 Wash, 145, 167 Pac. 108; Phelps v. Tacoma, 15 Wash, 367, 46 Pac. 400; Dillon, Mun. Corp. (5th Ed.) § 1817.

The case of Phelps v. Tacoma holds that a taxpayer's mistake as to his title to land upon which he pays the taxes does not alter the

wholly outside of the jurisdiction of any one. See, also, Homestead Co. v. Valley Railroad, 17 Wall. 153, 166, 21 L. Ed. 622; Cooley, Taxation (3d Ed.) 824, 1495.

> Decisions of this court cited by appellant, where recovery was allowed because of overvaluation through the mistake of the assessor, are based on the assumption of constructive fraud by reason of that fact, and are not authority for the recovery of voluntary payments of taxes upon land which the party paying believed he owned.

The judgment is affirmed.

ELLIS, C. J., and MOUNT, HOLCOMB, and CHADWICK, JJ., concur.

SUSMAN v. YOUNG MEN'S CHRISTIAN ASS'N OF SEATTLE. (No. 14518.)

(Supreme Court of Washington. 1918.)

1. CHARITIES \$==45(2)-TORTS-LIABILITY. A benevolent or charitable institution is not liable for torts of its servants against a patron of the institution, in the absence of showing of failure to exercise reasonable care in selection of such servant.

2. CHARITIES @==1-"BENEVOLENCE"-"CHAR-

"Benevolence" and "charity" do not consist wholly of almsgiving, but gratuitous im-provement of spiritual, mental, social, and physical condition of young men by the maintenance of lectures, gospel services, libraries, reading rooms, gymnasiums, recreation grounds, social meetings, etc., is charity.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Benevolence; Charity.]

3. CHARITIES 1—DEFINITION.

Since the term "charity" implies a gift in some form, it implies the bestowal of goods or money, rendition of services, or awarding of privileges free to the recipient without gainful return, and it is not charity in a legal or any sense to confer benefits when the recipient is required to return adequate consideration.

4. EVIDENCE \$\iff 22(2) - JUDICIAL NOTICE-Y.

M. C. A.—CHARITABLE PURPOSES.

The court cannot take judicial notice of the objects and purposes of a Y. M. C. A. local branch, duly incorporated, whose objects, purposes, powers, and privileges must be determined from its articles of incorporation. mined from its articles of incorporation.

5. Charities &=45(2)—Charitable Corpora-tions—Tobis of Servants—Pleading.

Complaint for injuries in elevator accident, alleging that plaintiff paid tuitton for instruc-tion at a Y. M. C. A. equal in amount to charges for like benefits furnished by other institutions ostensibly operated for gain and profit, not al-leging that the corporation had no capital stock, nor that the incorporators or members could derive no profit, nor that its gains were wholly devoted to furtherance of charitable purposes, did not show that the Y. M. C. A. was a charitable corporation so as to relieve it from answering.

6. CHARITIES &> 45(2)—CHARITABLE CORPORA-TIONS—LIABILITY FOR TORTS—OBDINANCE. A municipal ordinance, regulating operation of elevators, imposes no liability against chari-table institutions otherwise exempt, in the abcharacter of the payment as a voluntary sence of express or implied intent so to do.

The mere fact that Y. M. C. A. took out in-demnity policy for elevator, though evidence of the construction by the corporation of its liabilities, created no liability for tort of the eleva-tor operator if none theretofore existed.

Department 1. Appeal from Superior Court, King County: Mitchell Gilliam.

Action by Paul J. Susman, a minor, by Mary B. Martin, his guardian ad litem, against the Young Men's Christian Association of Seattle. Judgment dismissing the complaint after demurrer thereto was sustained, and plaintiff appeals. Reversed and remanded.

Walter S. Fulton and Arch F. Williams, both of Seattle, for appellant. J. Speed Smith, Henry Elliott, Jr., and James B. Murphy, all of Seattle, for respondent.

FULLERTON, J. The appellant, a student and patron of the respondent. Young Men's Christian Association, sought to recover in damages from the respondent for injuries sustained because of the negligent operation of a passenger elevator in the association's building by one of its employes. A demurrer was interposed to the complaint, which the trial court sustained. The appellant elected to stand on his complaint, and appeals from the judgment of dismissal which followed.

The complaint, omitting the formal parts, is as follows:

is as follows:

"I. That plaintiff is a resident of Seattle, King county, Wash., and is of the age of 13 years; that heretofore Mary B. Martin, who is plaintiff's mother and is also a resident of Seattle, Wash., was duly and regularly appointed by the above-entitled court guardian ad litem of plaintiff for the purpose of commencing and prosecuting this action, and she is now the duly appointed, qualified, and acting guardian ad litem of plaintiff for such purpose.

"II. That the defendant is a corporation duly organized and existing under and by virtue of the laws of the state of Washington, with its principal place of business in Seattle, King county, Wash., and its articles of incorporation provide inter alia as follows:

"Section 3. The object of the corporation shall be the improvement of the spiritual, mental, social and physical condition of the young men of Seattle by the support and maintenance of lectures, gospel services, libraries, reading rooms, gymnasiums, recreation grounds, etc., social meetings and such other means as may conduce to the accomplishment of this object.

social meetings and such other means as may conduce to the accomplishment of this object.

"The board of trustees shall devote the property of the association, of which they have the management and the income thereof to the purposes named herein and for no other, and so long as the board of directors shall so expend the same, the board of trustees shall pay over to them the income of the property of the association so managed by them."

"III. That in the prosecution of its business the defendant owns that certain brick building known as the Y. M. C. A. Building, located at the southwest corner of Madison street and Fourth avenue in Seattle; that in said building the defendant maintains gymnasium rooms,

ing the defendant maintains gymnasium rooms,

7. CHARITIES \$\iff 45(2)\$—CHARITABLE CORPORATIONS—LIABILITY FOR TORTS—INDEMNITY
INSURANCE.
The mere fact that Y. M. C. A. took out inditorium, a boys' department with offices, a cafeteria, barber shop, shower and steam baths, swimming pool, and sleeping rooms for rent, and in connection with its educational department said defendant maintains in said building a school in which general branches are taught, a school in which general branches are taught, and instruction in bookkeeping, typewriting, stenography, and other special courses is given, and for instruction in said branches and courses charges are made to persons taking or receiving the benefit thereof, said charges equaling in amount the prices charged for like instruction by business colleges and other schools in the city of Seattle which give instruction for profit, and for services and privileges in said barber shop, cafeteria, symnasium and baths.

in the city of Seattle which give instruction for profit, and for services and privileges in said barber shop, cafeteria, gymnasium, and baths, and for the use of said sleeping rooms, charges are made which equal in amount the prices charged for like services, privileges and rooms by other concerns in the city of Seattle organized and operated for profit.

"IV. That on the 23d day of June 1916, plaintiff, Paul J. Susmann, was a pupil in the school of defendant, and, through his mother, had paid to the defendant the tuition charges required by it for plaintiff's instruction.

"V. That on said day, and at about the hour of 8:25 o'clock a. m., plaintiff was on the third floor of defendant's said building, desirous of proceeding to his classroom on an upper floor, and for the purpose of being transported to his classroom he signaled for the passenger elevator maintained and operated by the defendant in said building, and in pursuance of plaintiff's signals said elevator then and there operated by an employé and agent of the defendant came from the lower floor and stopped at the level of the third floor for the purpose of receiving

signals said elevator then and there operated by an employé and agent of the defendant came from the lower floor and stopped at the level of the third floor for the purpose of receiving plaintiff as a passenger; that as plaintiff was in the act of entering the elevator, and before he had time to enter it, the operator thereof negligently and carelessly, and without notice or warning to him, and with the door of the elevator shaft open, caused the elevator to leave the level of said floor, and thereby the plaintiff was thrown upon the edge of the elevator floor, and was carried several feet above the level of the third floor, when, being unable to retain his position, plaintiff was forced to relinquish the same, and thereby fell four stories and into the basement of the building, a distance of approximately 60 feet, thereby receiving injuries as hereinafter more specifically set forth.

"VI. That the fall of plaintiff and his injuries were due to the negligence and carelessness of the defendant, in that the defendant at the time of plaintiff's injuries and for a long time previous thereto had maintained said elevator in a condition violative of section 667 of Ordinance No. 31578 of the city of Seattle, approved July 22, 1913, providing as follows:

Every door and gate to an elevator leaves the level of the floor or be so designed that the elevator cannot be started until they are closed'—and violative of Ordinance No. 24761 of the city of Seattle, approved August 2, 1910, containing the same provision, which was superseded by said Ordinance No. 31578, in this, that the door to the elevator shaft on the third floor of defendant's said building was so constructed and maintained that it could not be elevator as the elevator left the level of the floor of defendant's said building was so constructed and maintained that it could not be that the door to the elevator shart on the third floor of defendant's said building was so con-structed and maintained that it could not be closed as the elevator left the level of the floor, closed as the elevator left the level of the floor, or at all, and was not so designed as to prevent the elevator from being started until it was closed; that the fall of plaintiff was due to the further negligence and carelessness of the defendant, in that the operator of said elevator failed and neglected to stop the elevator at the level of said floor a sufficient length of time to enable the plaintiff to enter the same,

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but, on the contrary, started the elevator as the plaintiff was in the act of entering it and before he had time safely to enter, with the result that plaintiff was thrown and was compelled to hang onto the edge of the floor of said elevator in an attempt to save himself from being dropped down the elevator shaft, which was unguarded and unprotected, and thereby he fell

who previously was strong physically and men-tally, was knocked unconscious, in which con-dition he remained for a period of three weeks, during which time he was confined to the Seattle General Hospital, and thereafter he was taken to his home and confined to his bed under medical care; that both his arms were broken, and his right arm was dislocated at the clbow his left arm was broken at the wrist, his left nis lett arm was broken at the wrist, his left hand was bruised, and permanently stiffened, thereby deforming the same, a piece of the bone of plaintiff's left wrist was broken off and the wrist permanently stiffened; that plaintiff's skull was fractured at the base of the brain, and he sustained permanent internal injuries of an ature unknown to the plaintiff, but which have caused plaintiff much suffering in body and mind; that due to the fracture of plaintiff's skull atrophy of the optic nerve has occurred, and plaintiff has but three-tenths of his normal and plaintin has but three-tenths of his normal vision, which condition is permanent and progressive, and, as plaintiff believes and alleges the fact to be, will result in total blindness; that as a further result of said fall plaintiff's right side was paralyzed for several days, and he sustained abrasions about the limbs and an abrasion and cut under the wight are and due he sustained abrasions about the limbs and an abrasion and cut under the right eye, and, due to his injuries, plaintiff's mind has been affected, in that, while he is 13 years of age, he has not the mental capacity of a child above 5 or 6 years, and plaintiff is informed and believes and alleges the fact to be that this condition is permanent; that as a further result of plaintiff's injuries he has had to incur an indebtedness for hospital attendance in the sum of \$188, an indebtedness for nursing in the sum of \$162, and an indebtedness for doctor's bills of \$162, and an indebtedness for doctor's bills in the sum of \$600, and will be compelled to incur a further indebtedness for medical attendance due to his injuries in the sum of \$200.

endance due to his injuries in the sum of \$200.

"VIII. That in all plaintiff has been and is damaged, as a result of his injuries due to the negligence and carelessness of the defendant as herein alleged, in the sum of \$35,000.

"IX. That at the time of said accident defendant carried an elevator liability policy of insurance in the Ætna Insurance Company wherehy in consideration of a certain premium unsurance in the Ætna Insurance Company whereby in consideration of a certain premium which had theretofore been paid by defendant said Ætna Insurance Company agreed that if any person or persons should sustain bodily injuries, while entering upon or alighting from said clevator, as plaintiff was injured, said Ætna Insurance Company would indemnify defendant against liability on account thereof up an amount not exceeding \$5.000 that subto an amount not exceeding \$5,000; that subsequent to plaintiffs injuries, and prior to the commencement of this action, the claim of plaintiff was referred by defendant to said Ætna Insurance Company, and was investigated by the attorney for said Ætna Insurance Company; that since the commencement of this action, defendant has been represented in this action by an attorney employed by said Ætna Insurance Company, and if a judgment is recovered against defendant in this action, it will be paid to the extent of the liability of said Ætna Insurance Company under said policy of insurance."

[1] The trial court sustained the demurrer on the ground that the respondent is maintained as a benevolent and charitable in-

committed by its servants against a patron of the institution, in the absence of a showing that it failed to exercise reasonable care in the selection of the servant. The rule applied by the court is the settled rule in this state; and, if it appears from the complaint that the respondent is a benevolent and charitable institution, the demurrer was properly sustained. Wharton v. Warner, 75 Wash. 470, 135 Pac. 235; Magnuson v. Swedish Hospital, 169 Pac. 828.

[2] It may be conceded, we think, that the purposes for which this corporation is organized are in the wider sense benevolent and charitable. Benevolence and charity do not consist wholly of almsgiving. While to relieve the wants of the helpless, the needy, or the indigent is charity, it is not the only form of charity. To engage in the work of improving the spiritual, mental, social, and physical condition of young men by the maintenance of lectures, gospel services, libraries, reading rooms, gymnasiums, recreation grounds, social meetings, and such other things as may conduce to these objects so that the beneficiaries may not become helpless, needy, or indigent, is more to the purpose, and is, when done gratuitously, perhaps the purest form of charity. But it is not charity in the legal sense to do these things for the purposes of gain, profit, or private advantage, or in the anticipation of

gain, profit, or private advantage.

[3] The term "charity" in itself implies gift in some form; it implies the bestowal of goods or money, the rendition of services, or the awarding of privileges, free to the recipient, without gainful return or the anticipation of gainful return to the donors. Hence it is not charity in a legal, or in any sense, to confer benefits, which would be charitable if done without gain or the anticipation of gain, when the recipient, in order to receive the benefits, is required to return an adequate consideration. In other words, a charitable corporation to be such must not only engage in works tending to the betterment of mankind, but it must do so as a charity. If it renders no services except those for which it receives an adequate reward, it is a business, not a charitable, concern, and cannot claim the immunities of the latter. is not to say that it has not the character of a charitable institution merely because it may exact compensation from those desiring its privileges to the extent of their ability to pay. It is but to say that it is not a charity if it does no charity-if its privileges are extended to those only who have the ability and willingness to pay full value for the privileges afforded.

[4] Whether the respondent is or is not a charitable association, as the question is now presented to us, must be determined from the allegations of the complaint. The respondent contends that we may take judistitution, and as such is not liable for torts | cial notice of the objects and purposes of that they are essentially benevolent and charitable. But this is true only to a limited extent. We may know historically that the association originally founded under the name of Young Men's Christian Association was essentially charitable, but we cannot know judicially that the many independent organizations now existing under the same name are so. The particular association is an incorporation under the laws of this state. and its powers and privileges are such as the state laws confer upon it and permit it to assume in its articles of incorporation. We have, it is true, laws permitting the incorporation of purely charitable associations, but we have laws also which permit incorporation for business purposes, and whether this one is so incorporated or not depends upon its articles of incorporation and the manner in which it conducts its business thereunder, not upon the general character of the original institution whose name it bears.

[5] Turning to the complaint it is at once apparent that it does not there appear to be charitable association under the legal meaning of that term. While its purposes as defined in its articles of incorporation are designed and adapted to the accomplishment of charitable purposes, it is not shown that it pursues them as a charity. On the contrary, the allegation is that for the services rendered charges are made to the recipients of its benefits and privileges, equal in amount to charges made for like benefits and privileges furnished by other institutions ostensibly operated for gain and profit. Nor is it shown that it has no capital stock, nor that the incorporators or members can derive no profit from the conduct of the business of the association; nor does it appear that its gains, as was shown in the case of Magnuson v. Swedish Hospital, are all or in any considerable part applied to the maintenance of the association or in the furtherance of its purposes and designs.

[6, 7] We attach no particular importance to the allegation that the duty violated resulting in the injury was expressly imposed by an ordinance of the city of Seattle, nor to the allegation that the respondent had procured indemnity insurance upon its elevator. statute or ordinance, it is true, may create a liability where none before existed, but to accomplish that purpose it must be designed to that end. Here there is nothing to indicate that the municipal authorities enacting the ordinance intended thereby to create a liability against charitable institutions otherwise exempt from liability, and without some such express or implied intent none can be presumed to exist. The taking of indemnity insurance was but the exercise of business prudence. At any rate, it could create

such associations, and may know judicially ever much it might weigh as evidence of the construction the corporation placed upon its limitations and powers.

It will not be understood that we hold, even for the purposes of the particular case, that the respondent is not a charitable corpora-What we hold is that it does not so appear from the allegations of the complaint. The allegations of the complaint are, of course, disputable, but we are clear that they are sufficient to require the respondent to

The judgment is reversed, and the case remanded for further proceedings in the court below.

ELLIS, C. J., and PARKER, MAIN, and WEBSTER, JJ., concur.

## MALTBIE et al. v. GADD et ux. (No. 14511.)

(Supreme Court of Washington. April 26, 1918.)

Appeal and Error &==960(3) — Review DISCRETION-HEARING MOTION TO STRIKE.

Treating a motion to strike out an amended answer as a demurrer, and hearing it as such, is so far within the trial court's discretion as hardly to be reviewable in any case, and certainly not unless for manifest abuse.

2. Sales == 288(6)—Breach of Warranty-

WAIVER.
Where buyers of a gasoline pumping outfit, who claimed breach of sale warranty in seller's failure to properly install the pump so that it would pump the quantity of water warranted, had, after such installation, paid the greater part of the purchase price, and four years after the sale had renewed their obligation to pay the balance by giving a new note, the breach was waived, since they had as full knowledge of

the breach when they gave the renewal note as at any time afterwards. Pleading \$\sim 261\text{-Trial Amendment.}

Refusal to allow defendants' trial amendment, adding matter of affirmative defense was ment, adding matter of amirmative defense was not error, where at the time defendants had no affirmative answer in the record to which the proffered amendment could be applicable, but, although having had leave to file an amended answer, they had not done so, but had gone to trial on the issues made by the complaint and their denials thereto.

4. SALES 429 - BREACH OF WARRANTY -TENDER OF RETURN OF PROPERTY.

Tender of return of the property sold is not

necessary to enable buyers to recoup for breach of warranty.

Department 1. Appeal from Superior Court, Grant County; Sam B. Hill, Judge.

Action by P. G. Maltbie and D. O. Friel, copartners doing business under the firm name of Maltbie & Friel, against Joel P. Gadd and wife. From judgment for plaintiffs, defendants appeal. Affirmed.

W. E. Southard, of Wilson Creek, for appellants. C. J. Lambert, of Wilson Creek, for respondents.

FULLERTON, J. In June, 1909, the reno liability where none before existed, how-spondents sold and delivered to the appellants a pumping outfit consisting of a gas | engine, a pump with its appurtenances, and certain piping. The price agreed upon was \$725. Of this sum \$10 was paid in cash and for the balance a promissory note was given secured by a mortgage upon real property. Between the date of the sale and October 15, 1913, the appellants paid on the note \$616, and on that date gave a new note for the remainder due in the sum of \$336.60, securing it by a mortgage upon the same property. In 1916, the note not having been paid, the respondents began the present action to recover thereon and foreclose the mortgage given to secure it. The complaint was in the usual form in such cases. The answer of the appellants after certain denials set up the facts of the sale, averring the giving of the original notes and the payments thereon, and the giving of the note sued upon. It then set up a warranty in the contract of sale and its breach by the respondents. To the affirmative matter of the answer the respondents interposed a demurrer which the trial court The appellants thereupon filed an amended answer, setting forth the matters contained in the first in somewhat different language but in substance the same. The defendants moved to strike the amended answer on the ground that it was not different in effect from the original answer to which the demurrer was sustained. The trial court refused to entertain the motion in the form as made, but announced to counsel that he would treat it as a demurrer and hear it as such. Later on it was so heard and sustained as to the affirmative matter therein set forth. Leave was granted the appellants to amend if they so desired, but no amended answer was filed and the cause was brought on for hearing on the complaint and the denials in the answer. At this hearing the appellants asked leave to amend a certain paragraph of the affirmative defense by adding a clause thereto. This leave was denied, when the cause proceeded to trial on the issues as then framed. After the respondents had rested, the appellants offered evidence to sustain the affirmative matters set out in the amended answer, to which the trial court sustained an objection. The appellants then made an offer of proof and rested, whereupon judgment was entered for the respondents in accordance with the prayer of their complaint. This appeal followed.

Errors are assigned on the rulings of the court: (1) In treating the respondents' motion to the affirmative matter in the answer as a demurrer and sustaining it; (2) in refusing to allow the amendment offered to the affirmative answer at the trial; (3) in rejecting the appellants' evidence in accordance with its offer of proof; (4) in entering judgment for the respondents.

[1, 2] Noticing the assignments in the orcourt to treat the motion as a demurrer to wise failed.

the answer and hear it as such. This was purely a question of practice, so far within the discretion of the trial court that it may be questioned whether it is subject to review in any case, but certainly not unless for manifest abuse nothing of which is shown here. As a demurrer it was rightly sustained. The breach of warranty alleged was the failure to properly install the pump in the well of theappellants, so that it would pump the quantity of water named in the warranty, or comply in other particulars with its terms. the warranty was breached at the inception of the contract, and was waived by the subsequent conduct of the appellants. They not only paid the greater part of the purchase price thereafter, but more than four years later renewed their obligation to pay the remainder of the price. Seemingly, if a waiver of a breach of warranty could ever be made, there was a waiver in this instance. Their knowledge of the breach was as completewhen they gave the second note as it was at any time afterwards, and the giving of the note alone with that knowledge would constitute a waiver of the breach. Means v. Subers Sons, 115 Ga. 371, 41 S. E. 633.

The only case from our own court called toour attention which approaches this one in its facts is Huntington v. Lombard, 22 Wash. 202, 60 Pac. 414. But in that case the note sued upon was given prior to the time the pump sold could be tested, and the defense of breach of warranty was set up when the purchase price note was sought to be enforced. Here there was not only a substantial payment on the original note, but a renewal note given after the breach occurred. The difference is material.

[3, 4] The refusal to allow the trial amendment was not error. At that time the appellants had no affirmative answer in the record to which the proffered amendment could be applicable. Leave had been granted them to file such an amended answer, but they had not taken advantage of the offer; on the contrary, they had gone to trial on the issues made by the allegations of the complaint and their denials thereto. But more than this, the amendment offered added nothing to the allegations of the answer, treating it as in the record. It was simply a tender of the return of the property. This was not necessary to enable them to recoup for the breach of warranty. If their plea had been timely made it would have been as potent as a set-off without such a tender as with it.

Nor was there error in rejecting the offer of proof. It was but a restatement of the facts set forth in the answers to which the demurrers had been sustained. Waiving the objection that it was so far affirmative matter as not to be admissible without a plea, it contained nothing material not set forth in the answers filed. For the reason that the ander stated, it was not error on the part of the swers failed to constitute a defense, it like-

The judgment was in accord with the rec- larly used, signifies "net income" (citing Words ord, and is not objectionable.

The judgment will stand affirmed.

ELLIS, C. J., and WEBSTER, MAIN, and PARKER, JJ., concur.

STANTON v. ZERCHER et al. (No. 14260.) (Supreme Court of Washington. April 25, 1918.)

1. Fraud == 21-Sales-Reliance on Rep-RESENTATIONS.

Representations that insurance business wa increasing in value, and profits averaged \$500 net income per month, and had a valuable good will, if false, constituted actionable fraud and deceit; the purchasers having the right to rely upon such representations.

2. APPEAL AND ERROR 1001(1)—Scope of Review—Findings of Fact.

The jury's conclusion upon competent evidence is conclusive upon the parties and the court on appeal.

3. Fraud \$==59(1) - Sales - Measure of

DAMAGES

The seller's representations as to net income and value of good will being untrue, the pur-chaser's measure of damages was the difference between the net value of the business as it was and the net value of the business as it was represented to be, and in addition thereto the value of the good will of the business as represented. 4. GOOD WILL 2=2 - NATURE AND ELE-MENTS.

Good will of the business is the faith of the public and the probability of continuance of public and the probability of continuance of patronage, the advantage inuring to the pur-chaser from succeeding to the business, but is not the business itself, but is personal proper-ty, and a part of the assets.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Good Will.]

5. Good Will @==2-What Constitutes.

Good will of insurance business, though the sale price was computed on the basis of the amount of commissions on premiums and loans shown by the books, was something more than such amount, and included the advantage to be gained by the reputation of the seller.

6. Fraud 6-59(1)—Measure of Damages.
Fraud in a sale of an insurance business being established, the defrauded vendee is entitled to the highest measure of damages allowable under the law and facts, which could not exceed the total consideration, nor the balance of the consideration due.

7. TRIAL \$\infty 295(8)\to Instructions\to Burden OF PROOF.

Instruction that the purchasers had the burden of showing alleged falsity of representations, and that, if they failed so to prove their allegations, the verdict must be for the seller, "unless false representations were made in other respects," while misleading, if alone, was not erroneous, where the court fully instructed the jury as to all the issues of fact.

8. Trial &= 228(3)—False Representations
— "Income" — "Net Income" — "Gain" — Instructions.

Where purchasers of insurance business alleged misrepresentation as to "net income," and testimony referred principally to "income," instruction dealing with "net income" was not erroneous, since "income" is that gain proceeding from labor, business, or property, and "gain" signifies the difference between receipts and expenditures, so that "income," as popu-

and Phrases, Income. See, also, Words and Phrases, Gain; Net Income).

9. Trial \$\infty\$=251(9)—Instructions—Measure OF DAMAGES.

In action on note given for price of insurance business, where defendants counterclaimed for misrepresentations as to value of busied for misrepresentations as to value of business, seeking damages, including difference between business as represented and as it actually was and the value of the good will, instructions offered on theory that the business purchased included only the amount of renewals for one year, and not the good will, were properly refused. erly refused.

Department 2. Appeal from Superior Court, Benton County: Ralph Kauffman. Judge.

Action by Richard Stanton against R. H. Zercher and F. E. Zercher, wherein defendants filed a counterclaim. Judgment for defendants, and plaintiff appeals. Affirmed.

Moulton & Jeffrey, of Kennewick, for appellant. Hal H. Cole, of Toppenish, for respondents.

HOLCOMB, J. This controversy arose over the purchase by the respondents from the appellant, on or about August 18, 1914, of a certain insurance and loan business in Kennewick, Wash., for a consideration of \$4,830, on which was paid the sum of \$2,000 cash at the time of the transaction, and notes aggregating \$2,830 were given for the remainder. Certain payments were thereafter made and credit given therefor, as a result of which the trial court instructed the jury that the amount of recovery upon the notes in principal totaled the sum of \$2,843.63, with interest thereon at 12 per cent. per annum from June 7, 1916, the date of the commencement of the action, to the date of the submission to the jury, in case appellant recovered against respondents. The interest as above specified would have aggregated \$161.12. making the total recovery, in case appellant had recovered anything, \$3,004.75, principal and interest.

As an affirmative defense, and by way of counterclaim to appellant's complaint, respondents alleged certain false and fraudulent representations made by appellant in negotiations leading up to the sale, as follows: That the business of appellant was an old, established business; that there were no others in the field, and no chance for them to come in; that the business had increased largely in volume during the year next prior to the transaction; that the values at which the various properties upon the books of appellant were insured were the correct insurable values; that his reputation as an insurance man, as well as the reputation of "Stanton's Insurance Office," in Kennewick and vicinity, was good, and that, in case the business was continued under the name of "Stanton's Insurance Office," people would continue to do business with the office on acton, appellant advising respondents to continue the business under the name of "Stanton's Insurance Office": that in connection with the insurance business he had been and then was agent for the Pacific Building & Loan Company, which agency and business he would turn over to the respondents, and that he had been deriving from the insurance and loan business a total monthly net commission income of \$400 or \$500; that the good will of the business was valuable, and that the appellant's standing and reputation, as well as the standing and reputation of the office, was good: that the insurance business, including the furniture and fixtures of the office and the good will of the business, together with the agency of the Pacific Building & Loan Association, was reasonably worth the sum of \$4,830. It is claimed that all the foregoing representations were false, and that appellant knew them to be false when made.

In addition to the foregoing, respondents claim that, after taking over the business, they discovered that the business had not been on the increase for the preceding year; that the reputation of the appellant was bad: that the business had not been earning the income of \$400 or \$500 per month, and that it had not been earning any income in excess of \$250 per month; that the books and records which had been exhibited to him by the appellant were padded and falsified, and that the true condition and status of the business had been concealed from the respondents; that the properties covered by insurance were insured beyond their actual valuation and in violation of the law; that the good will of the business was of little or no value; that the appellant had been paying and allowing commissions and rebates to various persons and corporations in order to secure business; that the agency of the Pacific Building & Loan Association had been discontinued; and that the insurance business was not worth to exceed the sum of **\$**1.830. Respondents further alleged that they relied upon the representations made to them concerning the business, believed the same to be true, would not have purchased the business had they known the same to be false, and that they were accordingly damaged in the sum of \$5,000.

All of the alleged fraudulent representations were denied by appellant in his reply. The issues were submitted to the jury, and at the close of the trial the court instructed the jury that appellant was entitled to recover on his notes, with interest at 12 per cent. per annum from June 7, 1916, as heretofore stated, and that, if the jury found the respondents were entitled to recover more than this amount, their verdict should be for respondents to the extent of such excess; that if they found that respondents' damage ex-

count of the standing and reputation of Stan- their verdict should be for respondents, and if they found that the amount of respondents' damage, if any, was less than appellant was entitled to recover, their verdict should be for appellant for the difference. The jury returned a verdict for the respondents; in other words, finding that the damage to respondents was exactly equal to the amount which appellant would otherwise be entitled to recover. Judgment thereon for costs was entered by the clerk against appellant. In due time appellant filed his motion for judgment notwithstanding the verdict and for a new trial in the alternative, which motions were denied by the court, and a formal judgment. dismissing appellant's action and allowing respondents their costs and disbursements, was entered.

> [1] Twenty-eight errors are claimed by appellant, divided into nine groups. Under the allegations of respondents' affirmative answer, that the representations made by appellant, if false, constituted actionable fraud and deceit, and that respondents had the right to rely upon them, is well settled by the decisions of this court. Gilluly v. Hosford, 45 Wash. 594, 88 Pac. 1027; Blum v. Smith, 66 Wash. 192, 119 Pac. 183; Gillette v. Anderson, 85 Wash. 81, 147 Pac. 634; Christensen v. Koch, 85 Wash. 472, 148 Pac. 585; Duffy v. Blake, 80 Wash. 643, 141 Pac. 1149; Sowles v. Fleetwood, 97 Wash. 166, 165 Pac. 1056. Appellant's claims of error are so numerous, involved, and intricate that they cannot be separately discussed fully within the proper limits of this opinion.

> One of the principal claims of error is that the question of the good will of the business should not have been submitted to the jury. The court, as appellant says correctly, instructed the jury that the measure of respondents' damage, if any, was the difference between the value of the business which they actually got and the value it would have had. had it been as represented, to wit, its purchase price, in this case, \$4,330; the sum of \$500, which was given for office furniture and fixtures, not being in controversy. To determine this difference, it was, of course, necessary for the jury to determine the value of the business as it was when respondents received it, and for the purpose of guiding the jury along this line the court gave, among others, instructions numbered 8 and 17. In instruction No. 8 they were told:

"Your first inquiry naturally will be: 'What was the thing which the plaintiff sold, outside of the tangible personal property, consisting of the furniture and fixtures? To my mind, it was nothing more or less than the good will of the concern. I charge you that this is the law of this case. A learned English judge has said that by the term 'good will' is meant 'every advantage that has been acquired by the old concern by carrying on its business; every-thing connected with or carrying with it the benefit of the business.' Tested by this defini-tion, what did the defendants buy? In my opin-ion, they bought the reputation which the Stanactly equaled the amount due appellant ton Agency had built up in the community, its right to represent and solicit business for the companies which it had on its hills, its ability to earn commissions on renewals of insurance, its ability to earn commissions on new business to be acquired, and the probability that, by reason of its standing and reputation in the community, new business would come to the

In No. 17 the jury were told:

"To sum up: If you believe from the evidence here that the plaintiff made any or all of these representations, that such representations or any of them are false, were known by him at the time to be false, or were not known by him at the time to be true, or that he suppressed the at the time to be true, or that he suppressed the truth concerning any of these matters, of which it was his duty to speak, that the defendants relied upon the truth of these representations, either active or passive, and could not by reasonable diligence have ascertained their falsity, that as a result thereof they bought the business, and that they paid therefor a sum in excess of the value of the good will of the business as I have defined it, then they have been damaged by the making of these representations, and it will be your duty to ascertain and fix the sum of such damages."

Appellant complains that, because both appellant and respondents testified that the consideration for the sale was arrived at by ascertaining the amount which one renewal of the business then on the books would produce in the form of commissions, which was found to be \$4,330, all of the testimony and the instructions as to the good will were outside the issues and were no proper basis for the ascertainment of damages, and that no data were given the jury upon which to ascertain the value of the good will and the damage occasioned by the loss thereof. Authorities are cited and quoted by appellant dealing with actions ex contractu to recover damages for breach of contract conveying good will, where the vendor violated his contract not to engage in business for a definite period of time under the terms of the sale, to the effect that, while such damages are rarely susceptible of accurate proof, the measure generally expressed is the value of business lost to plaintiff; not the gain to defendant, which may be more or less than plaintiff's loss, though such gain may be considered in evidence. It should be shown to correspond in whole or in part with the loss of the plaintiff; nothing appearing of the amount of the plaintiff's loss, the allowance of damages beyond a nominal sum is error. But here, while by the terms of the instrument of conveyance, given by appellant to respondents, appellant conveyed the good will of the business and agreed not to engage in any manner in the business thereby conveyed, during a period of ten years from the date of the contract, in Kennewick or within a radius of 40 miles thereof, this is not an action for the violation of that term of the contract, but is an action by way of counterclaim for the damages sustained by respondents by reason of the misrepresentations of appellant as to the value of the business at the reputation and the good will of the business.

[2-4] It was shown by competent evidence on behalf of respondents which the jury evidently believed, and appellant and this court are concluded thereby, that the representations made by Stanton as to the good reputation of his insurance business, the income of the business for the year preceding, the amount of the business on the books which could and would be renewed, and the business on the books being clean good business, were all substantially false and untrue: that. on the contrary, the net earnings of the business for the preceding year had not been to exceed \$200 or \$250 per month, instead of \$400 or \$500 per month, as represented; that the reputation of Stanton's Insurance Office was not good, but was bad; that as such it was injurious, rather than valuable; that the reputation of Stanton as an insurance agent was that of a rebater, and therefore a violator of the law; that in fact he had a pending contract with a concern from which he had purchased the business to give it and the officers and employés thereof rebates of from one-third to one-half of the commissions of all business, and in some instances the entire commission; that, all these representations having been found untrue, the difference between the net value of the business to respondents and the net value of the business as represented was the thing upon which the jury had to base its verdict. In addition to that, it was entitled to allow to respondents a recovery of the value of the good will of the business, as represented by appellant. Good will was correctly defined by the court in its instruction complained of, but the measure of damages was somewhat unduly restricted and narrowed against respondents.

"Good will" has been defined by the courts to be the faith which the manager of a business wins from the public and the probability that old customers will continue their pat-Chittenden v. Witbeck, 50 Mich. 401, 15 N. W. 526; Williams v. Ferrand, 88 Mich. 473, 50 N. W. 446, 14 L. R. A. 161. It comprises those advantages which may inure to the purchaser from holding himself out to the public as succeeding in an enterprise which had been conducted in the past with the name and repute of his predecessor. Knoedler v. Boussod (C. C.) 47 Fed. 465. The good will of the business is not the business, but is one result springing out of it. It would be too narrow to construe the word "business" to be the good will of the business. McGowan v. Griffin, 69 Vt. 168, 37 Atl. 298. The good will of the business is a species of personal property, and, although inseparable from business, is an appreciable part of the assets of a concern, both in fact and in the estimation of the courts. It is a portion of the subject-matter which produces profits. Story, Partnership, § 99; Lindley, the time of the sale, including the value of Partnership, 842; Morgan v. Perhamus, 36 Ohio St. 517, 38 Am. Rep. 607. That it is property is abundantly settled by authority.

Atl. 843.

[5] It is evident that the good will alone could not be mathematically determined, nor could respondents or any other witnesses put a mathematical value upon it. It was to be a valuable asset, which went along with the other assets of the business, and was a thing which was misrepresented by appellant, under the facts found by the jury, as much as any other thing was misrepre-The damages claimed by respondents, amounting to \$5,000, included the good will; and in fact the good will included almost everything transferred by appellant to respondents. It might possibly be said to include the renewals of insurance on the books, or represented by appellant to be on the books, or existent. But certainly the good will of the business was something more than merely the amount of commissions on premiums and commissions on loans which might have been shown by appellant's books or in any way misrepresented as belonging to him, and therefore the aggregate damage sustained by respondents, which included the loss of good will of the business, might have been found by the jury, within the limits of the evidence and the allegations of respondents, in a sum considerably exceeding the difference between the value of the renewals of business as represented and actually and legally existing at the time of the sale.

[6] The fraud in the sale being established to the satisfaction of the triers of the facts, the defrauded vendee would be entitled to the highest measure of damages allowable under the law and the facts. The jury, having resolved the facts in favor of recovery by respondents, allowed an exact offset of the amount of the unpaid purchase money and interest thereon as a counterclaim in damages, evidently basing the award upon the 50 per cent. or 60 per cent. of the business represented and not received, and the total good will of the business as represented and sold, but not received. While this item of good will was not estimated in any given sum by any witness, it was a calculable item under the facts before the jury, although it could not exceed the total consideration, nor should it exceed the amount thereof which respondents, having paid part, had yet to pay; in other words, the exact damages sustained. The jury accordingly awarded exact compensation to respondents, and substantial justice was done. We think the court did not err against appellant in giving the instructions complained of.

[7] Complaints are made as to instructions numbered 6, 10, 15, 17, and 19. Instruction 6 told the jury that the burden of proof was upon the defendants to prove to the satisfaction of the jury their allegations as to misrepresentations by the greater weight of the evidence, and, in case defendants failed so to prove their allegations, the verdict of the jury must be for the plaintiff in the full income.

See v. Heppenheimer, 69 N. J. Eq. 36, 61 amount of his claim, unless the jury found that false representations were made in other respects. This instruction, standing alone, might appear to be misleading; but the court very fully instructed the jury as to all the issues of fact between the parties. Instructions numbered 10, 15, 17, and 19, complained of by appellant, relate to the reputation of appellant, and his insurance office and business, and padding of the books, and rebating. There can be no doubt that the court correctly instructed the jury as to what constituted rebating, and in so doing quoted the statutes of this state: and there can be no doubt that there was evidence, and inference to be derived from evidence, on the part of respondents, that appellant was guilty of rebating under the definitions given, and also of padding his books. There was also proper and competent evidence of the bad reputation of appellant as an insurance agent, and his insurance office as an insurance business. These instructions applied to the facts in controversy and were in no sense improper or erroneous.

[8] Appellant's assignments of error numbered 18, 19, and 20 relate to certain instructions given by the court, which appellant asserts assume the existence of a state of facts never contended for by respondents, and which must have radically misled the jury. These complaints refer to a subdivision of instruction No. 4 and instructions numbered 12, 13, and 15. The specific errors alleged consist of the use of the words "net income," instead of "income." instance, in subdivision C of instruction 4 the jury were told by the court:

"That the plaintiff represented the business which the concern had been doing had been increasing during each month of the prior year and the emoluments thereof in proportion, and that he was receiving from said business a net income of \$500."

This instruction occurs in the statement by the court of the fraudulent misrepresentations alleged by respondents, and correctly states the allegations of respondents. instruction No. 12 the jury were told that, if they found that the plaintiff represented the income of the concern had been increasing during each month of the year prior to the deal, and that he was receiving from the business a monthly net income in the neighborhood of \$500, that the jury were satisfied that the income from the business had been either stationary or diminishing during such period, and the plaintiff knew this, and that the defendants by reasonable diligence could not have ascertained the faisity of this statement, and parted with something of value by reason thereof and in reliance thereon, and were damaged thereby, they have a right to recover or set off in this case the amount of such damage. In instructions numbered 13 and 15 the allegations and theories of the respondents were again referred to as referring to the net income of the business or office, instead of the gross receipts or gross

the net income for the preceding year and at the time of the sale were represented to be so much. Sometimes, in testifying upon the subject, respondents did not include the word "net," but spoke of the representation as to "income"; and appellant accordingly claims that the testimony did not sustain the allegations as to representations of net income being so much per month, but would sustain the representations as to gross income only. "Income" is defined as that gain which proceeds from labor, business, or property of any kind; the profits of labor, commerce, or business. 4 Words and Phrases, 3501. "Gain" signifies the difference between the receipts and expenditures. In the ordinary and popular meaning, where representation of "income" is made, one would necessarily understand that it meant that "net income." It would certainly not be taken to mean merely the gross receipts of a business or property. There was no fault, therefore, with the instructions referring to net income, nor was there any variance in the evidence of respondents, referring to the "income" represented to them, instead of the "net income" of the business.

[9] Errors were assigned upon the refusal of the court to give instructions requested by appellant, which, upon the theory of respondents, were inconsistent with those given by the court, as to the method of determining the damages sustained by respondents, if any, and were based upon the theory that the value of the business was arrived at solely by determining the amount in the form of commissions which one renewal of the business then upon the books would produce. But since we have found that respondents sought to recover by way of counterclaim the value of the good will of the business, and the difference between the value of the business as represented and its actual value, and that these were proper elements of damage, it is not necessary to discuss the refused instructions. They were improper, and properly refused.

Other claims of error relate to the reception and rejection of testimony. We have examined these alleged errors, and find no merit in any of them, under the issue to be determined.

We find no error justifying reversal. Affirmed.

ELLIS, C. J., and CHADWICK and MOUNTS, JJ., concur.

STATE v. VAN VLACK. (No. 145641/4.) (Supreme Court of Washington. April 26, 1918.)

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Tideland.l

2. FISH \$==7(2)-CLAM BEDS-PRIVATE OWN-ERSHIP.

Because of the peculiar characteristics of the clam—its fixed habitation when imbedded in the soil—clam beds may become the subject of private ownership, which passes to the gran-tee by a conveyance from the state of tidelands in which the beds are located.

3. Criminal Law \$=304(1)—Judicial No-tice—Scientific Facts.

Courts will take judicial notice of scientific facts and natural laws which are well known and which may be found in standard publica-tions treating of the subject.

4. EMINENT DOMAIN \$== 2(4)—REGULATION OF

4. EMINENT DOMAIN \$\inspec 2(4)\$—REGULATION OF CLAM DIGGING.

Laws 1915, p. 108, \$ 100, forbidding digging of clams on Puget Sound tidelands, for certain purposes, between April and September, in restricting the rights of the owner of such tidelands, neither takes nor destroys his property, but merely regulates the use of it in the interest of the general welfare for conserving a valuable food product.

5. CONSTRUCTIONAL LAW \$\inspec 278(6)\$. From \$\inspec 278(6)\$.

5. CONSTITUTIONAL LAW \$\infty 278(6)\$—Fish \$\infty\$—CLAM DIGGING—STATUTES.

The statute, being a proper exercise of the police power, does not violate Const. U. S. Amend. 14, nor Const. art. 1, § 3.

Department 1. Appeal from Superior Court, Thurston County; John R. Mitchell, Judge.

Harry Van Vlack was convicted of having in possession clams unlawfully taken, and he appeals. Affirmed.

E. N. Steele, of Olympia, for appellant. W. V. Tanner and Glenn J. Fairbrook, both of Olympia, for the State.

WEBSTER, J. On July 10, 1917, an information was filed in the superior court against the appellant, the charging part of which is as follows:

"Then and there being, he, the said Harry Van Vlack, did unlawfully have in his possession one sack of clams purchased by him, the said Harry Van Vlack, from one C. A. Schneider, which said clams were taken for the purchased by the said clams were taken for the purchased said clams. pose of sale on or about April 26, 1917, and sub-sequent to April 1, 1917, by said C. A. Schneid-er from tidelands abutting on Puget Sound and owned by said C. A. Schneider."

To this information appellant filed a general demurrer, which was overruled. Refusing to plead further, sentence was pronounced and judgment thereon entered against appellant, from which this appeal was taken. The prosecution is based upon section 100. c. 31, Laws 1915, p. 108, which reads:

"It shall be unlawful for any person to take or dig clams or mussels from any of the tide-lands abutting on Puget Sound or from the waters of Puget Sound below the line of low tide, or have them in their possession, if the same have been taken for the purpose of canning or selling, between the first day of April and the first day of September of each year: Provided, that rething in this gention shell provided. 1. FIRE \$\insigma 12\$—CLAMS—INVASION OF PRIVATE
RIGHT—"TIDELANDS."

Laws 1915, p. 108, \{ 100, forbidding digging of clams on Puget Sound tidelands, for certain purposes, between April and September, that nothing in this section shall prevent the

taking of these clams for consumption of the of the individual, has been divested of its taker or his family, or guests at all times without a license."

[1] It is contended by appellant: First, that the statute has no application here, for the reason that the clams were dug and taken from tidelands by the owner of such lands, who by reason thereof had the unqualified ownership of the clams which were sold to the appellant, and that the statute in no wise affected or restricted the rights of private ownership of clam beds in tidelands abutting on Puget Sound: second, that if the statute applies to the facts of this case, then it contravenes section 1 of the Fourteenth Amendment to the Constitution of the United States, as it also does section 3, art. 1, of the Constitution of the state of Washington, and is therefore void.

The first proposition urged is without merit. The language of the statute is plain and comprehensive. It makes unlawful the taking or digging of clams, during the closed season, by any person from any of the tidelands abutting on Puget Sound, or from the waters thereof below the line of low tide. Tidelands are lands which in their natural state are affected by the ebb and flow of the tide. They are not divested of their classification or character as such by the mere fact that title thereto may have passed from the sovereign to the individual. Whatsoever incidents may follow the changed ownership, the fact still remains that they are known and designated as tidelands. There being no exception reserved in the act dependent upon the ownership of the land, it necessarily follows that the legislative enactment by its terms applies to all tidelands abutting on Puget Sound, regardless of whether the title thereto remains in the state or has vested in private ownership.

[2-4] The second proposition involves a more serious question, whether the restrictions placed by the act upon the property of the individual constitutes a taking of his property within the meaning of the constitutional inhibition, or whether it is merely a regulation of the property right within the valid exercise of the police power of the state. At the outset it may be conceded that because of the peculiar characteristics of the clam-its fixed habitation when imbedded in the soil—clam beds may become the subject of private ownership, which passes to the grantee by a conveyance from the state of tidelands in which the beds are located. Such is the effect of the decisions of this court in Sequim Bay Canning Co. v. Bugge, 49 Wash. 127, 94 Pac. 922, 16 Ann. Cas. 196, and Palmer v. Peterson, 56 Wash. 74, 105 Pac. 179. In this respect clams differ from fish, game birds, and game animals in their wild or natural state. The landowner acquires no vested ownership in the latter, but the state may regulate and control the subject by virtue of its sovereign power. Since

ownership of clam beds in tidelands conveyed by the state, its power to regulate the industry or to restrict the rights of the landowner in the use and enjoyment of his property must necessarily depend upon whether it may do so by virtue of the police power with which the state is invested; that is to say, whether the statute, as applied to private ownership, is a lawful exercise of the police power. It will be observed that the gist of the offense defined by the statute is the taking or digging of clams for the purpose of canning or selling, or having clams so taken or dug in one's possession, between the 1st day of April and the 1st day of September of each year. This is the only restriction placed upon the property right of the landowner. It neither takes nor destroys his property; it merely regulates the use of it in the interest of the general welfare by conserving a valuable food product, as we shall presently see. Provision is expressly made that he may take for his own use or for the use of his guests at all times. The sole question then is whether the legislative enactment which prevents the owner from digging and taking his clams for the purpose of selling or canning them, during the prescribed perlod, deprives him of his property without due process of law.

It seems to be settled that courts will take judicial notice of scientific facts and natural laws which are well known and which may be found in encyclopedias, dictionaries, or other standard publications treating of the subject. 15 Ruling Case Law, p. 1127, and cases cited. And scientists have demonstrated that the spawning season of clams extends throughout the latter part of May, the whole of June, and in many cases during the entire summer. The larvæ are active, and swim freely upon the surface of the water, where they are borne and scattered in all directions by the winds and tides, until in a few days, the shells becoming heavier, they sink to the bottom, and, resting on seaweeds, stones, or other objects, become attached by byssus threads. Soon after they cease swimming they begin to burrow, if a suitable location is found. The Encyclopedia Americana, subject Clam; Nelson's Encyclopedia, subjects Mussel and Clam; Observations on the Soft Shell Clam by Meade and Barnes (Brown University Contributions from the Anatomical Laboratory, vol. 4, 1905).

Such is the effect of the decisions of this court in Sequim Bay Canning Co. v. Bugge, 49 Wash. 127, 94 Pac. 922, 16 Ann. Cas. 196, and Palmer v. Peterson, 56 Wash. 74, 105 Pac. 179. In this respect clams differ from fish, game birds, and game animals in their wild or natural state. The landowner acquires no vested ownership in the latter, but the state may regulate and control the subject by virtue of its sovereign power. Since the state, by reason of the private ownership The effect of the statute is merely to prevent

a private owner from so using his property, All property as to interfere with or trench upon the corresponding ownership and rights of others, including the public.

In State ex rel. Case v. Howell, 85 Wash. 281, 147 Pac, 1162, Judge Ellis, delivering the opinion of the court, said:

"It may be asserted, as a general rule applicable to every phase of the police power, whether emergent or not, that, when the propriety of its exercise is called in question, the power will be sustained whenever the given measure has any 'real substantial relations to the general good and welfare.'"

In State v. Pitney, 79 Wash. 608, 140 Pac. 118, Ann. Cas. 1916A, 209, the court, speaking through Judge Main, said:

"In determining whether the provisions of a law bring it within the police power, it is not necessary for the court to find that facts exist which would justify such legislation. If a state of facts can reasonably be presumed to exist which would justify the legislation, the court must presume that it did exist, and that the law was passed for that reason. If no state of circumstances could exist to justify the statute. circumstances could exist to justify the statute, then it may be declared void because in excess of the legislative power."

This is but an application of the elementary principle that every reasonable presumption should be indulged in favor of the constitutionality of legislation.

In Thorpe v. Rutland, etc., R. Co., 27 Vt. 140, 62 Am. Dec. 625, Chief Justice Redfield used the following forceful language, which is approved by Judge Cooley in his valuable treatise on Constitutional Limitations:

"The police power of the state extends to the protection of the lives, limbs, health, comfort, and quiet of all persons and the protection of all property within the state. According to the maxim, 'Sic uters tuo ut allenum non ledas,' which being of universal application, it must, of course, be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others.

There is also the general police power of the state, by which persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the state, of the perfect right, in the Legislature to do which no question ever was, or, upon acknowledged general principles, ever can be made, so far as natural persons are concerned."

Judge Story, in his work on the Constitution, at section 1954, vol. 2 (5th Ed.), says:

"All the property and vested rights of individuals are subject to such regulations of police as the Legislature may establish with a view to protect the community and its several members against such use or employment thereof as would be injurious to society or unjust toward other individuals. It has been justly said to be 'a settled principle, growing out of the nature of well-ordered civil society that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it shall not be injurious to the equal emjoyment of others having jurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. and PARKER, JJ., concur.

is held subject to those all property is near subject to the general regulations which are necessary for the common good and general welfare; and it must, of course, be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others."

[5] Measured by these definitions of the police power, we are of the opinion that the act in question as applied to private owners of clam beds in tidelands abutting on Puget Sound is not unconstitutional. Let it be remembered that property in clams is not the result of human effort or industry; such property is acquired by the uncontrolled forces of nature. It cannot be said, therefore, to be unreasonable to so regulate the use and enjoyment of this mannalike possession by a private owner as to conserve the interest, not only of the public, but of the private owner as well. He is not deprived of his property by the act in question. His right to enjoy it is merely suspended during the reasonable closed season prescribed by the statute. In re Opinions of the Justices, 103 Me. 506, 69 Atl. 627, 19 L. R. A. (N. S.) 422, 13 Ann. Cas. 745.

Nor are we without authority to sustain the correctness of the application of the doctrine to the facts of this case. In Windsor v. State of Maryland, 103 Md. 611, 64 Atl. 288, 12 L. R. A. (N. S.) 869, the court had before it a statute which provided that any person who shall have oysters in his possession which contained more than 5 per cent. of shell, or which shall be less than 21/2 inches from hinge to mouth, shall be guilty of a misdemeanor and subject to a fine. After carefully considering the question, it was held that the act applied to planted oysters taken from private beds in the waters of that state as well as to oysters taken from natural beds or bars; the court being of the opinion that the act was a valid exercise of the police power in that it tended to preserve a source of food supply. In State v. Sermons, 169 N. C. 285, 84 S. E. 337, the Supreme Court of North Carolina said:

"It is chiefly urged for defendant that a conviction should not be had in this instance, be-cause it appears that the dealer had procured the oysters from an individual owner of the oyster grounds; but the statute makes no such exception, and we are not aware of any principle sustaining the position. The provision establishing a closed season and requiring dealers to operate only under a regular license are among the usual methods of regulating the in-dustry, and it is well understood that the rights of individual owners are also subject to reasonable state regulations affecting their interests.

The judgment will be affirmed.

ELLIS, C. J., and FULLERTON, MAIN,

CITY OF PASCO v. PACIFIC COAST CAS-UALTY CO. (No. 14553.)

(Supreme Court of Washington. April 26, 1918.)

1. PRINCIPAL AND SURETY \$==145(2)-ESTOP-

1. PRINCIPAL AND SURETY &==145(2)—ESTOP-PEL—ADJUDICATION AGAINST PRINCIPAL.

The judgment against a contractor in his action against a city for moneys claimed to be due him, entered upon an accounting, was had on the affirmative defense set up by the city, in which the contractor, as record plaintiff, was assisted by his surety, was not an estoppel against the surety, when sued by the city on its judgment, where the surety set up matters not involved in or material to the first action.

2. PRINCIPAL AND SUBETY (2)—ESTOP-PEL—PARTIES SECONDARILY LIABLE.

One secondarily liable, who participates in an action against his principal, is estopped by the judgment entered on the issues actually tried therein.

tried therein.

3. MUNICIPAL CORPORATIONS &=347(1)—CONTRACTOR'S BOND—LIABILITY OF SURETY.

A city contractor's surety bond for the protection of laborers and materialmen, reciting that it was intended to be made in compliance with the law requiring bonds in such class of contracts, and that the persons for whose benefit it was given might sue thereon, in compliance with Laws 1909, p. 716, was intended as an ordinary statutory bond, and not a bond making the surety company a joint principal with the contractor.

Appeal from Superior Department 1. Court, Franklin County; Bert Linn, Judge.

Action by the City of Pasco against the Pacific Coast Casualty Company. Judgment for defendant, dismissing the action, and plaintiff appeals. Affirmed.

See, also, 89 Wash, 382, 154 Pac, 433,

C. M. O'Brien and Gerard Ryzek, both of Pasco, for appellant. Danson, Williams & Danson, of Spokane, C. W. Johnson, of Pasco, and Geo. D. Lantz, of Spokane, for respondent.

FULLERTON, J. The city of Pasco on August 1, 1911, entered into a contract with one A. R. Garey for the construction of a city hall. The statutory bond for the protection of laborers and materialmen was given, with the respondent herein, the Pacific Coast Casualty Company, as surety. Before the completion of the work the city of Pasco declared the contract forfeited, and itself finished the construction of the building. Thereafter Garey brought an action against the city to recover moneys claimed as due him under the contract, and, on an accounting had between the parties on the affirmative defense set up by the city, judgment was awarded against Garey in the sum of \$4,353.64, which on appeal to this court was reduced to \$3,478.74. The facts in that case will be found fully set out in Garey v. Pasco, 89 Wash. 382, 154 Pac. 433. Subsequently the city of Pasco instituted the present action to recover from the respondent surety company the amount of its judgment against Garey.

The respondent pleaded as affirmative defenses: (1) That it had been released by material alterations made in the building contract between the city and Garey without its knowledge and consent; (2) that the contract provided that the city, in making payments as the work progressed, should hold back 15 per cent. of the contract price on partial and final payments, but that the city failed to retain such percentage, and in fact paid the contractor in full before the completion of the contract, that such sums so received were diverted to other purposes than payment of material and labor claims, and that respondent had been compelled to pay such claims, thus discharging it from liability on its bond; (3) that extras and additions in the building without the written order of the architect were made by the city in contravention of the provisions of the contract and at an additional outlay of \$4,921.50; and (4) that the costs of making the alterations and additions for which recovery is sought were incurred more than three years prior to the commencement of this action and are barred by the statute of limitations. The city replied, setting up that the matters therein alleged were res judicata under the judgment rendered in the prior action of Garey v. Pasco, supra. The cause was tried to the court which made the following findings of fact:

"I. That it has jurisdiction over the parties and subject-matter in said cause. That heretofore, on or about the 1st day of August, 1911, fore, on or about the 1st day of August, 1911, one A. R. Garey entered into a written contract with the plaintiff city of Pasco for the construction of a building known as the City Hall building, at an agreed price of \$27,492, less proper deductions. That thereafter the city of Pasco and the said A. R. Garey made deductions amounting to \$3,405 from said contract price, and before the completion of said building paid to the said A. R. Garey the sum of \$23,368.20, and further paid on the order of said A. R. Garey the sum of \$593.95, or a total payment to Garey or his order of \$23,962.15. That the original contract price, less the deduction which to darey or his order of \$23,902.10. That the original contract price, less the deduction which was made immediately after the execution of the contract, left the contract price for the building at the sum of \$24,087. That at the time of entering into the contract as hereinbefore stated, with the city, the defendant in this action executed the surety bond conditioned for the faithful performance of said contract.

action executed the surety bond conditioned for the faithful performance of said contract, as provided by chapter 207 of the Session Laws of the state of Washington for the year 1909.

"II. That the plaintiff city of Pasco terminated the contract with Garey prior to the completion of the building, leaving unpaid a number of laborers and materialmen, which were paid by the defendant bonding company.

"III. That the contract referred to was the uniform form of contract, and provided, among other things, that the city should pay to the contractor 85 per cent. of the amount earned as work progressed, the remaining 15 per cent. to be retained by the city for a period of 60 days, after the completion of the building, for the purpose of securing the payment of laborers and materialmen.

materialmen.
"IV. That after the termination of said contract Garey brought an action against the city of Pasco to recover an alleged amount claimed to be due from the city on account of extras furnished during the progress of the building. In this action the city counterclaimed against Garey and recovered a judgment for about \$4,-300. The cause was appealed to the Supreme In t Court of this state and modified, reducing said judgment to the sum of \$3,478.74. That no judgment was ever entered upon the remittitur

as returned from the Supreme Court.
"V. That after the return of said remittitur the present action was commenced by the city of Pasco against this defendant, in which action this defendant claims that it was relieved from linbility upon the bond by reason of certain acts of the said city, some of them being: First. The material alteration and change in plans and specifications, which changes increased the cost of constructing the building. Second. The

"VI. The court finds, upon the defendant's contentions, from the evidence adduced at the trial, that the building was materially changed without the consent of the defendant herein, and that such change added to the cost of the construction of the building, and also that the city of Pasco failed to reserve the 15 per cent. as provided in the contract. That approximately the entire amount of the contract price was paid to Garey prior to the completion of the building, and without the consent or knowledge of the

defendant surety company.
"VII. The court further finds that the question of the surety's liability was not an issue in the case of Garey v. City of Pasco, and that the defendant surety company was not a party thereto and was not tendered the defense

"VIII. The court further finds that, after the termination of the contract between Garey and the plaintiff city, the defendant surety company received notice that the contract was terminated, which notice contained information that there was between \$6,000 and \$7,000 due the said Garey, and thereafter the defendant surety company paid for labor and material expended upon said building approximately \$7,000; and that this amount was paid prior to the time that the defendant surety company ascertained that the 15 per cent. had not been reserved as provided for in the contract."

As conclusions of law the court found that the judgment in the action of Garey v. City of Pasco was not res judicata as to the respondent, and that the respondent was discharged from liability as surety by reason of material alterations in the contract and the dissipation of the 15 per cent, of the contract price which should have been retained under the contract. Judgment was rendered dismissing the action, from which this appeal is prosecuted.

While the appellant has assigned error upon all of the findings of fact made by the court, its argument is directed against the finding to the effect that the respondent's liability was not an issue in the case of Garey v. City of Pasco, and to the conclusion of law that the judgment rendered in that case was not conclusive against the respondent as the surety of the record plaintiff. shall not therefore discuss the other findings made. It suffices to say that they are abundantly sustained by the evidence, and are sufficient to sustain the conclusion of law to the effect that the respondent was discharged thereby from liability to the city on its bond, if it is not foreclosed by the judgment entered in the case mentioned.

closed by that judgment of the defense here interposed we think is equally clear. judgment, it will be remembered, was recovered by the city on an affirmative issue set forth in an answer in a suit brought by the contractor against it. The respondent is sought to be holden on the judgment because, through its counsel, it assisted the plaintiff in waging his affirmative issue and in maintaining his defense to the affirmative issue waged by the city. The defense it interposes to the present action was neither made an issue therein by the pleadings or by the evidence nor was it actually adjudicated in the final judgment of the court. But, more than this, the question could not have been made an issue in that cause by the parties to the record as the record then stood. Between the actual parties it was an immaterial inquiry. may be that, since the respondent was a surety of the plaintiff and liable over to the city, the city could under our practice have brought the respondent in and compelled it to set up its defenses or be barred from subsequently waging them. But the city was privileged to wage its own action in its own way, and since it did not choose to make the respondent an actual party, thus giving it an opportunity to set up defenses personal to itself, it cannot now be heard to urge that it is barred of these personal defenses merely because it participated in an action between other parties, in which the defenses were not an issue.

The cases cited by the appellant, as we understand them, do not maintain a different principle. Without reviewing them, or specially referring to them, it may be conceded that they sustain the doctrine that one secondarily liable, participating in an action brought against his principal, is estopped by the judgment entered on the issues actually tried therein, and perhaps issues actually triable therein. But none of them go to the extent of holding that a surety is barred by that circumstance, when sued on the judgment entered in such an action, from defending on any ground personal to himself which was not an issue and could not be made an issue in the action as it was waged. As applied to the present case the rule would mean that the respondent is estopped from asserting that the contract between its principal and the city was not breached by its principal, or that the damages awarded for the breach were not a just measure of the damages flowing therefrom; but it does not mean that it is estopped from urging that the original contract for the performance of which it became surety was so far changed and modified without its consent by the parties thereto as to relieve it from its obligation to answer over.

[3] In the reply brief of the appellant it is urged that the bond executed by the respondent is so worded as to make it a joint principal with the contractor, and that in consequence [1, 2] That the respondent was not fore- the defenses urged by it are not open to it.

An examination of the bond shows that it question, therefore, is: What is the proper contains language which, although not entirely clear, might be given this interpretation; but the bond, when read as a whole, is clear as to its purpose and meaning. Further on it specifically recites that it is intended to be made in compliance with the chapter of the laws requiring bonds in this class of contracts, and that the persons for whose benefit the bond is given shall have the right to sue thereon, "on compliance with the provisions of said chapter 207 of the Session Laws of the state of Washington for the year 1909." That it was intended as the ordinary statutory bond we think these recitals hardly leave room for doubt.

The conclusions reached require an affirmance of the judgment; and it will be so ordered.

ELLIS, C. J., and PARKER, MAIN, and WEBSTER, JJ., concur.

SCHWABACHER BROS. & CO., Inc., v. ORIENT INS. CO. (No. 14212.)

(Supreme Court of Washington. April 26, 1918.)

1. APPEAL AND ERROR &=544(2)—Scope of Review—Absence of Bill of Exceptions of Statement of Facts.

In the absence of bill of exceptions or statement of facts, the question on appeal is, What is the proper judgment under the facts as found by the trial court?

2. Insurance -95 - Fire Insurance KNOWLEDGE OF AGENT-LIABILITY OF COM-

Where an assignment of fire policy after loss was made in the office and in the presence of the policy writing agent, and the draft in payment of the loss was sent to him, was indorsed by the property owner, and used by the owner and the agent in paying other creditors than the assignee, the latter could recover from the insurance company the amount of his claim; the agent's knowledge being imputed to the insurance company.

Department 1. Appeal from Superior Court, King County; H. W. B. Hewen, Judge. Action by Schwabacher Bros. & Co., Incorporated, against the Orient Insurance Company and another. Judgment for defendant named, and plaintiff appeals. versed and remanded, with direction to enter judgment for plaintiff.

Grinstead & Laube, of Seattle, for appellant. H. T. Granger, of Seattle, for respondent.

MAIN, J. The plaintiff, as assignee of W. C. Watson, brought this action to recover for the loss of property covered by a fire insurance policy issued by the defendant. The cause was tried to the court without a jury, and resulted in a judgment denying liability. From this judgment the plaintiff

[1] No bill of exceptions or statement of

judgment under the facts as they appear in the findings of the trial court? These facts. so far as necessary to present the controlling question upon this appeal, may be stated as follows: The Orient Insurance Company, the respondent, is a corporation organized and existing under the laws of the state of Connecticut, and authorized to do business under and by virtue of the laws of this state. The policy writing agent of the company in the city of Raymond was Edward E. Little. The agent Little insured in the name of the respondent company certain property belonging to W. C. Watson at Raymond, Wash. While this property was thus insured, it was destroyed by fire. The insurance company admitted its liability under the policy in the sum of \$750, the full face value thereof. Soon after the loss occurred, Watson, the insured, for a valuable consideration, assigned all his rights under the policy to the appellant. This assignment was in writing, and was witnessed by the agent who had solicited and written the policy. This agent had full knowledge of the terms and conditions under which the assignment was made. He did not, however, communicate this knowledge to the insurance company. After this assignment was executed and delivered, the insurance company sent its draft, payable to Watson, to its agent who had written the insurance, with direction to deliver the draft to Watson and secure the policy from him and return it to the office of the insurance company at San Francisco. When the draft was delivered, Watson surrendered the policy to the agent and indorsed the draft to him; and the agent subsequently used the money which he obtained from the draft in payment of certain creditors of Watson, other than those who were provided for in the assignment to the appellant. The appellant, after learning that the assignment had been disregarded by the agent and Watson, brought an action against Watson and the insurance company. Apparently judgment went against Watson by default, and the only parties here involved are the appellant, who claims under the assignment, and the respondent, the insurance company.

The controlling question, as we view it. is whether the knowledge of the agent Little that the assignment by Watson had been made to the appellant after the loss occurred is imputable to his principal, the insurance company. If knowledge of this agent was knowledge to the company, even though not disclosed to the company, the case was not correctly decided by the superior court On the other hand, if the insurance company is not chargeable with the knowledge of its agent not actually disclosed to it, the judgment should be affirmed. We think the facts has been brought to this court. The case of Gaskill v. Northern Assurance Co.

73 Wash. 668, 132 Pac. 643, is controlling to act upon them for his principal, if material here. In that case the agent was a policy to the business in hand, and present in his memory." writing agent as here. He had sold the property covered by the policy and other property to A. W. Amick and wife. At this time, the policy which was upon the property was canceled. The agent solicited the rewriting of the business on behalf of the defendant company. The business was all transacted through A. W. Amick, the husband. The agent knew that the property covered by the policy which he rewrote in the defendant company was the separate property of Mrs. Amick, but "unthinkingly" wrote it in the name of the husband, A. W. Amick. The policy was delivered and paid for. The loss occurred during the term of the policy, and the defendant denied liability. The only defense advanced was that the policy was invalid because it insured the property in question in the name of A. W. Amick, whereas it belonged to Nettle B. Amick, his wife. It was there said:

"The sufficiency of that defense rests upon the question whether the knowledge of the true ownership possessed by the agent bound the appellant [the insurance company], as principal, so as to make the agent's mistake the mistake of the appellant, of which it cannot take advantage."

The question was there fully discussed, and in the course of the opinion it is said:

and in the course of the opinion it is said:

"It is plain that the agent had actual knowledge that Mrs. Amick owned this property. He acquired this knowledge almost simultaneously with the writing of the policy. He does not claim to have forgotten it, but unhesitatingly says that he knew it all the time, but just 'unthinkingly' wrote it up in Amick's name. If there ever was a case in which actual contemporaneous knowledge of a material fact on an agent's part should be held to bind the principal, these facts present it. We held in Deering v. Holcomb, 26 Wash, 588, 67 Pac. 240, 561, that knowledge acquired by an attorney while employed by the principal a year before bound the principal in another independent employment of the same attorney by the principal after the lapse of that year, so as to start running the statute of limitations against the principal from the date of the last employment. We there said: 'It is a general rule that notice to the attorney is notice to his client; that this rule applies to all notices arising in the progress of a case, or as to other matters in which the relation of attorney and client exists at the time of the notice, and it applies, not which the relation of attorney and client exists at the time of the notice, and it applies, not only to knowledge acquired by the attorney in the particular transaction, but to knowledge acquired by him in a prior transaction in which he acquired material information, if the information was so precise and definite that it is or must be present to his mind and memory in the last transaction. The Distilled Spirits, 11 Wall. 356 [20 L. Ed. 167]; 2 Pomeroy, Equity Jurisprudence, § 672; Wittenbrock v. Parker, 102 Cal. 98, 36 Pac. 374, 24 L. R. A. 197, 41 Am. St. Rep. 172.' To hold the principal affected with notice in that case where there was no continuous employment, and to hold the contrary tinuous employment, and to hold the contrary in this case where there was a continuous employment covering the period when the knowledge was acquired, because the notice was acquired in a matter in which the agent was acting for himself, would be to ignore the rationale of the rule, namely, that it was the duty of the agent to divulge the facts to his principal and

[2] The facts in the present case present as strong a case of liability as do the facts in that case. There, the knowledge that the property covered by the policy of insurance was acquired by the agent in a private transaction of his own. Here, Little, the agent, solicited and wrote the insurance, witnessed the assignment of the policy after the loss, and had full knowledge of the terms and conditions under which the assignment had been made. We are unable to see wherein the Gaskill Case can be distinguished from the present case. It is unnecessary to again review in detail the question, as it is fully discussed in the opinion in that case. Under the facts found by the trial court, the agent's knowledge of the assignment and its contents was binding upon the appellant, his principal.

The judgment will be reversed, and the cause remanded, with direction to enter a judgment in favor of the appellant.

ELLIS, C. J., and PARKER, FULLER-TON, and WEBSTER, JJ., concur.

## BRUENN v. NORTH YAKIMA SCHOOL DIST. NO. 7. YAKIMA COUNTY. (No. 14024.)

(Supreme Court of Washington. April 25, 1918.)

1. Trial &=251(8)—Instructions—Contrib-utory Negligence—Pleading.

Where contributory negligence was not pleaded, it was not incumbent on the court to submit such issue to the jury, although plaintiff testified to acts showing contributory negligence.

2. EVIDENCE 471(17) — CONCLUSIONS OF WITNESS.

An offer to show that a school district was in the exercise of reasonable care in providing a teeter board for playgrounds was an offer to show a conclusion of the witness, and was properly refused.

3. Schools and School Districts 4 121-TRIAL-ISSUES.

Where negligence submitted to jury was only lack of, or inadequate, supervision of a school playground, evidence as to whether a teeter board was a dangerous instrumentality was not material.

APPEAL AND ERROR \$\infty\$=1005(4)\to Review-\text{Weight of Evidence.}

Though evidence supporting a verdict is weak, and the weight of the evidence would seem to be the other way, the appellate court cannot interfere; the lower court having denied a new trial.

5. Schools and School Districts \$\inser\* 121-Injuries to Child on Playebound-Su-

PERVISION—EVIDENCE.
In action for injury to child on school playground, evidence held sufficient to sustain a
finding of negligent supervision of the playground.

6. STATUTES €==263—Construction—Retro-

court will not give the statute a retroactive effect, where to do so would impair existing rights.

7. Schools and School Districts 4 89-LIABILITY FOR NEGLIGENCE - "BROUGHT" - "MAINTAINED." - STATUTES -

Laws 1917, p. 332, providing that no action ll be "brought or maintained" against a school district for noncontractual acts or omissions relating to athletic apparatus or playgrounds, had no effect upon a judgment previ-ously rendered against a school district for negously rendered against a school district for negligent supervision of playgrounds, although an appeal was pending, and although the words "brought" and "maintained" will not be given an equivalent meaning; the word "brought" obviously applying to actions not yet instituted, and "maintained" to actions already brought, but not yet reduced to judgment, because, where judgment has been rendered, the prevailing party has nothing further to do, and need not appear on the anneal pear on the appeal.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Brought; Maintain.]

8. Damages == 132(6)—Excessiveness—Per-SONAL INJURIES.

Where child suffered greatly, had a number of operations, and one leg would probably grow shorter than the other, \$5,000 damages was not excessive.

En banc. Appeal from Superior Court, Yakima County; E. B. Prebee, Judge.

Action by Horatio Bruenn, a minor, by Susie Bruenn, his guardian ad litem, against the North Yakima School District No. 7, Yakima County. Judgment for plaintiff, and defendant appeals. Affirmed.

Harold B. Gilbert, John F. Chesterley, N. K. Buck and McAulay & Meigs, all of North Yakima, for appellant. Guy O. Shumate, of North Yakima, for respondent.

MAIN, J. Action to recover damages for injuries claimed to have been sustained while the minor plaintiff was at play on the public school playground. Verdict and judgment for plaintiff in the sum of \$5,000.

The injury to the minor plaintiff is alleged to have taken place in November, 1914; the minor plaintiff at that time being between seven and eight years of age. It is alleged that just prior to 1 o'clock on the day of the injury some of the small boys had taken a teeter board from its own upright and placed it across a swing, upon which the plaintiff and a number of other small boys seated themselves and began to teeter. Shortly after engaging in this form of play the school bell rang, when the boys on the opposite side of the teeter suddenly sprang from it, permitting the side on which the minor plaintiff sat to rapidly descend, striking him upon the ankle, and causing the injury complained of. The ground of negligence complained of, and upon which the verdict seems to have rested, was either lack or inadequacy of supervision. We shall notice the errors in the order in which they have been presented:

mitted error in refusing to instruct the jury upon contributory negligence. This assignment is based upon the evidence of the boy that while sitting upon the board he had his legs crossed beneath him; it being maintained by appellant that the crossing of the boy's legs was the proximate cause of the injury, and that such evidence was sufficient to take the question of contributory negligence to the jury. The court below refused to so charge, upon the ground that contributory negligence was not pleaded. It is true that in a number of cases we have held that while contributory negligence was an affirmative defense, and to be proved as any other affirmative defense by the party pleading it. such defense might be established by the testimony of the plaintiff upon either direct or cross-examination. This, however, is a rule of proof, and not a rule of pleading. It was not incumbent on the lower court, in charging the jury, to submit to them any issue not within the pleading. For this reason refusal to submit such issue cannot be held error.

[2, 3] The second error is claimed on the exclusion of testimony. Appellant called a teacher of long experience in school playgrounds, and offered to show that a teeter board constructed as the one upon this playground was not in itself a dangerous instrumentality, and that the school district was in the exercise of reasonable care in providing apparatus of this character. The offer was denied. The second part of the offer was clearly inadmissible, calling for a conclusion to be reached by the jury, and not by any witness. The first part, while a question of fact, was not material to the issue submitted to the jury. The instructions are not included in the record sent up. The lower court, however, in passing upon appellant's offer, announced that he would eliminate the question of the original construction of the teeter board from the jury, and submit to them only the question of failure or inadequacy of supervision. If the court so instructed the jury, and, since there is no contention to the contrary, we will assume it did, the denial of the offer, as not within the issue of negligence to be submitted, was not error.

[4, 5] Third. The verdict is said to be contrary to the evidence. The evidence supporting the verdict is very weak. The weight of the testimony, in our judgment, is to the effect that the boy was not injured at the time or place claimed, but was injured during the forenoon recess, while playing upon the teeter board when in its regular position That, however, is not for us to decide. The jury has decided otherwise, and the lower court has denied a new trial. We must therefore accept the fact, as found by the verdict. that the injury occurred in the manner and at the place testified to by the boy. assignment also necessitates a review of the [1] First. It is claimed that the court com- evidence as to the supervision of the play-

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ground. teachers testified to supervision of the playground on all days between 12:40 and 1 o'clock, which would include the time of the injury. No particular remembrance was had of the day of the accident, no complaint having been made at the time it is alleged to have occurred; testimony being to the effect that supervision was had on every day of the school year. The little boy, however, says he saw no teacher on the playground. This is negative testimony, and of little value. If, as accepted by the jury, the accident occurred in the manner and at the time testifled to by the little boy, and at the time, as contended by appellant, a teacher was present, then the jury might have found that the supervision was inadequate or negligent, in permitting the boys to take the teeter board from its own upright and use it in connection with the swing. If the teacher knew it, it was negligence to permit it; and, if she did not know it, it was negligence not to have observed it. For these reasons this claim of error must be rejected.

This opinion, up to this point, was written by the late Judge Morris, after the case was heard by the department to which it was first presented. Upon the hearing en banc, the opinion, as above set forth, was adopted by the court.

[6, 7] The principal question presented upon the hearing en banc was the effect which the act of the Legislature (chapter 92, page 332, Laws of 1917) in 1917 had upon a judgment which had previously been rendered against a school district. That act consisted of one section, which is as follows:

"Section 1. No action shall be brought or maintained against any school district or its officers for any noncontractual acts or omission of such district, its agents, officers or employes, relating to any park, playground, or field house, athletic apparatus or appliance, or manual training equipment, whether situated in or about any schoolhouse or elsewhere, owned, operated or maintained by such school district."

The act was approved by the Governor on March 12, 1917, and took effect during the month of June, following. The judgment in this case was rendered on the 19th day of June, 1916, approximately one year prior to the time when the act became effective. There are three possible classes of actions to which the statute might apply: First, causes which had arisen, but upon which no action had been instituted, or causes that might arise in the future; second, actions which had been instituted, but had not gone to final judgment, when the statute took effect; and, third, actions in which a final judgment had been entered when the act became effective.

It is the contention of the appellant that the act applies to all three classes of actions. It is the contention of the respondent that the act does not apply to those actions in which a judgment had been previously entered. The act provides that no ac-

The principal and two of the the use of the two words brought or maintained it was evidently the legislative intent that they should not be given a synonymous or equivalent meaning. Had the word "brought" not appeared in the statute, it may be that the word "maintained" could then be given the meaning as only preventing the institution of actions, and as not applying to those which had been previously begun. This was the view entertained by the Supreme Court of the state of Maine in Burbank v. Inhabitants of Auburn, 31 Me. 590. The act which the court was considering in that case contained only the word "maintain," and it was held not to apply to actions which had been previously brought. The doctrine of that case, however, cannot be applied to the statute now before us. It is the duty of the court to ascertain, so far as it can, the meaning which the Legislature intended to convey. and give it effect. The word "brought" obviously applies to all actions which had not been instituted prior to the time the act took effect, whether the cause of action had arisen at that time or not. The question then arises whether the word "maintained" applies both to causes of action which had been previously instituted, but which had not gone to judgment, and to actions in which a final judgment had been entered at the time the act took effect. Retroactive statutes are generally regarded with disfavor, and where it does not clearly appear that such was the legislative intent the court will not give the statute a retroactive effect, where to do so would impair existing rights. Moore v. Brownfield, 7 Wash. 23, 34 Pac. 199; In re Heilbron's Estate, 14 Wash, 536, 46 Pac, 153, 35 L. R. A. 602. In the case last cited it was said:

"To construe the statute therefore as retro-active would require us to hold that it impaired existing rights, and we ought not to incline to such a construction, where it does not clearly appear that such was the legislative intention. Retroactive statutes are generally regarded with disfavor, and we think that the act under condisfavor, and we think that the act under consideration must be construed as prospective only. In Sutherland on Statutory Construction, § 464, the learned author says: 'A statute should not receive such construction as to make it impair existing rights, create new obligations, impose new duties in respect of past transactions, unless such plainly appear to be the intention of the Legislature. In the absence of such plain expression of design, it should be construed as prospective only, although its words are broad enough in their literal extent to comprehend existing cases.'"

At the time the above-mentioned act was passed the respondent had an existing right in the judgment which had previously been obtained against the school district. As already pointed out, there is a class of actions to which the act could apply other than those in which a final judgment had been entered. There being a field in which the statute may operate, without applying it to actions in which a judgment had already been entered, we think it was not the legistion shall be "brought or maintained." By lative intention that it should apply to the latter class of actions, and thus destroy existing rights arising out of a final judgment.

But it is argued that, since the action was pending on appeal subsequent to the time when the statute took effect, the word "maintained" is applicable. This contention does not seem to us sound. When a person obtains a final judgment in the superior court, he has nothing further to do. He has obtained his judgment, and is out of court. True, when the appeal is taken, notice must be given him; but this notice is not process, and he is not required to appear in the appellate court. If he does not, no default can be taken against him. It is the common practice for respondents to appear in this court and present their causes, and from the court's standpoint it is quite desirable that they should do so. But, if they do not, no default is entered, and the cause is considered upon its merits. In the case of North Star Trading Company v. Alaska-Yukon-Pacific Exposition, 68 Wash. 457, 123 Pac. 605, the court had under consideration a statute which provided that no corporation should be permitted to "commence or maintain" an action without first alleging and proving that it had paid its annual license fee last due. It was there held that a corporation, even though it had not complied with the statute as to the payment of its license fee, could defend an action brought against it, and in so doing was not maintaining an action within the meaning of the statute. If to defend an action in the superior court, where, if no appearance has been made, a default may be taken, is not maintaining an action within the meaning of the statute, it would seem reasonably to follow that respondent in this court, by appearing and resisting assignments of error, is not maintaining an action.

The cause now before us was tried to a jury, and consequently is not tried here de novo. The appellant by its assignments of error claims that the trial court has committed errors of law. The respondent's position is that no errors were committed. The appellant has the affirmative of the argument, and the respondent the negative. In Glasser v. Hackett, 37 Fla. 359, 20 South. 532, it was held that a writ of error, which corresponds to an appeal in this state, is in the nature of a new suit. In Miller v. Union Mill Co., 45 Wash. 199, 88 Pac. 130, the court had under consideration the effect of the act of 1905 (Laws 1905, p. 164), which repealed the factory act of 1903 (Laws 1903, p. 40), upon causes of action which had arisen under the law of 1903 prior to its repeal. The law of 1903 required employers to safeguard dangerous machinery, and deprived such employers of the defense of assumption of risk. It was there held that the repealing act did not operate retroactively, or affect causes of action that arose under the law of 1903 prior to its repeal.

The case of Ettor v. Tacoma, 57 Wash. 50, 106 Pac. 478, 107 Pac. 1061, and 228 U.S. 148, 33 Sup. Ot. 428, 57 L. Ed. 773, is distinguishable in two respects: First, in that case the action had not gone to judgment when the repealing act became effective; and, second, the later act there was an act which repealed the prior act under which the action was being maintained. In the present case, as already pointed out, the action had gone to judgment long before the act took effect. In addition to this, the statute makes no reference to any previous statute, and it operates as a repealing act by implication only. As held in Redfield v. School District No. 3, 48 Wash. 85, 92 Pac. 770, and Howard v. Tacoma School District No. 10, 88 Wash, 167, 152 Pac. 1004, Ann. Cas. 1917D, 792, a right of action existed against the school districts by virtue of sections 950 and 951 of Rem. & Bal. Code. That statute is only repealed by the act of 1917 to the extent to which the two acts are necessarily inconsistent. Had the latter act expressly repealed the former, it may be that, under the doctrine of the Ettor Case, supra, the action would be terminated at whatever point it was, even though pending on appeal.

The case of Haynes v. Seattle, 87 Wash. 375, 151 Pac. 789, is distinguishable in this: There the statute applied to "pending" actions, and was held to be applicable to an action pending on appeal. As already pointed out, while the present case was pending on appeal, the respondent, within the meaning of the statute, was not maintaining an action here. The case of Spear v. Bremerton, 95 Wash. 264, 163 Pac. 741, is, we think, not applicable to the present situation.

[8] One other question remains, and that is whether the damages are excessive. The jury awarded a verdict of \$5,000, and after motion for new trial was overruled judgment was entered for this sum. If the boy's present condition was proximately caused by negligence attributable to the appellant, as the jury had a right to find, then the verdict was not in such amount as to indicate passion or prejudice. The boy suffered much pain, underwent a number of operations, and was permanently injured. The leg that was injured will be shorter than the other, and, the probabilities are, will not grow in proportion to the rest of the body.

The judgment will be affirmed.

ELLIS, C. J., and PARKER, HOLCOMB, CHADWICK, and WEBSTER, JJ., concur.

HOFFMAN v. M. GOTTSTEIN INV. CO. (No. 14578.)

(Supreme Court of Washington. April 25, 1918.)

1. Bills and Notes \$==518(1) — Transfer - Consideration—Evidence.

In an action against a corporation on its note, which plaintiff claimed was given in consideration of a transfer to the corporation of a personal note of the corporation's president, evidence held insufficient to show such considera-

2. Corporations 432(1)—Powers of Orficers—Persons Dealing with the Corpo-BATION NOTES-PRESUMPTIONS.

A payee giving up the personal note of the president of a corporation and receiving the corporation's note instead, is presumed to know that an officer may not bind the corporation, where his interests are adverse, without its knowledge and consent.

8. Corporations (\$\sim 425(5)\$ — Liability on Note-Equitable Estoppel,

Where a corporation's note was issued by its president and secretary in lieu of the president's personal note to the payee, which was neither indersed nor assigned to the corporation and neither note was carried on the books of the corporation and no other officer or stockholders corporation and no other officer or stockholders had knowledge of the transaction, and the payee was presumed to know from the president's adverse interest that the knowledge and consent of the corporation were required, the corporation was not estopped to set up the illegality of the transaction and lack of consideration for the note.

4. Corporations 4=426(1) - Unauthorized

ACTS-RATIFICATION.

Where the president and secretary issued the corporation's note for the president's debt without its knowledge or consent, the president cannot, by payment of interest thereon from corporation funds, ratify for the corporation his own wrongful act.

5. APPEAL AND ERROR \$\iiiis 882(8)\$ — INVITED ERROR—EVIDENCE BY INTERESTED WITNESS OF TRANSACTION WITH DECEASED.

Appellant cannot complain of error in refusion. ing to strike out testimony of witnesses as to transactions with one since deceased, where such testimony was in response to questions by appellant's counsel.

Department 2. Appeal from Superior Court, King County; Guy C. Alston, Judge.

Action by David M. Hoffman as executor of the estate of Simon Wolf, deceased, against the M. Gottstein Investment Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Kerr & McCord, of Seattle, for appellant. Bausman & Oldham and Walter L. Nossaman, all of Seattle, for respondent.

PARKER, J. The plaintiff, Hoffman, as executor, seeks recovery upon a promissory note purporting to have been executed and delivered by the defendant investment company to Simon Wolf, now deceased. Trial in the superior court for King county resulted in findings and judgment in favor of the defendant, from which the plaintiff has appealed to this court. Recovery was denied by the trial court on the ground that the note was execut-

execution was beyond the corporate powers of the defendant.

The note sued upon is for the principal sum of \$6,000. It was executed August 4, 1913, and made payable six months after date, with interest at 6 per cent. per annum. Upon its back is the single indorsement as follows: "Aug. 6/15, interest paid in full to this date." This indorsement is not signed by any one, nor are we advised as to who made it. Some five years prior to the execution of this note M. Gottstein borrowed of Simon Wolf the sum of \$6,000, evidencing the loan by the execution and delivery of a note for that sum. One or two years prior to the date of the execution of the note in question respondent investment company was incorporated under the laws of this state, with a capital stock of \$300,000, divided into 3,000 shares of \$100 each. The stock of the corporation was then owned as follows: M. Gottstein, 1,501 shares, Rosa Gottstein, his wife, 1,490 shares, Joseph Gottstein, his son, 4 shares, his daughter 4 shares, and his niece 1 share. Thereafter Rosa Gottstein died, and her stock passed to the management and control of her executors. The record does not advise us as to who were all of the trustees of this corporation, but apparently M. Gottstein, as president, and Joseph Gottstein, as secretary, had the general management and control of the corporation. About the 1st of August, 1913, Simon Wolf, who held the note against M. Gottstein, demanded of Gottstein that he cause to be executed and delivered to him (Wolf) a note of the corporation for \$6,000 in lieu of the personal note executed by Gottstein. Just what prompted this demand is not wholly certain. but apparently it was because of the organization of the corporation by the Gottstein family, and the placing of most of the property of M. Gottstein in the corporation. It appears, however, that Gottstein had retained individually property of the approximate value of \$20,000. At the time of making the demand by Wolf for a note of the corporation in lieu of the personal note of Gottstein, he protested to Wolf that his personal note was good and also that it was almost wholly paid. The Wolf and Gottstein families were related by marriage. While the two men had been apparently friendly theretofore, upon the making of this demand by Wolf they had a controversy, evidencing considerable ill feeling, especially on the part of Wolf. Finally Gottstein yielded to the demand of Wolf and executed the note in the name of the corporation, which was signed by M. Gottstein as president of the company, and Joseph Gottstein as its secretary. The circumstances attending the demand for and the making of this note strongly suggest that it was made to conciliate Wolf more than anything else. The personal note of M. Gottstein was then delivered up to him by Wolf, and the testied without consideration, and also that its mony leads us to believe was then and there

intention of Wolf to transfer or sell the Gottstein note to the corporation, but rather to simply have a note of the corporation in lieu thereof because of the family being the owners of most of its stock. We note that Wolf did not transfer the Gottstein note by indorsement or assignment in writing, but merely surrendered possession of it.

[1] In the third finding made by the trial court we read:

"That there was and is no valuable or any other consideration for said note, and the de-fendant received no value whatever therefor; and the same is and was ultra vires of the corporation and is void, and the corporation is under no liability thereon.

The latter part of this language may be regarded somewhat more as a conclusion of law than as a finding of fact. The first part of it, however, relative to receiving consideration by the corporation, we think, is clearly a finding of fact, and we think is amply supported by the evidence. The trial court, however, did in its fourth finding state as follows:

"That the said Simon Wolf delivered said original note of M. Gottstein to the M. Gottstein Investment Company, and the said M. Gottstein Investment Company received said note and executed in exchange therefor the note sued upon in this action.

The third finding was excepted to by counsel for appellant, while the fourth finding was excepted to by counsel for respondent. We think the quoted portion of the fourth finding is not supported by the evidence, and also that it is somewhat inconsistent with the third finding. We also note that in remarks made by the trial judge in his ruling upon the motion for a new trial he seems to take this view, and apparently looked upon the quoted portion of the fourth finding as not being wholly in accord with the evidence.

[2] Looking to the record as a whole, we cannot escape the conclusion that this transaction was in legal effect nothing but an effort on the part of M. Gottstein to pay his own personal debt by the execution and delivery to Wolf of the note of the corporation in lieu of his personal note, and it seems to us equally plain that Wolf was bound to take notice of this as the legal effect of the transaction he then had with Gottstein. Our decision in Mooney v. Mooney Co., 71 Wash. 258, 128 Pac. 225, seems to us decisive of this case in favor of respondent investment company. On page 264 of 71 Wash., page 227 of 128 Pac., we quoted with approval from the language of the decision of the New York Court of Appeals in Wilson v. Metro. Elev. R. Co., 120 N. Y. 145, 24 N. E. 384, 17 Am. St. Rep. 625, as follows:

"Undoubtedly the general rule is that one who receives from an officer of a corporation the notes or securities of such corporation, in payment of, or as security for, a personal debt of sel for appellant, and that they are not now

destroyed in the presence of Wolf, M. Gott-stein, and Joseph Gottstein. It is difficult to escape the conclusion that it was not the escape the conclusion that it was not the taken them with notice of the rights of the cor-

[3] It is contended in behalf of appellant that the respondent investment company did in law receive consideration of the new note by receiving the old one and, in any event, should now be held to be estopped from denying its liability upon the note in question, either upon the ground of want of consideration or want of power to execute it. cannot agree with this contention. We think the evidence calls for the conclusion that the private note of M. Gottstein surrendered by Wolf upon receiving this note was destroyed at that time; that Wolf, upon surrendering it, did not intend otherwise; that it was never carried upon the books or among the assets of the company as a part of its assets; that none of the trustees other than M. Gottstein or Joseph Gottstein even knew or suspected its existence as an asset of the corporation: that the note of the corporation here sued upon was never charged upon the books of the corporation as a liability of the corporation; and that no other trustees or stockholders of the corporation ever suspected its existence as a debt of the corpora-Indeed, the record suggests, when looked at as a whole, that M. Gottstein regarded this note as his personal obligation, as the first one was, even though he executed it in the name of the corporation.

[4] Counsel for appellant seem to assume that the interest was paid upon this note by the corporation. We have noticed that the single indorsement on the back of the note fails to inform us who made it, or as to who paid such interest. Even if that indorsement may be regarded as some evidence of the payment of interest, it may be said that if the record shows the actual payment of any such interest, it was either paid by M. Gottstein personally or by him from the funds of the company. Manifestly he cannot ratify his own act, and it seems clear to us that none of the other officers or stockholders of the corporation have ever ratified the execution of this note in such manner as to estop the corporation from now denying its liability thereon.

[5] Some contention is made in behalf of appellant that, in so far as the facts relating to the circumstances of the giving of this note and the surrender of the first note of M. Gottstein at the same time were brought out by testimony of the conversation and transaction had with Wolf at the time, who is now deceased, such testimony comes from interested witnesses, testifying in their own behalf against Wolf, now deceased, and therefore that such testimony is not admissible. and therefore should not be considered. It seems plain to us from the record that all of this evidence was brought out in direct response to questions propounded by coun-

of such evidence by the court. It is true they moved to have the principal part of it stricken after it had been adduced upon the trial, but they nevertheless voluntarily produced it. We think the trial court did not err in denying the motion to strike this testimony.

The judgment is affirmed.

ELLIS, C. J., and CHADWICK, MOUNT, and HOLCOMB, JJ., concur.

EASLEY et al. v. ELMER et ux. (No. 14418.)

(Supreme Court of Washington. April 25, 1918.)

APPEAL AND ERBOR \$\infty\$=671(2)\to Record\to Omission of Exhibits\to Instructions.

Where on appeal the instructions of the lower court are not made a part of the record, and numerous exhibits introduced during the trial and having an important bearing on the issues are neither produced nor copied into the record, the court on appeal cannot determine the issues considered by jury in reaching verdict.

Department 1. Appeal from Superior Court, Pend Oreille County; W. H. Jackson, Judge.

Action by W. J. Easley in his own right and as guardian ad litem for Dewey Easley and others against Henry D. Elmer and wife. Judgment for plaintiffs, and defendants appeal. Affirmed.

M. F. Ryan, of Newport, for appellants.

WEBSTER, J. Plaintiff W. J. Easley, in his own right and as guardian ad litem for the minor respondents, brought this action to recover the reasonable value of work and labor performed for the defendants at their special instance and request. For answer the defendants alleged that the work for which recovery was sought had been performed under an express contract, by the terms of which certain work was to be done for the agreed sum of \$225, and that without fault on their part the plaintiffs had abandoned the contract before the completion of the work. By way of counterclaim it was alleged that the plaintiff W. J. Easley was indebted to defendants for goods, wares, and merchandise sold and delivered in the sum of \$155.27. In the reply the plaintiffs denied the express contract pleaded in the answer, and alleged payment in full of the account set up as a counterclaim. The cause was tried to a jury, resulting in a verdict in favor of the plaintiffs in the sum of \$240.75. From the judgment entered upon the verdict the defendants appeal, assigning as error the insufficiency of the evidence to sustain the recovery.

The instructions of the trial court are not made a part of the record on this appeal. lant, called the "company," and respondent, Numerous exhibits were introduced during called the "dealer," entered into a written

in position to complain of the consideration; the progress of the trial which, it may be inferred from the testimony, had important bearing upon the issues. These exhibits are not before us: neither are their contents copied into the record.

Under such circumstances it is impossible for this court to determine what issues were submitted to the jury or what was considered by it in arriving at the verdict. There is, however, competent evidence to sustain a recovery in the amount awarded.

The judgment is therefore affirmed.

ELLIS, C. J., and FULLERTON, MAIN, and PARKER, JJ., concur.

PRICE v. HORNBURG. (No. 14470.) (Supreme Court of Washington. April 26, 1918.)

1. APPEAL AND EBROR - 759 - BRIEFS - ASSIGNMENT OF ERROR-REVIEW.

Where defendant excepted to the exclusion of parol testimony, but no assignment of error based thereon was made in the brief, the ruling was not reviewable.

2. Sales 4==61-Construction of Dealer's CONTRACT.

A contract giving plaintiff, a dealer, a right to sell, and under which defendant would sell to him ten cars in certain territory, at a certain him ten cars in certain territory, at a certain discount, and requiring the dealer, with each order, to prepay not less than \$50 upon each car ordered to be credited to him and to be repaid when last car was delivered and paid for, except that any part of the deposit or prepayment might be credited against his open account, was not an order for ten automobiles, but contemplated the future order of cars, especially where the agreement did not mention the dealer's prepayment of \$500. payment of \$500.

8. SALES \$== 397-CONTRACT-ACTION TO RE-COVER DEPOSIT - DEFENSE - BURDEN OF PROOF.

In such case, where the dealer's prepayment of a \$500 deposit was admitted, and the terms of the contract had expired, it was incumbent on the company receiving the deposit to allege and prove some valid defense or counterclaim enti-tling it to retain the deposit.

4. APPEAL AND ERROR & 728(3) — ASSIGNMENTS OF ERROR—EXCLUSION OF EVIDENCE.

Where the burden of proving its defense or counterclaim was on the defendant, and its evi-dence in discharge of that burden was excluded, and there was no assignment of error based up on such ruling, the judgment for plaintiff must be affirmed.

Appeal from Superior Department 1. Court, Spokane County.

Action by C. P. Price against C. H. Hornburg, doing business under the firm name of the C. H. Hornburg Automobile Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Barker & Barker, of Spokane, for appellant. H. J. Hibschman, of Spokane, for respondent.

WEBSTER, J. On June 14, 1913, appel-

contract; the provisions thereof pertinent to erroneous, the question is not before us for the present inquiry being as follows:

"The dealer shall have the right to sell, and the company will sell to him, the following styles and types of motor cars, namely, Maxwells, from the following territory: Lewis county, and north half of Idaho county, state of Idaho; quantity 10, model Maxwells, discount

"If any contract to take and pay for cars is unfulfilled by the dealer, the company may retain the amount of any deposit remaining to his

credit.
"The dealer, with each order for cars, shall make a deposit or prepayment to the company, in current funds, of not less than fifty dollars (\$50) upon each car ordered which sum shall be credited by the company to the dealer and will be repaid when last car ordered is delivered and paid for, except that any part or all of said deposit may at the option of the company, be credited against any parts or open account due the company from the dealer."

After the expiration of the contract respondent brought this action, alleging that on the date of its execution he advanced to the appellant and deposited with him the sum of \$500, and that he had paid in full for all automobiles ordered by him; that he had also paid all accounts due from him to the appellant; and that he had demanded the return of the deposit, which demand had been refused. The prayer was for a judgment in the sum of \$500.

For answer the appellant denied the material allegations of the complaint, and by way of affirmative defense alleged that at the time of entering into the contract respondent ordered from him the ten Maxwell automobiles mentioned therein, and paid to him the sum of \$500 as a deposit or prepayment thereon; that respondent took delivery of only one of the cars so ordered; that appellant had in all things complied with the terms of the contract on his part to be performed; that he had been ready, willing, and anxious for respondent to take delivery of and pay for the remaining nine automobiles, but that he had failed and refused to do so, and that appellant retained the \$500 as provided in the contract. The allegations of the affirmative answer were traversed by reply. Upon the issues thus joined the cause was tried to the court sitting without a jury, resulting in a judgment in favor of the respondent, from which this appeal is prosecuted.

[1, 2] Upon the trial, over appellant's objection, the court ruled that under the state of the pleadings the burden of proof was on the defendant, to which an exception was duly noted. Thereupon the defendant undertook to prove by parol that at the time of the execution of the contract the plaintiff ordered ten automobiles, and that the \$500 in question represented the deposit of \$50 on each car as stipulated in the contract, which evidence was rejected by the court. Exception to the exclusion of this testimony was duly taken, but no assignment of error based taken, but no assignment of error based. In an action for an agent's negligence in thereon is made in the brief. While we are collecting claims, when a prima facie case for inclined to the opinion that this ruling was the recovery of damages has been made the bur-

review. It is insisted, however, that the contract pleaded and relied on by both parties is on its face an order for ten automobiles at the price specified in the contract. We cannot accede to this view. The language of the contract in this respect is, "The dealer shall have the right to sell, and the company will sell to him the following types and styles of motor cars." This provision merely gave respondent the right to sell in the territory assigned to him ten Maxwell automobiles. and bound appellant to furnish him not to exceed that number of cars when ordered by the dealer-the contract by its terms clearly contemplating the future order of cars. No mention is made in the agreement of the payment of \$500, and if that sum represents the advance deposit on ten automobiles actually ordered by respondent, proof of such fact rests in parol, or at least must be established independently of the contract. Since no evidence was received on this point, the only question remaining is whether the court erred in holding that the burden of proof rested with defendant; this being one of the errors assigned in the brief.

[3] The payment of the \$500 deposit being admitted, and the term of the contract having expired, it was incumbent upon appellant to allege and prove some valid defense or counterclaim which would entitle him to retain the deposit. Nicolls v. Wetmore, 174 Iowa, 182, 156 N. W. 319.

[4] The burden being on the defendant. and the defendant's evidence in discharge of that burden having been excluded by the court, and there being no assignment of error based upon such ruling, there is no alternative—the judgment must be affirmed.

ELLIS, C. J., and FULLERTON, MAIN, and PARKER, JJ., concur.

GREEN v. BOUTON. (No. 14291.) (Supreme Court of Washington. April 26, 1918.)

APPEAL AND ERROR 4-679(2)—RECORD—PLEADING—THEORY OF CASE.

In an action for damages from an agent's negligence in not taking security for money loaned for plaintiff, an assignment of error in requiring plaintiff to elect upon which of two theories of negligence he would proceed was not reviewable, where the record contained neither the original nor the amended complaints, and did not show the ruling complained of.

PRINCIPAL AND AGENT &= 79(9)—AGENT'S NEGLIGENCE IN COLLECTING CLAIMS—DAM-AGES.

The measure of an agent's liability for negligence in collecting claims is the amount of damages sustained by the principal, which is prima facie the amount of the debt or claim. 8. Principal and Agent \$\infty 79(5) — Action for Agent's Negligence — Presumption and Burden of Proof.

den is on the agent to show facts relieving him (complaint, the answer thereto, and the refrom liability.

4. Principal and Agent \$\infty 79(9) - Negligence of Agent-Nominal Damages.

In an action against an agent for negligence in collecting claims, where, notwithstanding his negligence, the principal has suffered no loss, the recovery can be for nominal damages only. 5. APPEAL AND ERROR #==== 1176(1)-JUDGMENT -REVERSAL.

In an action for damages from an agent's failure to take security for money loaned on a note, where he introduced no evidence, and failed to meet the burden placed upon him by law, a judgment against him for nominal dam-ages only will be reversed and the cause remanded, with directions to enter judgment against him for the amount claimed, with interest and costs.

Department 1. Appeal from Superior Court, Clarke County; R. H. Back, Judge. Action by Adam Green against E. F. Bouton. Judgment for plaintiff on a directed verdict for nominal damages, and he appeals. Judgment reversed, and cause remanded, with direction to enter a judgment in favor of plaintiff.

Miller & Wilkinson, of Vancouver, for appellant.

MAIN, J. The purpose of this action was to recover damages claimed to be due to the negligence of the defendant in failing to take security for money which he had loaned for the plaintiff. The cause came on for trial before the court and a jury, and at the conclusion of the plaintiff's evidence the defendant moved for a nonsuit. This motion was denied, and the defendant rested without the introduction of any testimony. Thereupon the court instructed the jury to return a verdict in favor of the plaintiff for nominal damages. From the judgment entered upon the verdict, the plaintiff appeals.

The facts are these: On or about August 2. 1909, the appellant placed with the respondent the sum of \$500, under an agreement by which the money was to be loaned by the respondent for six months on good security. On August 7, 1909, the respondent loaned the money to one John M. Lay, and took the latter's promissory note for the same. The note was not supported by any security. The appellant had no knowledge that the money had been loaned without security until long subsequent to the time it was made. On October 31, 1914, the respondent wrote the appellant a letter inclosing the note, stating in the letter that he had made repeated efforts to collect the note, and had been unable to do so. Some time thereafter the present action was instituted to recover from the respondent damages for failure to take security for the note. Prior to the time this action was instituted, the maker of the note had died, and his es-

ply. The appellant in his brief states that in the original complaint two acts of negligence were pleaded, one failure to take security, and the other failure to present the note as a claim against the maker's estate, and that upon a previous occasion the cause came on for trial, and he was required by the court to elect upon which theory of negligence he would proceed. It is claimed that this ruling was error. However much merit there may seem to be in the contention, if the facts are as stated in the brief, the question is not here for review. The record contains neither the original complaint, the first amended complaint, nor the second amended complaint; nor does it show the ruling complained of. Since the record does not present the question, it must be passed without determination. The second contention of the appellant is the error of the trial court in directing a verdict for nominal damages only. As above indicated, at the conclusion of the appellant's case a motion for nonsuit was made. The court, before passing upon the motion for a nonsuit, inquired of the attorney for the respondent whether he desired to rest his case at that time, and stated that if the respondent did rest he would pass upon the motion. The respondent rested. The court then stated that he would deny the motion for nonsuit and instruct the jury that the appellant was entitled to recover only nominal damages. Thereupon the appellant requested that he be permitted to introduce further testimony upon the question of insolvency. To this the respondent objected, and the objection was sustained. The jury were then instructed to return a verdict in favor of the appellant for nominal damages.

[2-4] The question which first arises upon this branch of the case is whether the appellant had made a prima facle case as to the amount of damages claimed by him, which was the amount of the note and the unpaid interest thereon. The law appears to be that the measure of liability on the part of the agent for negligence in collecting claims is the amount of damages sustained by the principal, and this is prima facie the amount of the debt or claim. When a prima facie case has been made the burden is on the agent to show facts relieving him from liability. Mechem on the Law of Agency (2d Ed.) vol. 1, \$ 1320, thus states the law:

"The measure of damages in an action against an agent for negligence in collection is the actual loss sustained. The negligence being established, and it appearing with reasonable probability that but for such negligence the loss would not have happened, that loss prima facie is the amount of the claim, but the agent may show that, notwithstanding his negligence, the principal has suffered no loss and the recovery tate was being probated.

[1] The issues upon which the case was tried were made up by the third amended the had used the greatest diligence, the debt tried were made up by the third amended to the had used the greatest diligence, the debt tried were made up by the third amended to the had used the greatest diligence, the debt tried were made up by the third amended to the had used the greatest diligence, the debt tried were made up by the third amended to the had used the greatest diligence, the debt tried were made up by the third amended to the had used the greatest diligence, the debt tried were made up by the third amended to the had used the greatest diligence, the debt tried were made up by the third amended to the had used the greatest diligence, the debt tried were made up by the third amended to the had used the greatest diligence, the debt tried were made up by the third amended to the had used the greatest diligence, the debt tried were made up by the third amended to the had used the greatest diligence, the debt tried were made up by the third amended to the had used the greatest diligence, the debt tried were made up by the third amended to the had used the greatest diligence, the debt tried were made up by the third amended to the had used the greatest diligence.

could not have been collected; or that the prin-cipal's claim against the debtor is delayed only and not lost, or that he is wholly or partially and not lost, or that he is wholly or partially protected by securities which he holds, or that though the principal's claim against certain of the parties is lost, there are still others liable who are amply responsible, from whom the debt can be collected. The burden of making such showing seems to rest upon the agent. Thus in a recent case to recover damages against a bank for negligence it was said: 'It is claimed that there was no proof of damages; that is, that it was not shown that had the bank been diligent the drafts could have been collected. In such cases it is usually impossible to show with certainty that if due care had been observed the collection would have been made. The law is not so rigid in its requirements for the protection on the negligent agent. It is only necessary to show a reasonable probability that with due care the collection would have resulted. The burden then rests on the defendant to show that there was no damage.

This text states the law, which is supported by the authorities, and it is unnecessary here to multiply citations.

[5] The facts bring this case within the rule stated. The respondent, having rested without the introduction of any evidence, failed to meet the burden placed upon him by law. No appearance has been made in this court by him, he evidently realizing after further investigation, that the judgment entered was one which could not be sustained. It follows that the judgment must be reversed, and the cause remanded, with direction to the superior court to enter a judgment in favor of the appellant for the amount of the note, accrued and unpaid interest, and the costs.

ELLIS, C. J., and PARKER and WEB-STER, JJ., concur. FULLERTON, J., concurs in result.

ARMSTRONG v. SPOKANE INTERNA-TIONAL RY. CO. (No. 14642.)

(Supreme Court of Washington. April 26, 1918.)

1. APPEAL AND ERROR \$==628(2)-FAILURE TO FILE RECORD—EXCUSE.

Where there was a custom in the county to allow the transcript and statement of facts to remain in the office of the clerk of the trial to remain in the office of the clerk of the trial court for the use of respondent in preparing his brief, the clerk being instructed to forward all papers to the Supreme Court when the briefs had been prepared and filed, and the transcript and statement of facts on appeal were so filed with the clerk well within time, but, when respondent had prepared his brief, the clerk, apparently through oversight, failed to forward the record to the Supreme Court, appellant's failure to file the record within the time provided by law was excusable.

2. Damages 6=144 - Loss of Earnings -PLEADING.

A farmer whose business was to oversee op erations on his own land and other lands held by him under lease, who sued a railroad and claimed damages "by reason of said injuries to his person" and for the destruction of his automobile in collision, could not prove loss of earnings, since, when the consequences of an injury are peculiar to the circumstances, condition, or affairs of the injured person, the law

cannot imply damages simply from the act causing the injury, and loss of earnings in a special occupation or from any peculiar condition of the injured person, to be proved, must be alleged.

APPEAL AND ERROR \$\infty 1053(3)\$—CURE OF ERROR—EVIDENCE—INSTRUCTIONS.

When the trial court, by its instructions, in terms eliminates from consideration specified improperly admitted evidence of special damages, or in terms confines the recovery to the specific proper items of damage, error in the admission of the evidence of the improper items is cured.

APPEAL AND ERROR 4=1053(4)-CURE OF

ERBOR-EVIDENCE-INSTRUCTION.

ERBOR—EVIDENCE—INSTRUCTION.

In an action against a railroad for injuries, where the court improperly admitted, without special pleading, proof of plaintiff's loss of earnings in his special occupation of farmer, an instruction limiting the recovery to compensatory as distinguished from exemplary damages, not excluding the objectionable evidence from consideration, nor indicating what items of damage to plaintiff could properly be considered as resulting from his personal injuries, did not cure the error in admitting the testimony as to loss of earnings. of earnings.

5. PLEADING PLEADING 430(2) — AMENDMENT OF PLEADINGS—CONFORMITY TO PROOF.

The pleadings can be treated as amended to conform to the proof only where the evidence was admitted without objection, or where the objecting party has met the issue with evidence under such circumstances that he may be said to have waived his objection.

PLEADING 427 - EVIDENCE WITHOUT

ISSUES-CONTINUANCE.

Issues—Continuance.

In an action against a railroad for injuries, where plaintiff offered evidence of loss of earnings in his special occupation of farmer without specific allegations in support thereof, the court admitting such evidence, defendant, to render availing its objection to such evidence, was not required to claim surprise and ask for continuance. ance.

7. Pleading ==427—Evidence—Amendment

OF PLEADING.
Only where an amendment is asked and permitted is it incumbent on the adverse party to ask for a continuance on the ground of sur-prise in the introduction of evidence.

Department 2. Appeal from Superior Court, Spokane County; Hugo E. Oswald, Judge.

Action by William R. Armstrong against the Spokane International Railway Company. From a judgment for plaintiff, defendant ap-Reversed, and cause remanded for new trial, with direction.

Allen, Winston & Allen, of Spokane, for appellant. Smith & Mack and John Pattison, all of Spokane, for respondent.

ELLIS, C. J. This is an action for person-The facts briefly are these: al injuries. Defendant's railway tracks cross Napa street in the city of Spokane at its intersection with Broadway. Plaintiff at about 8:30 o'clock on the evening of July 22, 1916, was driving his automobile north on Napa street. At the crossing of these tracks a collision occurred between his automobile and the rear end of one of defendant's trains, destroying the automobile and causing the injuries to plaintiff of which he complains. The negli-

gence alleged was backing the train through ; a cut onto the crossing at a high rate of speed with no lights on the rear end, it being dark. and without giving notice or warning of its approach. Defendant admitted the collision and the destruction of the automobile, denied any negligence on its part, and alleged contributory negligence on plaintiff's part. At appropriate times defendant moved for a nonsuit and for a directed verdict. These motions were denied. The jury returned a verdict in plaintiff's favor for \$2,600. Defendant moved for judgment non obstante veredicto or in the alternative for a new trial. These motions were also denied. Judgment was entered on the verdict. Defendant apneals.

[1] Respondent has moved to dismiss the appeal on two grounds: First, that appellant failed to file the record within the time provided by law; second, that it failed to serve notice of appeal upon the cost bond sureties. As to the first ground we think a sufficient excuse was shown. It appears that it was the custom in Spokane county to allow the transcript and statement of facts to remain in the office of the clerk of the court for the use of the adverse party in the preparation of his brief; the clerk being instructed to forward all papers to this court when the briefs have been prepared and filed. The transcript and statement of facts were so filed well within the time, but when respondent had prepared his brief the clerk, apparently through an oversight, failed to forward the record to this court. While the error may have caused some delay, the cause was advanced on the docket of this court for one term, thus minimizing such delay. As to the second ground it is sufficient to say that appellant has filed in this court a written waiver of any claim against the cost bond and the sureties thereon. The motion to dismiss is denied.

Appellant has advanced several claims of error, but we find it expedient to discuss only one of them except in a general way. The evidence was voluminous and sharply conflicting. We have considered it with much care, but the conclusion which we have reached makes unnecessary an extended statement. We are satisfied that there was ample evidence to take the case to the jury upon the questions of appellant's negligence and respondent's contributory negligence.

Error is assigned upon the failure of the court to give certain instructions requested by appellant. We have considered them carefully in connection with all of the instructions which were given. We find that in so far as they were proper at all they were fully covered in every material particular by the instructions which were given. No exceptions were taken to the instructions given by the court. They sufficiently covered the case as presented, in every particular save one to which we shall hereafter advert.

earning capacity, respondent was permitted to testify that he was a farmer operating his own land and certain leaseholds, and further:

"Q. What was your earning capacity per annum prior to this accident? Mr. Winston: I object on the ground that it is incompetent and immaterial, not within any of the issues in the immaterial, not within any of the issues in the pleadings, there being no allegations in the complaint of loss of earning capacity. (Thereupon the objection was overruled, and it was agreed that defendant need make no further objections to this line of testimony.) A. My earning capacity was about \$1,500 per year. After the injury I had to get a man. He hitched my team to a binder, and it ran away, so I had to hire all my cutting done, and I disposed of my threshing rig because I was not able to take care of it; I gave up the leases because I was not able to work and oversee them; all this on account of my injuries."

Appellant contends that this evidence was inadmissible in that it tended to prove an element of special damage of which there was no allegation in the complaint. Respondent insists that it was admissible in proof of general damages necessarily resulting from the injury, and that in any event its admission, if error, was cured by an instruction.

[2] It is undoubtedly the law that a plaintiff, under a general allegation of damages. may recover all such damages as are the natural and necessary result of such injuries as are alleged, for the law implies their sequence. 2 Sutherland, Damages (4th Ed.) § 418. But not every loss which may result from the injury is a natural and necessary result of the injury. Injury to business as such, loss of business profits as such, loss of contemplated contracts or profits thereon are special damages. Where capable of proof at all, they can only be proved under an allegation of the specific facts showing such special damages, and then only by competent evidence that they resulted from the injury, and not from other causes. We attempted to point out this distinction and mark the limits of legitimate proof in the recent case of Singer v. Martin, 96 Wash. 231, 241, 164 Pac. 1105, which is cited by appellant. In that case, however, the plaintiff in his complaint alleged that he had been "compelled to neglect his business for over a month." We held that this allegation was sufficient to warrant proof of damages for loss of time or loss of personal earnings, but not damages for injury to business as such nor for loss of business profits as such. The plaintiff was permitted to introduce evidence of his loss of business profits as such, and the court instructed that he could recover for loss to business. For this error the judgment was reversed. But we did not hold that the allegation of loss of time and of personal earnings was a necessary allegation to a recovery for such loss. merely remarked that there was such an allegation in the complaint there involved. In the case of Horton v. Seattle, 61 Wash. Touching his loss of time, earnings, and | 301, 112 Pac. 366, we intimated, without

deciding, that evidence of loss of earning Ry. Co., 17 N. Y. Supp. 112; 1 Smith v. Whitcapacity was inadmissible under a complaint which failed to allege such loss, but held that the evidence there admitted was little more than an incidental reference to such loss, not followed up by any attempt to prove any loss of time; hence was not prejudicial. We have been cited to no decision of this court directly passing upon the question here involved, and recall none. The decisions from other jurisdictions are hopelessly divided. Many courts hold that damage through loss of time, impaired earning capacity, or interference with work are such necessary results of personal injury as to be capable of proof without being specifically pleaded, especially when the disability is total or the injury permanent. For examples see Murdock v. N. Y. & B. Dispatch Express Co., 167 Mass. 549, 46 N. E. 57; Palmer v. Winona Ry. & L. Co., 83 Minn. 85, 85 N. W. 941; Terre Haute Elec. Co. v. Watson, 33 Ind. App. 124, 70 N. E. 993; Missouri, Kan. & Tex. Ry. Co. v. Johnson (Tex. Civ. App.) 37 S. W. 771; Bailey v. Centerville, 108 Iowa, 20, 78 N. W. 831. Others, perhaps a greater number, hold that such damages are to be regarded as special. provable only when specifically averred. For examples see Union Trac. Co. v. Sullivan, 38 Ind. App. 513, 76 N. E. 116; Mellor v. Missouri Pac. R. Co., 105 Mo. 455, 16 S. W. 849, 10 L. R. A. 36; Farrington v. Cleponis & Parnarusky, 82 Conn. 258, 73 Atl. 139; Chesapeake & O. Ry. Co. v. Crank, 128 Ky. 329, 108 S. W. 276, 16 L. R. A. (N. S.) 197; Irving v. Stevensville, 51 Mont. 44, 149 Pac. 483; Ill. Cent. R. Co. v. Beeler, 142 Ky. 772, 135 S. W. 305; Fitchburg R. Co. v. Donnelly, 87 Fed. 135, 30 C. C. A. 580.

But, whatever may be the correct rule in case of injuries to laborers, ordinary mechanics and the like, whose earnings may be said to be standardized, and hence presumably known to the other party without averment (Stowe v. La Conner Trading & Transp. Co., 39 Wash. 28, 80 Pac. 856, 81 Pac. 97), it seems to us that the rule last above noted should apply in cases where the value of lost time or lost earnings of the injured person are dependent upon peculiar conditions. When the consequences of an injury are peculiar to the circumstances, condition, or affairs of the injured person, the law cannot imply damages simply from the act causing the injury (Tomlinson v. Derby, 43 Conn. 562, 567). Loss of earnings in a special employment, business, or profession or from any peculiar condition of the injured person, therefore, cannot be proved without being alleged. For illustrative cases see Luessen v. Oshkosh Elec. L. & P. Co., 109 Wis. 94, 85 N. W. 124, 125; Rush v. Metropolitan St. Ry. Co., 157 Mo. App. 504, 137 S. W. 1029; Hart v. Met. St. Ry. Co., 121 App. Div. 732, 106 N. Y. Supp. 494; Uransky v. Railroad Co., 118 N. Y. 304, 23 N. E. 451, 16 Am. St. Rep. 759; Melwitz v. Manhattan in 69 Hun, 622.

tlesey, 79 Conn. 189, 63 Atl. 1085, 7 Ann. Cas. 114; Baldwin v. Western R. Co., 4 Gray (Mass.) 333; Helser v. Loomis, 47 Mich. 16, 10 N. W. 60; Joslin v. Grand Rapids Ice Co., 50 Mich. 516, 15 N. W. 887, 45 Am. Rep. 54; L. & N. R. Co. v. Reynolds (Ky.) 71 S. W.

Respondent was not a mere farm hand. He was a farmer overseeing the operations on his own land and other lands held by him under leases. The value of his time and the extent of his personal earnings were necessarily dependent on conditions peculiar to himself which could not be anticipated by the appellant. His own testimony made this plain. Appellant was entitled to notice not only of the extent of his claim of damages, but for what the damages were claimed. In this respect the complaint was actually misleading. In it he enumerated certain specific injuries to his person, alleged intense past and present pain and suffering and probable future pain and suffering, and claimed damages "by reason of said injuries to his person" in the sum of \$15,000 and for the destruction of his automobile \$800. There was not even an allegation of loss of time. Aside from the loss of the automobile, the complaint, fairly construed, was a claim for damages for physical pain and suffering alone resulting from the specified injuries. As said by the Supreme Court of Florida in Jacksonville Electric Co. v. Batchis, 54 Fla. 192, 196, 197, 44 South. 933. 934:

"If the loss to plaintiff of earnings in her occupation was a direct, natural, and necessary result of the injury complained of, so as to be result of the injury companied of, so as of the covered by an allegation of general damages, there is no general allegation of damages in excess of the special damages claimed, and such damages are not specifically alleged. Loss of earnings cannot fairly be included in any damages. age stated, and cannot be clearly inferred from any facts alleged in the declaration. The al-legations of damage because of injuries and pain and suffering clearly refer to injuries to pain and suffering clearly refer to injuries to the person, and not to pecuniary losses. Loss of earnings is not fairly included in or plainly inferable from the allegation of damages for rent paid for plaintiff's place of business, which she was compelled to keep closed during her confinement in her room for two weeks. The objection to testimony as to losses by plaintiff of earnings in her occupation should have been sustained in view of the allegations of the delaration.

We are convinced that the allegations of the complaint in the case before us were insufficient soundly to permit the admission of the evidence under discussion for any purpose.

[3, 4] Was the error cured by the instruction of the court touching the measure of damages? We think not. When the court by its instructions either (1) in terms elim: nates from consideration specified improperly admitted evidence of special damages

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(Gallagher v. Town of Buckley, 31 Wash. 380, 72 Pac. 79), or (2) in terms confines the recovery to the specific proper items of damages (McCormick v. Tappendorf, 51 Wash. 312, 99 Pac. 2), error in the admission of the evidence of the improper items is cured. It will then be presumed that no prejudice has resulted from its admission. But when the instructions neither specify the items of damage to be eliminated nor the items of damage to be included in the jury's consideration, the admission of evidence of improper items is not cured. In such a case no court can assume that prejudice did not result. C. & O. Ry. Co. v. Crank, 128 Ky. 329, 108 S. W. 276, 16 L. R. A. (N. S.) 197.

A. (N. S.) 197.

"When incompetent evidence is erroneously permitted to go to a jury, and an attempt is subsequently made to withdraw it from their consideration, the direction of the court should be plain and specific, if the harm done is to be avoided. We must not be unmindful of the fact that instructions are addressed to a jury of laymen, not to trained legal minds. The question is not whether the court would have disregarded the offending testimony, but is it certain that the jury has done so." State v. Albutt, 169 Pac. 584.

See, also, Grays Harbor Boom Co. v. Lownsdale, 54 Wash. 83, 89, 102 Pac. 1041, 104 Pac. 267.

The only instruction which it is claimed excluded this objectionable evidence from the consideration of the jury was insufficient, we think, for that purpose. It reads:

we think, for that purpose. It reads:

"In the event you find from the evidence that the plaintiff is entitled to recover, then I instruct you that he is entitled to recover only such an amount as you find from a fair preponderance of the evidence will fairly and honestly compensate him for the personal injuries that he himself has sustained, if any, for the damage, if any, to his automobile. You are not at liberty to allow exemplary damages, that is, damages by way of punishment or smart money. In the event you find in favor of the plaintiff, then the amount of your verdict cannot exceed the sum of \$15,800 or the sum of \$15,000 for the injuries sustained by the plaintiff, if you find plaintiff to have sustained any injuries, and \$800 for the injury or destruction of plaintiff's automobile, if you find the same to have been injured or destroyed."

It neither in terms excluded the objectionable evidence from the jury's consideration nor indicated what items of damages to respondent could properly be considered as resulting from the "personal injuries that he himself has sustained, if any." On its face the purpose of this instruction was to limit the recovery to compensatory as distinguished from exemplary damages. That at least was its salient tendency. The offending evidence having been admitted over the specific objection that it was outside the issues, the jury could only infer that the court held it admissible for the purpose of augmenting the damages. There was nothing in the instruction calculated to remove that impression from the mind of the layman however intelligent.

[5-7] This is not a case in which we are at liberty to treat the pleadings as amended to conform to the proof. Though we have held that, where a case was tried upon an issue not properly within the pleadings, we will treat the pleadings as amended to conform to the proof, no such case is presented here. This can be soundly done only where the evidence was admitted without objection or where the objecting party has met the issue with evidence under such circumstances that he may be said to have waived his objection. Any other view would make an objection to improper evidence a useless formality. Nor was appellant required to claim surprise and ask for a continuance. Obviously such a claim and request would have been unavailing. The court had already ruled that the evidence offered was within the issues. The natural response to a claim of surprise would have been that the claim was unfounded, and doubtless for that reason a continuance would have been denied. It is only where an amendment is asked and permitted that it is incumbent upon the other party to ask for a continuance on the ground of surprise. It would be an absurdity to hold that an objection to improper evidence to be availing must be fortified by the idle formality of a request for a continuance where no amendment was asked for or made.

The judgment is reversed, and the cause is remanded for a new trial, with direction to permit respondent to amend his pleadings if he so desires.

WEBSTER, MOUNT, HOLCOMB, and CHADWICK, JJ., concur.

STATE ex rel. O'NEILL v. WALLACE, County Auditor. (No. 14480.)

(Supreme Court of Washington. April 25, 1918.)

1. Mandamus \$\infty 186-Noncompliance-Gabnishment.

A county auditor who has been directed by writ of mandamus to countersign, register, and deliver to relator school district warrants is not excused from complying with the writ because of having been served with a writ of garnishment in an action against relator.

2. Mandamus = 186—Noncompliance with Writ—Injunction.

In such case a writ of injunction subsequently issued, restraining him from doing the act commanded by the writ, is of no effect, and will not excuse noncompliance.

Department 2. Appeal from Superior Court, Whatcom County; William H. Pemberton, Judge.

Application by the State, on relation of Georgia O'Neill, for writ of mandamus against Will D. Wallace, Auditor of Whatcom County. Writ issued, and upon respondent's refusal to comply therewith an order was entered committing him to jail, and from this order he appeals. Affirmed.

W. P. Brown and Loomis Baldrey, both of Bellingham, for appellant. Brown, Peringer Land Thomas of Bellingham, for respondent. [2] It is next contended that the court erred in requiring the appellant to countersign.

MOUNT, J. This appeal is from an order of the lower court, directing the appellant to countersign and register two certain warrants and deliver them to the relator forthwith, or be committed to jail until he complies with the order of the court. This is the second appeal. When it was here before it was dismissed because the term of office of the county auditor expired while the case was here on appeal. We were of the opinion that the county auditor could not be required to countersign and register the warrants after his term of office had expired, and we remanded the case, with directions to set aside the order of the court committing the former auditor. We stated in that opinion (96 Wash. 107, 164 Pac. 741):

"The judgment in the mandamus proceeding is in no way affected by this appeal, and respondent must be relegated to her rights thereunder as against the present auditor of Whatcom county."

The facts leading up to the order complained of by this appeal are sufficiently stated in that opinion, and need not be repeated here. After the remittitur went down, the present appellant also refused to countersign and register the warrants, and an order was issued, requiring him to comply with the mandate of the court or show cause why he should not be punished for contempt. In answer to the show-cause order, he alleged that in the action of Seelye and wife against the respondent and others an injunction was issued, restraining him from countersigning, registering, and delivering one of the warrants, and that he could not countersign, register, and deliver that warrant without being in contempt of the injunction order. He also made answer to the effect that in the case of Seelye against the respondent and others a judgment for costs had been rendered against the relator, and that he had been served with a writ of garnishment and had answered that he had these warrants in his possession, and that by reason of this writ of garnishment he could not deliver either of the warrants. The trial court concluded that this answer was insufficient, and entered an order requiring him to forthwith countersign, register, and deliver these warrants to the relator or be committed to jail until he complied with the order. This appeal followed.

[1] We think it is plain that the writ of garnishment did not prevent the appellant from countersigning and registering the warrants. The court would no doubt protect the appellant by requiring delivery of the warrants to the clerk of the court, there to abide any valid judgment which any person had against the relator. So it is plain that the fact that a writ of garnishment was served upon him, and that he had made answer thereto, in no wise prevented the appellant

[2] It is next contended that the court erred in requiring the appellant to countersign, register, and deliver the warrants, because of the injunction which was issued restraining the appellant from delivering the war-We think there is no merit in this contention. As will be seen by a reference to the facts upon the other appeal (96 Wash. 107, 164 Pac. 741), on July 31, 1914, more than a month after the peremptory writ of mandate was issued by the trial court. Seelye and wife commenced an action to restrain the appellant from countersigning and registering the warrants. After a time—the record in this case does not show when-the same court, presumably by another judgethe record does not show the fact in this regard-issued a permanent injunction, restraining the appellant from countersigning. registering, and delivering one of these warrants. It is argued by the appellant that if he was required to obey the original mandate of the court to countersign, register, and deliver these warrants, he would be in contempt of the order of injunction issued by the same court. We are satisfied such result does not follow. The rule is stated in 14 R. C. L., at page 406, as follows:

"It is held that there is no jurisdiction to grant an injunction to stay proceedings on a mandamus, or on an indictment, information, or a writ of prohibition, and that therefore the enforcement by a court of law of an adjudication for contempt in disobeying a peremptory writ of mandamus, cannot be enjoined."

High, in his work on Extraordinary Legal Remedies (3d Ed.), at section 23, on page 29, states the rule as follows:

"And the rule is well established that the writ will not be granted to compel the performance of an act which has been expressly forbidden by an injunction in the same court or in another court of competent jurisdiction, or in another court of competent jurisdiction, or whose performance would be in direct violation of an existing injunction, even though the person seeking relief by mandamus is not a party to the injunction suit. Courts will not compel parties to perform acts which would subject them to punishment, or which would put them in conflict with the order or writ of an them in conflict with the order or writ of an-other court, nor will the court, in such cases, to which application is made for a mandamus, inquire into the propriety of the injunction.

And when it appears by the record that the respondent is already enjoined in the same court from performing the act sought, and that the injunction suit will determine the question involved, a mandamus will not be granted. If. however, the court granting the mandamus has first acquired jurisdiction of the subject-matter. it will not permit its jurisdiction to be ousted by the subsequent granting of an injunction by another court, restraining the respondent from doing the act in question. And in such case And in such case court granting the mandamus will exact obedience to its mandate, notwithstanding the granting of the injunction."

And in High on Injunctions (4th Ed.) vol. 2, at section 1317, on page 1334, it is said:

any valid judgment which any person had against the relator. So it is plain that the fact that a writ of garnishment was served upon him, and that he had made answer thereto, in no wise prevented the appellant of mandamus previously granted by a court of thereto, in no wise prevented the appellant of mandamus previously granted by a court of competent jurisdiction. Thus, where a county

judge is directed by a peremptory mandamus to issue county bonds in aid of a subscription to a railway, a subsequent injunction, restraining him from issuing such bonds, presents no obstacle to the enforcement of the mandamus.

"Courts will not ordinarily compel officers to put themselves in positive conflict with a writ or order of another court, and will not interfere by mandamus with the obedience of an injunction issued by a court of competent jurisdiction, and it has been held that obedience to such an injunction will be a sufficient protection if the directions of the subsequent writ of mandamus are not obeyed in violation of the injunction. But an injunction restraining defendant from performing the command of a peremptory writ of mandamus will be no excuse for noncompliance with such writ.

\* \* " 26 Cyc. p. 497.

"Equity has no jurisdiction to grant an in-

"Equity has no jurisdiction to grant an injunction to stay proceedings on a mandamus or a writ of prohibition, and the effect of a supersedeas cannot be controlled or destroyed by injunction." 22 Cyc. p. 811.

To the same effect is High on Injunctions (4th Ed.), vol. 1, § 68, p. 86.

Merrill on Mandamus, § 312, page 375, states the rule as follows:

"A chancery court has no authority to enjoin further proceedings in an application for a mandamus. "The reason is, that a mandamus is not a writ remedial, but mandatory. It is vested in the king's superior court of common law to compel the inferior courts to do something relative to the public. That court has a great latitude and discretion in cases of that kind, can judge of all the circumstances, and is not bound by such strict rules as in cases of common rights." It is said that to allow such interference would interrupt the course of judicial proceedings, and lead to a conflict of jurisdiction, producing the greatest confusion, and tending to subvert the administration of justice. The court which first obtains jurisdiction in any matter will not be deterred from issuing a peremptory mandate therein by the fact that another court, in proceedings subsequently begun has issued an injunction restraining the parties from prosecuting the matter further."

It is plain from the record in this case that the injunction suit was brought to restrain the very act that the court by mandate had directed and ordered to be done. The injunctional order simply confused the appellant, and the writ of garnishment further confused him, so that he did not know what his duty was in the premises. Under the authorities above cited, which are not controverted by the appellant and no authorities are cited to the contrary, it was the duty of the appellant to obey the original mandate of the court to countersign, register, and deliver these warrants. The same court, and no other court, had jurisdiction to avoid that order except by proceeding in the original action. It was never appealed from; it became final, and determined the whole matter; and neither the injunctional order nor the writ of garnishment had the effect to prevent the appellant from executing the mandate of the court.

The judgment appealed from is therefore affirmed.

ELLIS, C. J., and CHADWICK, J., con-

In re LOWE'S ESTATE, LOWE v. LOWE et al. (L. A. 5399.)

(Supreme Court of California. April 11, 1918. Rehearing Denied May 9, 1918.)

WILLS \$\infty\$=88(1)—NATURE OF INSTRUMENT—CONTRACT.

Where a writing, offered by a widow for probate as the will of her deceased husband, on its face purported to be a mere agreement between husband and wife for the support of the latter, and was annexed to an earlier writing of like character signed by both, and, though the signatures of both were contemplated, the husband alone signed, probate was properly refused.

2. EXECUTORS AND ADMINISTRATORS \$\infty\$=19-RIGHT OF WIDOW-ESTOPPEL-APPLICATION FOR ADMINISTRATION.

Where decedent's widow, who, under Code Civ. Proc. § 1365, was entitled to letters of administration, unless she waived her prior claim, requested that the petition of children for letters be granted, but before the hearing filed application for grant of letters to herself, asking that her prior request be disallowed, she was not estopped so to apply for letters in her own favor.

3. EXECUTORS AND ADMINISTRATORS &= 20(8)

— RIGHT OF WIDOW — WAIVER — QUESTION
FOR TRIAL COURT.

It was for the trial court, in the exercise of a sound discretion, to determine whether greater weight should be given to the original surrender of her right to administer by the widow, or to her subsequent assertion of the right; that is, whether she had waived her prior claim to administer.

4. STIPULATIONS \$\infty\$18(4)\to WITHDRAWAL OF ISSUE.

The trial court should not pass upon an issue withdrawn from consideration as immaterial by agreement of the parties accepted by the court.

 JUDGMENT \$\infty 728\$ — Res JUDICATA—FIND-ING ON IMMATERIAL MATTER.

The court's finding in relation to an immaterial matter will not control the parties in any subsequent proceeding.

Department 1. Appeal from Superior Court, San Luis Obispo County; T. A. Norton, Judge.

In the matter of the estate of Amos Lowe, deceased, wherein Louesa Lowe, his widow, and Frank E. Lowe and others petitioned for letters of administration. From an order denying her petition, the widow appeals. Order affirmed.

S. V. Wright and I. S. Genter, both of San Luis Obispo, for appellant. Alex. Webster, of Paso Robles, for respondents.

SLOSS, J. Upon the death of Amos Lowe rival applications for letters of administration were presented by the respondents, children of deceased, and by the appellant, his surviving wife. The widow also asked for the probate of a paper claimed to be the will of Amos Lowe. The widow appeals from the order denying her petition.

[1] The court below was clearly right in refusing probate to the paper offered as a will. The writing on its face purported to be a mere agreement between husband and wife for the support of the latter, and was

ter signed by the two. Although the signatures of both was contemplated, the husband alone signed. Whether there was an effective execution of the agreement contemplated is not to the point. Manifestly the paper was not drawn and signed animo testandi. Tennant v. John Tennant Memorial Home, 167 Cal. 570, 140 Pac. 242; Estate of Keith, 173 Cal. 276, 159 Pac. 705.

[2, 3] The other point in controversy was over the right to administer. The widow was entitled to letters, unless she had waived her prior claim. Code Civ. Proc. § 1365. The petition of the respondents was first filed, and was accompanied by a request, signed by the widow, that it be granted. Before the hearing the widow filed an application for the grant of letters to herself, asking that her prior request in favor of the son and daughter be disregarded. The court found that there was no good or sufficient reason for this change of position. There is a further finding to the effect that the respondents had gone to expense and trouble on the faith of the widow's request. This is, in effect, a finding of estoppel. We think the appellant is right in her claim that the evidence does not support the finding last mentioned. But a party may be held to a waiver of a prior right to letters, even though the elements of an estoppel in pais do not appear. The rule established by our decisions is that where it is sought to retract such a waiver, it is for the trial court, in the exercise of a sound discretion, to determine whether greater weight should be given to the original surrender, or to the subsequent assertion of the right. Estate of Kirtlan, 16 Cal. 162; Estate of Moore, 68 Cal. 281, 9 Pac. 164; Estate of Bedell, 97 Cal. 339, 32 Pac. 323; Estate of Shiels, 120 Cal. 347, 52 Pac. 808. Though the evidence was conflicting, there was enough to support the finding that the widow changed her mind without good reason, and this finding, as we have seen, warranted the grant of letters to the respondents, irrespective of any question of strict estoppel.

Complaint is made of various rulings on the admission and rejection of evidence. If error was committed in any instance, it was not of sufficient consequence to require a reversal.

[4, 5] By the pleadings an issue was made regarding the validity and effect of the first agreement between the appellant and her husband, under which, as was claimed by the respondents, the widow had surrendered any right to succeed to the separate property of the decedent. During the trial, a certain stipulation was made, pursuant to which the issues regarding the agreement were, by agreement of the parties, accepted by the court, withdrawn from consideration as immaterial. The court, nevertheless, made a finding against the widow with re-

annexed to an earlier writing of like charac- spect to the agreement. The appellant argues that this finding will bind her in subsequent litigation. The court should not have undertaken to pass upon the issue thus withdrawn. But we think the harmful effect which the appellant fears will not follow. On the entire record it appears that the finding relates to a matter which was not material, and such finding will not, therefore, control the parties in any subsequent proceeding. Collins v. Gray, 154 Cal. 131, 135, 97 Pac. 142.

The order is affirmed.

We concur: SHAW. J.: RICHARDS. Judge pro tem.

HUGHES MFG. & LUMBER CO. et al. v. ELLIOTT et al. (L. A. 4142.)

(Supreme Court of California. April 17, 1918. Rehearing Denied May 17, 1918.)

BANKS AND BANKING \$== 40-TRANSFER OF STOCK-PASSING OF TITLE.

Escrow instructions to return unpaid for bank stock to vendors at the end of six months was not inconsistent with passing of title to vendees under an agreement that, if the stock was not paid for in six months, the vendors had the option of rescinding or suing for the purchase price.

2. BANKS AND STOCK—TITLE. AND BANKING \$== 40 - SALE OF

Where purchaser of bank stock held in escrow till payment of price agreed to accept sub-stituted stock which the bank took in exchange for its stock, purchaser was liable for price of either the bank stock or its equivalent, where there was a doubt as to validity of exchange of bank stock; the bank commissioner disapproving the exchange.

Department 2. Appeal from Superior Court, Los Angeles County: John M. York, Judge.

Action by the Hughes Manufacturing & Lumber Company, a corporation, and others against L. L. Elliott and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Frank J. Thomas, of San Jose, and Scarborough & Bowen, Edwin A. Meserve, and Shirley E. Meserve, all of Los Angeles, for appellants. Sheldon Borden and George H. Moore, both of Los Angeles, for respondents.

WILBUR, J. [1] This is an action to recover from the defendants the purchase price of certain bank stock. The agreement for this purchase was in writing, dated March 15, 1911. The money was to be paid within six months. It was provided that:

"Said stock shall be placed in escrow with R. J. Waters to be by them delivered upon payment to said bank by said second parties (defendants) for the first parties (plaintiffs) said sum of \$24,480. In case said second parties fail or neglect to pay said sum of \$24.480 within six months, said first parties shall have the sight and or time to either declars said sale cape. right and option to either declare said sale canceled or recover said \$24,480."

Subsequently, on March 24, 1911, escrow instructions directed to R. J. Waters as escrow holder were signed by the parties plaintiffs and delivered to him with said 288 shares of stock. These instructions provided that the stock was to be delivered in whole or in part whenever payment was made therefor at the rate of \$85 per share, plus 3 per cent. interest from March 24, 1911, and also provided that:

"In case the said stock has not been delivered to the said parties named therein on or before six (6) months from date, you will return said stock or such portions thereof as shall then remain, to the Hughes Manufacturing & Lumber Company."

The purpose of this agreement was undoubtedly to secure to the plaintiffs the purchase price of the stock and to give possession of the unpaid for stock to the escrow holder. The provision for the delivery of the possession of the certificates of stock unpaid for to the vendors at the expiration of six months was not inconsistent with the actual vesting of title of all the stock in the vendees at the time of the delivery of the stock to the escrow holder on March 24, 1911. The escrow instructions did not provide that the sale should be rescinded at the expiration of six months. They merely provided that the shares unpaid for should be delivered into the possession of the vendors at that time, while the contract of March 15th gave the option to confirm or rescind the sale to the vendors. After the expiration of the six months the vendors of the stock gave notice to the vendees that they would expect them to pay the full purchase price for the stock, and that "said stock is still with said escrow holder, R. J. Waters, subject to your order." Under these circumstances the trial court was justified in finding that the title passed. Civ. Code, §§ 1140, 1141, 1748, 1756; Cuthill v. Peabody, 19 Cal. App. 304, 125 Pac. 926; Hoover v. Wolfe, 167 Cal. 387, 139 Pac. 794; Provident Gold Mining Co. v. Manhattan Securities Co., 168 Cal. 304, 142 Pac. 884; Provident Gold Mining Co. v. Haynes, 173 Cal. 44, 159 Pac. 155.

[2] After the deposit of the bank stock with R. J. Waters, it was undertaken by the stockholders of the bank to exchange a majority of the stock of the bank for stock in an insurance company. At the request of the defendants the plaintiffs signed the various agreements necessary for such exchange. This was done in pursuance of a written agreement between the plaintiffs and defendants, which agreement provided:

"But said exchange shall in no way or manner affect the sale of said 288 shares of the said Oil & Metal Bank & Trust Company's stock, except that said Vulcan Fire Insurance Company's stock shall be substituted in place there-

In the agreement of exchange by which the insurance company's stock was to be substituted for the bank stock, it was provided that the insurance company's stock received in exchange for the bank stock was to be deposited in escrow with the bank and to remain on deposit with the bank as security for certain agreements on the part of the bank stockholders. The president of the bank, finding that the proposed exchange was disapproved by the bank commissioner and by the insurance commissioner, returned the original certificate for 228 shares of bank stock to R. J. Waters, and it remained with him until the trial. But appellants claim that the agreement of exchange was consummated; that the attempted cancellation of that agreement by the president of the bank was unauthorized: that the title to the bank stock passed to the insurance company or to one Galloway, and that title to the insurance company's stock passed in accordance with the agreement of exchange, and that such consummated exchange was not affected by the unauthorized act of the president of the bank in returning the certificate for the bank stock to Waters. is immaterial whether or not this deal was consummated. If it was consummated the effect of the transaction was that the bank held the substituted insurance company's shares under the agreement of exchange entered into by the plaintiff for and on behalf of the defendants. If not consummated, the mere cancellation of the 288 shares of bank stock shares, for the purpose of issuing a certificate to effect said exchange, was of no consequence. The reissue of the original certificate for 288 shares and its redeposit with Waters placed the matter substantially where it was in the first instance. In either event, the whole transaction having been at the request of the defendants, they are in no position to complain. Upon payment of the purchase price they would secure all plaintiff's rights in the bank stock or in the stock so substituted therefor. If the transactions with reference to the exchange of the stock have any significance, they merely emphasize the fact that both parties regarded the stock as the property of the defendants.

Defendant Montgomery, after the execution of the original contract, signed the same as a party thereto, and in all subsequent proceedings in relation thereto he was recognized as such by the plaintiffs. We see nothing in the case to distinguish his obligation from that of the other defendants.

Judgment affirmed.

We concur: MELVIN, J.; VICTOR E. SHAW, Judge pro tem.

CITIZENS' TRUST & SAVINGS BANK v. TUFFREE et al. (L. A. 4211.)

(Supreme Court of California. April 17, 1918.) 1. Trusts \$\infty 44(2)\to Evidence\to Inconsisten-CY IN TESTIMONY.

Statements and conduct of a mother, to whom a son made a deed of gift, being consistent with a maternal desire to hold and administer the property for his benefit and pro-tection as his mother, and not as trustee, are not inconsistent with her other testimony ex-pressly denying existence of a trust relation.

APPEAL AND EBBOR \$\infty\$=1011(1)—REVIEW—FINDINGS ON CONFLICTING EVIDENCE.

Discretion of the trial court in resolving conflicts in the testimony will not be interfered with on appeal.

Department 1. Appeal from Superior Court, Orange County; W. H. Thomas, Judge. Action by the Citizens' Trust & Savings Bank, guardian of Fred B. Tuffree, an incompetent, against John C. Tuffree and another, executors of Carolina B. Pittman, deceased. Judgment for defendants, and plaintiff appeals. Affirmed.

Cates & Robinson, of Los Angeles, for appellant. Samuel M. Davis, of Santa Ana. for respondents.

RICHARDS; Judge pro tem. This is an appeal from a judgment in defendant's favor in an action to declare and enforce a trust in real property. The original defendant, Carolina B. Pittman, was the mother of one Fred B. Tuffree, of whom the plaintiff is The evidence presented at the guardian. trial disclosed the following facts: The property in question was a part of a large tract which belonged originally to Mrs. Pittman as a part of her separate estate. In the year 1902 while the father of Fred B. Tuffree was still living his parents joined in a gift deed of the premises to him, placing the same in escrow, to be delivered upon his mother's death, and at the same time placing him in possession of the property and in the enjoyment of its income. In the year 1907 at his request his mother made and delivered to her said son a deed of gift of the same property. Soon thereafter he became involved in an entangling transaction with some other people, and, being in danger of losing the property, came to his mother for relief. She untangled him from the difficulties in which he was involved at that time. It appears that said Fred B. Tuffree had been for a long time afflicted with periodical attacks of lunacy or incomptency, during which he was incapable of caring for his property and was in danger of giving it away to strangers. In the year 1909, not long after an emergence from one of these spells, he came to his mother and offered to deed back the property to her, and, in fact, and upon his own initiative did so, by a deed of gift. Later he undertook to claim with the statement, "without waiver of any that the deed so made was intended to objection to any defect in the procedure for tak-

create a trust, by the terms of which his mother should hold the title to the property during her life for his benefit. This being denied by her, the present action was brought on his behalf by the plaintiff as his guardian to declare and enforce such a trust. Upon the trial of the cause both mother and son testified respecting the facts and the nature of the transaction out of which the alleged trust was claimed to have originated. The trial court found against the plaintiff's contention and in favor of the defendant, holding that no such trust existed.

[1, 2] The only question presented by this appeal relates to the sufficiency of the evidence to sustain the findings and judgment of the trial court in this regard. It is conceded on the part of the appellant that Mrs. Pittman did testify in some portions of her testimony that the deed which her son made to her was intended by him and was taken by her as a deed absolute to the property. The appellant, however, insists that this testimony is in conflict with the testimony given by other witnesses and with the circumstances shown in the case, and that it is also in conflict with other portions of the testimony given by the defendant herself. With relation to these latter alleged inconsistencies in the defendant's own evidence we do not agree with the appellant's view that they are in such conflict as to destroy, or even seriously impair, the sufficiency and effect of the defendant's direct testimony that no trust was created by her son's deed of gift to her. The statements and conduct of Mrs. Pittman upon which the appellant relies were, we think, entirely consistent with a maternal desire to hold and administer the property in question for her son's benefit and protection as his mother and not as his trustee, and hence are not inconsistent with that portion of her testimony in which she expressly denies the existence of the trust relation. The trial court evidently so construed her evidence taken in its entirety, and, resolving all other conflicts in the evidence in her favor, rendered its judgment accordingly. With its discretion so to do, this court will not interfere upon appeal.

Judgment affirmed.

We concur: SHAW, J.; SLOSS, J.

SOPER v. DOMINGUEZ. (L. A. 4226.)

(Supreme Court of California. April 17, 1918. Rehearing Denied May 17, 1918.)

1. APPEAL AND ERBOR \$\infty\$=530\to Order Granting New Trial\to Stipulations\to Identification of Documents.

Of two stipulations, one reciting that the transcript on appeal from an order granting defendant's motion for new trial included cering appeals except as to contents of transcript," the second referring to the transcript and stipulating: "That the foregoing is a full, true, and correct transcript of the records on appeal from the order granting defendant's motion for new trial according to and in pursuance of the previous stipulation as in this transcript above set forth, and that the said transcript is in full compliance with said stipulation"—neither sufficiently identified what documents, records, or evidence were actually presented to and used by the trial judge on the hearing and determination of the motion for new trial.

2. APPEAL AND EBBOR & 613(1)—OBDER AS TO NEW TRIAL—CERTIFICATE OR STIPULATION AS TO EVIDENCE.

On appeal from an order granting or denying a new trial, either a certificate of the trial judge must be inserted in the bill of exceptions as to the evidence presented and used on the hearing and determination of the motion, or the matter must be covered by stipulation.

Department 1. Appeal from Superior Court, Ventura County; Robert M. Clarke, Judge.

Action by Robert R. Soper against Francisco H. Dominguez. From an order granting defendant's motion for new trial, plaintiff appeals. Affirmed.

Clay G. Knox, of Ventura, for appellant. Orr & Gardner, of Ventura, for respondent.

RICHARDS, Judge pro tem. [1, 2] This is an appeal from an order granting defendant's motion for a new trial. The question involved in the action was that of a disputed boundary line between the lands of the parties thereto. The trial court gave judgment in plaintiff's favor, whereupon a motion for a new trial was made by the defendant upon the following grounds: (1) Irregularity in the proceedings of the adverse party by which the defendant was prevented from having a fair trial; (2) accident or surprise which ordinary prudence could not have guarded against; (3) newly discovered evidence material to the defendant's case which he could not with reasonable diligence have discovered and produced at the trial. The court granted said motion generally, and it is its alleged error in so doing of which the appellant complains. The record on appeal does not contain any bill of exceptions, nor does it embrace any certificate of the trial judge showing what records, affidavits, or other evidence were presented before him or considered by him on the hearing and determination of the motion for a new trial. The transcript does contain two stipulations between counsel for the respective parties purporting to have been entered into upon the same day. One of these simply recites that the transcript on appeal includes certain documents specifically named in the stipulation and closes with the following statement, evidently inserted by the attorney for the respondent:

"Without waiver of any objection to any defect in the procedure for taking appeals except as to contents of transcript."

The second stipulation, referring to the transcript, stipulates:

"That the foregoing is a full, true, and correct transcript of the records on appeal from the order of said superior court granting defendant's motion for a new trial according to and in pursuance of the stipulation of said counsel dated March 31, 1915, as in this transcript above set forth, and that the said transcript is in full compliance with said stipulation."

Neither of these two stipulations sufficiently identifies what documents, records, or evidence was actually presented to and used by the trial judge upon the hearing and determination of the motion for a new trial. The later stipulation amounts to nothing more than a stipulation that the documents and records set forth in detail in the former stipulation have been fully, truly, and correctly transcribed, and does not pretend to be a sufficient substitute for the necessary certificate of the trial judge required to be inserted in a bill of exceptions upon appeal from an order granting or denying a new trial. That such a showing is necessary to be made either by the certificate of the trial judge or by the stipulation of the parties has been uniformly held by this court. In the absence of such showing in this record we are unable to determine whether or not the trial court was in error in granting the motion for a new trial upon whatever evidence was before it, and for that reason the order is affirmed.

We concur: SHAW, J; SLOSS, J.

GARRETT v. GARRETT et al. (L. A. 4179.) (Supreme Court of California. April 15, 1918.) 1. HUSBAND AND WIFE \$\infty\$298\(^4\)—SUITS FOR

1. HUSBAND AND WIFE @ 298%—SUITS FOR MAINTENANCE—REMOVAL OF CLOUDS.

In a suit by a wife against her husband for support, she cannot obtain, as ancillary relief, the removal of a cloud on title caused by a deed given by her husband, where he has ample property remaining to maintain plaintiff.

2. VENUE @-41—CHANGE—CODEFENDANTS.

In a suit by a wife against her husband and others for support and to remove a cloud, it was error to refuse a change of venue to the husband, a resident of another county, where the complaint stated no cause of action against his codefendants who were residents of the county wherein suit was brought.

Department 2. Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by Florence Garrett against David Thomas Garrett and others. From an order denying defendant Garrett's motion for a change of venue, he appeals. Reversed.

Meredith, Landis & Chester, of Sacramento, and Eugene A. Tucker, of Los Angeles, for appellant. Harry M. Irwin, of Los Angeles, for respondents.

WILBUR, J. This is an appeal from an order denying defendant Garrett's motion for

a change of venue, based upon his residence in Sacramento county. It was denied because two other defendants resided in Los Angeles county. The suit is brought by plaintiff to secure support and maintenance from her husband, defendant Garrett. The complaint alleges that the defendant Garrett recorded a deed of certain real property to his codefendants, but that such deed was never deflivered and that title did not pass. Plaintiff seeks to remove said cloud upon the record as ancillary to her action for support. Garrett's codefendants answer and disclaim.

[1, 2] The complaint shows that defendant Garrett has ample property to maintain the plaintiff other than that covered by the deed to his codefendants. Therefore plaintiff is not injured by the cloud upon the record title, and cannot sue to remove the same. As no cause of action is stated against the codefendants of Garrett, his motion for a change of venue should have been granted. Remington Sewing Machine Co. v. Cole, 62 Cal. 311; Sayward v. Houghton, 82 Cal. 628, 23 Pac. 120; McKenzie v. Barling, 101 Cal. 459, 461, 36 Pac. 8.

Order reversed.

We concur: MELVIN, J.; VICTOR E. SHAW, Judge pro tem.

BOAL et al. v. GASSEN. (L. A. 4168.) (Supreme Court of California. April 15, 1918.)

1. Mortgages \$\infty\$32(2)\to\Deed as Mortgage \to\Internst.

An instrument, though in the form of an absolute conveyance, will be treated as a mortgage, if in fact it was given as security for performance of an obligation; the question being one of intent.

2. Mortgages ← 38(1) — Payment—Conveyance to Mortgagor.

A deed by a mortgagor covering the property mortgaged under a trust mortgage, given by the mortgagor to the creditor on the threat of foreclosure if he did not, held, under the evidence, not a mortgage, but a transfer in payment and extinguishment of the mortgage debt.

3. MORTGAGES \$\infty\$=32(5)—DEED AS MORTGAGE

3. MORTGAGES \$\iiii 32(5)\$—DEED AS MORTGAGE
—EVIDENCE.
The continued existence of a debt is a cir-

The continued existence of a debt is a circumstance tending to show that a conveyance is a mortgage.

4. CANCELLATION OF INSTRUMENTS 55-SETTING ASIDE — RESTORATION OF STATUS

Where a deed by a mortgagor to the creditor was set aside as having been obtained without adequate consideration and under undue influence, it was not error to restore the creditor to his former condition, giving him the benefit of the security of the mortgage, which was given up in consideration of the conveyance.

5. CANCELLATION OF INSTRUMENTS \$\infty\$57 - EQUITABLE RELIEF-SALE OF PROPERTY. Where an absolute deed given by a mort-

Where an absolute deed given by a mortgagor to the creditor was set aside, and the mortgage restored, it was not error to direct a sale of the property by a commissioner appointed by the court, instead of by the trustee named in the original mortgage.

Department 1. Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by Alma L. Boal and husband and another against A. G. Gassen. Judgment for defendant, and plaintiffs Alma L. Boal and husband appeal. Affirmed.

Harrison G. Sloane, Morganstern, McGee, Henning & Hendee, and Wood & Wood, ali of San Diego, for appellants. Hunsaker & Britt, W. E. Mitchell, and John A. Powell, all of Los Angeles, for respondent.

SLOSS, J. The cause having been tried, the court made its findings of fact and conclusions of law, and entered a judgment granting certain relief to the plaintiff Alma L. Boal. On the defendant's motion, made under section 663, Code of Civil Procedure, the court altered and amended its conclusions of law, and entered a different judgment. Alma L. and J. Mills Boal appeal from the second judgment.

The findings are, in effect, as follows: Alma L. Boal was, on December 1, 1911, the owner of a parcel of land in San Diego county. On that day she and her husband, J. Mills Boal, made and delivered their promissory note for \$75,000, payable September 16, 1913, to the defendant, A. G. Gassen, and secured the same by a deed of trust conveying the above-mentioned land to Title Insurance & Trust Company, as trustee. The note contained a provision for accelerating the due date of the principal on nonpayment of interest. In December, 1912, plaintiffs were in default in payment of interest, and were unable to raise funds to pay such interest or the principal of their note. The defendant was aware of their financial condition. The plaintiffs had theretofore conveyed the land to one Bradbeer for convenience in negotiating a loan. The land was, on December 19, 1912, worth \$250,000, and there was then due from the Boals to Gassen \$76,293.-98. Prior to the last-named date the said plaintiffs had endeavored, but without success, to obtain from Gassen an extension on their debt. About December 14th Gassen notified them that, upon their failure to pay an installment of interest to fall due December 16th, he would elect to declare the principal due, unless they would convey the property to him upon the consideration that he would cancel and satisfy the note and execute to Bradbeer a certain option, which will be described hereinafter, and that, unless said plaintiffs should pay the note or make such conveyance, he would direct the trustee to sell under the deed of trust. On or about December 18th the Boals and Bradbeer "assumed to enter into" an agreement whereby plaintiffs were to convey the property to Gassen in payment of the note, and Gassen agreed to execute to Bradbeer an option for the sale, on or before January 1, 1914, of said land to Bradbeer for \$136,240,

which was \$45,000 in excess of the debt, together with incidental expenses. The plaintiffs were unable to secure funds with which to pay the debt, and they thereupon agreed to accept the terms proposed by Gassen, and to execute the necessary instruments, but such agreement and the execution and delivery of the instruments thereupon executed "was not the free and willing act of plaintiffs or either of them, but was induced by all of the circumstances surrounding the condition of the parties." The deed to the defendant was thereupon executed and de-The defendant canceled the note livered. and executed a release to plaintiffs, caused the trustee to make a reconveyance of the property to Bradbeer, and executed in favor of Bradbeer an option as above outlined. The plaintiffs at the same time signed a writing in which they declared and acknowledged, in the most direct and explicit words, that their obligation and indebtedness to Gassen was extinguished; that they owed him nothing; that the conveyance to him was absolute: and that the land was held by him free of any claim or interest on the part of any of said plaintiffs. Except as stated, Gassen gave to plaintiffs no consideration for the conveyance so made to him. On March 11. 1914 (after the commencement of this action), the plaintiffs made to Gassen a written offer to pay him \$94,000, being the sum due on December 19, 1912, with interest and expenses, and defendant refused to accept the same, claiming to be the owner of the land. Plaintiffs have not paid anything on account of said indebtedness. It was found that "there is now due and owing by plaintiffs J. Mills Boal and Alma L. Boal to defendant, Gassen," the principal of the promissory note, with interest and sums paid for taxes, aggregating \$97,812.82. The plaintiff did not at any time prior to the commenceof this action tender to defendant any sum of money, or attempt in any manner to rescind the transaction of December, 1912.

The conclusions of law first drawn from these facts were that the deed executed by plaintiffs to Gassen on December 19, 1912, is a mortgage; that plaintiff Alma L. Boal is the owner of the land; that she and J. Mills Boal owe the defendant \$97,812.82; and that said defendant has no interest in the land except a mortgage lien as security for the payment of said sum. Judgment was entered accordingly.

The conclusions, as amended following defendant's motion, were that the deed and other instruments executed by plaintiffs in December, 1912, were obtained without adequate consideration and under undue influence, and were voidable at plaintiffs' election, upon the condition that defendant should be restored to his rights under the promissory note originally held by him, and the deed of trust given to secure the same; that the sums due on the note are secured the appellants were prejudiced by the action

tled to have the property sold; and that a commissioner should be appointed to make such sale. These conclusions are, in substance, embodied in the second judgment, the one which is attached to this appeal.

[1.2] The appellants' contention is that the court was right in the first instance in holding that the conveyance of December, 1912, was a mortgage. But this claim is entirely without support in the findings of fact. It is familiar law that an instrument, though in the form of an absolute conveyance, constitutes and will be treated as a mortgage, if in fact it was given as security for the performance of an obligation. Lee v. Evans, 8 Cal. 430; Hodgkins v. Wright, 127 Cal. 690, 60 Pac. 431. The question is one of the intention of the parties. But the findings, which we have summarized, contain nothing which in any way indicates that the deed of December, 1912, was, so far as the understanding, agreement, or intention of the parties is concerned, given to the defendant as security for a debt. The situation plainly set forth is that Gassen insisted upon the transfer of the property in payment and extinguishment of his debt, and that the plaintiffs yielded to his demand. Nobody ever thought that Gassen was getting a new or continuing security.

[3] The appellants rely upon the findings that Mrs. Boal is the owner of the land, and that she and her husband are indebted to Gassen. The continued existence of a debt is, no doubt, a circumstance tending to show that a conveyance is a mortgage. Montgomery v. Spect, 55 Cal. 353. But when the findings in this case are read as a whole, it is perfectly obvious that the declarations of ownership and indebtedness were in reality conclusions based upon the more specific facts which led the court to the belief that the transaction of December, 1912, was not. in equity, binding upon the appellants. In other words, the court found that the debt remained because the parties, although iutending and agreeing that it should be extinguished, had dealt under conditions which entitled the parties of the one part to avoid their agreement. The theory of the trial court evidently was that the transaction had been induced by undue influence, as defined in subdivision 3 of section 1575 of the Civil Code.

[4, 5] The judgment finally entered gives to the appellants at least as much as they have a right to ask. If the transaction of December, 1912, is to fall, the defendant must be entitled to the benefit of the security which he gave up in that transaction. His note is overdue and unpaid, and the judgment gives him no more than he could claim under the original and unquestioned contract, when it decrees a sale under the deed of trust. We are unable to see that error was committed or that the interests of by the deed of trust, and defendant is enti- of the court in directing a sale by a commissioner appointed by it, instead of by the More v. Calkins, 85 Cal. 177, 190, 24 Pac. 729.

Whether, on the facts found, the plaintiffs were entitled to any relief at all, is open to serious doubt. But, since the defendant makes no complaint of the judgment, this question does not call for consideration.

The judgment is affirmed.

We concur: SHAW, J.; RICHARDS, Judge pro tem.

KURTZ et ux. v. CUTLER et al. (L. A. 4233.) (Supreme Court of California. April 17, 1918.)

1. APPEAL AND ERROR €= 753(2) — APPEAL GROUNDS FOR DISMISSAL.

Lack of specifications of error is not a ground for dismissal.

2. Exceptions, Bill of 🖚 26—Ambiguity-SETTLEMENT IN FAVOR OF PARTY ALLEGING

An ambiguity created by filing marks on purported bill of exceptions, showing that it was indorsed as filed on two different dates, will be settled against the party seeking to establish error.

3. EVIDENCE 4-44 - JUDICIAI NOTICE - RE-

THEMENT FROM OFFICE.

The Supreme Court is bound to take judicial cognizance of the fact that the judge who denied motion for new trial retired from office on a certain date.

4. JUDGES & 31 — POWERS AFTER EXPIRA-TION OF TERM—DIMINUTION OF RECORD. The judge who denied motion for new trial

could not, after termination of his term, make an order in diminution of the record, even if counsel for the parties so stipulated, since jurisdiction cannot be conferred by consent.

Department 2. Appeal from Superior Court, Santa Barbara County: E. P. Unangst, Judge.

Action by Eugene Kurtz and wife against William C. Cutler and another. From an order denying his motion for new trial, R. G. Putnam appeals. Affirmed.

Ben S. Hunter, of Los Angeles, for appellant. B. F. Thomas, of Santa Barbara, and Haas & Dunnigan, of Los Angeles, for respondents.

MELVIN, J. Defendant Putnam appeals from an order of the superior court denying his motion for a new trial.

[1] This case has been before us twiceonce on motion to dismiss, and again on motion to affirm on the record. The first motion was denied because the lack of specifications of error is not a ground for dismissal, and the other was denied without prejudice because the court declined to make the inspection of the record which would be involved until the case should be regularly before us on appeal. It has now reached that position, and we will examine the transcript in the light of the contention of respondents that there is no record upon which the court may consider any alleged errors.

The action was one relating to the rescistrustee named in the deed of trust. See sion of a contract for the exchange of real property and the recovery of the land of plaintiffs alleged to have been secured by fraud. Chronologically the following facts appear from the record before us: The original complaint was filed May 22, 1908; amended complaint December 15, 1908; and the case came on regularly for trial June 13, 1911. The decree was filed June 17, 1912. and the judgment roll was filed on the following day. There was no attempted appeal from the judgment. The court denied the motion for a new trial August 19, 1914, and notice of appeal from said order was filed October 16, 1914, having been served upon the attorneys for respondents on some earlier day of the same month. Following the clerk's certificate to the judgment roll in the printed transcript before us are 50 pages of matter under the title "Bill of Exceptions," purporting to be an assignment of errors and specifications of the particulars of insufficiency of evidence. This bill does not purport to have been signed by an attorney, settled by any judge, nor formally filed in the action. It is followed by that which apparently is a reproduction of a document fully entitled in the action and bearing the designation "Statement on Motion for New Trial." This seems to be a statement of the testimony received at the trial and the proceedings thereon. It covers more than 400 pages of the printed transcript. Counsel for respondents stipulated on April 10, 1914, that it was a true and correct "bill of exceptions" which might be settled by the court. It purports to have been settled "within the time and as required by law" and bears the name of Hon. E. P. Unangst, judge of the superior court, under date of April 11, 1914. There appear to have been two filing marks on this document, for the printed copy shows that it was indorsed as filed April 23, 1914, and March 4, 1915.

[2, 3] If we regard the printed transcript alone these indorsements create an ambiguity which we must settle against the party seeking to establish error. It is impossible to tell when the documents were filed or when either of them received the clerk's indorsement. While the term "bill of exceptions" is used in the order of settlement, it is not clear whether that order refers to the document so entitled or to the one designated as "Statement on Motion for New Trial." The location of the copy of this order would indicate, however, that it was meant to apply only to the latter paper, and that, therefore, there is no authenticated bill or statement containing any specifications of error. But in any view of the matter we are bound to take official cognizance of the fact that Judge Unangst retired from office in January, 1915, and that, therefore, if the last filing mark was the correct one, there was no record on file when he denied the motion for a new

have no specifications of error before us upon which we could act, and, therefore, could do nothing but affirm the order for want of a proper record.

If we inspect the affidavits and stipulation of facts filed upon the motion to affirm. the real history of the record becomes clear. Both the proposed "Bill of Exceptions" and the proposed "Statement on Motion for New Trial" were served by copies, under one cover, upon counsel for respondents. quently the proposed "Bill" was left by the clerk upon the desk of one of the judges of Santa Barbara county, and the "Statement" was sent to Judge Unangst at San Luis Obispo after counsel had agreed to certain amendments and the said amendments had been inserted in an engrossed bill and a certificate of the correctness, signed by counsel, had been attached thereto. This document, as engrossed, submitted to the judge and approved by him did not contain the matter included in the original document called a "Bill of Exceptions." In other words, the judge never had before him the specifications of error and of insufficiency of evidence, because the missing paper was not discovered by the clerk until long after the judge's term of office had expired. He denied the motion for new trial on August 19, 1914. The record then before him contained nothing amounting either in form or substance to specifications of errors of law or insufficiency of evidence. After discovery of the missing paper and after the termination of Judge Unangst's term of office, in March, 1915, he made an order amending the statement on motion for new trial by adding thereto the specifications of error and insufficiency in form as contained in the proposed "Bill of Exceptions" originally served, on counsel for plaintiffs. This he did after receipt of a letter from the attorney for appellants containing the statement that the paper had been omitted inadvertently from the engrossed bill. This letter was indorsed by L. A. Lewis with the names of attorneys for respondents, but it appears by affidavit that he acted under a misapprehension regarding the contents of the letter, and that he had no authority to represent respondents or their counsel. Subsequently the new filing mark was made.

[4] Whether we act upon the record contained in the transcript or regard the documents filed on motion to affirm as still before the court and available in the preparation of an opinion, the result is the same. The order must be sustained. The former judge could make no order in diminution of the record even if counsel for the parties stipulated that he might do so. Jurisdiction may not be conferred by stipulation. He was utterly without power in the prem-

Upon such a conclusion we would above set forth, we act the more readily because we have carefully read the briefs, and upon examination of the case find the contentions of appellant without merit.

The order is affirmed.

We concur: VICTOR E. SHAW, Judge pro tem.; WILBUR, J.

COOPER et al. v. HUNTINGTON et al. HELLMAN COMMERCIAL TRUST & SAV-INGS BANK v. CONDON et al.

(L. A. 4181, 4182.)

(Supreme Court of California. April 16, 1918. Rehearing Denied May 16, 1918.)

1. VENDOR AND PURCHASER 4-109-RESCIS-SION-FAILURE OF CONSIDERATION-PARTIAL CONSUMMATION.

Where a flood had washed away a substantial portion of land before partial consummation of contract of purchase by payment of any of the purchase price, the vendees could withdraw from a supplemental contract settling a suit for rescission of the original contract of sale for false representations, though they had taken possession.

2. Vendob and Purchaser \$\infty\$119-Rescis-SION-ESTOPPEL.

A vendor who, by holding out promises, induced vendees to postpone efforts to rescind, cannot insist on laches as a bar to rescission. Vendor and Purchaser €=36(2)—Valid-

ITY OF CONTRACT-REPRESENTATIONS.

Representations amounting to a promise that a water company by means of its improved facilities could and would furnish the vendees the agreed quantity of water, would bring the case within the rule that assurance by a vendor that land to be sold is well watered during the impristing the case with the case wi the irrigation season, is not a mere opinion.

4. PLEADING 279(4)-SUPPLEMENTAL COM-PLAINT-NEW MATTER.

Where, after commencement of action to rescind contract to purchase land for false representations as to water supply, about four acres of the ten purchased were washed away by flood, plaintiff was properly permitted to file a supplemental complaint averring such fact; it being the allegation of new matter accruing er commencement of action entitling plaintiff to additional relief.

Department 2. Appeal from Superior Court, Los Angeles County; G. W. Nicol, Judge.

Action by Hattie O. Cooper and others against H. H. Huntington and others and by the Hellman Commercial Trust & Savings Bank against T. J. Condon and others. From the judgment rendered in the first action, defendants appeal, and from the judgment rendered in the second action, plaintiff appeals. Judgments affirmed.

Sheldon Borden and George H. Moore, both of Los Angeles, for appellants. Kemper Campbell, Frank P. Doherty, W. J. Clark, Edward E. Leighton, and Leighton & Peairs, all of Los Angeles, for respondents.

MELVIN, J. These two cases involve substantially the same questions of law and In affirming the order for the reasons fact, and will, therefore, be treated in one opinion. ments.

The Hellman Commercial Trust & Savings Bank, formerly known as Merchants' Bank & Trust Company, was the nominal owner of the properties involved in both actions, which were certain lots of "tract 1292" in the San Fernando valley in Los Angeles county. This corporation, which we will designate as "the bank," was in reality a trustee for the equitable owners, Huntington and Brookins.

The Condon Case. Under date of March 25, 1912, the bank entered into a contract with T. J. Condon for the sale to him of lots 16 and 17 in the tract for \$3,500, in four installments of \$875 each, with certain interest on deferred payments. The sum of \$75 was paid by the vendee at the time of the execution of the agreement. By the terms of the contract the bank promised to grant to Condon without cost to him 11/2 miner's inches of continuous flow of water, and "a 10-240 interest in the reservoir and complete distributing system." The water was described as a part of that conveyed to the bank by a designated deed of certain date from the Tejunga Company. The deed in question conveyed to Condon's vendor 33 inches continuous flow, subordinate, however, to rights of previous purchasers to 333 inches.

On June 18, 1913, the bank filed its complaint to quiet title as against Condon, and one month later the vendee served notice of rescission of the contract, and verified and filed his answer and a cross-complaint. the latter he prayed rescission of the agreement upon the ground that at and prior to the time of the execution of the contract it was falsely represented that the vendee should have "a plentiful supply of water for domestic purposes, irrigation, and fire protection, viz. 11/2 miner's inches continuous flow." In the answer the bank set up the deed from the Tejunga Company, and pleaded laches of the vendee in failing to seek rescission for more than a year after knowledge of the facts of which he complained. The trial court found that false representations had been made to the vendee, on which he relied, and that he had not been guilty of laches.

Cooper Case. The bank agreed to sell to Hattie O. Cooper and her son Jos. L. Cooper lots 31 and 32 for \$3,250 in certain installments, the initial payment, which was made, being \$1,000. The agreement was dated May 28, 1912. The clauses with reference to water were the same as those in the Condon contract. On May 27, 1913, the vendees served notice of rescission, tendering a quitclaim deed to the property, demanding, however, return of the \$1,000 and \$800 which they alleged had been expended by them in improvements on the land. On May 28th they filed their complaint in a suit for rescission similar in all essential particulars to the don and the Coopers there would have been

The appeals are from the judg-1 was in their favor, and the findings were like those in the other case. The court also found that the improvements made by the Coopers were of the value of \$450, and that there was a partial failure of consideration in two particulars: (1) Because of the lack of a water supply; and (2) by reason of the damage done by a flood in February, 1914. In explanation of the latter finding we should call attention to the fact that, as appears from the record, negotiations for settlement were had between the vendor and vendees after the Coopers filed their complaint. This resulted in an arrangement for a settlement on the basis of a reduction of \$300 in the purchase price in favor of the A letter embodying these terms vendees. was written by Mrs. Cooper and her attorney and received the sanction of the real owners of the land. A check for the amount of the agreed initial installment under this new alleged contract of sale was sent, but payment thereon was stopped for the reason, as it appears, that a flood had washed away the soil from a substantial portion of the land described in the contract. The alleged agreement embodied in the letter and its indorsement, which latter was made in February, 1914, was set up by supplemental answer, to meet the allegations of a supplemental complaint filed by the Coopers.

[1] We are of the opinion that before partial consummation of this contract by a payment of any of the purchase price under it, the Coopers were in a position to withdraw from it. Without reviewing the testimony in detail, it is sufficient to say that before purchase of the properties by the Coopers and Condon, the vendor and its representatives assured them that there was and would continue to be a constant supply of water to the amount indicated by the contracts of sale. They were told that there was an abundance of water, and that in Tejunga Canyon there was-a dam and reservoir, with ample supply of water to irrigate all San Fernando valley. The evidence amply justified the finding of the court "that at times there was not sufficient water for domestic use, and there has never been sufficient water for irrigation at all times of the year when irrigation was necessary for the raising of crops."

[2] But appellants insist that even conceding these representations to have been made. the proof of laches in each case is so clear that the respondents must be held to have accepted their contracts in spite of the scarcity of water, and that they were not in position to rescind because each was in default in payments due under the respective agreements when the notices of rescission were Undoubtedly, the vendees realized given. that they were not getting the water supply promised by the vendor and its agents, and if nothing had been done further by Concross-complaint of Condca. The judgment reason for a conclusion that they were barred by laches from seeking relief. But there was ample evidence to the effect, and the trial court found, that the purchasers were given assurances from time to time, and that these promises induced them to remain upon the properties, and to endeavor to cultivate the land. For example, it was in testimony that, at a meeting on the tract in July, 1912, Mr. Huntington, one of the owners, said that given a little more time they would supply water to the vendees. Dr. Hanson, the president of the water company, said all they wanted was a little time and plenty of water would be supplied. These promises were given from time to time, not only before this litigation, but the alleged compromise with the Coopers was induced by representations made by Mr. Huntington and others, that improvements in the water system then being made would insure a bountiful supply of wa-Under these circumstances there is much force in the argument of respondents that the conduct of the vendor estopped that corporation and all who are interested with it from setting up the defense of laches on the part of the vendees. The bank, after holding out such promises, and thereby inducing the vendees to postpone any efforts to rescind the agreements, may not subject the said vendees to injury by disappointing the expectations on which they acted. Carpy v. Dowdell, 115 Cal. 677, 686, 47 Pac. 695.

[3] Appellants cite such cases as Owen v. Pomona Land & Water Co., 131 Cal. 530, 63 Pac. 850, 64 Pac. 253, in which it was held that where water shares were sold with certain land, the prediction by agents of the vendor that wells furnishing the water would always yield as abundantly as they were then providing was but an expression of opinion in the absence of any guaranty that the supply of water would be permanent. There is nothing in that authority, or in the other cases cited, which is in conflict with the conclusion reached by the court in this case. In the contract now before us the grantor promised a definite quantity of water, and the representations made to the vendees were not mere matters of opinion, but amounted to promises that the water company by means of its improved facilities could and would furnish the agreed quantity of water. The facts in this case bring it within the rule announced in such authorities as Hill v. Wilson, 88 Cal. 92, 95, 25 Pac. 1105, to the effect that assurance by a vendor that the land to be sold is well watered during the irrigation season is not the mere utterance of an opinion. See, also, Tracy v. Smith, 165 Pac. 535.

[4] Complaint is made by appellant that there was grave error committed in permitting the Coopers to file a supplemental complaint. By this pleading it was averred that about the 20th or 21st of February, 1914, the consideration for the contract failed in a manufacture.

terial respect because the soil of about four acres of the ten which the Coopers had contracted to purchase was washed away and destroyed by flood waters. This is surely the allegation of new matter occurring after the commencement of the original action, entitling the plaintiffs to additional relief, and we think a supplemental complaint was proper under the circumstances. Melvin v. E. B. & A. L. Stone Co., 7 Cal. App. 324, 328, 94 Pac. 389. By its answer appellant emphasized the fact that the relations of the litigants had altered after the commencement of the action by pleading an alleged new contract made by way of compromise.

But it is argued that the loss caused by the washing away of the soil must fall on the Coopers (so appellant contends) because they had received the consideration by being permitted to occupy the premises prior to the flood. In this behalf, appellant's counsel cite language from Conlin v. Osborn, 161 Cal. 659, 120 Pac. 755, in which, in analyzing the opinion in Smith v. Phœnix Insurance Co., 91 Cal. 330, 27 Pac. 738, 13 L. R. A. 475, 25 Am. St. Rep. 191, we said that the court had there adopted the rule that:

"The destruction by fire of buildings on property in the vendor's possession prior to the date fixed for the payment of the purchase price and the conveyance of the title defeats the vendor's right to compel performance on the part of the intending purchaser under the contract."

But that did not amount to a decision that under no contract may there be a failure of consideration, of which a vendee in possession may avail himself. Indeed, in the very case of Smith v. Phœnix Insurance Co., supra, cited by appellant, the court referred with approval to Thompson v. Gould, 20 Pick. (Mass.) 134, wherein a vendee in possession who had paid the whole purchase price, recovered the money because of destruction by fire of a material part of the consideration before any conveyance had been tendered.

No other matters discussed in the briefs require analysis.

Judgments are affirmed.

We concur: WILBUR, J.; VICTOR E. SHAW, Judge pro tem.

ADAMS v. ANTHONY. (L. A. 4204.) (Supreme Court of California. April 16, 1918.)

(Supreme Court of California. April 16, 1918.)

1. Sales \$\infty 479(2)\$—Right of Possession of Property—Conditional Sales—Leases.

An owner of an automobile who has leased it for a certain sum, payable monthly in installments, with an option of purchase, the contract providing that in case of default in any payment the lessor may retake possession is on such default, entitled to take and retain possession of the automobile; the right of the lessor thereto being entirely dependent on the contract.

2. Sales €= 479(11) — Construction — Concurrent Rights.

about the 20th or 21st of February, 1914, the Where a contract for the lease of an autoconsideration for the contract failed in a mamobile provided that upon default the lessor was

entitled to retake possession, and that such retaking of possession should not relieve the lessee from the payment of any sum due, the prosecution by the lessor of an action on the lessee's overdue notes given under the contract did not affect the lessor's right of possession, the right to retake possession and to sue for deferred payments being concurrent and not alternative.

Department 1. Appeal from Superior Court, Los Angeles County; Curtis C. Legerton, Judge.

Action by L. S. Adams against E. C. Anthony, doing business under the style and firm name of California Motor Company. Judgment for plaintiff, and defendant appeals. Reversed.

E. W. Freeman, A. D. Laughlin and Paul N. Nourse, all of Los Angeles, for appellant. Jones & Evans and Monta Moore, all of Los Angeles, for respondent.

SLOSS, J. The defendant appeals from a judgment declaring that plaintiff is entitled to the possession of a certain automobile truck.

On June 15, 1914, the parties entered into a written agreement concerning the truck, which was then the property of the defendant. By the terms of the writing, Anthony leased the truck to Adams for the term of 12 months, for a rental of \$3,785, of which \$1.200 was paid at the time, and the balance was made payable in monthly installments, for which Adams gave his promissory notes. It was stipulated that in default in payment of any of the rental, the lessor might at his option terminate the lease by written notice to the lessee, whereupon the lessee should lose all right to possession of the automobile and the right to purchase it, and the lessor should be entitled to possession; "but it is agreed," so the writing proceeds, "that such termination of this lease shall not release the lessee from the payment of any sums due lessor up to and including the day of such termination." Time was made of the essence, and it was provided that any default by the lessee should release the lessor from all obligations to further lease the automobile, and the lessee should forfeit all rights thereto. In the event of full performance by the lessee at the times specified, he was given the right, "within three days thereafter," to purchase the automobile for \$1. There were other provisions, not necessary to be set forth here. Pursuant to this contract, the plaintiff was given possession of the machine. He defaulted in the payment of the first two installments, of \$150 each, due on July 15, and August 15, 1914. The defendant gave him notice of termination, and took possession of the automobile. Thereafter he commenced suit on the two notes given for these installments and recovered judgment.

[1, 2] On these facts, which are undisput- ard, Alm & Swenson, and Francis ed, judgment in this case should have gone of San Francisco, for respondent.

in favor of the defendant. The agreement shows in every line the effort of the draftsman to give to the transaction the form and character of a lease. We need not stop to consider how far this effort was successful. Whether the writing be, in legal contemplation, a contract of lease or one of conditional sale, the plaintiff must rest his claim of possession upon its terms alone. By the express provisions of the agreement he was entitled to possession only so long as he complied with his obligation to pay the installments upon the dates when they fell due. Failing in this, the defendant was entitled to retake the property, of which he was and remained the owner. The prosecution of an action on the overdue notes did not affect the right of possession, since, as we have seen, the parties expressly stipulated that the termination of the lease, or agreement, should not relieve the plaintiff from the obligation to pay any sums then due. In suing on the notes, while still retaining possession of the automobile, the defendant was merely exercising rights, which, under the agreement, were concurrent and not alternative. The rules governing the decision are declared in Muncy v. Brain, 158 Cal. 300, 110 Pac. 945, which, in its essential aspects, is not distinguishable from the case at bar. The judgment is reversed.

We concur: SHAW, J.; RICHARDS, Judge pro tem.

HOOD v. BEKINS VAN & STORAGE CO. (L. A. 4192.)

(Supreme Court of California. April 15, 1918.)

1. EVIDENCE \$\iff 355(5)\$ — DESTRUCTION OF GOODS—VALUE.

In an action to recover the value of goods destroyed in storage, evidence that defendant had inserted an advertisement in a telephone directory stating that its warehouses were fireproof was properly admitted as corroborating plaintiff's evidence of the existence of a contract whereunder defendants were to have stored the goods in a fireproof depository.

2. APPEAL AND ERBOR \$\infty\$ 1010(1)—Review—QUESTIONS OF FACT.

Where in an action for damages to property the only evidence of value was that of plaintin, the court on appeal will not disturb finding of court based on such evidence.

3. EVIDENCE 4-374(19)—VALUE.

In an action to recover the value of goods destroyed while in storage, the owner was competent to testify as to the value of the goods.

Department 2. Appeal from Superior Court, Los Angeles County; S. E. Crow, Judge.

Action by Edith C. Hood against the Bekins Van & Storage Company. From a judgment for plaintiff and a denial of a new trial, defendant appeals. Affirmed.

R. T. Lightfoot, of Los Angeles, for appellant. Shepard & Alm, of Los Angeles, Shepard, Alm & Swenson, and Francis H. Boland, of San Francisco, for respondent.

VICTOR E SHAW, Judge pro tem. Plaintiff sued to recover the value of certain household goods which under an alleged express contract made with defendant were to have been by it stored in a fireproof depository for a compensation agreed upon. The goods were stored in a nonfireproof building, wherein a fire occurred which destroyed the same. The court found the contract was made as alleged by plaintiff, and that the value of the goods deposited was the sum of \$1,500, for which judgment was rendered in favor of plaintiff, and from which, and an order denying its motion for a new trial, defendant appeals.

[1] It appears that defendant had inserted in a telephone directory an advertisement that it was engaged, among other things, in the business of storing household goods and furniture for compensation, and that its warehouses and storage rooms were fireproof, the effect of which was well calculated to lead customers and persons dealing with it to believe that it was not only prepared to, but did, store the goods consigned to it by customers in fireproof depositories. ing been made to appear that plaintiff's agent, prior to making the alleged agreement, had read this advertisement, the same was, over defendant's objection, admitted in evidence. There was no error in this ruling. While the action was based upon an alleged express contract, in support of which direct evidence was offered, nevertheless, as stated in Lynch v. Bekins Van & Storage Co., 31 Cal. App. 68, 159 Pac. 822, wherein a like question was involved:

"The admission of evidence showing representations by advertisements and printed matter, to the effect that the defendant had at its disposal fireproof warehouses and offered to customers to furnish storage of that kind, was without error, as it tended to corroborate the evidence given by plaintiffs as to the express contract made and found by the court."

[2, 3] The only evidence offered touching the question of the value of the goods destroyed was that of plaintiff herself. pellant insists not only that she failed to qualify as a witness competent to testify upon the subject, but that her testimony was so uncertain and contradictory that it was not entitled to any weight whatsoever in considering the question. The value of her evidence and weight thereof was a question for the determination of the trial judge. Her testimony, however uncertain and contradictory. was nevertheless the only evidence offered bearing upon the subject, and since it satisfied the trial judge that the value of the goods alleged in the complaint to be worth upwards of \$3,000 was in fact \$1,500, it is not the province of this court, upon a review thereof, to determine otherwise. As to the other objection, namely, that she was not qualified to testify, Mr. Wigmore, in his work on Evidence (section 716), in discussing the subject. says:

"The general test, that any one familiar with the values in question may testify, is liberally applied, and with few attempts to law down detailed minor tests. The owner of an article, whether he is generally familiar with such values or not, ought certainly to be allowed to estimate its worth: the weight of his testimony (which often would be trifling) may be left to the jury."

And in Kirstein v. Bekins Van & Storage Co., 27 Cal. App. 586, 150 Pac. 999, where the court was considering the point here made in a similar case, it was said:

"It was for the trial court to determine whether the witnesses were qualified to testify as to the value of the articles, and there is nothing disclosed by the record which would justify this court in setting aside its ruling in permitting the testimony, objections to which went to the weight rather than to the competency of the evidence."

To like effect is Willard v. Valley Gas & Fuel Co., 171 Cal. 9, 151 Pac. 286.

In our opinion, the three cases above cited are decisive of the questions presented upon this appeal.

The judgment and order are affirmed.

We concur: WILBUR, J.; MELVIN, J.

ASEBEZ v. BLISS et al. (L. A. 4162.) (Supreme Court of California. April 15, 1918.) 1. TRIAL \$\infty\$345\to\$VERDICT\to\$WAIVER OF DEFECTS.

In an action wherein defendant filed crosscomplaint against plaintiff and another, defendant waived defects in a verdict which did not mention the cross-defendant and was in improper form as to an item, where defects were not called to attention of the court before the jury was discharged as authorized by Code Civ. Proc. § 619.

2. APPEAL AND EBROR \$\infty\$1070(1)\to Harmless Error.

Where a judgment in favor of plaintiff was necessarily a finding in favor of a cross-defendant and the plaintiff on a cross-complaint, the defendant cannot complain that the verdict did not mention his cross-action.

3. APPEAL AND ERROR \$\infty\$=1033(8)—HARMLESS ERROR—AMENDING VERDICT.

A party is not aggrieved by an amendment of a verdict which decreases his liability and reduces the amount of the judgment against him.

Department 1. Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by E. Asebez against R. L. Bliss. Defendant answered and brought cross-action against plaintiff and Alvin Hitchcock. Judgment for plaintiff, and defendant appeals. Affirmed.

Guy E. Maurice, of Los Angeles, for appellant. C. P. Kaetzel, of San Luis Obispo, and Hart & Cunningham, of Los Angeles, for respondents.

RICHARDS, Judge pro tem. In this action the plaintiff brought suit to recover the purchase price of 78 cattle alleged to have been sold and delivered to the defendant R.

defendant Bliss appeared and filed what he denominated an "amended cross-complaint and second and separate answer." in which he designated one Alvin Hitchcock as a crossdefendant, and then proceeded to set up in several counts what he claimed to be the real transaction between himself and plaintiff and Hitchcock. In one of these counts he alleged that plaintiff and Hitchcock were partners. In another he averred that plaintiff was merely the agent of Hitchcock, who was the principal in the transaction set forth in his said pleading. In all of these counts the defendant averred that the agreement between the parties was different from that sued on by the plaintiff, and that from its alleged breach the defendant was entitled to recover a large amount of damages from both the plaintiff and Hitchcock. Upon the filing of this pleading the cause was set for trial and proceeded to trial without any order of court or other action of the parties bringing in said Hitchcock as a party thereto. The record does not disclose that he was ever served with the cross-complaint, nor that he ever made any answer thereto, although the judgment recites his appearance by counsel at the trial. The cause was tried before a jury. No special verdict upon any of the issues was requested, and the jury, having been instructed by the court, retired and presently returned a general verdict in the following words:

"We, the jury in the above-entitled action, find for the plaintiff, and assess the damages against defendant R. L. Bliss in the sum of \$3.027.23, plus the 3 per cent. deducted as shrinkage from said last shipment together with interest."

To the form of the verdict as thus rendered the defendant Bliss made no objection at the time of its rendition, nor did he make any request of the court that the jury be directed to make any finding upon the issues tendered in his plending, nor did he request that the cross-defendant Hitchcock be named in said verdict, nor that as to him the jury should return a verdict.

[1] If the verdict was defective in these respects, it was the duty of the defendant Bliss to have called the attention of the court to such defects before the jury was discharged in order that it might retire and correct its verdict. The Code provides for this procedure (Code Civ. Proc. § 619), and by failing to avail himself of it the defendant Bliss must be held to have waived the defects, if any such existed, in this verdict. Van Damme v. McGilivray Stone Co., 22 Cal. App. 191, 133 Pac. 995; Benson v. S. P. Co. (decided March 20, 1918), 171 Pac. 948.

[2] We are not, however, to be understood as deciding that the verdict was defective in the respects urged by the appellant and respondent.

L. Bliss and for which he promised and which forms his main contention upon this agreed to pay plaintiff \$3,527.23, of which appeal. The action was upon a transaction only the sum of \$500 has been paid. The for the sale of cattle by plaintiff to the defendant Bliss. The agreement, it is admitted by the defendant Bliss, was made by him with the plaintiff. Asebez. His contention. however, was that its terms were other than those asserted by the latter in his complaint. and, further, that Asebez was either a partner of Hitchcock's or was his agent in entering into the agreement. Upon the defendant's own theory of the case he could have had no remedy against either Asebez or Hitchcock if the plaintiff succeeded in sustaining the averments of the complaint as to the terms of the contract between them. The verdict of the jury in the plaintiff's favor and for the amount sued for in his complaint is of necessity a finding against the defendant Bliss upon the averments in his cross-complaint, and hence necessarily a finding that no cause of action existed in his favor against either Asebez or Hitchcock. For both of the foregoing reasons therefore the appellant cannot here be held to complain.

> [3] The appellant makes the further contention that the trial court committed an error in granting the plaintiff's motion made after the discharge of the jury and entry of the judgment to amend the verdict and judgment by striking therefrom the words "plus the 3 per cent. deducted as shrinkage from said last shipment, together with interest." The elimination of these words from the verdict and judgment had the effect of decreasing the defendant's liability and reducing the amount of the judgment against him, and to that extent was an order in his favor. He was not therefore aggrieved, and hence cannot question the propriety of the court's action in that regard upon this ap-

Judgment and order affirmed.

We concur: SLOSS, J.; SHAW, J.

GERARDI v. BONOFF et al. (L. A. 4137.) (Supreme Court of California. April 15, 1918.) TRIAL \$=260(1)-Instructions-Requests.

Where instructions given fully and fairly informed the jury as to the legal rights and duties of the respective parties and embodied defendants' theory of the case it was not er-ror to refuse defendants' requested instructions thereon.

Department 1. Appeal from Superior Court, Los Ar geles County; Curtis D. Wilbur, Judge.

Action by V. L. Gerardi against Karl M. Bonoff and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Haas & Dunnigan, of Los Angeles, for appellants. O'Melveney, Stevens & Millikin and A. I. McCormick, all of Los Angeles, for

RICHARDS, Judge pro tem. appeal from a judgment in plaintiff's favor in an action for damages for personal injuries alleged to have been sustained by plaintiff through being struck by the defendants' automobile while he was in the act of alighting from a street car upon which he had been a passenger. The street car was proceeding westerly along West Eleventh street in the city of Los Angeles on the evening of July 13, 1912, at about the hour of 6:30 o'clock. The automobile of which the defendant Karl M. Bonoff was the driver, and the defendant D. Bonoff was the owner, and was also an occupant at the time of the accident, was proceeding westerly along the northerly side of said street. As the street car approached the intersection of West Eleventh street and Bonnie Brae street, the plaintiff gave the signal to stop and the car slowed down and stopped at said intersection. The plaintiff alighted and was about to cross to the northerly curb of Eleventh street when he was struck by the defendants' automobile and severely injured. Immediately prior to the slowing down and stopping of the street car, the defendant's automobile had been driving alongside of the car on the proper side of the street and at a rate of speed variously estimated by the respective witnesses at from 15 to 25 miles an hour. The width of the street at that point did not permit an automobile to pass at a distance from the running board or lowest steps of the street car equal to 4 feet while passing the same. The complaint alleged that the defendants' negligence consisted in the fact that they were violating the provisions of the traffic ordinance of the city of Los Angeles then in force in the manner and at the speed at which they were operating their automobile immediately before and at the time of plaintiff's injuries; and also alleged that the defendants were negligent in operating their said automobile in a careless manner and at an unlawful and dangerous rate of speed. These averments were denied in the defendants' answer, and the cause proceeded to trial upon the issues thus framed. Upon the trial the defendants contended and offered some evidence to show that the street car slowed and stopped with unusual suddenness and without warning to the occupants of the automobile in consequence of which they were unable to check the speed of their machine in time to stop or to avoid the accident. There was evidence to the contrary upon these matters, and the appellants do not seriously insist that upon the whole the evidence was insufficient to sustain the verdict.

The most important of the appellants' contentions is that the trial court was in error in giving certain instructions in which it undertook to consider and apply the terms of the traffic ordinance in question and in refusing to give certain other instructions requested by the defendants having the same pur-

This is an pose. The provisions of the traffic ordinance ff's favor in applicable to the situation read as follows:

"Sec. 22. The driver of any vehicle in or upon any street shall keep such vehicle at least four (4) feet from the running board or lowest step of any street car that shall have stopped or that is stopping for the purpose of taking on or discharging passengers; and if, by reason of the presence of a vehicle or other obstruction at the place where such car shall have stopped or is stopping, or by reason of the narrowness of the street, it is not possible to preserve such distance of four (4) feet from such running board or lowest step, as herein prescribed, then such driver shall cause such vehicle to be stopped until the passengers shall have been

taken on or discharged from such car.

"Sec. 23. It shall be unlawful for any person to ride, drive or propel, or to cause or permit to be ridden, driven or propelled, any vehicle at a rate of speed greater than four (4) miles per hour in passing any street car or interurban car that is slowing down or standing still in any public street; provided, however, that the provisions of this section shall not apply to any vehicle that is traveling in a direction opposite to that in which the car passed by such vehicle is proceeding and at least ten feet distant from such car."

"Sec. 80. Any person who shall ride, drive or propel, or who shall cause or permit to be ridden, driven or propelled any vehicle at a rate of speed greater than twenty (20) miles per hour, upon or along any street or portion of any street, in the city of Los Angeles, outside of the district described hereinbefore in this section, shall be deemed guilty of a misdemeanor, and upon conviction there shall be punishable as in this section provided."

We have examined the instructions which the trial court gave with respect to the scope. effect, and application of the foregoing provisions of the ordinance and are entirely satisfied that they correctly interpreted and applied the same and that the appellants' criticism of these instructions as given have no substantial merit. We have also examined the instructions which the defendants requested and which the court gave in connection with those instructions which the defendants requested and which the court refused to give, and we find that the former embodied substantially the defendants' theory of the case, and that the latter were sufficiently covered either by the instructions which the court had already given upon the plaintiff's request or upon its own motion, or by those which the court had given at the defendants' request. Taken as a whole, the instructions given by the trial court very fully and fairly informed the jury as to the legal rights and duties of the respective parties in the premises; while, on the other hand, the defendants' instructions which the court refused to give are defective and misleading in respect to the terms and effect of the ordinance and in their assumption as to the facts of the case, and they were properly refused by the trial court. This applies particularly to those portions of the requested instructions which undertook to set forth the duty of the plaintiff in alighting from the car. The court had already generally instructed the jury upon this subject, and we are of the opinion

that the defendants were in no wise prejudic- trial was however, not filed within 10 days ed by the failure of the court to give defendants' requested instructions upon this branch of the case.

No other error being complained of, the judgment and order are affirmed.

We concur: SLOSS, J.; SHAW, J.

WHITING-MEAD COMMERCIAL CO. BAYSIDE LAND CO. et al. (L. A. 5555.) (Supreme Court of California. April 10, 1918.) APPEAL AND ERROR 4 345(1)-TIME FOR AP-

APPEAL AND ERROR \$\ightharpoonup 345(1)\text{—Time for Appeal}\text{—Statutes.}\text{
Provision of Code Civ. Proc. \$\frac{2}{3}\$ 939 and 941B, that appeal from judgment must be taken within 60 days from entry, and that, if proceedings for new trial are pending, time for appeal shall not expire until 30 days after entry of order therein, is limited to cases where new trial proceeding is regularly initiated by filing and service of notice of intention to move for new trial within 10 days after receiving notice of entry of judgment or within 10 days notice of entry of judgment or within 10 days after receiving notice of entry of judgment or within 10 days after verdict, as required by section 659, and, if a new trial proceeding is not so initiated within 10 days, appeal from the final judgment must be taken within 60 days from entry.

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Actions by the Whiting-Mead Commercial Company a corporation, against the Bay-side Land Company, the Fidelity Savings & Loan Association, and Ben Kelsey and others. From the judgment, plaintiff appealed. On motion to dismiss. Motion granted.

R. L. Horton, of Los Angeles, for appellant. Bordwell & Mathews, of Los Angeles, and W. K. Young, for respondents.

PER CURIAM. In this case the motion to dismiss the appeal from final judgment on the ground that the appeal was not taken within the time provided by law was granted from the bench. As the matter involved the construction of certain sections of our Code of Civil Procedure relative to appeals, it is deemed proper to briefly state the reasons on which the decision of the court is based.

The final judgment herein was actually entered in the superior court on August 10. 1917, and the appeal was not taken until November 9, 1917, which was more than 60 days after the entry of the judgment. Our law substantially provides (sections 939 and 941b, Code Civ. Proc.) that an appeal from the judgment must be taken within 60 days from the entry of the judgment. It further provides:

"If proceedings on motion for a new trial are pending, the time for appeal from the judgment shall not expire until thirty days after entry in the trial court of the order determining

after notice of the entry of the judgment, as required by section 659, Code of Civil Procedure. In our opinion the provision relied on is limited in its effect to those cases where a new trial proceeding is regularly initiated by the filing and service of a notice of intention to move for a new trial "within ten days after receiving notice of the entry of the judgment, or within ten days after verdict, if the trial was by jury," as required by section 659, Code of Civil Procedure. If a new trial proceeding be not so initiated within such 10 days, no proceeding on motion for a new trial can be held to be "pending" within the meaning of sections 939 and 941b, and an appeal from the final judgment to be effective must be taken within 60 days from the entry of the judgment.

It was for this reason that the appeal from the judgment was dismissed.

## STOW v. SUPERIOR COURT OF CALI-FORNIA IN AND FOR ALAMEDA COUNTY. (S. F. 8450.)

(Supreme Court of California. April 15, 1918. Rehearing Denied May 13, 1918.)

1. STIPULATIONS \$== 14(12)—ENTRY OF JUDG-MENT ON PLEADINGS.

In an action on a contract, when plaintiff attempted to introduce testimony defendant objected on the ground that the complaint failed jected on the ground that the complaint failed to state a cause of action, whereupon plaintiff's counsel said, "If the complaint does not state a cause of action, of course, then, the easiest way to test that is by defendant making a motion for judgment on the pleadings," and such a motion was made and granted. Held, the language of plaintiff's counsel did not consti-tute a stipulation for entry of such judgment; it being merely a statement of that which, in con-templation of the court's view, counsel for plaintiff believed to be a speedy method of getting, ready for an appeal.

ON PLEADINGS.

Where a demurrer to the complaint had been overruled, and on trial before another judge plaintiff's evidence was rejected because the complaint was defective, and, plaintiff standing upon his pleadings, the court gave judgment against him, such judgment was not a judgment on the pleadings, but in effect one of nonsuit, the granting of which, if improper, was ground for new trial. for new trial.

APPEAL AND ERROR 4 662(2)-REVIEW-RECITALS IN JUDGMENT.

That a judgment itself recites that it is entered on the pleadings is not controlling, and will not prevent a reviewing court from examining the entire record to learn all the facts.

4. New Trial & 38—Grounds—"Error in Law Occurring at the Trial."
Where testimony proffered by plaintiff was rejected upon the ground that it could not be relevant under the complaint believed by the court to be faulty, and, plaintiff standing on his planding the court gave independs against his such motion for a new trial, or other termina-such motion for a new trial, or other termina-tion in the trial court of the proceedings upon such motion."

Appellant relies on the provision quoted.

Its notice of intention to move for a new rial by Code Civ. Proc. § 657, subd. 7.



In Bank. Petition by F. H. Stow against; sel for the respective parties made their adthe Superior Court of the State of California in and for Alameda County for certiorari to review a motion granting a new trial. On transfer by petition to Supreme Court. Writ discharged.

Costello & Costello, of San Francisco, for petitioner. Raine Ewell, in pro. per. in Superior Court.

MELVIN, J. The District Court of Appeal granted a writ of certiorari to review the action of the superior court in granting a motion for a new trial in a certain action entitled Ewell v. McKenzie and Stow, in the superior court of the state of California in and for the county of Alameda. The contention of petitioner was that the judgment had been granted upon the pleadings; that therefore there were no questions of fact to review on a new trial; and that consequently a motion for a new trial would not lie.

The learned District Court of Appeal being satisfied that the judgment was rendered in response to a motion for judgment on the pleadings held, upon the authority of Gray v. Cotton, 174 Cal. 256, 162 Pac. 1019, that the attempt to obtain a new trial was unauthorized, and that the court was without jurisdiction to grant it. On rehearing the court reached the same conclusion as before and set aside the order granting a new trial as one made without jurisdiction by the court below. The Court of Appeal said, in part:

"This matter was a hearing upon a motion for judgment on the pleadings purely and simply. It was presented in that form, as the record now shows, by the concurrence and consent of counsel for both sides in open court at the time the motion was granted. The judgment in the case shows it was a judgment based upon a motion for such judgment on the pleadings. No issue of fact was tried, and no issue of fact could be re-examined after such judgment. The only remedy which the party had for whatever error the court committed in granting a judgment upon the pleadings was by an appeal. The former opinion which the court rendered in this matter will stand as the opinion of the

Upon petition the matter was transferred to this court.

It is contended that both by reason of the stipulation of plaintiff's counsel in the trial of the case in the superior court and because of the contents of the judgment itself, this court is bound to accept the theory that the judgment was one given on the pleadings and involving no disputed issues of fact.

[1] Upon the record now before us it is shown that the course of events was substantially as follows: Action was commenced in the superior court, plaintiff's cause resting largely upon the alleged obligations arising from a certain written contract attached to the complaint as an exhibit. Demurrer to the complaint was overruled, an answer was filed and the cause being at issue was brought on for trial before a judge other than the one who had ruled upon the de-

dresses outlining their respective theories and the proofs which they intended to offer in support thereof; a witness for plaintiff was called and sworn, and his testimony sought to be introduced by plaintiff. fendant's counsel objected to the introduction of any evidence on behalf of plaintiff on the ground that the complaint failed to state facts sufficient to constitute a cause of action, in that the contract attached to the complaint as an exhibit was for an indefinite term. The objection was sustained by the learned judge of the superior court upon the ground that by the terms of the contract attached as an exhibit to the complaint an action on that agreement was not maintainable. Thereafter defendants moved to dismiss their cross-complaint and the motion was granted. Then they moved for judgment on the pleadings on the ground that the complaint did not state facts sufficient to constitute a cause of action. This motion was granted. The judge by affidavit has declared that in granting the motion last referfed to, he did not take into consideration the allegations of the complaint at all, but only regarded the contract marked "Exhibit A." Subsequently, on motion for new trial the court, convinced that the conclusion regarding the insufficiency of the complaint had been erroneous, granted the motion, and this is the order which, it is contended, was beyond the jurisdiction of the superior court to make.

At the trial, after the court had expressed a conviction that the complaint did not state facts sufficient to constitute a cause of action, counsel for plaintiff said:

"Well, if your honor has that view of it, there is no use going any further; if the complaint does not state a cause of action, of course, then, the easiest way to test that is by the defendant making a motion for judgment on the pleadings, and, if that is granted, then I can settle that bill of exceptions very quickly."

This was followed by dismissal of the cross-complaint at request of counsel for defendants and the making and granting of the motion for judgment on the pleadings. At the oral argument on this proceeding the contention was made, in effect, that the suggestion by counsel for plaintiff in the court below amounted to a stipulation that judgment on the pleadings be entered. As counsel said in argument before this court:

"I could not have made the motion if it had not been by consent.

We do not construe the remarks of counsel for plaintiff in the court below as amounting to consent that a judgment on the pleadings should be entered. Indeed he stoutly asserted at all times that his pleading was good. His suggestion to his opponent waived nothing. It was merely a statement of that which, in contemplation of the court's view of the law, counsel for plaintiff believed to be a speedy method of getting murrer. A trial by jury was waived; coun- ready for an appeal. Petitioner's counsel,

while conceding that the issue of law had judge who made the ruling excluding the on his demurrer to the complaint, says that his motion for judgment on the pleadings was equivalent to a new demurrer, and that the suggestion from his opponent amounted to a consent to the withdrawing of the answer and a stipulation for a decision solely upon the sufficiency of the complaint to aver facts amounting to a cause of action. cannot see that the language and conduct of plaintiff's counsel in the trial court created such a stipulation, and even if they could be so construed, it does not appear that as matter of record the answer was withdrawn. The situation therefore is this: Upon trial of issues under pleadings which had passed demurrer, proffered testimony was rejected upon the ground that it could not be relevant under the complaint believed by the court to be faulty; plaintiff stood upon his pleading; and the court gave judgment against him.

[2] Respondent takes the position that in essence this was a judgment of nonsuit, and with this view we agree. In the case of Green v. Duvergey, 146 Cal. 379, 80 Pac. 234. the court refused to permit the introduction of any evidence unless plaintiff would deposit a certain sum of money with the clerk. Plaintiff declining to obey this preliminary order a nonsuit was entered and a judgment of dismissal was given. Plaintiff's motion for a new trial was denied and on appeal the court reversed the order denying it, saying, in part:

"The trial of a cause includes all the rulings of the court and the proceedings before it which conduce to the decision which it makes upon conduce to the decision which it makes upon the issues in the case as the basis of its judg-ment. People v. Turner, 39 Cal. 270; Moore v. Bates, 46 Cal. 29. Any erroneous ruling, by virtue of which a party is precluded from introducing evidence in support of his cause of action as set forth in his complaint or his de-fence is an error of law occurring at the trial fense, is an error of law occurring at the trial. The action of the court in improperly granting The action of the court in improperly granting or refusing a nonsuit is also an error of law, whether made upon the opening statement of counsel or after the close of the evidence in the cause. Craig v. Hesperia Land & Water Co., 107 Cal. 675, 40 Pac. 1057. Under these principles, the order of the court requiring the plaintiffs to pay into court the sum of \$25,000, as a condition upon which they could proceed to trial, and the order granting a nonsuit upon the opening statement and admissions of their counsel, may be reviewed as errors of law occurring at the trial."

Respondent is of the opinion that in essence the judgment entered in the superior court in Ewell v. McKenzie et al. was a judgment of nonsuit, and that calling it by another name does not alter that fact. We are constrained to agree with this view and we believe that Green v. Duvergey, supra, supports our conclusion. In that case as in the Ewell Case the court declined to hear proffered testimony at the trial. In that case the refusal was regarded as error of law by this court on appeal. In the Ewell Case the in favor of plaintiff.

been duly decided when the court passed up- evidence believed that he had committed error and sought to give appropriate relief. That one error was due to a misunderstanding of the court's power and the other to a misconception of the sufficiency of a pleading does not in our opinion make any difference in regard to the power and jurisdiction of the trial court upon motion for a new trial.

[3, 4] The fact that the judgment itself recites that it was one entered upon the pleadings is not controlling. The whole record is before us, and a recital in the judgment will not prevent this court from examining the entire record for the purpose of learning all of the facts. A new trial may be granted for errors in law, occurring at the trial and excepted to by the party making the application. Section 657, subd. 7, Code Civ. Proc. Judge Hayne in his work on New Trial and Appeal uses the following language (vol. 1, § 1, p. 9, Rev. Ed.):

"But errors occurring at the trial, and having an indirect relation to the pleadings, may be ground for a new trial. So at the trial a party may test the question whether his adversary's pleading states a cause of action or defense by objecting to the introduction of any evidence under it, and the ruling upon such objection may be reviewed on motion for new trial."

Since the court's ruling upon the exclusion of evidence under the complaint was reviewable as an alleged "error in law. occurring at the trial," we must hold that no successful attack may be made upon the court's jurisdiction to pass upon the motion for a new trial.

The writ of certiorari is discharged.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; WILBUR, J.; SHAW, J.; VICTOR E. SHAW, Judge pro tem.; RICHARDS, Judge pro tem.

REED v. REED. (L. A. 4213.)

(Supreme Court of California. April 17, 1918.)

1. EXECUTORS AND ADMINISTRATORS 6=413(7) - Action - Complaint - Conditions Pre-CEDENT.

Under Code Civ. Proc. §§ 1493, 1500, providing that a suit against an executrix to enforce a money demand on contract cannot be maintained unless a claim therefor has been presented to the executrix and rejected, com-plaint against an executrix, stating a cause of action for money on an implied contract against decedent, was insufficient because of failure to allege presentation of the claim to the executrix.

2. EXECUTORS AND ADMINISTRATORS = 144(3)
- ACTION - POSSESSION AND TRUST CHAR-ACTER OF PROPERTY.

If the intention of plaintiff who sued an executrix on a cause of action for money on an implied contract with decedent was to charge the executrix as trustee of specific property, the complaint should have contained allegations showing she had come into possession of the property, and that it was charged with a trust in favor of plaintiff -ACTION-JUDGMENT-PAYMENT OUT OF AS-

Judgment against an executrix on a demand against decedent should have been made payable out of the assets of the estate in due course of administration.

Department 1. Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by Ella J. Reed against Ethel M. Reed, executrix of the estate of Henry A. Reed. From a judgment for plaintiff, and an order denying motion for new trial, defendant appeals. Judgment and order reversed.

W. A. Alderson, of Los Angeles, for appellant. Dennison & Towner, of Los Angeles, for respondent.

SHAW, J. The defendant appeals from a judgment and from an order denying her motion for a new trial. We think the appellant's claim that the complaint does not state sufficient facts to constitute a cause of action or to support the judgment of the court below is well taken. The action was against the defendant as the executrix of the estate of Henry A. Reed, deceased. It set forth that in the lifetime of decedent the plaintiff had given said decedent the sum of \$2,250 as the purchase price of certain stock in a corporation known as the Southwestern Sugar Company, which said decedent agreed to transfer to the plaintiff for said sum of money. It further alleges that the corporation was insolvent, and that the stock was worthless; that the decedent represented to her that it was of great value and worth the price which she agreed to pay therefor, and by that means obtained from her the said sum of money and the agreement to purchase the stock, and that the decedent further represented that he would consider the money as a trust fund, and would guarantee plaintiff against any loss, and that if the stock should prove to be of no value, he would repay the money so paid by plaintiff. It is alleged that the representations made by the decedent were false and untrue, and that the stock was in fact of no value. There is no allegation that the plaintiff ever offered to rescind the contract and return the stock, or that any claim for the money sued for against the decedent's estate was ever made or presented by the plaintiff, or that the defendant, as executrix, ever received the money paid by the plaintiff to the decedent. There is nothing in the complaint sufficient to state a cause of action to charge the executrix as trustee of any specific property belonging to the plaintiff. The judgment itself purports to be a personal judgment in favor of the plaintiff against the defendant Ethel M. Reed, executrix of the estate of Henry A. Reed. deceased, for \$2,123.-

8. Executors and Administrators 🖚 453(2) ; course of administration, nor charged against the estate of decedent.

> [1-3] It is well settled that a suit against an executrix to enforce a money demand upon contract cannot be maintained unless a claim therefor is presented to the executrix and is rejected prior to the beginning of the action. Code Civ. Proc. \$\$ 1493, 1500. The most that can be said of this complaint is that it states a cause of action for money upon an implied contract against the decedent. It is therefore insufficient because of the failure to allege the presentation of the claim. If the intention was to charge the defendant executrix as trustee of specific property, the complaint should have contained allegations showing that she had come into possession of such property, and that it was charged with a trust in favor of the plaintiff. No allegations tending to show such a case are contained in the complaint. Furthermore, there are no allegations to uphold a personal judgment against the executrix, and a judgment upon a demand against the decedent should have been made payable out of the assets of the estate in due course of administration. We find no ground upon which the judgment can be upheld.

The judgment and order are reversed.

We concur: SLOSS, J.; RICHARDS, Judge pro tem.

BUTLER V. UNION TRUST CO. (L. A. 4235.)

(Supreme Court of California. April 17, 1918.) 1. Joint Adventures &==5(2) — Action for Accounting—Pleading—Variance.

Where in action to dissolve an alleged part-

nership and secure an accounting plaintiff alleged facts which he claimed created a partnership, which facts were found to be true and to show a joint adventure, the court did not err snow a joint adventure, the court did not err in refusing a nonsuit on the ground that the facts showed a joint adventure only, since a joint adventure is similar to a partnership, and the right to an accounting of profits in accordance with the agreement therefor and the obligations growing out of such agreement are governed by the same rules of law.

2. Joint Adventures \$\sim 5(1)-Right to Ac-COUNTING.

Whether plaintiff, who contributed his skill in manufacturing fur garments, and defendant, who provided a shop, purchased furs, etc., were partners or joint adventurers, an accounting was necessary, where defendant breached his agreement before the time for division of net profits and termination of agreement.

3. APPEAL AND ERROR 6-1011(1)-FINDINGS BASED ON CONFLICTING EVIDENCE - RE-VIEW.

Findings of court based on conflicting evidence are conclusive on appeal.

Department 2. Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

Action by C. E. Butler, Guardian, etc.. against the Union Trust Company, executor 83 and costs. It is not made payable in due of the last will and testament of G. A. Williams, deceased. From an order denying motion for new trial, defendant appeals. Affirmed.

A. J. Morganstern, of San Diego, for appellant. Clifford C. Pease and Luce & Luce, all of San Diego, for respondent.

VICTOR E. SHAW, Judge pro tem. The purpose of this action, brought by I. J. Grossman, for whom, as plaintiff, C. E. Butler, his guardian, has been substituted, was to dissolve an alleged partnership, secure an accounting of profits accruing therefrom, and recover damages alleged to have been sustained by reason of the acts of G. A. Williams, now deceased, and for whom, as such defendant, the Union Trust Company, as executor of his estate, has been substituted. which prevented plaintiff from carrying out the terms of the partnership agreement. Judgment was rendered for plaintiff, and, the court denying defendant's motion for a new trial, he prosecutes this appeal from

As found by the court (reference being had to the original parties to the action), plaintiff was a skilled designer and manufacturing furrier, but without means to purchase material or conduct such business. In February. 1913. he and the defendant entered into an agreement whereby the former was to contribute his labor and skill, and defendant should advance the necessary money for the purchase of material and to pay the expenses of conducting the business of manufacturing fur garments in a shop therefor provided by defendant, and advance to plaintiff for his personal expenses the sum of \$15 per week; the goods so manufactured to be sold by defendant at his storeroom, where he conducted another line of business. The conduct of the business was to continue until January 1, 1914, at which time the net profits, less such sums as defendant had advanced to plaintiff for personal expenses, were to be equally divided between the parties.

Issue was joined upon the question as to the existence of the alleged partnership, and at the trial the court suggested that such issue be first determined before entering upon an inquiry as to the accounting prayed for. Thereupon evidence was introduced touching the issue, at the close of which the court indicated that the transaction between the parties did not constitute a copartnership. Thereupon defendant moved for a nonsuit upon the ground that the cause of action was based upon the theory that a partnership existed, out of which there arose the responsibility of one party to the other, and since, in the opinion of the court, the facts did not justify such theory, there was nothing on which to base an accounting. This motion was denied, the court holding that, while no partnership was created, facts were estab-

Judgment for plaintiff. | ing upon the theory that the arrangement had between the parties constituted a joint adventure in which the rights of the parties to an accounting were of a similar nature to what they would be were it found that a Continuing the trial, partnership existed. the court found the facts substantially as alleged in the complaint, and further found that they did not constitute an agreement of partnership, but did constitute a joint adventure between plaintiff and defendant: that plaintiff complied with his part of the agreement in devoting all of his time, skill, and labor in fulfillment of the terms thereof. and, save and except as prevented by defendant, fully performed the same, until about September 1, 1913, when, during the nighttime, defendant, without just cause, knowledge, or consent of plaintiff, entered the shop where the business was conducted and removed therefrom all of the goods theretofore purchased by defendant pursuant to the agreement to be used by plaintiff in the manufacture of fur garments, including garments made up by plaintiff, and took the same to his storeroom, thus depriving plaintiff of the opportunity to continue the business, and appropriated to his own use and exclusive control the garments which plaintiff by his labor and skill had manufactured, as well as the raw material in stock.

> While there is a sharp conflict in the evidence, and proof of the allegations of the complaint is based largely upon the testimony of plaintiff, who, by reason of his lack of acquaintance with the English language, appears to have been somewhat vague and uncertain in expressing himself, it is nevertheless, when taken in connection with other testimony which tended to corroborate his story, sufficient to justify the findings made by the court.

[1] This being true, we are brought to a consideration of the chief error upon which defendant bases his claim for a reversal namely: That the court erred in its refusal to grant the nonsuit upon indicating that the evidence failed to establish the existence of a copartnership. In our opinion, there is no merit in this contention. In his complaint plaintiff alleged facts which he claimed created a copartnership. These facts were found to be true. But the court also found that they did not constitute a partnership, but a joint adventure. It is sometimes a close question whether a transaction constitutes a partnership or a joint adventure. Jackson v. Hooper, 76 N. J. Eq. 185, 74 Atl. 130, and cases cited. A joint adventure, however, is similar to a partnership, and, being of a similar nature, the right to an accounting of profits in accordance with the agreement therefor and the obligations growing out of such agreement between the parties are governed by the same rules of law. 23 Cyc. 453; lished which entitled plaintiff to an account- Petrie v. Torrent, 88 Mich. 43, 49 N. W. 1076;

Causten v. Barnette, 49 Wash. 659, 96 Pac. 225; Claffin Co. v. Gross, 112 Fed. 386, 50 C. C. A. 300.

[2] Whether the parties were technically partners or not, an accounting was necessary to determine their respective rights. v. Redman, 6 Cal. 574. Clearly plaintiff by reason of contributing his labor and skill in the common venture was, under the agreement, entitled to his share of the net profits of the business the conduct of which, being terminated by defendant, could only be ascertained upon an examination and settlement of the accounts of the business, precisely the same as though a partnership had existed. Since the facts alleged and found entitled the plaintiff to an accounting for the purpose of determining what were the net profits of the venture, the fact that the agreement and transactions had between the parties did not, as found by the court, constitute a copartnership in the strict sense, is wholly immaterial. In no event, even were error conceded, could defendant be prejudiced by reason of the ruling.

[3] As a result of the accounting had and taken, the court also found that defendant was indebted to plaintiff in the sum of \$343.-55 for his share of the net profits of the business during the time it was conducted, and that plaintiff was damaged in the sum of \$250 by reason of defendant's breach of the agreement in wrongfully taking possession of and removing from plaintiff's shop the stock of goods and manufactured fur garments on September 1, 1913, thus preventing a continuance of the business to January 1st in accordance with the agreement. These findings are based upon conflicting evidence as to which the determination of the trial court must be deemed conclusive.

The order denying defendant's motion for a new trial is affirmed.

We concur: MELVIN, J.; WILBUR, J.

GRAFF v. UNITED RAILROADS OF SAN FRANCISCO. (S. F. 7338.)

(Supreme Court of California. April 16, 1918.) 1. Carriers &=348(13) — Passengers — Per-

SONAL INJURY - MISLEADING INSTRUCTION. In a action for injury when thrown from the front platform of an electric car to the ground, an instruction that where an injured passenger is riding in an unusual position, which increases his danger, the doctrine of rea ipsa loquitur does not apply, and no presumption arises that the resulting injury was due to the carrier's negligence, was misleading, in view of possible proof that the injury arose from the operation of the car.

2. Carriers \$\infty 316(1) - Personal Injury - Burden of Proof.

Where personal injury to a passenger arises from carrier's operation of car, there is a prima facie case of negligence, and burden is on the carrier to show that the thing done by it causing the injury was not the result of its negligence.

3. CARRIERS \$\infty 348(11) -- CAUSE OF INJURY-

QUESTION FOR JUEY.
Whether the injury arose from the manner of operating electric car or from a passenger's carlessness in standing too near the edge of the platform held a question for the jury.

4. Carriers == 347(7) — Personal Injury -CONTRIBUTORY NEGLIGENCE-QUESTION FOR JUBY.

In a passenger's action for personal injury when thrown from the front platform of an electric car while rounding a curve, the question of contributory negligence held for the jury.

5. Carriers \$==347(7) - Injury to Passen-GER-CONTRIBUTORY NEGLIGENCE.

Independently of statute, it is not negligence per se for a passenger to stand on the front platform of a moving electric car.

CABRIERS \$\infty 348(5) - Personal Injury -

6. CABRIEBS \$\ightharpoonup 348(5) — PERSONAL INJURY — REFUSAL OF INSTRUCTION.

In an action for personal injury when thrown from the front platform of an electric car while rounding a curve, a requested instruction that if the passenger voluntarily and for his own convenience was riding on the platform, exposed to greater danger than if he had remained in the car, and he could have entered the car a reasonable time before the accident, he assumed responsibility for the increased risks, and, if injured in consequence thereof, could not reif injured in consequence thereof, could not re-cover, was properly refused, as it charged the passenger with the assumption of all increased risks, including any misconduct on the part of the motorman in the operation of the car.

Carriers 4=348(5) -- Personal Injury -

REFUSAL OF INSTRUCTION.
In such case a requested instruction that, if plaintiff was thrown from the car by any swaying motion or sudden jerk ordinarily incident to the running of cars, under the circumstances of the case verdict should be for defendant was properly refused, as it made him assume the risk of such jerk, even if it arose from the motorman's reckless operation of the car with knowledge of plaintiff's presence on the platform.

8. Carriers &=348(13) — Personal Injury— Instruction — Contributory Negligence.

An instruction that as matter of law, notwithstanding the passenger's place of added peril on the platform, a legal presumption of negligence arose against the carrier from the fact of his injury was erroneous.

9. Courts 90(1) — Former Decisions — Scope — General Approval of Instructions.

TIONS.

For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

The Supreme Court's general approval of the instructions is not a specific approval of an instruction not criticized.

In Bank. Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by Warren Graff against the United Railroads of San Francisco. Judgment for plaintiff, accepted by plaintiff as reduced, motion for a new trial denied, and from the order and judgment defendant appeals. Reversed.

Wm. M. Abbott and Wm. M. Cannon, both of San Francisco (Kingsly Cannon, of San Francisco, of counsel), for appellant. Sullivan & Sullivan and Theo. J. Roche, of San Francisco, for respondent.

SHAW, J. [1,2] In the decision of this case in department the judgment was reversed because of the instruction which appears in the latter part of the opinion upon the subject of the presumption arising from; an injury to a passenger while on board a railroad car. In commenting upon this instruction the opinion contained the follow-

"The rule of law is that where an injured pasne rule of law is that where an injured passenger is riding in an unusual position, which position increases his danger, the doctrine of res ipsa loquitur does not apply, and no presumption arises that resulting injury was due to the negligence of the carrier."

The rehearing was granted because it was considered that this statement might be misleading. The concluding sentence of the opinion is also misleading. It is obvious that the proof may show that the passenger was riding in an unusual position which increased his danger, and may also show that the injury arose from something done by the carrier in operating the car. In such a case a prima facie case of negligence is made, and the burden rests upon the carrier to show that the thing done by it which caused the injury was not the result of its negligence. The true rule on the subject is stated in the Steele Case, cited in the opinion, and in Wyatt v. Pacific, etc., Co., 156 Cal. 174, 103

[3] It is true that this instruction has been approved in a number of cases decided by this court, but it will be found that in each case there was no dispute over the proposition that the injury arose from the manner of operating the car. When that is the case, the instruction, although it does not fully state the doctrine, is correct when applied to such a case, and the court would not reverse the judgment because of the failure to give the modifications which might be necessary if the evidence were of a different character. In the present case there was a dispute over the question whether the injury arose from the manner of operating the car, or from the plaintiff's carelessness in standing too near the side thereof, and the question as to which was the cause of the injury should have been left to the jury instead of being taken from them by the absolute character of the instruction given.

With this explanation of the concluding sentence, and the passage above quoted and the authorities cited in support of it eliminated, we adhere to the opinion rendered in department. It is as follows:

"Plaintiff charged that while a passenger upon an electric car of the defendant and riding on the front platform thereof the motorman propelled the car around a curve at a greatly excessive speed, causing him, the plaintiff, to be thrown violently from the car to the ground, thrown violently from the car to the ground, the car passing over both of his legs, necessitating amputation of both. Defendant answered by denial, and affirmatively charged that the injuries sustained by plaintiff were due to his own negligence. The jury rendered a verdict for plaintiff. On defendant's motion for a new trial the court reduced the verdict, and plaintiff accepted the reduction. The motion for a new trial was then denied, and defendant appeals from the judgment and order so doing

utory negligence beyond doubt, and that the court erred in refusing to instruct the jury return its verdict in favor of defendant. tiff, it appears, was familiar with the tracks over which he was traveling and with the curves thereon. He was on the front platform of the car near an open door on the right-hand side of the car which permitted the ingress and egress of passengers. He was in conversation with a of passengers. He was in conversation with a friend. He turned his head slightly to speak to this friend, when the car took the curve and hurled him through the open door. He was standing next to another door opening into the body of the car, and so far as he remembered, though his memory was not good, he was not leaving the parties of the car, and so far as he remembered. leaning against it nor holding to anything. was accustomed to ride on electric cars and on the cars of that particular line, and was standing, balancing himself. The evidence was conflicting as to the speed with which the car took the curve. It will be assumed that the jury believed that it was at an undue speed, and that the motorman was guilty of negligence, in view of the fact that to his knowledge passengers were standing on the front platform. Though witnesses for the plaintiff testified that plaintiff was, or apparently was, holding on to the iron gate or a handrail of the car, and that he also was leaning with his back against the door, it is said that by virtue of plaintiff's own testimony this evidence is not sufficient to raise a conflict. We think however that it is and a conflict. We think, however, that it is, and that we are bound to assume that the jury concluded that the plaintiff was doing both of these things, and this is so because it is a part of common experience that a man who has received so tremendous a shock as that which this plaintiff sustained frequently comes through his injuries with no clear memory of the accident itself or the events that occurred immediately antecedent thereto. This truth is one of common knowledge, and is universally recognized in the medical books. Plaintiff's own testimony in this regard is, 'At the present time, since this accident, my memory is pretty bad.'
"It is said that it was plaintiff's duty, even if

obliged to stand temporarily on the front platform, to enter the body of the car and thus make his position safe when opportunity presented itself so to do; that such opportunity did present itself, and plaintiff was guilty of continuous cont tributory negligence in not making use of the opportunity. Upon the question of the condition of the car, however, the evidence is in dispute; that of the plaintiff going to show that in the body of the car every seat was occupied, that passengers were crowded in the aisle and six or seven more were standing on the platform where he was. Under these circumstances again, the determination of these disputed facts is for the jury.

[5] "Authorities are cited by appellant declar-ing that the mere presence of a passenger upon an electric car on the platform when there is space for him within the body of the car is conclusive upon the contributory negligence of the plaintiff, and to this effect it is contended are Hodler v. Public Service Ry. Co., 85 N. J. Law, 346, 88 Atl. 1071, and Ward v. International R. Co., 206 N. Y. S3, 99 N. E. 262, Ann. Cas. 1914A, 1170, but whatever may be the rule in these jurisdictions, such is not the rule in this state, nor in the majority of states, nor yet do we conceive it to be the rule independently of statute in the state of New York, for it is said in Nolan v. Brooklyn City, etc., Ry., 87 N. Y. 63, 41 Am. Rep. 345: The rule is settled that independent of the mandate of the statute own negligence. The jury rendered a verdict for plaintiff. On defendant's motion for a new trial the court reduced the verdict, and plaintiff accepted the reduction. The motion for a new trial was then denied, and defendant appeals from the judgment and order so doing.

[4] "Defendant's first contention is that plaintiff's own evidence establishes his contribution of the mandate of the statute cars, negligence per se for a passenger to stand on the front platform of a moving car.' Kelly v. Santa Barbara R. R. Co., 171 Cal. 423, 153 Pac. 93, Ann. Cas. 1917C, 798; Pruitt v. Santa Barbara. etc., R. R. Co., 161 Cal. 29, 118 Pac. 223, 36 L. R. A. (N. S.) 331; Holplaintiff's own evidence establishes his contribution. 62 Pac. 478; Babcock v. L. A. Traction Co., 128 Cal. 173, 60 Pac. 780; Seller v. Market St. Ry. Co., 139 Cal. 268, 72 Pac. 1006; Lynn v. Southern Pac. Co., 103 Cal. 7, 36 Pac. 1018, 24 L. R. A. 710; 6 Cyc. p. 653; 3 Thompson, Negligence, § 2954.

[6, 7] The defendant proffered and the court refused to give the following instructions:

"(1) If the plaintiff voluntarily and for his own convenience was riding on the platform of the car at the time and place in question, and

the car at the time and place in question, and was thus exposed to dangers which he would not have encountered had he entered and remained within the car, and that he could have entered the car a reasonable time before the accident and remained therein until the time of the accident, I instruct you that the plaintiff assumed responsibility for the increased risks, if any, which he thus voluntarily exposed himself to, and if he was injured solely in consequence of such increased risk, I instruct you that he cannot recover, and your verdict must be in favor

of the defendant.
"'(2) If you find that the plaintiff was thrown from the car either by any swaying motion or any sudden jerk, and that such motion or jerk any studen jerk, and that such motion of jerk is ordinarily incident to the running of cars. under the circumstances of this case, you are instructed that your verdict must be in favor of the defendant."

"It was justified in so doing, for both of these

"It was justified in so doing, for both of these instructions contain a declaration not warranted in law. By the first the jury would have been told that the plaintiff 'assumed responsibility for the increased risks' occasioned by his presence on the platform, and 'if he was injured solely in consequence of such increased risk,' he could not recover. Something of what has heretofore been said points out the error in law heretofore been said points out the error in law here declared. Specifically the vice of the in-struction is that it charges the plaintiff with the assumption of all increased risks, whereas, the only increased risks which he assumed were those occasioned by his position and arising from the due operation of the car by the motorman who had knowledge of that position. He did not assume the increased risks of any misdid not assume the increased risks of any mis-conduct upon the part of the motorman in such operation. The specific legal flaw of the second instruction justifying its refusal is that it charges the jury that plaintiff assumed the re-sponsibility of injury from any 'sudden jerk or-dinarily incident to the running of cars under the circumstances of this case,' and here again is the implication, if not the statement, that the plaintiff assumed the risk of such a jerk even if it arose from the reckless operation of the car by the motorman who had knowledge of the car by the motorman who had knowledge of this presence on the platform. Making reference to the discussion of this question in Kelly v. Santa Barbara R. R. Co., 171 Cal. 415, 153 Pac. 903, Ann. Cas. 1917, c. 67, nothing further need here be added.

[8, 9] "Finally, the court instructed the jury in the following language: "Contributory negligence on the part of a passanger cannot be

ligence on the part of a passenger cannot be presumed from the mere fact of injury, but must be proved. On the other hand, the proof of an injury to a passenger on the car of a common carrier casts upon the common carrier the burden of proving that the injury was occasioned by inevitable casualty or some other cause which human care and foresight could not pre-vent, or by the contributory negligence of the passenger, unless the proof on the part of the passenger tends to show that the injury was ocpassenger tends to show that the injury was occasioned by the contributory negligence of the passenger, or by inevitable casualty, or some other cause, which human care and foresight could not prevent. A consideration of Steele v. Pacific Elec. Ry. Co., 168 Cal. 375, 148 Pac. 718, will establish the inapplicability and the injury of this instruction. \* \* \* Froeming v. Stockton Elec. R. R. Co., 171 Cal. 401, 153 judgment for plaintiff and from an order de-

Pac. 712, is relied on by respondent as authority for the giving of this instruction under these circumstances. It is true that this instruction was there given. It is also true that this court declared that the jury was ably and painstakingly instructed, but no objection was made to the giving of this instruction, and under familiar principles the court's general approval of the instructions was not a specific approval of an instruction not criticized. The injury worked by this instruction is most apparent. It directed the jury in its deliberations by telling them that as matter of law, notwithstanding the place of added peril which the plaintiff had voluntarily assumed, a legal presumption of negligence arose against the defendant by virtue of the fact that he sustained injury." Pac. 712, is relied on by respondent as authori-

The judgment and order appealed from are reversed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; WILBUR, J.; MELVIN, J.; RICHARDS. Judge pro tem.

GUMPEL v. SAN DIEGO ELECTRIC RY. CO. (L. A. 4136.)

(Supreme Court of California. April 16, 1918.)

1. CARRIERS \$\iiiis 314(1) — PERSONAL INJURY—SUFFICIENCY OF COMPLAINT.

An amended complaint, alleging that plaintiff was a passenger for hire on defendant's street car; that while it was rounding a curve, at a speed of 20 miles and more per hour, he was thrown from the car, and alleging negligence in respect to excessive speed and failure to provide straps for passengers; and that as the car ran on to the curve it gave a sudden and violent jerk by which he was thrown from and violent jerk by which he was thrown from the car and injured—stated a cause of action.

2. Carbiebs \$\infty 320(19)\to Personal Injury\to Contributory Negligence\to Question for JURY.

In such case held, on the evidence, that defendant's negligence was for the jury.

3. CARRIERS &=347(7) — CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In such case plaintiff's contributory negligence in not guarding himself from being thrown from car held, on the evidence, a question for the jury. tion for the jury.

4. Damages 216(8) — Personal Injury—Future Suffering and Loss of Earning POWER.

POWEE.

In such case an instruction to consider the extent of plaintiff's injury, the pain and suffering he had undergone by reason of the injury resulting from defendant's negligence, and any future pain and suffering traceable to and resulting from the injury and to consider the loss of time and earning power resulting from the injury, and any future loss resulting from the injury, correctly stated the elements of damages and those permissible under Civ. Code, 8 328R § 3283.

Trial \$\iff 260(1)\$ — Refusal of Instructions—Given Instructions.
 The refusal of instructions is not error,

where the subject-matter was sufficiently covered by the instructions given.

nying its motion for a new trial, defendant hill above the curve going very fast, about appeals. Judgment and order affirmed.

Read & Dilworth and Titus & Davin, of San Diego, for appellant. James E. O'Keefe and C. H. Van Winkle, both of San Diego, for respondent.

RICHARDS, Judge pro tem. This is an appeal from a judgment in plaintiff's favor and from an order denying the defendant's motion for a new trial, in an action for damages for personal injuries sustained by the plaintiff through being thrown from a street car of the defendant while it was rounding a curve at the corner of First and Spruce streets in the city of San Diego.

[1] The appellant assails the plaintiff's amended complaint as not stating a cause of action. The plaintiff in his said complaint, after averring that he was a passenger for hire upon the defendant's car, goes on to allege that the said car "proceeded in a northerly direction on its said street car line, and at that certain point on the corner of First and Spruce streets, while said car was rounding said curve, and while the same was traveling at a rate of speed of 20 miles per hour or thereabouts, plaintiff was thrown from said car and injured as hereinafter set forth." The plaintiff then proceeds to allege:

"That the said defendant company was negligent in the premises, in this: \* \* \* (b) In rounding said curve at an excessive rate of speed, to wit, 20 miles per hour or thereabouts; (c) in its failure to provide straps or other facilities for passengers standing to hold on to. \* \* \* That by reason of the negligence aforesaid plaintiff was thrown from said car, as hereinbefore alleged, and struck the ground with great force, and by reason of said negligence, received a severe injury,"

At the trial the plaintiff further amended his complaint by alleging that as the car ran onto the curve "it gave a sudden and violent jerk, by reason of which and at which time plaintiff was thrown from said car and injured." We are of the opinion that the complaint as thus amended sufficiently stated a cause of action.

[2] The appellant next contends that the evidence is insufficient to justify the verdict, in that it fails to show that the accident was the result of any negligence on the part of defendant company. The plaintiff himself testified in relation to the accident that he had boarded defendant's car at the corner of B and Third streets at some time after 11 o'clock on the night of his injury. It had The car was very crowded. been raining. Persons were standing on the front and rear platforms and on the steps of the car. He gained standing room on the rear platform, and, as some of the passengers got off, was able to step over to the door of the car, but could not get inside because of its crowded condition. He was standing leaning against

20 miles an hour. He had a package under his right arm, and was trying to get hold of the piece that runs down from the roof to the floor. The car made a terrible jerk at the curve and threw him off. The plaintiff also testified that he had been accustomed to ride on this car along this portion of its route, and knew that the hill and curve were there. There was other testimony supporting plaintiff, to the effect that the car was going at a more rapid rate of speed than usual as it approached the curve. was also evidence on the part of the defendant, contradicting that of the plaintiff as to the rate of speed of the car and as to a jerk at the curve, which it is not necessary to recite in detail, for it is evident that there was sufficient evidence presented in support of the plaintiff's case to make it a proper case for the jury, upon the authority of Babcock v. Los Angeles, etc., Co., 128 Cal. 173, 60 Pac. 780, and Graff v. United Railroads, 172 Pac. 603.

[3] It is next contended by the appellant that the plaintiff was guilty of contributory negligence as a matter of law, in not taking proper precautions to guard himself from the danger of falling or being thrown from the car as it approached a curve, the existence of which he knew, and at a rate of speed of which he was aware. Appellant cites numerous cases from this and other jurisdictions which it claims supports this position. But upon this point also the most recent and approved decisions of this court are to the effect that under like circumstances to those disclosed in the case at bar the question of the plaintiff's contributory negligence is one which should properly be submitted to the jury. The most recent utterance of this court upon the subject, citing and sustaining earlier cases, is that of Graff v. United Railroads, supra.

[4] The appellant further urges that the court erred in giving the following instructions:

"In fixing the compensation you take into account, if you find that he, by reason of the negligence of the defendant, had been injured, then you take into account the extent of his injuries, and whatever pain and suffering, either physical or mental, he has undergone by reason of that injury, resulting from the negligence of the defendant, and what pain and suffering he will yet undergo which can be traced and is the result of that injury.

ed and is the result of that injury.

"You also take into account his loss of time, that is, his inability to earn money, which has resulted from the injury which he received by the negligence of the defendant, whatever loss of time, loss of ability to earn money, has resulted up to this time, and whatever loss of time or loss of ability to earn money will result in the future, and which can be traced by you to the result of this injury, and due to the negligence of the defendant."

able to step over to the door of the car, but could not get inside because of its crowded instructions violate the rule laid down in the condition. He was standing leaning against the door when the car came down the steep Cal. 117, 91 Pac. 522, in that they permit the

jury to speculate upon the future pain and suffering of the plaintiff, and also as to his loss of time and ability to earn money, and do not confine these elements of damage to that detriment which would be certain to result from the plaintiff's injury. The difference between the instructions which were the subject of the court's criticism in the Melone Case and those above quoted is clear upon a comparison of the two sets of instructions. In the Melone Case the instructions as to the plaintiff's future injuries were phrased in the subjunctive, and it was in this that their vice consisted; while in the case at bar the court instructed the jury that, in estimating the compensation which the plaintiff could recover as a result of his injuries. it could take into account "what pain and suffering he will yet undergo, which can be traced and is the result of that injury"; and, as to the plaintiff's future loss of time and of ability to earn money, the court confined the jury to that "which can be traced by you to the result of this injury and due to the negligence of the defendant." These are, in effect, instructions to the jury that the plaintiff was to be limited in his right to recovery as to these elements of damage to such damages as it was reasonably certain he would suffer in the future, and they are thus within the rule declared to be the correct rule for the admeasurement of such elements of damage in the Melone Case, and to such as are permissible under section 3283 of the Civil Code.

[5] The appellant finally contends that the court erred in its refusal to give certain instructions requested by the defendant and dealing with particular phases of the evidence in the case. It is not necessary to set forth in detail these instructions nor refer to the argument or authorities cited by the appellant in their support, for the reason that the court, after a careful examination of the whole body of instructions given by the trial court, is of the opinion that they sufficiently cover the points emphasized by the defendant in its suggested instructions, and that, upon the whole, the jury were fully and fairly instructed as to the rules of law by which they were to be governed in arriving at their verdict; and hence that there was no error committed in refusing to give the instructions requested by the deferdant.

Judgment and order affirmed.

We concur: SLOSS, J.; SHAW, J.

LEVI v. CHESLEY. (L. A. 4178.)
(Supreme Court of California. April 15, 1918.)

Appeal and Error &==1011(1)—Review —
FINDINGS ON CONFLICTING EVIDENCE.

FINDINGS ON CONFLICTING EVIDENCE.

The Supreme Court will not disturb the findings of the trial court when the evidence is in substantial conflict.

Department 1. Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by Edgar B. Levi, as receiver, against James A. Chesley. From a judgment for plaintiff, defendant appeals. Judgment modified, and trial court directed to modify its finding and judgment in accordance with the views expressed.

Hoff & Chatterson, of San Diego, for appellant. Riley & Heskett, of San Diego, for respondent.

RICHARDS, Judge pro tem. This is an appeal by the plaintiff in the action to recover possession of personal property in which judgment went for the defendant, and a motion for a new trial was denied. The facts of the case were these: One Paul E. Lavoice, who was a tenant upon the ranch of the defendant Chesley, purchased from one Adolph Levi 30 cows, giving a mortgage to secure the purchase price of said cows upon them, and also upon some 43 other head of cows upon said ranch, and of which he was as such tenant of Chesley in possession, but which in fact belonged to the defendant. after this transaction the defendant Chesley discovered that his tenant Lavoice was disposing of the cattle upon his ranch, and he accordingly ousted him from it, and obtained his conviction and incarceration in the state prison. Subsequently, upon foreclosure of the mortgage, the plaintiff, Edgar B. Levi, was appointed receiver, and as such commenced this action against the defendant. Chesley, for the alleged conversion of 21 of the 30 cows for the purchase price of which the said mortgage was given. The defendant denied having possession of or having converted said cattle, except that he admitted being in possession of one of said cows which he had offered to deliver to the plaintiff prior to the institution of the action and still stood ready to deliver. opon the trial of the cause the evidence was conflicting as to the identity of the cows, for the conversion of which the plaintiff sought to recover, with the exception of the one cow which the defendant conceded and the court awarded to the plaintiff, and with the exception also of one other cow which the plaintiff, we think, sufficiently showed to have been one of those included in the mortgage.

[1, 2] The only points which the appellant presents upon appeal relate to the sufficiency of the evidence to sustain the findings of the court. Under the well-established rule, this court will not disturb the findings of the trial court when the evidence is in substantial conflict. This disposes of every question in the case except as to the right of plaintiff to the possession or value of the one red Durham cow, which, we think, the proofs sufficiently showed plaintiff to be also entitled.

The judgment will therefore be modified so as to award this additional cow to the appellant, or its value, which the trial court determined to be the sum of \$100; and, the respondent having in his brief suggested and consented to such modification, the trial court is hereby directed to modify its finding and judgment in accordance with the views expressed in this opinion, each of the parties to this appeal to pay his own costs.

It is so ordered.

We concur: SLOSS, J.; SHAW, J.

RUSHTON v. REEVE et al. (L. A. 4234.) (Supreme Court of California. April 17, 1918.)

MENT—ENFORCEMENT PENDING APPEAL.
Where an appeal is taken from a justice's judgment to the superior court on questions of law alone, and no stay bond is filed, it is competent for the justice, even before disposal of the appeal, to proceed to enforce the judgment by execution execution.

2. PLEADING \$\ightharpoonup 8(3)—Conclusion of Law-Character of Appeal.

CHARACTER OF APPEAL.

In an action to enjoin defendants from enforcing a justice's judgment against plaintiff, the complaint, alleging that at time of issuance of the execution complained of the judgment of the justice "had been fully vacated, voided, and set aside," plaintiff having taken an appeal from the indement to the superior court which from the judgment to the superior court, which, on motion, dismissed the appeal, and ordered all the papers returned to the justice, did not allege, as matter of fact, that the appeal was taken on questions of law and fact, which would have avoided the judgment, the allegation being a mere conclusion.

3. JUSTICES OF THE PEACE 4=135(4)-EXECU-

TION-INJUNCTION.

Where the superior court had jurisdiction of an appeal from a justice's judgment, and had power to dismiss it and make the necessary orders to dispose of it on the ground that it had not been duly perfected, its judgment, dismiss-ing the appeal, is conclusive in an action to en-join enforcement of the justice's judgment on ground that dismissal was erroneous and execution could not be issued by the justice court.

Department 1. Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by Julia E. Rushton against Sidney N. Reeve, Charles R. Thomas, E. R. Parmelee, and George H. Kelch. From judgment for defendants, and from an order denying a preliminary injunction, plaintiff Judgment and order affirmed. appeals.

Oliver O. Clark and George M. Pierson, both of Los Angeles, for appellant. George H. Kelch, of Los Angeles, for respondents.

SHAW, J. The complaint in this case purports to state a cause of action to enjoin the defendants from enforcing a judgment alleged to have been rendered in July, 1914, for the defendant Kelch against the plain-The court below sustained demurrers to the complaint, and thereupon gave judgment for the defendants. A preliminary in- be dismissed, that the clerk of the superior

junction had been issued upon the filing of the complaint, and the court, also prior to rendering the judgment, made an order dissolving such preliminary injunction. plaintiff appeals from the judgment and from the order denying the preliminary injunction.

It appears that Kelch recovered judgment in the court of Sidney N. Reeve, then a justice of the peace of Los Angeles township. against the plaintiff Julia E. Rushton and others; that Julia E. Rushton took an appeal from said judgment to the superior court of the county; that thereafter the superior court on motion of Kelch, the plaintiff in said judgment, dismissed said appeal, and ordered all the papers to be returned to the justice's court, and thereupon the justice proceeded to issue an execution upon said judgment.

[1, 2] The complaint does not state whether the appeal was taken on questions of law alone or on questions of law and fact. There are decisions of this court to the effect that when an appeal is taken on questions of law and fact, and before its final disposition in the superior court the judgment stands vacated, and that during that period no execution upon such judgment can be allowed. Bullard v. McArdle, 98 Cal. 359, 33 Pac. 193, 35 Am. St. Rep. 176. We have no decisions, however, which purport to declare that where an appeal is taken upon questions of law alone and no stay bond is filed, it is not competent for the court below, even before the disposal of the appeal, to proceed to enforce the judgment by execution, and unquestionably the court has power to do so. If the appellant contends that after the disposal of the appeal on questions of law and fact, and after upon a dismissal thereof in the superior court, the judgment of the justice's court cannot be enforced by execution, and that the same stands vacated, the complaint is fatally defective in not alleging that the appeal in controversy was taken on questions of law and fact. There is an allegation that at the time of the issuance of the execution complained of the judgment of the justice "had been fully vacated, avoided and set aside." The context shows, however, that this is a mere conclusion of law. It cannot be taken as an allegation of fact, or as sufficient to supply the omission to allege that the appeal was taken on questions of law and fact. This omission was sufficient to uphold the order sustaining the demurrer.

[3] With respect to the dissolution of the restraining order the facts stated in the answer are proper for consideration. there shown that Kelch, the plaintiff iu the justice's court, moved to dismiss the appeal on the ground that it had not been perfected by the necessary proceedings on behalf of the said appellant, and that this motion was sustained by the superior court, and that an order was made therein that the said appeal

court forthwith transmit the papers in the [6. Appeal and Error &==1151(2) - Support action to the justice of the peace, and that said justice proceed to enforce the collection The superior court had jurisdiction of the appeal, and had power to dismiss it and make the necessary orders to dispose of it on the ground that it had not been duly perfected. This judgment is conclusive upon collateral attack, and is sufficient to dispose of the application for the injunction. It justifies the order dissolving the preliminary injunction.

The judgment and order appealed from are affirmed.

SLOSS, J.: RICHARDS. We concur-Judge pro tem.

## ACKERMAN v. SCHULTZ et al. (L. A. 4214.)

(Supreme Court of California. April 17, 1918.) 1. Appeal and Erbor @==345(1) — Time for Appeal—Statute.

Under Code Civ. Proc. \$ 939, before its amendment in 1915, providing appeal may be taken from any judgment or order of a superior court within 60 days from entry, where judgment was entered January 27, 1914, appeal ment was entered January 27, 1914, appeal therefrom, dated, served, and filed January 20, 1915, was taken too late; pendency of proceedings on motion for new trial not extending the

2. STIPULATIONS C=18(3)—PRECLUSION FROM RAISING QUESTION.

In a suit on claim and delivery, defendant, who entered into a written stipulation with the other parties whereby he acknowledged due service upon him of the summons in the crosscomplaint, together with a copy, waived the right to demur to the cross-complaint, and agreed that his answer to the amended complaint might be deemed an answer to the cross-complaint, is precluded from raising the question whether a cross-complaint, in an action on claim and delivery, is improper.

CY OF EVIDENCE.

In an action on claim and delivery, evidence held to justify a finding that defendant and his cross-defendants, as an inducement to the cross-complainant to purchase the automobile in which defendant falsely claimed an interest, agreed that if cross-complainant would purchase the car they would warrant and defend the title.

4. Fraudulent Conveyances \$== 179(1) RIGHT TO INVOKE STATUTE.

In an action on claim and delivery involving an automobile sold, where a third person, who originally sold the car to plaintiff, was not a party, a defendant, not being one of his creditors, could not invoke Civ. Code, § 3440, as to transfers of personalty presumptively fraudulent, by objecting that plaintiff was not shown to have even hed presented of the car. have ever had possession of the car.

5. REPLEVIN 6-84-FRAUD-AWARD FOR RE-PAIRS.

Where, after transfer of possession, and before discovery of the fraud worked upon him, the buyer of an automobile expended or became indebted in a certain amount for repairs on the car, he was properly awarded judgment for the sum in an action of claim and delivery, wherein he was made defendant and cross-complained against his vendor.

BY PLEADINGS-MODIFICATION.

A sum awarded by the judgment on a crosscomplaint for a particular item should agree with the allegations and prayer of the cross-complaint, and judgment will be modified to that extent.

Department 2. 'Appeal from Superior Court, Los Angeles County; John W. Shenk. Judge.

Action by Charles M. Ackerman against Cleveland Schultz, W. J. Hittson, and Bert T. Demmitt and others. From a judgment against him on the cross-complaint of defendant Demmitt, and from order denying his motion for new trial, defendant Schultz appeals. Judgment as modified affirmed, and order denying motion for new trial affirmed.

Cleveland Schultz, of Los Angeles, in pro. per. Andrew J. Copp, Jr., Charles Ackerman, Clyde E. Cate, and W. J. Hittson, all of Los Angeles, for respondents.

MELVIN, J. Cleveland Schultz sought to appeal from a judgment against him on the cross-complaint of Bert T. Demmitt, and from an order denying his motion for a new trial.

[1] Respondent says that the appeal from the judgment was taken too late. Judgment was entered January 27, 1914. Appeal therefrom was dated, served, and filed January 20, 1915. Under section 939, Code of Civil Procedure, before its amendment in 1915, this was too late, as the pendency of the proceedings on motion for new trial did not extend the time for appeal from the judgment. We are therefore limited to a consideration of the appeal from the order denying the motion of appellant for a new trial, and that, too, upon a record which does not contain a copy of the original complaint of Ackerman. The judgment and findings upon the cross-complaint, however, refer to Ackerman's suit as one on claim and delivery, and appellant insists that there may be no cross-complaint in such an action. To support this contention certain authorities from other states are cited which refer to counterclaims and not to cross-complaints. One Californian case is referred to, and in the opinion in that case (Lovensohn v. Ward, 45 Cal. 8) it was merely held that the subject-matter of litigation in replevin being the property mentioned in the complaint, defendant may not in his answer allege that plaintiff has taken from him other property and ask for its return. In this case the crosscomplaint dealt with the very property in suit and appellant's conduct in relation to it. This is in accordance with section 442. Code of Civil Procedure.

[2] In any view of the matter appellant is precluded from raising the question, because he entered into a written stipulation with the other parties to the litigation by which he acknowledged due service upon him of the summons in the cross-complaint, together

with a copy thereof, waived his right to de-i s made up of the two amounts, \$275 alleged mur to the cross-complaint, and agreed that to have been paid cross-defendants for the auhis answer to the amended complaint of Ackerman might be deemed an answer to the cross-complaint.

[3] The court found Schultz guilty of fraud. Among the findings is one to the effect that he and his cross-defendants, as an inducement to the cross-complainant to purchase the automobile in which Schultz falsely claimed an interest, covenanted and agreed that if Demmitt would purchase the car, they would warrant and defend the title to said property. This finding is attacked upon the ground that the bill of sale given to respondent Demmitt was signed by Bruce Masse alone. But there was other testimony to the effect that Schultz said he was the owner of the property, and that the automobile was free and clear of all incumprances. There were also other circumstances in proof tending to support the finding. It was thoroughly justified by the evidence.

Appellant also objects to the finding that joins his name with that of Masse in making "a purported transfer of title" because the bill of sale was not signed by him. However, he did assert title in himself, and the mere fact that record title did not purport to come from him did not relieve him of responsibility for his instrumentality in aiding in the purported transfer of title.

- [4] Another finding was to the effect that the representations of appellant to respondent that the automobile was free and clear of all incumbrances were knowingly false, and were made with intent to deceive the respondent. The attack upon this finding is that Ackerman was not shown to have ever had possession of the chattel, and that therefore its purchase by him from one Van Tongel was fraudulent and void under section 3440 of the Civil Code. This contention is without merit. Van Tongel is not a party to this action, and appellant, not being one of his creditors, is not in a position to invoke that statute. Moreover, Ackerman testified that he did take possession of the property on the date of the execution of the bill of sale. This finding is also attacked on the ground that respondent employed an attorney to investigate the records to discover if any liens against the property existed, and that therefore he did not rely on the false representations. The obvious answer to this is that appellant's fraud, as found by the court, was not limited alone to false pretenses as to title.
- [5] After transfer of possession and before discovery of the fraud the respondent, as the court found, expended or became indebted for a certain amount for repairs on the motorcar. Judgment for this sum was properly awarded.
- [8] In the prayer of the cross-complaint judgment is asked for punitive damages in a the section; it being conceded that his case named sum and \$574,99, together with inter- is "not otherwise provided for" in the ordi-

tomobile, and \$299.99 expended by way of repairs. In the judgment as given the sum of \$303 is awarded as the amount expended for repairs, making, when added to the \$275, a total of \$578. This should be reduced to agree with the allegations and prayer of the cross-complaint; and it is ordered that the judgment be modified to that extent.

The judgment as modified must be affirmed; and it is so ordered. The order denying appellant's motion for a new trial is affirmed.

We concur: WILBUR, J.; VICTOR E. SHAW. Judge pro tem.

Ex parte HART. (Cr. 591.)

(District Court of Appeal, Second District, California. March 29, 1918. Rehearing Denied by Supreme Court May 9, 1918.)

€=7(6)—DISCRIMINATION—LICENS-LICENSES ING BUSINESSES.

Provisions of a city ordinance for the li-censing of certain businesses, imposing a fee of \$60 a year on every person selling or contracting to sell certain articles, but excepting persons having regularly licensed places of business in the city, were void as an attempted protective tariff for the benefit of businesses located in the

Original application of George Hart for writ of habeas corpus. Petitioner discharged from custody.

Hutton, Fogel & Coffin, of Los Angeles, for petitioner. Charles W. Lyon, City Atty., and Fredericks & Hanna, all of Los Angeles, for respondent.

WORKS, Judge pro tem. The petitioner operates a mercantile business at an establishment within the city of Santa Monica and sells his commodities in the contiguous city of Venice; sales and deliveries being made by him after the manner which is employed by dealers in articles of the same character, which dealers have their places of business located within the limits of Venice. An ordinance of the last-named city provides for the licensing of certain businesses and contains a section to the following effect:

"For every person \* \* \* selling or contracting to sell articles" of various kinds, including the commodities dealt in by the petitionentuing the commontes teat in by the petitoli-er, "to persons not regularly engaged in carrying on such lines of business, whether by sample or otherwise, \* \* not otherwise provided for herein, \$60.00 per annum; provided that this shall not apply to persons having regularly li-censed places of business, in the city of Venice, taking orders for or selling, goods handled by them in their respective business." them in their respective business.

The petitioner was arrested and imprisoned for making sales within Venice, without having taken out the license required by est from December 28, 1912. This latter sum | nance. It appears that persons whose places of business are within the boundaries of those conducting laundry businesses within Venice, and who conduct establishments similar to that of the petitioner, pay a license fee of only \$12 per annum under the ordinance.

The petitioner contends that the ordinance unjustly discriminates against him in that it requires from him a license fee of \$60 per year, while it exacts but \$12 per year from others similarly situated, except that his place of business is without, while theirs are within, the city of Venice. He points to section 21 of article 1 of the Constitution of California, providing that no "citizen, or class of citizens" shall "be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens," and to the Fourteenth Amendment to the Constitution of the United States, section 1, to the effect that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. Nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Questions similar to the one now propounded to us have been before the courts of this state several times. The respondent claims that the ordinance now in question, so far as the provisions quoted from it are concerned, is constitutional under the decision in Ex parte Haskell, 112 Cal. 412, 44 Pac. 725, 32 L. R. A. 527. The ordinance involved in that case was an ordinance of the city of Chico, and the person imprisoned pursuant to its terms was a traveling salesman for a concern in Oakland. It was insisted that he could be required, constitutionally, to pay a higher license than that exacted from merchants selling from a fixed place of business within the municipality. The Supreme Court upheld this view in the following language:

"The very power to license for purposes of regulation and revenue involves the right to make distinctions between different trades and between essentially different methods of conducting the same general character of business or trade. And that is all that is done here. While it may be true, as suggested by petitioner, that Haskell is, in a sense, a merchant equality of the state of here. ly with those having a fixed place of business, it is nevertheless true that the manner in which he conducts and carries on his business is so distinct from that of the merchant of the latter class as to make it essentially a different business."

The petitioner relies upon the Matter of Hines, 33 Cal. App. 45, 164 Pac. 339. In that case one who operated and maintained a laundry wagon was under imprisonment for a failure to take out a license under an ordinance of the city of Venice. He delivered laundry work in Venice from an establishment outside the corporate limits of the city, in the same manner that laundry work was delivered to the people of the city from laundries within its limits. A greater license fee was sought to be required from him for operating and maintaining his wagon than from in employment.

the city, for the conduct of such businesses. In the opinion in the case we said:

"We are of the opinion that the provisions of the ordinances under which petitioner has been convicted attempt to create and enforce a discrimination not based upon differences in the nature of the business being transacted or differences in the manner of conducting the same business, or any other difference other than the mere fact of difference in destination of the goods collected and delivered by wagons collect-ing for laundries located outside of the city and ing for laundries located outside of the city and the destination of goods collected for delivery to laundries within the city. The license provisions in question are plainly devised as a protective tariff for the benefit of laundries located in the city of Venice, or laundry wagons doing business with laundries located in the city of Venice and annually they have the conductive the city of Venice. Venice, and apparently they have no other pur-

We then declared the assailed provisions of the ordinance to be void. We are convinced that the provisions which are attacked of the ordinance now before us are also "devised as a protective tariff for the benefit" of businesses located in the city of Venice, and that "apparently they have no other purpose." Ordinance provisions having their origin in such a purpose cannot stand. This proceeding is ruled by the Matter of Hines, and not by Ex parte Haskell.

The petitioner is discharged from custody.

We concur: CONREY, P. J.; JAMES, J.

SHELL CO. OF CALIFORNIA v. INDUS-TRIAL ACCIDENT COMMISSION et al. (Civ. 2360.)

(District Court of Appeal, First District, California. March 6, 1918. Rehearing Denied by Supreme Court May 3, 1918.)

1. Master and Servant €==405(1) - Work-MEN'S COMPENSATION ACT—CAUSE OF INJU-BY—SUFFICIENCY OF EVIDENCE.

In a workmen's compensation case, evidence held to support finding that employe's second injury, while exercising his leg by walking under direction of his surgeon, arose from a condition produced by his first injury, which broke the neck of his femur.

the neck of his femur.

2. MASTER AND SERVANT & 412—WORKMEN'S COMPENSATION ACT—HEARSAY EVIDENCF.
Under Workmen's Compensation Act, § 77a (St. 1913, p. 313, as amended by St. 1915, p. 1102, § 28), making hearsay evidence admissible in cases of death, where the hearsay testimony relates directly to the injury in question, on petition for writ of review against Industrial Accident Commission to review award for death of an employ his declarations that his cerutch an employe, his declarations that his crutch slipped and that he fell, injuring him the second time, which second injury was the direct out-come of the first, and resulted in his death, were admissible.

3. MASTER AND SERVANT @== 417(7) CAUSE OF MEN'S COMPENSATION ACT — C. DEATH—SUFFICIENCY OF EVIDENCE.

On petition for writ of review by an employ-er against the Industrial Accident Commission to review award for death of an employé evi-dence held to sustain award on point whether death was caused by operation, made necessary by second injury resulting from first received 4. MASTER AND SERVANT &== 405(1) -- WORK-MEN'S COMPENSATION ACT -- DEGREE OF PROOF.

The Workmen's Compensation Act does not require demonstration as to the cause of death, but only that degree of proof which produces conviction in an unprejudiced mind.

Proceedings under Workmen's Compensation Act by Catherine Fleming, individually and as guardian ad litem of John Fleming, opposed by the Shell Company of California, employer, and others. There was an award by the Industrial Accident Commission, and the employer petitions for writ of review. Petition dismissed.

Redman & Alexander, of San Francisco, for petitioner. Chris. M. Bradley, of San Francisco, for respondent Industrial Accident Commission. Henry S. Richmond, of Coalinga, for respondent Fleming.

BEASLY, Judge pro tem. Petition for writ of review by the Shell Company of California against the Industrial Accident Commission and Catherine Fleming, individually, and as guardian ad litem of John Fleming. The undisputed facts of this matter are briefly these: On July 8, 1916, the husband of the respondent Catherine Fleming, and father of John Fleming, received an injury while in the employ of the petitioner, the Shell Company of California, by which the neck of his femur was broken. He made a slow recovery, and on January 11, 1917, while exercising his leg by walking in his yard, under the special direction of his surgeon so to do, he slipped and refractured the bone at the same point. The bones never united after this second fracture except by a fibrous connection, and on April 27, 1917, the doctor decided that an open operation was necessary to readjust the bone. This was performed, and while the operation seemed to be a success, it transpired that within a few hours thereafter his stomach filled with gas and became greatly distended, his heart collapsed, and he died. The Industrial Accident Commission awarded a death benefit to the respondents, Catherine Fleming and John Fleming, and the petitioner applies to this court to have this award set aside upon the usual grounds.

The points made against the award are two: The first is that the second accident was independent of the first, and that therefore no award can be made therefor; and the second point is that Mr. Fleming died from causes not in any way connected with the original accident.

[1] We are satisfied that both points must be decided upon the facts, and that the award must be sustained, and we will briefly give our reasons for this conclusion.

The undisputed facts are as above stated; gas pressing against the diaphragm and and, it appearing therefrom that Fleming at the time of his second injury was obeying his doctor's instructions to exercise his leg, that he fell and that the fibrous connection what caused the accumulation of the gas,

WORK- which had been established was torn loose at the point of the previous fracture are circumstances which seem to us to be conclusive to the effect that this second injury arose from a condition produced by the first injury.

Petitioner, however, contends that this is not so, and it is therefore proper to state that in addition to the circumstances above specified there was other evidence which must be satisfying to any one that the condition did arise from the condition produced by the original accident. This evidence consists of declarations of the deceased to the effect that his crutch slipped and that he fell. He made other statements of the circumstances connected with the accident, but none which, it seems to us, are inconsistent with this statement, and, even if they may be so considered, this court will not say that the Industrial Accident Commission was not correct in adopting this statement that his crutch slipped, and that he thus fell and refractured his bone.

[2] The petitioner further contends with respect to this testimony that it was hearsay. and therefore not admissible. It insists that the rule in the cases of Englebretson v. Industrial Accident Commission, 170 Cal. 793, 151 Pac. 421, and Employers' Assurance Corporation, 170 Cal. 800, 151 Pac. 423, against the same defendant, still obtains in this state; but since those cases were decided section 77a of the Workmen's Compensation Act has been amended (St. 1915, p. 1102) so as to make hearsay evidence admissible in cases of death, where the hearsay testimony relates directly to the injury in question. Petitioner contends that this statute is not broad enough to cover the present case, in that, as it claims, the evidence as to the manner of occurrence of the second accident does not directly relate to the injury which the statute seeks to compensate. We cannot concede so narrow a construction to the amendment. Its purpose was to permit hearsay evidence to be given in support of a claim in case of death, and as this second injury was the direct outcome of the first, we think the statute broad enough to cover it and to permit hearsay evidence of the manner in which it occurred to be given in this case.

[3, 4] In support of its second point, that death was caused by extraneous circumstances and not by the surgical operation, the petitioner insists that the evidence is so conflicting and inconclusive that it will not sustain the award. The facts as to the manner of Mr. Fleming's death, that is, that he was operated upon by the opening of his hip and the readjustment of its bones, and that some hours later he died from inflation of his stomach caused by an accumulation of gas pressing against the diaphragm and causing the heart to collapse, there seems no reasonable ground to dispute, but the doctors differed somewhat in their opinions as to what caused the accumulation of the gas,

and whether Fleming died from the failure of entitled to the moneys as against the survivor, weak heart or whether the heart collapsed where the intent to provide for her was clearly as a result of the action of the gas. Dr. Gibbon, the medical adviser of the Industrial Accident Commission, gave it as his opinion that the condition stated by the attending physicians reasonably showed that death was due to the operation, and added that this opinion was not based upon possibilities, but upon the probabilities of the case. He believed that the death was caused by the condition produced by the anæsthetic, or operation, or both. He admitted that other causes might operate to cause the accumulation of gas, but, after examining the entire record, including the testimony of the other doctors, and having all the facts available before him, he stated that no other factor was disclosed by the record which might have produced the condition referred to except the anæsthetic and the surgical operation.

It is conceded that other causes may be followed by an accumulation of gas in the stomach, and also that the heart might have collapsed from natural causes, and counsel for petitioner therefore urges that the evidence is not sufficient to sustain the finding upon this point. But Dr. Gibbon may be said, in the language of the Supreme Court in Santa v. Industrial Accident Commission, 165 Pac. 689, to have been "giving what on the facts before him and in the light of medical science, appeared to be the most probable explanation of the event." We can therefore see no distinction between that case and this, and, besides, the law does not require demonstration, but only that degree of proof which produces conviction in an unprejudiced mind, and surely no unprejudiced mind, reading the statements of these physicians as to the manner of this man's death, could come to any other reasonable conclusion than that Fleming died as the result of this surgical operation. The commission found in accordance with Dr. Gibbon's opinion on this point, and this finding in the state of the evidence we may not disturb.

For the reasons given, the petition is dismissed.

We concur: ZOOK, Presiding Judge pro tem.; KERRIGAN, J.

HALSTED et al. v. CENTRAL SAV. BANK et al.

SAME v. FIRST SAV. BANK et al. (Civ. 2302, 2304.)

(District Court of Appeal, First District, California. March 12, 1918. Rehearing Denied by Supreme Court May 9, 1918.)

1. BANKS AND BANKING \$\infty\$301(1)-Joint Ac-COUNTS-SURVIVORSHIP.

Where deceased deposited money in savings bank to joint account of himself and another, payable to their survivor, his heirs were not carrying a \$10,000 deposit to Mrs. Collins,

manifest.

2. Banks and Banking \$\ightharpoonup 301(1) - Joint ACCOUNTS-SURVIVORSHIP

Where deceased deposited money in savings bank to joint account of himself and another, payable to their survivor, further provision in deposit agreement that "the parties agree to be-come partners" therein did not affect the right of survivorship, when the contract was construed as a whole.

Appeals from Superior Court, Alameda County; W. H. Thomas, Judge.

Two actions by James D. Halsted and others against the Central Savings Bank, substituted for the Union Savings Bank, and Anna M. Collins, and against the First Savings Bank and Anna M. Collins. Judgment in each case adverse to plaintiffs, and they appeal. Both judgments affirmed.

O'Neill & O'Neill and Chapman & Trefethen, all of Oakland, for appellants. Harry E. Leach and Abe P. Leach, both of Oakland, for respondents.

BEASLY, Judge pro tem. These two cases arose out of the deposit of certain moneys in the defendant banks by James Mandeville Halsted, deceased, in the names of himself and his foster sister and housekeeper. Anna N. Collins.

On the 8th day of March, 1913, the deceased deposited with the Union Savings Bank the sum of \$12,915.87, and at the time signed with Mrs. Collins an agreement relating to this deposit which in substance provided that all moneys then on deposit or at any time thereafter to be deposited by either of them to the credit of this account were to be received by the bank on condition that the amounts thereof and all dividends thereon should be paid by the bank to the depositors, or either of them, or to the survivor of them, or to the personal representatives or assigns of such survivor, without reference to the original ownership of the moneys. This deposit was made in the names of James M. Halsted and Mrs. Anna Collins. Halsted at the time of making this deposit was in perfect health. He told Mrs. Collins, as she testified in response to questions by appellants' attorney, that this money was for her; that he wanted her to have it just as soon as anything happened to him; that he gave it to her, and it further appeared that what he meant by "anything happening to him" was his death. Of another witness. Mr. Furniss, he asked whether, in the event of his making a joint account in the bank, there would be any question about Mrs. Collins getting the money if anything should happen to him, and Mr. Furniss replied that there was no question about it. He told the witness De Pue that he had just been down to the bank and turned over or transferred a book

me Anna is provided for."

The deceased suffered a paralytic stroke in the month of March, 1911, and died on the 25th day of October, 1914. There seems to have been no change in the account until the day previous to his death, when Mrs. Collins transferred the account to her own name.

The court found that the claim to these funds made by the plaintiffs, as executors of Mr. Halsted's will, was without foundation and invalid; that the estate of the deceased had no interest in the money, and that the same was the sole and separate property of Mrs. Collins, to the possession of which she was entitled. It was conceded at the argument that the only difference between the facts of the case against the Union Savings Bank and the companion case against the First Savings Bank is in the language of the agreement signed at the time the deposit was transferred to the account of Mr. Halsted and Mrs. Collins. In the case of the First Savings Bank this agreement authorized and directed the corporation to open an account in the names of James M. Halsted and Anna Collins, payable to either or the survivor, and by this instrument the two persons named agreed with each other to become and be partners in the ownership of the moneys and of all interest thereon and all other moneys to be deposited to said account; and they agreed with each other that either and each of them and the survivor of them might at any and all times draw and receive from the bank the whole or any part of the money, and empowered each to sign their respective names to any receipt, check, or voucher for the money so drawn.

[1] The deceased was a man of few words apparently, and he said little at the time of making these changes in the deposits of his funds; but, as was said in Booth v. Oakland Bank of Savings, 122 Cal. 19, 54 Pac. 370, there can be no doubt of the intention of Mr. Halsted in this matter, and that intention should be carried out if the law will permit it. We do not deem it necessary to discuss the writings made for the purpose of giving a particular character to these deposits, or the facts of these cases at length. The facts showing an intention on the part of Mr. Halsted to create a trust in favor of Mrs. Collins in these funds are far stronger than were the facts in the case of Booth v. Oakland Bank of Savings, supra; and the findings of the court and the evidence supporting them bring the cases clearly within the rule in this court No. 2302. In all the cases the plaintiffs, as executors of the last will of James M. Halsted, deceased, are seeking to establish an interest in certain savings bank deposits belonging to the deceased in his lifetime, but in which he had created an interest in favor of Anna N. Collins amounting upon his death to absolute and sole ownership.

Upon the authority of the above-mentioned case of Halsted et al. v. Central Savings Bank, No. 2302, the judgment in each of these cases is affirmed.

and he added, "Now, if anything happens to of the following cases: Estate of Harris, 169 Cal. 725, 147 Pac. 967; McCarthy v. Holland. 30 Cal. App. 495, 158 Pac. 1045; McDougald v. Boyd, 172 Cal. 753, 159 Pac. 168; Waters v. Nevis, 31 Cal. App. 511, 160 Pac. 1081; and numerous other cases which have been decided by the Supreme Court and by this court in which similar instruments have been construed.

> [2] The expression that "the parties agree to become partners" in the case of the First Savings Bank account, when this agreement is held "by its four corners" and read and construed as a whole, does not change its meaning from that given it by the trial court. The intention is plainly the same as in the case of the Union Savings Bank, and we are not disposed to split hairs over definitions of words, but to hold that the intention so plainly indicated by all the acts and words of Mr. Halsted shall be carried out.

> The judgment is affirmed in each of the cases above entitled.

> We concur: LENNON, P. J.; KERRI-GAN, J.

HALSTED et al. v. OAKLAND BANK OF SAVINGS et al.

SAME v. CENTRAL SAV. BANK et al. (Civ. 2301, 2303.)

(District Court of Appeal, First District, California. March 12, 1918. Rehearing Denied by Supreme Court May 9, 1918.)

Appeals from Superior Court, Alameda County; W. H. Thomas, Judge.
Actions by James D. Halsted and others against the Oakland Bank of Savings and another, and by James D. Halsted and others against the Central Savings Bank and another. From the judgments rendered, plaintiffs in each case appeal. Judgment in each case affirmed.

O'Neill & O'Neill and Chapman & Trefethen, all of Oakland, for appellants. Harry E. Leach and Abe P. Leach, both of Oakland, for respondents.

PER CURIAM. The facts of these two cases are such as to present the same question that we have this day decided in James D. Halsted et al. v. Central Savings Bank, 172 Pac. 613, numbered in this court No. 2302. In all the cases

SOUTHERN CALIFORNIA IRON & STEEL CO. v. MAIER. (Civ. 2115.)

(District Court of Appeal, Second District, California. March 15, 1918.)

PLEADING \$\infty\$380 -- EVIDENCE -- ADMISSIBILITY.

In action on a corporation debt against a stockholder, where upon the allegations of the complaint as they stood admitted there was no issue as to the number of shares the corporation had outstanding when the debt was incurred, plaintiff was not entitled to raise such issue by introducing evidence contradicting the allegations of the complaint as to the number of shares.

Appeal from Superior Court, Los Angeles County; Wm. D. Dehy, Judge.

Action by the Southern California Iron & Steel Company against Edward R. Maier. From judgment for plaintiff, defendant appeals. Reversed.

A. L. Abrahams, of Los Angeles, for appellant. A. P. Michael Narlian and N. B. Nelson, both of Los Angeles, for respondent.

CONREY, P. J. The defendant appeals from a judgment entered against him in the sum of \$171.40 as a stockholder in Maier Pier Company, a corporation, on account of a contract whereby merchandise was sold to that corporation at the agreed price of \$857.04.

There is only a typewritten transcript of the record. The quotations from pleadings and from evidence, as printed in the briefs, are less complete than they should have been. But by piecing together a scrap found in one brief with other scraps found here and there in the other briefs, together with positive admissions of fact by counsel, we find enough, although barely enough, material for a decision on the merits. It is a dangerous practice for attorneys in preparing their briefs to neglect the provisions of section 953c, Code of Civil Procedure. We have referred to this matter in many recent decisions.

It was alleged in the complaint "that at the time said debts were contracted, the total number of shares of the capital stock of said corporation, Maier Pier Company, issued, subscribed and outstanding, was 77,941 shares." Without denying this allegation, the defendant denied that at the time mentioned he was a shareholder in the corporation, and alleged that at that time he had no stock therein. Nevertheless the court, in finding No. 6, declared:

"That at the time said contract was made said defendant Edward R. Maier was the owner of 1 share of stock, and that the total number of shares of stock subscribed for at that time was 5."

If appellant is right in his contention that finding No. 6 is unsupported by any evidence, the judgment must be reversed. Counsel for respondent contend that the pleadings were amended at the trial in such a manner as to eliminate the above-stated allegation as to

total number of shares of stock outstanding at the time in question and to substitute an allegation conforming to finding No. 6. It seems to be true, according to a quotation from the transcript as made by them, that the court allowed the parties to amend their pleadings to conform "to the facts and proof in the matter." But the more complete quotation given by counsel for appellant limits the amendment made at the trial to the following:

"That the plaintiff amends and alleges the contract to have been made on August 14th, and that the answer is amended to show that the defendant alleges that he had no stock on that date."

Counsel for respondent do not suggest that any proof was made on the subject before us, except that they introduced in evidence the articles of incorporation of Maier Pier Company, executed eight days before the making of the corporation's contract with the plaintiff, with the statement made by counsel that, as shown by those articles, 5 shares of the stock of the corporation were subscribed, of which the defendant Maier subscribed for 1 share. They admit, however, that these articles "were not copied into the record by the reporter, but this no doubt was through an oversight on his part." There has been no suggestion of diminution of the record, and it does not appear that respondent made any effort to have the record completed so as to have presented before this court this evidence which is vital to his However, we are of the opinion that case. upon the allegations of the complaint, as they stood admitted by the defendant, there was no issue upon the subject of number of shares of the corporation then outstanding. The plaintiff was not entitled to raise such an issue by introducing evidence, to which defendant duly objected, contradicting the allegations contained in its own complaint. The judgment is reversed.

We concur: JAMES, J.; WORKS, Judge pro tem.

Ex parte CORREA. (Cr. 599.)
(District Court of Appeal, Second District, California. March 14, 1918.)

Obscenity \$\iffsize 11\)—Complaint—Sufficiency. Under Pen. Code, \$ 311, providing that every person who willfully and lewdly exposes his person or the private parts thereof in any public place, or in any place where there are present other persons to be offended or annoyed, is guilty of a misdemeanor, a complaint charging that defendant at the time and place named did "willfully and unlawfully expose his person," etc., was insufficient, in that it did not allege that the acts were done "lewdly."

In the matter of the application of Jose Correa for a writ of habeas corpus. Granted, and applicant ordered discharged from custody.

N. D. Meyer, of Santa Ana, for petitioner. | will not be disturbed, in the absence of abuse L. A. West, Dist. Atty., and Arthur E. Koepsel, Deputy Dist. Atty., both of Santa Ana, for respondent.

PER CURIAM. Habeas corpus. Jose Correa is in the custody of the sheriff of the county of Orange under a commitment issued out of the justice's court of Anaheim township, Orange county. In that court Correa was convicted of an alleged misdemeanor pursuant to a complaint which charged that the defendant at the time and place named did "willfully and unlawfully expose his person," etc. It is admitted that by the complaint it was attempted to charge the offense described in section 311 of the Penal Code. section, so far as applicable to this case, is as follows:

"Every person who willfully and lewdly, either: One. Exposes his person, or the private parts thereof, in any public place, or in any place where there are present other persons to be offended or annoyed thereby; \* \* is guilty of a misdemeanor."

It is manifest, upon an inspection of the complaint, that it failed to charge the offense described in the statute. It was not alleged that the acts described were done "lewdly," nor were any words of equivalent meaning used in the complaint. An essential element of the crime being thus omitted, the complaint did not state a public offense.

It is ordered that the prisoner, the said Jose Correa, be discharged from custody.

JOHNSTON v. MURPHY. (Civ. 2324.) (District Court of Appeal, First District, California. March 7, 1918.)

1. Mortgages €==40 - What Constitutes FORM.

"This is to certify that there is due you a sum of \$4,000 secured by a lien upon certain land," when not accepted or received or treated by the recipient as a mortgage, and in the absence of showing that it was so intended by the sender, would not be considered a mortgage. sender, would not be considered a mortgage.

2. EQUITY \$==65(2) -- CLEAN-HANDS DOC-TRINE.

Where defendant deceived the mortgagee in-Where defendant deceived the mortgagee into giving him a deed for the land and then deeded it to his wife, he was in no position to defeat recovery on the note later given, on the ground that an instrument, not on its face a mortgage, was such in fact, and that the suit should have been for foreclosure thereof, especially where the bar of limitations could have been invoked against a later suit on the note, since unconscientious conduct, even without since unconscientious conduct, even withe fraud or illegality, precludes resort to equity. without \$588-CROSS-EXAMINATION 3. EVIDENCE

RECONCILING CONFLICTING STATEMENTS. Where statements of witness on cross-ex-amination, though apparently contradicting his statements on direct examination, were capable of reconciliation therewith, it was the duty of the court to reconcile them.

4. APPEAL AND ERBOR @ 984(5)—REVIEW—ATTORNEY'S FEES—DISCRETION.
In action on note empowering court to fix

attorney's fees, the court has a discretion which as a mortgage.

as to the amount to be awarded.

Appeal from Superior Court, Alameda County; J. O. Moncur, Judge.

Action by James A. Johnston against Herman Murphy. Judgment for plaintiff, and defendant appeals. Affirmed.

Edward C. Harrison and Maurice E. Harrison, both of San Francisco, for appellant, Daniel O'Connell, of San Francisco, for respondent.

BEASLY, Judge pro tem. This is an action begun December 31, 1914, on a promissory note given by defendant to plaintiff. principal defense is that the note was secured by a mortgage, and that the action should have been one of foreclosure.

The note was dated January 23, 1909. The alleged mortgage consists of a letter from the defendant to plaintiff, the body of which reads as follows:

"I hereby certify that there is due to you the sum of \$4,000. Said sum is secured by a lien upon that certain land comprising 937 acres in the rancho Los Positos, being the same land conveyed to me by Louis Aurrecoechea. The indebtedness is a prior claim to any lien I may have." have.

The letter was not acknowledged nor recorded.

The transactions between the parties of which this letter formed an incident may be stated more at large as follows: The defendant, Murphy, during or perhaps before the year 1902, acting for one Aurrecoechea, borrowed \$4,000 from plaintiff, and Aurrecoechea executed a mortgage on a ranch belonging to him to secure payment of the loan. In 1904 Murphy purchased the ranch from Aurrecoechea, and on July 19, 1906, he conveyed it to his wife. This deed was not recorded until June 30, 1908. Some time in the early summer of 1908-so Johnston testified-Murphy induced him to sign what he, Johnston, supposed was a release of a part of the ranch from the lien of the Aurrecoechea mortgage. but what turned out to be a deed of the entire ranch to Murphy. This deed was not recorded until November, 1906. Johnston did not learn until January 23, 1909—the date of the note in suit—of the true character of the paper he had signed in 1906, namely, of the deed to Murphy of the whole ranch, nor that this deed released the ranch from the lien of the mortgage: nor was anything said by Murphy even at that time about the deed to Mrs. Murphy, and it appears from Johnston's evidence that although the letter which defendant now seeks to have construed to be a mortgage is dated November 1, 1906, it was actually received by Johnston through the mail and after the execution of the note in suit. It also appears that Johnston kept this letter but made no reply to it; that is to say, it does not appear that he accepted it or treated it

sires to defeat recovery on this note by claim- the work of counsel evidenced by the record. ing that the letter in question is a mortgage, and argues that if it is not as a matter of law such, it should be so construed in equity. We cannot agree with him, for the reason, among others, that it is evident that Johnston did not receive or accept or treat it as a mortgage; nor does it appear upon its face, nor from the surrounding circumstances in evidence, that Murphy ever so intended it. Counsel suggests that it is "an imperfect attempt to create a mortgage" which will be considered a mortgage in equity, but it seems to us, in view of the defendant's conduct throughout these transactions, that he is in no position to invoke the aid of equity to have this paper declared a mortgage, a result which would defeat the collection of the note in this action. And it could not be collected in a new action should the defendant plead the bar of the statute of limitations. It is quite plain from the evidence that the trial court decided that Murphy had deceived Johnston into releasing the Aurrecoechea mortgage in full, and that the latter was not undeceived until after the note sued on here was executed. At that time Murphy's mortgage would have been of no value, for Mrs. Murphy owned the property, and Murphy refused to let her even sign the note. Upon these facts Murphy cannot be permitted to call upon a court of equity and conscience to indirectly relieve him from the payment of a just debt by holding this mere letter to be a mortgage. "It is not alone fraud or illegality which will prevent a suitor from entering a court of equity; any really unconscientious conduct connected with the controversy to which he is a party will repel him from the forum whose very foundation is good conscience." 1 Pomeroy's Eq. Juris. (3d Ed.) § 404.

[3] Defendant claims that the amount of interest included in the judgment is exces-Without going into the computation here it is sufficient to say that we find no error in the amount allowed by the trial court under this head. The plaintiff testified clearly as to the payments, and they were not disputed. It is claimed, however, that the plaintiff contradicted this testimony on cross-examination; but his testimony on cross-examination was susceptible of reconciliation with that on direct examination, and it was accordingly the duty of the court to reconcile this testimony. This it patently did.

[4] The judgment provides for \$700 attorney's fees, which defendant objects is excessive. Under the provisions of the note the duty of fixing a reasonable fee for plaintiff's attorney rested upon the trial court; and its judgment in that matter will not be disturbed unless its discretion has been abused. Berke-1101.

[1, 2] Upon the facts, the defendant de- to have been abused in this case considering Judgment affirmed.

> We concur: LENNON, P. J.; KERRI-GAN, J.

> Ex parte SCHWITALLA. (Cr. 597.) (District Court of Appeal, Second District, California. March 13, 1918.)

> 1. CRIMINAL LAW \$\sim 238-PRELIMINARY EX-AMINATION-PROBABLE CAUSE-UNCORROBO-BATED ACCOMPLICE TESTIMONY.

> The uncorroborated testimony of an accomplice may be sufficient to establish probable cause for the magistrate's action in holding accused to answer for trial, and in committing

> 2. CRIMINAL LAW \$\infty 238-Preliminary ExAMINATION - UNCORROBORATED ACCOMPLICE TESTIMONY.

> While a defendant cannot be convicted upon the uncorroborated testimony of an accomplice, the testimony of an accomplice is sufficient to make it appear that there is a "probability" that defendant has been guilty of the offense charged.

> Application by Alexis M. Schwitalla for a writ of habeas corpus. Writ diacharged, and petition remanded.

> Harry A. Chamberlin, of Los Angeles, for Thomas Lee Woolwine, Dist. petitioner. Atty., and Asa Keyes, Deputy Dist. Atty., both of Los Angeles, for respondent.

> JAMES, J. Habeas corpus. asks to be discharged from the custody of the sheriff of Los Angeles county to which he was heretofore committed by a magistrate. A complaint in sufficient form, charging defendant with the crime of arson, was filed before the magistrate and after examination had, at which testimony was taken, the order holding defendant to answer for trial to the superior court was made and commitment issued.

[1] One contention urged is that the evidence was insufficient to establish probable cause for the holding of the defendant. The principal evidence against the defendant was furnished by an accomplice in the alleged crime. This accomplice very fully narrated the acts which the defendant did and which were participated in by the witness, all of which showed that the fire was the result of a deliberate plan of the defendant. There was the further testimony of a witness who was not an accomplice, wherein it was shown that the defendant, some months prior to the time the building was burned, solicited the co-operation of that witness to the end that the building which was ultimately destroyed should be set fire to. We are not prepared to concede, notwithstanding the holding made by the Supreme Court of Nevada in Ex parte Oxley, 38 Nev. 379, 149 ley, etc., v. Miller, 23 Cal. App. 315, 137 Pac. Pac. 992, that the uncorroborated testimony The court's discretion does not seem of an accomplice may not be sufficient to es-

tablish probable cause. may be sufficient.

[2] While a defendant cannot be convicted upon the uncorroborated testimony of an accomplice, the testimony of an accomplice is admissible and is proper to be considered, and we think is sufficient to make it appear that there is a "probability" that a defendant has been guilty of the offense charged against him. Our Supreme Court, in People v. Cokahnour, 120 Cal. 253, 52 Pac. 505, held that the unsworn written confession of a defendant, which constituted the entire evidence submitted to the committing magistrate, was sufficient to justify an order determining that probable cause existed upon which the defendant was held to answer. See, also, Ex parte Heacock, 8 Cal. App. 420, 97 Pac. 77. And we may add that, to our minds, the testimony of the independent witness who gave evidence of the plan of the defendant to burn the building several months prior to the time the fire actually occurred furnished some corroboration, slight though it was, of the testimony of the accomplice.

The writ is discharged, and petitioner remanded to the custody of the sheriff of Los Angeles county.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

## JOLLY v. McCOY. (Civ. 1524.)

(District Court of Appeal, Third District, California. March 11, 1918. Rehearing Denied by Supreme Court May 9, 1918.)

1. Husband and Wife 4=131(1) - Owner-SHIP-BURDEN OF PROOF.

In a wife's action against the sheriff for the conversion of personalty taken and sold under writ of execution pursuant to judgment rendered against her husband, the burden to prove her ownership of the property was upon plaintiff wife.

2. Husband and Wife €==262(1)—Community of Separate Property—Possession of

TY OR SEPARATE PROPERTY—POSSESSION OF HUSBAND—PRESUMPTION—STATUTE. Where personalty was in the possession of the husband, and treated by him as though it were community or his own separate property, from the circumstances a disputable presumption follows, under Code Civ. Proc. § 1963, subd. 12, that such was its character.

3. APPEAL AND ERROR \$\infty\$1064(1)\to Harmless Error\text{Instruction}\to "Acquire."

In a wife's action against the sheriff for the conversion of personalty under execution pursuant to judgment against her husband, the wife claiming the property was her separate estate, the instruction that in determining the question as to who was the owner the jury had a right to consider the manner in which the property to consider the manner in which the property was acquired and by whom, where it was kept, how it was handled, and by whom controlled, etc., though open to criticism as lying close to the line between law and fact, and being somewhat confusing, was harmless to plaintiff, since the word "acquire" has not only the meaning of to obtain as one's own, but also the meaning of "procure," in which sense the jury may have understood if. understood it.

fEd. Note.-For other definitions, see Words

We think that it 4. Trial \$\iftharpoonup 191(4) -- Instructions -- Assumption of Question in Issue.

Instructions that the use of the property by the husband, and his control of it, or any part of it, did not change its status from the wife's separate property, etc., and that the mere fact that the property was seemingly in the possession and apparent control of the husband did not estop the wife from claiming the stock, or deprive her of her separate property, were ob-jectionable, as assuming the property was the separate estate of the wife, the question in issue. 5. Trial \$\infty 260(6)\$—Instructions—Requests

MATTERS COVERED. Where the court instructed that certain insurance money with which the property was purchased was the wife's separate property, and that, if the money was used by her to buy some or all of the property sued for, such property also became the wife's separate property, she could not ask for more as to such feature of the case, and her proposed instruction that the deposit of the insurance money by her in bank in her own name and the name of her husband was not a gift to him, unless she intended to give, could have been of no greater benefit to her.

Appeal from Superior Court, Yuba County: Eugene P. McDaniel, Judge.

Action by Mrs. Minnie Jolly against Chas. J. McCoy. From a judgment for defendant, plaintiff appeals. Affirmed.

John M. Fulweiler, of Auburn, and E. Ray Manwell, of Marysville, for appellant. W. H. Carlin, of Marysville, for respondent.

BURNETT, J. The action was for dainages for conversion of certain personal property of the alleged value of \$1,871. The defendant is the sheriff of the county, and he justified his taking and sale of the property under a writ of execution issued in pursuance of a judgment rendered in the superior court of said county against A. Jolly, the husband of the plaintiff herein.

The claim of appellant was and is that said property sold under said execution was her separate estate, and therefore not liable for the debts of the husband. Plaintiff, her husband, and their son all testified to facts from which the jury might legally have drawn the inference that her claim was just, and, if the verdict had been in her favor, we should have no hesitation in affirming it as amply supported. But the jury distrusted these witnesses, and it is apparent, also, that the trial judge was not convinced that they were entitled to full credit, as he denied the motion for a new trial. Since we have not had the witnesses before us, we cannot say that such attitude of the court and jury was unwarranted. Indeed, we may add that the printed record of their testimony reveals certain circumstances that tend to justify the suspicion with which their statements were undoubtedly received by the jury. These we need not stop to particularize.

[1, 2] As to the support for the verdict, unless the jury believed the story told by and Phrases, First and Second Series, Acquire.] said witnesses, it was their duty to find for the defendant, since the burden of proof was, but it seems rather objectionable as emphaupon the plaintiff. The peculiar province of by this court in Clark v. Tulare Lake Dredging Co., 14 Cal. App. 414, 112 Pac. 564, and in this connection it is sufficient to refer to that decision. Besides, the evidence showed that all of the property was in the possession of said A. Jolly, and treated by him as though it were community or his own separate property. From this circumstance, the presumption-disputable, it is truewould follow that such was its character. Code Civ. Proc. § 1963, subd. 12.

The observation may not be out of place that fraudulent claims as to the ownership. of property under similar conditions are often made, and the court or jury should scrutinize with care an asserted right, which has been quiescent until credit may have been extended on the faith that such right does not exist. No doubt such claims are sometimes genuine, and, where so established, they should be protected; but it is hardly to be expected that they will be regarded without some suspicion. We may add that, as to a portion of the property which plaintiff claims she obtained from her husband, the jury was justified in concluding that there was not an immediate delivery and continuous change of possession within the contemplation of section 3440 of the Civil Code. Upon the whole it cannot be said that the verdict of the jury lacks legal support.

[3] Another question seriously argued arises over the action of the court in reference to the instructions. Most of them are unobjectionable, however, and therein were presented quite fully the legal principles bearing upon the theory of plaintiff as well as of defendant, and the general axioms that should be regarded by the jury in every case. The following, though, is somewhat open to criticism:

"I instruct you that, in determining the question as to who was the owner of the property claimed by plaintiff herein at the time of the levy of the writ of execution therein by the defendant, you have a right, and it is your duty, to consider the manner in which said property was acquired and by whom, where it was kept, how it was handled, and by whom controlled, whether or not it was mingled with other property admittedly belonging to the husband of plaintiff, whether or not there was anything plantin, whether or not there was anything about the use, possession, or control of said property, or anything at all about the use, possession, or control of said property, or anything at all in connection with the property, to indicate that it belonged to any other person other than the husband of plaintiff, and all the facts and circumstances begins upon the guestions as and circumstances bearing upon the question, as the same is made to appear to you from the evidence; and if, from the consideration of all thereof, you are not satisfied by a preponderance of the evidence that said property was the sep-arate property of plaintiff at the date of the levy of the writ of execution, your verdict should be in favor of defendant."

The instruction lies close to the line bedirection as to the weight of the evidence, | trol of the property by the husband was not

sizing certain features that were developed the jury in such matters is fully considered by the testimony in the case. No doubt, respondent in his argument to the jury, laid particular stress upon the facts suggested in the instruction, and the peculiar phraseology thereof might be seized upon by the jury as an argument in favor of the defendant. In other respects, also, the instruction is somewhat confusing. The jury was directed "to consider the manner in which said property was acquired and by whom." One meaning of the word "acquire" is to "obtain as one's own." An ultimate fact to be determined by the jury was really, "By whom was the property acquired?" The instruction, however, puts this ultimate fact upon the same footing as certain evidentiary matters, and directs the jury to consider this in connection with other facts, to determine who was the owner of the property; whereas it would seem to be true that, if they were satisfied as to who had "acquired" the property, that would be equivalent to a determination as to who was the owner. If the instruction had declared that in the determination of "who had acquired or owned the property the jury should consider the manner in which the property was obtained, where it was kept, how it was used, and whether mingled with other property of the husband," etc., there would be less ground for criticism. But it is fair to say that the word "acquired" has also the meaning of "procured," and it is not unreasonable to hold that the jury so understood it. Indeed. while we think the instruction is somewhat obscure and of doubtful propriety, the common understanding would probably accept it as a direction to consider the manner in which the property was procured and how it was used, with other circumstances disclosed by the evidence, in the determination of the ownership of the property. Besides. the other instructions were so clear and favorable to appellant that we are satisfied she suffered no prejudice in this matter.

[4] Among certain instructions requested by the plaintiff and refused by the court was the following:

"The use of the property by the husband, and his control of the same, or any part of said per-sonal property of the wife, did not change the status of the property from the plaintiff's separate property, or make it liable to levy and sale to pay the debt of Jolly & Son, or either of them.

This was also refused:

"The mere fact that the property was seemingly in the possession and apparent control of the husband does not estop the wife from claiming the stock, or in any wise deprive the wife of her separate property therein."

Both instructions were objectionable in assuming that the property was the separate estate of the wife-the very question which the jury was to determine. If appellant had requested the court to instruct the tween law and fact. It is not strictly a jury that the mere possession, use, and coninconsistent with the ownership of the wife, | purchased with the insurance money. It or was not sufficient to transfer title, it is thus to be seen how exceedingly favorable would probably have been given. To say that it "did not change the status of the property from the plaintiff's separate property" was, of course, to assume that it had such status. If the phrase "would not" had been used, the situation might be different.

[5] Another instruction refused was this: "The deposit of the insurance money by the plaintiff in the bank in her own name and in the name of the husband was not a gift to him, unless she then intended to give the same absolutely to him; and it is the intent with which that deposit was made in the bank that must appear by a preponderance of the evidence to have been to divest herself of all interest in the money and make it the money of her husband, and so long as she held the bank book, and the control of the money, it could not in law be a gift to her husband."

It appears from the evidence without any question that plaintiff had received something over \$2,500 as insurance money and had deposited it as suggested in said proposed instruction. It was the claim of appellant that with this money she purchased the property in controversy here, and, to meet the possible conclusion that the money became community property by reason of the form of the deposit, the instruction was re-The court, however, virtually instructed the jury that the money was the separate property of the wife, and also:

"That if this money thus received by plaintiff was by her or under her instructions used to buy was by her or under her instructions used to buy some or all of the personal property described in the complaint, then such personal property, thus purchased, became and was her separate property, and was not liable to levy and sale to pay the debts of her husband, A. Jolly & Son, Raphael Jolly, or that of either of them."

As a matter of law, therefore, the court instructed the jury that under the evidence this money was the separate property of the plaintiff. She could not ask for more as to this feature of the case, and the proposed instruction could have been of no greater benefit to her. Indeed, it is quite apparent that, since the court instructed the jury that this insurance money was the separate property of the wife, and, that, if she used it in the purchase of any of the property in controversy, that property was also her separate property and not liable for the debts of her husband, it left only one question for the jury to determine and that is whether she so purchased it. If they believed she did purchase it with said money, under this instruction of the court, they must have found for the plaintiff, notwithstanding any possession, use, or control by the husband. It appears clear, therefore, that no specific instruction as to a change of title by virtue of the use of the property could have been of any avail to appellant, and also that the instruction given on behalf of respondent, to which we have adverted, could only have been considered by the jury in deciding whether any of the property was actually tiff, and defendant appeals. Affirmed.

to appellant was the law presented by the

The question of the intention of the wife to make a gift to the community or to her husband, and the consideration of the use and control of the property, were entirely eliminated, and the jury were expressly told that, if any of the insurance money was used to purchase any of said property, they must find it to be plaintiff's separate property and not subject to execution. Respondent might have some cause to complain of this instruction, but not so the appellant, While the case is not altogether free from difficulty, we think it cannot be said that the verdict is unjust.

The judgment is therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

TURNER v. WATKINS. (Civ. 2114.) (District Court of Appeal, Second District, California. March 12, 1918.)

1. Pleading == 122-Answer-Sufficiency. Denial in answer predicated upon a lack of information only, and not upon a lack of information and belief, is insufficient under Code Civ. Proc. § 437, providing that, if defendant has no information or belief upon the subject sufficient to enable him to answer an allegation of the complaint, he may so state in his answer, and place his denial on that ground.

2. Trial &=25(4)—Opening and Closing-Affirmative Defense — Answer — Sui FICIENCY

In action for commission for furnishing one ready to exchange land, affirmative allegations in answer that the exchange was not "consummated," that defendant was at all times ready to exchange and failure was not his fault, and that the deal fell through because of misrepresentations of the broker, did not amount to a traverse of anything averred in the complaint, and where the denial was insufficient, the court properly required the defendant to go forward at the opening of the trial with his affirmative defenses.

3. Brokers 51 - Exchange of Lands -CONSUMMATE.

Where broker agrees to "consummate" an exchange of land within 30 days, he has done his part by bringing the parties together so that his principal could have carried through the deal in such time.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Consummate: Consummated Sale.]

4. BROKERS € 36(7)—EXCHANGE OF LANDS—
COMMISSION—SUFFICIENCY OF EVIDENCE.
In action by broker for furnishing one
ready to exchange lands, evidence held sufficient to sustain finding that deal did not fall
through by reason of false representations of the broker.

Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

Action by E. C. Turner against Roy 8. Watkins, administrator of the estate of W. C. Watkins, deceased. Judgment for plainA. T. Roark, of San Diego, for appellant.

John F. Greer and W. P. Cary, both of San

Diego, for respondent.

WORKS, Judge pro tem. This is an action for the recovery of a broker's commission for an exchange of real property, under a contract between the plaintiff and the defendant's intestate, W. C. Watkins. The plaintiff had judgment, and the defendant appeals.

[1] At the opening of the trial the respondent contended that the denials of appellant's answer were insufficient to present a defense, and asked the court to rule that the appellant should go forward with his proof in support of certain affirmative defenses set up in the answer. The court ruled accordingly, and the ruling is assigned as error. The claim that the denials of the answer were insufficient was based upon the fact that they were preceded by the following statement, ending with a colon:

"Not having sufficient information on which to base his answer, defendant denies:"

Section 437 of the Code of Civil Procedure contains this language:

"If the defendant has no information or belief upon the subject sufficient to enable him to answer an allegation of the complaint, he may so state in his answer, and place his denial on that ground."

It will be observed that the denials in the answer in this action were predicated upon a lack of information only, and not upon a lack of information and belief. A denial in that form is insufficient; for section 437 permits a denial only upon the want of both information and belief, and not upon a want of information alone. Humphreys v. McCall, 9 Cal. 59, 62, 70 Am. Dec. 621.

[2] The appellant insists, however, that the affirmative allegations of his answer present a state of facts inconsistent with the allegations of the complaint, and that for that reason the answer amounted to a traverse of the complaint; and he accordingly contends that the respondent should have been compelled to go forward with the introduction of evidence in support of the complaint. The affirmative matter in the answer was to the effect that the exchange for the bringing about of which the respondent claimed a commission "was not consummated within the 30 days set apart for that purpose, nor during any other period of time, nor has said exchange yet been consummated by the parties to said deal," and that the failure to consummate it was not due to any fault of appellant's intestate, but that he was always "ready and anxious" to carry out the arrangement. It is also alleged that the failure to consummate the deal was occasioned by the fact that the respondent made certain misrepresentations to the parties on the other side; the misrepresentations having to do with the matter of the value of and the income derived from his principal's property. The allegation that the exchange was not |

consummated within 30 days arose from the fact that there was a provision in the commission contract to the effect that it was to be consummated within that time; but that allegation, as well as the allegation that it was never consummated at any time, negatived nothing in the respondent's pleading, for respondent does not contend that the deal ever went through, and it is his theory of the case that he is entitled to a commission because he brought the parties together, the other side, as he alleges, having at all times been ready, able, and willing to make the exchange. The allegation of the answer that the failure to consummate the exchange was not due to any fault of appellant's intestate, and that he was at all times desirous of carrying it out, is a plain allegation of new matter, as there was no averment upon the subject in plaintiff's pleading. The statement of the answer that the deal fell through because of misrepresentations made by the respondent is, of course, not responsive to anything in respondent's pleading. It is plain, then, that the affirmative allegations in the answer did not amount to a traverse of anything averred by respondent in his pleading.

[3] The contract upon which the action was based provides, in part, that appellant's intestate "agrees to pay E. C. Turner a commission \* \* \* on account of above exchange; said exchange to be consummated on or before thirty days from date first above written." As already remarked, the respondent does not contend that the deal ever was completed. He claims that the commission was earned when he presented to his principal the parties on the other side, one Brown and one Anderson, and by his principal having entered into an agreement with them for the exchange, within the 30 days limited in the commission agreement, which the record shows he did. The appellant insists, however, that the deal could have been consummated, in the sense intended by the commission agreement, only by the passing of deeds between the parties, and that therefore no commission was earned. Our courts have long adhered to the rule that a broker who contracts to sell has earned his commission when he has presented to his principal one who is ready, able, and willing to buy (Phelps v. Prusch, 83 Cal. 626, 23 Pac. 1111; Purcell v. Firth [Sup.] 167 Pac. 379); and in the latter case the commission was to have been paid, under the written agreement between the parties, when the sale was "consummated." The only difference, then, between that case and this lies in the fact that in the one the broker was to be paid upon the consummation of a sale, while in the other he was to be paid upon the consummation of an exchange, which, to our minds, is, in legal effect, no difference at all. The exchange was consummated to the extent that such a result could have been brought about by the respondent. The parties principal on both sides had entered into an agreement for the exchange, and over the performance of the terms of that agreement he could exercise no control. All the services he could have performed in the premises were completely rendered, and his commission was earned.

[4] Upon the issue as to whether the failure to complete the deal between the principals was because of misrepresentations made by the respondent to Brown and Anderson. the trial court found with the respondent. The appellant contends that the finding lacks support in the evidence, but the contention is untenable. It is enough to say, without making a more detailed statement of the evidence, that: First, the respondent never had any dealings with Anderson in the matter of the proposed exchange; and, second, if it be conceded for the purpose of the argument that misrepresentation was made by the respondent to Brown, the latter testified that the statements were not ascertained to be incorrect until "after the deal was turned down "

In his opening points and authorities A. T. Roark, the counsel for the appellant, quotes language as coming from a certain reported case, but it is found only in the brief of the party unsuccessful on the appeal which is there decided; he cites two cases to a proposition of law stated within quotation marks, the language not being found in the report of the case first cited, and being stated in a dissenting opinion in the report of the second; he cites four cases to a statement within quotation marks, and the quoted language is found in none of them: he quotes from the opinion in another case, but omits from his quotation an important clause found in the opinion, and without indicating the omission in any way; he quotes certain language as being in the case last mentioned when it is not to be found in the opinion, and he later commits the same offense as to another reported case. Counsel for the respondent calls attention in his points and authorities to all these derelictions, and, in addition, specifies two or three other faults of the same character. have not examined into these latter charges because of the length of the reports of the cases in which they are involved. In his reply points and authorities Mr. Roark has only this to say upon the subject which now interests us:

"Respondent, after offering a great variety of criticisms to citations of law quoted by appellant bearing on the point as to what constitutes consummation of a real estate broker's contract, was charitable enough to concede that the laws of the states of Maryland and Georgia dealing with contracts of this character support appellant's contention."

The amazement with which we view the conduct of Mr. Roark in the matter of the erroneous citations and quotations in his points and authorities is heightened by the cavaller manner in which he seeks to dismiss

the subject. If in fact these misquotations were no more than the result of gross carelessness, he should have admitted the facts, with an apology and a suggestion of any excuse that he might have for committing such errors. Nothing less was due to the court, which is entitled to rely upon counsel for a true statement of the language contained in quoted decisions. He has left himself in a very poor position to urge the charge made in his reply brief that opposing counsel has pursued a certain course in framing his argument, "for the purpose of confusing this court."

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

UNWIN v. BARSTOW-SAN ANTONIO OIL CO. (Civ. 2121.)

(District Court of Appeal, Second District, California. March 12, 1918.)

1. ATTORNEY AND CLIENT 6-75(1) — WITH-DRAWAL OF ATTORNEY—NOTICE OF SUBSTI-TUTION.

Code Civ. Proc. § 286, requiring that when an attorney withdraws the party for whom he is acting must, before further proceedings are had against him, be required by the adverse party in writing to appoint another attorney or appear in person, does not apply when, at the time of the withdrawal, the client serves notice that he appears in person, since giving notice would then be a futile thing.

Since, under Code Civ. Proc. §§ 1033, 1035. Costs cannot be determined until disposition of pending motion to tax, an order just prior to denial of a motion to tax, fixing keeper's fees in favor of the sheriff, as permitted by Pol. Code. § 4300b, was in time, and such item was properly included in the cost bill.

Appeal from Superior Court, San Bernardino County; J. W. Curtis, Judge.

Action by B. V. Unwin against the Barstow-San Antonio Oil Company. From a judgment for plaintiff, and an order denying defendant's motion to tax costs, defendant appeals. Judgment and order affirmed.

Fred A. Wilson, of San Bernardino, for appellant. C. C. Haskell and John A. Hadaller both of San Bernardino, for respondent.

WORKS, Judge pro tem. This cause is before us on two appeals by the defendant; one being from the judgment, and the other from an order denying the defendant's motion to tax the costs in the action.

There is but one point presented on the appeal from the judgment. The first appearance of appellant in the action was by a demurrer to the complaint, filed in its behalf by an attorney at law. In the due course of procedure in the action the demurrer was overruled and time was allowed to answer. On a certain day thereafter the appellant its attorney had withdrawn from the case. The notice was attached to a document sign-

ed by the appellant and by its retiring attorney, which stated that it was "stipulated and agreed" between them that the attorney "may, and he does hereby, withdraw from said action as attorney for said defendant therein, and that the said defendant may, and it does hereby, appear in said action in person and without attorney." In addition to its appearance, thus formally entered by the appellant in person, it did, on the same day, serve and file its answer in the action, signed by itself by its resident agent. Thereafter the respondent caused the case to be set down for trial. Upon the date set, the appellant having employed new counsel in the interim, it was objected by him that the court had no jurisdiction to proceed with the trial on the ground that respondent had not complied with the provisions of section 286 of the Code of Civil Procedure, which provides:

"When an attorney dies, or is removed or suspended, or ceases to act as such, a party to an action, for whom he was acting as attorney, must, before any further proceedings are had against him be required by the adverse party, by written notice, to appoint another attorney, or to appear in person.

fil The court overruled the objection, and it is complained that the ruling was erroneous. The contention cannot be sustained. The only object of the notice contemplated by the statute is to require of a party whose attorney has ceased to act that he appoint a new attorney or appear in the action in person. In this case the appellant had voluntarily appeared in person on the same day that respondent had notice that the attorney had ceased to act. It would be useless, in any situation, and speaking generally, to require one to do a thing which he had already The statute, in this instance, does not require the commission of such an act of folly.

[2] On the appeal from the order the question which is presented has to do with the taxing, as costs, of an item of keeper's fees under an attachment. Section 4300b of the Political Code provides that there shall be allowed the sheriff, as keeper's fees, "such sum as the court may fix." The respondent served and filed his cost bill, and in it he included a certain sum for keeper's fees. The appellant made its motion to tax the costs specified in the cost bill by striking out the sum charged for keeper's fees on the grounds that the item was not legally chargeable as costs, that it was not necessarily incurred, that it had not been legally fixed as required by law, and that it was prematurely charged and included as costs. On the day that the motion to tax came on for hearing, the court made an order fixing the amount charged in the cost bill for keeper's fees as a proper sum to be charged for the service rendered. The court then made its order denying appellant's motion to tax.

properly included in the cost bill for the reason that the order of the court fixing it as a proper charge was not made before the cost bill was filed. No authorities are cited which support this contention, although several decided cases are presented which are to the effect that keeper's fees are not recoverable as costs where there is an entire absence of such an order as was here made on the day the motion to tax was passed on. These cases are in no way helpful in the solution of the question now presented, and we are unable to see why, in such a case, the order need be made earlier than it was made in the present instance. The amount in question had no standing as an item of chargeable costs, even though it appeared in the cost bill, until the order was made disposing of appellant's motion to tax, for the costs in an action are not determined, and the amount of them cannot be inserted in the judgment until disposition is made of any pending motion to tax. Code Civ. Proc. §§ 1033, 1035. The order fixing the amount of the keeper's fees was in time.

The judgment and order are affirmed.

We concur: CONREY, P. J.; JAMES, J.

REYNOLDS V. E. CLEMENS HORST CO. (Civ. 1731.)

(District Court of Appeal, Third District, California. March 15, 1918.)

Powers of Court.

The appellate court has inherent power to grant application for stay of issuance and transmission of remittitur in order to permit application to Supreme Court of the United States for certiorari, where a jurisdictional question is involved.

APPEAL AND ERROR 4 1188-REMITTITUR-POWERS OF COURT.

Where there is ground on which the United States Supreme Court might issue a writ of certiorari to review a state court decision, though there is some doubt, stay of issuance and transmission of remittitur to the trial court pending application for such writ will be granted, where no prejudice will result, and otherwise irreparable injury might be done.

Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

Action by Susan M. Reynolds against the E. Clemens Horst Company. On defendant's application for stay of issuance and transmission of remittitur. Application granted. See, also, 170 Pac. 1082.

Harrison & Harrison, of San Francisco, and H. P. Andrews and W. A. Fish, both of Red Bluff, for appellant. Frank Freeman, of Willows, and James T. Matlock, of Red Bluff, for respondent.

PER CURIAM. This is an application by appellant for a stay of the issuance and transmission of the remittitur from this Appellant contends that the item was not court to the superior court of the county of Tehama. The application is made in order that appellant, before execution of the judgment, may have an opportunity to apply to the Supreme Court of the United States for a writ of certiorari; it being contended that said superior court had no jurisdiction of appellant by reason of its residence in another state. The judgment of the lower court was affirmed by this court on December 28, 1917 (170 Pac. 1082), and a petition for a rehearing was denied. On February 25, 1918, the Supreme Court denied a petition to have the cause heard by that court, and the judgment has therefore become final as far as the state courts are concerned.

[1] There is no doubt this court has inherent power to grant the application. same principle is involved as in the exercise of the power of courts of common law to temporarily stay execution of their judgments, whenever it was necessary to accomplish the ends of justice. Eaton v. Cleveland Ry. Co. (C. C.) 41 Fed. 421. Indeed, it is not disputed by counsel for respondent that Attention is called to the power exists. the fact that the Supreme Court has exercised control over remittiturs even after their issuance to prevent wrong and injus-Trumpler v. Trumpler, 123 Cal. 248, 55 Pac. 1008.

[2] Respondent, however, contends with much learning and the citation of numerous decisions of the United States Supreme Court that there is no substantial ground for the belief that said court will entertain the writ. It has undoubtedly been decided by that tribunal that where, as herein, an action has been begun in a state court and then transferred to a federal court, and by the latter remanded to the state court, an appeal or writ of error will not lie to the Supreme Court of the United States. However, it is the contention of appellant that the rule has been changed by an amendment passed by Congress September 6, 1916, to the Federal Judicial Code (U. S. Comp. St. 1916, § 1214), and that the remedy of certiorari may be invoked.

We think appellant is in error, but courts do not always agree, and the Supreme Court of the United States might, of course, find merit in appellant's position. At least, there is some room for candid disputation, and, since it does not appear that respondent will suffer any injury by a short delay in the execution of the judgment, whereas appellant might suffer irreparable damage if the judgment should be carried into execution, and thereafter the Supreme Court of the United States should hold that the superior court was entirely without jurisdiction, we think the application should be granted. It must be understood, though, that this court will not voluntarily extend the time allowed unless some extraordinary reason should appear.

TOWN OF CALISTOGA v. ADAMS, Town Clerk. (Civ. 1833.)

(District Court of Appeal, Third District, Cal-March 11, 1918.) ifornia.

MUNICIPAL CORPORATIONS \$\ifthat{\operation} 919\text{—Bonds.}\$
The act relating to the incurring of indebtedness by municipalities (St. 1901, p. 28), dectedness by municipalities (St. 1901, p. 28), requiring municipal bonds to be payable annually in parts not less than one-fortieth part of the whole indebtedness, does not require annual payments to be uniform in amount.

Original application by Town of Calistoga for writ of mandamus against I. C. Adams, as Town Clerk of the Town of Calistoga. Writ granted.

Wallace Rutherford, of Napa, for petitioner.

PER CURIAM. The petitioner prays for the writ of mandate of this court commanding the respondent, as town clerk of the town of Calistoga, to countersign certain bonds issued under the authority of an ordinance passed by the town of Calistoga. The ordinance provided that:

nance provided that:

"Said bonds shall be called 'Waterworks Bonds', shall be forty in number, of the denomination of one thousand dollars each, and shall be numbered consecutively from one to forty, both inclusive, and shall be payable in numerical order consecutively, commencing with number one, in the manner following, that is to say: Bond No. 1 shall be paid on January 1st, 1919, bond No. 2 shall be paid on January 1st, 1920, bond No. 3 shall be paid on January 1st, 1921, bond No. 4 shall be paid on January 1st, 1922, bond No. 5 shall be paid on January 1st, 1923."

Bonds Nos. 6 and 7 were made payable on January 1, 1924, bond No. 8 January 1, 1925, and so on throughout the series, payments being at regular period but in irregular amounts, sometimes one bond maturing and sometimes two, bringing the final payment on January 1, 1939, 21 years after the issuance of the bonds.

Section 5 of the act relating to the incurring of indebtedness by municipal corporations, etc. (Stats. 1901, p. 28) reads, in part, as follows:

"All municipal bonds issued under the provisions of this act shall be payable substantially in the manner following: A part to be de-termined by the legislative body of the municipality, which shall be not less than one-fortieth part of the whole amount of such indebtedness, shall be paid each and every year on a day and date, at the city treasury, to be fixed by the legislative branch of the municipality issuing the bonds, together with the interest on all sums unpaid at such date.

The objection now made to the manner in which the payments are to be made is that they do not conform to the statute, in that the annual installments are not uniform in amount. We see nothing in the act, either expressly or by implication, requiring that the payments shall be made at annual consecutive periods in equal amounts. The only lim-The remittitur will be stayed for 30 days. | Itation, apparently, is that payments shall

not to be less than one-fourtieth part of the |7. Physicians and Surgeons ==11(3)—Revwhole amount of the indebtedness.

At the argument the following cases were cited by petitioner which seem to support its contention: Simonton on Municipal Bonds, § 102; Turpin v. Madison Co., Fiscal Court, 105 Ky. 226, 48 S. W. 1085; Board of Com'rs of Kearney Co. v. Vandriss, 115 Fed. 866, 53 C. C. A. 192; Keith Co. v. Citizens' Svgs. & Loan Ass'n, 116 Fed. 13, 53 C. C. A. 525; Olty of Venice v. Lawrence, 24 Cal. App. 350, 141 Pac. 406.

In our opinion the provisions of the ordinance are authorized by the statute, and therefore it is ordered that the writ prayed for in the petition be granted.

#### LANTERMAN v. ANDERSON et al. (Civ. 2407.)

(District Court of Appeal, Second District, Cal-ifornia. March 8, 1918. Rehearing Denied by Supreme Court May 7, 1918.)

CERTIORABI \$==28(1)-Scope of REMEDY-

RECORD.

The office of the writ of certiorari is to determine only whether the inferior board or court has acted in excess of jurisdiction, and the investigation of the trial court will go no further than to inspect the record as it appears written than to determine from that inhether there has and to determine from that whether there has been action unwarranted by the powers given to the board or court whose proceedings are under review.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Certi-

2. Certiorari 4=5(1)-Record-Remedy by APPEAL.

The writ of certiorari cannot be used to take the place of an appeal or to add to or modify a record with respect to any jurisdictional fact therein determined.

3. CERTIORARI \$==56(2)-Scope of Reviews CONTRADICTION OF RECORD.

In certiorari to review order of board of medical examiners, revoking license of the petitioner to practice medicine, where the record recital was that a quorum of the board was present on the hearing, petitioner could not make a showing that one of the board absented

himself for a time from the session.

4. Constitutional Law \$\infty\$\infty\$80(2) — Division of Powers—Judiciary—Board.
St. 1915, p. 184, providing for revocation of a physician's license to practice for professional misconduct, is not unconstitutional as conferring upon a board powers belonging strictly to the judicial department.

S. Physician's Aven Supercond (2011/2)

5. Physicians and Subgeons =11(3)-Rev-OCATION OF LICENSE-COMPLAINT TO BOARD

-Sufficiency.

A complaint to the board of medical exam-A complaint to the board of medical examiners, charging a physician in the language of St. 1915, p. 198, § 12, subd. 1, with attempting a criminal abortion, was sufficient, without stating the acts of the offense, since Pen. Code, § 950, requiring such statement, does not apply to proceedings before the board of examiners.

6. Physicians and Surgeons === 11(3)-Rev-OCATION OF LICENSE-EVIDENCE-TESTIMONY OF ACCOMPLICES.

Since a proceeding to revoke the license to practice of a physician is not criminal, the rule that a person may not be convicted upon the uncorroborated testimony of an accomplice does not apply in such proceeding.

OCATION OF LICENSE - EVIDENCE-SUFFI-CIENCY.

Evidence held to warrant revocation of physician's license to practice on the ground that he aided in performing a criminal abortion.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Proceeding for writ of review by R. S. Lanterman against Harry E. Anderson and others. From a judgment affirming the proceedings and determination of the board of medical examiners revoking petitioner's license to practice medicine, petitioner appeals. Affirmed.

W. H. Dehm, Frank Dominguez, and W. J. Ford, all of Los Angeles, for appellant. John W. Hart, of Los Angeles, for respondents.

JAMES. J. This is an appeal from the judgment of the superior court rendered upon hearing of a writ of review and which judgment affirmed the proceedings and determination of the board of medical examiners of the state under and by which the certificate and license authorizing petitioner to practice medicine and surgery was revoked.

In the court below, by his petition, appellant set up a very complete record of the evidence and proceedings had before the respondent board. Respondents, not questioning the correctness of the record as there pleaded, objected to the legal sufficiency of the facts shown. The board further filed in the superior court affidavits to meet one allegation made in the petition of appellant. By that allegation it was asserted by petitioner to be the fact that one of the members of the board absented himself during the hearing, and that therefore no quorum was present at all times while the evidence was being taken. The charge made, and upon which the order revoking the license and certificate of petitioner was based, was that petitioner had been guilty of unprofessional conduct as defined by the state medical act. Stats. 1915, p. 184; Deering's Gen. Laws, 1915, p. 877. In section 12 of that act it is provided that the certificate of a physician may be revoked or suspended. It is first required that there shall be filed with the secretary of the board a sworn complaint, charging the holder of the certificate with "having been guilty of unprofessional conduct." It is then provided that the secretary shall issue a citation, requiring the certificate holder to appear at the next session of the board of medical examiners, which shall occur at least 30 days after the filing of the complaint. It is further provided that after issue has been joined by answer, the board shall proceed to determine the matter, and may hear such "proper" evidence as may be adduced before it. In the same section the things which shall constitute unor revocation of the certificate are specifically set forth. Appellant was charged under the first subdivision, which reads as follows:

"The procuring or aiding or abetting or attempting or agreeing or offering to procure a criminal abortion."

The complaint made, in its charging part. was as follows:

"That on or about June 19, 1916, the said R. S. Lanterman did, in the county of Los Angeles, state of California, procure, aid, and abet, and attempt, agree, and offer to procure a criminal abortion upon a pregnant woman, to wit, Elizabeth Johnson."

[1, 2] The first point made by appellant is that the trial court erred in refusing to take testimony upon the alleged issue as to whether one member of the board had absented himself during the taking of evidence. As before noted, the record of the proceedings had and testimony taken was made a part of the petition of the petitioner, and as to the correctness of that record or its completeness respondents made no issue. office of the writ of certiorari is to determine only as to whether the inferior board or court has acted in excess of jurisdiction, and the investigation of the trial court will go no further than to inspect the record as it appears written and to determine from that whether there has been action taken unwarranted by the powers given to the board or court whose proceedings are under review. The writ may not be used to take the place of an appeal or to add to or modify a record with respect to any jurisdictional fact determined therein. In re Grove Street, 61 Cal. 453; De Pedrorena v. Superior Court, 80 Cal. 144, 22 Pac. 71. Petitioner in no case is permitted to contradict the record as to the jurisdictional facts shown thereby.

[3] Examining the petition filed herein, we note at once that the exhibit attached to the petition purports to be an exact record of the proceedings had at the hearing of the charge made against petitioner before the medical board. That record contains this · recital:

"At the hour of 11:00 a. m. of the above day, there being a quorum of the board present, the following proceedings were had."

Nowhere in that record-and the whole thereof is given as from a reporter's transcript—is it shown that any member of the board absented himself during the hearing of the charge. The assertion made by the record is that a quorum of the members was present, and we cannot presume in the face of that recital that any other condition existed throughout the hearing. There was a recital that an adjournment was taken at one point until 4 p. m., and at 4 p. m. continued until 8 p. m. of October 5, 1916, and the opening paragraph of the record made shows that at the convening of the evening session a quorum of the board was again present. The allegation in the petition,

professional conduct authorizing suspension charging that a quorum was not present at some time during the hearing, is directly in conflict with the record, and the record must prevail. Therefore, upon the face of appellant's petition, the trial judge was compelled to hold that no issue was tendered as to that matter which required the taking of evidence.

> [4] The point is suggested, too, that the act under which petitioner was prosecuted is unconstitutional. The particular ground of this objection is that powers are conferred which belong strictly under the Constitution to the judicial department. Acts of the nature here under consideration have been repeatedly sustained as a proper exercise of the legislative grant. Various boards performing legislative and ministerial functions have the incidental and necessary power, sometimes referred to as quasi judicial, to determine facts and enter their judgment thereon; such as boards of supervisors, boards of equalization, boards of police commissioners, and many other unnecessary to name. Referring specially to medical acts, it is said in Hewitt v. Board of Medical Examiners, 148 Cal. 590, 84 Pac. 39, 3 L. R. A. (N. S.) 896, 113 Am. St. Rep. 315, 7 Ann. Cas. 750:

"Legislation of the character embraced within the general scope of the act in question, in so far as it provides for the revocation of the cer-tificate of a physician, \* \* \* is sustained upon the ground that the Legislature has au-thority under its general police power to provide all reasonable regulations that may be necessary affecting the public health, safety, or morals, and with this object in view to provide for the dismissal from the medical profession of all persons whose principles, practices, and character render them unfit to remain in it. As the duty of determining whether such profession or moral unfitness exists must necessarily be vested in somebody other than the Legislature, it is usually committed by appropriate legislation to boards composed of men learned in their profession."

See, also, Ex parte McNulty, 77 Cal. 164, 19 Pac. 237, 11 Am. St. Rep. 257; Ex parte Whitley, 144 Cal. 167, 77 Pac. 879, 1 Ann. Cas. 13; Meffert v. State Bd. of Medical Registration, 66 Kan. 710, 72 Pac. 247, 1 L. R. A. (N. S.) 811.

[5] The principal contention made, however, is that the complaint filed before the board of medical examiners was insufficient in its statement of facts to sustain the determination based thereon. The charge, as we have already quoted it, was phrased exactly in the language of that portion of the act defining the particular unprofessional conduct of which it was charged petitioner had been guilty. Counsel for appellant argue that because the statute refers to a "criminal abortion," and that because in order to determine what a criminal abortion is one must look to the Penal Code, the charge would be insufficiently laid unless the acts defined in the Penal Code as constituting the crime of abortion are set forth. Appellant was not charged with a crime, nor was he

subject, upon the adverse determination or through irregular method of procedure made, to any penalty except the revocation of his license to practice medicine and surgery. The contention of counsel would be entitled to more serious consideration were we considering here a criminal offense with its attendant penalties, as the same is understood under any of the penal laws of the state. Where an indictment or information is drawn under the Penal Code, it must, of course, comply with the provisions of section 950 of that Code, in that it must contain "a statement of the acts constituting the offense, in ordinary and concise language. \* \*" No similar provision appears in the medical act. It must be said, we think, that the language of the statute is sufficiently explicit to advise a person charged thereunder of the particular kind of unprofessional conduct which it is proposed to prove against him, and that, we think, is all that need be said upon the question. The case cited by appellant, where the Supreme Court of Oregon held a complaint before the medical board to be insufficient because not alleging sufficient facts (Board of Medical Examiners v. Eisen, 61 Or. 492, 123 Pac. 52), presents a case under a law different from that before us. In the decision it is recited that:

"Before a license can be revoked by said board for unprofessional or dishonorable conduct under the provisions of this act a complaint of some person under oath must be filed in the office of the secretary of said board, charging the acts of unprofessional or dishonorable conduct and facts complained of against the licentiate accused, in ordinary and concise language."

That provision which finds place in the Oregon law is practically identical with the provision of section 950 of our Penal Code, but, as has been just stated, is entirely absent from our medical act. It has been held that an accusation made under Penal Code, § 772, having as its object the removal of a public officer, is not required to conform to the provisions of section 950 et seq. of the Penal Code. Woods v. Varnum, 85 Cal. 639, 24 Pac. 843.

[6] The last contention which we shall notice is that there was no legal or sufficient evidence authorizing the medical board to make the order complained of. The force of this objection rests chiefly upon the assertion that all the material testimony furnished against the appellant was that given by accomplices. The action not being criminal in its nature, it is again, apparent that the statutory mandate that a person may not be convicted upon the uncorroborated testimony of an accomplice has no application here. We feel satisfied that any witness whose testimony as to competent facts was convincing to the board engaged in the hearing of the charge would be legally sufficient. It is said in Tinn v. U. S. District Attorney, 148 Cal. 774, 84 Pac. 152, 113 Am. St. Rep. 354, that certiorari will not review a deci- full period. In the face of this evidence, it sion rendered upon "insufficient evidence" cannot be said that the findings made by the

not going to the question of jurisdiction. The statement in the opinion to that effect is no doubt subject to the qualification that an entire want of evidence may present a case showing a lack of power to render a judgment or make a finding. We have expressed the conclusion, however, that the testimony of persons who might be accomplices could be received and might be considered by the board trying the charge.

[7] There was ample testimony coming from the persons concerned in the commission of the act charged to sustain the determination made by the medical board. the facts here may be made more fully to appear, we will briefly state in an abstract way the substance of the testimony: A young drug clerk had engaged in illicit intercourse with a girl of about 18 years. He testified that when he concluded, by reason of the cessation of the menstrual act, that she had become pregnant, he gave her certain drugs to take, which did not produce the desired effect. He testified that he then took her to petitioner's office, and that a young woman named Smith accompanied Miss Smith remained in the antethem. room while a conversation was had with petitioner; that he told petitioner that the young woman was in trouble, and wanted to know whether he could get her out of it; that petitioner responded that the young woman would have to be given an anesthetic and be curetted; that she would be in a hospital 24 hours, and the service would cost \$55; that no examination was made of the young woman, but that petitioner gave her a card with the address of a Mrs. Purcell upon it, and told the young man to take the young woman out there. The girl testified that she went to the place and presented the card and was admitted; that in the afternoon petitioner arrived and she was taken down and placed upon a table and given an anesthetic and operated upon. The young man in question testified that he carried the girl back to her room from the operating table. The operation was admitted to have been made in the place of Mrs. Purcell, and it was shown that a sister of Mrs. Purcell administered the anesthetic. The appellant and Mrs. Purcell and her sister all testified that no abortion was performed, but that the girl came to the house suffering from an excessive flow, and that Dr. Lanterman operated upon her for that trouble. Another physician testified that he made an examination of the girl some weeks after the operation had been made and found a condition showing that there had been a dilation of the sexual organs. The petitioner further admitted that the girl had appeared at his office, but denied that he had agreed to perform any abortion upon her, stating that he had advised that the pregnancy be allowed to run its

medical board were wholly wanting in proof | violence, from which fall she sustained painto sustain them.

The judgment appealed from is affirmed.

We concur: CONREY, P. J.: WORKS, Judge pro tem.

# CITY OF CUSHING v. STANLEY. (No. 8404.)

(Supreme Court of Oklahoma. Feb. 26, 1918. Rehearing Denied May 7, 1918.)

### (Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS \$= \$16(1)-DE-FECT IN STREETS-PERSONAL INJURY.

Petition examined, and held to state a cause of action.

2. Negligence ⇐⇒136(2) — Question for Jury—Taking Issue from Jury.

What is negligence is generally, under proper instructions, a question for the jury. And when competent evidence has been admitted to prove negligence, it is only where the standard of duty is capable of being determined as a matter of the property of the standard feets. ter of law, or where, under the undisputed facts, reasonable men could not draw different conclusions respecting the question of negligence, that the court is warranted in taking the question of negligence from the jury.

Error from District Court, Payne County; A. H. Huston, Judge.

Action by Willie A. Stanley against the City of Cushing. Judgment for plaintiff and defendant brings error. Affirmed.

Weldon & Mitchell, of Cushing, for plaintiff in error. Thos. G. Andrews, of Stroud, F. A. Rittenhouse, of Chandler, and Robert Lowry, of Stillwater, for defendant in error.

BRETT, J. In this case the defendant in error sued the city of Cushing and recovered a judgment, and from this judgment the city has appealed.

The material facts in the case are that defendant in error, a married lady, was driving a span of horses, hitched to a buggy, and they became frightened at some children coming up behind them on roller skates. The horses ran, and it is alleged that on Broadway, one of the main thoroughfares of the city, the street had been permitted to remain in an unsafe condition, by reason of deep and dangerous holes in the middle of said street; that the defendant in error had almost regained control of the horses, and would have been able to have stopped them without injury, but for the fact that the buggy plunged into one of these holes in the street, and threw her from the buggy, to and upon the street, with great force and

ful and serious injuries.

The city in its brief presents but two questions: First, that the court erred in not sustaining its demurrer to the petition; and, second, that the court erred in not sustaining its demurrer to the evidence.

[1] The petition alleges, in substance, that it was the duty of the city to keep and maintain its streets in a reasonably safe condition for the use of those who had occasion to travel upon them; that this street was, and had negligently been, permitted to remain in an unsafe and dangerous condition at the point where the defendant in error received her injuries; and that such negligence was the proximate cause of her injuries. facts thus pleaded stated a cause of action. and the court properly overruled the demurrer to the petition.

[2] 2. On the proposition that the court erred in not sustaining the demurrer to the evidence, we will say that whether the street had negligently been permitted to become and remain in an unsafe and dangerous condition, and whether such negligence was the proximate cause of the injuries sustained by the defendant in error, were questions of fact to be determined by the jury. For what is negligence is generally, under proper instructions, a question for the jury. And when competent evidence has been admitted to prove negligence, it is only where the standard of duty is capable of being determined as a matter of law, or where under the undisputed facts reasonable men could not draw different conclusions respecting the question of negligence, that the court is warranted in taking it from the jury. And neither of these conditions existed in the case at bar. For there was a sharp conflict between the testimony offered on behalf of the city and that offered on behalf of the defendant in error, both as to the condition of the street and as to the circumstances under which the accident occurred. There was testimony on behalf of the defendant in error to the effect that the hole into which the buggy plunged was about 3 by 6 feet, and from 18 inches to 2 feet deep. And the evidence of the defendant in error also was that her injuries were not only temporarily painful, but resulted in a miscarriage, and had greatly impaired her health. And under these conditions the evidence was properly submitted to the jury. Littlejohn v. Midland Valley Ry. Co., 47 Okl. 204, 148 Pac. 120.

The judgment is affirmed. All the Justices concur.

For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

COMANCHE ICE & FUEL CO. v. BINDER & HILLERY. (No. 8333.)

(Supreme Court of Oklahoma. Dec. 11, 1917. Rehearing Denied May 7, 1918.)

(Syllabus by the Court.)

1. JUDGMENT @== 720 - RES JUDICATA - PAB-TIES.

A fact or question which was actually and directly in issue in a former suit, and was there judicially passed upon and determined by a court of competent jurisdiction, is conclusively settled by the judgment therein, so far as con-cerns the parties to that action and persons in privity with them, and cannot be again litigated in any future action between such parties or privies, in the same court, or in any other court of concurrent jurisdiction, upon the same or a different cause of action.

2 JUDGMENT €==634—RES JUDICATA—RELIT-IGATION.

When a matter has once passed to final judgment, without fraud or collusion, in a court of competent jurisdiction, it has become res judicata, and the same matter between the same parties or their privies cannot be reopened or subsequently considered.

Commissioners' Opinion, Division No. 2. Error from District Court, Stephens County; Cham Jones, Judge.

Motion by the Comanche Ice & Fuel Company against Binder & Hillery to vacate a judgment. Judgment for defendant, and plaintiff brings error. Affirmed.

H. B. Lockett, of Comanche, for plaintiff in error. H. W. Sitton, of Duncan, for defendant in error.

GALBRAITH, C. On the 12th day of July, 1915, the plaintiff in error presented a motion to vacate a judgment rendered upon default on the 15th day of November, 1909, establishing a lien in favor of Binder & Hillery, on lots 1, 2, and 3, block 107, of the town of Comanche, Stephens county, Okl., for a certain material sold and delivered to the Comanche Ice & Cold Storage Company, in the erection of certain improvements upon said property, and ordering the property sold to satisfy said lien. The motion alleged that the Comanche Ice & Fuel Company was a corporation duly organized under the laws of Oklahoma, and was the owner and in the peaceful possession of the property above described; that on May 13, 1908, the defendants, Binder & Hillery, commenced an action against the Comanche Ice & Cold Storage Company to establish a lien and to foreclose the same for certain materials alleged to have been sold and used in the erection of improvements on said property; that at that time the said Comanche Ice & Cold Storage Company did not own the property or any interest therein, and did not make any appearance in said action; that on November 15, 1909, a decree was entered in said cause on default, establishing a lien as prayed in the petition and ordering the sale of the property

said cause are seeking to enforce the decree rendered therein, and are threatening to have an order of sale issued thereon, and will do so unless restrained from so doing by the order of court, etc., and that said decree, so far as it undertook to establish a lien and to foreclose the same, was void, first, because "no sufficient service was ever had upon the defendants in said action to authorize a default judgment; second, that the petition filed by plaintiffs in said action and upon which decree was based, and the only petition ever filed in said cause, did not state facts sufficient to authorize the court to find any lien or to order the sale of said property, or to affect the title or possession in any manner." The prayer was that the sale be restrained, and on final hearing that the judgment be vacated.

On the hearing of the motion the movant offered in evidence the petition filed May 13, 1908, by Binder & Hillery in the action to establish their lien, and the decree rendered in that action, and rested. The defendants in error offered in evidence a copy of the petition in the case of Geo. W. Works against W. M. Cates, sheriff of Stephens county, and Wm. Binder and R. H. Hillery, partners, Binder & Hillery, filed in the district court of Stephens county July 23, 1910, and resulting in the judgment of November 11, 1910. sustaining a demurrer to such petition. In this petition Works alleged that he was the owner of the property above described, and that he purchased the same for \$13,500 at the foreclosure sale under the decree of the district court of Stephens county rendered upon the trust deed executed by the Comanche Ice & Cold Storage Company in August. 1907, conveying the property above described to the trustee for the benefit of all of its creditors, and that this trust deed was foreclosed and the sale made in May, 1908, and that the defendants, Binder & Hillery, had caused an order of sale to be issued upon their judgment rendered in November, 1909. against the Comanche Ice & Cold Storage Company, and had placed the order in the hands of the sheriff of Comanche county for execution, and that he had seized the property and advertised it for sale, and would do so unless restrained by the order of the court; that the judgment of November, 1909, upon which the order of sale was issued, was void for the reason that the materials for which the same was rendered were not necessary and were not used in the construction and erection of the building upon said property and because said suit was not brought within the time prescribed by the statute, and a restraining order was asked against the sheriff and against Binder & Hillery from making the sale, or any attempt to enforce said judgment. Binder & Hillery appeared and filed a general denial on Novemto satisfy the same, and that the plaintiffs in | ber 10, 1910. On November 11, 1910, the

cause came on for hearing upon a demurrer to the petition. This demurrer was sustained, and the temporary restraining order theretofore granted in said cause was dissolved, and the cost of action assessed against the plaintiff. The demurrer is not in the record. We infer, however, that all of the defendants joined therein, as the journal entry of the judgment recites that the case was disposed of on the demurrer. Although an exception was saved and notice of appeal given, it does not appear that the appeal was perfected, and therefore that judgment sustaining the demurrer became final.

On the 26th day of November, 1915, the motion to vacate the instant case came on for hearing, and the journal entry of the judgment rendered thereon, after reciting the ap-

pearance of counsel, proceeds:

"Thereupon the Comanche Ice & Fuel Company offered in evidence a petition filed in this action and offered in evidence a decree of this court, whereupon the attorney for plaintiff to save introduction of evidence of undisputed facts admitted that the only matters in dispute were the sufficiency of the plaintiff's petition filed in this action to justify the rendition of the decree complained of, and whether the issues involved in this motion had not been barred by another judgment rendered concerning the same matter, and that the petition offered by the Comanche Ice & Fuel Company was the only petition filed by the plaintiff in this action and the only one filed and was the one upon which said decree was rendered, and that the decree offered was the decree sought to be vacated and was the only decree rendered in said action, and that the same had been rendered in plaintiff's favor and the plaintiffs were seeking to enforce the same against said property. Plaintiff then offered in evidence the decree heretofore rendered in the case of Works v. Cates. Upon the testimony offered and the admissions of parties the court finds that the Comanche Ice & Fuel Company are the owners of said lots subject to said decree; that the said petition states facts sufficient to sustain the decree fixing, finding, and foreclosing a mechanic's lien on the property described in said motion and charging the same with the payment of said judgment. It is therefore ordered that said motion be and the same is hereby overruled, to which said Comanche Ice & Fuel Company excepts."

[1, 2] A consideration of this record convinces us that the trial court rendered the correct judgment, although we are inclined to think that he gave the wrong reason for it, inasmuch as the sufficiency of the petition to sustain the decree in favor of Binder & Hillery rendered on November 15, 1909, was in issue and directly passed upon by the same court, resulting in the judgment of November 11, 1910. The grounds upon which the judgment of November 15, 1909, was attacked were that the judgment was void because the facts set out in the petition were not sufficient to authorize the judgment. That decree has not been appealed from, and therefore became final. Although the Comanche Ice & Fuel Company was not a par-

cause came on for hearing upon a demurrer in error that decree was res adjudicata in to the petition. This demurrer was sustained, and the temporary restraining order theretofore granted in said cause was distance. In Pratt v. Ratliff, 10 Okl. 168, theretofore granted in said cause was dis-

"A judgment is a bar if the cause of action be the same, though the form be different. The cause is the same when the same evidence will support both actions; or rather, the judgment in the former action will be a bar provided the evidence necessary to sustain the judgment for the plaintiff in the present action would have authorized a judgment for him in the former. When a matter has once passed to final judgment without fraud or collusion, in a court of competent jurisdiction, it has become res judicata, and the same matter, between the same parties, cannot be reopened or subsequently considered."

In Woodworth v. Town of Hennessey, 32 Okl. 267, 122 Pac. 224, it is held:

"A fact or question which was actually and directly in issue in a former suit, and was there judicially passed upon and determined by a domestic court of competent jurisdiction, is conclusively settled by the judgment therein, so far as concerns the parties to that action, and persons in privity with them, and cannot be again litigated in any future action between such parties or privies, in the same court, or in any other court of concurrent jurisdiction, upon the same or a different cause of action." See Earl v. Earl et al., 48 Okl. 442, 149 Pac. 1179; Prince v. Gosnell, 47 Okl. 570, 149 Pac. 1162.

The Comanche Ice & Fuel Company was a successor in title to Works, who had succeeded to the title of the Comanche Ice & Cold Storage Company. The title passed subject to and burdened with the lien established by the final judgment of November 15, 1909. The regularity of that judgment was brought in question by the action commenced in 1910, resulting in the judgment of November 11, 1910, which was not appealed from and therefore became final.

It therefore appears that the judgment appealed from should be affirmed.

PER CURIAM. Adopted in whole.

BERRY v. TOLLESON et ux. (No. 8965.) (Supreme Court of Oklahoma. March 5, 1918. Rehearing Denied May 7, 1918.)

### (Syllabus by the Court.)

1. GUARDIAN AND WARD \$\infty 103\to Confirmation of Sale.

The judgment of a county court in confirming a guardian's sale of real estate will be accorded like force, effect, and legal presumption as the judgments and decrees of other courts of general jurisdiction.

2. GUARDIAN AND WARD \$\iiint 105(1) - Mort-gages \$\iiint 153 - Sale - Validity of Lien.

cause the facts set out in the petition were not sufficient to authorize the judgment. That decree has not been appealed from, and therefore became final. Although the Comanche Ice & Fuel Company was not a party to that suit, it is a privy in interest, being a successor in title and is bound by that decree, and the contention of the defendants of the mortgage did not participate in this fraud or have notice sufficient to put him decree, and the contention of the defendants of the mortgage did not participate in this fraud or have notice sufficient to put him upon inquiry. Such exchange constitutes fraud

upon the estate of the ward, and the sale may be set aside in an action against the purchaser or any person acquiring rights in said lands with knowledge, or chargeable with notice, of such fraud.

3. MOBTGAGES &= 154(2) — NOTICE TO PURCHASER'S MORTGAGEE—EVIDENCE.

The circumstances relied upon to charge the

mortgagee with notice so as to put him upon inquiry examined, and held not sufficient to charge him with notice of fraud in the guardian's sale.

### (Additional Syllabus by Editorial Staff.)

4. Words and Phrases — "Bona Fide Purchaser."

The essential elements which constitute a "bona fide purchaser" are a valuable consideration, the absence of notice, and the presence of good faith.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Bona Fide Purchaser.]

Error from District Court, Garvin County; F. B. Swank, Judge.

Action by W. D. Berry against R. E. Tolleson and wife. Judgment for defendants denying foreclosure and canceling mortgage, and plaintiff brings error. Judgment reversed, and cause remanded, with directions to enter judgment for plaintiff.

Bennett & Pope, of Oklahoma City, for plaintiff in error. Stuart, Cruce & Cruce, of Oklahoma City, for defendants in error. Ames, Chambers, Lowe & Richardson, of Oklahoma City, amicus curiæ.

OWEN, J. This action was brought by W. D. Berry in the district court of Garvin county to foreclose a mortgage executed by R. E. Tolleson and wife. Judgment below was for the defendants denying the foreclosure and canceling the mortgage.

Tolleson purchased the land in question at a guardian's sale, and executed a mortgage This guardian's sale purported to Berry. to sell the lands belonging to Charles, Bruce, and Thomas Hamm, minors. It is conceded the probate proceedings were in all things regular so far as the record discloses. It appears from the evidence that the sale was not in fact for cash, but was in exchange for certain other real estate; the exchange being accomplished by proceedings to reinvest the funds of the minors.

The case presents but two questions: First. Is a guardian's sale of lands, under an order of the proper probate court, apparently for cash, but where the purchaser pays for the land in other real estate, void to such an extent that the grantee cannot convey title thereto to an innocent purchaser for value? Second. If the sale is not void, is the plaintiff in error a purchaser for value and without notice, to the extent of his mortgage?

[1] The county courts of this state in probate matters are courts of general jurisdiction, and the orders and judgments of such

are entitled to the same favorable presumption, force, and effect accorded those of other courts of general jurisdiction. Rice v. Theimer, 45 Okl. 618, 146 Pac. 702; Moffer v. Jones, 169 Pac. 652; Welch v. Focht (No. 8436) 171 Pac. 730, not yet officially reported.

[2] Under the former holding of this court. where a guardian sells the land of his ward apparently for cash, but upon a secret understanding that property will be accepted in payment of the purchase price, the sale may be set aside in an action of the ward against such purchaser, or any other person who acquires rights with notice of such fraud. Bridges v. Rea, 166 Pac. 416; Allison v. Crummey, 166 Pac. 691. Our attention has not been directed to any case in which it has been held by this court that such fraud on the part of the guardian and the purchaser rendered the sale void as against innocent purchasers for value.

Counsel insist that, the court having no jurisdiction to order a sale except for cash, as required by section 6557, Rev. Laws 1910, no title passed to the purchaser. This section requires the sale to be made for cash only, and the records of the sale show a sale for cash, receipt of cash by the guardian, and a confirmation of the sale by the court. This was exactly the sort of a sale required by the statute so far as the records disclose. In a proper action brought by the minors against the purchaser this sale would have been held void for the reason that he was a party to the fraud, not for the reason that the estate did not benefit by the sale. We have the same condition as if there was no consideration whatever passed from Tolleson to the guardian, or if the guardian, after receiving the money, had misappropriated it. He is liable under his bond to the minors to the extent of their damage as the result of this fraud. The statute requires a bond to cover the proceeds of the sale in addition to the general bond of the guardian, and was enacted to meet conditions arising from just such fraud as appears here. This bond contemplates a sale being conducted as provided by law. It covers the collection and retention of the purchase price. If the guardian fails to collect, or, after collecting, fails to retain the purchase price, the liability accrues upon his bond. Dunleavy v. Mayfield. 155 Pac. 1145; Allison v. Crummey, supra; In re Potter's Estate, 249 Pa. 158, 94 Atl. 465, L. R. A. 1916A, 637.

To give the orders and decrees of the county court full faith and credit in probate matters, where the proceedings are in all things regular and proper, innocent purchasers for value must be protected. Probate sales in this state are entitled to the same faith and credit of any judicial sale, and will not be set aside as against an innocent purchaser on proof of secret agreements between the courts, when acting within their jurisdiction, guardian and the original purchaser, which

are not disclosed by the record and cannot ence of good faith. If any one of these esbe ascertained by such investigation as would ordinarily be made by a reasonably prudent person. To hold otherwise would mean that the purchaser at guardian's sale would not pay the full value for the land. Such title would be rendered practically unmarketable. As was said by this court in the case of Allison v. Crummey, supra:

"On the other hand, if such sales which are perfectly fair on their face and appear to have been conducted according to law and have been approved by the court are held to be good as against a claim for fraud, arising out of such secret understanding, stability will be given to such titles, and purchasers using proper caution will be induced to pay a fair value for such will be induced to pay a fair value for such lands."

[3] In support of the contention that Berry was not an innocent purchaser counsel rely principally upon two circumstances. When the mortgagee was en route to examine the lands, before making the loan, he was introduced to the father and guardian of the minors, and informed that he was the man from whom Tolleson was purchasing the land. And before the money had been advanced on the loan, a petition had been filed by the guardian asking leave to invest the funds of these minors in other real estate. Counsel insist that, if Berry had made inquiry of the guardian concerning these lands, and the terms of sale, he would have been advised that the sale was not, in fact, for cash, but to be made in exchange for other real estate, and that he was chargeable with this notice. The filing of the petition to invest the funds in other real estate of approximately the same value, it is urged, was sufficient to arouse the suspicion that this was not, in fact, to be done, but was merely an exchange of real estate. These circumstances, to our minds, were calculated to allay rather than arouse suspicion. We fail to see anything to arouse suspicion in the mere fact that Tolleson introduced his grantor to Berry. The records showing the sale was made for cash and the cash received, it was not a suspicious circumstance to learn from the record that the guardian, having the cash on hand, desired to reinvest it in other real estate. The statute requires this duty of the guardian, if in his judgment a reinvestment will be profitable to the minors. Under section 6569, Rev. Laws 1910, the county court may authorize and require the guardian to invest the proceeds of sales in other real estate. To learn from the record that the court had ordered this to be done would not, in our opinion, be such a suspicious circumstance as to render Berry a purchaser with notice. That Berry advanced \$12,000 there is no question, and it is not contended he had actual notice of the exchange of property.

[4] The essential elements which constitute a bona fide purchaser are a valuable consideration, the ausence of notice, and the pres- | H. L. Standeven, Judge.

sential elements is lacking, a person is not a bona fide purchaser as the term is known to the authorities. 8 C. J. 1146.

The rule is well settled that Berry is chargeable with any knowledge he would have received upon inquiry, if the circumstances mentioned were such as to arouse the suspicions of a reasonably prudent man, or to suggest to his mind any such irregularity in the proceedings as might affect the sale. The trial court considered these circumstances sufficient to put Berry upon inquiry. We are compelled to take a different view.

Therefore the judgment of the lower court will be reversed, and the cause remanded, with directions to enter judgment for plaintiff foreclosing the mortgage according to its terms. All the Justices concur.

HOFFMAN BROS. INV. CO. v. PORTER. (No. 9693.)

(Supreme Court of Oklahoma. April 23, 1918.)

(Syllabus by the Court.)

1. APPEAL AND ERROR & 564(3)—OVERFULING OF MOTION FOR NEW TRIAL—CONSTRUCTION OF ORDER—EXTENSION OF TIME FOR FILING CASE-MADE—"30-10-5 FOR CASE-MADE." MADE.

The inclusion of "30-10-5 for case-made" in an order of court overruling a motion for a new trial and entry of notice of appeal should be and is construed as an allowance by the court to the plaintiff in error of an extension of time within which to make and serve a case-made, and a case-made served within such extension was served in time.

2. GROUNDS FOR NEW TRIAL--Impossibility OF MAKING CASE-MADE-STATUTE.

OF MAKING CLASE-MADE—STATUTE.

Under the ninth subdivision of section 5033.

Rev. Laws 1910, it is a ground for a new trial when, without the fault of the complaining party, it becomes impossible to make a case-made and under section 5035, Rev. Laws 1910, at application for a new trial on this ground may applicate the section 5035. be made at any time during the term the order appealed from was made.

3. APPEAL AND ERROR \$\infty\$ 345(1) - APPEAL FROM ORDER—JURISDICTION.

Where plaintiff in error appeals from the order of the county court overruling his motion for a new trial on the ground of the impossible ity of making a case-made, and the petition in error and case-made are filed in this court with in six months from the time said order is mace. the appeal is filed in time and the jurisdicties of this court attaches.

APPEAL AND ERROR \$\infty\$ 801(1)-Motion to Dismiss Frivolous Appeal-Denial.

A motion to dismiss an appeal on the group. that the same is frivolous will be denied wherthe question cannot be determined without si examination of the evidence adduced in support of the motion for a new trial, and the case has not been submitted or briefed on its merits.

(Additional Syllabus by Editorial Staff.)

APPEAL AND ERROR =110-APPEALABLE ORDERS.

An order overruling a motion for a new trial is an appealable order.

Error from County Court, Tulsa County;

For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Action between the Hoffman Bros. Investment Company and Jack A. Porter. From a judgment of the county court, on appeal from a justice court, in favor of the latter, the former brings error. Motion to dismiss appeal overruled.

Albert C. Hunt, of Tulsa, for plaintiff in error. Lee Daniel, of Tulsa, for defendant in error

RAINEY, J. This action was originally filed in a justice of the peace court of Tulsa county, and on appeal tried in the county court of said county, where judgment was rendered against the plaintiff in error on the 2d day of June, 1917. Motion for a new trial was filed and overruled, and notice of appeal to the Supreme Court given by the plaintiff in error. An extension of 60 days was given plaintiff in error within which to make and serve case-made, the defendants in error given 10 days thereafter within which to suggest amendments to the casemade, the same to be settled on 5 days' notice. On June 22d, thereafter, plaintiff in error filed a second motion for a new trial. on the ground of impossibility of making a case-made, as provided for by section 5035. Rev. Laws of Oklahoma 1910. This motion was overruled on June 29, 1917. On the 6th day of July following the following order was made, as appears from the case-

"Order made overruling second motion for new trial, revoked. Motion reinstated, and overruled, exception.

"30-10-5 for case-made. Notice of appeal in open court."

The defendant in error has filed a motion to dismiss the appeal on the following grounds:

"First. Because this court is without jurisdic-

"First. Because this court is without jurisdiction to entertain this appeal for the reason that the purported case-made was not made, served, and settled according to law, and is a nullity. "Second. Because the purported case-made herein was not made, served and settled within the time provided by law, nor within the legal extension ordered by the court. "Third. Because the attempted appeal herein is frivolous and made for delay only, and the only ground for reversal is the alleged impossibility of the plaintiffs in error to prepare case-made, due to the negligence and fault of counsel for plaintiffs in error.

"Fourth. Because this purported case-made was not filed in the Supreme Court within six months from and after the final order overruling

motion for new trial.

[1] If the order of the court, made on the 6th day of July, cannot be construed as an allowance by the trial court of an extension of time to the plaintiffs in error within which to prepare and serve a case-made, for the suggestion of amendments thereto and the settlement thereof, the appeal must be dismissed on one or both of the first and second grounds urged for dismissal. In support of his contention that the order "30-10-5 for case-made" is not susceptible of a legal construction, counsel for defendant in dered. As to whether the plaintiff in error

error cite the cases of McCann v. McCann et al., 24 Okl. 264, 103 Pac. 694, and St. Louis, I. M. & S. Ry. Co. v. Farley, 157 Pac.

In the first-named case the question as to whether the figures "60-10-5" were intelligible enough to constitute an extension of time within which to make and serve a case-made was suggested, but not decided. In the other case cited, this court, in an opinion by Commissioner Mathews, held that the entry of the figures "60-10-5," in an order of the court overruling a motion for a new trial, did not constitute an extension of time, but in that case the court observed that it did not appear from the order that the figures employed had any connection or relation to the making and serving of a case-made, while in the one at bar it does appear that they are expressly used in connection with the case-made and notice of appeal.

While a careless practice in making the records of the proceedings of courts of record is disapproved, we must not lose sight of the fact that the primary purpose of making a record is to preserve in an intelligent form the judgments and orders actually made by the court. It is a matter of general knowledge that courts frequently, in granting an extension of time for preparing and serving a case-made, for suggesting amendments thereto, and for settling the same, use the expression herein complained of, and we do not think that it could truthfully be said that any lawyer or other person with ordinary familiarity with court proceedings would not understand the meaning and the import of the figures used in this connection. The figures and words employed convey to us the idea that the plaintiff in error was given 30 days within which to prepare and serve a case-made, the defendant in error 10 days to suggest amendments thereto, and that the case-made was to be settled on 5 days' notice by either party, just as effectually as we understand "12-23-1915" to mean "the twenty-third day of December, in the year one thousand nine hundred fifteen," and we are satisfied that counsel and all parties similarly situated get the same idea from the record as made. We are therefore of the opinion that the same should be construed as allowing such extension of time. Giving the order this construction, the casemade was served in time.

[2-4] With reference to the third ground for dismissal, it is sufficient to say that under section 5033, supra, one of the grounds for a new trial is the impossibility of making a case-made, and under section 5035, supra, a motion for a new trial on this ground is not required to be made within 3 days after the verdict or decision was rendered, but may be made at any time during the same term of court the judgment was ren-

was at fault in not having the evidence reported, and as to whether a new trial should have been granted by the trial court under the circumstances, calls for an examination of the evidence adduced at the hearing of the motion for a new trial, and is a question that should properly be considered by this court when the case is briefed on its merits. We do not think we should, at this time, express any opinion as to whether the appeal is meritorious or frivolous.

[5] There is not any merit in the fourth ground for dismissal, for the reason that an order overruling a motion for a new trial is an appealable order. The second motion for a new trial was on the ground authorized by the ninth subdivision of section 5033, supra, and the appeal was taken within 6 months from the entry of the order overruling this motion.

The motion to dismiss is therefore overruled. All the Justices concur.

# WITHINGTON v. GYPSY OIL CO. (No. 8680.)

(Supreme Court of Oklahoma. April 23, 1918.)

### (Syllabus by the Court.)

1. CONTRACTS \$== 154-Construction-Avoid-

ANCE OF UNREASONABLE CONSTRUCTION.

Where the meaning of the language of a contract is doubtful and the same is fairly susceptible of two constructions, that construction must be preferred which makes it fair and such as prudent men would naturally execute in preference to a construction that would make it inequitable, or such as reasonable men would not be likely to enter into.

CONTRACTS \$\infty 147(3) - CONSTRUCTION -INTENTION OF PARTIES.

The intention of the parties must be deduced from the entire agreement, not from any part or parts of it, and where a contract has several stipulations, the intention of the contracting parties is not expressed by any single clause or stipulation, but by every part and provision in it, which must all be considered together, and so construed as to be consistent with every other part.

3. Mines and Minerals 4=79(7) - Lease -ACTION FOR ACCOUNTING—SUFFICIENCY OF PETITION.

W., the plaintiff, alleged in his petition that the defendant, G. O. Co., had been producing from each of several oil wells upon the lands of plaintiff gas, the same being commonly spoken of as casinghead gas, and had, in its own nearby plant, reduced or condensed the said gas into the form of gasoline in which form it had nearby plant, reduced or condensed the said gas into the form of gasoline, in which form it had been marketing the same, and for which it had received a very large sum of money, and had not accounted to plaintiff for any part thereof. The lease, under which the defendant was op-erating, which was attached to and made a part of the petition, contained the following provi-sions with reference to the payment of revelties: sions with reference to the payment of royalties:

"In consideration of said grant and demise, the parties of the second part agree to deliver to the party of the first part one-fourth of the oil realised from the premises, in tanks, at the well without cost. If gas is found in any well or wells on said premises the party of the first part is to have, upon demand, sufficient gas for domestic purposes free of charge, the ment of royalties:

remainder with all gas from oil wells to go to the second part [parties].

"If the parties of the second part shall market any gas from any well producing gas, then the party of the first part shall receive therefor at the rate of one-fourth of all the gas so marketed or sold."

Held, that the petition stated a cause of action, and that the trial court erroneously sustained a demurrer thereto.

(Additional Syllabus by Editorial Staff.)

4. Contracts = 147(2) - Construction -VERBAL INACCUBACIES.

Where a contract is ambiguous, the true intention of the parties, if it can be ascertained therefrom, prevails over verbal inaccuracies, inapt expressions, and the dry words of the stipu-

5. Contracts \$==152 - Construction - Position of Parties.

The court must place itself, as far as possible, in the position of the parties when the contract was entered into; and consider the instrument itself as drawn, its purpose and the circumstances surrounding the transaction, and, from a consideration of all these elements, determine upon what sense or meaning of the terms used their minds actually met.

Error from District Court. Tulsa County: Conn Linn, Judge.

Suit by G. M. Withington against the Gypsy Oil Company. From an order sustaining a demurrer to the petition, plaintiff brings error. Reversed and remanded, with directions to overrule the demurrer.

Chas. W. Grimes, of Tulsa, A. D. Follett, of Marietta, Ohio, and McGuire & Devereux, of Tulsa, for plaintiff in error. James B. Diggs, Rush Greenslade, and William C. Liedtke, all of Tulsa, for defendant in er-

RAINEY, J. This is an appeal from the order of the district court of Tulsa county, Okl., sustaining a demurrer to the petition of the plaintiff in error, G. M. Withington, filed by him in the district court of Tulsa county, Okl., in an action to recover from the defendant in error, Gypsy Oil Company, a one-fourth interest in all the gasoline produced from casinghead gas taken by it from the 120 acres of land described in the petition, less the cost of converting said casinghead gas into gasoline. The parties will hereinafter be designated as they appeared in the trial court.

[2, 3] The material facts, as alleged in the plaintiff's petition, are substantially as follows: On June 20, 1906, one G. W. Barnes, Jr., executed and delivered to George J. Kobusch and associates an oil and gas mining lease on the land herein involved, which lease was subsequently assigned to the defendant in error, and the title to the land. after the execution of the lease, passed into the hands of the plaintiff in error. lease, which is attached to and made a part of the plaintiff's petition, contains the following provisions with reference to the pay-

"In consideration of said grant and demise, the parties of the second part agree to deliver the parties of the second part agree to userve to the party of the first part one-fourth of the oil realized from the premises in tanks, at the well without cost. If gas is found in any well or wells on said premises the party of the first part is to have upon demand sufficient sas for part is to have, upon demand, sufficient gas for domestic purposes free of charge, the remainder with all gas from oil wells to go to the second

"If the parties of the second part shall market any gas from any well producing gas, then the party of the first part shall receive therefor at the rate of one-fourth of all the gas so marketed or sold."

Basing his action on these provisions of the lease, plaintiff proceeds to state his case as follows:

"V. That for about a year last past (precise time being unknown to the plaintiff), the defendant has been producing from each of several oil wells upon the said land gas, the same being commonly spoken of as casinghead gas, and has been, in its own nearby plant, reducing or condensing the said gas to the form of gasoline, and has been marketing the said gas in the form of gasoline; that the defendant has marketed a very large quantity of such gas in the form of gasoline; and has received a very large sum of money therefor, but the plaintiff does not know, and has no means of ascertaining, save by an accounting under the decree of this court, the precise amount of gas which the defendant has so marketed, or the amount of money that has been received by the defendant

therefor.

"VI. That by the terms of said lease of June
"VI. That by the terms of said lease of June 20, 1906, the defendant is obligated and bound to account to the plaintiff for the proceeds of the one-fourth part of the gas so produced by the defendant, and so marketed by it in the form of gasoline; that the amount so due to the plaintiff is the amount of the gross proceeds from which the defendant has sold, in the form of gasoline, the plaintiff's one-fourth part of and interest in the said gas, less a reasonable allowance to the defendant for the cost to it of reducing or condensing the said gas to the changed form; that is to say, to the form of gasoline, in which it has been sold."

The above allegations are followed by the statement that the defendant has failed to account to the plaintiff for the one-fourth part of the proceeds of the gasoline produced, and by a prayer for an accounting.

In this case it is unnecessary for us to decide whether casinghead gas is oil or gas, since in their briefs counsel for the respective litigants have assumed that it is gas. The correctness, therefore, of the ruling of the trial court depends upon the interpretation and construction of two clauses in the lease, which are as follows:

"If gas is found in any well or wells on said premises, the party of the first part is to have, upon demand, sufficient gas for domestic purposes free of charge, the remainder with all gas from oil wells to go to the second party.

"If the parties of the second part shall market any well producing gas, then the

any gas from any well producing gas, then the party of the first part shall receive therefor at the rate of one-fourth of all the gas so marketed or sold."

It is the contention of counsel for plaintiff that, if the contract be read as a whole and given a reasonable construction, one that will give effect to every part of it, the first clause must be construed to mean that the lessor is to have sufficient gas produced transaction at the time the lease was en-

on the lease for domestic purposes, free of charge, and that the lessee is to have the remainder, with all gas from oil wells that is used on the premises, and that under the second clause, lessee is to pay for all gas marketed from any and all wells on the

It is the contention of counsel for defendant that a proper construction of the two clauses of the lease would give the plaintiff no interest in the gas produced from an oil well, and that under the terms of the lease casinghead gas produced from gas taken from an oil well was free from royalty. We agree with counsel for defendant that, if the first provision stood alone, the only right the plaintiff would have to the gas produced from the land in controversy, whether from oil wells or gas wells, would be upon demand to have sufficient gas for domestic purposes, free of charge, and that he would not be entitled to a royalty from gas produced from an oil well. But the provision does not stand alone, and must be construed as affected or modified by the clause immediately following, providing, if the lessee "shall market any gas from any well producing gas that the lessor should receive therefor at the rate of one-fourth of all the gas so marketed or sold." (Italics ours.) These two clauses must be construed together, as it is evident that the parties did not express all of their agreement in either clause. Union Trust Co. v. Shelby Downard Asphalt Co., 156 Pac. 903; Kansas City Bridge Co. v. Lindsay Bridge Co., 32 Okl. 31, 121 Pac.

[4,5] In arriving at their meaning, we must bear in mind that the primary object of all rules of interpretation and construction is to arrive at and to give effect to the mutual intent of the parties, as expressed in the contract, and that, where a contract is ambiguous, the true intention of the parties, if it can be ascertained from the contract, prevails over verbal inaccuracies, inapt expressions, and the dry words of the stipulation. We must also bear in mind that it is the duty of the court to place itself, as far as possible, in the position of the parties at the time the contract was entered into; then to consider the instrument itself as drawn, its purposes and the circumstances surrounding the transaction, and, from a consideration of all these elements. to determine upon what sense or meaning of the terms used their minds actually met. Kansas City Bridge Co. v. Lindsay Bridge Co., supra; Union Trust Co. v. Shelby Downard Asphalt Co., supra; Lamont Gas & Oil Co. v. Doop & Frater, 39 Okl. 427, 135 Pac. 392; Nelson v. Reynolds et al., 158 Pac. 301; Brown et al. v. Coppadge et al. (Okl.) 153 Pac. 817; Elliott on Contracts, vol. 2, \$ 1508; 6 Ruling Case Law, \$ 239.

As to the circumstances surrounding the

tered into, we quote the following interesting statement from the brief of counsel for the defendant in error:

"Again it is a matter of history and common knowledge in the oil industry that the extraction of gasoline from casinghead gas was practically unknown in Oklahoma in 1906, when this lease was made. There was no commercial manufacture of gasoline from the gas of oil wells prior to 1904 in the United States, and there was no plant for such manufacture in the Mid-Continue Wald until 1900 or three years after Continent Field until 1909, or three years after the lease in question was made, when D. W. Franchot installed the first plant at Kiefer, Okl. By the close of the year 1911 there were only seven plants in operation in the Mid-Continent Field, making not to exceed about 2,000 gallons of gasoline daily. For several years after the of gasoline daily. For several years after the first plant was installed the industry was in an experimental stage, and as late as 1913 gas from only about 2 per cent. of the total oil wells in Oklahoma was used for making gasoline. See Burrell, Seibert, and Oberfell, Gasoline from Natural Gas, U. S. Bureau of Mines Rulletin No. 88 \* \* \* \* " Bulletin, No. 88.

We understand that a provision giving the lessor sufficient gas for domestic purposes is usually found in all oil and gas leases, and likewise it is usually provided in such leases that the lessee shall have free of charge gas used in developing or operating the property. With these facts and the principles above stated in mind, we do not have much difficulty in arriving at the true intent of the parties to the contract. The first clause, with reference to gas, in our opinion, simply means that the lessor is to have gas for domestic purposes, free of charge, upon demand, from gas wells, and that the remainder of the gas from gas wells and the gas from oil wells is to go to the lessee. This provision did not contemplate the marketing or sale of the gas by either the lessor or the lessee, but had reference to private uses to be made of such gas.

We turn now to the second clause. Construing this clause, together with the first clause, by the well-known rules of construction, it is clear to us that the parties intended that, if any gas should be marketed or sold by the lessee, the lessor should receive compensation therefor at the rate of one-fourth of all the gas so marketed or sold. We have read with a great deal of interest and have carefully considered what counsel have to say relative to gas being produced from three classes of wells, to wit: First, a well producing gas from a gas-bearing stratum without oil; second, a well producing gas from a gas-bearing stratum and at the same time producing oil from an oil-bearing stratum, and so to be both an oil well and a gas well; and third, a well producing oil and at the same time producing gas from the oil-bearing stratum known as "casinghead gas"; but we cannot agree with the conclusion that the lessor is not entitled to compensation for gas marketed by the lessee from an oil well producing gas from the oil-bearing stratum known as "casinghead gas." The language, "if the party of the second part should market any gas from

produced in any one of the forms above mentioned, but is sufficiently comprehensive to include them all, and applies to gas marketed. whether from a well producing gas only or from a well producing both oil and gas, and this construction is not defeated by taking into consideration the preceding clause of the contract. We have been unable to draw any distinction from the language of the contract itself in the gas produced from oil wells and that produced from wells producing gas only.

Referring again to the first clause, if we accept the construction, contended for by counsel for defendant, that the lessor was only to have gas for domestic purposes from gas wells, and that the remainder of the gas from gas wells, with all gas from oil wells, was to go to the lessee, it will be seen that "the remainder" of the gas from gas wells and the "gas from oil wells" were treated exactly alike, and under this clause both were to go to the lessee. If the contract stopped here, the lessor would not be entitled to any compensation for any gas, but it does not, as we have seen, and the subsequent clause performs the office of a proviso and modifies the first clause by providing that the lessee shall compensate the lessor for gas marketed from "any well producing gas." Certainly an oil well producing gas from any stratum is a "well producing gas."

A similar question was before the Supreme Court of Kansas in the case of Mathes v. Shaw Oil Co., 80 Kan. 181, 101 Pac. 998. The oil and gas lease under consideration in that case contained a clause to the effect that if gas were found in any well sufficient to justify saving and casing, the "lessor may have enough for domestic purposes, and the lessee the remainder." Immediately after this provision in the lease came the following clause:

"If, however, second party shall use, market or sell gas from any well producing gas, it shall pay therefor fifty dollars per year for and dur-ing the time such gas shall be sold, marketed or used, except for drilling or domestic use of parties leasing to second parties.

In the opinion the court said:

"It seems clear from the provisions of the lease that it contemplated the production of both gas and oil, and whether from the same or separate wells was not considered material. either case the parties would naturally expect to receive the benefits due them under the pro-visions of the lease. Some of the wells in con-troversy produced both oil and gas. The de-fendants seem to understand that in such a case the well must be regarded either as a gas. well or an oil well, depending upon which pre-dominates. The district court, in its findings, appears to have taken the same view. Upon this conclusion a finding seems to be predicated to the effect that if oil predominates, it is an oil well, and gas may be used by the defendants for their own purposes without accounting to the lessors for any part thereof. It is claimed that the defendants are liable for gas only when there is a quantity sufficient to justify the ex-pense of saving it and casing the well for that purpose. There is a clause in the lease which, standing alone, would apparently justify such a conclusion, but immediately following this any well producing gas," is not limited to gas | clause, and apparently for the purpose of avoiding such a construction and to prevent any trouble or misunderstanding as to when a well was producing the stipulated quantity of gas,

A defendant, having filed no answer in the the further condition was added: 'If, however, second party shall use market or sell gas from any well producing gas, it shall pay,' etc. This indicates that gas shall be paid for if used by the defendants for any purpose other than for drilling, the purpose for which the gas is used by the defendants, rather than the amount produced by the well, being the test as to when rent shall be paid. If the liability of the defendants for gas used by them depended upon the quantities of the defendants for gas used by them depended upon the quantities are the statement of the statement tity produced by the well, a controversy might arise whenever the lessors insisted that there was enough to justify easing the well for that purpose. This provision obviates such trouble purpose. This provision obviates such countries and embarrassment, and apparently was inserted for that purpose. The defendants have had ed for that purpose. The defendants have nad the benefit of the lessors' gas, and no good rea-son has been shown why it should not be paid for. The fact that this might compel the de-fendants to pay rent for gas and royalty for oil out of the same well does not seem impor-tant. The lessors should of right have what oil and gas their premises produce, whether it is taken from one well or several."

[1] Even if the language of the agreement were doubtful and susceptible of two constructions, it would be our duty to give it that construction which would make it fair and such as prudent men would naturally execute in preference to one that would make it inequitable or such as reasonable men would not be likely to enter into. Kansas City Bridge Co. v. Lindsay Bridge Co., supra; Union Trust Co. v. Shelby Downard Asphalt Co., supra; Elliott on Contracts, vol. 2, § 1510.

We think the petition sufficiently alleges that the defendant is taking the gas from plaintiff's property under the terms of its lease for which it has not compensated him. The petition may not ask for an accounting on the right basis, but it is unnecessary for us to express an opinion at this time on that phase of the case, since the prayer of the petition forms no part of it, and relief may be granted the plaintiff in accordance with the facts stated in his petition rather than pursuant to the prayer. Burnham-Hanna-Munger D. G. Co. v. Hill, 17 N. M. 347, 128 Pac. 62; Smith v. Smith, 67 Kan. 841, 73 Pac. 56; Willoughby v. Summers, 162 Pac. 206.

It follows that the judgment of the trial court should be reversed and remanded, with directions to overrule the demurrer. All the Justices concur.

ST. LOUIS & S. F. R. CO. et al. v. WHITE-FIELD et al. (No. 8548.)

(Supreme Court of Oklahoma. April 9, 1918. Rehearing Denied May 7, 1918.)

(Syllabus by the Court.)

JUSTICES OF THE PEACE \$= 92, 174(4) -PLEADING-DEFENSES-APPEAL.

defendant in the justice court may, without filing pleadings, prove any defense he may have to plaintiff's claim, and, on appeal to the county court no answer to the pleadings having been filed in the justice court, the same rule applies.

A defendant, having filed no answer in the justice court, was entitled to make any defense it had in the county court without answer, and had a right to introduce proof showing that an interstate shipment of live stock for which plaintiff claimed damages moved under a special contract, limiting its liability.

3. TRIAL \$\infty 214\to Defenses\to Instruction.

Where defendant in such suit introduced as defense such contract, containing a provision a detense such contract, containing a provision that "As a condition precedent to recovery of damages for death, loss, injury or delay of the live stock, that notice in writing of his claim to some general officer of the company or the nearest station agent or the agent at destination before the live stock, mingled with other live stock and within one day after its delignment destined. fore the live stock, mingled with other live stock and within one day after its delivery at destina-tion, and providing that a failure to comply with this provision shall be a bar to recovery of any damages for loss or injury or delay," it was er-ror in the court to fail to give requested instruc-tion covering this provision of the contract.

Commissioners' Opinion, Division No. 2. Error from County Court, Carter County; Thomas W. Champion, Judge.

Suit by A. H. Whitefield and another against the St. Louis & San Francisco Railroad Company, James W. Lusk, and others, receivers, etc. Judgment for plaintiffs in justice's court, and from a judgment for plaintiffs in the county court on appeal, defendants bring error. Reversed and remanded.

W. F. Evans, of St. Louis, Mo., and R. A. Kleinschmidt and E. H. Foster, both of Oklahoma City, for plaintiffs in error. H. C. Potterf and Earl Q. Gray, both of Ardmore, for defendants in error.

WEST, C. This was a suit instituted by defendants in error against plaintiff in error in the justice court of Carter county. Okl., to recover damages in the sum of \$180, on account of loss and injury and damage to shipment of live stock from Forman, Ark., to Ardmore, Okl. The parties will be hereinafter referred to as they appeared in the courts below. Plaintiffs in their bill of particulars sued upon a common-law contract; defendants did not file a written answer. Plaintiffs obtained judgment, defendant appealed to the county court, where the cause was tried to a jury on issues made in the justice court, and resulted in a judgment in favor of plaintiffs, and defendant has perfected its appeal.

[1] The only question presented by the appeal is whether or not the defendants under the state of the pleadings could prove that the shipment moved under a special contract which contained a provision limiting its liability. Section 5414, R. L. 1910, is as follows:

"Bill of Particulars to be Filed. In all cases before a justice, the plaintiff, his agent or attorney, shall file with such justice a bill of particulars of his demand, and the defendant, if required by the plaintiff, his agent or attorney, shall file a like bill of particulars if he claim a set-off, and the evidence of the trial shall be confined to the items set forth in said bill."

Western Union Telegraph Co. v. Hollis, 28 Okl. 613, 115 Pac. 774, lays down the following rule, as will appear by the first paragraph of the syllabus, as follows:

"A defendant in a justice's court may, without filing pleadings, plead any defense he may have to plaintiff's claim; and on appeal to the county court, when no answer or pleadings was filed in the justice's court, the same rule applies."

In the body of the opinion the court uses the following language:

"It is not disclosed from the record that any pleadings were filed in the justice court by the defendant, or that any request that such be done was made. Judgment was rendered for the plaintiff in the sum of \$102, from which an appeal was prosecuted to the county court, where it is recited that on the 15th day of May, 1908, it is recited that on the 15th day of May, 1908, defendant was permitted to file its answer, being entitled 'Amended Answer,' in which it is specifically pleaded that upon the back of said telegram was a printed condition under which said message was received and transmitted, which was made by William Brown for the benefit of the plnintiff, and that said plaintiff, as well as the defendant company, was bound thereby; that in said condition it was provided that the defendant company should not be liable for damages or statutory penalties growing out for damages or statutory penalties growing out of said contract, where the claim is not present-ed in writing within 60 days after the message is filed with the company for transmission; that no such claim was presented to the defendant company by said plaintiff, or by any one for him, within the specified time. If the defend-ant filed an answer in the justice of peace court, on appeal and trial de novo in the county court, it will be confined to the same issues as were made and tried in said court. Section 4993, Wilson's Rev. & Ann. Stat. 1903; section 6335, Comp. Laws Oklahoma 1909; section 4714, St. Okl. Ter. 1893; section 14, art. 7, Const.; Johnson v. Acme Harvester Mach. Co., 24 Okl. 469, 103 Pac. 638. The record not so disclosing, the defendant was entitled in the county court to plead in said answer the failure to present said claim within said 60 days. Wagstaff v. Challis, 29 Kan. 505; Denver M. & A. Ry. Co. v. Cowgill, 44 Kan. 325, 24 Pac. 475; Stanley et al. v. Farmers' Bank, 17 Kan. 592; Douglass v. Easter, 32 Kan. 406, 4 Pac. 1034. See, also, Houston & T. C. R. Co. v. Lefevre (Tex. Civ. App.) 40 S. W. 340; Hall v. Doyle, 35 Ark. 445." on appeal and trial de novo in the county court,

[2] It would therefore appear that the defendant, having filed no written answer in justice court, was entitled to make any defense it had in county court without answer, and had a right to introduce proof showing that said shipment moved under a special contract, which contained the following provision limiting its liability, to wit:

"13. As a condition precedent to recovery of damages for any death, loss, injury or delay of the live stock, the shipper shall give notice, in writing, of his claim to some general officer of writing, or the nearest station agent, or the company, or the nearest station agent, or the agent at destination, and before the live stock is mingled with other live stock, and with-in one day after its delivery at destination, so that the claim may be properly and fully inves-tigated, and a failure to comply with this condi-tion shall be a bar to the recovery of new damtion shall be a bar to the recovery of any damages for such death, loss, injury, or delay."

[3] It is well settled that the above and foregoing provision of an interstate live stock contract is valid and binding.

In construing this section this court, in Louis & S. F. R. Co. v. Zickafoose, 39 Okl. 302, 135 Pac. 406; St. Louis & S. F. R. Co. v. Driggers, 166 Pac. 703, and it necessarily follows that the court was in error in failing to give requested instructions covering this phase of the case, and erred in refusing to give defendants requested instruction No. 3, which is as follows:

"You are charged, that before you can find for the plaintiff, you must believe from a fair preponderance of the testimony that the plain-tiffs notified the station agent at Ardmore in writing, before said stock was mingled or mixed with other cattle, and within one day of their delivery at Ardmore, that they should claim damages for the cattle injured; and, if they failed to give such notice, they cannot recover, and your verdict should be for the defendants."

On account of this error of the court it necessarily follows that this case should be reversed and remanded; and it is so ordered.

PER CURIAM. Adopted in whole.

DAVIS v. STATE INDUSTRIAL COMMIS-SION et al. (No. 8994.)

(Supreme Court of Oklahoma. April 23, 1918.)

(Syllabus by the Court.)

MASTER AND SERVANT \$\infty 417(5)\to Workmen's Compensation\to Appeal\to Time for Filing BRIEF.

Where plaintiff fails to serve and file his brief within the time required by rule 5 (171 Pac. 1), governing appeals from the State In-dustrial Commission, or within any extension of time granted by this court, the appeal will be considered abandoned, and, upon motion, will be dismissed.

Appeal from State Industrial Commission. Proceeding by Tom Davis under the Workmen's Compensation Act to obtain compensation for personal injury, opposed by the Independent Gin Company, employer. From an order of the State Industrial Commission discontinuing the weekly compensation theretofore allowed plaintiff, he appeals. Appeal dismissed.

E. Hamilton, of Chickasha, for plaintiff. J. S. Ross, of Oklahoma City, for defendants.

PER CURIAM. This is an appeal from an order of the State Industrial Commission entered on kebruary 26, 1917, discontinuing the weekly compensation theretofore allowed plaintiff for injuries received while in the employ of the Independent Gin Company, of Nelly, Okl. The case was submitted to this court on May 8, 1917, but no briefs have yet been filed by plaintiff. Rule 5 (171 Pac. x) of this court requires that plaintiff file his brief within 20 days after answer of defendant is filed. It clearly appears that the appeal has been abandoned, and the motion of defendants to dismiss for failure to file brief is therefore sustained and the appeal dis-St. missed.



For other cases see same topic and KEY-1/UMBER in all Key-Numbered Digests and Indexes

CLEVELAND PETROLEUM REFINING CO. et al. v. BONNER. (No. 8864.)

(Supreme Court of Oklahoma. April 23, 1918.)

(Syllabus by the Court.)

APPEAL AND ERROR 5-773(2)—WANT OF PROS-ECUTION—DISMISSAL.

Where pending an appeal in this court the questions involved in the appeal become moot as between the defendant in error and all the plaintiffs in error, except one, and where the remaining plaintiff in error fails to file a brief, as required by rule 7 of this court (165 Pac. vii), and offers no excuse for such failure, the appeal will be deemed to have been abandoned, and will be dismissed for want of prosecution.

Error from District Court, Oklahoma County; Edward Dewes Oldfield, Judge.

Action between the Cleveland Petroleum Refining Company and George J. Ames and others and W. M. Bonner. Judgment for the latter, and the former bring error. Dismissed.

E. R. Hastings, of Oklahoma City, for plaintiffs in error. Wilson, Tomerlin & Buckholts, of Oklahoma City, for defendant in error.

RAINEY, J. The petition in error and case-made were filed in this court on the 12th day of January, 1917, and this cause was regularly assigned for submission at the February, 1918, term of this court. At that time no briefs had been filed by any of the plaintiffs in error, but there was on file defendant's motion to dismiss the appeal as to all of the plaintiffs in error except George J. Ames, in which motion it was recited that during the pendency of the appeal the defendant in error and all the plaintiffs in error except George J. Ames had entered into an agreement whereby the defendant in error released all the plaintiffs in error except the said George J. Ames from any personal liability on the judgment rendered by the trial court, in consideration of part payment of the indebtedness represented by the judgment. and other considerations. It was further recited that "nothing herein contained shall be so construed as to release George J. Ames from any liability whatever." The agreement referred to was attached to and made a part of the motion.

On December 7, 1917, the said George J. Ames filed a response to the motion to dismiss, in which he admitted the agreement made between the defendant and all the plaintiffs in error, except himself, and further alleged that the agreement was made without his knowledge or consent, and also without the knowledge or consent of his attorney, and that he, the said George J. Ames, was desirous of urging his appeal in the court. In said response it was further contended that the release of part of the plain-

tiffs in error operated in law as a release of all

Upon consideration of the matters contained in the motion to dismiss and the response filed thereto, this court, on the 8th day of January, 1918, overruled the motion to dismiss, and on March 19, 1918, the said George J. Ames, as one of the plaintiffs in error, was given 20 days within which to file a brief. This he has not done, and has offered no excuse whatever for his failure to do so in compliance with the rules of this court. We have frequently held that under such circumstances the appeal will be presumed to have been abandoned. Hilligoss v. Webb et al., 159 Pac. 291; Wilcox v. Wootton, 159 Pac. 1118.

It therefore appears that, since the questions involved in the appeal have become moot as between the defendant in error and all the plaintiffs in error, except the said George J. Ames, and that he has abandoned the appeal, the same should be, and is hereby, dismissed. All the Justices concur.

In re REFERENDUM PETITION NO. 81 (Muskogee Free Fair Bill). (No. 9727.)

(Supreme Court of Oklahoma. April 23, 1918.)

(Syllabus by the Court.)

STATUTES \$\sim 35\\ - REFERENDUM PETITION - SIGNATURES-VALIDITY.

Petition was filed in the office of the secretary of state, purporting to contain the signatures of 16,800 legal voters of the state, the object of which was to invoke a referendum on Senate Bill No. 307 (Laws 1917, c. 19), pursuant to Const. art. 5, § 3, and Rev. Laws 1910, § 3368 et seq. The petition so to do required the signatures of 14,821 legal voters of the state, together with the post office address and residence of each opposite his signature, 5,000 of which were omitted from sheets circulated at points in the state, far removed from each other, and the sheets sent to H. at Oklahoma City, who filled them in, apparently by guesswork. Held, that such was not a substantial compliance with the statute, and destroyed the presumption that said signatures were those of legally qualified electors, and hence the validity of the petition.

Appeal from Ruling of Secretary of State; J. L. Lyon, Secretary.

In the matter of Referendum Petition No. 31, State Question No. 95, Senate Bill No. 307 of 1917 Legislature, known as the Muskogee Free Fair Bill. From a ruling of the secretary of state sustaining the validity of the petition, Charles A. Moon, protestant, appeals. Protest sustained, and petition dismissed.

Chas. A. Moon and L. E. Neff, both of Muskogee, for plaintiff in error.

torney, and that he, the said George J. Ames, was desirous of urging his appeal in this court. In said response it was further contended that the release of part of the plain-lendum petition No. 31, State Question No. 95;

dum of Senate Bill No. 307, being an act of the 1917 Legislature known as the Muskogee Free Fair Bill, and on June 4, 1917, followed it up by also filing therein pamphlet petitions purporting to be signed by 16,800 voters of the state, asking a vote on said bill at an election to be held August 6, 1918, pursuant to Const. art. 5, \$ 3, and Rev. Laws 1910, c. 37, § 3368 et seq. On June 20, 1917, Chas. A. Moon duly protested against said petition on certain grounds later to appear, and thereafter both sides appeared by their said attorneys before the secretary, who heard testimony upon the protest. At the close of all the evidence, after said Everest, for himself and as attorney for petitioners, had, in effect, confessed the invalidity of the petition and moved the secretary for leave to withdraw the petition and dismiss the proceeding, to which no objection was made by opposing counsel, the secretary overruled the motion, sustained the validity of the petition, and protestants bring the proceeding here, where they have filed briefs, but which petitioners have failed and refused to do or resist in any manner a reversal of the rulings of the secretarv.

Assailing the validity of the petition, the evidence discloses: That T. P. West, W. C. Adams, and 14 other persons testified that they were election officials in different precincts in Oklahoma City at an election held on May 8, 1917, for the purpose of voting bonds for the Oklahoma City Fair Association. That at that election referendum petitions were kept on the tables in the room where voters obtained their ballots and voted. That the attention of each voter was called to the referendum petition for the purpose of having him sign it. That the different officials at each precinct did this, and that the petitions were left on the tables with the election supplies at all times during the day. That the witnesses were absent from the room a part of the day and at various times engaged in their duties as such officials, and, therefore, unable to see each signer sign his name to the petitions. That when the polls closed some one of the officials in each precinct made the affidavits on the back of each pamphlet as required by law. Most of these affidavits were made in blank and filled in afterwards by some person unknown to the atliants. That the addresses of numerous signers were filled in during the day by various election officials when their duties as such officials did not require their time, and other addresses were afterwards filled in by some unknown party. Each of these 14 witnesses made all of the affidavits to the pamphlets in their respective precincts.

The evidence further discloses that the witness Hemphill, a resident of Oklahoma City, and an employé of the Oklahoma City Fair Association, circulated pamphlet No. 0690 only, and was in charge of the referendum petition; that names were secured to

the object of which was to secure a referen- | the separate pamphlets throughout the state and sent to him in said city where he kept them until turned over by him, after checking same, to Mr. Everest for filing; that upon receiving these pamphlets, he filled in opposite perhaps 5,000 signatures the post office addresses of each signer; that the petition purported to contain 16,800 signers; that at the last state election the state candidate receiving the highest number of votes received 292,416, making it necessary for the petition to be signed by 14,621 voters; that there were 293 duplicate signatures, and that more than 2,400 names were signed thereto at the various election precincts in Oklahoma City at the election on May 8, 1917; that all the signatures thereto were obtained and the affidavits to the pamphlets made in the manner testified by the witness Adams, who checked the names on the petition with the list of registered voters kept in the office of the secretary of state, and that 6,140 of the signatures were not registered voters; that he checked the names of the signers from five counties outside of Pittsburg county, and those in that county residing in McAlester with the registration lists kept in the office of the county clerk of those counties, and that the names of 3.812 were not registered voters; that the addresses of at least 5,000 of the signers were written in as stated, and not in the signer's presence; and that addresses of signers from various portions of the state far removed are in the same handwriting. The witness Sawyer, 19 years old, lived at Chandler. He testified that on June 1, 1917, some man there employed him to circulate pamphlets numbered 0416, 0417, 0419, 0422, and 0423, which he did, and that the signatures he got were signed in the presence of no one but himself; that he did not make the affidavit to them, and did not know W. E. Vance, who did verify them, and that the man who employed him to circulate the pamphlets stayed in the bank while he went around town getting the signatures.

It is contended, among other things, that there is no way of determining whether each of the 5,000 signers in question was a legal voter of the state, and that the circulator and signers having omitted to state their respective post office addresses and residence, Hemphill had no right, upon receiving these pamphlets sent by the circulators from various parts of the state, to write them therein opposite the name of the signer, for the reason that he could not have done so other than by guesswork, and that to do so was not a substantial compliance with the statute, and destroyed the presumption that the signatures were those of legally qualified electors of the state, and hence the validity of the petition. The point is well taken.

Rev. Laws 1910, § 3373, provides:

"Each sheet of every such petition containing signatures shall be verified on the back thereof in substantially the following form by the per-son who circulated said sheet of said petition, by his or her affidavit thereon and as a para thereof:

"'State of Oklahoma, \ss. County of ———

"I, —, being first duly sworn, say: (Here shall be legibly written or typewritten the names of the signers of the sheet) signed this names or the signers of the sheet) signed this sheet of the foregoing petition, and each of them signed his name thereto in my presence; I believe that each has stated his name, post office address and residence correctly, and that each signer is a legal voter of the state of Oklahoma and county of \_\_\_\_\_, or of the city of \_\_\_\_\_ (as and county of —, or of the city of — (as the case may be). (Signature and post office address of affiant.) Subscribed and sworn to before me this — day of —, A. D. 19—. (Signature and title of the officer before whom oath is made, and his post office address.)'"

And this, although Id. § 3393, provides:

"The procedure herein prescribed is not man-datory, but if substantially followed will be suf-If the end aimed at can be attained and procedure shall be sustained, clerical and mere technical errors shall be disregarded.

This for the reason that such is not a substantial compliance with section 3373, which contemplates that it is the duty of the circulator of the sheets to see that the proper address of the signers is placed on the petition, and hence to gain the information at the time to enable him so to do (State ex rel. v. Olcott, Secy. of State, 62 Or. 277, 125 Pac. 303), and not to circulate it throughout various and far distant parts of the state with such omitted and, after securing signatures thereto, to forward it to another at a central point, far removed, and leave it to him, presumably without information in the premises, to insert any address he may choose, as was done here. Besides, the aims of the statute requiring correct addresses of the signers is to enable a protestant of the petition to trace the signer for the purpose of determining his qualification to sign the petition, and when this cannot be done, on account of the procedure adopted here, the statute is not substantially complied with, and the presumption that the signatures were those of legally qualified electors is prima facie destroyed.

It follows the procedure complained of is not a mere clerical error, and hence cannot be disregarded, and that the protest must be sustained, and the petition dismissed. It is so ordered. All the Justices concur.

LINSEY v. JEFFERSON. (No. 8289.) (Supreme Court of Oklahoma. Feb. 12, 1918. Rehearing Denied May 7, 1918.)

### (Syllabus by the Court.)

1. MARBIAGE 6 47 - EVIDENCE - ACKNOWL-EDGMENT.

Repeated acknowledgments by a man, since deceased, of his marriage with a certain woman constitute direct evidence of marriage.

2. Marriage €==40(4), 50(1) — Circumstan-TIAL EVIDENCE-PRESUMPTION.

Marriage may be proven by circumstantial evidence, and since the presumption is in favor of marriage and against concubinage, the fact that a man and woman have openly cohabited together as husband and wife for a considera-ble length of time, holding each other out and recognizing and treating each other as such by

declarations, admissions, or conduct, and are accordingly generally reputed to be such among their relatives and acquaintances and those who come in contact with them, may give rise to a presumption that they have previously entered into an actual marriage, although there may be no direct testimony to that effect.

3. Marbiage 4-40(11), 48-Reputation and Cohabitation - Evidence - Burden of PROOF.

In an action in ejectment the right of the plaintiff to recover depended upon whether she was the legitimate offspring of W. and A., and phantin to recover depended upon whether she was the legitimate offspring of W. and A., and this question, in turn, depended upon whether a certain relation shown to exist between W. and A. was matrimonial or meretricious. To support the issues in her behalf, the plaintiff introduced in evidence certain declarations of many friends and relatives of the respective families to the effect that W. and A. openly lived and cohabited together as husband and wife for more than a year prior to the birth of the plaintiff, holding each other out and treating each other as such by repeated acknowledgments that they were husband and wife; and that accordingly W. and A. were generally reputed to be husband and wife among their relatives and acquaintances and those who came in contact with them. Hold, that this evidence, W. and A. being deceased, was competent for the purpose of showing a valid marriage between them, and sufficient to require the party tween them, and sufficient to require the party asserting its invalidity to take the burden of proving it.

4. Reversal of Judgment - Technical Er-

Section 6005, Rev. Laws 1910, provides:
"No judgment shall be set aside or new trial granted by any appellate court of this state in any case, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence, or as to error in any matter of pleading a procedure unless in any matter of pleading or procedure, unless, in the opinion of the court to which application is made, after an examination of the entire record, it appears that the error complained of has probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right."

8. APPEAL AND ERROR =1170(1)—MISCARRIAGE OF JUSTICE—VIOLATION OF CONSTITUTIONAL AND STATUTORY RIGHT.

Record examined, and held, that it does not appear that the error complained of has probably resulted in a miscarriage of justice or con-stitutes a substantial violation of any constitutional or statutory right.

Error from District Court, Tulsa County; Conn Linn, Judge.

Action by Senora Jefferson, by Chas. F. Bliss, her next friend, against Lilah D. Linsey. Judgment for plaintiff, and defendant brings error. Affirmed.

James H. Sykes and E. G. Wilson, both of Tulsa, for plaintiff in error. Davidson & Williams, of Tulsa, for defendant in error. .

KANE, J. This was an action, commenced by Senora Jefferson, by Chas. F. Bliss, her next friend for the purpose of recovering possession of and quieting the title to a certain tract of land situated in Tulsa county. Upon trial to a jury there was a verdict for the plaintiff, upon which judgment was duly entered, to reverse which this proceeding in error was commenced.

[1, 2] Upon trial the only question of fact

involved was whether Senora Jefferson was | made two affidavits at different times in the legitimate child of Walter Jefferson, and that question turns upon whether Walter Jefferson and Annie Jefferson, née Starr, admittedly the father and mother of the plaintiff, were husband and wife at the date of her birth. Senora claims the land in controversy by descent from her grandfather, Chesley Starr, the father of Annie Jefferson, née Starr, and it is conceded that she is entitled to it if the relation between her father and mother was correctly found to be matrimonial, and not meretricious, by the trial court. Chesley Starr, the grandfather, Annie Starr, his daughter, Walter Jefferson, and Senora Jefferson are all Creek Indians of the full blood; and the contention of the plaintiff in error, as we understand it, is that, inasmuch as the evidence introduced at the trial for the purpose of establishing a valid marriage between Walter Jefferson and Annie Starr tended only to show that they were married, if at all, according to the tribal customs of the Creek Indians subsequent to the abrogation of such tribal custom marriages by the enactment of the Creek Marriage Laws, which prohibited tribal custom marriages, and required ceremonial marriages among the Creek Tribe of Indians, it was not sufficient to support the verdict and judgment rendered in favor of the plaintiff. The record probably warrants the inference that the trial court was of the opinion that the evidence adduced at the trial tended only to establish a marriage between Walter Jefferson and Annie Starr according to the custom and usage of the Creek Tribe of Indians, and that such a marriage was valid. But, even if the trial court was in error as to this and submitted the plaintiff's cause to the jury upon an erroneous theory, more unfavorable to her than a correct theory upon which she was entitled to recover, it would be no ground for the reversal of the judgment rendered in her favor. The evidence offered by the plaintiff for the purpose of establishing her legitimacy tended to show that about a year prior to her birth her father and mother, both since deceased. commenced to live together as husband and wife at the home of her maternal grandfather. Chesley Starr: that after this relation commenced until the time of the death of her mother, which occurred at the birth of Senora, both Walter Jefferson and Annie Jefferson recognized and treated each other as husband and wife, by declarations and admissions to that effect, and so they were considered by their friends, relatives, and neighbors: that upon the death of Annie Jefferson, Walter, who was present, took the child, Senora, to live with his parents, where she continued to reside, always bearing the name of Senora Jefferson and always being recognized by Walter Jefferson, his family and friends as the legitimate child of Walter and Annie Jefferson. That Walter Jefferson caused Senora to be enrolled as his daughter on

which he stated under oath that he was the husband of Annie Jefferson, deceased, and that Senora was the fruit of this union. At the same time and in the same connection an affidavit was also made and filed by Lena Jefferson, a midwife, the mother of Walter, and grandmother of Senora, wherein she stated under oath that she attended Mrs. Annie Jefferson, wife of Walter Jefferson, as midwife, at the birth of the child Senora, that said child is now living and is named Senora Jefferson. Much more testimony of the same import was introduced, but this is sufficient for the purposes of this opinion.

If at the time in question a legal marriage, whether ceremonial or otherwise, could have been consummated between Walter and Annie Jefferson, this evidence, which is practically uncontradicted, was competent for the purpose of proving such marriage. It is well settled that, repeated acknowledgments by a man, since deceased, of his marriage with a certain woman, are direct evidence of marriage. Coleman v. James, Ex'r, et al., 169 Pac. 1064, recently handed down, but not yet officially reported; In re Comly's Estate, 185 Pa. 208, 39 Atl. 890; 8 Enc. Ev. 475.

Of course, the value of declarations of the parties concerning marriages must always depend upon the circumstances under which they were made, but when, as here, there was not only repeated oral acknowledgments of the status by both parties, but also declarations to that effect made by the man under oath in circumstances of greatest deliberation, such declarations, as we have seen, are entitled to great weight. 8 Enc. Ev. 476: Greenawalt v. McEnelly, 85 Pa. 352.

It is also well settled that marriage may be proven by circumstantial evidence, and that since the presumption is in favor of marriage and against concubinage, the fact that a man and woman have openly cohabited together as husband and wife for a considerable length of time, holding each other out and recognizing and treating each other as such by declarations, admissions, or conduct, and are accordingly generally reputed to be such among their relatives and acquaintances and those who come in contact with them, may give rise to a presumption that they have previously entered into an actual marriage, although there may be no direct testimony to that effect.

Therefore, in the case at bar, as we have seen, the verdict of the jury and judgment entered thereon by the trial court is not only supported by circumstantial evidence, but also by direct evidence consisting of the repeated acknowledgments of both parties and acknowledgments by the man made in the most solemn and formal manner possible. Now, in making these acknowledgments of marriage we do not understand that Walter Jefferson, or Annie Jefferson, stated to any one that they were joined together by the the Creek Rolls and in connection therewith | ceremonial marriage required by the Creek

Marriage Laws, or according to the Creek custom and usage governing marriages in the Creek Nation prior to the enactment of such laws, or according to the common law, or any other form of marriage. They merely acknowledged that they were husband and wife, as the man did in the affidavits filed before the Dawes Commissions, as follows:

"I am the lawful husband of Annie Jefferson, who is a citizen by blood of the Creek Nation; that a female child was born to me on the 31st day of July, 1903; that said child has been named Senora Jefferson, and is now living.".

These acknowledgments and the other evidence adverted to, which is practically uncontradicted, being competent to prove a valid marriage between Walter Jefferson and Annie Starr, the manner of its solemnization is unimportant. The plaintiff having produced both direct and circumstantial evidence tending to show a valid marriage between her father and mother, the law requires the party who asserts its illegality to take the burden of proving it. Chancey v. Whinnery, 47 Okl. 272, 147 Pac. 1036; Crickett v. Hardin, 159 Pac. 277, not yet officially reported.

[3, 4] In our judgment, the defendant herein has completely failed to sustain this burden. Upon the whole record we are satisfied the judgment rendered is in accord with right and justice. Section 6005, Rev. Laws Okl. 1910, provides that:

"No judgment shall be set aside or new trial granted by any appellate court of this state in any case, civil or criminal, on the ground of misdirection of the jury or the improper ad-mission or rejection of evidence, or as to error in any matter of pleading or procedure, unless, in the opinion of the court to which application is made, after an examination of the entire record, it appears that the error complained of has probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right."

[5] After a careful examination of the entire record, it does not appear that the error complained of has probably resulted in a miscarriage of justice or constitutes a substantial violation of any constitutional or statutory provision.

For the reasons stated, the judgment of the court below is affirmed. All the Justices concur.

LITTLEFIELD v. BROWN et al. (No. 8629.) (Supreme Court of Oklahoma. April 23, 1918.)

# (Syllabus by the Court.)

1. PROCESS 4=68-SERVICE OF ORIGINAL SUM-MONS-EFFECT-FILING OF CROSS-PETITION.

When the original summons is served, the defendants are in court for every purpose connected with the action, and the defendants served are bound to take notice of the filing of a cross-petition by a codefendant.

2. Mobtgages 440 — Foreclosure Suit— Summons — Statute — Indobsement on WRIT.

Rev. Laws 1910, § 4705, does not require the summons in a foreclosure suit, where per-

fendant of the nature of the action against him and the kind of judgment that will be rendered. Nor is it necessary, the action not being for the recovery of money only, to indorse on the writ the amount for which, with interest, judgment will be taken if the defendant fail to answer. Following Horton v. Haines, 23 Okl. 878, 102 Pac. 121.

Error from District Court, Rogers County; W. J. Campbell, Judge.

Suit by C. H. Brown against Jesse E. Burr. C. B. Littlefield, and others, with answer and cross-petitions by the other defendants. Judgment for plaintiff and in favor of the cross-petitioners, and defendant C. B. Littlefield moved to vacate and set aside the judgment, and from an order overruling his motion he brings error. Affirmed.

Adams & Wills, of Claremore, for plaintiff in error. C. B. Holtzendorff and P. W. Holtzendorff, both of Claremore, for defendants in error.

TURNER, J. On December 16, 1915, defendant in error C. H. Brown sued Jesse E. Burr to recover upon a promissory note executed by said Burr to Gum Bros. and to foreclose a mortgage on certain lands described to secure the same. Plaintiff alleged that he was the owner and holder of said note and mortgage in due course; that the same was due and unpaid, and asked that the same be declared a first lien on the premises and that the same be foreclosed. Plaintiff further alleged that plaintiff in error C. B. Littlefield and defendants in error J. Z. Hogan, Kansas Wholesale Grocery Company, C. F. Godbey, First National Bank of Claremore, Kerfoot-Miller & Co., Julia Clements, state of Oklahoma, Lin C. McConnell, Chas. R. Ward, M. H. Gordon, and Joe Wicks claimed some title or interest in the property, and asked that they be required to appear and set up their interests, if any they had. Personal service of summons was had upon all defendants save and except J. Z. Hogan, Kansas Wholesale Grocery Company, Kerfoot-Miller & Co., state of Oklahoma, and Lin C. McConnell. Defendants in error McConnell, Gordon, Godbey, First National Bank of Claremore, and Kansas Wholesale Grocery Company, and the state of Oklahoma ex rel. E. M. Gallaher, county attorney of Wagoner county, appeared and filed their separate answers and cross-petitions, in effect, that each had a lien upon said property superior to plaintiff's, and asked that the same be foreclosed and that the land be sold to satisfy the same. Plaintiff in error, C. B. Littlefield, and defendants in error Jesse E. Burr, Julia Clements, Joe Wicks, and Chas. R. Ward made default. Kerfoot-Miller & Co. and J. Z. Hogan appeared and filed disclaimers.

No notice or process was served upon plaintiff in error of the filing of said crosspetitions. The cause proceeded to trial upon sonal service has been had, to advise the de- the issues thus joined, and judgment was rendered in favor of plaintiff and in favor of the cross-petitioners establishing their liens on the premises and ordering the property sold to satisfy the same. Thereafter plaintiff in error appeared and filed his motion to vacate and set aside said judgment in so far as the same attempted to adjudge and determine the rights between him and his said codefendants, which said motion, upon hearing, was overruled. From the order overruling the motion to vacate, plaintiff in error prosecutes this appeal, and for reversal contends that the judgment was void, because rendered against him by default, without service of summons or notice of any kind given him of the filing of said cross-petitions by his codefendants.

[1] This question has not been directly passed upon by this court. The authorities are somewhat in conflict upon the proposition. Our statute nowhere provides for service of summons on all parties interested upon the filing of an answer and cross-petition, and we are of opinion that, where a party to an action is personally served with summons, he is in court for every purpose connected with the action, and bound to take notice of all proceedings that follow. This is the rule announced by the Supreme Court of Kansas, from which our Code of Civil Procedure was adopted. In Jones v. Standiferd et al., 69 Kan. 513, 77 Pac. 271, the court said:

"Mary P. Jones and her codefendant, T. B. Jones, were duly served with summons in the suit brought by the Wisconsin Planing Mill Company to foreclose its lien. They were bound to take notice of the cross-petition of Hiram Holt, filed thereafter, in which he asked for and obtained a decree for the foreclosure of his mortgage and an order of sale of the property in controversy. In Kimball and Others v. Connor, Starks and Others, 3 Kan. 414, 431, it was said: 'When the original summons is served the defendants are in court of the defendants. the defendants are in court for every purpose connected with the action, and the defendants served are bound to take notice of every step taken therein.' In Curry v. Janicke, 48 Kan. 168, 29 Pac. 319, it was held that when a party has been properly served with summons he must take notice of an answer and cross-petition filed by a defendant who was made a party to the action after the answer-day named in the summons.

In Shellabarger v. Sexsmith, 80 Kan. 530, 103 Pac. 992, in the syllabus the court said:

"In a mortgage foreclosure suit judgment was taken by default against the mortgagor, who was served personally. At the same time it appeared that a person claiming an interest in the land had been omitted, and an order was inthe land had been omitted, and an order was included in the foreclosure decree allowing him to be made a party. The petition was amended and he was duly served. He answered setting up a second mortgage given by the defaulting defendant, and prayed a personal judgment against him, which in due time was entered without further notice or appearance. tered without further notice or appearance. Held, the defendant in default was bound to take notice of the proceedings and the judgment against him is not void."

To the same effect, see Lawson v. Rush, 80 Kan. 262, 101 Pac. 1009.

statute (Rev. Laws 1910, § 4691) makes it the duty of the court to require that every person claiming an interest in the property be made a party to the action, to the end that all rights respecting such property may be adjudicated. thereby preventing a multiplicity of suits. Blanshard v. Schwartz. 7 Okl. 23, 54 Pac. 303. Plaintiff in error made no effort to determine why he was made a party to the action brought by Brown to foreclose his mortgage on the property involved; neither did he attempt to assert any lien or claim which he might have had upon the property. Had he made the slightest investigation, he would have discovered that plaintiff was attempting to foreclose a mortgage upon property upon which, he alleges, he holds a mortgage, and he would have been given an opportunity to assert any claim he might have had on the property. But instead he preferred not to do so, and, after judgment had been entered against him by default, he filed his motion to vacate for certain reasons heretofore stated. The judgments rendered on the cross-petitions were not void for failure to serve plaintiff in error with notice of the filing of said crosspetitions by his codefendants, and the court did not err in so holding. A majority of the states wherein a contrary rule has been announced by the courts have statutes requiring the service of notice of the filing of a cross-petition. But we have no such statute.

Plaintiff in error relies upon the case of Griffin et al. v. Jones et al., 45 Okl. 305, 147 Pac. 1024, as supporting his contention that service of summons upon a cross-petition is necessary. That was an action brought by James K. Jones, administrator, against A. S. Griffin and Chas. A. Sandals to recover upon certain promissory notes and to foreclose a mortgage. Service by publication was attempted to be had upon Griffin and Defendant Sterling Oil Company Sandals. was duly served, but did not appear. Defendants Frick-Ried Supply Company and James Taylor appeared and filed their an-No service of swers and cross-petitions. summons or notice was given defendants Griffin and Sandals of the filing of said cross-petitions, and they did not appear. Upon a trial, the court rendered personal judgment against them for the respective amounts prayed for in the petition and crosspetitions. It appears that the court rendered judgment on two notes past-due and also on eighteen notes not due, and ordered the property sold to satisfy said judgments. On the day the case was called for trial. plaintiff filed an amended petition, setting up four additional causes of action upon notes which had matured since the filing of the original petition. After the expiration of the term of court, Griffin and Sandals and Sterling Oil Company appeared and filed their motion to vacate said judgment for In an action to foreclose a mortgage, the certain jurisdictional and nonjurisdictional reasons, which motion was overruled and an appeal taken to this court. In an opinion by Mr. Justice Riddle, we held that the service of summons attempted to be had upon defendants Griffin and Sandals was void for the reason the affidavit for publication was void, and for that reason the judgment against them was likewise void for want of jurisdiction. We further held the judgment void for the reason that the petition did not state a cause of action upon eighteen notes yet immatured, and in reversing the judgment, said:

"We are of opinion that the petition failed to state a cause of action as to all the notes, except the first two notes sued on, amounting to \$1.784.90, and, had plaintiff taken a separate judgment for this amount, that part of the judgment would be affirmed. But, in that these two causes of action and the fourth additional cause of action were included in the judgment." it is necessary to reverse the entire judgment.

We further held that the filing of said amended petition declaring on additional notes due since the filing of the original petition, without notice to defendants, was such an irregularity as to require a vacation of said judgment, and in passing, said:

"There is no contention that any appearance was made, so far as relates to the cross-petitions or the judgments rendered thereon; neither is it contended that there was any summons served or notice of any kind given to defendants on said cross-petitions."

But we do not think the question here under consideration was either presented or passed upon in the above case. The summons which was served upon plaintiff in error in the trial court recites:

"If the defendant fails to appear, judgment will be taken for the sum of \$198.43, with interest at the rate of 10 per cent, per annum, payable annually from the 15th day of December, 1915, \$50 attorney's fee, and costs of suit."

[2] Judgment was rendered for approximately \$4,000. Plaintiff in error contends that under Rev. Laws 1910, \$ 4705, the court was without jurisdiction to render a judgment for a greater amount than that indorsed on the summons. This contention is without merit. In Horton v. Haines et al., 23 Okl. 878, 102 Pac. 121, in the syllabus we held:

"That part of section 4259. Wilson's Rev. & Ann. St. 1903, which provides that the summons shall be 'directed to the sheriff of the county, and command him to notify the defendant or defendants, named therein, that he or they have been sued, and must answer the petition filed by the plaintiff, giving his name, at a time stated therein, or the petition will be taken as true and judgment rendered accordingly; and where the action is on contract for the recovery of money only, there shall be indorsed on the writ the amount, to be furnished in the precipe, for which, with interest, judgment will be taken, if the defendant fail to answer. If the defendant fail to answer. If the defendant fail to appear, judgment shall not be rendered for a larger amount and the costs'—does not require the summons in a foreclosure suit, where personal service has been had, to advise the defendant of the nature of the action against him and the kind of

judgment that will be rendered. Nor is it necessary, the action not being for the recovery of money only, to indorse on the writ the amount for which, with interest, judgment will be taken if the defendant fail to answer."

Finding no error requiring a reversal, the judgment of the trial court is affirmed. All the Justices concur.

EWING v. RICHVALE LAND CO. et al. (Civ. 1841.)

(District Court of Appeal, Third District, California. April 24, 1918. Rehearing Denied by Supreme Court June 20, 1918.)

MORTGAGES \$\infty 559(3)\$—Deficiency Judgment —Authority of Clerk.

In an action on notes secured by mortgage, prayer being for foreclosure and deficiency judgment, a distinct adjudication and judgment against defendant in a sum named is equivalent to judgment that defendant is personally liable to plaintiff for amount found to be due, and sufficient to authorize clerk, after commissioner's return showing deficiency, to enter deficiency judgment under Code Civ. Proc. § 726, providing that if it appears from the commissioner's report that the proceeds are insufficient and a balance still remains due, judgment must then be docketed by the clerk in the manner provided "against the defendant or defendants personally liable for the debt."

Appeal from Superior Court, Butte County: H. D. Gregory, Judge.

Action by Samuel Ewing against the Richvale Land Company and others. From a deficiency judgment entered for plaintiff by the clerk of court, defendant named appeals. Affirmed.

See, also, 167 Pac. 876.

J. Oscar Goldstein, of Chico, for appellant. James A. McGregor, of Oronville, and Karl C. Partridge, of San Francisco, for respondent.

CHIPMAN, P. J. This is an appeal by defendant Richvale Land Company from a deficiency judgment entered by the clerk of the superior court on the coming in of the commissioner's return in an action to foreclose a mortgage executed by appellant to plaintiff.

It is alleged in the complaint in the action that the defendant company executed and delivered to plaintiff two certain promissory notes each for \$4,593; that plaintiff is the owner and holder of said promissory notes, neither of which nor any part thereof except certain interest on one of said notes has been paid: that to secure payment of said notes defendant company executed and delivered to plaintiff its mortgage on certain described land, describing it, which was duly acknowledged and recorded; that defendant Jones claims some interest in said land, but that such interest is subordinate to said mortgage; that by the terms of said mortgage a reasonable attorney's fee was allowed for the foreclosure, should foreclosure become necessary. Upon the foregoing averments the prayer of the complaint is that plaintiff have "judgment against defendant (Richvale Land Company) in the sum of," stating the amount of each note together with interest thereon for attorney's fees in the sum of \$1,000; that "said mortgage be foreclosed, and that each of said defendants and all persons claiming under them, or either of them, may be foreclosed of all right \* \* \* and that the usual decree may be made \* \* \* for the sale of said mortgaged premises by the sheriff \* \* or by a commissioner to be appointed by said court, and that the proceeds of said sale may be applied to the payment of said note, interest, attorney's fee, and costs of suit and sale"; that each of said defendants and all purchasers subsequent to the execution of said mortgage be foreclosed of all, etc., "and that plaintiff may have judgment and execution against the defendant Richvale Land Company, a corporation, for any deficiency which may remain after applying all the proceeds of the sale of said property properly applicable to the satisfaction of the said judgment"; that plaintiff may become the purchaser at such sale. The rights of defendant Jones are not involved, and he does not appeal. The answer of defendant Richvale Land Company admits all the averments of the complaint except as to attorney's fees, and as to that the denial is that \$1,000 is a reasonable The cause came on for trial December 21, 1915, and a minute order was made which stated, among other things:

"Matter submitted to the court, and the court orders that a decree be entered for the plaintiff of foreclosure and counsel fees at \$500."

On the 25th day of February, 1916, the court made and entered its decree. It is entitled, "Decree of Foreclosure," recites that the cause came on to be heard December 21, 1915, both oral and documentary evidence was submitted, and "the court now finds the following facts": That defendant Richvale Land Company is a corporation duly organized: that it executed and delivered to plaintiff the promissory notes set out in the complaint, and "that the plaintiff ever since has been and still is the owner and holder of said promissory notes, and that neither the sum mentioned therein, or any part thereof, has ever been paid," nor any interest except as stated; that defendant Richvale Land Company executed the mortgage mentioned in the complaint to secure payment of said notes and described the property mortgaged; that said mortgage provided for the payment of a reasonable attorney's fee, which is found to be \$500 (the finding as to defendant Jones is immaterial). The findings of fact here end. It is then stated:

"It is hereby ordered, adjudged, and decreed that a judgment be entered against the defendant Richvale Land Company in the sum of \$4,593, with interest at the rate of 10 per cent. per annum from the 1st day of March, 1914, and for the sum of \$4,593, with interest at the rate of 6 per cent. per annum from the 1st day of March, 1913, to the 1st day of March, 1915,

and at the rate of 10 per cent. per annum from the 1st day of March, 1915. For attorney's fees in the sum of \$500 and for all costs of suit and sale."

It is further stated:

"That said mortgage be foreclosed, and that said defendant Richvale Land Company, a corporation, be foreclosed of all right, claim, or equity of redemption of its interest in said mortgaged premises, or any part thereof, and that John Myers be, and he is hereby, appointed a commissioner to conduct said sale and apply the proceeds thereof to the payment of said notes, interest, attorney's fees, and costs of suit and sale, and that before qualifying as such commissioner, the said John Myers gives a bond in the sum of \$100."

The commissioner duly made return of his proceedings, from which it appeared that there was a deficiency of \$6,617.30 after disposing of the proceeds of the sale in accordance with the decree. The clerk made the following entry in judgment docket:

"Judgment for deficiency of \$6,617.30 as shown by commissioner's return of sale."

It will appear from the foregoing that the findings of fact are a part of the decree, and that no conclusions of law as such are stated. In the paragraph, immediately following what purport to be findings of fact, is the order and decree. There is no provision in the decree for entering a deficiency judgment.

It is upon this condition of the record that appellant makes the following contentions:

"(1) Section 726, Code of Civil Procedure, providing for foreclosure of mortgages of realty, does not give the clerk power to docket a deficiency judgment unless a judgment is entered adjudicating the defendant personally liable for the debt. (2) The mere recital, preceding the judgment, or as contained in the judgment and decree of the court, that judgment be entered against defendant Richvale Land Company in the amount of the debt sued for, with interest, costs, and counsel fees, is not the entry of a judgment that defendant Richvale Land Company is personally liable for the debt, or permitting a deficiency judgment to be docketed by the clerk against them."

The provision of section 726 touching the question here is as follows:

"If it appear from the sheriff's return, or from the commissioner's report, that the proceeds are insufficient, and a balance still remains due, judgment must then be docketed by the clerk in the manner provided in this code for such balance against the defendant of defendants personally hable for the debt, and it becomes a lien on the real estate of such judgment debtor, as in other cases in which execution may be issued."

It is undoubtedly true and the cases all so hold, that the deficiency judgment contemplated by section 726 can only be docketed by the clerk "against the defendant or defendants personally liable for the debt" for such is the express language of the statute. Scamman v. Bonslett, 118 Cal. 93, 50 Pac. 272, 62 Am. St. Rep. 226; Herd v. Tuohy, 133 Cal. 55, 65 Pac. 139; and among the earlier cases may be cited Cormerais v. Genella, 22 Cal. 116; Leviston v. Swan, 33 Cal. 480. In the case last cited the court stated what is

still true, for the forty-sixth section of the Practice Act was substantially the same so far as concerned the deficiency judgment, as is section 726 as we now have it. The court speaking of the judgment in a foreclosure case, said:

"All that it need or should contain is a statement of the amount due the plaintiff a desmation of the defendants who are personally liable for the payment of the debt, and a di-rection that the mortgaged premises, or so much thereof as may be necessary, be sold according to law and the proceeds applied to the payment of the expenses of the sale, the cost of the action, and the debt. Nothing furcost of the action, and the debt. Nothing lurther is required. All else is ministerial, and is expressly regulated by the statute, which is not made clearer or more binding by being copied into the judgment. \* \* Under our system, the sheriff is furnished with a certified copy of the judgment. Armed with this process, he the judgment. Armed with this process, he proceeds to sell the mortgaged property in the mode and manner, and at the place designated in the Practice Act for the sale of real estate under judicial process, and makes a return of his proceedings as in the case of an execution upon a money judgment. If it appears from his return that the amount due the plaintiff has not been fully paid by the sale, the clerk then dockets the judgment, for the balance due, against those defendants named in the judgment as heing personally liable for the payment. ment as being personally liable for the payment of the debt, without any order from the court."

Herd v. Tuohy, 133 Cal. 55, 65 Pac. 139, is relied on by appellant. That was a foreclosure case in which the defendant recovered judgment against the plaintiff for the foreclosure of a mortgage. It was stated by the court in its opinion:

"In the judgment as originally entered, there was no adjudication that the plaintiff was personally liable, or provision for a deficiency judgment against him."

On an ex parte application of defendant's attorneys, the judgment was amended by adding thereto a paragraph, adjudging the plaintiff to be personally liable on the mortgage, and that on the commissioner's return of the sale, deficiency judgment should be docketed against him; and accordingly such a judgment was docketed against him. This action was brought to obtain relief against this judgment as amended and the deficiency judgment entered thereon, and resulted in a judgment for plaintiff, in effect canceling both judgments. The appeal was from this Among other points, appellant judgment. urged:

"That the complaint does not purport to set forth all of the original decree, and non constat that it was not sufficient to authorize a deficiency judgment."

Said the court:

"As to the second point, the complaint purports to set out the whole judgment, but in fact, as appears from the findings, does not do so. But the omitted portions contain no provision for a deficiency judgment; nor is there any adjudication that the plaintiff, then defendant, was personally liable, unless, as claimed by the appellant, the following recital may be so construed, viz.: "That the interest on said note to November 30, 1895, has been paid; that no other \* \* \* part of said note, principal, or interest has been paid, and there is that no other \* \* \* part of said note, principal, or interest has been paid, and there is now due and owing to the plaintiff from the

defendants John Herd, Jr., and R. Linder on said note the sum of \$91,101.85, etc., and that the said defendants John Herd, Jr., and R. Linder are personally liable \* \* \* for said sums so found due from them to plaintiff as aforesaid. But this is merely the recital of a fact preceding the actual judgment, and cannot be regarded as an adjudication of personal liability; which alone could authorize the clerk to docket a judgment for deficiency"—citing cases.

In that case it will be observed that there was found as fact what amounted to a liability on the part of defendants Herd and Linder, but the finding was not followed by an adjudication of personal liability. In the present case the complaint set out the indebtedness and called for a deficiency judgment. The answer admitted the averments of the complaint. The court in its findings found the amount due on the promissory notes to plaintiff from defendant Richvale Land Company, and that no part thereof had been paid, except certain interest on one of the notes. Upon the findings the court entered judgment against the defendant Richvale Land Company in the sum so found to be due plaintiff. Herein lies the important feature distinguishing it from the case of Herd v. Tuohy relied upon by defendant. In that case the recital was but a finding of fact, and was not followed up, as was done in the present case, by an adjudication and judgment. It was not necessary that the judgment should in express terms state that defendant Richvale Land Company is personally liable for the It is sufficient if from the findings and judgment such fact clearly appears. Judge Sanderson in Leviston v. Swan, supra, pointed out all that the judgment need contain. "All else," he said, "is ministerial, and is expressly regulated by the statute, which is not made clearer \* \* by being copied into the judgment." See Hooper v. Mc-Dade, 1 Cal. App. 733, 739, 82 Pac. 1116. In MacNeil v. Ward, 2 Cal. Unrep. Cas. 174, tne court said:

"The judgment in this case is not amenable to the criticism of counsel for appellant, that it is erroneous because there is no direction in it that a judgment be docketed for deficiency. In this respect it [the judgment] accords with Leviston v. Swan, 33 Cal. 480, where the ques-Levision V. Swaii, Scai. 400, where the question is considered and correctly determined. The only point in which the judgment seems to be defective is in not expressly adjudging that \* \* Ward is personally liable to the plaintiff for the money found to be due. This is inferentially done."

The court directed that on the going down of the remittitur, the judgment be amended, "inserting words remedying this defect, and, as thus modified the judgment will stand affirmed." The record of the case does not give the form of the judgment, and it may not have, except as the court said, "inferentially" adjudged that Ward was liable for the debt. Here there is a distinct adjudication and judgment "against the defendant Richvale Land Company in the sum of," etc. It seems to us that this is the equivalent of

saying that defendant Richvale Land Company is personally liable to the plaintiff for the money found to be due, and is sufficient. By no possibility could there have been a liability other than by defendant company. The statute does not prescribe the form of the judgment. All that it requires is that it shall appear from the judgment that the defendant is personally liable for the debt, and we think that this may appear without in express terms adjudging the defendant to be personally liable. Language used which unmistakably means this should be held to be, and we think is, sufficient.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

### THOMAS v. PEEBLER.

(Supreme Court of Oregon. June 11, 1918.) 1. FRAUDS, STATUTE OF \$\infty\$=150(3)—PLEADING
—DEMURER-LEASES—VALIDITY.

A complaint alleging an oral contract on

A complaint alleging an oral contract on June 16th to remodel a building, and on comple-tion of changes to lease to defendant for one year, and that on August 15th a lease for one year in accordance with the agreement was made operative by giving and taking possession, was not demurrable as pleading an invalid contract under L. O. L. § 808, subd. 6, making void a lease for a period longer than one year.

2. APPEAL AND EBROB €==907(3) — PRESUMPTIONS—FINDING OF COURT.

The findings of fact by the trial court sitting without a jury being equivalent to a verdict, the court on appeal must, in the absence of bill of exceptions, presume that there was evidence to support them.

3. Pleading == 22-Redundancy.

Where complaint alleged oral contract on June 16th to remodel building, and on completion of changes to lease to defendant for one year, and that on August 15th a lease for one year in accordance with the agreement was made operative by giving and taking possession, the allegations as to the contract of June 16th were unnecessary and redundant.

Department 1. Appeal from Circuit Court, Multnomah County; J. P. Kavanaugh, Judge. Action by H. E. Thomas against T. C. Peebler. Judgment for plaintiff, and defendant appeals. Affirmed.

The parties agree that the plaintiff is the owner of the storeroom and premises in question. The complaint narrates an oral agreement made on June 16, 1914, to the effect that the plaintiff was to make certain changes in the premises, fitting them for the defendant's use, and that in pursuance thereof the alterations were made. Then comes this averment:

"That on said 15th day of August, 1914, plaintiff leased, let and demised to the defendant, and defendant leased, occupied and entered ant, and derendant leased, occupied and entered into the possession of said premises for a period of one year all in accordance with said agreement of June 16, 1914, and defendant agreed to pay to the plaintiff during said period of one year the said sum of \$540, in installments of not less than \$45 each."

This is followed by the statement to the

count of the rent reserved, and without the consent of the plaintiff abandoned the premises on May 15, 1915; that from that time to June 30, 1915, no one paid the rent; that at the latter date the plaintiff succeeded in getting a new tenant who took possession and remained there and paid the rent during the rest of the term. There is another statement that prior to the defendant's taking possession plaintiff importuned him to execute a written lease for the one-year term, but the latter put him off, claiming "that his word was as good as his bond."

A general demurrer to the complaint was overruled. Except as stated at the outset. the answer traversed all the averments of the complaint. One affirmative defense is that the defendant occupied under a month to month lease, and paid for the full time of his occupancy. A second is that after the defendant removed from the premises the plaintiff accepted from him in full settlement of the claim arising out of the occupancy of the property a certain stove of the value of \$16; and, lastly, that the alleged oral agreement of June 16, 1914, was one which was not to be performed within a year from that date, and consequently is void under the statute of frauds. Otherwise than as stated in the complaint the reply joins issue upon the answer.

After a trial without a jury, the court made findings of fact and conclusions of law substantially in consonance with the allegations of the complaint and against the contentions of the answer. Judgment was rendered upon them in favor of the plaintiff, and the defendant appeals.

Oliver M. Hickey, of Portland (Frank E. Swope, of Portland, on the brief), for appellant. W. B. Shively, of Portland, for respondent.

BURNETT, J. (after stating the facts as above). [1] There is nothing before us as data for a decision except the pleadings, findings of fact, and conclusions of law, and the resultant judgment, to which alone we are confined in our investigations, as there is no bill of exceptions. The argument has taken the form of a debate upon the sufficiency of the complaint. The defendant contends that it is disclosed that the agreement was made on June 16th, and was not to be performed within a year, and that its being oral makes it void under the statute of frauds. L. O. L. § 808, subd. 1. This contention, however, is fallacious, for the complaint directly alleges that a lease was made by the parties on August 15th for one year; that under it the defendant took possession of the property and agreed to pay for the term \$540 in installments of not less than \$45 each. The contract embodied in this statement of the complaint is valid, for the effect that the defendant paid \$405 on ac-| statute of frauds declares void only "an



agreement for the leasing, for a longer period than one year, or for the sale of real property, or of any interest therein." L. O. L. § 808, subd. 6. out any lease from the owner of the property, Rima sought to defend an action of forcible entry and detainer on an alleged oral promise of Dechenbach to make such a lease. The

[2, 3] The findings of fact in a trial by the court are equivalent to a verdict, and in the absence of any bill of exceptions we must presume that there was evidence before the court competent to prove the quoted allegation, and the verdict therefore cannot be disturbed. The averments of the complaint as to the preliminary bargaining were unnecessary and might have been left out. If they had been attacked as redundant instead of irrelevant and immaterial, it would have been proper to strike them from the pleading.

In White v. Holland, 17 Or. 3, 3 Pac. 573, cited by the defendant, it appeared by the record that the lease relied upon was actually made on January 20th for one year. to commence March 1st thereafter. whole agreement was made at the earlier date. No subsequent stipulation was counted upon, and hence as this was oral and not to be performed within one year the court was right in declaring it void. In Dechenbach v. Rima, 45 Or. 500, 77 Pac. 391, 78 Pac. 666, the latter had bought out a previous tenant of the plaintiff with the expectation of securing a new lease from the landlord for a term of three years, but without taking any writing from any one to that effect. After he had come into possession as subtenant, with- cur.

Rima sought to defend an action of forcible entry and detainer on an alleged oral promise of Dechenbach to make such a lease. The substance of the ruling was that he had no competent evidence to sustain such a pleading, as there was no writing embodying the contract alleged. Bowman v. Wade, 54 Or. 347, 103 Pac. 72, was a case in which the plaintiff sought to recover money loaned on an oral agreement to the effect that it should be paid in three years, with interest at 10 per cent. The court held that the recovery could not be had upon such a contract, because it was not in writing, and could not be performed in one year. A recovery of the money, with interest at 6 per cent., was permitted, however, upon the implied contract deduced from the facts stated in the pleading, as for money had and received. These cases cited by the defendant are not by the mark in the present juncture.

The essence of the complaint is found in the allegation of a verbal lease of August 1, 1914, made for one year. Despite the surplusage, there is enough in the pleading to authorize a recovery. There is no basis upon which to challenge the findings of fact. The conclusion of law to be drawn from those findings is correct, and judgment must be affirmed.

BEAN, BENSON, and HARRIS, JJ., concur.

STATE v. THOMAS. (No. 14632.)

(Supreme Court of Washington. June 17, 1918.)

1. FORGERY \$\ightharpoonup 26\to Indictment and Information \$\ightharpoonup 60\to Information \to Sufficiency. An information charging forgery under Rem. Code, \$\frac{2}{5}\$ 2583, setting forth the instrument, stating that it was forged with intent to defraud, is sufficient under Const. art. 1, \$\frac{2}{5}\$ 22, requiring the nature and cause of the accusation to be stated, and Rem. Code, \$\frac{2}{5}\$ 2055, \$\frac{2}{5}\$ bd. 2, requiring a statement of facts in ordinary and con-

cise language.

2. Indictment and Information \$\ifthered{\infty} 101\to Information \text{OFFIGURE}.

FORMATION DEFRAUDED,

In view of Rem. Code, § 2303, subd. 5, making it unnecessary to aver an intent to defraud any particular person, and section 2292, providing that whenever an intent to defraud is an element of an offense, it is sufficient if the testimony shows that there was an intent to defraud any person, an information charging forgery need not name the person intended to be defrauded, notwithstanding section 2057, requiring the particular circumstances of the crime to be charged, section 2065, subd. 6, requiring a concise statement of the facts, and subdivision 7, requiring the act to be stated with certainty.

Department 2. Appeal from Superior Court, King County; Kenneth Mackintosh, Judge.

George Thomas was convicted of forgery of a check, and he appeals. Affirmed.

John T. Casey, of Seattle, for appellant. Alfred H. Lundin and Frank P. Helsell, both of Seattle, for the State.

CHADWICK, J. Appellant was charged upon the following information:

"He, said George Thomas, in the county of King, state of Washington, on or about the 22d day of March, A. D. 1917, with intent to defraud, did then and there willfully, unlawfully, and feloniously forge a certain written instrument, to wit, a check, in the words and figures following, to wit: 'No. 122. Seattle, Wash., Mar. 22, 1917. To the Seattle Branch The Canadian Bank of Commerce 19-13: Pay George Thomas.....\$15.00 or order Fifteen Dollars......100 Dollars. A. C. Paul'—said written instrument then and there being a request for the payment of money. Contrary to the statute in such case made and provided and against the peace and dignity of the state of Washington."

He appeals from a judgment of conviction, contending that the information does not charge a crime in that it does not state the nature and the cause of the accusation as is required under section 22, art. 1, of the Constitution, and that it does not state the facts in ordinary and concise language so that a person of common understanding may know what is intended as required by subdivision 2, § 2055, Rem. Code, and that it does not conform to and that it is not sufficient under section 2057 and subdivisions 6 and 7 of section 2065, Rem. Code, in that it does not state the name of the person intended to be defrauded.

[1] It is a settled rule of law that the holders therefor.

crime of forgery may be charged by setting forth the instrument saying that it is forged Conn Linn, Judge.

and with intent to defraud. Section 2583, Rem. Code; 12 Ruling Case Law, p. 154; 9 Enc. of Pleading & Practice, p. 555; 11 Standard Enc. of Procedure, 1142.

[2] It is also held almost without contradiction in the cases that it is unnecessary to name the particular person intended to be defrauded. It is provided in section 2303 of Rem. Code, subd. 5, "that it is not necessary to aver or prove an intent to defraud any particular person," and in section 2292 that whenever an intent to defraud is an element of an offense charged it is sufficient to sustain a conviction if the testimony shows that there was "an intent to defraud any person, association, body politic, or corporate whatsoever." See State v. Pilling, 53 Wash. 464, 466, 102 Pac. 230, 132 Am. St. Rep. 1080.

There being no statement of fact. we are bound to assume that the proof disclosed an intent to defraud some particular person, association, body politic or corporate.

We find no error, and the judgment is affirmed.

MAIN, C. J., and HOLCOMB, MOUNT, and FULLERTON, JJ., concur.

UNION STATE BANK OF SHAWNEE et al. v. MUELLER et al. (No. 8431.)

(Supreme Court of Oklahoma. Feb. 12, 1918. Rehearing Denied May 7, 1918.)

(Syllabus by the Court.)

1. RECEIVERS €=35(1) — APPOINTMENT — No-TICE TO ADVERSE PARTY.

Where the petition for appointment of a receiver fails to state facts sufficient to show that the delay which would result in giving notice of the application to the adverse party would defeat petitioner's rights or result in injury to him, it is error for the court to appoint a receiver without notice.

2. Receivers \$\sim 35(3) — Appointment without Notice—Waiver.

Where after a receiver is appointed without notice, the defendants filed motion to vacate and amended motion to vacate the appointment and also filed answers to the merits and the issue upon the motion to vacate and amended motion to vacate is tried and both sides are given ample opportunity of presenting fully their evidence and such evidence is presented, the error in making the appointment without notice is waived.

3. Corporations ♦ 553(6) — Receivers — Grounds — Mismanagement of Corporation.

where the property of a corporation is being mismanaged or is in danger of being lost to the stockholders through mismanagement, collusion, or fraud of its officers and directors, a court of equity has the inherent power to appoint a receiver for the property of such corporation, and to require its officers to make an accounting upon petition of the minority stockholders therefor.

Error from District Court, Tulsa County; Conn Linn, Judge.



Action by C. C. Mueller and others against | quires jurisdiction to make an order overthe Arkansas River Bed Oil & Gas Company and others for the appointment of a receiver. From the denial of their motion to vacate the appointment of the receiver the Union State Bank of Shawnee and others bring error. Affirmed.

Aby & Tucker, of Tulsa, and Abernathy & Howell, of Shawnee, for plaintiffs in error. Horace Speed, of Tulsa, for defendants in error.

HARDY, J. C. C. Mueller and others commenced an action in the district court of Tulsa county against the Arkansas River Bed Oil & Gas Company and others as defendants, for the appointment of a receiver of certain property alleged to belong to the Arkansas River Bed Oil & Gas Company, upon which petition, and without notice of any kind or character to any of the defendants, the court on March 16, 1916, appointed a receiver as prayed, who thereupon gave bond and took possession of the property. The defendants who prosecute this proceeding filed motion and amended motion to vacate the appointment of said receiver, and also filed answers in said cause, and at a hearing had on said motion and amended motion to vacate offered evidence in support thereof, upon which hearing the court overruled said motion and refused to vacate the appointment theretofore made, from which action of the court this proceeding is prose-

[1] It is first urged that the action of the court in appointing the receiver without notice, without evidence and upon a petition verified only on information and belief, was erroneous. The petition failed to state facts sufficient to show that the delay which would result in giving notice of the application to the adverse party would defeat petitioners' right or result in injury, and under such circumstances it was error for the court to appoint a receiver without notice. Pyeatt v. Prudential Ins. Co. et al., 38 Okl. 15, 131 Pac. 914, Ann. Cas. 1915C, 894.

[2] Plaintiffs in error, however, are not in position to urge this objection, because after the appointment was made they filed motion and amended motion to vacate the appointment, and also filed answer to the merits and offered evidence in support of the issues made upon the amended motion to vacate, and thereby entered a general appearance in the action and tried out the issues on their merits. The petition was properly verified at the time of the hearing on the amended motion to vacate. The situation here presented is similar to that where a party against whom a decree had been rendered without service of process files a motion to vacate the same upon nonjurisdictional as well as jurisdictional grounds, where it is held that the party enters a and on the next day, January 21st, Fleming, general appearance, and that the court ac- as president of the bank, without any notice

ruling said motion to vacate. Chicago, R. I. & P. R. Co. v. Austin, 163 Pac. 577, L. R. A. 1917D, 666, and cases cited.

The precise question here involved has not heretofore been considered by the court, but a similar situation was presented in Elwood v. National Bank, 41 Kan. 475, 21 Pac. 673, where it was said that such question was material, as the entire question with regard to the necessity or want of necessity for a receiver, or the propriety or impropriety in having one, had been heard, and both sides had enjoyed an ample opportunity of presenting all that they desired to present.

[3] This then requires an examination of the evidence to determine whether the receiver was rightfully appointed. It was the claim of plaintiff that the property of the corporation was being mismanaged and in danger of being lost to the stockholders through the mismanagement and fraud of its officers. The principal officer of the corporation was at Tulsa, which is the center of the oil region and one of the largest financial centers of the state, and there is evidence tending to show that A. T. Brown, president of the company, who had formerly been a partner with M. C. Fleming, president of the Union State Bank at Shawnee. arranged with said Fleming for a loan of \$4,000 payable in 15 days, which was represented by two separate promissory notes, especially prepared, bearing date of December 4th, in which all of the property of the corporation was pledged as collateral for the payment thereof, and which authorized a sale of the property so pledged, either at public or private sale, with or without notice; that to secure the payment of these notes there was also assigned an oil lease, together with all the oil which might be produced therefrom, and on December 6th a chattel mortgage on all of the personal property of the company was executed. There appears in the record a schedule of the equipment, which amounts to \$29,452.77. The lease which was assigned is shown to have had a probable value of \$30,000 or \$40,000 at the time of the assignment, and the amount of oil produced therefrom which had been assigned to the bank amounted to about \$2,000 per month. The notes were not to bear interest until after maturity. During December and January over \$3,000, the proceeds of oil sold from the lease, was deposited in the bank, which was not applied to the payment of said notes, but the bank permitted same to be paid out by defendants upon claims against the company, a large proportion of which was in favor of said defendants for salaries and expenses. On January 20, 1916, Brown, the president of said company, went to Shawnee and held a consultation with Fleming and his attorney.

whatever, sold to the bank all of the com- has resulted in wrecking its business and pany property for \$500, and on January 27th, acting for the bank, executed to himself a written assignment of the lease, together with all the wells, lease equipment, rights, and privileges in connection with said lease and contracts for the sale of oil therefrom. On January 23d, which was on Sunday, notice of sale of the property covered by the mortgage and the assignment of the oil runs were posted, bearing date as of January 20, 1916, and on February 4th a sale of all the lease equipment and outfit to satisfy the mortgage was made for the sum of \$1,750 by the bank through Fleming as its president, to himself as trustee for his wife, himself, and other individuals, who thereafter organized the Security Investment Company, to whom was conveyed the property purchased by Fleming. There was no one present at this sale, and no one bid thereat except employes of the bank. The Oil Well Supply Company had a claim against the Arkansas River Bed Oil & Gas Company secured by a mortgage on certain property which was prior in time to that held by the bank, and about the 7th of February, 1916, Fleming proposed to its manager that the company foreclose its mortgage, and that he could sell the property of the company for \$60,000 or \$70,000, and would split the profits between him and one Hill, who was manager for the Oil Well Supply Company. There is additional evidence tending to show, and from which the court would be justified in finding, that Brown as president of the company and the other individual defendants as officers thereof were acting in collusion with Fleming in disposing of the property of the corporation at a grossly inadequate price, and that as a result thereof the property would be lost to stockholders of the company. And there is evidence tending to show that the revenues of the company were sufficient to pay its ordinary running expenses, and that its receipts were consumed by the officers in the allowance of excessive claims. A court of equity has the inherent power to appoint a receiver for the property of a corporation, and to require the officers to make an accounting therefor upon the petition of minority stockholders. The officers of a corporation in the management and control of its assets are the trustees of the stockholders, and are charged with the faithful management of the corporate property for the accomplishment of the purposes for which the corporation was chartered; and, under a state of circumstances such as the evidence tends to establish, it would amount to a denial of justice if courts of equity were unable to afford a remedy where no adequate remedy could be had at law. If the foregoing facts are established upon final trial, there will be shown a gross mismanage-

wresting from the stockholders its property, and the court was justified in reaching out its arm and taking charge of the property and placing it in the hands of a receiver until these matters could be investigated upon final trial and the rights of the minority stockholders could be determined and an accounting had. Exchange Bank of Wewoka et al. v. Bailey, 29 Okl. 246, 116 Pac. 812, 39 L. R. A. (N. S.) 1032.

It follows that the court committed no error in refusing to vacate the order appointing a receiver, and the decree appealed from is affirmed. All the Justices concur, except RAINEY, J., absent.

SPRINGFIELD FIRE & MARINE INS. CO. v. FIRST NAT. BANK OF TALOGA. (No. 7785.)

(Supreme Court of Oklahoma. Dec. 4 Rehearing Denied Jan. 8, 1918. Fu Rehearing Denied May 21, 1918.) Dec. 4, 1917. 18. Further

(Syllabus by the Court.)

INSUBANCE \$\sim 389(2) - FIRE INSURANCE -Knowledge of Insurer—Estoppel.
Where an insurance company issues its pol-

icy insuring certain property against loss by fire with full knowledge of the conditions of the title to said property, the nature of the interest of the interest of the interest of the ownership at the time of the issuance and delivery of said policy, it is estopped from set-ting up as a defense in an action on said policy the facts and circumstances concerning the condition of the title of the property, the nature of the interest of the insured, and the change of ownership, of which it had knowledge and no-tice at the time of issuance of the policy.

(Additional Syllabus by Editorial Staff.)

2. Insurance \$\infty 378(1) -- Fire Insurance --

INSURER'S KNOWLEDGE.
In an action on a fire insurance policy, evidence that the insurer's agent knew of the condition of the title and of the interests of other parties when he delivered the policy and accepted the premiums was competent to show the insurer's knowledge as to title and interests.

Commissioners' Opinion, Division No. 3. Error from District Court, Dewey County; T. P. Clay, Judge.

Action by the First National Bank of Taloga against the Springfield Fire & Marine insurance Company. Demurrer to petition overruled, and judgment for plaintiff, and defendant brings error. Judgment affirmed

Scothorn, Caldwell & McRill, of Oklahoms City, for plaintiff in error. Adams & Smith. of Taloga, for defendant in error.

PRYOR, C. This is an action commenced on the 9th day of December, 1914, in the district court of Dewey county by the First National Bank of Taloga, defendant in error. against the Springfield Fire & Marine Insurance Company, plaintiff in error, to recover the sum of \$1,500 under and by virtue of a ment of the affairs of the corporation, which certain fire insurance policy, by reason of

the loss by fire of the property covered by said policy. The parties will be referred to as they appeared in the trial court.

The petition of plaintiff, in substance and in so far as is material to the determination of the questions involved on appeal, alleges: That on the 24th day of February, 1914, D. W. Peer was the owner of lots 13 and 14 in block 68 of the town of Taloga, and of a certain frame building thereon occupied and used as a livery barn: that on said date the said D. W. Peer, for the purpose of securing a loan of \$1,500 made him by the plaintiff, the First National Bank of Taloga, conveyed, executed, and delivered to one George W. Strohm a deed to said property; that the said Strohm executed his promissory note payable to the said D. W. Peer in the sum of \$1,500, secured by a real estate mortgage on the said premises; that said note and mortgage were by the said D. W. Peer assigned and negotiated to this plaintiff; that on the same day, and as a part and parcel of the same transaction, the defendant, the Springfield Fire & Marine Insurance Company, issued its insurance policy in the sum of \$1,500 to the said George W. Strohm, insuring the building situated on said lots against loss by fire, which insurance policy contained the following clause:

"Loss, if any, under this policy, payable to D. W. Peer, mortgagee, as his interest may appear, subject to all conditions of said policy"

that as a part and parcel of the same transaction George W. Strohm delivered the said insurance policy to the plaintiff as collateral security for the payment of the indebtedness above mentioned, and that said policy has been in the possession of the plaintiff ever since; that as a part of the same transaction and on the same date George W. Strohm executed and delivered a deed reconveying said property to D. W. Peer: that said defendant had full knowledge of the facts and these actions with reference to the title of the property; that on the 3d day of August, 1914, the property insured was totally destroyed by fire; that proper notice and proof of said fire and loss was made to the defendant company; that after the loss by fire of said property, on the 17th day of November. 1914, the said D. W. Peer and George W. Strohm, assigned all of their interest in the proceeds of said policy to this plaintiff; that the insured had faithfully performed all of the conditions contained in said policy obligatory upon him, and that, with full knowledge of all of the facts and circumstances surrounding the transactions between the said George W. Strohm and D. W. Peer and the plaintiff herein, the defendant thereafter accepted the premium for said policy; that the defendant company, through its duly authorized agent, had full knowledge of all of the transactions between the said D. W. Peer and George W. Strohm and the plaintiff concerning the property and the mortgage executed thereon, and the nature of the title and interest of each,

and consented to all of said transactions. The petition has attached thereto copies of the said insurance policy and of the assignments of said policy to plaintiff by the said D. W. Peer and George W. Strohm.

Plaintiff asked for judgment in the sum of \$1,500. Defendant filed a demurrer to the petition of plaintiff on the ground that the petition failed to state facts sufficient to consitute a cause of action, and, as a special ground of demurrer, that the petition showed upon its face that there had been a change of ownership of said property subsequent to the issuance of said policy in violation of the provisions of said policy, which rendered the This demurrer was overruled same void. by the trial court. Thereafter defendant filed an answer interposing a general denial of the allegations of plaintiff's petition, alleging as a further defense breach of the policy contract by reason of change of ownership of the property insured, and alleging that the assured had concealed and misrepresented material facts in securing said policy, and that the said George W. Strohm had no insurable interest in the property insured.

The only contentions urged on appeal by the defendant which have sufficient merit to require consideration are: First, that the court erred in overruling the demurrer of the defendant to plaintiff's petition; second, that the policy was rendered void by reason of the acts of the insured in changing the ownership of the property insured, and thereby defeating the rights of plaintiff; third, that the court erred in admitting incompetent evidence.

[1] As the first and second propositions involve the same question of law, we will consider them together. The bank is the assignee of the said D. W. Peer of the mortgage referred to in said policy, and therefore has whatever right to the proceeds of the policy that D. W. Peer had before the assignment. Plaintiff is also the assignee of the rights of both George W. Strohm and D. W. Peer to the proceeds under said policy by virtue of the written assignment executed after the loss occurred. This narrows the question down to whether or not the transaction between the said D. W. Peer and George W. Strohm concerning the property and ownership thereof is sufficient to render the insurance policy void and defeat the plaintiff's rights thereunder. The petition alleges, and the evidence of the plaintiff reasonably supports the allegations, that defendant, through its duly authorized agent, had full knowledge of the execution of the various instruments complained of and their purport and the purpose and intention of the parties in executing the same, and, knowing these facts, issued and delivered the policy sued on and afterwards accepted the premium under said policy from the said D. W. Peer.

A party to a contract cannot execute the



same and accept benefits thereunder with full gagor, and by the terms of the policy makes the knowledge of the facts and circumstances surrounding the execution of the deed and afterwards take advantage of the same circumstances which he had full knowledge of to defeat the obligations imposed upon him by such contracts, nor will an insurance company who knows of the nature of the ownership of the parties to the property insured be allowed to say, after issuing the policy and accepting benefits thereunder, that the insured did not have an insurable interest in said property. Germania Fire Ins. Co. v. Barringer, 43 Okl. 279, 142 Pac. 1026; Northam v. International Ins. Co., 45 App. Div. 177, 61 N. Y. Supp. 45; Id., 165 N. Y. 666, 59 N. E. 1127; Robbins v. Springfield Fire & Marine Co., 149 N. Y. 477, 44 N. E. 159; Light v. Countrymen's Fire Ins. Co., 169 Pa. 310, 32 Atl. 439, 47 Am. St. Rep. 904; Appleton Iron Co. v. British America Assurance Co., 46 Wis. 23, 1 N. W. 9, 50 N. W. 1100; Grabbs v. Ins. Co., 125 N. C. 389, 34 S. E. 503; Gerringer v. North Carolina Home Ins. Co., 133 N. C. 407, 45 S. E. 773.

In the case of Gerringer v. North Carolina Home Ins. Co., 133 N. C. 410, 45 S. E. 774, the Supreme Court of North Carolina, in discussing the question under consideration here, uses the following language:

"We cite with approval the language of Mr. Justice Douglas in Grabbs v. Insurance Co., supra: 'We think the rule is well settled that where an insurance company, life or fire, issues a policy with full knowledge of existing facts, which by its terms would work a forfeiture of the policy, the insurer must be held to have waived all such conditions, at least to the extent of its knowledge, actual or constructive. It cannot be permitted to knowingly issue a worthless policy upon a valuable consideration. An implied waive er is in the nature of an estoppel in pais, which might well be enforced by any court of equity under such circumstances.' It would seem that common fairness would demand that upon a full, frank disclosure of the condition of the title to the property made to the agent of the company at the time of or before the issuing of the policy, and as the basis therefor, the agent should inform the applicant that he had no insurable interest, if such was the case, or, in default thereof, bind his principal to perform its contractual obligations. This is nothing more than the application to the contract of insurance of the well-settled elementary principle that if one fails to speak when it is his duty, he shall not thereafter be permitted to do so for the purpose of avoiding a liability assumed at the time of such failure. If there be any concealment or fraudulent representation of material facts by the insured, the same principle relieves the insurer from liability. The contract of insurance must be the result of fair, honest disclosures of all facts material to the risk assumed. These principles are recognized and enforced by all of the courts, both state and federal. That notice to the agent of all matters affecting the risk is notice to the company is well settled by abundant authority. Horton v. Ins. Co., 122 N. C. 499 [29 S. E. 944], 65 Am. St. Rep. 717."

The Supreme Court of Wisconsin, in the case of Appleton Iron Co. v. British America Assurance Co., supra, held:

"Where an insurance company issues a policy on mortgaged personal property to the mort-

loss payable to the mortgagee, as his interest may appear, it is estopped to say that the mortgagor had no insurable interest in the property."

The above-cited cases clearly establish the law that, where an insurance company has issued an insurance policy insuring against loss by fire property of which it has full knowledge of the condition of the title and the interest of the insured, it will not be allowed to set up the defense to avoid liability under said policy that the assured did not have an insurable interest in said property or that the title to said property was not such as would support an insurable interest. The changes in the ownership of the property insured in this case were made with the knowledge and consent of the agent and at the time of the issuance of the policy. The property was conveyed by D. W. Peer to George W. Strohm, who executed his mortgage to D. W. Peer on said property, and executed and delivered a deed of reconveyance to the said D. W. The mortgage above contained the clause that in case of loss, if any, the same should be paid to D. W. Peer as his interest might appear. This mortgage was a part of this same transaction wherein the deeds were executed and the policy executed and delivered. There was no change in the ownership of this property after the issuance and delivery of the policy. The premiums were accepted by the agent of the company under said policy with full knowledge of all the transactions complained of concerning said property. Not only the law, but the principles of reason and justice, seem to be against the contention of the defendant that it could not avoid the policy on the grounds which it has set up as a defense. It is estopped to deny liability by reason of the facts which were fully within its knowledge at the time that it executed and delivered said policy. There were no facts that occurred after the issuance of the policy complained of by the defendant.

[2] The testimony admitted by the court of which the defendant complains was testimony tending to show that the agent of the company had knowledge of the condition of the title of the property and the interests of D. W. Peer, George W. Strohm, and the plaintiff bank at the time of the issuance and delivery of the policy and the acceptance of the premiums thereunder.

Under the principle announced by the court in the cases of Germania Fire Ins. Co. v. Barringer, supra, Western Nat. Ins. Co. v. Marsh, 34 Okl. 414, 125 Pac. 1094, 42 L. R. A. (N. S.) 991, Ins. Co. v. Little, 34 Okl. 449, 125 Pac. 1098, and Merchants' Ins. Co. v. Marsh, 34 Okl. 453, 125 Pac. 1100, 42 L. R. A. (N. S.) 996, this evidence was clearly competent to establish the knowledge of the company as to the facts and circumstances surrounding the condition of the property and title thereto and its ownership at the time ance policy.

Therefore the judgment of the trial court should be affirmed.

PER CURIAM. Adopted in whole.

MELGARD v. EAGLESON. State Treasurer.

(Supreme Court of Idaho. April 30, 1918.)

1. STATES \$== 126-STATE INSTITUTIONS-MON-

1. STATES \$\insert 120 - \text{STATE INSTITUTIONS} - \text{Moneyer}\$
EYS RECEIVED UNDER ACTS OF CONGRESS - PLACING IN GENERAL FUND OF STATE.

By certain acts of Congress \$50,000 is appropriated annually for the use and benefit of agricultural and mechanical colleges in each state and territory, the beneficiary institutions to be selected by the several states and territories. These acts provide that this sum shall be paid by the Secretary of the Treasury of the be paid by the Secretary of the Treasury or the United States to the state treasurer, who shall, upon the order of the trustees of the college, immediately pay it over to the treasurers of the respective colleges or other institutions entitled to receive it. U. S. Comp. Stat. 1916, § 8872. This money cannot properly be placed, when received by the state treasurer, in the general fund of the state, as its exclusive supervision is vestil in the trustees of the institution designated ed in the trustees of the institution designated by the state Legislature as the beneficiary entitled to receive it.

MANDAMUS EMPLOY - NOT TREASURER PROPERTY OF UNIVERSITY 2. Mandamus € 100 — State Treasurer — Payment of Moneys to Treasurer of IDAHO.

The state treasurer, to whom the fund is transmitted by the Secretary of the Treasury, is charged with the ministerial duty of immediately paying it over to the treasurer of the board of regents of the University of Idaho, upon its order, and the state auditor has no authority over and no duty to perform with respect to it.

3. States €==126—State Treasurer—Plac-ing Money in General Fund.

The acts of the defendants, state auditor and state treasurer, in attempting to place the money in the general fund of the state treasury, by making entries upon their books to that end, were mere nullities, and did not affect its legal status.

Original proceeding for mandamus by H. Melgard. Treasurer of the Board of Regents of the University of Idaho, against John W. Eagleson, Treasurer of the State of Idaho, and Clarence Van Deusen, Auditor of the State of Idaho. Writ of mandate ordered to issue.

Wm. Healy, of Boise, and J. R. Smead, of Idaho City, for plaintiff. T. A. Walters, Atty. Gen., and A. C. Hindman and J. P. Pope, Asst. Attys. Gen., for defendants.

BUDGE, C. J. This is an original proceeding for a writ of mandate to compel the defendants to pay over to the plaintiff the sum of \$50,000 for the use and benefit of the University of Idaho, and to compel them to correct the books and records of their respective offices by canceling thereon all entries showing the aforesaid sum to be a part of the general fund of the state of Idaho, and for general relief. The petition alleges in substance

of the execution and delivery of said insur-1 that the fund in question was paid by the United States to the defendant Eagleson, as state treasurer, on July 10, 1917, under the provisions of Act Cong. Aug. 30, 1890, c. 841, 26 Stat. 417 (U. S. Comp. St. 1916, §§ 8871-8876), as amended by Act Cong. March 4, 1907, c. 2907, 34 Stat. 1256, providing for the appropriation from the public treasury of the United States of the sum of \$50,000 annually for the more complete endowment and maintenance of each of certain designated classes of colleges, of which the University of Idaho is one; that thereafter the board of regents duly made an order upon the treasurer that this sum be paid over to plaintiff in his official capacity; that on July 10, 1917, the defendant Van Deusen, as auditor, issued his certificate directing that the sum be deposited in the general fund; that the defendant state treasurer issued his official receipt for the sum, and purported to deposit it in the general fund, and that the state auditor and treasurer respectively have carried the sum on their books as part of the general fund; that they have refused to pay the sum to the plaintiff or to correct their books in this respect, and still carry the sum as a part of the general fund; that unless the fund be turned over to plaintiff as provided by the acts of Congress, the University will be unable to obtain any use or benefit of the same to its great and irreparable injury and detriment, and that plaintiff will be unable to report to the Secretary of Agriculture and the Secretary of the Interior a detailed statement of the disbursements of said sum as he is required to do by the acts of Congress.

Defendants have demurred to the petition on the grounds: (1) That it does not state facts sufficient to entitle the plaintiff to the relief prayed; (2) that it appears from the petition that the sum in question has been deposited in the general fund, and that to grant the relief prayed for would be a violation of section 13, art. 7, of the Constitution of the state of Idaho, which provides that no money shall be drawn from the treasury, but in pursuance of appropriations made by law, and that it does not appear from the petition that any appropriation has been made therefor; (3) that the petitioner has a plain, speedy, and adequate remedy at law, in that if defendant Eagleson is withholding funds properly belonging to petitioner, the same can be recovered in an action at law.

[1] By three acts of Congress, namely, Act July 2, 1862 (U. S. Compiled Statutes 1916, § 8870), Act Aug. 30, 1890 (Comp. St. 1916, §§ 8871-8876, inclusive), and Act March 4, 1907, (Comp. St. 1916, § 8877), the sum of \$50,000 is appropriated for the use and benefit in each state and territory of agricultural and mechanical colleges, the beneficiary institutions to be selected by the several states. These acts provide that this sum shall be paid by the Secretary of the Treasury of the

United States to the state treasurer, "\* \* \* who shall, upon the order of the trustees of the college, \* \* \* immediately pay over said sums to the treasurers of the respective colleges or other institutions entitled to receive the same, and such treasurers shall be required to report to the Secretary of Agriculture and to the Secretary of the Interior, on or before the first day of September of each year, a detailed statement of the amount so received and of its disbursement." Act Aug. 30, 1890, c. 841, § 2 (U. S. Compiled Stat. 1916, § 8872).

Our state Legislature, by H. B. 192 (Sess. Laws 1909, p. 38), approved the action of the board of regents in establishing and maintaining a college of agriculture in accordance with the foregoing acts of Congress. It is apparent that the fund in question cannot properly be placed in the general fund of the state of Idaho. Yale College v. Sanger (C. C.) 62 Fed. 177. The exclusive supervision of the fund is vested by the act of Congress in the trustees of the institution designated by the state Legislature as the beneficiary entitled to receive the fund. State Board v. Fuller, 180 Mich. 349, 147 N. W. 529.

[2, 3] Under the acts of Congress, the state treasurer, to whom the fund is transmitted by the Secretary of the Treasury, has, with reference to this fund, a mere clerical or ministerial duty to perform; that is, to pay over the fund immediately to the treasurer of the board of trustees, in this case the board of regents, upon their order. The acts of the defendants, state treasurer, and state auditor in this instance of placing this fund in the general fund by making appropriate entries upon their books to that end were mere nullities. County of Blaine v. Fuld et al., 171 Pac. 1138. Under the acts of Congress in question the state auditor has no duty whatever to perform with respect to this fund and no authority over it. It is therefore apparent that the defendant state treasurer has but one duty to perform in the premises, and that is to pay over the sum in controversy immediately to the plaintiff, as treasurer of the board of regents.

The writ of mandate should issue directing him to do so, and it is so ordered. No costs awarded.

MORGAN and RICE, JJ., concur.

P. PASTENE & CO., Inc., v. FIRST NAT BANK OF NOGALES. (No. 1575.)

(Supreme Court of Arizona. May 8, 1918.)

1. BANKS AND BANKING \$\infty\$ 134(1)—APPLICATION OF DEPOSITS TO DEBTS DUE BANK.

A bank and its depositor could validly agree, as a consideration for further credit to the depositor, that the bank might apply all funds from whatever source received to the depositor's account, to the satisfaction of any indebtedness due or to become due from the depositor.

United States to the state treasurer, 2. Carbiers 558 — Bills of Lading — \*\* \* who shall moon the order of the Rights of Transferee.

Where a borrower, being heavily indebted to a bank, had agreed that the proceeds of shipments by it were to be applied on such indebtedness and the borrower had sent the bank a draft on consignee of goods sold with bill of lading attached, the bank, since it had the right to hold the bill of lading as collateral security for payment of the draft, had a special interest in the consigned property to the extent of the amount of the draft, taking precedence over an attachment under writ of garnishment on judgment against the shipper.

Appeal from Superior Court, Santa Crus County; W. A. O'Connor, Judge.

Garnishment by P. Pastene & Co., Incorporated, against the First National Bank of Nogales. From a judgment for garnishee the plaintiff appeals. Affirmed.

John H. Campbell, of Tucson, for appellant. Barry & Barry, of Nogales, and S. M. Franklin, of Tucson, for appellee.

FRANKLIN, C. J. The appellant had a judgment for a large amount of money against M. James & Co., Successors, and Augustin Beraud and Emilio Beraud, which judgment remaining unsatisfied, a writ of garnishment was sued out, and on the 10th day of October, 1915, served upon the First National Bank of Nogales, the appellee, requiring it to answer under oath "what, if anything, it is indebted to the said M. James & Co., Successors, and Augustin Beraud and Emilio Beraud, and was when the writ was served upon it, and what effects, if any, of the said defendants it has in its possession, and had when the writ was served, and what other persons, if any, within its knowledge, are indebted to the said M. James & Company, Successors, and Augustin Beraud and Emilio Beraud, or have effects belonging to them in their possession." In due course of the proceedings, an issue in garnishment was tendered as required by the statute, and, after a trial thereof, the court rendered judgment in favor of the garnishee with costs, including the allowance of attorney's fees.

M. James & Co., Successors, is a Mexican corporation and was engaged in moving the garbanzos (chic peas) crop of Mexico via the port of Nogales to New York. In this pursuit, it did its banking business with the First National Bank of Nogales, the appellee, and was given a liberal credit by the bank. In the course of time its account was overdrawn, and it became indebted to the bank in a large amount of money for loans and overdrafts. In this state of affairs, and on August 14, 1915, the bank refused to honor its checks. It being represented, however, that this attitude would destroy the business of M. James & Company, Successors, because the company would be unable to move the garbanzos crop and pay its indebtedness to the bank, the latter agreed to and did lend the company an additional \$45,000

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in gold, evidenced by its three notes, each ; for \$15,000. In consideration of these "forced loans" as the bank terms them, and the extension of further credit, it was expressly agreed between the parties that all moneys paid or deposited with the bank or received by the bank from the garbanzos, or any other source, for the account of M. James & Co., Successors, should be applied to the payment of the indebtedness and the open current account as it fluctuated from time to time. Also an instrument in the Spanish language was executed by Augustin Beraud, representing M. James & Co., Successors, and Otto H. Herold, representing the First National Bank of Nogales. The effect of this instrument is somewhat obscure, but whatever be its purport, whether it may be considered security or merely an agreement to give security, it is clear that it is not for any specific indebtedness. It is for any balance that may appear in the current account at the time of the execution of the instrument or in the future. In substance, it re-

"With the object of guaranteeing to the said First National Bank the payment of the balance in its favor, which may be shown in the account current carried with that institution now and in the future, he pledges for the payment of said balance the referred to one hundred shares of the Compania Industrial del Pacifico S. A., as well as the proporties known as 'El Represo' previously described and bounded; obligates himself that the firm M. James & Co., Successors, which he represents, shall transfer said stock and convey said land to the First National Bank of this place, or the persons it may designate for the debit balance which may appear in the said current account."

Whatever it may be, the bank never realized anything on account of it. At the trial of the issue in garnishment, the evidence was undisputed that M. James & Co., Successors, was then indebted to the garnishee in a sum exceeding \$50,000 in gold. Whether or not there were any funds in the bank subject to the execution of the judgment of appellant against M. James & Co., Successors, depends upon the right of the bank to apply all moneys received by it for the account of M. James & Co., Successors, to the extinguishment of the indebtedness to the bank. Under the facts of this case, it seems too plain for argument that it had this right. The bank and appellant occupied the relation of debtor and creditor, with mutual demands existing between them. After stating the account and a satisfaction of the cross-demands, a large amount of indebtedness is due the bank on account of credit extended to appellee. "It may be stated as a general rule that, when a depositor is indebted to a bank, and the debts are mutualthat is, between the same parties, and in the same right—the bank may apply the deposit, or such portion thereof as may be necessary, to the payment of the debt due it by the depositor, provided there is no express agree-

specifically applicable to some other particular purpose." 3 R. C. L. Banks, par. 217. Whatsoever the right of the bank may be called is not of much moment. Whether it be a lien or a right of set-off, under the particular circumstances, the practical effect is the same. The reason for it is that the bank gives credit to the depositor by allowing overdrafts and permitting paper to become overdue, on the faith of the general deposit. It is then but natural and just that the bank be permitted to apply such general deposit to the satisfaction of the past-due indebtedness. Unless there agreement to the contrary, this right may, of course, be waived, or it will be denied, where any specific past-due indebtedness is fully protected by other collateral security.

[1] The appellee is not relying upon its general authority, however, but upon a special authority from M. James & Co., Successors. The bank knew of the financial straits of its depositor. To protect the payment of past-due loans and overdrafts, the bank was forced to extend further credit to the company, so that the garbanzos crop could be moved out of Mexico and the indebtedness This was the only hope for M. James & Co., Successors, to satisfy its indebtedness to the bank. The company had no money with which to do this and was facing bankruptcy. As a consideration for further credit, the bank exacted and was given the authority to apply all funds from whatever source received to the account of M. James & Co., Successors., to the satisfaction of any indebtedness due or to become due. In addition, the instrument mentioned was executed to like effect. The bank being thus vigilant to protect itself, it is not apparent upon what ground the court would be justifled in gathering the fruits of such vigilance for the benefit of appellant.

On the trial of the issue in garnishment, it developed that M. James & Co., Successors, a short time before the writ of garnishment was served, had consigned a carload of garbanzos, of the value of \$5,712 to Santamaria, Saenz & Co. M. James & Co., Successors, drew a draft on Santamaria, Saenz & Co., for the value of this shipment of garbanzos in favor of the appellee. This draft, with a bill of lading for the garbanzos attached, was sent to appellee. The appellee presented the draft for payment, and delivered the bill of lading to Santamaria, Saenz & Co. The latter, in its account with the consignor of the garbanzos. had a set-off against the draft which was in process of settlement when the writ of garnishment was served. A few days afterwards the amount of the draft, less the setoff, was paid to appellee, and by it credited on the indebtedness of M. James & Co., Successors. With this credit allowed, M. James & Co., Successors, was still indebted to the bank in a sum approximating \$50,000. It ment to the contrary, and the deposit is not is contended that the amount paid on this

draft should have been set forth in the answer of the garnishee as a debt due M. James & Co., Successors, and subject to the execution of appellant's judgment. M. James & Co., Successors, was enabled to ship the garbanzos because of the credit extended to it by appellee, and with the express agreement that the proceeds of such shipments were to be applied on the indebtedness.

[2] It is argued that because appellee had the bill of lading in its possession, it had the carload of garbanzos in its possession; that the bill of lading was symbolical of the carload of garbanzos; and that the bank had no right to sell the garbanzos and appropriate the proceeds as against the attachment of plaintiff's writ of garnishment. But M. James & Co. had sold and shipped the garbanzos to Santamaria, Saenz & Co., and had assigned the bill of lading to the consignee. In whatever view that may be taken of the transaction, it is clear that the appellee was the owner of the draft; and, even if it be conceded that, under the circumstances of this case, the bill of lading was symbolical of the carload of garbanzos, under the specific agreement between appellee and M. James & Co., Successors, the bank had the right to hold the bill of lading of the garbanzos as collateral security for the payment of the draft. In this aspect it had a special interest in the consigned property to the extent of the amount of the draft, which will take preredence of the attachment by virtue of the writ of garnishment. It cannot be said that the bank was compelled to answer that it was indebted to M. James & Co., Successors, on account of the carload of garbanzos, when at the time M. James & Co., Successors, was indebted to the bank in an amount approximating \$50,000. Some criticism is indulged against a report made by the appellee to the Comptroller of the Currency. It is not our province to ascertain if the methods of business or bookkeeping adopted by the appellee as shown in this report are in accord with the requirements of the Comptroller of the Currency. Such a matter is foreign to our jurisdiction. It is necessary only to observe that at the time the writ of garnishment was served and the answer of the garnishee made, the undisputed evidence shows that M. James & Co., Successors, was indebted to appellee in a large amount of money.

In its answer, the appellee disclosed that it had in its possession two sealed envelopes and one sealed package belonging to M. James & Co., Successors, the contents of which were unknown. Before the trial, the appellee discovered that there were three of the scaled envelopes and one sealed package, all of which were by it produced in court. These packages were opened and found to contain: eleven pieces of gold amalgam; one \$500 Mexican bank bill issued by the Banco de Jalisco; a Mexican gold doubloon minted in 1869; two packages of Mexican money,

one containing \$1,506, and the other \$1,476, the same having been issued by the different factions at war in the republic of Mexico.

It is contended that the court erred in rendering judgment in favor of the plaintiff for the contents of the package and envelopes. There was no such judgment. There is nothing in the judgment which would prevent the appellant from proceeding to have this property found in the sealed envelopes and package subjected to the execution of its judgment. This property is subject to the order of the court.

Appellant objects to allowing the garnishee an attorney's fee because its return had successfully been controverted with respect to the two sealed envelopes. The answer in garnishment disclosed two sealed envelopes, when, upon the trial, it produced three sealed envelopes. The answer of the garnishee with respect to the number of sealed envelopes was not controverted. There was no issue as to this matter. The garnishee stated that it had two sealed envelopes, but before the hearing it discovered three sealed envelopes and produced them in court.

The controverted issue before the court was whether or not the bank was indebted to M. James & Co., Successors. The court found this issue in favor of the bank, discharging it as garnishee. In this it was fully justified by the record presented.

The judgment is affirmed.

CUNNINGHAM and ROSS, JJ., concur.

AZBILL et al. v. STATE. (No. 422.) (Supreme Court of Arizona. May 8, 1918.)

1. Homicide \$\iff 135(1)\$—Indictment and Information — Means or Instrument Employed—Sufficiency of Allegations.

An indictment or information for murder is not bad in failing to describe the means employed to effect death.

2. Homicide \$\iff 136\text{-Indictment and Information}\$—Description of Wounds Causing Death—Sufficiency.

An indictment or information for murder is

An indictment or information for murder is not bad because it fails to describe the wounds causing death.

3. CRIMINAL LAW \$\infty\$ 1137(5) — APPEAL — Invited Error—Cross-Examination.

Defendants in a homicide trial cannot complain of a nonexpert witness giving his opinion as to the age of deceased from the appearance of the body, where such testimony was drawn from the witness on their own cross-examination.

4. CRIMINAL LAW \$==\$693—TRIAL—OBJECTIONS TO EVIDENCE—TIME.

An objection to evidence made after answer comes too late.

5. CRIMINAL LAW == 1169(2) -- APPEAL -- HARMLESS ERROR-ADMISSION OF EVIDENCE -- IDENTITY OF DECEASED.

—IDENTITY OF DECEASED.

Where a state's witness was asked whether he could tell the age of deceased from the appearance of the body, and answered that he was a young man, the answer was properly permitted to stand; the evidence that the body was that of a young man being uncontroverted.

For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

An "alibi" is evidence offered in rebuttal of the state's case, and literally means "elsewhere," and to be effective must show that the accused was at another place so far away or under such circumstances that he could not, with ordinary exertion, have reached the place of the crime in time to have participated in it, for, if accused is near the place and free to act, he, in contemplation of the law, is not "elsewhere."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Alibi; Elsewhere.1

Appeal from Superior Court, Coconino County: F. W. Perkins, Judge.

Willis Azbill and Henry Azbill were convicted of murder, and appeal. Affirmed.

F. Louis Zimmerman, of Phœnix, for appellants. Wiley E. Jones, Atty. Gen., R. W. Kramer, Geo. W. Harben, and L. B. Whitney, Asst. Attys. Gen., and C. B. Wilson, Co. Atty., of Flagstaff, for the State.

ROSS, J. [1, 2] The appellants assign as error the order overruling the demurrer to the information, for the reason it does not set forth the means or instrument used in inflicting the mortal blow, and does not describe the wounds. Whatever the rule in this regard may be in other jurisdictions, it is at rest here. The indictment or information is not bad in failing to describe the means employed to effect death, or in failing to describe the wounds causing death. Molina v. Territory, 12 Ariz. 14, 95 Pac. 102; People v. Suesser, 142 Cal. 354, 75 Pac. 1093. We early adopted the California criminal procedure and the construction placed thereon by that state's courts.

It is said the corpus delicti was not established; that it was not shown by the evidence that Henry O. Thomas, whom the appellants are charged with murdering, is dead, or that the human carcass found was identified as his remains, or, if identified, that death was caused by the criminal action of appellants. The evidence denies and puts to rout all of the propositions contained in this contention. Unerringly, it confirms the death of Henry O. Thomas, finds and identifies his dead body, and points the finger of guilt to the appellants. A recitation of the many facts and circumstances surrounding and enveloping the appellants, as a stone wall, would serve no useful purpose, and we will not, therefore, keep them alive in this opinion.

[3] It is next contended that the court erred in permitting a nonexpert witness to give his opinion as to the age of the deceased from the appearance of the flesh and bones found. It is only necessary to state that this testimony was drawn from the witness upon cross-examination by the appellants.

[4.5] Error is also assigned because it is said another witness, without proper quali-

6. CRIMINAL LAW \$\infty 31 - Trial - Instructification as an expert, was permitted to express his opinion as to the age of the deceased from an inspection of the remains. When the body was found, the flesh had been almost completely denuded from the waistline up, and was in an advanced state of decomposition from the waistline down: this difference being occasioned by reason of the fact that the lower parts of the body were under water, while the upper part was not. The witness, an undertaker of 15 years' experience in the business, in answer to the question whether he could tell from the appearance of the body, its age, said:

"I don't know that I could be considered an expert, but from the nature of the bones and the form of the body, etc., I should judge it was a young man."

After the answer, an objection was made, but no motion to strike. The answer was properly permitted to stand for at least two reasons: First, because the objection came too late, and no motion was made to strike; and, second, the uncontroverted evidence was that the body was that of a man from 20 to 25 years old.

[6] The appellants complain of the following instruction:

"The court instructs the jury that the defense of an alibi, to be entitled to consideration, must be such as tends to show that at the very time of the commission of the crime charged, the accused were at another place so far away, or under such circumstances that they could not with ordinary exertion have reached the place where the crime was committed, so as to have participated in the committed, so as to have participated in the com-mission thereof."

The criticism is that:

"Under this declaration of law, if the defendant were near the place and free to act, his alibi would not be entitled to consideration.

"Alibi," literally, means "elsewhere," and therefore, lack of opportunity because not present. If the accused were present or in close proximity or easy access, and the evidence so showed, the inability or impossibility of committing the crime would be refuted. While an alibi is frequently referred to as an independent defense, it is, in fact, evidence offered in rebuttal of the state's case. It is an effort to show defendant did not commit the crime because, at the time, he was in another place so far away, or in a situation preventing his doing the thing charged against him. The effect of the instruction is that before an alibi is entitled to consideration, the evidence must tend to show these things. If the defendant is "near the place and free to act," he, in contemplation of the law, is not "elsewhere," and evidence to that effect, whatever else it may do, does not tend to establish an alibi. 8 R. C. L. 124, § 94; State v. Fenlason, 78 Me. 495, 7 Atl. 385; Barbe v. Territory, 16 Okl. 562, 86 Pac. 61; Peyton v. State, 54 Neb. 188, 74 N. W. 597.

The other instructions as to conspiracy,

possession of the fruits of crime and recent-in which was a telephone transmitter connectly stolen property, of which complaint is made, correctly state the law, and are as favorable to the appellants as the facts would justify. The other points argued in appellants' brief are without merit, and some of them are without the record. For instance, complaint is made of misconduct of the officer in charge of the jury, and of the county attorney in his remarks to the jury, with nothing in the record to support the charges. The record discloses that the trial, a long and tedious one, was remarkably free from error, and that appellants' every legal right was well and cautiously protected.

The judgment of conviction is affirmed.

FRANKLIN, C. J., and CUNNINGHAM, J., concur.

STATE v. BEHRINGER. (No. 433.) (Supreme Court of Arizona. May 8, 1918.) Telegraphs and Telephones 5-79. FENSES-WIRE TAPPING-DICTOGRAPH.

Pen. Code 1913, \$ 692, providing that every person who by means of any machine, instrument, or contrivance, or in any other manner, willfully and fraudulently reads, or attempts to read, any message or to learn the contents thereof while the same is being sent over any telegraph or telephone line, shall be punishable, does not apply to the act of secretly placing a dictograph over the transom of a room in a hotel for the purpose of learning the contents of a telephone message sent through a transmitter in the room, the room not being a receiving or sending office of a telegraph or telephone com-pany, nor did the interception take place while the message was being sent over the line.

Cunningham, J., dissenting.

Appeal from Superior Court, Maricopa County; F. H. Lyman, Judge.

Arthur L Behringer was indicted for intercepting a telephone message. From order overruling demurrer to information and a judgment of dismissal, the State appeals. Affirmed.

Wiley E. Jones, Atty. Gen., G. W. Harben and R. W. Kramer, Asst. Attys. Gen., and L. M. Laney, Co. Atty., George J. Stoneman and W. L. Barnum, all of Phoenix, and E. S. Ives, of Tucson, for the State. Alexander & Christy and Bullard & Jacobs, all of Phœnix, for respondent.

ROSS, J. The state appeals from an order sustaining a demurrer to the information against the respondent, and a judgment of dismissal.

It is not necessary to set out the information, as it is excepted to, not because of a defective statement of the facts charged, but because of the insufficiency of the facts, under any view of the law, to constitute a public offense. The conduct of the respondent, which it is charged constitutes a crime, consisted of his secretly placing a dictograph over the transom of room No. 400 of the Adams Hotel, situated in the city of Phoenix, the contents of the message whilst it is

ed with the Mountain States Telephone & Telegraph Company's telephonic system, for the purpose of learning the contents of any message that the occupant of room No. 400 might send over said telephone line; and, to assure his hearing any such message, it is charged, respondent with a wire connected the dictograph with the earpiece thereof, which was located and used in another room occupied by respondent, and that in this manner he did learn, and attempt to learn, the contents of messages spoken into the telephone transmitter by the occupant of room 400.

The information is grounded upon section 692 of the Penal Code which reads as follows:

"Every person who, by means of any machine, instrument or contrivance, or in any other manner willfully and fraudulently reads, or attempts to read, any message, or to learn the contents thereof, whilst the same is being sent over any telegraph or telephone line, or willfully and fraudulently or clandestinely learns, or attempts to learn, the contents or meaning of any message while the same is in any telegraph or telephone office, or is being received thereat or sent therefrom, or who uses or attempts to use, or communicates to others any information so obtained, is punishable as provided in section 690."

This section defines three offenses differentiated from each other principally in the circumstance of time and place of commission. The first has to do with the interception of messages whilst in transmission, "whilst the same is being sent over the telegraph or telephone line." The locus of the second is the receiving and sending telegraph or telephone office. The third denounces the use or communication of the information obtained at either of the places and times mentioned in the first two.

The facts of this case must bring it within one of these definitions to constitute a pub-The state insists, under the lic offense. facts as pleaded, respondent is guilty of the offense of learning, or attempting to learn, the contents of the messages while they were being sent over the telephone line. It cannot be truthfully said that one listening to another speaking a message into a telephone transmitter is learning the message as it goes over the line. Such a one is learning the message while it is being sent, at the instant it is being taken up by the electric current, but before it starts on its journey The word "sent" is used over the wire. twice in section 692, but not in the same sense. The context shows it was not used to convey the same meaning in both instances. In the last use thereof, it is found in connection with the crime of learning the contents of a message while the same is being received at a telephone office or being sent therefrom.

In the first use, it is in connection with the crime of learning, or attempting to learn,

For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

being sent over the telephone line. If the pany's business from trespassers who would latter was intended to comprehend the sending of the message, that is, the speaking of it into the transmitter, then its repetition in the second definition was a vain thing. To give effect, as was evidently intended, the learning, or attempting to learn, the contents of the message "whilst it is being sent over the telephone line" must be construed to mean the interception of the message between the termini on the line by means of a machine, instrument, or contrivance, or in some other manner, and not the learning of the message as it is spoken into the transmitter of the telephone at the initial point, at the place of sending, the telephone office, for that is a separate offense. It was directed against what is commonly known as "wire tapping," defined by the Standard Dictionary as "the act or process of tapping a wire for the purpose of diverting the current or securing or sending information." This process is effected by a machine, instrument, or contrivance attached to the wire over which the message is being sent, or over which it is traveling; and, inasmuch as some other way might be invented to intercept the electric current, the Legislature provided against it by inserting "or in any other manner," meaning thereby that it should be unlawful to divert the current by the specific means named or any other, but it all has reference to what is known as "wire tapping."

Section 692, in its present form, first appeared in our laws in the revision of 1913. it is found in the Penal Code of 1887 as section 1013, and in the Penal Code of 1901 as section 598, but in these it only applied to telegraphic messages and telegraphic offices. It was first made to cover telephones and telephone offices in the revision of 1913, by inserting the two phrases, "or telephone line, "or telephone office," which had the effect of extending the terms of the statute so as to include persons who, under the same conditions and circumstances, learned, or attempted to learn, telephonic messages as, before the amendment, were necessary to constitute the offense of learning, or attempting to learn, a telegraphic message. Now, when it is considered how telegrams are made up and sent, it is too clear for argument that the acts denounced under the old law were the interception of the message as it traveled over the wire, or the learning, or attempting to learn, its contents at the receiving or sending office. It is not a telegraphic message until it is received at the telegraph office. Until it is delivered to the telegraph company, the duty of protecting its contents devolves upon the sender, and the same is true as to telephone messages. Section 689, Penal Code.

When the statute was originally adopted, we had no telephones. It was intended to protect the public's and the telegraph com- his ear to the keyhole of room 400 to learn

invade the secrecy of private telegraphic correspondence, and was admirably and comprehensively drawn for that purpose, but the Legislature, in amending the original act to cover telephone messages, did not take into consideration the situations that have arisen by reason of the installment of telephones in private homes, in hotels, and business places, from which so many messages, in these later days, originate, and for that reason perhaps the law was not extended to protect telephonic conversations in such places.

It is urged by the prosecution that under a liberal construction, which is not only authorized, but enjoined, in construing penal statutes (section 5, Penal Code), section 692 would cover the acts alleged in the informa-If by a "liberal construction" it is tion. meant that the courts can extend the meaning of the language used by the Legislature to include all cognate or related acts to those actually condemned, the contention is plausible; but, as we view it, we are not permitted to go that far. If the letter of the law clearly excludes the state of facts propounded in the pleading, or does not reasonably include them, even though they be within the reason and policy of the legislation, the courts cannot, by implication or construction, declare a person charged with them guilty of a crime. In this information the facts alleged do not meet the conditions of the statute, either in letter or in spirit. The acts alleged do not constitute the crime of learning, or attempting to learn, the contents of a telephonic message while it is being sent over the line, for, as we have seen, from the context and history of this offense, it is clearly what is known as wire tapping. They do not constitute the crime of learning, or attempting to learn, the contents of a telephonic message at the receiving or sending office of the telephone company. These, together with the offense of using or communicating the information so obtained, are the only crimes defined by section 692. The facts alleged in the information fall far short of the facts the Legislature has said in section 692 constitute a public offense.

"Constructive crimes—crimes built up by courts, with the aid of inference, implication, or strained interpretation—are repugnant to the spirit and letter of English and American criminal law." Ex parte McNulty, 77 Cal. 164, 19 Pac. 237, 11 Am. St. Rep. 257; section 521, Sutherland Statutory Construction.

The conduct of respondent in placing the dictograph in room 400 and connecting it with his room so that he could hear conversations and learn the contents of messages transmitted by telephone from that room was most reprehensible, and it is to be regretted that the law does not reach him. But, as a matter of fact, respondent was a mere eavesdropper. His conduct, while more refined and ingenious than if he had placed

temptible. If his act had been connected with the sending or receiving office of the telephone company, it would fall within the terms of section 692, but, having been in connection with the room of a guest of a hotel in which was a telephone for private use, it does not fall within the terms of that statute. This room was not the receiving or sending office of the company. The respondent, by his device, was enabled to learn the contents of the message as it was spoken into the transmitter of the telephone at a time and place not mentioned in the law, nor was it while it was being sent over the telephone line. as the prosecution would have it.

We conclude, with the learned trial judge, that the information does not state facts sufficient to constitute a public offense.

The judgment is affirmed.

### FRANKLIN, C. J., concurs.

CUNNINGHAM, J. (dissenting). I am of the opinion that the facts set forth in the information and briefly stated in the opinion of the majority of the court clearly constitute a criminal offense within the spirit of section 692, Penal Code 1913, as denounced by the clause of said statute reading as follows: "Every person who, by means of any machine, instrument or contrivance \* \* \* willfully and fraudulently reads, or attempts to read, any message, or [attempts] to learn the contents thereof, whilst the same is being sent over any \* \* \* telephone line \* \* \* is punishable as provided in section 690" ishable as provided in section 690."

The mere fact that the machine, instrument, or contrivance used, the dictograph and its attachments, was so used as to intercept the message whilst being sent between the point of its origin, the sender's vocal chords and the sound receiver, and before the contents of the message actually passed on to the telephone line, but was in the act of so passing through the air from the vocal chords of the sender to the apparatus for receiving and transmitting the same when intercepted, was, for that reason, no less in spirit a tapping of the telephone line than would the act of attaching physically a tapping wire to the telephone line at any point between the transmitter end and delivering end of the telephone line. The gist of the offense denounced is the willful and fraudulent reading, or attempt to read or to learn, the contents of the message being sent whilst so being sent, by means of the use of any kind of machine, instrument, or contrivance to accomplish that purpose.

The evident purpose of the statute is to protect the persons using the wire for their business affairs from intermeddlers, and thereby preserve secrecy if they desire. The public interest demands that private persons using public service conveniences in their business affairs have the right to preserve

what was being said therein, was no less con-through its servants, agents, or employes who have an opportunity to learn the contents of messages disclose the same, that is another matter, but if intermeddlers unconnected with the telephone company intercept private messages wrongfully, the public interests suffer.

> Whatever construction other courts have placed upon statutes of other states, like or unlike our said statute, whereby ruch other statutes have been held as only meaning the physical tapping of wires. I do not agree to such decisions as correct interpretation when applied to our statute supra. The strict literal, technical construction only will permit of holding that the facts charged constitute no offense under the said statute. True, the statute does not say in words that the offense includes the reading or learning of the contents of a message by means of a machine, instrument, or contrivance that will intercept the message at the instant the same starts toward the telephone wire, yet the message is as certainly being sent over a telephone wire from the time the words constituting the message are separately spoken by the sender as when the message is being sent after the words have reached the transmitter device of the telephone. For these reasons, I cannot agree with the order affirming the judgment. On the other hand, I am of the opinion the broader construction of the statute is the clear · legislative intention, and the judgment should be reversed, and the cause remanded.

### SHEEK v. STATE. (No. 432.)

(Supreme Court of Arizona. May 8, 1918.)

WITNESSES \$\infty\$40(2) - COMPETENCY OF CHILD-DISCRETION.

Admission of the testimony of an Indian boy of 13, objected to because of witness' youth and inability to understand the obligation of an oath, was discretionary.

CRIMINAL LAW 656(5) - COMMENT ON

TESTIMONY.
That the trial court, in passing upon the competency of a state's witness, a 13 year old Navajo boy, remarked: "The court has had considerable experience with Indians, and, while Navajo children do not understand what an oath explain to them what it is, and tell them they must tell the truth, that they generally do so; and, furthermore, the weight of the testimony is for the jury, so that the objection is overruled" was not objectionable as comment upon testimony; the court having charged, when the case was submitted, that the credibility of witnesses and the weight to be given their testimony was exclusively for the jury.

3. Homicide \$==165 - Evidence - Previous CONTROVERSY.

In murder trial, defense being controversy with deceased necessitating killing in self-defense, evidence by the state as to what accused did when his cattle were driven from deceased's field, which accused claimed was the cause of deceased's rage towards him, was relevant as tending to establish the relations between the parties and the state of their minds toward secrecy. If the public service company each other at the time of the killing.

Where witness, called by accused to testify as to the general reputation of a state's witness for truth and veracity, not understanding what general reputation means, persisted in stating his own opinion of the state witness' truth and veracity, disclosing personal enmity tov him, his testimony was properly excluded.

Appeal from Superior Court, Apache County: Geo. H. Crosby, Jr., Judge.

Fay Sheek was convicted of manslaughter, and appeals. Affirmed.

A. S. Gibbons, of St. Johns, and Jones & Jones, of Flagstaff, for appellant. Wiley E. Jones, Atty. Gen., W. P. Geary, Geo. W. Harben, and Louis B. Whitney, Asst. Atty. Gen., and Gilbert E. Greer, Co. Atty. for Apache County, of St. Johns, and C. B. Wilson, Co. Atty. for Coconino County, of Flagstaff, for the State.

FRANKLIN, C. J. This appellant was informed against for the crime of murder; the result of his trial being a conviction of manslaughter. The appellant was a cowboy and. in the course of his employment, was herding some cattle at the ranch of Leonard Olsen, the victim of the homicide. These cattle got into a field of oats belonging to Olsen, and an Indian boy employed by Olsen set a dog upon the cattle to drive them out. In his testimony, the appellant gave the particulars of this incident in connection with and leading up to the act of killing. It appears from appellant's testimony that on this occasion he went into Olsen's house for the purpose of finding him, but Olsen was absent therefrom. According to his testimony, appellant's conduct in going into the house angered Olsen very much, the latter accusing appellant falsely of breaking open one of his trunks while in the house; that Olsen became very hostile towards appellant on account of this and such hostile conduct on the part of Olsen was the cause of the homicide, the act being committed in self-defense. In rebuttal of this testimony as to the incident arising because of the cattle getting into Olsen's oat field, the prosecution put on the stand the Indian boy who set the dog after the cattle. This lad was a little Navajo Indian about 13 years of age and called by name Hostien Soo. The defense objected to the testimony of this lad being received because of his youth and his inability to understand the obligation of an oath. Before admitting his testimony, the court examined him quite carefully as to such matters. After the examination, and in overruling the objection to the competency of the witness, the court made these observations:

"The court has had considerable experience with Indians, and, while Navajo children do not understand what an oath is as well as the white children, yet when you explain to them what it is, and tell them they must tell the truth, that they generally do so: and, furthermore,

4. WITNESSES &= 352 — WITNESSES AS TO the weight of the testimony is for the jury, so that the objection is overruled."

[1-3] In the course of his testimony, Hostien Soo stated that at the time the cattle got into the oat field he was afraid to drive them out and set the dog on them; that appellant saw the dog go after the cattle and "he looked like he was mad"; that appellant then shook a rope at Hostien and pointed a pistol at him in a threatening manner. Appellant then went into Olsen's house, and, after looking around the house, came out in an angry mood, got on his horse, and rode away. We do not see any abuse of discretion on the part of the trial judge in admitting the testimony of Hostien Soo. Both on direct and cross examination, his testimony is clear and satisfactory, and impresses one that he is quite an intelligent boy. It was a question for the trial court. Fernandez v. State, 16 Ariz. 269, 144 Pac. 640. Nor is the objection good that the court, in passing upon his competency to be a witness, commented upon the testimony of Hostien Soo. It was a mere general observation of the trial judge's experience with Navajo children, and, in addition to what developed on the court's examination of the witness, was another element in his opinion justifying the admission of his testimony. The court was careful to tell the jury in the same breath that the weight to be given to this lad's testimony was a matter entirely for them to determine. Again, when the case was submitted to the jury, the court charged that the credibility of the witnesses and the weight to be given their testimony was a matter exclusively for the jury. Under these circumstances, it cannot be said that the remark of the court was objectionable as a comment upon the testimony, nor do we think that the jury could so have construed it. Nor is there any foundation for the asserted error of the trial court in permitting Hostien Soo to tell what the appellant did at the time the cattle were driven from Olsen's field of oats. It was the hypothesis of appellant that what occurred at that time was the cause of Olsen's rage toward him, which necessitated the killing of Olsen in appellant's self-defense. occurrence was brought out by appellant as a part of his case. It was material and relevant, as tending to establish the relations between the parties and the state of their minds toward each other at the time of the killing. Hurley v. Territory, 13 Ariz. 2, 108 Pac. 222. The logical connection between what occurred at the Olsen house, including the assault upon the Indian lad, and what occurred at the scene of the homicide, is thus quite apparent.

[4] One of the witnesses for the state was a Navajo Indian by the name of Joe Parker. The defense called another Navajo Indian, named Silver Smith, to testify to the general reputation of Parker for truth and ve- 8. Appeal and Erbor == 1062(2)—Prejudiracity. This witness. Smith. could not be CIAL ERROR—REFUSAL TO SUBMIT EVIDENCE. racity. This witness, Smith, could not be got to understand what the general reputation of a person means. In answer to questions, Smith persisted in stating his own opinion of Parker's truth and veracity, and in this disclosed a personal enmity towards Parker. There was no error in excluding such testimony.

We have given careful consideration to the record. It is convincing that the conviction of appellant is justified under the law and the facts. There is no reversible error. Judgment affirmed.

CUNNINGHAM and ROSS, JJ., concur.

# COSTELLO v. CUNNINGHAM et al. **CUNNINGHAM et al. v. COSTELLO.** (Nos. 1560, 1561.)

(Supreme Court of Arizona. May 9, 1918.)

Appeal and Error 4-1027 - Harmless ERROR-CORRECT RESULT.

Error committed on trial with reference to matters connected with claims from which no portion of the money adjudged to be paid by defendant in the accounting is found to have arisen, was harmless to defendant.

APPEAL AND ERROR \$== 1002 - REVIEW -WEIGHT OF EVIDENCE.

The Supreme Court will not determine the weight of evidence and revise the jury's verdict, reached from conflicting evidence, to conform to its own idea of the weight of such evidence.

3. APPEAL AND ERROR == 841-REVIEW-EVI-

DENCE—CONCESSION BY APPELLANT.

Defendant-appellant's concession in her brief that the evidence presented by plaintiffs as to two items of the account in suit is substantially the same as on former trial, and held suffi-cient by the Supreme Court, relieves the Su-preme Court of the necessity of comparing the evidence in the record relating to the two items with such evidence in the former record.

4. EVIDENCE \$\infty 584(1)-Weight-Grades. The jury must determine the weight to be given all evidence submitted, though it be of different grades.

5. EVIDENCE \$\infty\$383(3)\rightarrow Record EVIDENCE\rightarrow Documents Signed by Administratrix

AND GUARDIAN.

Documents filed, signed, and sworn to by an administratrix while such and also guardian of the estate of minors, being record evidence, are deemed of very high grade as evidence of perti-nent facts to which they relate.

6. Trusts 44(2)-Existence-Sufficien-

CY OF EVIDENCE.

In an action for an accounting by heirs against the executrix of another decedent with respect to mining claims alleged to have been the held in trust by the executrix's decedent for the heirs' decedent, evidence held sufficient to support the jury's finding that a trust existed with respect to certain claims.

7. Appeal and Error = 1099(3) — Second Appeal-Matters Concluded-Res Adju-DICATA.

Where, on former appeal in an action for an accounting with respect to mining claims held in trust, an assigned claim was finally adjudicated, such claim will not be considered on second appeal.

If substantial evidence has been received on trial which would sustain verdict for plaintiffs finding defendant liable to account, and the trial court refused to submit the evidence to the jury for their determination of the fact, it committed error prejudicial to plaintiffs.

9. Trusts 44(2) — Existence of Agree-

MENT-SUFFICIENCY OF EVIDENCE.

In an action for an accounting with respect to mining claims alleged to have been held in trust by defendant executrix's decedent for the ancestor of plaintiff heirs at law, evidence held sufficient to justify an inference that a trust agreement was in existence with reference to certain claims.

10. TRIAL \$\instructure 370(3)\$—EQUITABLE ACTIONS—SUBMISSION OF CONTROVERTED QUESTIONS.

Under Civ. Code 1913, par. 542, as to submitting to the jury questions of fact in equitable actions, in an action for an accounting with respect to mining claims alleged to have been held in trust by defendant executrix's decedent for the ancestor of plaintiff heirs at law, the court should have submitted to the jury, by appropriate interrogatories, a question as to the existence of a trust with relation to a claim on which the evidence was conflicting.

Appeal from Superior Court, Cochise County; A. C. Lockwood, Judge.

Action by Mary Aileen Cunningham and another, minors, by Emil Marks, their guardian, against Mary M. Costello, as executrix of Martin Costello, deceased. From the judgment and orders refusing new trial, plaintiffs and defendant appeal. Affirmed in part and reversed in part, and cause remanded for trial of additional matters.

See, also, 16 Ariz. 447, 147 Pac. 701; 16 Ariz. 479, 147 Pac. 714.

The purpose of the action, the material issues joined in the pleadings, and the material facts appear in a statement in 16 Ariz. 447, 449, 147 Pac. 701, where the report of the decision of this court on a former crossappeal of this case may be found. A restatement of the case is not deemed necessary with a reference to the former appeal decision. The following opinion sufficiently sets forth the amendments introduced and the material changes in facts occurring in the last trial.

Joseph Scott and Ben Goodrich, both of Los Angeles, Cal., J. S. Casey, of Tyrone, N. M., and Ellinwood & Ross, of Bisbee, for appellant-appellee. Eugene S. Ives, of Tucson, Wm. B. Cleary, of Bisbee, and Chas. R. Morfoot, of Los Angeles, Cal., for appelleesappellants.

CUNNINGHAM, J. For convenience and brevity I shall refer to the parties as plaintiffs, meaning the original plaintiffs, and defendant, meaning the original defendant, as we did in the former appeal.

The defendant, Mary M. Costello, executrix of the last will of Martin Costello, deceased, in her former appeal, complained of certain errors in the judgment and of error in the order refusing a new trial. The plaintiffs, Mary Aileen Cunningham and Patricia Julia Cunningham, minors, by their guardian, on their former appeal complained of error in the judgment only. We expressed a separate opinion upon each of said appeals, but decided the cause upon the defendant's appeal.

The eminent counsel and the lower court on a return of the cause below seem to have been unable to fully agree as to the effect of our former decision upon the new trial. A brief reference to these matters in dispute, with reference to the binding scope of our decision, may clarify to some extent such seeming misunderstanding.

The purpose of the action is to enforce an accounting for certain alleged items. interest of the plaintiffs in the said alleged items, an accounting for which is sought, is of an equitable nature. The equitable right accrued by oral contract made between Martin Costello and Patrick Cunningham at a time prior to the acquisition of the said items for which an accounting is sought. The items constituting the account for which plaintiffs are seeking an accounting consist of the net proceeds of the sales of 17 named mines. It is conceded that the said mines were sold by, and the purchase price paid to, Martin Costello, and the amount of the purchase price received by him, and the dates upon which he received each separate amount. The plaintiffs admit that the record title to all of said mines was in Martin Costello's name at and before the dates of sale. They allege that pursuant to said contract between said parties the mines were acquired by the said contracting parties as tenants in common, each owning an equal share in said mines, and the titles thereto were conveyed to or held in Costello's name for their mutual convenience, and held by Costello in trust for the use and benefit of himself and Patrick Cunningham. Plaintiffs expressly ratify the sales of the said mines by Costello, and by this action are seeking an accounting from his estate for the proceeds of such sales.

The several items for which an accounting is sought may be fairly stated as consisting of the several separate sales made by Costello. Briefly, these items are as follows: Sale of the "Senator," "Senator No. 2," "Pride," "Hope," "Wagner," "Giberalta," and "Buckeye," for a consideration of \$300,-000, dated November 9, 1899; sale of the "Irish Mag," "George Washington," "Old Republican," and "Angel" (the "Irish Mag" group), for a consideration of \$200,000, dated November 9, 1899; sale of the "Supplement," "Hattie Manchester," "Belflower," and "Smogler," for a consideration of \$300,000, dated April 2, 1903; and the sale of the "Leo" and "Roy" for a consideration of \$169,112, dated May 14, 1904.

The defendant admitted the existence of the said contract, but limited its application

"Senator No. 2," "Pride," "Hope," "Wagner," and "Giberalta," and denied that such contract had any application or effect upon the remaining 11 mines. She set forth a settlement had of the proceeds of the sale of the said six mines on a basis of \$247,776.80, and payment in accordance therewith to the administratrix of the estate of Patrick Cunningham, deceased, the guardian of the plaintiffs, minors, and Julia Cunningham, the heirs at law of said Patrick Cunningham, deceased, and a release of the trust by said Julia Cunningham acting in the said several capacities, and the approval of her said act in behalf of the said estates by the probate court. She also pleads laches and the statute of limitations. The plaintiffs replied, admitting the receipt of the alleged amount paid, the settlement had and the due approval by said court, but attacked the settlement as unfair to their interests in the particular of wrongful charges against them and upon other grounds.

The trial first had resulted as indicated in the former decision by this court. The defendant was adjudged liable to account for the net proceeds of the sale of the "Irish Mag" group and the "Belflower" and "Smogler" mines and for interest. The effect of that judgment was to relieve defendant from the necessity of accounting for the net proceeds of the sale of the "Wagner" group and "Giberalta," the "Buckeye," the "Leo," the "Roy," the "Supplement," and the "Hattie Manchester:" We sustained the lower court's conclusion that the item of account arising from the sale of the "Wagner" group was settled and finally disposed of by the settlement, payment of the amount agreed upon, and the approval of the said settlement and payment by the probate court. reference to the pleadings, the nature of the action, the purpose sought, and the conclusion reached with respect to the scope of that settlement, no doubt should exist that such settlement and compromise completely covered the item of the account arising from the sale of the "Senator," "Senator No. 2," "Pride," "Hope," "Wagner," "Buckeye," and "Giberalta." conveyed by Martin Costello and his wife by a single deed to Lake Superior & Western Development Company for the consideration of \$300,000. The basis of the settlement was the consideration received by Costello for the mines, omitting the "Buckeye." In dealing with this matter on our former consideration of the case, we frequently referred to the six claims, omitting the "Buckeye." This omission arose from the fact that the declaration of trust omitted to name the "Buckeye" mine. had been included with the other six claims in the same deed, and the consideration fixed by the deed and admitted to have been paid was the lump sum of \$300,000. Said lump sum is made an item of the account in the to the proceeds of the sale of the "Senator," | complaint. Such item was finally disposed of such item carried with it, as a necessity, relief from accounting for the proceeds of the sale of the "Buckeye" claim. The compromise of that item effected a settlement for the proceeds of the sale of the "Buckeye" claim. At the time such settlement was had the proceeds of such sale consisted of money, and Julia Cunningham, as the representative of Patrick Cunningham, deceased, was legally entitled to recover the same, or discharge the debtor with the approval of the probate court. This occurred. The statute of limitations bars further recovery by accounting for the proceeds of the sale of the "Buckeye."

The net result of the former appeal was to finally dispose of the item in the alleged account arising from the said sale of the "Wagner" group of five claims, the "Giberalta" and the "Buckeye" claims; also to finally dispose of the claim of Julia Cunningham as the surviving wife and heir at law of Patrick Cunningham, deceased—the assigned claim of Julia Cunningham-on the ground of laches.

The alleged account being thus modified, the cause was remanded to the lower court for the determination by that court of the defendant's duty to account to the plaintiffs as the minor heirs at law of Patrick Cunningham, deceased, for their proportion of the net proceeds of the sales of the "Irish Mag," "George Washington," "Old Republican," and "Angel" mines sold November 9, 1899, and for which \$200,000 was thereafter paid as one principal item; and for their portion of the net proceeds of the sale of the "Hattie Manchester," "Belflower," "Smogler," and "Supplement," sold for a gross consideration of \$300,000, as another principal item; and their portion of the net proceeds of the sale of the "Leo" and "Roy" claims, sold for a gross consideration of \$169,112, as a third principal item. The question of damages for the detention of any money which may have been received by the trustee and detained by him, if such was a fact, was left open.

With this brief reference to the effect of the former decision, I will proceed to discuss the controversies presented on this appeal.

The plaintiffs amended their complaint before the termination of the last trial in the lower court. The plaintiffs state that the amendments made consist of three important features: (1) Affecting the acquisition of the four claims of the "Irish Mag" group; (2) affecting the "Leo," "Roy," and "Supplement"; and (3) affecting the amount of damages for detention.

Such seems to be the effect of the said amendments, generally stated.

Upon the pleadings so amended and the reply, original reply abandoned, the cause went to trial. At the conclusion of the evi-

of on the former appeal, and such disposition; the court. The jury returned answers thereto, and upon a return of the jury's said special verdicts both sides moved for judgment. The plaintiffs moved for judgment on the verdicts and special findings by the jury. The defendant moved for judgment notwithstanding the verdict. The plaintiffs had judgment for \$105,577.55 and costs and interest. The amount of the judgment was determined by the court from the facts found by the jury by their special verdicts. From such facts the court reached the conclusion, briefly stated, as follows:

That at the time of the death of Patrick Cunningham he owned an equitable one-half interest in the "Irish Mag," "George Washington," "Angel," "Old Republican," "Belflower," "Smogler," and "Hattle Manchester" mines, and as his separate property he owned said interest in the "Irish Mag," "George Washington," "Old Republican," and "Angel," which he acquired prior to his marriage, and he acquired said interest in the "Belflower," "Smogler," and "Hattle Manchester" after his marriage, and said interest was at the time of his death community property; that Martin Costello held the legal title to all of the aforesaid claims, subject, however, to a trust in favor of Patrick Cunningham as to said equitable onehalf interest therein; that the trust in the case of the "Hattie Manchester" was an express trust, and that the trust in the other named claims was a resulting trust, arising by reason of equal contributions by said parties toward the purchase of said six claims; that the releases executed by Julia Cunningham as the guardian of the estate of plaintiffs, minors, etc., were ineffective as releases of said minors' rights in the said claims; that plaintiffs are entitled to recover from defendant one-half of the net proceeds of the sale of the "Irish Mag," "George Washington," "Old Republican," and "Angel" claims, less a life interest in one-third of such sum. "which amount so to be recovered has been fixed by an accounting held by stipulation since the verdict herein at the sum of \$49,-702.55"; that plaintiffs are entitled to recover one-fourth of the net proceeds of the "Belflower," "Smogler," and "Hattie Man-The "said one-fourth has been determined by an accounting held by stipulation since the verdict herein to be the sum of \$55,875," with interest on the said sums from the 26th day of March, 1912, the date of said accounting, until the 20th day of September, 1915, the agreed date of rendering judgment, at the rate of 6 per cent. per annum, and at the legal rate thereafter until satisfied.

The defendant appeals from the judgment and order refusing a new trial. Such appeal, as is evident, only attacks that portion of the judgment which forces an accounting for the dence a large number of interrogatories were net proceeds of the sale of the "Irish submitted to the jury under the direction of Mag," "George Washington," "Old Republican," "Angel," "Belflower," "Smogler," and he purchased an undivided one-half interest "Hattie Manchester" claims, and does not attack the judgment in the particular of the remaining other claims, as it does not require an accounting for the net proceeds of the sale of the same, viz. "Leo," "Roy," "Supplement," and "Buckeye" claims.

The plaintiffs appeal from the judgment and from the order refusing them a new trial. Such appeal is an express attack on the order refusing a new trial, as the judgment denies to plaintiffs, as heirs of Patrick Cunningham, an accounting of the net proceeds of the sale of the "Leo," "Roy," "Supplement," and "Buckeye" claims, and the plaintiffs' notice of appeal limits their appeal to said matter and to that portion of the judgment which denies plaintiffs damages for the detention of the sums of money plaintiffs were awarded, from the dates upon which Costello received such money up to the date of filing the demand against the estate of Martin Costello, at the rate of 6 per cent. per annum, and to that portion of the judgment which denies plaintiffs' recovery of said portions of the proceeds of the sales of said four claims. The plaintiffs' notice of appeal expressly limits their appeal to such matters as may be corrected by means of a partial new trial, as prescribed by paragraph 597, Civil Code 1913.

For convenience I will first consider the defendant's appeal.

## Defendant's Appeal.

The facts found by the special verdicts of the jury applicable to the "Irish Mag" group of mines, composed of the "Irish Mag," "Old Republican," "George Washington," and "Angel" claims, hereafter, when referred to as a group of four claims, I shall so refer to such group as the "Irish Mag" group, and the "Belflower," "Smogler," and "Hattle Manchester" claims, may be briefly stated as follows (the figures indicate the number of the interrogatory in the body of which the fact is found):

(2) Patrick Cunningham, on or about the 11th day of November, 1890, in consideration of a power of attorney to James Reilly, paid to Mrs. Daley \$1,000, (3) out of his own funds and for his use and benefit. (4) Said \$1,000 so paid for said power of attorney was a part of the \$3,000 purchase price paid to Mrs. Daley for her one-half interest in the "Irish Mag" claim and her entire interest in the "George Washington," "Old Republican," and "Angel" claims. (5) That James Reilly, as attorney in fact of Mrs. Daley, on or about the 16th day of September, 1892, did execute and deliver to Martin Costello a deed of Mrs. Daley's said interest in said claims named. (6) That said deed was executed and delivered upon Martin Costello's promise to Mrs. Daley to pay the remaining \$2,000 of the purchase price. (7) Martin Costello, at the time of or prior to the time dicts:

in the "Irish Mag" claim theretofore owned by Mrs. McDowell which interest he purchased by paying a consideration therefor of \$3,000, promised Patrick Cunningham that said Cunningham should be an equal owner in said claim with Martin Costello. (8) Martin Costello did not purchase the "Irish Mag" group with his own funds, (9) nor for his sole and individual use and benefit. (9A) Costello paid the \$2,000 of the purchase price after he sold the said group of claims. (16A) Martin Costello paid to Pete Johnson \$1,000 for the "Belflower" and "Smogler" claims. (16B) Patrick Cunningham advanced to Martin Costello \$500 of said sum prior to purchase of said claims. (17) Costello did not purchase said two claims with his own funds, (18) nor for his sole use and benefit. (19) Patrick Cunningham paid to Martin Costello \$500 towards the purchase price of the "Belflower" and "Smogler" claims. (20) Cunningham delivered to Costello money which he intended to be used in the purchase of said two claims prior to the time when Costello acquired the title to said claims. (21) Costello was advised by Cunningham of the intention with which the money was delivered and of the purpose for which it was intended to be used. (22) Costello used the money so delivered to him for the purpose intended, viz. in the payment of the purchase price of the said "Belflower" and "Smogler" claims, (26A) At the time said two claims were conveyed to Martin Costello by Peter Johnson, Martin Costello promised Patrick Cunningham that the title thereto would be held by Martin Costello as trustee for Patrick Cunningham and himself as equal owners thereof. (27) Patrick Cunningham purchased an undivided onehalf interest in the "Hattie Manchester" claim, paying therefor in assessment work. (28) Said Cunningham acquired and paid for the other one-half interest in said claim prior to the 9th day of December, 1897, and on that date he conveyed the title to Martin Costello. (29) Before the execution of said deed Costello in writing requested Patrick Cunningham to so arrange the title to said claim to the end that they, Cunningham and Costello, would be in it as they were in together on all the rest. (30) By reason of such request, Cunningham thereupon conveyed the entire title to said claim to Costello. (31B) Costello paid to Patrick Cunningham the sum of \$50 as consideration for said conveyance of the "Hattie Manchester" claim. (32) Martin Costello promised Patrick Cunningham that he would hold the legal title to said claim as trustee for himself and Patrick Cunningham as equal owners thereof.

The following additional facts, referring to the maintenance of the title in the seven claims were also found by the special verdicts:

(34) Patrick Cunningham to the time of | his death performed half of the annual assessment work on the "Irish Mag" group, except Costello at one time paid to Cunningham \$100 on account of such annual work. (39) Costello promised to pay Cunningham at the rate of \$5 per day for his services in connection with the annual work done on the "Irish Mag" group, and on the "Smogler," "Belflower." and "Hattle Manchester." Martin Costello frequently promised Julia Cunningham, after the death of Patrick Cunningham, that when he sold the "Irish Mag" group and the "Smogler," "Belflower," and "Hattie Manchester" claims, that he would give the heirs of Patrick Cunningham half of the net proceeds of the said claims.

Other facts touching the seven claims are found and will be noticed in connection with the matters to which they relate, viz. the matters of settlement and compromise, and damages for the detention of the proceeds of the sale of mines.

[1] The errors assigned by the defendant are numerous, and have reference to many incidents transpiring in the course of the trial. A large number of such assignments have reference to matters connected with the "Wagner" group of claims, the assigned claim of Julia Cunningham, and the accounting for the net proceeds of the "Leo," "Roy," "Supplement," and "Buckeye" mines. portion of the money adjudged to be paid by defendant in accounting to plaintiffs is found to have arisen from either of said sources; consequently defendant has clearly suffered no injury by reason of errors committed with regard to such matters. deem this statement entirely sufficient to dispose of all such questions as they are affected by the defendant's appeal.

The defendant assigns as error the insufficiency of the evidence to sustain the jury's findings referred to above as Nos. 2, 4, 5, 6, 7, 9A, 26A, 32, and 34; that is, the defendant contends that the evidence is insufficient to establish these facts: That Patrick Cunningham paid Mrs. Daley \$1,000 in consideration of her granting to James Reilly her power of attorney; that said \$1,000 was a part of the \$3,000 purchase price paid to Mrs. Daley for her one-half interest in the "Irish Mag" claim, and her entire interest in the "George Washington," "Old Republican," and "Angel" claims; that on the 16th day of September, 1892, Mrs. Daley, through her attorney in fact, James Reilly, executed and delivered to Martin Costello a deed conveying to said Costello her said interests in said claims and that said deed was delivered upon Martin Costello's promise to pay the remaining \$2,000 purchase price, as set forth in a certain letter; that Martin Costello promised that Patrick Cunningham and himself should be equal owners in the "Irish Mag" claim at the time Costello purchased an undivided

ell; that Costello paid the said \$2,000 for the Daley interests after the claims were sold by him; that Martin Costello promised Patrick Cunningham that he would hold the legal title to the "Smogler" and "Belflower" claims purchased from Peter Johnson as trustee for said Cunningham and himself as equal owners thereof; and that Martin Costello promised Patrick Cunningham that he would hold the legal title to the "Hattie Manchester" claim as such trustee for the benefit of himself and Patrick Cunningham as equal owners thereof.

[2, 3] Defendant's opening brief, page 74. concedes that the evidence presented by the plaintiffs "as to the 'Belflower' and 'Smogler' is substantially the same as upon the former trial and held sufficient by this court." The defendant therefore submits a request that we re-examine such evidence for the reason a new mass of evidence has been offered by the defendant. This is a request of this court to determine the weight of such evidence and revise the jury's verdict reached from conflicting evidence to conform to our idea of its weight. Such course has not been followed by this court, and will not be followed by me in this instance. The verdict of the jury, supported by substantial evidence, is binding upon the lower court and upon this court as establishing the fact found. The defendant's concession with respect to the evidence concerning the "Smogler" and "Belflower" relieves this court of the necessity of comparing the evidence relating to these two mines in this record with such evidence in the former record. The judgment, in so far as it requires the defendant to account for the net proceeds of the sale of the "Smogler". and "Belflower," must necessarily be determined as proper and sustained by substantial evidence. At the former trial the same determination was reached from the same evidence as was reached at the last trial. The net proceeds of the sale of these two claims are separate items of the second principal item of the alleged account.

[4] Have the findings of the jury of the equitable rights of Patrick Cunningham in the "Irish Mag" group and the "Hattie Manchester" the support of substantial evidence, is the next important inquiry. The defendant bitterly attacks the testimony of Mrs. Julia Cunningham as unworthy of belief for many reasons, the principal of which is that her testimony is contradicted by testimony of a grade higher than oral testimony and therefore controlling. But this is, in effect, saying that the testimony which contradicts the testimony of said witness is entitled to the greater weight. If so, the jury must determine the weight to be given all testimony submitted to them.

certain letter; that Martin Costello promised that Patrick Cunningham and himself should be equal owners in the "Irish Mag" claim at the time Costello purchased an undivided one-half interest thereof from Mrs. McDowars far as the evidence in said former trial.

by the former appeal, this record contains the circumstances transpiring at the time the Reilly power of attorney from Mrs. Daley was obtained. The evidence is clear that Costello and Cunningham discussed the circumstances surrounding the acquisition of said power of attorney in the presence of Mrs. Julia Cunningham. From this witness' testimony it appears that Patrick Cunningham left off his work, took \$1,000 in money to Mrs. Daley at an early hour in the morning, and had her to accompany him (Cunningham) to a notary public, where she accepted the money, executed the Reilly power of attorney, and delivered the paper to Cunningham as a contract of sale of her interest in the "Irish Mag" group. Another witness testifled to having seen \$1,500 in Cunningham's possession as he (Cunningham) was on his way to see Mrs. Daley, and on Cunningham's return this witness saw a paper in Cunningham's possession in all respects similar to the Reilly power of attorney and Cunningham had only \$500 in his possession. The transaction was a surprise to Costello. Thereafter, up to the date of Cunningham's funeral, Costello treated the "Irish Mag" group as the property of himself and Cunningham, and at the date of Cunningham's funeral he squarely admitted that Cunningham owned from the beginning an undivided half interest in said group.

Defendant urges with great seriousness that the many contradictions in the evidence presented by documentary items and by letters should have the effect of destroying all of the testimony of Mrs. Cunningham so contradicted. The record abounds in probate court documents filed, signed, and sworn to by Mrs. Cunningham while administratrix of the estate of Patrick Cunningham, deceased, and as guardian of the estate of these minors, which, being record evidence, is always deemed of very high grade evidence of facts pertinent thereto, and of which they relate; but the claims made, the property appraised, the property reported to the probate court by means of the said documents, all pertain to the property belonging to said estates without dispute. The mines accounted for in said two probate proceedings are the "Wagner" mines. The only manner in which the duty to account for the net proceeds of the sale of the other eleven mines is by a system of elimination by inference. That because said statements and reports do not mention mines or interest in mines other than the "Wagner" group, that this is evidence contradicting the claim of interest in any and in all mines other than in the mines mentioned. This is argument, but does not preclude the jury from lawfully believing the truth of the witness' story. Strictly, the documentary evidence mentioned does not conflict with Julia Cunningham's evidence relating to the additional claim now made in behalf of the

went. In addition to the evidence submitted by the former appeal, this record contains the circumstances transpiring at the time the Relly power of attorney from Mrs. Daley was obtained. The evidence is clear that Costello and Cunningham discussed the circumstances surrounding the acquisition of said power of attorney in the presence of Mrs. Julia Cunningham. From this witness' stetimony it appears that Patrick Cunningham left off his work, took \$1,000 in money to Mrs. Daley at an early hour in the morning, and had her to accompany him (Cunningham) to a notary public, where she accepted

[6] With regard to the "Hattle Manchester" claim, the evidence is without conflict of a serious nature that Cunningham paid Allie Howe at least the value of one year's assessment work for his one half interest in said claim, and that he paid Tom Concannon \$50 for the other half interest of said claim, and the entire title was conveyed to said Cunningham; that thereafter Costello suggested in a letter to Cunningham that they, meaning Costello and Cunningham, had just as well be in on that claim as they were on all of the others; that Cunningham conveyed the said "Hattie Manchester" to Costello, and in the deed of conveyance the consideration therefor is expressed as the sum of \$50 paid by Costello.

This testimony, with the other facts and circumstances in evidence, substantially sustains the findings and judgment, and the finding justifies a decree requiring an accounting by the defendant estate for the net proceeds of the sale of the "Hattle Manchester" claim as a separate item of the second principal item of the alleged account, thus leaving the proceeds of the sale of the "Supplement" included in said second principal item open to future inquiry.

As a consequence, the judgment and portions thereof from which the defendant appeals is without error, and must be affirmed in so far as the same requires an accounting for the net proceeds of the sale of the "Irish Mag" group of four claims, the "Hattie Manchester," and of the "Belflower" and "Smogler" claims. The effect of this judgment on the matter of accounting was to require defendant to account for the first alleged principal item, and to account for the second in part. She is adjudged not liable to account for the proceeds of the sale of the separate item of the second principal item consisting of the proceeds of the sale of the "Supplement," nor for the third mentioned item of the alleged account.

## Plaintiffs' Appeal.

This is argument, but does not preclude the jury from lawfully believing the truth of the witness' story. Strictly, the documentary evidence mentioned does not conflict with Julia Cunningham's evidence relating to the additional claim now made in behalf of the heirs of Patrick Cunningham. If such probate

ing was to deny to the plaintiffs an accounting for the items mentioned, the net proceeds of the sales of the "Leo," "Roy," Supplement," and "Buckeye" mines, the assigned claim of Julia Cunningham, and interest on the money received as damages for its detention. The Judgment rendered for plaintiffs did not include an accounting for said items. Plaintiffs have expressly limited the scope of their appeal to said order refusing a new trial with respect to said items.

[7] The assigned claim of Julia Cunningbam is res adjudicata in its entirety, and the discussion of the same must be dismissed with that statement. On the former appeal (16 Ariz. 479, 147 Pac. 714) that claim was finally adjudicated.

The trial court declined to submit to the jury the consideration of the "Leo," "Roy," "Supplement," and "Buckeye" claims. The agreed statement of the facts, page 1440, folios 4306 and 4307, of the abstract of record contains the following:

"The plaintiffs requested the court to submit to the jury interrogatories with respect to the interest of the plaintiffs in the 'Leo,' 'Roy,' 'Supplement,' and 'Buckeye' claims, or the proceeds thereof, which interrogatories the court refused to present to the jury, upon the ground that, as a matter of law, the plaintiffs, under the evidence, were not entitled to any interest in said claims or either of them, or the proceeds thereof, said refusal being based upon the objection of the defendant to any interrogatories being submitted to the jury regarding said 'Leo,' 'Roy,' 'Supplement,' and 'Buckeye' claims."

Plaintiffs grounded their motion for a new trial upon the court's said order refusing to submit said matters. Such motion was denied. Plaintiffs assign such refusal order as error, alleging that "for the reason that under the evidence and the law \* \* \* the plaintiffs were \* \* \* entitled to have appropriate interrogatories submitted to the jury with respect to each of said claims, which, if answered as contended for by plaintiffs, would have either supported or necessitated judgment in favor of plaintiffs with respect to their alleged interest therein."

The question is presented by a number of assignments, and plaintiffs' contention in this respect is answered by solving the inquiry whether the record contains evidence of a substantial nature tending to establish facts from which the reasonable inference may be drawn that Costello held the title to said "Leo," "Roy," and "Supplement" claims in trust for the uses and benefits of himself and Cunningham.

[8] The assignments present the reverse of that which is presented upon the allegation that the evidence is insufficient to sustain the verdict and judgment. If substantial evidence has been offered and received during the course of the trial, which would sustain a verdict for the plaintiffs finding that defendant is liable to account for the proceeds of the sale of either of said three claims, and the court refused to submit the evidence with respect to such items to the

jury for their determination of the fact, the plaintiffs have been denied a trial to that extent and are injured thereby. No error was committed by the court in refusing to submit interrogatories with respect to the "Buckeye," for the reason the proceeds of the sale of said claim were not involved, as we have seen above.

[9, 10] With this inquiry in view, we will refer briefly to the evidence affecting the "Leo," "Roy," and "Supplement" items. The "Leo" was located December 12, 1895, and the "Roy" was located December 7, 1895. The location notice of each is signed by Martin Costello as locator and Pat Cunningham as witness. These location notices were recorded February 20, 1896, at the request of James Reilly. Mrs. Cunningham testifies as to the circumstances under which they were located, and the testimony tends to show that Patrick Cunningham discovered the ground, performed all the acts of location required by law, procured the location notices from Costello after some delay, and always claimed an interest in the claims equal with Costello. Such testimony is not the subject of dispute. Can one say as a matter of law that but one reasonable inference can be drawn from such evidence? The fact that the name of Pat Cunningham appears at the foot of each notice, but appears under the word "witness," indicates his presence and participation in the location. The further fact is in evidence that the "Leo" claim was so called in honor of Costello's son Leo. and that the "Roy" claim was so called in honor of Roy Morfoot, the relative of the Cunninghams, a member of their family, and at that time a warm friend of Leo Costello. These are small circumstances, but worthy of consideration as throwing light upon the close relation existing between Martin Costello and Patrick Cunningham. The heirs of Patrick Cunningham have alleged that a contract had actual existence; that pursuant to its terms these claims were located, and by said agreement Patrick Cunningham located these claims in Costello's name; that by the terms of said agreement the said parties thereto held equal rights therein, and that Costello held the legal title in trust for their equal use and benefit, pursuant to said trust agreement.

The defendant admits that five claims other than the eleven claims in controversy on this appeal were acquired by the parties and held by Costello as alleged, with the exception that Costello's trust required him to account to Cunningham for the interest so held after a sale was made. They deny that the eleven mines, including the "Leo", "Roy," and "Supplement" claims, acquired by original location, were so acquired and impressed with such trust.

proceeds of the sale of either of said three claims, and the court refused to submit the such facts and from such admission is that evidence with respect to such items to the a like contract was in existence with the

prior to the time of location, and that the said "Leo" and "Roy" locations were made by Cunningham in the name of Costello in pursuance to such contract then existing. The testimony mentioned is substantial in its nature and reasonably justifies the said inference. True, such is not the only inference to be necessarily drawn from such circumstances, and, this being the situation, the one inference of the two which a jury may draw therefrom, having the support of substantial evidence, is, when determined, conclusive upon the courts, both the trial court and on this court. The question whether the "Leo" and "Roy" claims were held by Costello subject to the said trust agreement was one of the controverted facts in the case with respect to which substantial evidence exists. The trial court, therefore, erred in refusing to submit all of the controverted questions of fact to the jury. Paragraph 542. Civil Code of Arizona 1913.

The items arising from the proceeds of the sale of the "Supplement" require no extended discussion to determine this appeal. In the former appeal we acted upon such condition, and did not discuss the record as it affected the "Leo," "Roy," and "Supplement," presuming that the trial court would commit no error upon a retrial with respect to the matters we were not required to discuss. The record now before us seems to disclose that the trial court considered our failure to discuss these items was a determination by this court that such items were eliminated from the cause. Such was the result of the objections of defendant's counsel, and the trial court approved the objection.

In order to avoid a repetition of such erroneous understanding, and for no other purpose, I will refer briefly to the remaining questions, the determination of which is not necessary to the disposition of this appeal, in view of the determination reached above that the court erred in arbitrarily withholding from the jury the consideration of controverted questions of fact with regard to the "Leo" and "Roy" claims.

The evidence without dispute shows that the "Supplement" claim was located July 6, 1894. The name of the locator is Martin Costello, and the witness Patrick Cunning-It was recorded at the request of The evidence tends to Martin Costello. show that Costello and Cunningham were both present on the ground at the time of this location. Other circumstances with regard to this location, the assessment work, claims of ownership, etc, are produced in The matters are in controversy. The fact appears that the "Supplement" was included in the same deed of conveyance with the "Hattle Manchester," "Belflower," and "Smogler," and the consideration received by

contract embracing the five "Wagner" mines of \$300,000, and this is the second principal concededly acquired near the same time, but prior to the time of location, and that the said "Leo" and "Roy" locations were made by Cunningham in the name of Costello in pursuance to such contract then existing. The testimony mentioned is substantial in its nature and reasonably justifies the said second principal item in said alleged account. These facts should have been submitted to the jury by appropriate interrogatories for their determination. Whether the proceeds of the sale of the "Supplement" mine was an item of the said second principal item in said alleged account. These facts should have been submitted to the jury by appropriate interrogatories for their determination. Whether the proceeds of the sale of the "Supplement" mine was an item of the said second principal item in said alleged account. These facts should have been submitted to the jury by appropriate interrogatories for their determination. Whether the proceeds of the sale of the "Supplement" mine was an item of the said second principal item in said alleged account. These facts should have been submitted to the jury by appropriate interrogatories for their determination. Whether the proceeds of the said second principal item in said alleged account.

The interrogatories submitted to the jury with regard to the matter of arriving at the damages for detention of trust money by the trustee are criticised by plaintiffs for uncertainty. Such interrogatories seem to be open to criticism, but the jury found no such damages occurred as a fact. On a trial of the remaining matter, if the question again arises, I presume the court will clearly set forth, by interrogatories, the question involved.

The matter of the community property of Patrick Cunningham in the mines, the equities acquired after his marriage to Julia Cunningham, was mentioned on the former appeal of plaintiffs (16 Ariz. 479, 481, 147 Pac. 714), and that matter is only important to this action in determining exactly the amount of the interest the plaintiffs as heirs at law of Patrick Cunningham, deceased, are entitled to recover of the net proceeds of the saies of said mines in which they have aiready or may on another trial be able to establish. Patrick Cunningham owned an equity. and that equity existed at the time of the sale. The community property rights are defined by statute and by the decisions of this court. On another trial the law applicable thereto, I presume, will be followed. I adhere, however, to the expressions appearing in said former opinion with regard to this matter. I do not now, and did not then, see the necessity of such expressions. The criticism of counsel to the effect that such expressions are obiter dicta is perhaps fully justified. Such expressions, unnecessary at the time, are often made, sometimes with the best of intentions, but regrets follow. However, counsel sometimes show so great an aptness to misunderstand the opinions of the appellate court, when such opinions interfere with their theory of presenting their side of the case reversed, that these unnecessary expressions are thrown in by the appellate courts as good measure and wholesome advice to counsel for consumption on the trial to follow. Some of the foregoing matters prompted our obiter dicta above referred to.

gard to this location, the assessment work, claims of ownership, etc, are produced in evidence. The matters are in controversy. The fact appears that the "Supplement" was included in the same deed of conveyance with the "Hattle Manchester," "Belflower," and "Roy," and "Supplement" mines was, in effect, the denial of a trial of the controverted facts in the case, and it was therefore error

to refuse a new trial on motion. For such error the said order is reversed and the cause remanded for a trial of such matters only. The judgment will stand affirmed in so faras the defendant is required to account to plaintiffs for their portion as heirs at law of Patrick Cunningham, deceased, of the net proceeds of the sale of the "Irish Mag," "George Washington," "Old Republican,"
"Angel," "Belflower," "Smogler," and "Hattie Manchester" mines, as adjudged without modification.

The cause is remanded to the lower court for the trial of the controverted questions with regard to the "Leo," "Roy," and "Supplement" mines only as a partial new trial in such respect. Consequently the cause is remanded, with instructions that the lower court grant to the plaintiffs a trial of the questions and matters pertaining to the "Leo," "Roy," and Supplement," and when the result of said partial new trial is finally reached, and a final accounting of the whole matter involved is thereby determined, to enter a judgment in accordance with the truth of such whole account as the same is so finally determined.

FRANKLIN, O. J., and ROSS, J., concur.

#### BARKER v. SAVAS et al. (No. 3145.)

(Supreme Court of Utah. April 16, 1918. On Petition for Rehearing, May 9, 1918.)

1. Highways \$\infty 184(2) -- Pedestrians Death-Cause of Death-Evidence.

Evidence held sufficient to sustain a finding that plaintiff's child was killed by an automobile, and that defendant's automobile killed it.

TRIAL \$\iff 140(1)\$—WEIGHT OF EVIDENCE
QUESTION FOR JURY.
The truth of testimony is for the jury.

3. Highways \$\infty 184(2) - Sufficiency of EVIDENCE.

In action for death of child killed while riding his tricycle on a broad open highway in the daytime, evidence held sufficient to sustain a finding that an automobile driver was negligent, although no one saw the accident.1

4. Highways = 176 - Persons on Road - Duty to See Persons on Road.

The law imposes the duty on an automobile driver to see persons on the road in front of him where his view is unobstructed.1

5. HIGHWAYS 4=184(2) - COLLISIONS - CON-TRIBUTORY NEGLIGENCE-EVIDENCE.

Evidence held to show that child on tricycle on a road killed by an overtaking motor truck was not guilty of contributory negligence.

6. Death ⇐⇒58(1)—Presumptions as to Due

CARE BY DECEASED—BURDEN OF PROOF.

A child killed on the road on a tricycle by an overtaking motor truck, in the absence of evidence to the contrary, will be presumed to

<sup>1</sup>Corbett v. O. S. L. R. Co., 25 Utah, 449, 71 Pac, 1065; Palmer v. Railroad Co., 34 Utah, 466, 98 Pac. 689, 16 Ann. Cas. 229; Jensen v. Railroad Co., 44 Utah, 100, 138 Pac. 1185.

have been exercising due care, the burden being on defendant to rebut the presumption.2

7. EVIDENCE \$\infty 471(22) - Conclusions WITNESS.

Testimony that defendant had admitted driving his automobile on the R. road "about the time we figured the accident happened" was a conclusion, and should have been stricken.

APPEAL AND ERROR @=== 1050(1)-HARMLESS ERROB-EVIDENCE.

Where there was no controversy as to the time defendant drove his motor truck along a road, a conclusion of a witness that he admitted driving it there "about the time of the accident" was harmless.

9. EVIDENCE 4-471(24) - CONCLUSIONS OF WITNESS.

Testimony of a witness that he went to the scene of an accident and saw deceased lying there and saw the track of the automobile "that had run over him" was a conclusion, and should have been stricken.

10. APPEAL AND ERROR €== 1170(7) - HARM-LESS ERROR-EVIDENCE.

Although testimony of a witness was a conclusion, it was harmless, where every fact with ciusion, it was narmiess, where every fact with which the witness was acquainted was then and there known to the jury, and the jury knew it was a conclusion, under Comp. Laws 1907, \$ 3285, providing that no exception shall be regarded unless the decision excepted to is material and prejudicial to the substantial rights of the party excepting.4

A parent was not guilty of contributory negligence in allowing a bright six year old child to go a short distance down a road with a tri-cycle, where she watched him until he started to return.

12. APPEAL AND ERBOR \$== 1066 - HARMLESS ERBOR-INSTRUCTIONS.

Where there was no contributory negligence, there was no prejudicial error, if error, in instructing that under the pleadings the jury could not take the question of contributory negligence into consideration.

Appeal from District Court, Salt Lake County; W. H. Bramel, Judge.

Action by Charles Barker against Andrew Savas and others. Judgment for plaintiff. From the judgment and an order overruling a motion for a new trial, defendants appeal. Affirmed.

J. J. Whitaker, of Salt Lake City, for appellants. Willey, Willey & Watkins, of Salt Lake City, for respondent.

THURMAN, J. This is an action to recover damages for the death of a minor child, son of plaintiff, alleged to have been caused by the negligence of the defendants. It is alleged, in substance, that while said child was riding northerly along and upon the east side of what is known as the "Redwood Road," in the Taylorsville district, Salt Lake county, a large truck automobile driven and directed by defendant Andrew Savas, in a northerly direction, at a dangerous rate of

For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

<sup>&</sup>lt;sup>2</sup>Lewis v. Railroad Co., 40 Utah, 483, 123 Pac. 97. \*R. G. W. Ry. Co. v. Utah Nursery Co., 25 Utah, 187, 70 Pac. 859.

<sup>4</sup>R. G. W. Ry. Co. v. Utah Nursery Co., 25 Utah, 187, 70 Pac. 859.

speed, negligently, carelessly, and willfully | named some little boys were passing the ran upon and against said child, knocking and throwing him with great and violent force to the ground, thereby causing his immediate death. It is also alleged that the said Andrew Savas was at the time the servant and employé of the defendants and acting in the due course of their business, and that the child at the time of his death was of the age of six years, strong, able-bodied, and capable and able to render aid, assistance, and comfort to the plaintiff. Damages are alleged in the sum of \$6,250, for which the plaintiff prays judgment. The case was tried to a jury, which returned a verdict for the plaintiff for \$2,500. Judgment for said sum was duly entered; motion was made for a new trial and overruled. Defendants apneal.

Appellants assign as error the admission of certain evidence, error in instructions to the jury, and insufficiency of the evidence to sustain the verdict.

The most serious question presented, and the one most earnestly insisted upon by appellants, relates to the sufficiency of the evidence to sustain the verdict. This necessitates a careful consideration of all the evidence relied on by respondent. There is substantial evidence in the record tending to show the following facts: That the son of respondent, who will hereafter be referred to as "the deceased," was six years old at the time of his death; that he lived with his parents in Taylorsville, Salt Lake county; that he was a bright, able-bodied child, above the average size for his age; attended school alone; did little chores for his parents, such as bringing in water and fuel, picking up tin cans, raking up débris on the lot, and did small errands for his parents; that his home, where he lived with his parents, was situated on the east side of the Redwood road referred to in the complaint, about 1,500 feet north of the Taylorsville blacksmith shop, and the blacksmith shop was on the west side of the road; that approximately halfway between the plaintiff's home and the blacksmith shop the cemetery grounds were situated on the west side of the road, and a canal on the other, the waters of the canal coming close to the road; that the road through this section of the country and for several hundred feet both north and south was level and free from obstructions—nothing to obscure the vision or prevent objects upon the road from being seen throughout the entire distance. The traveled road was from 21/2 to 3 rods wide. The day on which the accident occurred was somewhat cloudy with some wind and dust, but not consider-

At about 12:30 p. m. on the 6th day of November, 1915, the deceased was at the home of his parents above referred to. He had been to the blacksmith shop a few minutes before to get his tricycle repaired by his fa-

plaintiff's home with a little pony and saddle horse, going south on the road. Deceased asked his mother, who was scrubbing the floor, if he might follow the little boys down to the cemetery, which, as before stated, was just opposite the canal. She gave him permission and watched him until he reached the cemetery bridge. He rode his tricycle. She saw him down to that point, and when he turned to come home. That was the last time she saw him alive. While he was at the point mentioned he was seen by the witness David Cook. Deceased was watching the little pony drink out of the canal. David Cook knew deceased and talked with him. but the conversation was not disclosed. The witness saw deceased start north on his tricycle on the east side of the road. Witness went south to the blacksmith shop where he worked. While on his road to the blacksmith shop a truck automobile passed him, going north. Melvin Devereaux, another witness, saw deceased on his tricycle going north on the east side of the road. Deceased was north of the canal. This witness also saw the truck going by just behind the boy; then went into his shop. Clyde Panter, another witness, a clerk at Lindsey's store, south of the blacksmith shop, took his lunch at home, about a quarter of a mile north. Returning from his lunch to the store, a large truck automobile passed him going north. A. B. Caldwell, another witness, attending a funeral still farther south than Lindsey's store, saw a large truck automobile pass the Ward House, where the funeral was held, going north. Two other witnesses saw the same kind of an automobile going north. It is described by all of the witnesses as a truck automobile, light-colored top and dark body. Some of the witnesses say that the automobile was going very fast. The witnesses agree substantially as to the time when the truck went by, which varied all the way from 12:80 to 1 o'clock p. m. One or two witnesses recognized the truck as one which the Greeks drove between Salt Lake and Bingham. There is, however, no controversy concerning the fact that the defendant Andrew Savas, at about that time, drove over the road in just such a vehicle, going north, and it undoubtedly was the one seen and testified about by the witnesses above named. He was on business for the defendants. The testimony further tends to show that no other automobile passed over the road, in either direction, for some time before or after the truck passed by. The first one seen to pass afterwards was that of the witness Geo. A. Jenkins, undertaker, going north from the funeral to which we have referred. At a point somewhere from 200 to 400 feet north of the point where the canal touches the road heretofore mentioned, the witness Jenkins found, on the east side of the road, the little tricycle lying on its side, and about 30 feet ther, and had returned. At about the hour north of the tricycle the body of the deceas-

ed. He turned the body over, and found that t the boy was dead. He made inquiry in the neighborhood, and found the mother, who identified the body as that of her son. He found the tracks of an automobile which had turned partially out of the traveled road near where the tricycle lay and then back into the road at a point north of where the body was found. The track of the automobile was quite plain. He thought the track he saw was made by a pneumatic tire. He had preceded the funeral procession, which was traveling north, by about 15 or 20 minutes. When the funeral procession arrived at the point where he found the body, at the suggestion of Mr. Jenkins, it halted a few minutes, while some of the cortége examined the premises. The procession then moved on, and the witness, as undertaker, took charge of the deceased. The right wheel of the tricycle was somewhat bent. There were some bruises and abrasions on the face, left arm, and hand of the deceased, and the neck was broken, the bones being fractured, which in the opinion of the medical witnesses caused immediate death.

The defendant Andrew Savas admitted that he drove an automobile, of the description above given, from Bingham to Salt Lake City on the day in question, and passed the points above referred to at or about the timetestified to by the witnesses, but denied any knowledge whatever of having struck the boy. His automobile had pneumatic tires in front and solid tires behind. It was testified by a former partner, who was unfriendly to him, that the defendant, in conversation with him after the accident, said he remembered something happened, that he looked back an i saw the boy lying on the side of the road; that he saw no one had seen him and he drove on, increasing his speed. This testimony was vigorously assailed by impeaching witnesses, and considerable effort was made to destroy its effect.

The foregoing, in substance, constitutes the evidence in the case. As will be seen, the evidence as to the accident itself is almost entirely circumstantial. No eye saw it as far as the record discloses, and the jury that tried the case was compelled to ascertain the facts from such inferences as were warranted from the circumstances detailed by the witnesses.

[1, 2] That the deceased was struck by an automobile seems to be absolutely conclusive. If he had fallen off his tricycle without some violent force being applied, it seems altogether improbable that his neck would have been broken, much less the bones fractured as shown by the evidence. Furthermore, in such case it is impossible to conceive how the body would become separated from the body was either thrown from the tricycle by a considerable force, or was dragged from 16 Ann. Cas. 229; Jensen v. R. R. Co., 44 it and borne along to the point where it was Utah, 100, 138 Pac. 1185; Theis v. Thomas

ed in the light of the evidence laid before the jury. In whatever way the accident happened it must have occurred probably within less than five minutes from the time his mother and the witness Cook saw him leave the canal and start toward home. The distance from the canal to the point where his body was found was not exceeding from 200 to 400 feet, as before stated. The witnesses differ as to the exact distance. It will be remembered that Cook started south when the deceased started home. The truck automobile passed him going north before he reached the blacksmith shop, which was only 700 or 800 feet from the point where he left the deceased. The witness Devereaux saw the deceased when he started north from the canal, and then saw the automobile close behind him. This was the only automobile that passed in either direction at or near the time of the accident. If circumstantial evidence is permissible in any case and the jury is permitted to infer facts therefrom, how can this court, in the light of these circumstances, say there is no substantial evidence to sustain the inference that the defendant's automobile struck the boy and caused his death? The evidence, we believe, was sufficient to take the case to the jury and sustain its verdict independent of the controverted admission of defendant that something happened to him, and he looked back and saw the boy lying on the side of the road. The truth of this alleged admission. however, was a matter to be determined by the jury.

[3, 4] But it is contended by appellant that there is no evidence of negligence on his part, or want of due care in driving his machine. The circumstances tend to show that the deceased was riding his tricycle on the east side of the road, near the very edge of the traveled thoroughfare, where he should have been in the exercise of reasonable care. Huddy on Automobiles (3d Ed.) 120. All of the remainder of the road lying west of where the deceased was riding was open to the defendant. He was behind the deceased, with nothing to obscure or obstruct his vision. If he had looked ahead, as was his duty to do, there was nothing to prevent his seeing the deceased in time to avoid the collision. That it was his duty to look ahead in the exercise of reasonable care, in cases of this kind, is so generally recognized as a legal duty as to be beyond all controversy. Indeed the doctrine is elementary. Berry on Automobiles (2d Ed.) pp. 147, 148, 832, 833, 845; Babbitt on Motor Vehicles, § 244, at page 268, also section 303, p. 300, and section 5410, p. 1107; David's Motor Vehicles, § 154, p. 141; Corbett v. O. S. tricycle by a distance of 30 feet. That the L. R. Co., 25 Utah, 449, 71 Pac. 1065; Palmer v. Railroad Co., 34 Utah, 466, 98 Pac. 689, found, is a conclusion which cannot be avoid- (Sup.) 77 N. Y. Supp. 276; O'Dom v. Newa-



ham, 13 Ga. App. 220, 80 S. E. 36; Birkett v. Knickerbocker Ice Co., 110 N. Y. 504, 18 N. E. 108; Shipelis v. Cody, 214 Mass. 452, 101 N. E. 1071; Hennessey v. Taylor, 189 Mass. 583, 76 N. E. 224, 3 L. R. A. (N. S.) 345, 4 Ann. Cas. 396; Hodges v. Chambers, 171 Mo. App. 563, 154 S. W. 429; Deputy v. Kimmell, 73 W. Va. 595, 80 S. E. 919, 51 L. R. A. (N. S.) 989, Ann. Cas. 1916E, 656; Haake v. Davis, 166 Mo. App. 249, 148 S. W. 450; So. Ry. Co. v. Wiley, 112 Va. 183, 70 S. E. 510.

Counsel for appellant cites and quotes at great length numerous cases which he insists support his contention that there is no evidence in this case of the defendant's negligence. Hicks v. Roumaine, 116 Va. 401, 82 S. E. 71; Neill v. Chicago, etc., Ry. Co., 2 L. R. A. (N. S.) 909, note; Schier v. Wehner, 116 Md. 553, 82 Atl. 976, Ann. Cas. 1913C, 1053; Lee v. Jones, 181 Mo. 291, 79 S. W. 927, 103 Am. St. Rep. 596; McNamara v. Beck, 21 Ind. App. 483, 52 N. E. 707: Winter v. Van Blarcom et al., 258 Mo. 418, 167 S. W. 498; So. Ry. v. Hall's Adm'rs, 102 Va. 135, 45 S. E. 867; Havermale v. Houck, 122 Md. 82, 89 Atl. 314; and many others too numerous to mention. The most casual reading of the cases cited by appellant shows that they are clearly distinguishable from the present case. Here the deceased was riding his tricycle on the highway, as he had the right to do. He was riding north, and the circumstances indicate he was on the extreme east side of the road, as was his duty in the exercise of reasonable care. Defendant's automobile approached from the rear. His vision was unobstructed; he could have seen deceased if he had looked, and the law imposed upon him that duty.

[5, 6] As regards the question of the deceased's negligence, the evidence tends to show affirmatively that he was not negligent. Besides this, if it be said that a child of his age can be guilty of contributory negligence, in this case there being no evidence to the contrary, the law presumes he was in the exercise of due care, and the burden was on the defendant to rebut this presumption. Lewis v. Railroad Co., 40 Utah, 483, and cases cited at pages 494 and 495, 123 Pac. 97.

[7-16] During the course of the trial Sheriff Corless, a witness for the plaintiff, while testifying as to a conversation he had with defendant after the accident, was asked, by plaintiff's counsel, the following question:

"I will ask you whether or not he (meaning defendant) said that he passed there about 1 o'clock."

This was objected to as leading. Objection overruled. The witness answered:

"I know he did admit passing on the Redwood road about the time we figured the accident happened."

Appellant then moved to strike out the annot reflect the facts as we read the record. swer as being a conclusion. The motion was denied. The motion ought to have been his father had repaired his tricycle, and must

granted, as the answer was undoubtedly a conclusion of the witness, but there was no substantial controversy whatever as to the time defendant passed the point where the accident occurred. The error, therefore, was harmless. Again, the same witness, at a later stage of the testimony, while testifying concerning the place of the accident was asked by plaintiff's counsel:

"Describe what you saw there."

The witness answered:

"I saw the boy lying by the side of the road and the tricycle a few feet from him. The boy was dead when I got there. There was some man there that was keeping all the people and every vehicle from the track of this automobile that had run over him."

Counsel for appellant moved to strike out the answer as being a conclusion of the witness. The motion was denied. This motion also should have been granted. The answer of the witness was undoubtedly a mere conclusion; but the question again arises. Was it prejudicial? It is manifest the witness drew his conclusion from the circumstances laid before the jury, with which the jury was equally familiar with himself. Every fact with which the witness was acquainted was then and there known to the jury. The jury knew that he was not an eyewitness to the accident, and therefore knew that he was drawing his conclusion solely from the facts and circumstances with which Under these circumthey were familiar. stances we cannot presume the error was prejudicial. Comp. Laws Utah 1907, § 3285, reads:

"No exception shall be regarded unless the decision excepted to is material and prejudicial to the substantial rights of the party excepting," R. G. W. Ry. Co. v. Utah Nursery Co., 25 Utah, 187, 70 Pac. 859.

This assignment cannot be sustained.

[11, 12] The court instructed the jury in effect that, the defendant not having raised the question of contributory negligence on the part of the deceased or his parents, that question should not be by them taken into consideration. This is assigned as error. We have already shown there was no evidence of contributory negligence on the part of the deceased, and that if such could be attributed to a child of his age and understanding, there being no evidence of his negligence. in view of his death by the accident, the law presumes that he exercised reasonable care for his own safety. This assignment of error is inexplicable. Appellant assumes that deceased came to his death on the road from the blacksmith shop to his home; that plaintiff, having started him on that journey, cannot recover for the injury that may have occurred, because in sending a boy of his age and discretion out on the public highway he was guilty of contributory negligence. This theory and assumption of appellant do not reflect the facts as we read the record. The deceased left the blacksmith shop, after

have gone straight home as his father directed, for we find him there a few minutes after. He then obtained permission of his mother to follow the boys with the pony down to the cemetery, as we have heretofore shown. She carefully watched him to that point, and saw him turn and start for home. Certainly there is not a scintilla of evidence in the record that any negligence of the plaintiff contributed to the injury complained of. Neither was there any negligence on the part of the mother. If the jury in this case had rendered a special verdict and found against the plaintiff on the grounds of contributory negligence of any of the parties concerned, and the question were presented to this court for review, we would feel it our duty to reverse the cause on that ground alone. While the court is not willing to concede that the instruction complained of was proper, merely because contributory negligence was not pleaded as a defense, we do hold that, under the facts of this case, the court did not err in giving the instruction.

Neither did the court err in respect to the measure of damages or the admission of evidence in relation thereto. Rulings of the court in respect to the question of damages were fairly within the case of Corbett v. O. S. L. R. R. Co., supra.

We find no error in the record. The judgment is affirmed. Respondent to recover costs.

FRICK, C. J., and McCARTY, CORFMAN, and GIDEON, JJ., concur.

## On Petition for Rehearing.

'THURMAN, J. Appellant has applied for a rehearing on the alleged grounds that there is no evidence of his negligence and that it is consistent with all the facts, and probable, that deceased ran his tricycle into appellant's machine without his fault. Appellant cites authorities.

These same propositions and authorities are relied on in appellant's former brief and were urged at the oral argument. were carefully considered by the court and its conclusion thereon is reflected in the opinion handed down. Nothing new is presented in the application for a rehearing. It would add nothing to the weight of our opinion to again review the evidence and report our conclusions. The facts and circumstances are sufficiently reflected in the opinion to show that it is a case in which reasonable men might differ as to the defendant's negligence. In such circumstances we have no power to determine what the fact is as a matter of law. In Newton v. R. R. Co., 43 Utah, 226, 134 Pac. 570, the correct rule is stated:

"All that can be said is that, unless the question of negligence is free from doubt, the court cannot pass upon it as a question of law; that is, if after considering all the evidence and the

inferences that may be deduced therefrom the court is in doubt whether reasonable men, in viewing and considering all the evidence, might arrive at different conclusions, then this very doubt determines the question to be one of fact for the jury and not one of law for the court."

The application for a rehearing is denied.

FRICK, C. J., and McCARTY, CORFMAN, and GIDEON, JJ., concur.

FURLONG et al. v. TILLEY et al. (No. 3155.)
(Supreme Court of Utah. April 16, 1918.)

 EVIDENCE €□14—JUDICIAL NOTICE—MAT-TER OF COMMON KNOWLEDGE—CAPACITY OF EPILEPTIC.

The court will take judicial notice as a matter of common knowledge that one afflicted with epilepsy to the extent of an attack once or twice a month, is not necessarily disqualified from transacting ordinary business during the intervals between the attacks.

2. DEEDS \$\inspec 211(1)\to Capacity of Grantor\to Sufficiency of Evidence.

In an action to set aside and cancel a deed for the grantor's incompetency, and fraud and undue influence of the grantees, evidence on the question of incompetency held to support judgment dismissing the action.

3. Deeds \$\infty\$ 196(2)—Conveyance by Father to Sons—Fraud or Undue Influence—Burden of Proof.-

Where a deed was executed to the grantor's son voluntarily, the relation between the parties gave rise to no presumption of fraud or undue influence casting on the son the burden to show the good faith of the transaction in an action by heirs to cancel the deed.<sup>1</sup>

Appeal from District Court, Utah County; A. B. Morgan, Judge.

Action by Alice Furlong and others against Alma C. Tilley and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

Parker & Robinson, of Provo, for appellants. Elias Hansen, of Spanish Fork, for respondents.

THURMAN, J. This is an action to set aside and cancel a deed for land situated in Spanish Fork, Utah county, executed by one Henry Tilley, hereinafter for convenience called the grantor. The deed was made to defendant Alma C. Tilley.

The complaint, in substance, alleges that the grantor died in November, 1915, but that on December 8, 1911, he is purported to have made the deed in question; that at that time he was mentally incompetent and unable to transact ordinary business; that the defendants, taking advantage of his weakness of mind, by fraud and undue influence, wrongfully procured the deed to be made; that the deed was made without consideration. fendants controvert these allegations of the plaintiffs, and further allege, in effect, that the defendant Alma C. Tilley paid part of the purchase price of said land; that in 1907 he was arranging to leave the state of Utah. whereupon the grantor and his wife entered

into an oral agreement whereby they agreed that if the defendants would remain at home and cultivate the land in question and other land belonging to the grantor, the said grantor and his wife would convey the land in question to the defendants in such form that the title thereto would vest in them upon the death of the said grantors; that the said defendants accepted the terms of said agreement and fully complied therewith; that the deed sought to be canceled was made in pursuance of said agreement, and at the time it was executed the defendant Alma C. Tilley and his wife duly executed a written lease for a life estate in said premises and delivered the same to the grantor. Other matters are set up in defense, but they are immaterial. Plaintiffs sue as heirs of the said grantor. The administrator, who refused to join as a plaintiff, is made a party defendant. The trial court, sitting without a jury, found the issues in favor of the defendants. Plaintiffs appeal.

Several errors are assigned relating to the admission of testimony, motions to strike out portions of the answer, rulings of the court thereon, and error in the findings. All of said rulings except as to the issues of fact were either proper or nonprejudicial, and will not be further considered.

The only questions necessary to be determined are: (1) Was the grantor mentally incompetent to convey his property at the time the deed was executed? (2) Was he unduly influenced thereto by the defendants? Upon these issues many witnesses—about an equal number—were sworn and examined on each side of the case. The witnesses were all neighbors of the grantor, Henry Tilley, in his lifetime, and many of them were his relatives by consanguinty or affinity. All the parties to the action are his lineal descendants and heirs at law, his wife having died in June, 1911.

The testimony on the part of the plaintiffs tended to show abnormal conduct, strange behavior and eccentricities on the part of the grantor, indicating weakness of mind, inbecility and mental aberration, some occurring before the deed was executed. December 8. 1911, but most of it after. As samples of incidents related by the witnesses for plaintiffs, the following may be mentioned: He was known to go to town in his buggy and come home without it; tried on one occasion to put on baby shoes in the presence of the family; had a curious expression in his eyes: sometimes commenced eating dinner before other members of the family were ready; after eating dinner would crack and eat cherry stones; sometimes got lost in the community where he lived; once said he did not care to live any longer; once at a conference in Salt Lake City he sat on the curb and put his feet in the water, saying he did so to cool them off. He was a Republican in politics, and once when talking to a witness who was a Democrat, said, "God will take

care of the Republican party"; on one occasion he did not know his wife's sister; asked one witness about the health of his mother-in-law who had been dead for five years, grantor was well acquainted with her. On one occasion he was on the ground floor of a house and insisted he was upstairs; sometimes wandered around. His wife died in June, 1911. After that he frequently visited the cemetery and was seen crying. He was 69 years of age when he died, in November, 1915. Some of the plaintiffs' witnesses testified to instances occurring as early as 1908, but all agree he was much worse after his wife died. Deceased was subject to epileptic fits, which occurred generally about once a month, sometimes twice a month in later During these fits and for a short time after it is admitted he was incapable of transacting business. At all other times they insist his mind was normal, at least up until August, 1914. After that they noticed a marked change for the worse in his mentality.

The testimony introduced by defendants tended to show that the grantor transacted business with other people at or about the time the deed in question was executed; that he sold land and executed deeds therefor; transferred water rights, conveyed lands to the plaintiffs, long after executing the deed to the defendants; that plaintiffs still hold the deeds; that his conduct was generally normal down to 1913 or 1914, the testimony varying in that respect. He attended church regularly until 1914. Defendants' witnesses saw some changes as time went on, but were of the opinion he was competent to transact business in 1911; told several witnesses he had turned the land over to the boys. Witnesses talked with him about business matters as late as 1913 or 1914, and saw nothing unusual in his demeanor. Defendants' testimony also tended to show that both of the defendants, before the deed was executed, contemplated leaving Utah, and in consideration of their remaining at home and cultivating the farm grantor promised to execute the deed in question. The testimony tends to show the grantor lived at the home of defendant Alma C. Tilley for two or three years after the deed was executed: that Alma had no farm prior to this conveyance; that he had a wife and nine children, and the other defendant, James Tilley, had a wife and four children; that Alma had assisted in paying for the farm, and that after the deed and life lease were executed defendants paid to the grantor, as rental, a substantial The testimony further sum per annum. tends to show that the deed was recorded soon after it was made, and that some of the plaintiffs had actual knowledge of its execution several years before the grantor died: that no question was ever raised by any of the plaintiffs concerning the validity of the deed until after the grantor's death.

foregoing, in substance, constitutes the facts ants were his sons, with large families and upon which the trial court based its judg-no land to cultivate; that his daughters ment.

[1-3] It does not appear from the evidence that the eccentricities above enumerated, introduced to show the grantor's incompetency. reflected his mental condition at all times. They appear to be more in the nature of isolated occurrences of mental aberration. It is admitted, as before stated, that when the grantor was under the influence of an epileptic fit, to which he was at times subject, he was unable to transact business. We believe it is a matter of common knowledge, of which the court will take judicial notice, that where a person is so afflicted to the extent appearing in the record before us, he is not necessarily disqualified from transacting ordinary business during the intervals between the attacks. This, perhaps more than anything else, accounts for the apparent conflict in the opinions of the various witnesses. Those who happened to see the grantor in one of these attacks, or soon after, would notice something abnormal in his demeanor or conversation, while those who saw him only in the intervals would notice nothing As to the incidents themselves, while many of them are exceedingly peculiar, they are not by any means conclusive. His going to town in the buggy and returning without it, unexplained, certainly indicates absence of mind. His trying to put on baby shoes, perhaps in the presence of his little grandchildren, might be for their amusement only, or it might indicate mental aberration at the time. His sitting on the curb and putting his feet in the ditch to cool them off was not unnatural or abnormal; it may not have been according to ethics under the circumstances. His wandering around at times through the town may or may not indicate abnormality. His saying to a Democrat in argument that "God would take care of the Republican party" to the Democrat may have suggested the rankest kind of imbecility, but this court as a whole cannot accede to that view. His failure on some occasions to remember names or persons with whom he was familiar is, perhaps, a common failing of many persons as they advance in years. We cannot say that such evidence is even persuasive that such persons are incompetent to transact ordinary business. We might continue these comments until every incident related has been reviewed and criticized, but it would not answer any useful purpose. The fact remains that all the evidence in the record relating to the transaction itself indicates that at the time the deed was executed he was in a normal state of mind; that the execution of the deed was in pursuance of an oral agreement and a fixed and settled determination on his part, expressed in various forms to disinterested witnesses as well as to those interested; that the defend-

no land to cultivate; that his daughters were married off and were not residing under his roof; that he desired to keep his boys at home and made the agreement referred to with that end in view. In making the agreement he did not overlook his own interest, but reserved a life estate in himself. It also appears he did not forget his other children and grandchildren. They are the plaintiffs in this action. He conveyed property to them long after the deed to defendants was executed. They still hold the property so conveyed. Whether it is equal in value to the property conveyed to defendants, or less, is not a controlling question. The questions are, as stated in the beginning: Was the grantor incompetent to convey his property when the deed was executed? and was the deed obtained by fraud or undue influence on the part of the defendants? The trial court decided both questions in the negative and entered judgment for the defendants, dismissing the action. We are of the opinion that the evidence preponderates in favor of the judgment. The rule contended for by appellants, that the burden was on the defendants to show that the deed was not obtained by fraud or undue influence, does not apply in this kind of a case. Hatch v. Hatch, 46 Utah, 218, 148 Pac. 433, and cases cited.

For the reasons above stated, the judgment of the trial court is affirmed; respondents to recover costs.

FRICK, P. J., and McCARTY, CORFMAN, and GIDEON, JJ., concur.

STATE ex rel. JONES v. WEST PUB. CO. et al. (No. 3166.)

(Supreme Court of Utah. April 20, 1918.)

1. JUSTICES OF THE PEACE \$\insp\1(8)\$ — Com-PLAINT—VERIFICATION.

Where a complaint in a replevin action before a justice of the peace was verified June 6th, and not filed until June 12th, the court was not thereby prevented from acquiring jurisdiction by reason of the complaint not alleging a present ownership of the goods, as required by Comp. Laws 1907. § 3046.1

2. COSTS 4 119 SECURITY FOR COSTS TIME OF FILING BOND.

Under Comp. Laws 1907, § 3769, a bond as security for costs, by a nonresident corporation in a replevin action, is filed in time if filed within 20 days after order therefor.<sup>3</sup>

3. JUSTICES OF THE PEACE \$\iiii 84(1)\to JUBIS-DICTION\to DETERMINATION.

A defendant sued in replevin before a justice of the peace, who has filed a special demurrer submitting jurisdiction of the court, cannot, after an adverse determination with time given to answer, challenge the jurisdiction of the justice by application to the district court for certiorari.

<sup>1</sup> James v. Jensen, 167 Pac. 827.

<sup>&</sup>lt;sup>2</sup>Douglas v. District Court of Salt Lake County. 45 Utah, 486, 146 Pac. 562.

<sup>&</sup>lt;sup>2</sup> Page v. Bank, 38 Utah, 440, 112 Pac. 816.

County; J. D. Call, Judge.

Certiorari by the state of Utah, on the relation of R. H. Jones, against the West Publishing Company and Denmark Jensen, Justice of the Peace, to review proceedings in a justice's court. From a judgment dismissing plaintiff's application and directing the justice to proceed with the case, plaintiff appeals. Affirmed.

Henry Seeger, of Brigham City, for appellant. Le Roy D. Young, of Brigham City, for respondents.

CORFMAN, J. The plaintiff made an application to the district court of Box Elder county for a writ of certiorari directed to the defendants for the purpose of having reviewed the proceedings theretofore had in an action pending before the defendant Denmark Jensen, as justice of the peace of the justice's court of Brigham City, in said county, wherein the defendant West Publishing Company was plaintiff, and the plaintiff, R. H. Jones. was the defendant. The writ was issued by the district court, as prayed for in the application, and thereupon the record of proceedings in the justice's court, together with the files in said action, were certified to the district court by the said justice of the peace. The defendants filed an answer to the plaintiff's application, and, after a hearing in the district court, that court made and entered its findings, conclusions of law, and judgment to the effect that the proceedings in said action before the said justice had been regular, dismissing plaintiff's application, and directing the justice of the peace to proceed with the case.

Plaintiff appeals, and complains that the district court failed to find on the material issue presented on his application for the writ of certiorari.

The court found, so far as material here, as follows:

"(1) That the defendant, the West Publishing Company was at all times mentioned, and now is, a nonresident foreign corporation created under the laws of Minnesota; and that the defendant Denmark Jensen was at all times mentioned, and is, an acting justice of the peace in and for the city of Brigham, county of Box Elder, state of Utah, and exercising judicial functions as such within the limits of said office of justice of the peace.

"(2) That on the 12th day of June, 1916, the said West Publishing Company, as plaintiff, filed a suit or action against R. H. Jones, as defendant, before the said Denmark Jensen, as justice of the peace, in replevin to recover certain law books in the possession of the said R. H. Jones, defendant, and claimed to be owned by the said West Publishing Company, plaintiff.

"(3) That summons was thereupon issued by the said Denmark Jensen, as justice of the peace, and on the 19th day of June, 1916, said summons was returned showing due and legal service to have been made upon the defendant, R. H. Jones.

"(4) That at the time of the filing of said complaint, to wit, on the 12th day of June, 1916,

Appeal from District Court, Box Elder | a bond in replevin in the sum of \$250 was filed a bond in replevin in the sum of \$250 was filed by the plaintiff, as provided by law, and that thereafter, to wit, on the 1st day of July, 1916, a demand was made by the defendant, R. H. Jones, for an undertaking for costs, in the sum of \$300 additional, as security for costs, on the grounds that the plaintiff was a nonresident corporation

poration.

"(5) That on the 18th day of July, 1916, and after written notice served upon the defendant on the 18th day of July, 1916, the said Denmark Jensen. as justice of the peace, made an order fixing the amount of bond, as security for costs, in the sum of \$25; that on the 4th day of August, 1916, a bond was filed by plaintiff in the sum of \$25, as ordered by the court; that on the 29th day of November, 1916, a copy of said bond, as security for costs, was served on the defendant, R. H. Jones.

"(6) That on the 2d day of December, 1916, the defendant, R. H. Jones, filed his objections to the service of summons and moved to quash

to the service of summons and moved to quash the same; that on the 18th day of December, 1916, the said Denmark Jensen, in open court, overruled said objection, and gave the defend-

1916, the said Denmark Jensen, in open court, overruled said objection, and gave the defendant R. H. Jones five days in which to plead further to said complaint; that on the 23d day of December, 1916, the defendant filed a verbal demurrer to plaintiff's complaint at 10 o'clock a. m.; at 3 o'clock p. m. defendant filed with said court a written demurrer to plaintiff's complaint; that thereupon the court set the hearing of the demurrer for January 1st, 1917; at 10 o'clock a. m. the court was in session, neither party being present, no action was taken on the demurrer by the court."

"(8) That thereafter, to wit, on the 6th day of March, 1917, a written notice was served on the defendant, R. H. Jones, that his demurrer to plaintiff's complaint would be heard at 10 o'clock a. m., March 12, 1917; that on the 12th day of March, 1917, at 10 o'clock a. m., the court being in session, the defendant not being present, and the court having been personally notified by the defendant, R. H. Jones, in person, that he would not be present, the court overruled the demurrer of the defendant; the defendant, R. H. Jones, was notified in writing that he would be given ten days within which to tile his answer, dating from the 15th day of March, 1917."

The findings of the district court were pred-

The findings of the district court were predicated on the record of proceedings and files of the justice's court. The only question, therefore, for the district court to try and determine was whether or not the justice had jurisdiction to proceed with the case.

[1] It was set forth in the plaintiff's application for the writ of certiorari that the complaint in the justice's court had been verifled June 6, 1916, and not filed in that court until June 12, 1916, and therefore, being one in replevin, the court acquired no jurisdiction of the subject-matter of the action by reason of the complaint not alleging a present ownership in accordance with the provisions of section 3046, Comp. Laws 1907. Plaintiff complains that the district court's failure to find the fact was prejudicial error. point raised by plaintiff has been but recently before this court, and decided adversely to him in the case of James v. Jensen, 167 Pac.

shows the order was made by the justice [4. CARRIERS \$==316(3) - DOCTRINE OF "RES of the peace fixing the amount of the bond July 18, 1916, and that thereafter on the 4th day of August, upon notice to defendant, in full compliance with statute and the orders of the court, the defendant's bond was filed. Douglas v. District Court of Salt Lake County, 45 Utah, 486, 146 Pac. 562.

[3] Other questions are raised and contended for in plaintiff's brief and argument to the effect that the justice was without jurisdiction to proceed with the case. We will not, however, pause to discuss them in detail, nor say more than that the plaintiff appeared before the justice's court on December 23, 1916. and filed his special demurrer invoking the jurisdiction of the court for the purpose of disposing of the questions thus raised, among them the question of jurisdiction of the court itself; and that question being submitted and determined adversely to him, with time given to answer, he then proceeds to challenge the jurisdiction of the justice's court by application to the district court for a writ of certiorari. He may not do that. Page v. Bank et al., 38 Utah, 440, 112 Pac. 816.

The finding of the district court that the justice's court proceeded regularly is amply sustained by the record. Therefore the judgment of the district court dismissing plaintiff's application for a writ of certiorari, and directing the justice's court to proceed with the case, is affirmed. Defendants to recover

FRICK, C. J., and McCARTY, THURMAN, and GIDEON, JJ., concur.

## WILLIAMSON v. SALT LAKE & O. RY. CO. (No. 3150.)

(Supreme Court of Utah. April 16, 1918.)

1. CARRIERS 4 320(8) - PERSONAL INJURIES TO PASSENGER-NEGLIGENCE-QUESTION FOR JURY.

In an action for injuries sustained by plaintiff while attempting to board defendant's passenger train, the question of defendant's negligence held, under the evidence, for the jury.

2. Carriers 4=821(21) — "Res Ipsa Loquitur"—"Raises "—Instruction.

An instruction, in effect, that the sudden starting of the car "raises" (that is, compels the inference of negligence), was erroneous, and should have been "warrant" or "authorise," an inference of negligence, since the principle of res ipsa loquitur does not relieve the plaintiff of the burden of proof, or raise any presumption in plaintiff's favor, but simply entitles the jury, in view of all the circumstances and conditions as shown by plaintiff's evidence, to infer negligence, and to say whether, upon all the evidence, the plaintiff has sustained his allegation. (Citing Words & Phrases, Res Ipsa Loquitur.) 3. Carriers 4=316(3) - "Res LPSA LOQUI-

TUR."
The doctrine of res ipsa loquitur, as applied to the sudden starting of a passenger coach, warrants or authorizes an inference or assumption that the sudden starting was due to the negligence of those controlling the train. but does not compel such inference or presumption.

IPSA LOQUITUR"-APPLICABILITY.

Where the train which was alleged to have been suddenly started with a jerk, which it was claimed caused the injury, was under the exclusive management and control of defendant, and there was no evidence or explanation on defendant's part as to the sudden starting, the doctrine of res ipsa loquitur was applicable, since, if something unusual or extraordinary occurred in the operation and management of the train which resulted in an injury to a pas-senger, the occurrence warranted, but did not compel, an inference that it was due to the neg-ligence of defendant, unless it was made to appear that the occurrence was due to some other cause than the one assumed or inferred, and for which defendant was not responsible.

5. APPEAL AND ERROR \$\int\_1064(1) ERBONE-OUS INSTRUCTIONS-REVERSIBLE ERROR.

In action for injuries due to the sudden starting of a train, where defendant was unable to explain the sudden starting, instructing that the sudden starting "raises" an inference of negligence was reversible error.

Appeal from District Court, Weber County; A. E. Pratt, Judge.

Action by James Williamson against the Salt Lake & Ogden Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with directions to grant new trial.

Boyd, De Vine & Eccles and Arthur Woolley, all of Ogden, for appellant. Jno. G. Willis, of Ogden, for respondent.

FRICK, C. J. Plaintiff commenced this action on the 8th day of March, 1916, to recover damages for personal injuries which he alleged he received through the negligence of the defendant on June 14, 1912. In his complaint he alleges that he was injured while attempting to board one of defendant's passenger trains at Clinton, a station some distance south of Ogden City. The acts of negligence relied on are alleged as follows:

"That while plaintiff was such passenger, and in the act of boarding said train at said station of Clinton, and while he was upon the lower step of the rear platform of said car, the said car was, through the negligence of defendant, sudwas, through the negligence or detendant, suddenly started and put into quick motion, without allowing plaintiff sufficient, or any, time to safely get upon said car; and in consequence thereof, and of the negligence of the servants of defendant conducting and operating said car, plaintiff was violently thrown against the rear end of the platform of said car, whereby he sustained great and permanent injuries, as follows: lows:

The alleged injuries are then described. and plaintiff adds a prayer for judgment.

The defendant, upon the ground of want of knowledge or information, denied that plaintiff was a passenger on defendant's train; that he was injured as alleged, or at As an affirmative defense, defendant averred that, if plaintiff was injured as alleged, such injury was caused wholly and solely through his own negligence, etc.

Upon those issues the case was tried, and at the conclusion of the evidence the defendant requested the court to direct the jury to return a verdict in its favor for the reasous: (1) That evidence is insufficient to justify a finding of negligence on the part of the defendant; (2) that the alleged injuries were caused through plaintiff's own negligence and want of ordinary care; and (3) that the evidence shows that the alleged injuries were caused by some cause other than the alleged accident.

The court refused to so charge, but submitted the cause to the jury upon the evidence, and six out of eight jurors impaneled returned a verdict in favor of the plaintiff. Judgment was duly entered upon the verdict, and the defendant appeals.

While many errors are assigned, yet counsel in their brief have argued but two.

Counsel insist that the court erred in refusing the request to direct a verdict in favor of the defendant for the reasons before stated. The plaintiff was the only witness produced who seemed to know anything concerning the happening of the accident. While the conductor and brakeman in charge of the train on the day of the alleged accident were called by the defendant, neither of them knew anything of the happening of the accident, and neither of them knew the plaintiff or that he was a passenger on the train at the time in question. No other witness was called who either saw or knew anything about the accident. The plaintiff, who was a plumber engaged in that work, in substance testified that at about 20 minutes before 5 o'clock on the afternoon of the 14th day of June, 1912, and while he was on the steps of one of the cars of defendant's train. and while attempting to board the train carrying his plumbing tools, the train was suddenly started and he was injured. In answer to his counsel's questions he described the accident as follows:

"Well, when the train came into the depot I was standing there and they stopped; and while I was in the act of getting on the train, I picked up my tools off the ground, put them on my shoulder, and put my gasoline furnace on my arm like that, and this hand grasped the— Q. Which hand is that? A. Left hand grasped the handrail, and just as I was taking a step up— I had stepped up on the right foot first—and just as I was taking the step up, before my left foot got on the step, the car started off with a jerk."

The witness said he was thrown against a ledge at the end of the car, and that he thereby injured his hip, etc.

The plaintiff, although he alleged he was injured in the manner aforesaid on June 14, 1912, nevertheless made no claim of any kind against the railroad company until the 22d day of November, 1915, and thereafter brought this action as before stated.

[1] Counsel insist that the evidence is insufficient to justify a finding of negligence on the part of the defendant. While it is true that the evidence of negligence in some respects is not strong, yet, in view of the high degree of care that a common carrier to say that there was no substantial evidence of the negligence produced by the plaintiff. If there is any substantial evidence of negligence on the part of the defendant, and that such negligence was the proximate cause of the injury complained of. then the question is one of fact for the jury and not one of law for the court. While there are a number of circumstances in this case, which we need not pause to state here, from which the jury might have found the facts in favor of the defendant, yet the effect that should be given to such circumstances was purely a question to be determined by the jury. It follows, therefore, that the district court did not err in refusing to direct the jury to return a verdict for the defendant, and in submitting the case to the jury.

[2] It is, however, also insisted that the court erred in charging the jury. The court charged the jury as follows:

"The mere fact, if you find it to be a fact, that plaintiff was injured at the time and place mentioned, does not justify an inference either that the plaintiff was negligent or the defendant was negligent; yet if you believe from a preponderance of the evidence that plaintiff boarded the ance of the evidence that plaintiff boarded the car at Clinton, having a mileage ticket with which to pay his fare and intending to take passage therein, and while in the act of getting on the car he was injured by the sudden starting of the car, the sudden starting of the oar under such circumstances raises an inference of negligence on the part of the defendant, though not a conclusive one, and the law casts upon the defendant the burden of showing that such starting scas not caused by the negligence of the defendant or its servants in control of the oar, or that plaintiff was negligent and his negligence was a proximate cause of or contributed to his was a proximate cause of or contributed to his was a proximate cause of or contributed to his injury. Nevertheless, whether or not the defendant was negligent, and whether or not the plaintiff was negligent, are questions of fact to be determined by you from all the evidence in the case, and in the light of these instructions as to the law applicable thereto." (Italics ours.)

Counsel excepted to the charge, and especially to that portion which is given in italics. It will be observed that in the instruction excepted to the district court informed the jury respecting the effect of the maxim res ipsa loquitur. While expressions similar to those used by the court in the instruction are often met with in the written opinions of the courts, yet it is not always safe to charge a jury in the precise language used by the justices in writing opinions. Opinions are not intended as instructions to laymen or jurors, but they are intended for judges and lawyers who are learned in the law. It will be observed that the court told the jury in express terms that the "sudden starting of the car \* \* raises an inference of negligence on the part of the defendant. \* \* and that the law casts upon the defendant the burden of showing that such starting was not caused by the negligence of the defendant." The jurors were thus informed in positive terms that the sudden starting of the car raised an inference of negligence, and that the burden was cast on the defendant to owes to his passenger, we are not prepared explain away or to dissipate such inference.

The natural and obvious meaning of the language of the instruction is, and a jury of laymen, we think, would so understand it, that from the sudden starting of the car an inference or presumption of negligence necessarily arose, and that, unless the defendant produced evidence to explain the sudden starting of the car, the plaintiff was entitled to a verdict as a matter of course. In other words, if the jury believed the car was suddenly started, it then became their duty to infer negligence. If, therefore, the agents and servants of the defendant (which is a corporation and can and does know and act only by and through its agents and servants) knew nothing about the happening of the alleged accident and the sudden starting of the car, and for that reason could not explain why the car was started, as claimed by plaintiff, the jury, under the instruction, would assume that only one result was permissible, and that was to return a verdict for the plaintiff. Much has been said and written concerning the effect of the doctrine of res ipsa loquitur and when it is applicable. The clearest statement concerning the effect of that doctrine that the writer has seen is found in the somewhat recent case of Sweeney v. Erving, 228 U.S. at page 240, 33 Sup. Ct. at page 418, 57 L. Ed. 815, Ann. Cas. 1914D, 905, where the Supreme Court of the United States, speaking through Mr. Justice Pitney, states what is meant by the doctrine in the following words:

"In our opinion, res ipsa loquitur means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury, not that they forestall the verdict. Res ipsa loquitur, where it applies, does not convert the defendant's general issue into an affirmative defense. When all the evidence is in, the question for the jury is whether the preponderance is with the plaintiff. "Such, we think, is the view generally taken of the matter in well-considered judicial opinions." (Italics ours.)

In the foregoing statement the distinction between the court charge in the case at bar and what a charge in a case where the doctrine is applicable should be is clearly and admirably stated.

In addition to the foregoing, other well-considered statements of the doctrine and its application are found in 4 Words & Phrases, Second Series, 318, where it is said:

"The principle of 'res ipsa loquitur' renders the question of negligence one for the jury, but does not relieve the plaintiff of the burden of proof. It does not raise any presumption in plaintiff's favor, but simply entitles the jury, in view of all the circumstances and conditions as shown by the plaintiff's evidence, to infer negligence, and to say whether, upon all the evidence, the plaintiff has sustained his allegation."

It is there further said:

"The doctrine of 'res ipsa loquitur' does not dispense with the rule that the person alleging

negligence must prove it; but it is simply a mode of proving negligence, and does not change the burden of proof."

Numerous cases in support of the foregoing texts are cited, which we need not refer to here.

[3] In the instruction in question the district court in effect told the jury that the sudden starting of the car "raises," that is compels, an inference of negligence. That is not the law. The law is that, inasmuch as the train was under the exclusive management and control of the defendant's servants, the sudden starting of the car warranted or authorized the jury to infer or assume that the sudden starting was caused through the negligence of those who then managed and controlled the train, and not that such starting necessarily raised such an inference or presumption. In the case at bar, in view that the defendant was unable to explain the sudden starting of the car by reason that it knew nothing concerning the accident, the jury no doubt assumed that a finding of negligence necessarily followed as a matter of The sudden starting complained of merely authorized the jury to infer negligence, but did not require it to so find. The jury, without any evidence or explanation on the part of the defendant, were nevertheless, under the law, authorized to find that there was no negligence. The jury, therefore, should have been instructed that if they found the car was suddenly started, that fact, standing alone, would warrant or authorize an inference of negligence on the part of the defendant, and unless the sudden starting was explained by it the jury would be justified in returning a verdict for the plaintiff upon that issue.

[4] Counsel for defendant, however, also contend that the doctrine of res ipsa loquitur had no application in this case. In this contention counsel are in error. Here the train. which was alleged to have been suddenly started "with a jerk," and which it is claimed caused the injury, was under the exclusive management and control of the defendant. If, therefore, something unusual or extraordinary occurred in the operation and management of the train which resulted in injury to a passenger, the occurrence warranted, but did not compel, an inference that it was due to the negligence of the defendant, unless it was made to appear that the occurrence was due to some other cause than the one assumed or inferred, and for which the defendant was not responsible.

[5] We desire to add that it does not necessarily follow that because similar language is sometimes used, or may be used, in a charge to the jury, that for that reason alone the judgment in a particular case would, under all circumstances, be reversed. It might well be that upon the whole record it would appear that no prejudice resulted notwithstanding the use of such language, and in such event the judgment would not be re-

versed. stances of this case, however, to which we have referred, we are not satisfied that no prejudice resulted from the giving of the instruction complained of, and hence, for the reason stated, the judgment is reversed, and the cause is remanded to the district court of Weber county, with directions to grant a new trial. Appellant to recover costs.

McCARTY, CORFMAN, THURMAN, and GIDEON, JJ., concur.

In re BOVIER'S ESTATE. (No. 8153.) (Supreme Court of Utah. April 9, 1918. Rehearing Denied May 10, 1918.)

1. WILLS 4-471—Construction—Effect of "Proviso."

A proviso in a will, which is a limitation of a preceding general provision, will be held to limit the immediate clause or general statement, unless it clearly appears from the whole sentence preceding such proviso that the proviso was intended to refer to the whole general provision 1 (quoting Words and Phrases, Proviso). WILLS \$=527-CONSTRUCTION-EFFECT OF Provisos.

Where a will bequeathed certain property to various persons, and then provided that if the residue of the estate, after payment of such the residue of the estate, after payment of such bequests, should be more than enough to pay just debts and expenses, the remainder should be added pro rata to the bequests, which should be increased proportionately so as to distribute the entire estate, and in case the residue should be insufficient to pay the bequests each of such bequests was to be decreased proportionately, so as to distribute the estate pro rata according to the amount of the bequests, "provided, however, that the bequest of the lands above described to my nephew shall remain unchanged," and the residue was more than sufficient to pay the bequests, the provisions for an additional pro rata distribution were not limited by the proviso relating to testator's nephew, such proviso limiting only the direcnephew, such proviso limiting only the directions as to decreasing the bequests in case of a deficiency.

Appeal from District Court, Salt Lake County; W. H. Bramel, Judge.

Suit between Harlow Grow and the executor of Rachael Bovier's will to construe the will. From the decree both parties appeal. Reversed on Harlow Grow's appeal, with directions. Affirmed on the executor's appeal.

G. M. Sullivan, of Salt Lake City, for Harlow Grow. Wedgwood, Irvine & Thurman, of Salt Lake City, for executor.

GIDEON, J. This appeal requires the construction of the will of Rachael Bovier, deceased. The testatrix died May 14, 1912, and prior thereto had disposed of her real and personal property by will as follows:

By paragraphs 1 to 10, inclusive, she gave to various relatives and one or two friends certain definite sums of money, and in the fourth paragraph gave to Harlow Bovier Grow, a minor, five shares of stock of the Deseret National Bank of Salt Lake City, Utah, with the proviso that the same should | for determination by this court is, what was

In view of the peculiar circum- not be sold or disposed of until such minor reaches the age of twenty-one years. In paragraph 6 she gave to her nephew Harlow Grow, in addition to \$5,000 in money, two pieces of real estate located in Salt Lake City. Utah, with the provise that the title to such real estate should not pass from her estate until five years after her death, but that in the meantime the said Harlow Grow should have the right to occupy and reside upon said premises with his family. The testatrix, in paragraph 11, then provides as

> "It is my further will and wish that all my "It is my further will and wish that all my just debts and proper expenses of the administration of my estate be first paid out of the residue of my estate, proper expenses of last illness being first paid, and, if the residue of my said estate after the payment of said above-described bequests shall be more than sufficient to pay my just debts and expenses, the remainder above said bequests and expenses shall be added pro rata to the bequests hereinbefore made, and each bequest shall be increased proportionately so as to distribute my entire estate, but under the same terms and conditions as is contained in each separate bequest; and as is contained in each separate bequest; and in case the residue of my estate, after the payment of all just debts and expenses, shall be insufficient to pay the full amount of all of said bequests, each of said bequests shall be scaled down and decreased proportionately, so that the estate shall be distributed pro rata according to the amount of the above bequests, provided, however, that the bequest of the lands above described to my perhew Herley Grow shall remain ed to my nephew Harlow Grow shall remain unchanged."

> Five years after the death of the testatrix the executor of the will made his report, and asked the district court for a decree of distribution. It appears from that report that after the payment of the specific gifts or bequests mentioned in the first 10 paragraphs of the deceased's will, and the payment of the expenses, etc., there was a large excess in money and other personal property. and the executor advised the court that in his judgment the bank stock given to the infant Harlow Bovier Grow and the land given to Harlow Grow were not entitled to participate in the prorating of the residue or surplus mentioned in paragraph 11 of the will.

> The court construed the paragraph to entitle the minor to share in the residue in proportion to the appraised value of the bank stock, but denied the right of Harlow Grow to participate in the residue pro rata according to the appraised value of the land given to him by paragraph 6 of the will. From that part of the judgment denying the right to Harlow Grow to pro rate according to the appraised value of the real estate Harlow Grow appeals to this court, and from that part of the judgment holding that the minor Harlow Bovier Grow was entitled to participate in the residue according to the appraised value of the bank stock the executor appeals.

It will therefore be seen that the question

the intent of the testatrix by the last clause of paragraph 11, "provided, however, that the bequest of the lands above described to my nephew Harlow Grow shall remain unchanged"?

Both parties to the appeal invoke the rule that in the construction of a will it is the duty of the court to determine, if possible, from the will itself the intent of the testator. It is also contended that "in determining the testator's intention the court should place itself as near as possible in his position, and hence, where the language of the will is ambiguous or doubtful, should take into consideration the situation of the testator and the facts and circumstances surrounding him at the time the will was executed."

It appears from the record that the deceased left no children and never had had any: that her husband died in the year 1896; that when the appellant Harlow Grow. nephew of the deceased, was of the age of four years, he became an inmate of the home of the testatrix and her husband, and resided with them until the death of the husband. and thereafter made his home with the testatrix; that his relationship to the deceased was very intimate; that some years before the death of the testatrix the appellant married, and at her request he and his wife became inmates of her home, and resided there in intimate and friendly relationship during the remainder of her life.

It is the contention of the appellant Harlow Grow that the proviso in said paragraph 11 intended to limit or apply only to the latter part of that paragraph, wherein it is provided that, if the residue of the estate was not sufficient to pay all the bequests made in the will, all of said bequests should be cut down pro rata according to the amount of each, while, on the other hand, it is the contention of the executor that the proviso refers not only to the latter part of that paragraph, but also modifies or limits the first part of the paragraph, wherein it provides for the disposition of any residue by prorating it, in the event that on the final closing of her estate it is found that a residue exists.

The first part of that paragraph, standing alone, appears to be definite and not susceptible of any doubt as to the meaning of the testatrix. It is provided that the "remainder above said bequests and expenses shall be added pro rata to the bequests hereinbefore made, and each bequest shall be increased proportionately so as to distribute my entire estate." The testatrix, in all of the first 10 paragraphs of the will, employs the words, "give, devise, and bequeath." therefore evident that no technical or limited meaning can be given to those words or either of them as used in the will, and it would follow that the words "each bequest," etc., mentioned in the above-quoted paraor statement in the will, would include and relate to the bequest of personal property as well as the devise of real property. It is therefore apparent that the first part of that paragraph, or the provisions relating to the increase of the bequests if there is a residue, cannot reasonably be said to be doubtful or ambiguous.

The testatrix then proceeds to provide for the scaling down of the bequests in the event the residue of her estate was not sufficient to pay the full amount of such bequests, and following that the provision in question is found.

The provisions of the will show definitely that it was the desire of the testatrix that her nephew Harlow Grow, by reason of their relationship, should receive the bulk or major part of her estate. It is insisted by appellant that the court would have the right, in determining any uncertain or ambiguous phrases or provisions in the will, to place itself in the position, as near as possible, of the testatrix. But, independent of that, we are of the opinion that the proviso cannot be held to limit the first part of paragraph 11.

[1] It may be considered as a general rule of construction that a proviso which is a limitation of a preceding general provision will be held to affect or limit the immediate clause or general statement, unless it clearly appears from the whole sentence preceding such proviso that it was the intention of the proviso to refer to the whole general provision. A proviso either imposes a condition or is itself a limitation. In this case it is clearly a limitation of the foregoing general provision.

"The nature and office of the proviso being to restrain or qualify some preceding matter, it should be confined to what precedes it, unless it fairly appears to have been intended to apply to some other matter. It should be construed to relate to the immediately preceding parts of the clause to which it is attached, and will be so restricted, in the absence of anything in its terms or the subject it deals with evincing an intention to give it a broader effect." Words & Phrases, vol. 6, p. 5756.

As indicated, the first part of that paragraph, standing alone, is not ambiguous or uncertain. The rule of construction adopted by this court in In re Campbell's Estate, 27 Utah, 361, 75 Pac. 851, is:

"Where the intention of the testator in respect to the particular matter is clearly expressed by the terms of the will, 'any subsequent expression of intention by the testator must, in order to limit' the prior expression of intention, 'be equally clear and intelligible, and indicate an intention to that effect with reasonable certainty.' 1 Underhill on Wills, § 358; 29 Am. & Eng. Ency. Law (1st Ed.) 367–369, and cases therein cited. That is a well-settled rule."

words, "give, devise, and bequeath." It is therefore evident that no technical or limited meaning can be given to those words or either of them as used in the will, and it will not be limited or modified by the provision attached to the latter part of the paraetc., mentioned in the above-quoted paragraph, if not limited by some other provision by the usual rule of construction, the pro-

viso would be limited to the general provisions immediately preceding it.

In Walker v. Alverson, 87 S. C. 55, 68 S. E. 966, 30 L. R. A. (N. S.) 115, the Supreme Court of South Carolina says:

"When a gift is made in one clause of the will in clear and unequivocal terms, the quantity or quality of the estate given should not be cut down or qualified by words of doubtful import found in a subsequent clause. To have that effect, the subsequent words should be at least as clear in expressing that intention as the words in which the interest is given.

To the same effect is Settles v. Shafer (Mo.) 129 S. W. 897.

What has been said disposes of the contention of the executor in the appeal concerning the right of the minor to participate in the residue or surplus of the estate.

It follows that the judgment of the district court must be reversed, with directions to allow the appellant Harlow Grow to participate in the residue according to the appraised value of the real estate given to him. The order of the court from which the executor appeals is affirmed. Costs of this appeal to be paid from the funds of the estate.

FRICK, C. J., and McCARTY and CORF-MAN. JJ., concur.

THURMAN, J., not participating.

## WILLIS v. WILLIS. (No. 3190.) (Supreme Court of Utah. April 16, 1918.)

1. Divorce €==285 — Appeal — Failure to Certify Evidence—Findings—Review.

On appeal from judgment refusing to modify decree for alimony, the court on appeal is unable to determine whether findings are or are not supported by evidence, no evidence having been certified.

2. DIVORCE 286 - COURT FINDINGS - CON-

FORMING TO EVIDENCE—PRESUMPTION.

No evidence having been certified, presumption is that findings conform to evidence.

8. DIVORCE 285-REVIEW-EVIDENCE NOT CERTIFIED.

Affidavit filed in support of motion to amend decree for alimony, being merely evidence, cannot be considered on appeal, where not certified by district court in the form of a bill of excep-

4. DIVORCE \$== 286-RULINGS OF TRIAL COURT

-Presumption.

In the absence of evidence to the contrary the court on appeal from a judgment refusing to modify decree for alimony, and compel de-fendant to pay certain claims, is bound to presume that the reasons given by the trial court for refusal to require defendant to pay amount of plaintiff's claim are well founded.

Appeal from District Court, Weber County; P. C. Evans, Judge.

Action by Mae Willis against John G. Wil-From a judgment refusing to modify a decree for alimony, plaintiff appeals. Af-

A. G. Horn, of Ogden, for appellant. John G. Willis, of Ogden, for respondent.

FRICK, C. J. This is an appeal from a judgment refusing to modify a decree for alimony. The appeal is upon the judgment roll without a bill of exceptions. The controlling facts appearing from the record as filed in this court are substantially as fol-

On March 19, 1912, the plaintiff herein commenced an action against the defendant in the district court of Weber county for a divorce. The defendant made default, and, after a hearing on plaintiff's complaint, the district court aforesaid, on the 20th day of May, 1912, made and filed findings of fact and conclusions of law granting her a divorce from the defendant, and also determined the amount of alimony the defendant was required to pay from time to time to the An interlocutory decree, as provided by our statute, was duly entered on the same day the findings of fact and conclusions of law were filed. Thereafter, and pursuant to the interlocutory decree, and in compliance with our statute, a final decree of divorce was duly entered on the 8th day of November, 1913. On the 7th day of June, 1917, plaintiff filed her motion, of which she served notice on the defendant, and in connection therewith also prayed for an order requiring him to show cause why the decree for alimony should not be amended in certain particulars, and why he should not pay certain claims mentioned in the motion and order to show cause. The motion was supported by plaintiff's affidavit, in which the facts upon which she based her claims were stated. The district court issued an order, which was duly served on defendant, requiring him to show cause on the 18th day of June, 1917, why the decree for alimony should not be granted as prayed for by plaintiff, etc. The defendant appeared in answer to the order to show cause, and the matter was tried before the Hon. P. C. Evans, one of the district judges of Salt Lake county, who, at the request of the judge of the district court of Weber county, and pursuant to our statute, heard the evidence produced by both parties. The district court, on the 22d day of September, 1917, made and filed its findings of fact and conclusions of law, in which the issues presented by plaintiff's motion were found in favor of the defendant, and judgment was entered denying plaintiff's motion, and the decree as originally entered wasaffirmed.

Plaintiff appeals from the judgment, and insists that the district court erred in making its findings of fact and conclusions of law and in entering judgment as before stated.

It is conceded that both parties produced much oral evidence in support of their respective contentions.

[1] In view that no evidence has been certified up, we are unable to determine whether

[2] The presumption is that the findings conformed to the evidence.

[3] The only evidence in the record is the affidavit of plaintiff which was made and filed in support of her motion. That, however, was merely evidence in the case. Like all other evidence produced by her in support of her motion, and in view that it is not certified up by the district court in the form of a bill of exceptions, we cannot consider even that. This court cannot consider affidavits which are presented to the trial court in support of the claims of the parties unless certified up by the trial court. Notwithstanding the fact that no evidence is certified up, counsel for plaintiff, nevertheless, very earnestly insists that we should set aside the findings of fact and conclusions of law made by the district court. Counsel, in his brief upon that subject, makes the following observation: "It appears as if the court below tried to favor the defendant for some reason or other." In appealing to this court counsel further says: "In this case the plaintiff realizes that the defendant is an attorney and may expect or seek special consideration at the hands of this court," etc. (Italics ours.) If the plaintiff intimated to her counsel that she entertained such views, it was his duty, as an officer of this court, to disabuse her mind of her error, and not make such observations to this court as a reason why the findings are erroneous and should be modified. Such statements are always improper, and, in view of the peculiar circumstances of this case, are highly so. Indeed, they might well be characterized by a much harsher term. Moreover, if counsel believed that the district court committed error in its findings, it was counsel's duty to present the evidence to this court, so that we might review it and correct any error the court may have made in that respect. To intimate, as counsel does, that the district court did not act impartially, and that the defendant may expect "special consideration" from this court, transcends the bounds of propriety. To say the least, it is a severe reflection not only upon the trial court, but upon this court as well. In passing this question we express the hope that counsel will not repeat the offense.

Counsel, however, insists that the court erred in not enforcing the provisions of the original decree, and, as he says, in granting defendant "affirmative relief" without pleadings. While it is true that the court refused to comply with the plaintiff's request to require the defendant to pay a certain amount she claimed on a certain plano, yet it is also true that the court may have found good reasons in the evidence for refusing to comply with plaintiff's request. Here again it is pertinent to ask why counsel did not ant purchased an automobile from the Tur-

the findings are or are not supported by the present the evidence produced before the trial court. Counsel is in error, however, in his statement that the court granted affirmative relief. All the court did was to refuse plaintiff's demand for affirmative relief.

> [4] The court set forth its reasons why it refused to require the defendant to pay the amount plaintiff claims on the piano, and, in the absence of any evidence to the contrary, we are bound to presume that the reasons are well founded. It may be that the evidence disclosed that the plaintiff was no longer entitled to what she claims.

The judgment is affirmed.

McCARTY, CORFMAN, THURMAN, and GIDEON, JJ., concur.

BECK v. LEE. (No. 8162.)

(Supreme Court of Utah. April 19, 1918.)

APPEAL AND EBBOB &==248-REVERSAL-REVIEW-BILL OF EXCEPTIONS-NECESSITY

OF EXCEPTIONS—NECESSITY OF EXCEPTIONS—NECESSITY OF EXCEPTIONS BELOW.

Where no exceptions were taken below to the court's rulings, they cannot be reviewed.

REPLEVIN \$\instructure{12}(2)\$—Counterclaims.

Ordinarily, counterclaims, or counter demands, cannot be litigated in replevin.

3. Appeal and Error \$==1061(2)-Harmless ERROR-DISMISSAL

Where defendant in replevin waived his counterclaim and tendered into court the amount claimed by plaintiff, which plaintiff accepted, the court's action in dismissing the case at the time, while perhaps somewhat unusual and irregular, was not prejudicial error; there being nothing further to litigate.

CLERKS OF COURTS 17 — FEES — FILING PAPERS AFTER JUDGMENT — NEW TRIAL

2. CLERKS OF COURTS & 7 FEES - FILING PAPERS AFTER JUDGMENT - NEW TRIAL.

The provision in Comp. Laws 1907, \$ 972, that clerks of the district court may charge 25 cepts for the filing of any papers not otherwise provided for, does not apply to the filing of affidavits supporting a motion for new trial, since the same section provides specifically for a fee of \$2.50 from the moving party.

Appeal from District Court, Box Elder County; J. D. Call, Judge.

Action by John A. Beck, Jr., against J. A. Lee. From a judgment dismissing the action, defendant appeals. Affirmed.

Ricey H. Jones, of Brigham, for appellant. Henry Seeger, of Brigham, and John A. Beck, Jr., of Salt Lake City, for respondent.

FRICK, C. J. This is an action in replevin, or in claim and delivery, as it is called, under our statute. The action was brought to obtain the possession of a certain automobile. The complaint is in the usual form in such actions. The defendant, in his answer to the complaint, denied plaintiff's ownership and right of possession of the automobile. He also set up two affirmative defenses: (1) Tender, and (2) set-off, as hereinafter more fully explained.

It appears that in June, 1916, the defend-

ner-Dresbach Company, hereinafter called company, doing business at Brigham City, Utah. The defendant paid part of the purchase price of the automobile in cash, and for the remainder executed and delivered to said company his promissory note, payable September 15, 1916, by the terms of which the title to said automobile was retained in said company with the right to repossess itself thereof in case defendant failed to pay said note at maturity. On September 14, 1916, the company transferred the note to the plaintiff herein. Plaintiff alleged, and produced evidence in support of his allegation, that after said note became due he demanded payment of said note, and, payment being refused, he demanded posssesion of said automobile, and upon refusal brought this action to recover the same. The defendant in his answer averred "that about September 14th this defendant tendered to the plaintiff and to said Turner-Dresbach Company" the amount due on said note, with accrued interest. The defendant further averred that said company had failed to "repair or make good a poor, faulty, and defective top," which had been furnished with the automobile at the time of its purchase. He averred that said company had agreed to replace said top, and had failed to do so, by reason of which he was damaged in the sum of \$75, which he claimed as a "set-off against said" note. After producing sufficient evidence to make a prima facie case the plaintiff rested. The defendant testified in his own behalf. He stated that he always had been able, ready, and willing to pay the balance due on said note; that on a certain day in September, 1916, after said note was due however, he had tendered to the agent of the plaintiff who had demanded payment of said note the amount due thereon, with accrued interest, and that he was still able and willing to pay said amount. The amount due on said note with interest was produced in open court. When the defendant was testifying as aforesaid and the money had been produced in court the following proceedings took place, as appears from the bill of exceptions, which is certifled to by the lower court, and which purports to contain all the proceedings:

"The Court: What is between you gentlemen? I don't understand the purpose of this suit. One is ready to pay and the other wants to pay."

The bill of exceptions then reads:

"The defendant, by counsel, offers to make the tender in open court and the plaintiff accepts."

After some discussion by counsel:

"The Court (addressing defendant's counsel): What is the matter with you making your tender good?

'Mr. Jones: In this case we want to make the tender on the note part of the case, but not on the replevin. We claim there is a note part, and there is a title retaining part of the contract on the note part.

"The Court: You have placed in court how much? "Clerk: Three hundred and forty-three dol-

lars. "The Court (addressing plaintiff): Do you want it?

"The Plaintiff: We take it.

"The Court: The case is dismissed.
"Mr. Jones: At whose costs?
"The Court: That is a question for you gentlemen to bring up later."

The note was surrendered by plaintiff to the defendant, and the plaintiff took the money tendered, and the case was accordingly dismissed. Afterwards the court settled the questions of costs and taxed them against the defendant. The record does not clearly disclose why this was done, but we assume it was upon the theory that the tender alleged to have been made in September was by the court held to have been insufficient, but further held that it was a good tender in court.

[1] By reference to the bill of exceptions we find that no exceptions were taken by either party to the rulings of the court as we have set them forth above. After the case was dismissed the defendant filed his motion for a new trial, and supported the same with numerous affidavits, all of which are made a part of the bill of exceptions. The court denied the motion, and the defendant appeals, assigning the foregoing rulings of the court as error. In view that no exceptions were taken to the court's rulings, we cannot review them, and hence all we can pass on is whether the judgment should be sustained. Defendant's counsel, however, vigorously argues that his client was deprived of the \$343 by the court's rulings. The contention is, however, clearly untenable.

[2, 3] Ordinarily, counterclaims, or counter demands, cannot be litigated in replevin actions. The action is one to determine the right of property or the right of possession, or both, and therefore "accounts cannot be adjusted or settled in a replevin action." Cobbey on Replevin (2d Ed.) §§ 736, 791, 792; Wells on Replevin (2d Ed.) \$\$ 630, 631, and 632. In certain instances set-offs may be allowed in replevin actions, but even those are only allowed to a limited extent. In this case, although the defendant did tender the money in court, yet he could have insisted upon reducing the claim to the extent of the damages he sustained by reason of the defective top. But assuming defendant could have reduced the claim by that amount, that, nevertheless, would not have been a defense to the action. The plaintiff still would have been entitled to the possession of the automobile, and that right would have continued until the entire claim was paid or discharged. The defendant, however, testified that at the time the alleged tender was made he had telephoned to one of the members of the company, and in view that such member had agreed to furnish a new top he was willing to pay the whole amount of the note. The court was therefore justified in assuming that the defendant in this case had waived his claim for the top, and in that event there was nothing further to litigate in the action. Indeed, that is precisely what the court held. While the court's action in dismissing the case at the time may have been somewhat unusual and irregular, yet, in view of the whole proceedings, as disclosed by the record before us, we cannot say that the court committed prejudicial error in dismissing the action, or in overruling the motion for a new trial. There is no authority in the statute for such a charge. The language of the statute is explicit. The statute clearly provides that in case a party desires to move for a new trial after judgment all he is required to pay is \$2.50, and in case papers are filed which are not specially provided for in the section the clerk may require a filing fee of 25 cents. The 25 cents may, however, only be demanded where it is not otherwise provided for. In case a motion for a new trial.

[4] The defendant, however, also complains because the court permitted the clerk of the district' court to demand an item of \$2.50 from defendant as fees for filing defendant's affidavits in support of the motion for a new trial. That charge, defendant's counsel contends, is illegal. In our judgment the defendant had paid all the fees that could be required of him by our statute by paying the clerk the \$2.50 when he filed his motion for a new trial. Comp. Laws 1907, § 972, specifies the fees that the clerks of the district courts may demand for their services from litigants. That section, so far as material here, reads:

"For all services after judgment, pending appeal to the Supreme Court (not including the making of copies), \$2.50, to be paid by the party moving for a new trial or to set aside .judgment."

That section also provides:

"For filing any papers in any cause after judgment, not otherwise provided for, 25c."

While the record is not specific, yet, as we read it, the clerk demanded 25 cents for filing each affidavit which was tendered in GIDEON, JJ., concur.

is no authority in the statute for such a charge. The language of the statute is explicit. The statute clearly provides that in case a party desires to move for a new trial after judgment all he is required to pay is \$2.50, and in case papers are filed which are not specially provided for in the section the clerk may require a filing fee of 25 cents. The 25 cents may, however, only be demanded where it is not otherwise provided for. In case a motion for a new trial is filed, however, the fees are specially provided for by requiring the payment of \$2.50 by the party moving for the new trial. The 25-cent fee for filing each affidavit can therefore not be exacted. The charge of \$2.50 made by the clerk of the district court is therefore clearly an overcharge, and hence cannot be sustained. That, however, had nothing to do with plaintiff's case. It is a matter which arose between the clerk and the defendant, and not between the plaintiff and the defendant. While the district court should have construed the statute and declared the law as we have herein declared it, yet the defendant has his remedy against the clerk to recover from him the amount of the overcharge, and he has no remedy against the plaintiff. In view that the clerk holds the money without legal right, he, on demand, no doubt, will refund it to the defendant. If he refuses to do so, the defendant has his remedy against him.

The judgment is affirmed, at defendant's costs.

McCARTY, CORFMAN, THURMAN, and GIDEON. JJ., concur.

## KNIGHT v. SOUTHERN PAC. CO. (No. 3172.)

(Supreme Court of Utah. April 12, 1918.)

1. RAILBOADS & 413(1) — DUTY TO FENCE — CATTLE GUARDS AND WING FENCES—STAT-UTES.

Under Comp. Laws 1907, § 458x, as amended by Laws 1913, c. 74, requiring a railroad to fence its right of way on both sides of the track, and to provide gates for private crossings, so constructed that they may be easily operated, a railroad is not under duty either to put in cattle guards or to construct wing fences at private farm crossings.

2. RAILROADS 413(1)—Fencing—Repairs

IMPLIED AGREEMENT.

Where a railroad voluntarily constructed wing fences at a private crossing on a farm intersected by its right of way, soing so purely for the owner's convenience, and not pursuant to a statutory duty, it did not also impliedly agree to maintain such fences and keep them in good repair for all time.

3. DEEDS \$\sim 94 - COVENANTS - ANTECEDENT

CONTRACT.

Where a written antecedent option agreement to convey real property is merged into a deed, the grantor ordinarily must rely on the covenants contained in the deed, and cannot predicate a right of action upon the antecedent agreement.1

4. COVENANTS A-68—BUNNING WITH LAND.

An agreement or covenant on the part of a railroad to maintain and keep in repair wing fences at a private crossing on a farm is limited to the landowner, because it does not run with the land.

5. COVENANTS \$= 53-RUNNING WITH LAND. A parol agreement in no event runs with the

6. Railroads ← 429 — Killing Stock — Fencing—Horses of Others.

Where a railroad made no covenant or agreement to maintain and keep in repair wing fences at a private crossing on a farm of which the owners of horses pastured on such farm could avail themselves, the law imposing no such duty on the railroad, no recovery against it could be had by the owner of the farm for the horses of others killed at the crossing with his own; the owners of such horses having assigned their alleged causes of action to him.

7. Negligence &=136(26) — Contributory Negligence—Questions for Jury.

The question of contributory negligence of plaintiff, like that of defendant's original negligence, ordinarily is a question of fact for the jury, and can be disposed of as a question of law only in rare instances, as when the evidence is undisputed, and not conflicting. is undisputed, and not conflicting.

€=3422 - KILLING STOCK -RAILROADS FENCING-CONTRIBUTORY NEGLIGENCE.

The mere fact that a railroad company fails The mere fact that a railroad company fails to comply with its statutory duty to fence its right of way where its track passes through the land of others, or, in case it has complied with such duty, fails to maintain its fences or keep them in repair, does not render it contributory negligence on the part of the owner of the land to turn his live stock into his fields adjacent to the railroad merely because he knows that it has failed in its duty in constructing or in keeping the fences in repair, a doctrine which applies to gates at private crossings, where the statute requires the railroad to construct them for the use of the owners.

<sup>1</sup>Savings & Trust Co. v. Stoutt, 36 Utah, 210, 102 Pac. 865.

9. RAILBOADS \$\infty \text{A22}\text{-Killing Stook-Con-tributory Negligence.}

Where the owner of a farm, and the owners of horses pastured on it, were familiar with the defective condition of a wing fence at a private railroad crossing for several months before their horses were killed on the right of way, and were also informed by the railroad's section foreman that it was not his business to repair the fence, such owner of the farm and owners of horses were guilty of negligence contributing to the death of the horses on the right of way. ). Railroads &== 425 — Killing Stock -Proximate Cause.

Where a railroad's wing fence at a private where a railroad's wing sence at a private crossing was in defective condition, but, if the owner of the land had kept the gates in the fence closed, all of his horses would have been safe, and could not have been killed, and, if some human agency opened the gate, and left it open, it was the act of such third person or agency that made it possible for the horses to get from the pasture onto the railroad's right of way, the negligence of the railroad in failing to keep the wing fence in repair was not the proximate cause of the death of the horses.<sup>2</sup>

Appeal from District Court, Weber County; A. E. Pratt, Judge.

Action by William Knight against the Southern Pacific Company. From a judgment for plaintiff, defendant appeals. Reversed, and cause remanded, with directions to grant new trial.

Geo. H. Smith, J. V. Lyle, and B. S. Crow. all of Salt Lake City, and C. R. Hollingsworth, of Ogden, for appellant. Skeen & Skeen, of Salt Lake City, for respondent.

FRICK, C. J. The plaintiff brought this action against the defendant to recover damages for the alleged negligent killing of certain horses. Five causes of action are set forth in the complaint. The first one was for horses killed that were owned by the plaintiff, and the other four causes of action were assigned to him by two of his neighbors and his two sons for the purpose of prosecuting the action. The horses belonging to the two sons and to the neighbors were killed at the same time that plaintiff's horses were killed.

The complaint is too long to be set forth even in substance. It must suffice to say that the complaint is based upon the theory that the defendant was guilty of negligence in not keeping in good repair a certain wing fence at plaintiff's private farm crossing. It is alleged in the complaint that the defendant had agreed to make and to maintain what in the record is called wing fences at a private subway crossing on plaintiff's farm. The case was tried and submitted to the jury on that theory. No contention was made by plaintiff that the defendant could have avoided the killing of the horses in the operation of its train after they got onto the right of way and track of the defendant, but the case was submitted to the jury upon the theory that defendant's negligence consisted in

<sup>&</sup>lt;sup>2</sup>Edgar v. Railroad, 32 Utah, 330, 90 Pac. 745, 11 L. R. A. (N. S.) 738, 125 Am. St. Rep. 867.



not maintaining the wing fences as herein-

The defendant denied the alleged agreement to maintain fences and its negligence as alleged, and pleaded that plaintiff's own negligence, as hereinafter explained, was the sole cause of the killing of the horses.

There is little, if any, conflict in the evidence, which tended to establish the following facts:

In 1902 the plaintiff entered into an option agreement in writing with the Central Pacific Railroad Company, the predecessor in interest of the defendant, whereby he agreed to sell a strip of ground 100 feet wide through his farm for a right of way for railroad pur-The option agreement was subsequently merged into a deed. Neither the option nor the deed was produced in evidence by either party, and the evidence is not as clear as it might be respecting the terms of the option agreement. After the option agreement had been entered into the defendant constructed a railroad track upon the right of way aforesaid, and ever since the completion of the railroad has operated the same. The evidence also tended to show that in said option agreement it was provided that the Central Pacific Railroad Company should construct a farm crossing on plaintiff's land with gates in the right of way fences and with cattle guards on the track. Such a crossing was thereafter constructed. About the year 1905 the defendant company removed the cattle guards or pits, as they are called in the evidence, and plaintiff then went to Ogden, where defendant maintained an office, for the purpose, as he says, of having the farm crossing removed from the place where it was originally placed to another point on his farm, at which point the conditions were such that a subway crossing, that is, one passing through under the railroad track, could be put in. With respect to what was said and done in that regard, the plaintiff, as appears from the bill of exceptions, testified that he went to Ogden and inquired for the defendant's claim agent. He said:

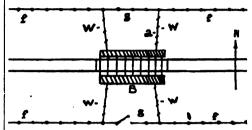
"I was directed to the place where his office was and I went there. He wasn't there. They said the claim agent was in California. There was a man in there who had charge of the office, I don't know who he was. Q. What did you say to him? A. Well, I stated that they had filled up—took out the cattle guards, and the stock was getting—had been damaged some; one or two killed. And they said they was taking them out all along the cattle guards. one or two killed. And they said they was taking them out all along the road, and they wouldn't put them back again. So I proposed that if they would get chains and locks I would lock the gates that went over the tracks, providing they would not in gates that went over the tracks, providing they would put in gates under this subway and fence from the main line to the abutments there so that I would have a road from one pasture to the other that stock couldn't get on the track."

In answer to the question of what was done respecting the crossing, plaintiff further said:

"I found it fixed as I requested them to do

the chains were lying there, they had thrown them off of the train, I suppose; anyway, I got them and put them on the gates that went over, and the fences had been cut opposite the runway under there and gates put in and fences from the abutments to the main fence so that I had a clear way under."

The following rough sketch or plat will make clear to the reader what the witness meant in his statements:



The two outside lines on the plat represent the right of way fences. The lines W W W represent the wing fences leading from the right of way fences to the bridge marked B on the plat. The parallel lines in the center of the plat represent the railroad track, and the lines g g represent the gates that were put in the right of way fences on each side of the track.

Plaintiff's farm, which was principally used for pasture, lies on both sides of the track. There was a washout, or what is designated an old arm of the Weber river, which was dry most of the year, over which the bridge, B, was constructed, and which washout constituted the subway spoken of by the plaintiff in his testimony. The plaintiff desired the subway so that in case he opened the gates a a his horses could pass under the bridge, B, from one side of his farm to the

In answer to his counsel plaintiff further testified:

testified:

"Q. I want you to state fully what the substance of your conversation was with the man in that office. A. Well, now, that has been so long ago that I don't remember just what it was, but then they came down there and fixed this gate; it complied with my request from them, and I just let it go; I never paid any more attention. Q. Now, do you remember what you said and what you asked them to do there in the office, upon condition of the closing of the crossing lower down? A. Well, I asked them to make me a runway under there that I could take my stock through and I would lock the other gates up. And they did so; that is, it was done when I went down. Q. How was it done with respect to the manner in which you requested it to be done? A. Well, it was done just as I wanted it done with the fences and the gates."

On cross-examination, with respect to what

On cross-examination, with respect to what was said at the office at Ogden when he went to see the claim agent about changing the farm crossing, the plaintiff further testified:

in answer to the question of what was he respecting the crossing, plaintiff fursaid:

I found it fixed as I requested them to do

Q. Just tell us how it was fixed. A. Well,

do it or not; he just took an item of it, and

I suppose he reported it, for when I went down it was done. Q. Oh, that is the reason that you said before that you didn't make any agreement. A. Why, no. I say now I didn't make any; that is, they didn't agree with me to do it. I just told them what I would accept for the other (crossing) for taking the pits out of there. \* \* Yes; I didn't find the man that was authorized to make any agreement with me. Q. And this man that you talked to was not authorized to make any agreement with you?

A. I don't suppose he was. He said he would report. Q. And you didn't talk to anybody else about it, did you? A. No."

The plaintiff further said that about two weeks after he had spoken to the man in the office at Ogden he went to the place where the original crossing had been put in, and found chains lying on the ground with which he fastened the gates that were originally put in the right of way fences.

It was also made to appear that the old or original crossing was not entirely abandoned, but was left so that it could be used in case of high water or in case of other necessity.

It was further shown that plaintiff's two sons and two of plaintiff's neighbors had some horses in plaintiff's pasture which were pastured by him for a stipulated price per month: that some time early in the month of May, 1916, by reason of a freshet or high water which was then prevailing, the support or soil which supported the posts upon which the wires were strung for the wing fences at the point marked a on the plat was washed away, and the wing fence, at the point aforesaid, was, by the floating débris in the water, caused to fall over and lie flat on the ground, which left an opening from the subway onto defendant's right of way; that on August 1, 1916, in the nighttime, some time after midnight, plaintiff's horses, together with the other horses sued for in this action in the four assigned causes of action, and which belonged to plaintiff's two sons and two of his neighbors, passed out of the pasture through the south gate, which, by some person unknown, or by some unknown agency, was opened, as indicated on the plat, and the horses passed through said gate and onto the subway, and from thence over the wing fence that was lying flat on the ground onto defendant's right of way and on the track, and some of them were fatally injured, while others were killed outright, by a passing fast freight train loaded with fruit; that the horses were found in the condition just stated next morning by plaintiff's sons, at which time they also found the gate standing ajar as before stated. It was further made to appear that plaintiff and his sons, and perhaps the owners of the other horses, knew just when the high water washed away the soil and caused the fence to fall down; that some time in the month of July, before the killing of the horses, one of the sons spoke to the section foreman of defendant and called his attention to the wing fence at the point | The court refused to so instruct the jury,

marked a on the plat; that the foreman told him that it was not the foreman's duty to repair or erect a fence, but that it was the carpenter's duty to build fences; that neither the plaintiff nor any one else thereafter said anything about the fence to any defendant's employés. Plaintiff also proved by a witness that the defendant. after the year 1905, when the wing fences were put in, made no repairs on them, and that all that was done with respect thereto was to "whitewash" them, the same as all other wing fences along defendant's right of way; that the wing fences were constructed of barbed wire with a board nailed to the posts along the top; that, while defendant put in the wing fences at private crossings along its right of way, it did not maintain all of them in repair. It also appeared that plaintiff lived several miles from the crossing in question, and that one of the sons lived only a short distance from the subway, and he testified that he saw the gates a day or two before the accident, and that they were then closed and in good condition. Both the plaintiff and his sons also admitted that they knew that, if the horses should pass through the gate leading into the subway, in view that the wing fence was down as aforesaid, the horses would pass onto the railroad right of way, and thus might get injured; that the gates were kept closed to prevent such an occurrence; that when the wing fences were in good condition the gates were at times left open to permit the horses to pass from one side to the other of the track; that both gates were in good repair at the time of the accident; and that the right of way fences and the other three wing fences were all in good condition and repair at that time. The plaintiff also proved that before the bringing of the action the four causes of action were assigned to him by his two sons and the two neighbors afore-

There was some other additional evidence upon the matters hereinbefore referred to. but it is not material to a determination of

After proving the value of the horses, plaintiff rested his case, and defendant's counsel interposed a motion for a nonsuit based upon 21 separate grounds. We shall not set forth the grounds of the motion, but shall hereinafter state those that are deemed material, but without specially referring to the grounds of the motion.

The motion was denied, and defendant produced some evidence, which, however, is not material to this controversy.

After the production of the evidence, defendant's counsel requested the court to instruct the jury to return a verdict for the defendant upon practically the same grounds that were urged in the motion for nonsuit.

but submitted the case to them upon the be so constructed that they may be easily evidence.

operated." The statute therefore imposes no

Exceptions were saved to all the rulings of the court.

The jury returned a verdict in favor of the plaintiff on all five causes of action. Judgment was duly entered on the verdict, from which defendant prosecutes this appeal.

While many errors are set forth in the original assignment of errors, yet in their brief and oral argument counsel rely on five propositions, and such as are deemed material we shall now proceed to consider.

[1] In view of the circumstances that appear in the record, the case in some of its aspects is quite peculiar, if not entirely unique. The first proposition argued by defendant's counsel is that this action must fail for the reason that it is predicated upon an alleged contract to construct and maintain wing fences; that no such contract was proved, and hence no right of action was While it may be true, as counsel contend, that plaintiff proved no express contract or agreement on the part of the defendant to construct the wing fences in question, yet it is shown beyond dispute that plaintiff made a request for wing fences of some one in defendant's office at Ogden, and that within about two weeks thereafter. and presumptively, in pursuance of the request, gates were put in and wing fences were constructed at the place designated by the plaintiff, and chains were left upon the ground at the old gates so that those might be permanently closed. No other inference is permissible than that the person in the office, whoever he was, reported plaintiff's request, and that the defendant through its employés acted upon the request and put in the gates and wing fences. It is therefore of no consequence that the plaintiff may not have seen any one in authority, or that the person with whom he left the request had no power or authority to enter into an agreement on behalf of the defendant so far as the construction of the gates and the wing fences is concerned. Defendant therefore voluntarily put in the gates in the right of way fences, and likewise voluntarily put the wing fences as requested by the plaintiff. Counsel for plaintiff, however, attempted to prove at the trial that defendant had agreed to maintain and keep in repair the wing fences. In our judgment, however, there is no evidence in the record justifying any such finding. The new gates were put in the right of way fences, and the wing fences were also constructed for the benefit and convenience of plaintiff. Under our statute (Comp. Laws 1907, \$ 456x, as amended by chapter 74, Laws Utah, 1913, p. 117), the defendant was required to fence its right of way on both sides of the track and to "provide gates for private crossings for the convenience of the owners of the land through

operated." The statute therefore imposes no duty upon the defendant either to put in cattle guards or to construct wing fences at private farm crossings. So far as we are aware, all the decisions are to the effect that, where the statute does not impose such a duty, it does not exist. Fitterling v. Mo. Pac. Ry. Co., 79 Mo. 504. That case was approved and followed in Dent v. St. L., I. M. & S. Ry. Co., 83 Mo. 496. Pennsylvania Co. v. Spaulding, 112 Ind. 47, 13 N. E. 268. The duty that was imposed upon the defendant by the statute was therefore limited to the construction and maintenance of gates at plaintiff's private crossing. True, the defendant had a perfect right to construct, for the convenience of the plaintiff, cattle guards. It could also put in wing fences at his farm crossing if it felt so disposed. It in fact did put in wing fences at the new subway crossing. Plaintiff's counsel earnestly contend, however, that because the defendant did put in the wing fences, for that reason it was required to maintain them in good repair for all time. If the law had imposed the duty to put in wing fences, no doubt counsel's contention would have much force. Moreover, defendant could have entered into an agreement with the plaintiff whereby, if based upon a sufficient consideration, the defendant could have bound itself to maintain the wing fences and to keep them in good repair notwithstanding the fact that they were voluntarily constructed for plaintiff's benefit and convenience. As already pointed out, it is apparent from plaintiff's own testimony that no express agreement was entered into to that effect. His counsel, however, insist that such an agreement is implied from the fact that the wing fences were in fact put in. With that contention we cannot agree.

[2] There is absolutely nothing in the record to show what the man with whom plaintiff left the request to construct the gates and the wing fences told the employe or agent of the defendant who subsequently ordered the gates and wing fences put in. No doubt, we may assume that the man in the office informed some one of defendant's employés or agents that plaintiff wanted his private crossing changed to the new place, and that he wanted gates and wing fences put in at the new place. It cannot be assumed or implied, however, that the man plaintiff saw in the office told defendant's employé or agent anything beyond that. Neither does it follow that because the defendant voluntarily constructed the wing fences for plaintiff's convenience it thereby also impliedly agreed to maintain them and to keep them in good repair for all time. This precise question came before the Supreme Court of Indiana in the case of Evanswhich the railroad passes; such gates shall ville, etc., Ry. Co. v. Mosier, 114 Ind. 447,

at page 450, 17 N. E. 109, at page 111, where, in passing upon the question, it is said:

"It is contended that, because the railroad company erected the gates and constructed the crossings some 15 years ago, it impliedly came under a contract to maintain the gates in repair and closed, as if they had not been erected for the appellee's convenience. We do not assent to this view. The evidence shows nothing sent to this view. The evidence shows nothing more than that the crossings and gates were constructed by the railroad company, and that they were used exclusively by the owners of the land. It cannot be implied that the railroad company came under an obligation to keep the gates closed."

Where the duty to construct wing fences is not imposed by law, the duty to maintain and keep them in repair for all time can exist only if it is assumed by contract, and a contract to maintain and keep in repair for all time cannot be implied from the mere fact that the defendant, at plaintiff's request, has voluntarily accommodated him by putting in wing fences at his private farm crossing. only actual and obvious inference from a transaction such as is shown by the evidence is that, when the defendant acceded to plaintiff's request to change his private farm crossing from the place where it originally was placed to a new place and to put in wing fences at the new place, defendant had discharged its full duty in so far as the wing fences are concerned. With respect to the wing fences the transaction does not differ from any other where one person has through some agency transmitted a request to another and such other person has fully complied with such request by performing the very thing requested. When that is done, however, all men, we think, will agree that no further duty would be imposed on the part of the person complying with the request unless the law imposed a further duty.

Before passing from this subject, we desire to add that the authorities are to the effect that, where the duty to maintain gates or fences is not imposed by law nor assumed by contract, the failure to maintain or keep in repair gates, cattle guards, or fences voluntarily constructed at private crossings for the convenience of landowners does not constitute actionable negligence. Chicago, R. I. & P. Ry. v. Woodworth, 1 Ind. Terr. 20. 35 S. W. 238; Crary v. Chicago, M. & St. P. Ry. Co., 18 S. D. 237, 100 N. W. 18; Martin v. Chicago, B. & Q. Ry. Co., 15 Wyo. 498, 89 Pac. 1025; Davis Bros. & Burke v. Le Flore, 26 Okl. 729, 110 Pac. 782; Beasley v. New Orleans, etc., Ry. Co., 91 Miss. 268, 45 South. 864; Georgia S. & F. Ry. Co. v. Wisenbaker, 113 Ga. 604, 38 S. E. 956. In Crary v. Chicago, M. & St. P. Ry. Co., supra, it is held:

"If the railroad company was not required by law to fence its right of way, it is not bound to construct or maintain any such fence, and the fact that it did construct a fence does not estop it from showing that the law did not require the same and that the plaintiff \* \* \* equire the same, and that the plaintiff had no right to assume that the company would maintain the fence in good repair.

In Georgia, etc., Co. v. Wisenbaker, supra, it is held:

"There is no law in this state requiring a railroad company to fence its right of way. It follows that there can be no liability for failing follows that there can be no liability for failing to keep in proper repair a fence which it has erected at particular points on its right of way. Hence, when on the trial of an action instituted to recover damages for killing cattle it is admitted by the plaintiff 'that the agents of the railroad company in charge of the train exercised all reasonable diligence to prevent the killing,' no recovery can be had.

"Failure to keep a fence in such condition as will prevent cattle from going upon its right of way does not subject a railroad company to the payment of damages for killing cattle thereon by the operation of its trains, unless such killing was negligently done."

less such killing was negligently done."

Upon principle neither of the foregoing cases is distinguishable from the case at bar in so far as the wing fences are concerned. So far as the gates are concerned, however, as we have seen, the law does impose a continuing duty, but such is not the case respecting the wing fences.

Both upon reason and authority we are of the opinion that defendant's contention that no duty was imposed upon the defendant either by law or contract to maintain and keep in repair the wing fences should pre-

The next proposition, namely, that in no event is defendant liable upon any one of the four causes of action that were assigned to the plaintiff by his two sons and by the two neighbors, is so clearly related to the proposition we have just discussed that we prefer to consider that at this point.

[3-6] As we understand plaintiff's counsel, they contend that the defendant is liable upon the theory that the horses included in the four assigned causes of action were all rightfully in plaintiff's pasture at the time of the accident, and that the defendant is liable for the reason that in constructing the wing fences it, in legal effect, covenanted to maintain and to keep them in good repair for all time, and that such a covenant is in the nature of a covenant "running with the land." By referring to the statement of facts it will be seen that no written agreement or deed containing any covenant was produced. While it is true that plaintiff undertook to prove the contents of the written option agreement to purchase the right of way by the Central Pacific Railroad Company, yet, in view that it was shown that the option agreement was subsequently merged into a deed in which the right of way was conveyed by plaintiff, the district court at the trial correctly held that plaintiff could rely upon the option agreement only for the purpose of showing a consideration for the putting in of the new crossing and the wing fences. view that the defendant voluntarily did that at the request of the plaintiff, we cannot see how consideration is material. court's ruling, however, conforms to the doctrine that, where a written antecedent contract to convey real property is merged into a deed, the grantor ordinarily must rely on the covenants contained in the deed and cannot predicate a right of action upon the antecedent contract. Savings & Trust Co. v. Stoutt, 36 Utah, 210, 102 Pac. 865. Plaintiff must therefore fall back upon the alleged oral agreement to construct and maintain the wing fences. We have already shown that there was no express agreement to that effect, and that, although the defendant did voluntarily construct the wing fences, no agreement to maintain and keep them in repair can be implied from the latter fact. We have also shown that the law does not impose the duty on the defendant to maintain the wing fences and to keep them in repair. If it be assumed, however, that the granting of the request of the plaintiff to construct the wing fences by the defendant constituted an oral covenant or agreement to maintain them and to keep them in repair, yet such an agreement could not redound to the benefit of the owners of the horses included in the four assigned causes of action, for the reason that such an oral agreement or covenant is limited to the landowner for the reason that it does not run with the land. In this case, however, the owners included within the four assigned causes of action in no event had any interest in plaintiff's land. They merely pastured their horses on his land and paid him therefor the amount stipulated for pasturage. That a parol agreement in no event runs with the land is the effect of the authorities. Kentucky, etc., Ry. Co. v. Kenney, 82 Ky. 154; Pitzner v. Shinnick, 41 Wis. 676; Osborne v. Kimball, 41 Kan. 187, 21 Pac. 163. In the case first above cited it is said:

"It is very clear that a parol agreement to maintain fences does not run with the land, but affects only the parties to the agreement."

In the case of Pitzner v. Shinnick, supra, while the court withholds its decision upon the question of whether a parol agreement to maintain fences is good as between the parties, yet it does hold that such an agreement "will not bind grantees or lessees who have not recognized or acted upon it." Indeed, we know of no case which holds that a parol agreement to maintain fences runs with the land. True, counsel for plaintiff cite and rely on Toledo, etc., Ry. Co. v. Burgan, 9 Ind. App. 604, 37 N. E. 31, Nelson v. Wilson, 157 Iowa, 80, 137 N. W. 1048, Miller v. Chicago, etc., Ry. Co., 66 Iowa, 546, 24 N. W. 36, Siglin v. Coos Bay Co., 35 Or. 79, 56 Pac. 1011, 76 Am. St. Rep. 463, and Congdon v. Central Vt. Rv. Co.. 56 Vt. 390, 48 Am. Rep. 793, as holding that parol agreements to construct and maintain fences by railway companies, or by adjoining landowners, are binding. A mere cursory reading of the foregoing cases will disclose, however, that the decisions are based upon the fact that the statute imposed the duty to construct and maintain the particular fence in question in those cases, although the agreements between the parties were referred to. For example, from the case cited from Indi- and does not admit of conflicting inferences

the one cited from Iowa, Nelson v. Wilson, it is quite clear that the duty to construct and maintain the fences there in question was imposed by statute, and as to the agreements set forth in the complaints in those cases, as the Iowa court (quoting from the case of Ivins v. Ackerson, 38 N. J. Law, 220) says: "It [the contract] does not create any new duty, nor does it impose any new burden." The statements in the Indiana case just referred to are to the same effect. Such is likewise the effect of the other cases cited by plaintiff's counsel, although not so clearly expressed. It is quite clear, even from plaintiff's cases, that the duty to construct and maintain fences, unless imposed either by statute or by written agreement, does not run with the land, and is not enforceable by nor for the benefit of strangers to the contract. It is therefore quite clear from the cases last cited that they do not sustain a recovery under the undisputed facts of the case at bar. In view, therefore, that the defendant entered into no covenant or agreement to maintain and keep in repair the wing fences of which the owners of the horses included in the four assigned causes of action could avail themselves, and for the reason that the law imposed no such duty upon it, no recovery can be had for the horses included in those causes of action. Plaintiff's rights as to those horses are precisely the same as are the rights of the owners thereof, and in view that they could not recover in independent actions plaintiff cannot recover.

[7, 8] Counsel for defendant, however, insist that, although both of the foregoing propositions were decided in favor of the plaintiff, yet he cannot recover in this action for the reason that he was guilty of contributory negligence as a matter of law. There is no conflict in the evidence, and this question must be determined upon the evidence produced by plaintiff. While it is true, and this court has so held in cases too numerous to cite here, that the question of contributory negligence on the part of the plaintiff, like that of original negligence on the part of the defendant, is ordinarily a question of fact for the jury, and can only in rare instances be disposed of as a question of law, yet it is also true that this court, in common with other courts, has also very frequently held that, where the evidence is undisputed and is not conflicting, and is such that reasonable men may not deduce conflicting inferences therefrom or arrive at different conclusions, then the question of necessity is purely one of law to be determined by the court. Under the circumstances last above stated courts may not legitimately refuse to discharge the duty the law imposes and permit the jury to find negligence where there is no evidence either direct or inferential authorizing such a finding or to refuse to find negligence where the evidence of negligence is clear, undisputed, ana, Toledo, etc., Ry. Co. v. Burgan, and from or deductions. It, no doubt, is the law, and



we so hold, that the mere fact that a railroad | manded the case with directions to apply the company fails to comply with its statutory duty to fence its right of way where its track passes through the land of others, or in case it has complied with that duty, but fails to maintain its fences or to keep them in repair. it does not constitute contributory negligence on the part of the owner to turn his live stock into his fields adjacent to the railroad merely because he knows that the railroad company has failed in its duty either in constructing or in keeping the right of way fence in repair. The same doctrine applies to gates at private crossings where the statute requires the railroad company to construct them for the use of such owner. If such were not the law, railroad companies could disregard their statutory duty with impunity, and the landowner would be guilty of contributory negligence by merely using his land. This would prevent the landowner from making use of his own property. Such a law would do violence to every principle of justice and right. The cases to that effect are numerous, some of which are cited by plaintiff's counsel. We shall not pause here to refer to them. stated in the beginning of this opinion, however, this case is exceptional, and if it were permitted to be governed by the general rule just stated, justice and right would also be defeated. The evidence is clear and without dispute that the plaintiff, as well as all of the owners of the horses included in the four assigned causes of action, was thoroughly familiar with the condition of the wing fence for several months before the occurrence of the accident. Indeed, the plaintiff and his two sons admitted that they knew that, if the horses that were kept in the pasture should get through the gates leading into the subway, they would pass over the prostrate wing fence, and thus go onto the right of way and railroad track of the defendant. They were also informed by defendant's section foreman. as we have seen, that it was not his business to repair the wing fence. Moreover, no one had ever seen the defendant's employés repair the fence, and hence there was nothing from which plaintiff or his sons, or his two neighbors, who were familiar with the facts respecting the wing fence, could infer that the defendant would repair the wing fence. In the face of all these facts plaintiff and his sons were willing to take the chance of injury to their horses rather than go to what seems to be rather small trouble or expense in re-erecting the one wing of the fence that was washed down by the high water as hereinbefore stated. It has also frequently been held that the doctrine of contributory negligence may be applied where, under peculiar circumstances as in this case, live stock is injured or killed by passing trains, and where it is not injured or killed through the negligence of the trainmen. In reversing the judgment in a case cited by plaintiff's counsel, namely, Nelson v. Wilson, 157 Iowa, 80, 137 N. W. 1048, the Supreme Court of Iowa re-

general principles of contributory negligence. To the same effect are the cases of Jones v. Sheboygan, etc., Ry. Co., 42 Wis. 306; Curry v. Chicago, etc., Ry. Co., 43 Wis. 665; Terry v. New York, etc., Ry. Co., 22 Barb. (N. Y.) 574; Sandusky, etc., Ry. Co. v. Sloan, 27 Ohio St. 341. The case of Terry v. New York, etc., Ry. Co., supra, is, in its facts, very much like the case at bar. In that case a small gap or opening was burned in a right of way fence. The owner of the animal, notwithstanding that he was fully cognizant of the burned gap or opening in the fence, which easily could have been closed, and thus prevented injury to his horse, nevertheless took the chance. and when his horse passed through the burned gap onto the railroad track and was killed sued to recover its value. In that case, as in this, the law imposed no duty on the company to construct the fence; yet it had voluntarily done so. Fire, however, destroyed a small portion of the fence and caused a gap or opening through which plaintiff's horse passed onto the railroad track as before stated. In view that that case so clearly resembles the one at bar, we take the liberty of quoting somewhat copiously from the court's opinion. The court said:

"Although the defendants might have been liable to pay the owner the damages for burning the fence, they were under no legal obligation to repair it; nor had the owner a right to neglect or abandon the rest of his property. and charge the defendants for all the damages he might sustain by reason of such neglect or abandonment, until the fence was repaired, any more than the owner of a store filled with valuable goods, which happened to have a door or window destroyed by the carelessness of his neighbor, might neglect and abandon his goods and suffer them to remain in the store in the usual manner, and charge his neighbor for all the goods which might have been taken or lost before he repaired the store. Still the affirmative of the proposition is understood to be, in substance, identical with that insisted upon by the appellant's counsel, on the argument of this

appeal.

"But a full and fatal answer to the plain"But a full and fatal answer to the plain"But a full and fatal answer to the plaintiff's action, in whatever aspect it may be pre-sented, is the carelessness on his part, as proved by himself. It appeared by the testimony of his own witnesses that he suffered his mare to run in a small pasture adjoining the railroad, and between which and the railroad there had been no fence since the latter part of the sum-mer preceding, until the day she was killed on the railroad, which was the 8th of December. This is the case as made out by the plaintiff, without showing any legal reason or excuse for permitting his mare to run at large, as she did, or to run on the defendants' railroad, and without pretending that the defendants, their agents or servants, intentionally, willfully, or know-ingly ran their engine against the mare. It is believed that no reported case can be found giving a plaintiff any encouragement for maintaining an action under such circumstances."

It must also be remembered that under our statute (Comp. Laws 1907, § 456x1), the duty to keep the gates in the right of way fence closed was cast on the plaintiff, and not on the defendant; the latter being the case in many jurisdictions.

In Reid v. Railroad, 39 Utah, 617, 118

Pac. 1009, we had occasion to call attention to the foregoing statute. Mr. Justice Mc-Carty, after quoting the statute, in the course of the opinion in that case said:

"Under this statute, if the cow entered upon the right of way through the open gate, ap-pellant cannot be held liable for her loss; there being no evidence of negligence on the part of trainmen at the time she was killed."

That case, in effect, covers the case at

In the following cases it is held that under statutes like ours the duty to keep the gates closed at private crossings is cast on the landowner: Pennsylvania Co. v. Spaulding, 112 Ind. 47, 13 N. E. 268; Adams v. Atchison, T. & S. F. Ry. Co., 46 Kan. 161, 26 Pac. 439; Harrington v. Chicago, R. I. & P. Ry. Co., 71 Mo. 384; Binicker v. Hannibal, etc., Ry. Co., 83 Mo. 660. In the last two cases cited it is held that, where the law imposes the duty on the landowner to keep the gates at private crossings closed, the railroad company is not liable for stock killed which come on the right of way through gates that were opened or were left open by third persons without the consent of the railroad company, and where such stock were not killed through the negligence of the trainmen. Such is necessarily the effect of the holding in Reid v. Railroad, supra.

[9] Under the peculiar facts and circumstances of this case, all of which are without conflict or dispute, we are of the opinion that both the plaintiff and the owners of the horses included in the four assigned causes of action cannot recover, upon the ground of having been guilty of contributory negligence.

[10] It is, however, further contended by defendant's counsel that plaintiff cannot recover in this action for the reason that, although it be conceded that defendant was guilty of negligence in failing to keep the wing fence in repair, yet such negligence was not the proximate cause of the killing of the horses in question. It seems that under the rule laid down by this court in the case of Edgar v. Railroad, 32 Utah, 330, 90 Pac. 745, 11 L. R. A. (N. S.) 738, 125 Am. St. Rep. 867, the contention is well founded. It requires no argument to show that, if plaintiff had kept the gates in the right of way fences closed, as it was his duty to do, all the horses would have been safe, and the accident could not have happened. If, therefore, some human agency opened the gate and left it open, as plaintiff's son testified must have been the case, it was the act of such third person or agency that made it possible for the horses to get out of the pasture and for the accident to happen as it did. Without the act of such agency in leaving the gate open the condition of the wing fence was of no consequence. So long as the gate remained closed there was no danger. In view that the law did not impose the duty upon the defendant either to GIDEON, JJ., concur.

maintain or to' keep in repair the wing fence, nor to keep the crossing gates closed. this case, in principle, is the same as though the horses had gotten onto the right of way and onto the railroad track through a gate which was left open either by the plaintiff or by some one else without defendant's fault or consent. In no event, therefore, can it be said that the condition of the right of way fences was the proximate cause of the killing of the horses. Let it be remembered that, if the defendant had given the plaintiff a private crossing without gates in the right of way fence, the case would be different. That was not done. however. Gates were put in by the defendant, and were always maintained in good working condition. While, no doubt, plaintiff could have left the gates, or any one of them, open with impunity at any time so long as the wing fences were in good condition, yet if he left them open when the wing fences were not in good condition or were entirely down, as was the case in this instance, he did so at his peril.

Counsel in their briefs have discussed the question of ratification upon the theory that, when defendant put in the gates and wing fences at the new crossing, it by that act ratified all that was said to the man in the office. It is elementary that no ratification takes place except where the alleged act which is said to have been ratifled is based upon full knowledge of the material facts. As already pointed out, there is not a scintilla of evidence in this record of what was communicated to defendant's employé or agent who ordered the gates and wing fences put in. For other reasons, however, which it is not necessary to discuss, the doctrine of ratification has no application to this case.

What we have already said also disposes of the exceptions to the instructions given, and also to those that were refused.

In closing we desire to state that we have devoted so much time and space to the discussion of the questions involved in this case for three reasons: (1) Because the case presented questions that were peculiar in their nature and effect; (2) because, under our statute, in case a judgment is reversed. and the cause is remanded for a new trial, we are required to decide all material questions presented by the record; and (3) because, under our Constitution, we are required to state the reasons upon which we base our decisions.

It follows from what has been said that the judgment should be, and it accordingly is, reversed; and the cause is remanded to the district court of Weber county, with directions to grant a new trial; defendant to recover costs on appeal.

McCARTY, CORFMAN, THURMAN, and

In re THOUROT'S ESTATE. (No. 3161.) (Supreme Court of Utah. April 19, 1918.)

1. Taxation \$= 98 - Situs-Determination. The fiction of law that all intangible property is presumed to have its situs at the domicile of the owner must give way, in the face of contrary facts.

2. TAXATION \$\ightharpoonup 98 - PROPERTY SUBJECT -SITUS.

Under Comp. Laws 1907, \$\frac{3}{4}\$ 2501, 2505, 2506, 2515, 2516, 2545, 2613, 2677, as to assess 2000, 2010, 2010, 2010, 2011, as to assessing and collecting taxes, property of estate of nonresident testator, while in the hands of a resident executor having absolute and exclusive control, is within jurisdiction of the state for purposes of taxation, at least during time of administration.

3. Taxation 6-4—Right of State to Tax.

The right of the authorities of one state to tax property in its jurisdiction subject to taxation does not depend on the action of the taxing power of any other state.

TAXATION \$\ightharpoonup 345 -- Property of Estate-To Whom Assessable.

That the property of a nonresident testator was assessed to the estate, and not to the executor, is immaterial, where executor had notice of assessment and made no objection, other than that property was not subject to taxation, in view of Comp. Laws 1907, \$ 2613, making it the duty of the district court to require the executor to pay all taxes due from the estate, and section 3956, providing that before any decree of distribution is made the court must be satisfied that all state, county, and municipal taxes legally levied upon personal property of the estate have been fully paid.

Appeal from District Court, Salt Lake County; Geo. G. Armstrong, Judge.

Petition by Salt Lake County for an order directing E. B. Wicks, executor of the will of Peter Thourot, deceased, to pay certain taxes assessed against the estate. Petition dismissed, and the County appeals. Reversed, with directions.

Robert B. Porter, of Salt Lake City, for appellant. Hurd & Hurd, of Salt Lake City, for respondent.

GIDEON, J. Peter Thourot died testate at Jarbridge, state of Nevada, on January 23, 1915. He was at that date, and for a number of years prior thereto had been, a resident of that state. At no time did he reside within the state of Utah. On April 2. 1915, his will was admitted to probate in Salt Lake county, this state. E. B. Wicks was appointed executor. The will was executed in Salt Lake county on January 19, 1908, and had remained continuously in the the possession of said Wicks in Salt Lake county from the date of its execution. Wicks was named as executor by the terms of the will, without bond. It appears that the testator left a small estate in Nevada, but there is nothing in the record to indicate that the will was ever admitted to probate in that state. The proceedings here, therefore, are not ancillary.

An inventory and appraisement was filed with the clerk of the district court of Salt

Lake county on September 30, 1915, showing personal property belonging to the estate in the sum of \$21,844.87, all of which property consisted either of money on deposit in a Salt Lake City bank in the name of the testator or of certificates of deposit issued by a Salt Lake City bank, except the sum of \$1,200, which was evidenced by two notes secured by mortgages on real property in Salt Lake county. It also appears that the testator, in or about the year 1907, deposited certain moneys in the McCornick bank at Salt Lake City, to be loaned on real estate mortgages in Salt Lake county, and that the said moneys were so loaned for a number of years and mortgages taken in the name of the deceased. It also appears that the moneys so deposited were subject to check whenever Mr. Wicks desired to make a loan, and that the checks were signed, "Peter Thourot, by E. A. Wicks, Agent;" that Mr. Wicks would make the loans and take mortgage securities without communicating with the testator. It further appears that Thourst notified Wicks later to make no more loans, but, as rapidly as could be done, to collect in money already loaned and place the same in the bank in such form as to enable him (Thourot) to withdraw the money whenever he should require it for the purpose of developing certain mining claims owned by him in Nevada; that accordingly Mr. Wicks did collect in all of the loans, except the two notes for \$1,200, above referred to, and secured by mortgages as aforesaid. It also appears from the testimony of Mr. Wicks that, when any money was collected, he would obtain a certificate of deposit from a local bank in his own name for the amount, drawing interest payable every three or six months, and would indorse such certificates, "Payable to the order of Peter Thourot," sign his name to the indorsement, and place the certificates in his safe, and that he continued to renew such certificates from time to time until the death of Thourot.

After the executor had been appointed, the assessor of Salt Lake county assessed the property in the hands of the executor for city, county, and state taxes for the year 1915. Such taxes were not paid, and on March 22, 1916, during the administration of the estate, Salt Lake county filed its petition, asking for an order from the district court to direct the executor to pay the amount of taxes so assessed against the property of the estate. Upon a hearing the court entered judgment dismissing the petition, and ordered the assessment made by the assessor of Salt Lake county to be set aside. From that order or judgment the county appeals.

The provisions of the statutes of Utah, so far as material, respecting the authority for assessing and collecting taxes, are as follows:

Comp. Laws 1907, \$ 2506: "All taxable property must be assessed at its full cash value.

Section 2515: "All taxable property must be

Section 2515: "All taxable property must be assessed in the county, city, town, or district in which it is situated."

Section 2505: "The term 'property' includes moneys, credits, bonds, stocks, franchises, and all other matters and things, real, personal and

mixed, capable of private ownership. \* \* \* \* \* Section 2501: "All property in this state, not exempt under the laws of the United States, or under the constitution of this state, shall be taxed. \* \* \* "

Section 2613: "The district court must require every administrator or executor to pay out of the funds of the estate all taxes due from such estate. \* \* \*"

Section 2516: "The assessor must, before the first Monday of May of each year, ascertain the names of all taxable inhabitants, and all property in the county subject to taxation, except such as is required to be assessed, by the state board of equalization, and must assess such property to the person by whom it is owned or claimed, or in whose possession or control it was at 12 o'clock m. of the second day of Jan-

was at 12 o'clock m, of the second day of January next preceding, and its value on that date."
Section 2529: "The undistributed or unpartitioned property of deceased persons may be assessed to their heirs, guardians, executors, or administrators, or any of them. \* \* \* \* \*

Section 2677: "No assessment or act relating

to assessment or collection of taxes is illegal on account of informality or because the same was

not completed within the time required by law."
Section 2545: "Any property discovered by
the assessor to have escaped assessment may be assessed at any time, and when so assessed shall be reported by the assessor to the auditor, and the auditor shall charge the county treasurer with the taxes on such property, and the treas-urer shall give notice to the party assessed there-with."

Respondent contends that under the facts stated (and there is no dispute as to the facts appearing in the record) the property belonging to the estate is not taxable in Salt Lake county: that the property consists of intangible assets, and has not, and cannot have, a situs, except the domicile of the owner, and therefore cannot be taxed in this state, but can only be taxed at the home of the testator in the state of Nevada. On the other hand, it is the contention of appellant that, under the facts stated, the property had acquired in this state what is designated by the authorities as a "business situs"; that it was located here; that it was under the control of a resident agent, and had been left here originally for the purpose of investment, and had been so invested by such agent, and that, notwithstanding the testator had notified his agent to collect in the loans, so that the testator might withdraw the money from this state more readily at any time his interests required, in fact such withdrawal had never been made; that the situs as established by the contract made with the agent in 1907 had never been changed; that the property was wholly located within this state and was protected by the laws of this state; that there is no claim or intimation that it had ever been assessed at the domicile of the testator, either in the year 1915 or any other time.

We do not feel called upon to determine whether, under the facts as shown by the record, the property belonging to the estate | cerned, the administration is complete. Until

was subject to taxation under the laws of this state by reason of it having acquired such a "business situs" here as to authorize the taxing power of this state to levy and collect taxes against it, as in our judgment the conclusion of the district court must be reversed on other grounds.

As will be seen, if the property in question belonged to a resident of this state, under the provisions of our statutes it would be subject to taxation. The term "property," as defined by the statute, includes not only money, but credits, etc. While the mortgages, under the Constitution of this state, would not be subject to tax, the remaining part of the estate undoubtedly would be. But, as indicated, we do not express an opinion as to whether, under the facts, the property in question here was located in this state, so as to make it subject to taxation.

The executor was appointed on April 2, 1915. From that date on, and prior thereto during that entire year, the assets of the estate had been in his possession and under his control. The inventory of the estate filed on September 30th of that year shows that the assets were still in his possession. The property never was, in any sense, in the hands of a foreign administration. On the contrary, it specifically appears from the record that on October 1, 1915, a partial decree of distribution was made, distributing the estate direct to the sole beneficiary under the will of the deceased, who was then a resident of the state of New York.

In the case of Taylor, Adm'r, v. St. Louis County Court, 47 Mo. 594, it appears that the deceased was, at his death, a resident of Illinois, and among his assets were certain bonds issued by the Masonic Hall Association of St. Louis, Mo.; that after the appointment of the administrator in Illinois ancillary letters of administration were issued by the St. Louis county court, and the bonds in question were transmitted from Illinois to the administrator in St. Louis for the purpose of administration. The bonds were taxed in the hands of the ancillary administrator, and he sued out a writ of certiorari to review the proceedings of the St. Louis county court in making the assessment; that from an order of the circuit court setting aside the assessment the state of Missouri appealed. The statutes of Missouri made no special mention of the particular kind of property involved, but provided that taxes shall be levied "on all property, real and personal," etc. The Supreme Court of Missouri, in answering a contention similar to the one made by respondent here, in the opinion in the case above cited, says:

"Administration of so much of the estate of a nonresident as is found within our jurisdiction is ancillary, in that it becomes the duty of the administrator to transmit to the representa-tive of the estate of the domicile any balance remaining after full administration. Yet, so far as local creditors and local distributees are con

such balance be transmitted, the local administrator has full possession of all the property, and the foreign administrator had no right to intermeddle. In no sense can it be said to be in the possession of the foreign administrator, and it does not matter whether or not it may have been transmitted, or rather the evidence and representation of it, in the shape of bonds and notes, from such administrator to the local one. When transmitted for the purpose of administration, it becomes a local estate, it comes within the jurisdiction of the tribunals of the domicile of the local administrator, it seeks the protection of its laws and the enforcing process of its courts, and until the closing up of the local administration it can have no other situs."

See Commonwealth v. Camden, 142 Ky. 365, 134 S. W. 914.

[1. 2] It is true that by fiction of law all intangible property is presumed to have its situs at the domicile of the owner, but that fiction must give way, under all the authorities, in the face of contrary facts. The property in question in this case was at least within the jurisdiction of this state during the time of the administration. The executor here had the exclusive and absolute control of it, and it was not subject to the orders and direction of any foreign administration, if one existed. The courts of this state recognized that by directing the executor to pay to the sole beneficiary practically the entire estate at the date of the partial distribution on October 1, 1915.

[3] The fact that this property was or was not assessed at the domicile of the testator is immaterial, as the right of the authorities of one state to tax property in its jurisdiction subject to taxation cannot, and does not, depend on the action of the taxing power of any other state. Taylor, Adm'r, v. St. Louis County Court, supra; Blackstone v. Miller, 188 U. S. 189, 23 Sup. Ct. 277, 47 L. Ed. 439.

[4] Some objection is made to the method of the assessment; that is, that the property was assessed to the estate of Peter Thourot and not to the executor or the beneficiary under the will. By Comp. Laws 1907, \$ 2613, it is made the duty of the district court to require the executor or administrator to pay all taxes due from the estate. By section 3956, it is provided that before any decree of distribution is made the court must be satisfied by the oath of the executor or administrator that all state, county, and municipal taxes legally levied upon personal property of the estate have been fully paid. That the executor had notice of the assessment made against this property is admitted. That the aid of the court was invoked to enforce the payment is the very object of these proceedings. How, then, can the executor complain as to the method of making the levy? In what way is he injured? The very object of assessng property in the name of the real owner is that the owner may have notice that an assessment has been levied advised of the assessment is not in dispute. He contested its payment, not on that ground, but on the ground that the property was not subject to taxation in this state. That contention cannot prevail.

The judgment is reversed, with directions to the district court of Salt Lake county to enter an order directing the executor to pay such amount of tax as was due on the assessment for the year 1915. Costs to be paid out of the funds of the estate.

FRICK, C. J., and McCARTY, CORFMAN, and THURMAN, JJ., concur.

MINNEAPOLIS THRESHING MACH. CO. v. FOX et al. (No. 3149.)

(Supreme Court of Utah. April 19, 1918.)

APPEAL AND EREOR \$\iiii 345(1) - APPEAL - TIME - SUSPENSION.

—SUSPENSION.

Under Comp. Laws 1907, § 3301, providing that an appeal may only be taken within 6 months from entry of judgment and section 3329, prohibiting the extension of time within which an appeal may be taken, the serving and filing of a motion for new trial pursuant to extension granted by trial court more than 6 months after the entry of the judgment is of no effect so far as suspending the time within which judgment becomes final for purpose of appeal.

Appeal from District Court, Salt Lake County; F. C. Loofbourow, Judge.

Action by the Minneapolis Threshing Machine Company against Jesse W. Fox and others. From a judgment against defendants they appeal. Appeal dismissed.

Ben Johnson, of Salt Lake City, for appellants. Wedgwood, Irvin & Thurman, of Salt Lake City, for respondent.

FRICK, C. J. The defendants have appealed from a judgment entered against them by the district court of Salt Lake county. The plaintiff has interposed a motion to dismiss the appeal. The motion is based on several grounds, but for the reasons hereinafter appearing, we shall consider the first ground only, namely, that the appeal was not taken within the time required by our statute, and for that reason this court is without jurisdiction to hear the appeal.

The record filed in this court shows that the judgment against the defendants was duly entered on January 15, 1916, and that notice of the entry of judgment was served on defendants' counsel the same day; that no motion for a new trial was served and filed until the 31st day of July, 1916, or 6 months and 16 days after the entry of judgment; that the notice of appeal was served and filed June 1, 1917, and the appeal was perfected on the 6th day of that month. The record also shows that the district judge from time

notice that an assessment has been levied against his property. That the executor was 560; Felt v. Cook, 31 Utah, 299, 87 Pac. 1092.



to time granted the defendants extensions; of time within which to serve and file their motion for a new trial, and that the last extension granted expired on the 31st day of July, 1916, the day on which the motion for a new trial was served and filed.

Plaintiff's counsel insists that, inasmuch as, under our statute (Comp. Laws 1907, § 3301), an appeal may only 'be taken within six months from the entry of the judgment," and that section 3329 prohibits the extension of the time within which an appeal may be taken, the serving and filing of a motion for a new trial more than 6 months after the entry of judgment is of no force or effect. The Territorial Supreme Court of Utah, in Brough v. Mighell, 6 Utah, 317, 23 Pac. 673, held that the time within which an appeal must be taken cannot be extended, and this court, in Anderson v. Halthusen, etc., Co., 30 Utah, 31, 83 Pac. 560, held that the time for appeal may not be extended by stipulation. In Felt v. Cook, 31 Utah, 299, 87 Pac. 1092, this court also held that an application to file a motion for a new trial upon the ground of excusable neglect must, under section 3005, be made within 6 months after entry of judgment or it comes too late. Upon the other hand, it has frequently been held by this court, and such has become the settled practice, that the district court or the district judge may grant extensions of time within which to serve and file a motion for a new trial, provided the application for such an extension of time is made before the time provided by Comp. Laws 1907, \$ 3292, has expired, or, in case further extensions are given, that the new application is made before the time mentioned in the preceding exten-Where such extensions sion has expired. have been granted and the motion for a new trial was regularly served and filed within the time granted, this court has very frequently held that the serving and filing of the motion for a new trial, for the purposes of appeal, prevents the judgment becoming final until the motion for a new trial is denied. In other words, the serving and filing of a motion for a new trial, if done as before stated, suspends the time within which a judgment becomes final for the purposes of appeal. The question now presented, however, namely, whether a motion for a new trial may be served and filed after the 6 months have expired within which a judgment becomes final and the appeal must be taken under section 8301, has never been pre-That, however, is the sented for decision. question we must now decide.

As already pointed out, the time within which an appeal may be taken is jurisdictional, and may not be extended by agreement or otherwise. The only means by which the time within which a judgment becomes final for the purposes of an appeal may be suspended is by serving and filing a motion for a new trial as before stated. The question, therefore, is, when must such a motion be beyond which it may not be so extended. A

served and filed in order to have the effect of extending the time for appeal? Can that be done within any time that the district court, or a judge thereof, may fix? May the court, or judge, extend the time to file a motion for a new trial indefinitely, or is there a limit beyond which the time may not be extended? If there is no limit, then the district court, or the judge, has power to extend the time so that an appeal need not be perfected for years after the judgment is entered. True, the district court, after the motion for a new trial is filed and pending. may withhold decision, and thus may likewise retard an appeal. If the district court, however, unreasonably withbolds a decision upon a motion duly filed, the parties to the action are not without remedy. Either party may, by writ of mandate, require the court to act and to dispose of the motion one way or another. Such may also be done where the motion for a new trial is served and filed. When a motion is filed the adverse party may at any time serve notice on the party filing the motion, and may thus force an early hearing on the motion, and may have it disposed of within a reasonable time at least. If, however, the district court or the judge may extend the time in which to move for a new trial indefinitely, then there is absolutely no remedy. While we concede that neither the several sections of the statute to which we have referred nor the decisions which we have cited are decisive of the question here discussed (nor have we cited them for that purpose), yet when the statutes and the decisions of this court are considered together, as they must be, we are clearly justified in concluding that in order to prevent a judgment from becoming final the party intending to appeal must serve and file his motion for a new trial before the expiration of the 6 months within which an appeal must be taken. If the motion is filed before the 6 months have expired, the time for appeal is suspended for the sole reason that the finality of the judgment is suspended. It is suspended, however, only for the reason that the aggrieved party, by a motion which is sanctioned by law, and which is part of the record before the judgment has become final, has asked that the finality may be suspended until his motion can be heard and determined. When, therefore, such a motion is filed before the time for appeal has expired as provided by section 3301, the time within which to appeal is suspended by operation of law. If, however, the district court, or the judge, may extend the time for filing a motion for a new trial, then he may extend the time within which an appeal may be taken indefinitely and without any cause or reason therefor whatever. The finality of the judgment may thus be suspended through the mere caprice, whim, or generosity of the district judge. Moreover, if it may thus be extended beyond the 6 months, then we know of no legal limit

annul section 3301 and extend the time for appeal almost without limit. Such a holding is clearly and manifestly opposed to the due administration of law and justice. court, therefore, should not encourage a practice which would be productive of such results, unless no other avenue of escape is open to it. To require the aggrieved party to serve and file his motion for a new trial before the judgment becomes final by lapse of time can work no hardship on him or to any one. To permit the district court or judge to extend the time within which to file a motion for a new trial up to, but not beyond, the time within which an appeal must be taken is not only in consonance with reason and common sense, but it harmonizes and gives full force and effect to our statutes and to the former decisions of this

We remark that while in this opinion we have used the term "motion for a new trial" instead of the statutory term "notice of motion for a new trial," we did so for convenience merely, and not for the purpose of making any distinction between the two

We are of the opinion, therefore, that in order to suspend the time within which an appeal must be taken the party intending to file a motion for a new trial must serve and file the same before the expiration of the 6 months mentioned in section 3301, and that neither the district court nor the judge thereof has the power or authority to grant an extension of time beyond the 6-month period aforesaid. The motion for a new trial in this case, not having been filed within such period of time, was impotent to arrest the finality of the judgment, and hence the appeal in this case was not taken within the time provided by our statute.

The motion to dismiss the appeal should therefore be, and it accordingly is, granted, and the appeal is dismissed, at the defendants' costs.

McCARTY, CORFMAN, and GIDEON, JJ., concur. THURMAN, J., being disqualified, did not participate in the disposition of this appeal.

HENRIOD v. CHURCH, Mayor. (No. 3212.) (Supreme Court of Utah. April 20, 1918.)

1. MUNICIPAL CORPORATIONS 4=183(4)-OF-FIGERS—INCREASE IN SALARY—RESIGNATION AND REAPPOINTMENT.

In the absence of prohibitive statute, a city marshal, having resigned on the day preceding the effective date of a raise in salary, was eligible to reappointment on the next day, especially in view of Laws 1911, c. 125, and Laws 1917, c. 44, amending Comp. Laws 1907, § 225, proc. 44, amending Comp. Laws 1907, § 225, pro-hibiting increase of salary during term of city officer, so as to limit such section to elective of-

district judge would thus have the power to | 2. MUNICIPAL CORPORATIONS 422145 — CITY MARSHAL-FORM OF BOND.

Bond of city marshal conditioned on his performing well, truly, and justly all the duties of his office was not defective for failure to be conditioned, in words of Laws 1911, c. 125, \$216, ton "payment of all moneys according to law and ordinances."

3. MUNICIPAL CORPOBATIONS \$== 145 - CITY

MARSHAL—APPROVAL OF BOND.

Where city marshal filed a bond, the mayor and council's failure to disapprove or reject the bond, or raise any question as to its suffi-ciency, and their permitting him to perform the duties of office, were sufficient evidence of ac-

ceptance and approval of the bond. 4. MUNICIPAL CORPORATIONS 4== 188(2)-

MARSHAL—DE FACTO OFFICER.

Mere fact that city marshal's bond had expired did not forfeit his right to the office where he was permitted to continue to act, and was therefore a de facto officer at least, and entitled to compensation, especially since the city authorities could at any time on notice have required a bond.1

5. MUNICIPAL CORPORATIONS \$== 183(3)—CITY MARSHAL-REMOVAL.

Assuming a city marshal was rightfully holding the office, the attempt by the mayor to remove him without the concurrence of the council was wholly ineffectual, in view of Comp. Laws 1907, § 215, as amended by Laws 1911, c. 125, requiring the concurrence of the council.

6. MUNICIPAL CORPORATIONS 4 149(4) -- Ap-

POINTIVE OFFICERS—TENURE OF OFFICE.

In view of Comp. Laws 1907, \$ 215, as amended by Laws 1911, c. 125, appointive officers in citles of the third class hold their respective offices until their successors are appointed and qualified.

7. MUNICIPAL COMPORATIONS 4 149(4)-AP-POINTIVE OFFICERS—TENURE OF OFFICE.

Even in the absence of statute, municipal officers hold over until their successors are elected and qualified, and until such time are entitled to the compensation attached to the office.2

Original proceeding in mandamus by Gus J. Henriod against Major Church, as mayor of Eureka City. Writ issued.

Barnes & Iverson, of Salt Lake City, for plaintiff. Rawlins, Ray & Rawlins, of Salt Lake City, for defendant.

THURMAN, J. The petition of plaintiff, in substance, shows: That plaintiff on the 6th day of August, 1917, was duly appointed to the office of city marshal of Eureka City, Juab county, by the mayor thereof; that said appointment was duly confirmed by the city council of said city; that plaintiff duly qualified by taking the oath of office and giving bond; that said appointment was made to fill a vacancy in said office, and that plaintiff has ever since continued to act as such officer and is now fulfilling the duties thereof; that defendant on the 18th day of February, 1918, was and now is the duly elected. qualified, and acting mayor of said city; that on the 1st day of February, 1918, defend-

<sup>&</sup>lt;sup>1</sup>Peterson v. Benson, 38 Utah, 286, 112 Pac. 801, 32 L. R. A. (N. S.) 949, Ann. Cas. 1913B, 640.

<sup>&</sup>lt;sup>2</sup>Pratt v. Swan, 16 Utah, 483, 52 Pac. 1092.

then city council of said city the name of one Minor Peterson for appointment as said marshal; that said city council refused, and ever since has continued to refuse, to confirm said appointment, and no other appointment to said office has been made other than the appointment of plaintiff aforesaid; that plaintiff continued to perform the duties of such office during the month of February, 1918, and at all times since his appointment; that at the time of his appointment the salary of said office was and is now \$135 per month; that plaintiff received said amount per month as salary from the date of his said appointment down to and including the 1st day of February, 1918; that on the 1st day of March, 1918, the city recorder of said city issued and delivered to plaintiff a city warrant for \$135 in payment of his services for the month of February next preceding; that said warrant was made payable to the order of plaintiff, but under a city ordinance of said city the defendant, as mayor, is required to countersign all warrants drawn on the city treasurer; that under said ordinance it was the duty of the defendant, as mayor, to countersign said warrant, but when it was presented to him for his signature he wrongfully, willfully, and without just cause refused to countersign it and still refuses: that plaintiff presented said warrant to the city treasurer of said city, who indorsed thereon, "Payable at the Eureka Banking Company, Eureka"; that plaintiff then presented said warrant to said banking company, but it refused to pay the same, and still refuses, because it was not countersigned by the defendant as mayor or at all; that plaintiff is still continuing to act as such officer and perform the duties thereof, but that defendant refuses to, and will continue to refuse to, recognize plaintiff as such officer, and refuses, and will continue to refuse, to countersign said warrant, or any warrant that may be issued to plaintiff in payment of his salary as such officer; that plaintiff is without remedy in the premises unless by interposition of this court. Plaintiff prays that a writ of mandamus issue against said defendant as mayor of Eureka City, commanding him to countersign said warrant, and to recognize plaintiff as city marshal of said city, and for such other relief as may be just.

Said application was filed on the 15th day of March, 1918, and an alternative writ of mandamus issued thereon commanding the defendant, as mayor of said Eureka City, to recognize plaintiff as said city marshal of said city, and countersign said warrant, as required by the ordinances of said city, for the payment of plaintiff's salary for the month of February, 1918, or to show cause at the time stated in said writ why he has not done so.

ant, as mayor of said city, presented to the leging as grounds of demurrer that the petition does not state facts sufficient to constitute a cause of action or to sustain an alternative writ of mandamus.

> It was thereafter stipulated by the parties. for purposes of demurrer, that the following facts should be considered as a part of the petition: That plaintiff was appointed city marshal of Eureka City January 7, 1916, at a salary of \$100 per month; that on July 27, 1917, the city council of said city passed an ordinance raising the salary of city marshal to \$135 per month, becoming effective the 4th day of August next following; that on August 3d plaintiff resigned said office, and on the same day was hired by the mayor as acting marshal of said city; that on the 6th day of the same month he was appointed such marshal to fill the vacancy created by his own resignation; that under said appointment of August 6, 1917, he filed his bond in the sum of \$2,500, a copy of which is attached to the stipulation; that said bond has never been approved by the mayor; that the city ordinances of Eureka provide that before entering upon the discharge of his duties the marshal shall file a bond with the city in the sum of \$2,500, to be approved by the mayor; that plaintiff has filed no other or additional bond than the one a copy of which is attached to the stipulation; that on the 4th day of February, 1918, the defendant, as mayor, gave verbal notice to the plaintiff that his term had expired as city marshal, and that he was no longer to be recognized or receive compensation as such.

[1] The right of plaintiff to hold the office in question, perform the duties and enjoy the emoluments thereof, prior to August 3, 1917, when he resigned, is not made an issue in this proceeding. Whether or not defendant seriously questions the right of plaintiff to resign under his first appointment, when the salary was only \$100 per month, and accept an appointment a few days later, when the salary had been increased to \$135 per month, is not at all clear. There is a veiled suggestion in the brief that plaintiff resigned for the purpose of obtaining the increased salary, but that is all. The point was not argued, and we are left in the dark as to defendant's attitude respecting that question. It is admitted, however, that plaintiff had resigned the office before the ordinance increasing the salary went into effect. created a vacancy, which continued until the new law became operative, when the plaintiff was again regularly appointed. In the absence of a statute prohibiting such proceeding, we see no reason why the plaintiff was not just as eligible to appointment after the salary was increased as any otherperson would have been. There is, however, no statute forbidding it. On the contrary, Comp. Laws Utah 1907, \$ 225, which at one time prohibited all city officers from receiv-The defendant appeared in response to the ing increased compensation during the time writ, and filed a demurrer to the petition, al- | for which such officer was elected or appointed, has been amended by later statutes, making such provisions applicable to elective officers only. Sess. Laws 1911, \$ 225, at page 231, and Sess. Laws 1917, \$ 325, at page 125.

[2] The next point presented by appellant's brief is that plaintiff under his second appointment, or the appointment now in question, filed his bond with the city recorder, but that the bond was never approved by the mayor. It is also claimed that the bond so filed was defective in form in not stating one of the conditions required by law, viz. "the payment of all moneys received by such officer according to law and the ordinances of such city." Sess, Laws 1911, c. 125, § 216. The bond filed by the plaintiff omitted the words above quoted, but did declare as a condition that "the said Gus J. Henriod shall well, truly, and justly perform all the duties enjoined upon him by virtue of his office."

It is contended by plaintiff, and we think with reason, that while the words used in the bond are not exactly the words of the statute, yet, in substance, they cover and include all that the statutes require. Certainly if the plaintiff well, truly, and faithfully performs all the duties enjoined upon him by virtue of his office, he would pay all moneys received by him under the law and the ordinances, and the obligors on such bond could undoubtedly be held for any default of the plaintiff in this regard. As supporting the proposition that a substantial compliance with the law as to the form of the bond is sufficient, counsel for plaintiff call our attention to the following authorities: Mechem on Pub. Officers, § 268, at page 167: Throop on Pub. Officers, § 187, at pages 197, 198; Murfree on Official Bonds, § 38, at page 28; and Dillon on Municipal Corps. (5th Ed.) \$ 396, at pages 681-687. These authorities are in point, and, in the judgment of the court, clearly reflect current legal opinion upon the question under review. See, also, 29 Cyc. 1452.

[3] The objection is also made by defendant that the official bond filed by plaintiff was not approved by the mayor. It is, however, conceded that it was filed by the plaintiff, and that ever since his appointment he has continued to perform the duties of the office. Furthermore, as suggested by plaintiff, it does not appear that the bond was rejected or disapproved, or that any objection was made to it either by the mayor or city council. The circumstances all tend to show the plaintiff was recognized by the city authorities, and was paid his monthly salary in the sum of \$135 per month from the date of his appointment down to and including the month of January, 1918. Under these circumstances, the approval of his bond might well be inferred. Throop, Pub. Officers, § 184; Pepper v. State, 22 Ind. 399, 85 Am. Dec. 430; Green v. Wardwell, 17 Ill. 278, 63 Am. Dec. 366: Bartlett v. Board, 59 Ill. 364; Young v. Comm., 6 Bin. (Pa.) 88; 29 Cyc.,

supra. The failure to disapprove or reject the bond or raise any question as to its sufficiency, together with the fact that plaintiff was permitted to perform the duties of the office, and was recognized as marshal of the city during all the time mentioned, ought to be sufficient evidence of acceptance and approval by the proper authority.

[4] Neither did the fact that the bond expired December 31, 1917, justify the assumption that he had forfeited his right to the office to the extent at least of relieving the city of the obligation to pay for his services. Under the admitted facts of this case plaintiff was at least a de facto officer, if not an officer de jure, and was entitled to the compensation authorized by the ordinance. Peterson v. Benson, 88 Utah, 286, and cases cited at page 292, 112 Pac. 801, 32 L. R. A. (N. S.) 949, Ann. Cas. 1913B, 640. Besides this, the city authorities could at any time, on proper notice, require plaintiff to file a new bond, if the one first filed for any reason is insufficient.

[6] But it is urged by defendant that on the 4th day of February, 1918, he verbally notified plaintiff that his term of office as city marshal had expired; that he was no longer to be recognized as such or as such to receive compensation. This is one of the stipulated facts. Just what significance it has in the present case does not appear in the argument. Neither is it manifest, prima facie, or self-evident. Comp. Laws 1907, § 215, as amended by chapter 125, Laws Utah 1911, pp. 229, 230, provides that in cities of the third class appointive officers may be removed by the mayor with the concurrence of a majority of the city council, or by the city council with the concurrence of the mayor. It nowhere appears in the petition of plaintiff or the additional facts stipulated that the city council concurred in any attempted removal of plaintiff by the defendant as mayor. Assuming that plaintiff was rightfully holding the office, the attempt by the mayor to remove him without the concurrence of the council was abortive, a useless ceremony, and wholly ineffectual.

[8] Finally, it is contended by defendant that chapter 125, Laws Utah 1911, p. 228, provides that the term for which a city marshal in a city of the third class may be appointed extends from the first Monday in February next succeeding any municipal election for a period of two years, unless removed for cause. Under this provision it is contended by defendant that at the end of the term thus specified and defined plaintiff had no right to hold over as in cases where the statute provides that an officer may hold his office during the term for which he is elected or appointed, and "until his successor is elected and qualified."

Our attention is called to the fact that the same section 213 above referred to provides that elective officers hold their offices during the term for which they are elected and until their successors are elected and qualified. From this distinction in the language of the statute concerning the appointive and elective officers referred to in the section, it is argued by defendant that the law does not contemplate that the city marshal in a city of the third class shall hold over after his term of office expires; that his official functions end at the expiration of the term fixed by law; and that he can no longer perform the duties of the office or enjoy its emoluments. Defendant for some inexplicable reason overlooks the fact that the same session of the Legislature (viz. the session of 1911), which amended Comp. Laws Utah 1907, \$ 213, relied on by defendant, by the same act also expressly amended section 215 of the Compiled Laws aforesaid, and retained in said section the hold-over clause as applied to these officers. In other words, it made no change in the law as it existed before, except making some reference to cities of the first and second class. Sess. Laws Utah 1911, § 215, at page 229. Hence, as we understand the statute now in force, appointive officers in cities of the third class hold their respective offices until their successors are appointed and qualified.

[7] In addition to this, it is contended by plaintiff that it is a general rule of law that an incumbent of a public office will hold over after his term expires until his successor is elected or appointed and qualified, even though there is no express provision of law to that effect. In support of this contention many authorities are referred to. McQuillin, Mun. Corps. § 487; Robb v. Carter, 65 Md. 321, 4 Atl. 282; State v. Harrison, 113 Ind. 434, 16 N. E. 384, 3 Am. St. Rep. 663; 23 Am. & Eng. Ency. L. (2d Ed.) 412; 1 Dillon, Mun. Corps. (5th Ed.) \$ 719; Bunker v. | and GIDEON, JJ., concur.

Gouldsboro, 81 Me. 188, at p. 194, 16 Atl. 543. In Pratt v. Swan, 16 Utah, 483, 52 Pac. 1092, the fourth syllabus reflects the opinion of the court as to this particular question, and reads as follows: "In the absence of any restricting provision of statute, municipal officers hold over until their successors are elected and qualified."

So that, even if there were no positive statute authorizing it, the general law seems to be that such officers are entitled to continue in office, perform the duties thereof, and receive the compensation therefor until their successors are appointed and qualified. Besides this, the interests of the public demand that public offices be filled and the duties thereof performed. This is recognized by the authorities as the fundamental reason for the hold-over principle. 1 Dillon, Mun. Corps. (5th Ed.) § 412; Throop, Pub. Officers, § 308; Tiedeman, Mun. Corps. § 81; Stratton v. Oulton, 28 Cal. 45; State ex rel. v. Seay, 64 Mo. 89, 27 Am. Rep. 206; and Pratt v. Swan, supra.

This doctrine, declared by the authorities referred to, reflects the law applicable to cases of this kind.

For the reasons above stated, the demurrer of the defendant filed in this case should be overruled and judgment entered for the plaintiff. It is therefore ordered that a peremptory writ issue to the defendant, as mayor of Eureka City, commanding him to recognize the plaintiff as city marshal of said city, and to countersign the warrant issued to him in payment of his salary for the month of February, 1918. Defendant to pay the costs of this proceeding.

FRICK, C. J., and McCARTY, CORFMAN,

HAHN v. CITIZENS' STATE BANK et al. (No. 922.)

(Supreme Court of Wyoming. May 16, 1918.) 1. APPEAL AND ERBOR \$\infty\$ 134(1)—CUBING DE-FECTS-STATUTE

Comp. St. 1910, § 5135, permitting practice of the common law to be adopted where neces-sary to prevent failure of justice where redress cannot be had under the Code of Civil Procedure, does not apply to authorize appellate jurisdiction of a case wherein no judgment has been entered of record in the court below.

2. APPEAL AND EBROB 4 134(2)-RECORD EN-TRY OF JUDGMENT.

Record entry of judgment in the court below, necord entry of judgment in the court below, necessary for appeal, cannot be shown by entries upon the trial docket for use of the trial judge under Comp. St. 1910, § 4455; such docket not being the journal of the court, nor entries thereon journal entries, required by statute for entry of judgment.

Error to District Court, Sheridan County; E. C. Raymond, Judge.

On petition for rehearing. Petition denied.

For former opinion, see 171 Pac. 889.

Robert P. Parker, of Sheridan, for appellant. Chas. A. Kutcher and Camplin & O'Marr, all of Sheridan, for respondents.

POTTER, C. J. The motion to dismiss the appeal in this cause having been sustained (see 171 Pac. 889), the appellant has filed a petition for rehearing. The questions involved in the motion were very carefully considered, and we see no reason for a different conclusion. The appeal was dismissed on the ground that the record failed to show that a judgment had been entered in the cause, and therefore that the notice of appeal was insufficient to give this court jurisdiction. The only showing of a judgment by the record, as stated in the former opinion, was a paper purporting to have been filed July 14, 1917, entitled "Judgment." signed by the trial judge, reciting the trial and verdict, which the record otherwise shows occurred on June 14, 1917, and concluding with a form of judgment upon the verdict, and a statement as to its date as follows:

"Done in open court the 14th day of June, 1917.

But there was not a transcript or copy of the journal entry of the judgment in the record, nor anything to show that the judgment had been entered. The statute under which the appeal was taken provides for taking an appeal by serving and filing a notice thereof "within ten days from the entry of the judgment or order appealed from." And the notice of the appeal in this case was filed and served on June 23, 1917. We held that an entry of the judgment was essential under the statute to support an appeal.

It is now suggested by counsel for appellant that the judgment order signed by the ring to the "entry" or the "date of the en-

June 13th, instead of July 14th, as stated in the former opinion. It bears a filing indorsement signed by the clerk with the date of filing "July 14" written with pen and ink. Above and partly over that date is a pencil notation "June 13." But we do not think the latter is to be understood as a change in the filing date. While there is nothing to show its purpose, we think it may have been intended to show the date under which the judgment was to be entered upon the journal, and that if it had been intended as a change in the date of filing, such intention would have been made more clearly apparent. The paper could not have been actually or properly filed on June 13th, for the case had not then been tried and was not in a condition for judgment. But it is unnecessary to conjecture what was intended by the pencil written date. Whenever filed that paper is insufficient to show an entry of the judgment, and is not the record evidence thereof for the reasons explained in the former opinion. In addition to the statutory provisions referred to in that opinion for entering judgments and orders upon the journal, it is further provided by the statute that the clerk of the district court shall keep a journal (section 4273, Comp. Stat. 1910); that he shall "keep the journals, records, books and papers appertaining to the court, and record its proceedings" (section 4278); and that "orders made out of court shall be forthwith entered by the clerk in the journal of the court, in the same manner as orders made in term" (section 4279).

The general rule is that the record must show the rendition and entry of an appealable judgment, decree, or order, so that the jurisdiction of the appellate court may appear (4 C. J. 45), and there is nothing in the so-called direct appeal statute making that rule inapplicable. On the contrary, the provision for taking an appeal by filing and serving a notice within a prescribed period from the entry of the judgment or order appealed from makes it clearly necessary that the record on appeal shall show the entry of the judgment or order, and that the notice of appeal was filed and served within the time prescribed. It seems now to be argued that the statute providing for the record on appeal and designating the judgment as one of the things to be included in the record does not require a journal entry of the judgment or any journal entries. But the statute does require that the judgment shall be included in the record, and since the record of a judgment is the entry thereof upon the journal of the court, it is clear, we think, that it does in effect require a copy or transcript of such journal entry. And this is made more certain, if that be possible, by the several provisions of the statute refertrial judge appears to have been filed on try" of the order or judgment appealed

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from, for the purpose of fixing the time for taking the appeal, for filing the transcript of the testimony when requested, and for preparing and filing the record on the appeal.

In Ohio, from which state our Code of Civil Procedure is taken, under a statute requiring a party desiring to appeal a cause from the court of common pleas to the circuit court to enter on the records notice of such intention within three days after the judgment or order is entered, it is held that the provision means that the notice must be entered on the record within three days after the judgment or order is entered on the journal. Layer v. Schaber, 57 Ohio St. 234, 48 N. E. 939. And that a memorandum of the trial judge on his docket of a notice of such intention to appeal is not a compliance with the statute because that is not an entering of the notice on the records of the court. Moore v. Brown, 10 Ohio, 197; Bank of Circleville v. Bowsher, 15 Ohio Cir. Ct. R. 114. The Ohio Supreme Court has also gone to the extent of holding that in order to create a judgment lien upon lands as of the first day of the term at which a judgment is rendered, the judgment must not only be pronounced, but it must also be entered on the journal during the term. And the court say:

"It is true that the two words 'rendered' and 'entered,' in their strict use, bear a clear difference in meaning and intent. Giving to these words such signification, a judgment may be said to be 'rendered' by a declaration from the bench; but to enter it requires the act of the clerk in writing it upon the journal. It is true, also, that for some purposes a judgment may be regarded as rendered so soon as it is pronounced. \* \* \* The requirement that all judgments must be entered on the journal carries the implication that until that is done the judgment is inchoate only; it is incomplete. Though possessing the character of potentiality, it lacks the character of actuality, and hence is without probative force." Coe v. Erb, 59 Ohio St. 259, 52 N. E. 640, 69 Am. St. Rep. 764.

[1] Counsel states that since no motion for new trial was presented to the trial court, the appellant is not in a position to have the case reviewed by proceeding in error. and, in that connection, calls our attention to section 5135, Comp. Stat. 1910, and asks that the provisions thereof be applied here, if it is to be held that the record provided for in the direct appeal statute is not complete enough to enable a review of this case. The record provided for by that statute is certainly sufficient for the review of a case properly brought and perfected under it. The difficulty with this case is that the appeal is not properly brought and perfected under the statute, for the reason that the record fails to disclose the entering of a judgment in the cause, or that the notice of appeal was filed and served within the prescribed period from the entry of the judgment. Section 5135 thus referred to by counsel, which is found in the Code of Civil Procedure, provides:

"If a case ever arise in which an action or proceeding for the enforcement or protection of a right, or the redress or prevention of a wrong, cannot be had under the Code of Civil Procedure, the practice of the common law may be adopted, so far as it may be necessary to prevent a failure of justice."

That section is clearly not applicable, and cannot be held to authorize the exercise of jurisdiction to pass upon the merits of this case on appeal by assuming, without a proper showing by the record, that a judgment was duly entered therein, and that the appeal was properly taken and perfected. But at common law, as explained in the former opinion, a writ of error could not be brought for the review of a judgment until it had been entered of record.

[2] It is further suggested that there is no provision in the direct appeal statute as to who shall make the entry of the judgment or order, or that prescribes the form of judgment provided for. Neither was necessary. When the statute was enacted the statutory provisions referred to in this and the former opinion were in force, requiring all judgments and orders to be entered on the journal by the clerk, and it was provided by section 4627, Compiled Statutes of 1910, that such judgments and orders shall clearly specify the relief granted or order made. But there is attached to the petition for rehearing a certified copy of certain pages of the civil trial docket, prepared no doubt for the use of the district judge under section 4455, Comp. Stat. 1910, on which appears to have been entered under appropriate headings the number of the cause, the names of the attorneys and parties respectively, the kind of action, and under the heading "Date of Proceedings," 'June 14," and, under the heading of "Judge's Notes," the following: "Jury impaneled; motion sustained as to Deft. Citizens State Bank, overruled as to Diers. Judgmt, for Defts."

And it is insisted that such memoranda show or constitute the entry of a judgment in this cause. The entries of the date and proceedings may be presumed to have been made by the trial judge. But while such memoranda might be taken to show that a judgment was ordered and perhaps also the date thereof, and might authorize an entry of the judgment, or, if that was neglected, an order for an entry nunc pro tunc, it cannot be taken or considered as a substitute for an entry of the judgment on the journal required by statute. The trial docket is clearly not the journal of the court, nor are the entries on such docket by the judge or clerk journal entries.

Counsel asks in this connection that the record be returned to the district court for an amendment so that the entries on said docket may be properly made a part of the record. Since, if contained in the record, they would not, for the reasons stated, show the entry of judgment, nothing would be gained by returning the record for the sug-

gested amendment. And therefore we think the request should not be granted, even if made in apt time, which we need not decide. Had application been made, at least before the motion to dismiss was decided, to return the record to the district court for amendation and the record to the district court for amendation and the record to the district amendation and the record to the district court for amendation and the record to the district account of the city and county the district attorney of ment or correction so as to show the entry of the judgment, accompanied by a showing that the judgment had been entered and at such time or under such conditions as to give effect and validity to the notice of appeal, such application, we think, might have been granted. This court has been quite liberal in permitting the return of bills of exceptions for amendment, as illustrated by several reported cases. And in two cases that was done upon application made at the time of filing a petition for rehearing, to allow the plaintiff in error an opportunity to apply in the district court for amendments curing certain defects in the bill which had caused the dismissal of the error proceeding in one of the cases and an affirmance of the judgment in the other. And in each case the amendment was allowed by the district court, and upon the return of the bill as amended the case was heard and decided upon its merits. We refer to Royal Insurance Co. v. Lumber Co., 23 Wyo. 264, 148 Pac. 340, Id., 24 Wyo. 59, 155 Pac. 1101, Ann. Cas. 1917E, 1174, and McCague Investment Co. v. Mallin, 23 Wyo. 201, 147 Pac. 507, Id., 170 Pac. 763. Whether an application to amend a record on appeal, under the direct appeal statute, could properly be granted after an order dismissing the appeal, when made in connection with a petition for rehearing accompanied by a showing which would justify the return of the record for amendment if applied for in time, we do not decide. No such application has been made, except to amend by inserting a transcript of certain entries in the civil trial docket above mentioned, which ought not to be granted even upon timely application, for it would not show the entry of judgment.

The petition for rehearing must be denied.

BEARD and BLYDENBURGH, JJ., concur.

# LINDSLEY V. CITY AND COUNTY OF DENVER. (No. 8716.)

(Supreme Court of Colorado. June 4, 1917. On Petition for Rehearing, May 6, 1918.)

1. MUNICIPAL CORPORATIONS \$\infty\$36(5) — ALTERATION—TEMPORARY LOCAL GOVERNMENT—OFFICERS HOLDING TWO OFFICES—"ALSO."

Under Const. art. 20, adopted as an amendment on December 1, 1902, merging the city of Denver and the part of the county within the city boundaries into the city and county of Denver, and providing a temporary local government for the city and county until the adoption of a charter, by section 3 providing that the district attorney should also be ex officio attorney of the city and county of Denver, and complete the city and county of Denver, and county of Denver and county of Denver.

far as applicable, be the charter and ordinances of the city and county, the district attorney of the county, and ex officio of the city and county, whose duties in the two capacities were distinct, and who, while acting as district attorney was governed by the state law, and while acting as city and county attorney by a different law, held two distinct and separate offices—the word "also" meaning "beside"; "as well as"; "too."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Also.]

2. Officers \$\infty\$=103-Ex Officio-Single Of-

Where the law declares that some officer already chosen and acting shall act ex officio in some other capacity, and the duties of each capacity are of the same general nature and inseparably blended in the law creating and declared the undisputed office the officer holds but fining the undisputed office, the officer holds but one office.

3. MUNICIPAL CORPORATIONS \$\iftsize 36(8)\$\to City and County Attorney\$\to Compensation\$\to Constitutional Provisions \$-\tilde{S}\$ far as APPLICABLE.

Under Const. art. 20, adopted as an amendment on December 1, 1902, merging the city of Denver with part of the county within its boundaries as the city and county of Denver, and providing a temporary local government, by section 3 declaring the district attorney to be ex officio of the city and county, and to serve the full term for which he was elected, and by section 2 that any officer of the city and county should receive a stated salary to be fixed by the charter, and by section 4 making the existing charter and ordinances, so far as ap-plicable, the charter and ordinances of the city and county, without expressly providing com-pensation for the attorney for the city and county, the whole charter was prima facie ap-plicable, the phrase "so far as applicable" not enabling the court to declare any provision inenabling the court to declare any provision in-applicable, because of inexpediency, etc., and his compensation was governed by the provi-sions of the old charter, which prescribed his powers and duties, so that he would receive the salary of both offices.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, So Far as Applicable.1

4. MUNICIPAL CORPORATIONS \$\sim 35 - Home Rule Statute—Construction.

Such amendment was intended to remedy the denial to the people of Denver of the right of a local self-government, and the administra-tion of the functions of the city and county governments in the same territory by two sets of officers, and to permit a new charter consolidating city and county affairs, so as to administer them by one set of officers.

Officers 594-Holding Two Offices-COMPENSATION.

Where an officer may and does hold two offices, he is entitled to receive the compensation attached to each.

thereon; the municipality being an involuntary political division of the state sharing the state's exemption from liability for the payment of interest, as the officer was not a creditor of the municipality, so that such a demand did not fall within the terms of the interest statute.

En Banc. Error to District Court, City and County of Denver; George W. Allen, Judge.

Action by Henry A. Lindsley against the City and County of Denver, a municipal corporation. Judgment for defendant, and plaintiff brings error. Reversed, and cause remanded, with directions to enter judgment for plaintiff.

N. W. Dixon, Clayton C. Dorsey, Henry A. Lindsley, and Walter E. Schwed, all of Denver, for plaintiff in error. James A. Marsh, City Atty., Thomas H. Gibson, and G. Q. Richmond, Asst. City Atty., all of Denver, for defendant in error. John A. Rush, of Denver, amicus curize.

BAILEY, J. On December 1, 1902, article 20, as an amendment, became a part of the State Constitution. By its provisions the city of Denver and all included municipalities and that part of the county of Arapahoe within the boundaries of the city were merged into the City and County of Denver. That territory, by express provision, also became a separate judicial district.

A temporary local government, for the city and county thus formed, to exist until the people of the city should adopt a charter, was provided by section 3 of the article, in these terms:

"Sec. 3. Immediately upon the canvass of the vote showing the adoption of this amendment, it shall be the duty of the governor of the State to issue his proclamation accordingly, and thereupon the city of Denver, and all municipal corporations and that part of the county of Arapahoe within the boundaries of said city, shall merge into the city and county of Denver, and the terms of office of all officers, of the city of Denver, and of all included municipalities, and of the county of Arapahoe, shall terminate; except, that the then mayor, auditor, engineer, council, (which shall perform the duties of a board of county commissioners,) police magistrate, chief of police and boards, of the city of Denver, shall become, respectively, said officers of the city and county of Denver, and said engineer shall be ex officio surveyor and said chief of police shall be ex officio of the city and county of Denver; and the then clerk and ex officio recorder, treasurer, assessor and corner of the county of Arapahoe, and the justices of the peace and constables holding office within the city of Denver, shall become, respectively, said officers of the city and county of Denver, and the district attorney shall also be ex officio attorney of the city and county of Denver. The foregoing officers shall hold the said offices as above specified only until their successors are duly elected and qualified as herein provided for; except that the then district judges, county judge and district attorney shall serve their full terms respectively, for which elected."

The last sentence of Section 2 of the amendment is as follows:

"If any officer of said city and county shall receive any compensation whatever, he or she shall receive the same as a stated salary, the amount of which shall be fixed by the charter."

Section 4 of the Article provides, inter alia, this:

"Sec. 4. The charter and ordinances of the city of Denver as the same shall exist when this amendment takes effect, shall, for the time being only, and as far as applicable, be the charter and ordinances of the city and county of Denver."

When Article 20 was adopted, the plaintiff was the duly elected, qualified and acting district attorney of the County of Arapahoe, and upon its taking effect became thereunder district attorney of the judicial district which the city and county constituted, and ex officio attorney of the city and county. Assuming that the provisions of the charter of the former city, relative to the office of city attorney were applicable, he took the oath of office thereunder as attorney for the city and county, appointed the assistants authorized by such charter, and entered upon the discharge of the duties of this office as therein defined, and continued to perform those duties until December 24, 1904. During the years 1903 and 1904, appropriations were made for the payment of the salary provided by the old charter for the city attorney, but payment was refused by the treasurer, and this action was brought to recover such salary covering the period from December 1, 1902, to December 24, 1904.

There is no disputed fact, and the case presents only questions of law: First, did plaintiff hold two offices? second, if so, was a salary provided for the office of aftorney of the city and county? and third, if yes, was plaintiff entitled to receive the salary of both offices?

[1, 2] Upon the first question, defendant contends that plaintiff held the office of district attorney only, and that the purpose and effect of the provision declaring him to be ex officio attorney of the city and county was to transfer the duties of city attorney, as defined in the old charter, to the district attorney, without compensation. No attempt, however, is made to show how any language of Article 20 can have that effect.

When Article 20 was framed and adopted, it was well understood that plaintiff as district attorney was a state officer whose salary was paid in part out of the treasury of the State, and in part out of the fees of the office, while, as attorney of the city and courty, he was in the service of and paid by the local government. His powers and duties in the former capacity were defined by general law, and in the latter by local law. Moreover, it was expressly provided in Article 20 that, as district attorney, he should serve for the full term for which elected; while his term as attorney for the city and county would expire when an attorney should be selected, as provided by the charter to be

adopted by the people of the city and county | legislature did create two separate and distinct for that entity. People v. Lindsley, 37 Colo. 478, 86 Pac. 352. By the opinion in that case it was practically determined that plaintiff held separate and distinct offices, the tenures of which were different, terminating at different times and for different causes. The language of the provision, "and the district attorney shall also be ex officio attorney of the city and county," plainly imports that plaintiff should hold two offices, to wit, the office of district attorney under state government, and the office of attorney of the city and county under local government. Bounanchaud v. D'Hebert, 21 La. Ann. 138; People v. Edwards, 9 Cal. 286; Denver v. Hobart, 10 Nev. 28; State v. Laughton, 19 Nev. 202, 8 Pac. 344; Moore v. Foote, 32 Miss. 480; Wyoming v. Ritter, 1 Wyo. 318.

By the law of California, when People v. Edwards was decided, the sheriff of each county was made ex officio tax collector. In that case Justice Fields said:

"The offices of sheriff and tax collector are as distinct as though filled by different persons. The duties and obligations of the one are enthe duties and obligations of the one are entirely independent of the duties and obligations of the other. \* \* \* The offices are not so blended that the bond executed for the faithful performance of the duties appertaining to one would embrace, in the absence of statute, the obligations belonging to the other."

In Denver v. Hobart, 10 Nev. 28, it appears that the law provided that the lieutenant governor should be ex officio warden of the state prison. Held:

"The offices of lieutenant governor and warden of the state prison were as distinct as though filled by different persons. The duties and obligations of the one are entirely independent of the duties and obligations of the other. The act refers to and mentions the lieutenant governor only as descriptio personæ, of the ex officio warden."

In State v. Laughton, 19 Nev. 202,1 the act involved provided that the lieutenant governor should be ex officio State librarian. The court said:

"There is no vacancy in the office of lieuten-"There is no vacancy in the office of lieutenant governor by reason of respondent's failure to file a new and additional bond (as State librarian). It is claimed and conceded by both sides that the office of lieutenant governor and the office of State librarian are separate and distinct. Making a person an ex officio officer, by virtue of his holding another office, does not merge the two into one."

In Moore v. Foote, 32 Miss. 480, where a sheriff is made ex officio tax collector, they were held separate and distinct offices, the court saying:

"The duties and responsibilities of the individual in the different capacities in which he'acts are as distinct as though each office was held by a different individual."

In Wyoming v. Ritter, 1 Wyo. 318, the decision was upon a statute providing that "the judge of probate shall be ex officio county treasurer." The court said:

"The conclusion, would therefore, seem almost inevitable if we look to the act alone creating the office of judge of probate, to ascertain the intent of the legislature, that it was the intent and the

offices, the duties of each to be performed by \* \* \* the same person. The correctness of this view as to the intent of the legislature is not lessened, but on the contrary greatly strengthened, by the fact that the duties of the office of judge of probate and that of county treasurer have no connection one with the other; each is clothed with different and distinct powers; each to perform different and distinct duties, the functions of the former being wholly judicial, the latter purely ministerial. The question, however, has been well considered by one of the most respectable courts of the Union, and has, as we think, ceased longer to be debat-able. The Supreme Court of California has able. The Supreme Court of California has held, in numerous cases, that to make a person an ex officio officer by virtue of his holding another office, does not merge the two into one.

The principle underlying all the cases which determine the effect of provisions of law declaring that some officer, already chosen and acting, shall act ex officio in some other capacity, is this: If the duties of each capacity are of the same general nature and inseparably blended in the law which creates and defines the undisputed office, then the officer holds but one office, but if the duties of the two capacities are separate and distinct so that the officer while acting in the one capacity is governed by one law, and while acting in the other is governed by a different and independent law, then he holds two distinct and separate offices.

Plaintiff as district attorney served under the State; as attorney of the city and county under the city. As district attorney his duties and powers were defined by the state constitution and general laws; as attorney for the city and county by the city charter and ordinances. His responsibilities and duties in the two offices were not only separate and distinct, but of an entirely different character, having no possible relation to or connection with each other. In such circumstances, under all the authorities, the words, "and the district attorney shall also be ex officio attorney of the city and county of Denver," mean that plaintiff held separate and distinct offices.

[3-5] Upon the second question plaintiff contends that the office of attorney of the city and county was the office created in and by the old charter continued under the new government with all its incidents, except as to the term of office, because of the adoption of such charter temporarily as the charter of the new entity. Defendant contends that, if the position of attorney of the city and county was an office, it was a new one, created by Section 2 of Article 20, without compensation, as the power which created it neither provided for nor authorized compensation.

If it be assumed that the office was a new constitutionally created and which view we think the correct one, still the conclusion that it was an office without compensation by no means results, as by such reasoning the conclusion that it was an office without powers and duties would necessarily follow. Certainly the supreme folly of creating an office without powers or

Article 20, and since they did not prescribe the powers and duties of the attorney of the city and county in the Article itself, by declaring the charter of the city of Denver to be, so far as applicable, the temporary charter of the city and county, it follows that the powers and duties of the attorney of the city and county, until the adoption of the new charter, were as defined in the old one. That charter created the office of city attorney; fixed the term; prescribed his duties; authorized him to appoint two assistants and a stenographer; prescribed his salary and that of his assistants and stenographer. The phrase, "so far as applicable," as used in connection with the adoption of the temporary charter does not place it in the power of the court to declare any provision of said charter inapplicable because of expediency, or because it does not accord with its notion of what ought to be, or with what it might think was the intention of the framers of the article. Prima facie, the whole charter was applicable, and to conclude that any provision was inapplicable it must be shown that something in the Article rendered it so.

' In Hallett v. Denver, 46 Colo. 487, 104 Pac. 1038, it was said:

"'So far as applicable' has reference to Article 20. If there is nothing in that Article which renders inapplicable the charter and ordinances of the former city, then they are the charter and ordinances of the new city and county \* \* for the time being."

If any of the provisions of the temporary charter relating to the office of the city attorney were applicable to the office of attorney of the city and county they were all applicable unless some provision of Article 20 renders certain of them inapplicable. There is nothing in Article 20 which renders any of these provisions inapplicable, except the one fixing the term of office for two years, which is inconsistent with Section 3 which requires the officers thereby appointed to hold until their successors are selected as provided in the charter. It cannot be logically held that the provisions of the temporary charter defining the duties of the city attorney, authorizing him to appoint assistants, and fixing their salaries, were applicable, but that the provision fixing the salary of the attorney is inapplicable, for that would be purely arbitrary, and would be an exercise of a legislative and not a judicial function. Whether the office of attorney of the city and county be regarded as the office created by the old charter, as contended by plaintiff, or as a new office created by Section 3 of Article 20, as contended by defendant, it was manifestly intended that it should be governed by the provisions of the old charter relating to the office of city attorney, which intention was given effect by the adoption of such charter as the temporary charter of the new entity. Unless this

duties cannot be imputed to the framers of Article 20, and since they did not prescribe the powers and duties of the attorney of the city and county in the Article itself, by declaring the charter of the city of Denver to be, so far as applicable, the temporary charter of the city and county, it follows that the powers and duties of the attorney of the city and county must have been fixed by the same law which prescribed his term of the city and county, until the adoption of the new charter, were as defined in the old one. That and by the same token when it did the one charter created the office of city attorney;

There is no dispute upon the proposition that "where an officer may, and does, hold two offices, he is entitled to receive the compensation attached to each." 29 Cyc. 1424; Mechem, Public Officers, sec. 859; Throop, Public Officers, sec. 496; United States v. Brindle, 110 U. S. 688, 4 Sup. Ct. 180, 28 L. Ed. 286; United States v. Saunders, 120 U. S. 126, 7 Sup. Ct. 467, 30 L. Ed. 594; United States v. McCandless, 147 U. S. 692, 13 Sup. Ct. 465, 37 L. Ed. 334; Cornell v. Irvine, 56 Neb. 657, 77 N. W. 114; State ex rel. v. Grant, 12 Wyo. 23, 73 Pac. 470, 2 Ann. Cas. 382; and In re Conrad (C. C.) 15 Fed. 641.

In State ex rel. v. Grant, supra, it appears that the secretary of state was required to act as governor upon the death of the incumbent of the latter office. Upholding his claim to the salary of both offices the court said:

"He is required to give attention to the duties of two state offices; his responsibilities are largely increased; and every principle of justice requires that he be compensated."

So in Re Conrad, supra, where a chief supervisor of elections, declared by statute to be ex officio United States Commissioner, claimed compensation in both capacities, his claim was upheld, and the court said that, where an officer is required to hold two positions, "it is more consonant with the principles of justice and equity that compensation for that service should be made according to the provisions of the statute that applies to it, rather than to deny such remuneration on mere technical grounds and to require the gratuitous performance of the service by the officer." There is nothing in Article 20 which either expressly or by implication takes this case out of the general rule.

Aichele v. Denver, 52 Colo. 183, 120 Pac. 149, is relied upon as an authority against the claim of plaintiff. That case involved an entirely different situation from the one at bar, both in fact and law. Aichele was county clerk and ex officio recorder of Arapahoe County when Article 20 was adopted. It was declared in Section 3 thereof that "the then [county] clerk and ex officio recorder \* \* \* shall" be said officer "of the city and county of Denver." In the action which he brought Aichele claimed that he held also the office of city clerk, and was entitled to the salary of that office as fixed by the charter. There was not the slightest ba-

sis for this claim, except as an inference | sought to be drawn from the Johnson Case, 34 Colo. 143, 86 Pac. 233, which was later overruled by the Cassiday Case, 50 Colo. 503, 117 Pac. 357. · Aichele was by the clear, explicit language of Section 3 of Article 20 appointed to one office, and to one office only. Plaintiff expressly held two separate and distinct offices. Nor does the reasoning of that case, based upon the purpose of the framers of Article 20 to consolidate the duties of city and county offices in the hands of one set of officials, have the slightest application to this case, for the reason that the provision under consideration was not and could not be within that purpose, since it formed no part of the general plan. It should be observed that, as to all local officers performing consolidated duties, they were limited by Article 20 to one compensation. Former city officials performing consolidated duties were by the last sentence of Section 2 of the Article limited to the pay provided by the charter, and former county officers designated to perform consolidated duties were named for only one office and could not, therefore, have two salaries. We search Article 20 in vain to find any hint of such limitation as to the pay of the district attorney. The provision as to that office was special and temporary. He was not an official of, nor did he discharge any duties pertaining to, the city and county. The appointment of the district attorney to the office of attorney of the city and county was as foreign to the general plan of consolidation as would have been the appointment of the attorney general of this State. If the latter had been so appointed no one could reasonably contend that the two offices were merged.

Moreover, a consolidation of the office of district attorney and of attorney of the city and county was not a change which could be perpetuated by the people of Denver in their charter as contemplated by Article 20 because by Section 2 thereof their authority is limited to providing for city and county offices. That is plainly decided in Dixon v. People, 53 Colo. 527, 127 Pac. 930.

If, therefore, the clause as to the district attorney be given its legal effect it is plain that he held two separate offices, and the court may not by intendment permit the general rule, established for county and city offices under an altogether different state of facts and different provisions relative thereto, to derogate from the special provision adopted as to this particular office, without violating fundamental legal principles. The provision as to the district attorney is sui generis, and has no analogy to the provisions relating to county and city officers. It is special in nature, grafted upon a general plan, and its intent must be determined from its express language as though stand-condition that the people establish such a

ing alone. Thus considered there can be no doubt that plaintiff held separate and distinct offices. This fact is emphasized by the use of the word, "also," which means, "beside," "as well as," "too," The meaning is that plaintiff as district attorney should be attorney of the city and county as well; that is, that he should be district attorney and besides should be attorney of the city and county: or district attorney and attorney of the city and county, too.

In the adoption of Article 20 the people rightfully believed that if they should contract the boundaries of the county and expand those of the city so as to make them cover the same territory, and consolidate the duplicate county and city offices into the hands of one set of officers, they would be able to find competent persons willing to perform the consolidated duties of any two offices for the salary attached to one, and that a single salary would be full compensation for the performance of such consolidated duties. The office of district attorney and of attorney of the city and county are not duplicates, and have no duties in common, nor is there any foundation for holding that the salary of the district attorney was a fair and just compensation for performing the duties of both offices. On the contrary, the first charter adopted under Article 20 in 1904, fixed the salary of the attorney for the city and county at \$4,600.00 per annum. That charter was framed by a convention of freeholders and ratifled by a vote of the people of the city and county. We are bound to assume that the salary so authorized is no more than a fair compensation for the responsibilities and duties of the office. From the 1st of January, 1905, to the present time, the district attorney in and for the City and County of Denver has been paid the salary attached by law to his office, and the attorney of the city has been paid the salary fixed for his office by the charter.

The charter of the city of Denver, enacted by the General Assembly, fixed the salary of the city attorney at \$5,000.00 per annum; yet it is contended that in framing Article 20 the General Assembly was guilty of the injustice of intending to compel the district attorney to perform gratuitously services which that body had valued at \$5,000.00 before consolidation, and which the people of the city and county, since consolidation, and up to this good day have valued at \$4,600.00 per annum.

The evils sought to be remedied plainly were: First, the denial to the people of Denver of the right of local self government, and second, the administrations of the functions of city and county governments, in the same territory, by two sets of officers. The conclusion follows that the purpose of Article 20 was to grant Home Rule to the Oity and County of Denver, subject to the government as would consolidate the functions of city and county affairs so as to be administered by one set of officers. And the manifest purpose of Section 3 was to remedy the second evil by immediately setting inoperation a temporary or provisional government which the people of the city and county could perpetuate in their charter.

It is also urged by defendant that the purpose of the framers of Article 20 by terminating the term of the then city attorney was to require the district attorney to act as attorney of the city and county without compensation, and thus save the salary of such attorney during the temporary government. That is a pure assumption, and since no such intention is expressed in Article 20 the court may not give effect to a suggestion of a merely speculative character. A legislative purpose does not become law unless it be expressed and enacted in written words. No matter how clear the purpose may be in the legislative mind, if language is not employed to make it effective, the courts cannot supply the deficiency; and the purpose fails in whole or in part, according to the insufficiency of the language. This is the fundamental principle of written law. From it follows the cardinal rule of construction that the intent must be found in the language of the instrument. If the language be clear, and capable of but one meaning, then there is no necessity or room for construction. The duty of the courts is to enforce the law as written. The policy of the law does not concern them. nor whether it seems wise or unwise, just When the written language is ambiguous and may reasonably have different meanings then, and then only, may a court consider what it conceives to be the general purpose of the enactment to aid it in resolving such ambiguity. But in respect to the language under consideration, "and the district attorney shall also be the attorney of the city and county," there is no uncertainty or ambiguity, and there is no phrase or word in Article 20 which casts any doubt upon its meaning. The amendment in plain and unequivocal language ended the term of the old city attorney, created the new office of attorney of the city and county and named a new incumbent. right and authority to do this is clear, and the motive is of no concern of the courts. The whole situation may be thus expressed:

- 1. Plaintiff held two separate offices.
- 2. To each of them a salary was attached.
- 3. Under the general rule of law he was entitled to both salaries.
- 4. There is no provision in Article 20 which takes his case out of the operation of this rule.
- "In the case of all written law it is the intent of the law that it is to be enforced. But this intent is to be found in the instrument itself.

  \* \* \* That which the words declare is the meaning of the instrument, and neither courts nor legislatures have a right to add to or take away from that meaning."

"It is not allowed to interpret what has no need of interpretation. Where an instrument is worded in clear and precise terms, when its meaning is evident, and leads to no absurd conclusions, there can be no reason for refusing to admit the meaning which the words naturally import. To go elsewhere in search of conjectures to restrict or extend it is but to elude it. If this dangerous method be once admitted, there will be no instrument which it will not render useless."

See Newell v. People, 7 N. Y. 9, 83; Beardstown v. Virginia, 76 Ill. 34; Rasmussen v. Baker, 7 Wyo. 117, 50 Pac. 819, 38 I. R. A. 773; 8 Cyc. 732; 6 A. & E. Enc. 922.

The foregoing principles are applicable in this case. To prevent the clause, "the district attorney shall also be ex officio attorney of the city and county," from being meaningless and non-effective, it is necessary to hold that it was intended that the office of attorney of the city and county should be governed by the provisions of the charter relating to the office of city attorney. That point being settled the meaning of the enactment is clear; and it may well be added that if that meaning had not been adopted and acted upon during the period of the temporary government, the proper and orderly administration of the vast legal business of the city would have been impossible. When, as here, the law is plain, the court should enforce it as written.

Paraphrasing the language of the Supreme Court of Wyoming, already quoted:

"The plaintiff was required to give attention to a very important state office, and also to a very important city and county office. His responsibilities were largely increased, and every principle of justice requires that he be compensated."

The inherent justice of this proposition appeals to all. The plain language of Article 20, and every fair inference to be drawn from it, manifests the intention that plaintiff should hold those offices as separate and distinct positions, and receive the salary attached to each. No question of double salaries for consolidated duties under local government is presented, but the question is whether it was intended that a district attorney, entitled to his salary as such, as every other district attorney in the State was, should also be held responsible for the performance of the very important and arduous duties of attorney of the city and county of Denver without any compensation? There is nothing in Article 20 indicating that any such unjust imposition was intended and the answer to the question must be in the negative and the judgment accordingly reversed.

The judgment is reversed and the cause remanded to the district court, with directions to enter judgment for plaintiff according to the prayer of his complaint.

ALLEN, J., not participating.

### On Petition for Rehearing.

PER CURIAM. After a careful consideration of the grounds urged for a rehearing, the court it still satisfied that its conclusion, as to the general right of plaintiff to recover, is sound.

[6] The defendant in error urges that in any event the plaintiff in error has no right to interest on the sum found due him as salary: thus raising a question not heretofore argued or considered. We are of the opinion that the position is well taken.

In Montezuma County v. Wheeler, 39 Colo. 207, 89 Pac. 50, it was held that a division superintendent of irrigation, having a claim against the county for salary, was not entitled to interest thereon. This was upon the ground that a county, being an involuntary political division of the state, shares with the state an exemption from liability for the payment of interest, in the absence of an express provision for such payment. The plaintiff in this case sues for salary due him from a municipality and the case is clearly within the above-named decision.

The case of Golden v. Western Co., 60 Colo. 382, 154 Pac. 95, in which interest was allowed on a debt due for material furnished in the construction of a waterworks system for the city, is distinguished from Montezuma County v. Wheeler, supra, and is distinguishable from the case at bar. The contract for material for the waterworks was entered into by the city, as the court points out, in its private or business capacity; while the claim in the case at bar is against the municipality in its governmental capacity. The Montezuma County Case is conclusive upon the question of interest here raised, and we hold that no interest can be allowed on plaintiff's claim.

Another ground for holding that interest should not be allowed is that a public officer. having a claim for salary, is not a creditor of the state, or of a political subdivision thereof, and, therefore, such demand does not fall within the terms of the interest statute. This fact clearly distinguishes the case from the cases cited by counsel as being in conflict with the Montezuma County Case. They dealt with the question of interest on instruments in writing and money due on account, where the relation of creditor and debtor plainly existed. They have, therefore, no bearing on the question here involved.

The opinion heretofore delivered will be construed as allowing judgment only as to the principal of the claim. The opinion is modified accordingly, the petition for rehearing is denied, and cause remanded to the district court with directions to enter judgment for plaintiff only for the amount of salary due and costs.

ALLEN, J., not participating.

STATE v. INDEPENDENCE GAS CO. et al. (two cases). (Nos. 21142, 21143.)

(Supreme Court of Kansas. April 6, 1918. Rehearing Denied May 16, 1918.)

(Syllabus by the Court.)

1. APPEAL AND ERROE \$\iiii 339(2)\$ — Time for Appeal—Dismissal.

When an action is dismissed as to certain defendants, all orders which were made prior to the order of dismissal, and of which complaint is really and the statement of the complaint. is made by those defendants, must be appealed from within six months after the order of dismissal is made.

2. Gas &=11—Change of Rates by Receiver—Consent of Public Utilities Commis-SION.

The courts of this state have no jurisdiction to appoint receivers for the purpose of regulating the rates of public service corporations, and neither the courts nor the receivers of such corporations have jurisdiction to change legal rates without the consent of the public utilities commission; but, when the legal rates charged by the receiver of a public service corporation have been enjoined by a court of competent jurisdiction, the receiver may put into effect rates to be charged until the commission establishes a new rate.

3. APPEAL AND ERROR 4 781(1) - STIPULA-TION-DISMISSAL.

An appeal may be dismissed when it appears that all the orders from which the appeal is taken were made under a stipulation signed by the party appealing.

4. APPEAL AND ERBOR & 790(1)—DISMISSAL
—REVIEW INEFFECTUAL.
An appeal may be dismissed when this court

cannot make any order that will affect the rights of the parties thereto.

Appeal from District Court, Montgomery County.

Quo warranto by the State of Kansas against the Independence Gas Company and others, in which the Wyandotte County Gas Company and the Kansas City Pipe Line Company were thereafter made parties defendant. Action dismissed as to the Wyandotte County Gas Company, after its receivers had been discharged; and from a judgment forbidding certain deliveries of natural gas and ordering certain deliveries, the Wyandotte County Gas Company and the Kansas City Pipe Line Company separately appeal. Appeals dismissed.

John H. Atwood, of Kansas City, Mo., for appellants. Robert Stone, of Topeka. Chester I. Long, of Wichita, T. S. Salathiel, of Independence, and J. W. Dana, of Kansas City, Mo., for appellees.

MARSHALL, J. On January 5, 1912, in the district court of Montgomery county, the Attorney General commenced an action in quo warranto against the Independence Gas Company, the Consolidated Gas, Oil & Manufacturing Company, and the Kansas Natural Gas Company; and, in the petition in that action, charged that the defendants had violated the anti-trust statutes of the state. The Kansas Natural Gas Company was then

gas through the eastern part of the state to the Wyandotte County Gas Company in Wyandotte county, and, in transporting the gas, used the pipe lines of the Kansas City Pipe Line Company. After the action had been commenced, the Wyandotte County Gas Company and the Kansas City Pipe Line Company were made parties thereto. The Wyandotte County Gas Company appeared specially and filed a motion to quash the service of the summons made on it. That motion was overruled. The Wvandotte County Gas Company and the Kansas City Pipe Line Company each filed a demurrer. The demurrers were never heard by the court. Receivers were appointed for the Kansas Natural Gas Company, for the Wyandotte County Gas Company, and for the Kansas City Pipe Line Company. On October 16, 1915, the receivers for the Wyandotte County Gas Company were discharged, and the action was dismissed as to that company. No appeal was taken at that time, nor at any time within six months thereafter. On October 16, 1916, the court rendered the following judgment:

"It is therefore considered, adjudged, and decreed that none of the distributing contracts aforesaid are binding upon, or effective against, said receiver, and that he should not, and is hereby forbidden to, deliver natural gas to any of said distributing companies under the distributing contracts formerly existing between the Kansas Natural Gas Company and said distributing companies, respectively; and he is hereby ordered to deliver natural gas to such of said distributing companies as will receive the same at the rates and prices, and on the terms named in the schedule of rates and prices heretofore promulgated by said receiver to said distributing companies, respectively; and the acts of said receiver in promulgating said schedules are hereby approved."

From that judgment the Wyandotte County Gas Company and the Kansas City Pipe Line Company have filed separate appeals.

[1] 1. The Wyandotte County Gas Company contends that:

"The court below had no jurisdiction under sections 50 and 51 of the Code [Gen. St. 1915, §§ 6940, 6941] to summon the Wyandotte Country Gas Company, a domestic corporation, domiciled, located, doing business, and owning property only in Wyandotte county, to appear in the district court of Montgomery county, in an action for the recovery of a fine, penalty, or forfeiture imposed by statute."

In the order discharging the receivers of, and dismissing the action against, the Wyandotte County Gas Company, there was a finding that all the pleadings charging or attempting to charge the Wyandotte County Gas Company with acts subjecting it to penalties had been withdrawn by stipulation. There was therefore no action pending against the Wyandotte County Gas Company on October 16, 1916; and there was then no petition charging that company with any act which would subject it to any penalty.

All errors that had been committed by the County Gas Company, the court did not have trial court against the Wyandotte County power or jurisdiction to cancel the contracts Gas Company were concluded by the judg- between that company and the Kansas Nat-

engaged in the transportation of natural gas through the eastern part of the state to the Wyandotte County Gas Company in Wyandotte county, and, in transporting the gas, used the pipe lines of the Kansas City Pipe Line Company. After the action had been commenced, the Wyandotte County Gas Company and the Kansas City Pipe Line Company and the Kansas City Pipe Line Company were made parties thereto. The Wyandotte County Gas Company to appeal within six ly and filed a motion to quash the service of months after the date of that company; and those errors cannot now be presented, for the reason that no appeal was taken within six months from the date of the dismissal. All questions concerning the service of summons, concerning the appointment of the receivers, and concerning the receivers, and concerning the control and concerning the service of summons, concerning the appointment of the reason that no appeal was taken within six months from the date of the dismissal. All questions concerning the service of summons, concerning the appointment of the receivers, and concerning the conduct until the order of dismissal, are concluded by the failure of the Wyandotte County Gas Company to appeal was taken within six months from the date of the dismissal.

[2] 2. The Wyandotte County Gas Company contends that the court had no jurisdiction to appoint receivers to regulate rates; that neither the court nor the receivers had jurisdiction to change the existing rates of the Kansas Natural Gas Company, or of the Wyandotte County Gas Company, without the consent of the public utilities commission; and that the court had no jurisdiction to disavow and cancel the supply contract existing between the Kansas Natural Gas Company and the Wyandotte County Gas Company.

The rate-making body of public service corporations in this state is the public utilities commission. Under section 8358 of the General Statutes of 1915, the rates charged by the Kansas Natural Gas Company and by the Wyandotte County Gas Company on January 1, 1911, became, and thereafter were, the legal rates; and those rates could not be changed without the consent of the public utilities commission. State ex rel. v. Gas Co., 88 Kan. 165, 127 Pac. 639; State ex rel. v. Flannelly, 96 Kan. 372, 152 Pac. 22; Telephone Co. v. Utilities Commission, 97 Kan. 136, 154 Pac. 262; City of Scammon v. Gas Co., 98 Kan. 812, 160 Pac. 316: State ex rel. v. Gas Co., 100 Kan. 593, 165 Pac. 1111.

The order from which this appeal was taken was based partly on a conclusion of law:

"That the supply contracts with the distributing companies, whose plants are located within the state of Kansas, are invalid, illegal, and void, being in violation of the laws of this state and of the United States, and are not binding on the receiver."

The validity of the contract between the Kansas Natural Gas Company and the Wyandotte County Gas Company is immaterial in these appeals, for the reason that the rates fixed by the contract were in effect on January 1, 1911, and became legal rates by virtue of section 8358 of the General Statutes of 1915. The trial court did not have power in the action then pending before it to declare those rates illegal. State v. Flannelly, 96 Kan. 372, 382, 152 Pac. 22.

The court did not cancel the contracts; it found that the contracts were illegal and void, and stopped there. In this action, under the pleadings as they then stood, with the action dismissed as to the Wyandotte County Gas Company, the court did not have power or jurisdiction to cancel the contracts between that company and the Kansas Nat-

ural Gas Company. The court ordered the receiver of the Kansas Natural Gas Company not to deliver natural gas to any distributing company except to such as would receive the same at the rates and prices that had been fixed by the receiver. The Wyandotte County Gas Company was distributing gas in Wyandotte county. Neither the court nor the receiver could compel that company to receive gas at any price other than the one named in the contract between the Wyandotte County Gas Company and the Kansas Natural Gas Company.

On December 10, 1915, the public utilities commission promulgated an order increasing the rates that had been established by section 8358 of the General Statutes of 1915. On June 3, 1916, in an action then pending in the United States District Court for the District of Kansas, in which John M. Landon, receiver of the Kansas Natural Gas Company, was plaintiff, and the public utilities commission and others were defendants, a temporary injunction was issued enjoining the public utilities commission and its attorneys and the Attorney General from putting into effect and enforcing, by legal proceedings or otherwise, the rates established by law or those fixed by the public utilities commission. The injunction took effect on August 29, 1916. In Telephone Co. v. Utilities Commission, 97 Kan. 136, 154 Pac. 262, this court said:

"Where a court having jurisdiction determines that a rate fixed by the statute and approved by the utilities commission is confiscatory, the utility is left free to operate under such rate as it may establish until a new one has been fixed by the commission." Syl. 5.

When the federal court enjoined the rates that were in effect on January 1, 1911, and enjoined the rates that the public utilities commission put into effect on December 10, 1915, there were no legal rates that could be collected by the receiver of the Kansas Natural Gas Company. In order to serve the public, the receiver was then compelled to put into effect rates of his own; that he did. His rates were approved by the order from which these appeals have been taken.

The Wyandotte County Gas Company, in its specification of errors, presents other questions; but they are not argued in its brief and will not be discussed.

[3] 3. The appeal of the Kansas City Pipe Line Company is not identical with that of the Wyandotte County Gas Company. There is but one brief on the two appeals, and that brief presents the cause of the Wyandotte County Gas Company. The questions involved in the appeal of the Wyandotte County Gas Company have been disposed of, and, so far as the appeals are identical, the questions involved in the appeal of the Kansas City Pipe Line Company have also been disposed of.

The Kansas City Pipe Line Company, with a number of other parties to the action, entered into a stipulation which has been commonly called a creditors' agreement. Under that agreement, none of the matters, of which the Kansas City Pipe Line Company complains, can be modified or reversed, for the reason that its property has been operated and controlled by its receiver in conformity with the stipulation.

The action in the district court of Montgomery county has been dismissed, and the whole gas controversy is now in the federal courts; and that court, through its receivers, has control of all the property connected with the Kansas Natural Gas Company.

[4] 4. John M. Landon, receiver of the Kansas Natural Gas Company, moves to dismiss these appeals. There is no substantial difference between the views herein expressed and the order made by the district court on October 16, 1916. Any order made at this time in this action cannot have any effect in the suits now pending in the federal courts.

The appeals are therefore dismissed. All the Justices concurring, except DAWSON, J., who did not sit.

# ENGELBRECHT v. HERRINGTON. (No. 21007.)

(Supreme Court of Kansas. Nov. 10, 1917. On Rehearing, May 11, 1918.)

# (Syllabus by the Court.)

1. Limitation of Actions \$\isplies 46(5) - Running of Statute-Accrual of Action.

An owner of land entered into a contract with his son that, if the son would remain at home and help the father pay a mortgage debt upon his farm, he would leave to the son one-half of the farm at the death of the father and mother, and the son in accordance with the contract remained at home for about 5 years during which time the mortgage debt was paid. More than 26 years after performance by the son had been completed the father conveyed the farm to a stranger, and died without devising any part of the land to the son. Held, in an action brought by the son for specific performance, or for damages in lieu of performance, that when the father conveyed the land to another and placed it beyond his power to devise one-half of the land to the son and performance by the father became a legal impossibility, a cause of action accrued at once in favor of the son, and from that time the statute of limitations began to run against him.

# On Rehearing.

2. Pleading \$\infty 367(1) - Indefiniteness-Motion.

To be available, an objection to the generality or indefiniteness of the averments of a pleading should be raised by motion.

3. CREATION OF EXPRESS TRUSTS—STATUTE.

Under the statute, an express trust relating to lands can only be created by a writing signed by the party creating the same, or by his attorney lawfully authorized in writing.

4. FRAUDS, STATUTE OF \$==71-SALE OF LAND | According to his testimony, the same words

-PAROL CONTRACT.

A parol contract for the sale of lands, or of any interest therein, is within the statute of frauds and unenforceable, unless it is taken out of the statute by some fact or circumstance connected with it.

5. Frauds, Statute of &==129(5) — Parol Contract for Sale of Land—Payment of Purchase Price—Payment in Services.

The payment of the purchase price does not

take a verbal contract for the sale of lands out of the statute of frauds, nor will the payment of the consideration in services have that effect, if the value of the services may be determined and compensation in money may be made therefor.

Appeal from District Court, Shawnee County.

Action by Peter Engelbrecht against J. B. Herrington, as executor of the will of Andrew Engelbrecht. From a judgment for defendant, plaintiff appeals. Affirmed.

Crane, Hayden & Hayden, of Topeka, for appellant. Hazen & Gaw, of Topeka, for appellee.

JOHNSTON, C. J. This action was brought by Peter Engelbrecht against J. B. Herrington, the executor of the will of Andrew Engelbrecht, deceased, to recover land, or rather the value of land, which it is alleged the deceased orally agreed to devise to plaintiff. Plaintiff appeals from a judgment in defendant's favor.

In 1878 Engelbrecht purchased a farm and at the same time executed a mortgage for most, if not all, of the purchase price. He and his family occupied it as a homestead from that time until June, 1909, when he sold and conveyed it to another. It was alleged by plaintiff that in 1884 his father entered into an oral agreement with him by which it was agreed that, if plaintiff would stay at home, work upon the farm, and help earn money enough to pay the mortgage debt against it, he would leave plaintiff one-half of it at the death of himself and wife. It was further alleged that in June, 1909, the father, in violation of the contract, had sold the farm for \$8,000, when it was really worth \$12,000, and he therefore asked a recovery of \$6,000. The answer of the defendant was a general denial and an averment that the action was barred by the statute of limita-The testimony offered in support of the plaintiff's claim consisted principally of conversations which the plaintiff claimed to have heard between his father and mother. both of whom had died some time before this action was brought. He testified that one of these occurred about 1885, that the other was several months later, and that in each of which his father had said to his mother that he had entered into a contract with Peter by which he had agreed to leave Peter onehalf of the farm when they (his parents) were through with it. The response of the mother in each case was: "I am glad of it."

were used by the father and mother in each of these conversations. He testified that about five years afterward he heard his father say to his mother that Peter had performed his part of the contract and that he now had money enough to pay off the mortgage. Although Peter was present at all of the conversations, he says he took no part in any of them. Nothing was said by either the father or mother to him nor by him to them. On this account it could not be said that these statements constituted communications or transactions had between him and deceased persons. Other witnesses, however stated that they heard the father in his lifetime praise Peter and his work and say that he would give the property to Peter when he died. Evidence produced by defendant consisted of facts and circumstances inconsistent with the contract pleaded. For instance, in 1901 Andrew Engelbrecht made a will leaving a life estate in the farm to his wife, and at her death the property was to be equally divided among his children, including Peter. There were eight children in the family, and it appears that others of them worked on the farm after they reached majority, although Peter and Mrs. Herrington were at home much longer than the others after they became of age. When the farm was sold there was no recognition by Andrew Engelbrecht of a contract to give his son one-half of the land nor any suggestion that Peter had any interest in it. After his wife's death Andrew Engelbrecht executed another will, the one probated after his death, and in it he gave his property in equal shares to his children, with the exception of two of them, but Peter was given a share as though he had no claim or interest in the estate. The general verdict of the jury was in favor of the defendant, and they also returned answers to a number of special questions. Among other things, the jury found that the alleged contract had been made between plaintiff and his father, and that plaintiff had performed his part of it; that the farm was a homestead when the contract was made, but that the wife of Andrew Engelbrecht did not join in making the contract; and that she was afterwards informed that a contract had been made, when she said: "I am glad of it." It was also found by the jury that the oral contract could not be performed in a year, and that it was not intended by the parties that it should be performed within that time, and. further, that the plaintiff could be compensated in money for his services rendered to his father from 1884 to 1889, and that the first time he ever made any claim to the farm or to the proceeds of it was on January, 1915, which was shortly before this action was brought. The plaintiff moved for judgment on the special findings and the

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admissions of the parties, but the court denied the motion and awarded judgment in favor of the defendant.

Much attention has been devoted to the question whether the parol contract was within the statute of frauds, and therefore unenforceable on the grounds: (1) That it was a contract affecting real estate; and (2) that it was not capable of performance nor intended to be performed within one year. Another contention argued at length is that the subject of the contract was a homestead, and that, as the wife did not join in the execution of the contract, it was absolutely void. It is unnecessary to determine these questions so ably argued by counsel, as in the opinion of the court the contention that the action is barred by the statute of limitations must be sustained.

The contract was made in 1884, and fully performed by plaintiff in 1889. He had completed his part of the contract 26 years before the action was brought. According to his version of the contract, he was not to receive one-half of the farm until his parents were through with it. The expressions used were intended to convey the meaning that, if he worked at home and helped to pay the mortgage debt, his father would leave or will him one-half of the farm. The agreement, as we have seen, was in parol. He is seeking damages in lieu of specific performance of the contract, recognizing that performance of it has become impossible. An action upon an oral contract like the one under which plaintiff claims is barred within 3 years after the cause of action accrues. When a time is fixed for the performance of a contract, ordinarily there can be no breach of it until that time has arrived. Where an owner of land makes a promise to an employé that, if he will perform personal services for him during his lifetime, the employé will be given a share of his estate, the right of action in favor of the employe will not accrue until after the death of the employer, unless in his lifetime he has committed an actionable breach of the contract. 25 Cyc. 1074. If a party repudiates and renounces the entire contract, the other is absolved from its obligations, and may at his option bring an action at once for the damages he has sustained. 17 R. C. L. 759. An illustration of the rule is found in Heery v. Reed, 80 Kan. 380, 102 Pac. 846, where a girl, Maggie, was taken into the home of Devenney to live with and work for him until the death of himself and wife, in consideration of which she was to receive all of his property at the death of himself and wife. After many years of service Devenney discharged her and drove her from his premises, and he made no provision for her in his will. In an action brought by her to recover the estate it was contended that the discharge was a

statute of limitations in motion, and a recovery thereon was barred within 3 years after that time. The contention was not sustained, it being held that, as the term of service of Maggie was to continue until the death of Devenney and wife, she was at liberty to ignore the breach and hold herself in readiness to perform the services contracted for until the specified time. She had the option of accepting the renunciation and suing him for the damages sustained, but she also had the right to treat the contract as a subsisting one and await the time for final performance specified in the contract. Until that time the statute of limitations did not begin to run.

That authority is not controlling here. In this case the plaintiff had long since executed his part of the contract, and, what is of greater consequence, his father absolutely disabled himself from performing his part of the contract in June, 1909, by the conveyance of the land to another. Thereafter it was beyond the power of the father to leave or will one-half of the land to the plaintiff. The contract being fully executed on the part of the plaintiff, and performance on the part of his father being a legal impossibility, the contract was at an end, and the rights of the plaintiff then fully accrued. The action of the father was more than a renunciation which the plaintiff at his option might or might not elect to treat as a breach of the contract; it was a self-imposed disability which ended the life of the contract. There was no occasion or excuse to await the death of the plaintiff's father and mother, as performance was beyond the power of the father, and nothing that the plaintiff could do thereafter would revitalize the contract or enable him to obtain a share of the land that had been conveyed to a stranger. Whether he sought damages in lieu of the land or the value of his services on the quantum meruit, his cause of action had accrued when the conveyance was made, and from that time the statute of limitations was running against him. It has been said that:

"If the vendor has broken his contract by conveying the property to a third person, the purchaser's right of action for damages accrues at the time of the conveyance, and the statutory bar is computed from that date." 25 Cyc. 1090.

In 6 Ruling Case Law, p. 1028, reference is made to the voluntary disability of a party to a contract, and it is said:

"Under the view that such a renunciation may be treated as a breach, a party to a contract has an immediate right of action if the act of the other party in voluntarily disabling himself from performing can be treated as a repudiation of the contract. Illustrations that have been given of this rule are the case of a man who, having promised to marry a woman on a certain day, marries another woman before that day, or where one who has contracted to execute a lease on a future day for a certain term executes before that day a lease to another for the same term," etc.

it was contended that the discharge was a In Union Insurance Co. v. Central Trust repudiation of the contract which set the Co., 157 N. Y. 633, 52 N. E. 671, 44 L. R. A.

227, the rule was applied to an arbitration agreement, and it was said:

"The principle is not confined to agreements of submission, but is applied to contracts generally, and the rule is universally recognized that where a party, before the time of performance arrives, puts it out of his power to keep his contract, there is an immediate right of action for a breach of that contract by anticipation." 157 N. Y. at page 643, 52 N. E. at page 674 (44 L. R. A. 227).

Authorities tending to support the view taken are Wolf v. Marsh, 54 Cal. 228; Cochrane v. Oliver, 7 Ill. App. 176; Henry v. Rowell, 31 Misc. Rep. 384, 64 N. Y. Supp. 488; Harris v. Harris, 70 Pa. 170; Maitland v. Zanga, 14 Wash. 92, 44 Pac. 117; Crist v. Armour, 34 Barb. (N. Y.) 378; Burtis v. Thompson, 42 N. Y. 246, 1 Am. Rep. 516; Stark et al. v. Duvall et al., 7 Okl. 213, 54 Pac. 453; Crabtree v. Messersmith, 19 Iowa, 179; note 8 Ann. Cas. 113.

Plaintiff's pleading can only be construed as an action for the enforcement of a contract under which he was to have specific property, namely, one-half of a certain farm. The statute of limitations began to run on the contract either for specific performance or for damages in lieu of performance as soon as the right of action thereon accrued. It accrued when the conveyance was made by plaintiff's father, which was more than three years before his action was commenced. His action can hardly be regarded as one on the quantum meruit for the value of personal services rendered by him, and even if it were open to that interpretation, the statute of limitations would probably have run upon that action within three years after the services had been performed.

In any view it must be held that the cause of action was barred when the action was commenced, and hence the judgment of the district court is affirmed. All the Justices concurring.

# On Rehearing.

A rehearing has been granted in this appeal. On the former hearing, the judgment in favor of the defendant was affirmed, upon the ground that plaintiff's alleged cause of action was barred by the statute of limitations. Engelbrecht v. Herrington, 101 Kan. 720, 172 Pac. 715. The rule of law declared in the first opinion is conceded to be correct and applicable in ordinary cases of breach of contract; but it is contended that because of the agreement and conduct of the parties a trust arose in favor of the plaintiff, and that the proceeds of the farm sold by his father in 1909 became a trust fund in the hands of the father, and that the statute of limitations did not run until the plaintiff obtained knowledge of the repudiation of the

[2] First, it is said that the question of the statute of limitations was not sufficiently pleaded to raise an issue in the case. In his answer the defendant set forth a general de-

nial, and then alleged that "plaintiff's pretended cause of action is barred by the statute of limitations." The allegation as to this defense is not as specific as it should have been, but no reply was filed, and no question was raised as to the sufficiency of the allegation at the trial. An attack as against generality, or as to the statement of conclusions of fact in a pleading, should be raised by motion, and such an objection is not good, even when raised by a demurrer. Meagher v. Morgan, 3 Kan. \*372, 87 Am. Dec. 476; L., L. & G. Rld. Co. v. Leahy, 12 Kan. 124; McPherson v. Kingsbaker, 22 Kan. 646; Neosho County v. Spearman, 89 Kan. 106, 130 Pac. 677. No objection having been made as to the form and sufficiency of the averment on the trial, nor yet in the brief filed at the first hearing of the appeal, it cannot be raised at this time.

[3] The question then is: Did the contract between the father and son create a trust which prevented the statute of limitations from running against his action? The plaintiff contends that, as an express trust is created by agreement which specifically defines the persons, property, and purposes of the trust, the agreement between Andrew Engelbrecht and himself created an express trust, and that in case of such a trust the statute does not begin to run until there has been a denial or repudiation of the trust. The contract sought to be enforced and upon which a trust is claimed was not in writing. It related to lands, and under the statute an express trust concerning real estate can only be created by a writing signed by the party creating the same or by his attorney, lawfully authorized in writing. Gen. Stat. 1915, \$ 11674; Knaggs v. Mastin, 9 Kan. 532; Gee v. Thrailkill, 45 Kan. 173, 25 Pac. 588.

[4, 5] Aside from this objection, the contract is one which cannot be enforced because of the prohibition of the statute of frauds. Under that statute a contract for the sale of lands or of any interest therein is void, and unenforceable, if it, or some memorandum of it, is not in writing. It is likewise void if it is one not to be performed within a year. As the contract in question was oral, and there is a finding by the jury, which the court adopted, that it was not capable of performance within one year, and further that it was not the intention of the parties that it should be performed within that time, it must be deemed to be void unless it is taken out of that statute by some fact or circumstance in the case. Gen. Stat. 1915, 4889. Plaintiff contends that performance of the contract on his part was sufficient to take it out of the statute. Performance by him is the equivalent of payment of the purchase price of one-half of the farm, but under the authorities that will not take a parol contract concerning lands out of the statute.



591, there is a discussion as to what will take a parol contract for the sale of lands out of the statute, and, after stating that improvements made after the death of one of the contracting parties and without authority from his heirs would not have that effect, and also that mere constructive possession would not remove it from the operation of the statute, the court, in speaking of performance to the extent of payment of the purchase price, said:

"In reference to this the general rule is that payment of the purchase price does not take such a contract out of the reach of the statute of frauds. Edwards v. Fry, 9 Kan. 423; Fry on Specific Performance, \$ 430; Browne on Statute of Frauds, \$ 463. This is upon the ground that the money can be recovered back by action, and so no fraud will be accomplished if the parol contract is not enforced." 31 Kan. 284, 1 Pac. 592.

In Goddard v. Donaha, 42 Kan. 754, 22 Pac. 708, it is decided that:

"A parol agreement to convey land and full payment of the purchase price will not alone operate to pass the title thereto, where no possession of the land is taken under the agreement, and no memorandum thereof is in writing." Syl. par. 3.

In Baldwin v. Baldwin, 73 Kan. 39, 84 Pac. 568, 4 L. R. A. (N. S.) 957, it was stated that payment of the purchase price alone is not sufficient to take the case out of the statute, nor is such payment accompanied by possession enough, unless the possession is open, notorious, exclusive, continuous, and obviously in pursuance of the contract See, also, Baldridge v. Centgraf, 82 Kan. 240, 108 Pac. 83. The general rule is that every parol contract concerning lands is within the statute of frauds and perjuries, and unenforceable, except where the performance cannot be compensated in damages. The fact that the consideration for the contract was to be paid in services, and not in money, makes no difference in the application of the rule. If the value of the plaintiff's services may be determined, and compensation made in money, the case is not taken out of the statute. Baldwin v. Squier, 31 Kan. 283, 1 Pac. 591. Any dispute there might have been on that subject is settled by the answer given by the jury to special interrogatory No. 11, submitted by the court, which is as follows:

"Can Peter Engelbrecht be fairly and reasonably compensated in money for the services he rendered on the farm from the spring of 1884 to 1889? Ans. Yes."

This finding, which met the approval of the court, together with the conceded facts that there was no possession and no performance, except services rendered in payment of the consideration—something which it is found can be measured and computed in money—makes it clear that the verbal contract is within the statute and unenforceable.

The judgment must therefore stand affirmed. All the Justices concurring.

WILLARDSON v. WILLARDSON. (No. 3174.)

(Supreme Court of Utah. April 19, 1918.)

HUSBAND AND WIFE \$\ightharpoonup 297 — SEPARATE MAINTENANCE—ACTIONS—EVIDENCE.

In a wife's action for separate maintenance under Comp. Laws 1907, §§ 1216, 1218, authorizing a married woman living apart from her husband without her fault to apply for separate maintenance, and giving the court power to change the allowance thereof, evidence held sufficient to sustain the decree for plaintiff.

Gideon, J., dissenting.

Appeal from District Court, Salt Lake County; P. C. Evans, Judge.

Action by Elizabeth Willardson against Irvin Willardson. Judgment for plaintiff, and defendant appeals. Affirmed.

Lewis Larson, of Manti, for appellant. Weber, Olson & Lewis, of Salt Lake City, for respondent.

CORFMAN, J. Plaintiff is the wife of the defendant. She commenced an action against the defendant for separate maintenance, under the provisions of chapter 4, Comp. Laws Utah 1907, alleging in her complaint that she "now without her fault lives separate and apart from her husband," and prayed for separate maintenance for herself and a minor child of the marriage, attorney's fees, and costs.

The answer denied the allegation, and affirmatively alleged that since the marriage in April, 1915, the defendant has provided a home at Mayfield, Sanpete county, Utah, for the plaintiff and defendant, and that until on or about the 22d day of September, 1916, he provided for and supplied the plaintiff at said home, when without his consent and against his will, and without any just cause or excuse for so doing, plaintiff deserted and abandoned the defendant and his said home, and now continues so to do. It is also alleged in the answer the willingness of defendant to provide a home and the necessaries of life on the condition that plaintiff will live with defendant, be a wife to him, and perform her obligations growing out of the marital relation.

The district court, after hearing the testimony adduced in behalf of the respective parties, made its findings of fact, conclusions of law, judgment, and decree against the defendant, awarding to the plaintiff, until the further order of the court, \$50 per month for the support of herself and the minor child, the further sum of \$344 expenses paid by plaintiff in sickness and for support since the separation, \$100 attorney's fee, and costs of suit. Defendant appeals.

Defendant contends the findings of fact and the judgment are not supported by the evidence, and that the judgment is against law.

The evidence, in brief, shows that the par-

ties were married in Salt Lake City, in April, 1915, and that after the marriage they resided and made their common home at Mayfield, Sanpete county, Utah, until September 20, 1916, when the plaintiff separated from the defendant, and since has continued to live separate and apart from him. The plaintiff, in part, testified concerning the alleged cruelty of the defendant as follows:

"I was sick three weeks after I was married, and he went to dances and ball games and picture shows and affairs, and he told me if I would just get out of bed and get some exercise I would be all right, there was nothing the matter with me; and, of course, when I was carrying my baby, and he ordered me out, and said I wasn't in any worse condition than he was; and he came home drunk, and used abusive language toward me. \* \* \* He would swear, and walk up and down the house and rave over things. \* \* \* In my nervous condition I had terrible convulsions through it. \* \* \* I couldn't stand it; it was ruining my health, the treatment I got; and he went to the canyon for a week, and came back and bragged he had slept with a woman up there."

The plaintiff's evidence as to cruelty and misconduct of the defendant was in part corroborated by her mother. Substantial testimony was also offered and received by the district court bearing on the ability of the defendant to provide for the plaintiff separate maintenance for herself and the minor child.

The defendant, in his own behalf, gave testimony denying the cruelty testified to by the plaintiff. He also expressed a willingness to provide the plaintiff with a home and provide for her if she would return to him and live with him as a wife.

So far as material here, section 1216 of Comp. Laws 1907 provides:

"Where a married woman, without her fault. now lives, or may hereafter live, separate and apart from her husband, the district court shall, on the application of the wife, allot, assign, set apart, and decree to her as alimony, the use of such part of her husband's real and personal estate or earnings as the court may determine in its discretion."

Section 1218 of the same chapter provides:

"In all actions brought pursuant to this chapter the court \* \* \* may decree the payment of a fixed sum of money for the support of the wife and minor children, \* \* \* and provide \* \* \* the payment to be made at such times and in such manner as may be proper. \* \* \* And the court shall have the power to change the allowance from time to time, according to circumstances, or may revoke such allowance altogether upon satisfactory proof of a voluntary and permanent reconciliation."

In view of the record here, we are clearly of the opinion that the judgment and decree of the district court is amply sustained by the evidence and is in full compliance with our statute.

It is therefore ordered that the judgment of the district court be affirmed. Costs to respondent.

FRICK, C. J., and McCARTY and THUR-MAN, JJ., concur.

GIDEON, J. (dissenting). In my judgment the testimony, as the same appears in the record before us, does not warrant the findings made by the district court, namely, that the plaintiff was justified in living separate and apart from her husband, the defendant.

Probably the most serious charge against the defendant made by the plaintiff in her testimony is that, after his return from an outing in the mountains, he "bragged" about having slept "with a woman up there." That is positively denied by the defendant. And he further stated (which is not denied by plaintiff) that while traveling in the mountains he met a party of young people, among whom was one of his own sisters, and also a sister of the plaintiff, with a number of other young people. As I view it, the circumstance of there being a company of young people together strongly goes to corroborate the fact that the defendant was not guilty of any such an offense as plaintiff in her testimony intimated. That statement on the part of the plaintiff is not corroborated by any witness nor by any circumstance in the CARO.

It is true plaintiff testified that the defendant was addicted to drink, but the only serious charge made in that regard is that on the Fourth of July defendant attended a baseball game and came home somewhat intoxicated. I have never understood that such slight indiscretions on the Natal Day of the Republic were sufficient ground for either divorce or separate maintenance. However, if it be the law, I very much doubt that the American public will accept it as a good law.

In addition to all of this, the defendant in his answer affirmatively alleged that he had not only always furnished plaintiff with a home, but that he is now willing and ready to furnish her with a comfortable home and provide for her the necessaries of life, and all he asks in return is that she will return to his home and perform her part of the marital contract. Defendant testified in defense that he had, since his wife left him, endeavored to get her to return; that she left against his will; that he did not know that she was going until the morning before she left; that he is now ready and willing to take her back, and desires to do so and to furnish her a home. That testimony stands uncontradicted in the record, and no attempt was made to show that the offer was not made in good faith. The testimony further shows that the defendant is able to furnish plaintiff with a home. True, the court made no finding as to whether the defendant's offer was made in good faith. As the fact is not disputed, I am unable to determine why it should not be accepted as having been made with an honest desire to resume the marital relations existing between the parties. As I understand the authorities, even though the wife was justified liminary examination, the case was, pursuant to in the first separation, an honest effort on the part of the husband to terminate that separation, and to take his wife back and court without objection, cannot successfully astreat her as a wife should be treated, will defeat an action for separate maintenance. Creasey v. Creasey, 168 Mo. App. 98, 151 S. W. 215; McMullin v. McMullin, 123 Cal. 653, 56 Pac. 554; Ivanhoe v. Ivanhoe, 68 Or. 297, 136 Pac. 21, 49 L. R. A. (N. S.) 86; 21 Cyc. 1602.

The defendant in this action is a young man 34 years old, a farmer by occupation. The plaintiff is a young woman 26 years old. As I understand the decree of the district court, it is to remain in full force for the remainder of the joint lives of these parties. In other words, the defendant is to be prohibited from remarrying, is to be compelled to pay monthly for the support of plaintiff during all of that time, and is to be deprived of the companionship of his wife upon testimony which, in my judgment, gave her no valid ground for living separate and apart from him. I do not wish to be understood as holding that the defendant, as shown by the record, was not guilty of most reprehensible conduct in his treatment of plaintiff. His apparent neglect of her cannot be justified. But I am of the opinion that he, having attempted to get his wife to return to him, and stating in his testimony that he is willing to have her return and desires that she do return to him, should be given one more chance.

For the reasons above stated, I dissent.

# STATE v. HAY. (No. 3057.)

(Supreme Court of Utah. April 16, 1918.)

1. Indictment and Information == 198-Er-BOR IN ALLOWING AMENDMENT OF INFORMA-TION-WAIVER.

Where defendant's counsel, who was informed before the trial commenced that the information had been amended to conform to the complaint by changing the year 1916 to 1915, made no objection, the error, if any, in permitting the amendment was waived.

Indictment and Information \$\inc 161(7)\$.
 Amendment to Conform to Complaint.

Amendment of information by changing figures so at to make the year conform to the year ures so as to make the year conform to the year stated in the original complaint, and to correct year in which alleged offense was committed, was properly permitted, being expressly author-ized by Laws 1913, c. 42, as to amendment of information without leave, in any matter of form or substance before defendant pleads there-

3. Criminal Law \$==242(1) — Preliminary Heabing — Transfer of Case — Stipula-TION.

A prosecution for a felony may, by stipula-tion of counsel, be transferred from the city justice to the municipal court for a preliminary hearing.

4. Criminal Law 4== 225-Preliminary Ex-AMINATION-WAIVER.

Where, after defendant was legally appre- v. Sheffield, 45 Utah, 426, 146 Pa hended and brought before city justice for pre- taldi, 41 Utah, 63, 123 Pac. 897.

sail conviction on the ground that he was not given a preliminary examination, in view of Comp. Laws 1907, \$ 686x13, conferring on municipal court the powers and duties of a magistrate 1

Appeal from District Court, Salt Lake County; C. W. Morse, Judge.

Robert Hay was convicted of the crime of carnally knowing a female over the age of 13 and under the age of 18, and he appeals. Affirmed.

P. P. Jenson and Ben Johnson, both of Salt Lake City, for appellant. Dan B. Shields, Atty. Gen., and Jas. H. Wolfe and O. A. Dalby, Asst. Attys. Gen., for the State.

FRICK, C. J. The defendant was charged with, and convicted of, the crime of carnally knowing a female "over the age of thirteen years and under the age of eighteen years," which constitutes a felony under our statutes. He was duly sentenced to serve a term in the state prison, and appeals.

The case was submitted on briefs, and but two assignments of error are argued: (1) That the district court erred in permitting the state to amend the information filed in that court by substituting the figure "5" for the figure "6" so as to make the information read 1915 instead of 1916; (2) that the district court was without jurisdiction for the reason that defendant had been given no preliminary hearing.

[1, 2] The change of figures in the information was made so as to make the year conform to the year stated in the original complaint filed before the city justice of the peace, and to correct the year in which the alleged offense was committed. The amendment was made under the following circumstances: The case had been duly set for trial and the defendant failed to appear for trial. The district attorney then discovered the error, and asked leave of the court to make the change as aforesaid. The appellant, however, thereafter appeared and the case proceeded to trial. Before the trial commenced appellant's counsel was informed that the year had been changed from 1916 to 1915 as aforesaid, so as to make the information conform to the year stated in the original complaint filed before the magistrate. Counsel then made no objection. Indeed, the record shows that he, in open court, stated, "If the court please, I don't have any objection to this [the information] being amended," and the trial then proceeded. No objection having been interposed at the time, the error, if one had been committed, not being juris-

<sup>&</sup>lt;sup>1</sup>State v. Shockley, 29 Utah, 25, 80 Pac. 865; State v. Sheffield, 45 Utah, 426, 146 Pac. 308; State v. Gus-

dictional was waived. Moreover, the amendment was properly allowed and made, since such amendments are expressly authorized by our statute. Chapter 42, Laws Utah 1913, p. 54. This disposes of the first assignment.

[3, 4] The contention that the court was without jurisdiction to try the case because the defendant was not given a preliminary examination, as provided by our Constitution, is likewise untenable. That objection is based on the circumstance that the original complaint was filed before the city justice of the peace before whom the defendant was taken after his arrest. After the defendant had appeared before said justice, his attorney and the assistant county attorney entered into a stipulation whereby it was stipulated that the preliminary examination should be held before the municipal court of Salt Lake City. A preliminary hearing was afterwards duly held before that court, and the defendant was in due form held to appear for trial before the district court of Salt Lake county. An information was duly filed in said court, and the defendant proceeded to trial on such information without objection or protest. His counsel now contends however: (1) That the case could not legally be transferred from the city justice to the municipal court by stipulation merely; and (2) that the municipal court does not possess legal authority to hold preliminary examinations. the first proposition we think counsel is in error; but assuming, without conceding, that counsel's contentions were sound, yet the municipal court, by Comp. Laws 1907, § 686x13, is given the same powers in all criminal actions that are conferred on justices of the peace, and the powers and duties of a magistrate are expressly conferred on the municipal courts. This court has expressly held in State v. Shockley, 29 Utah, 25, 80 Pac. 865, that under the foregoing statute the municipal courts possess all the powers of magistrates, and thus have jurisdiction and authority to conduct preliminary examinations. In the case at bar there was filed a complaint under oath, in which the defendant was properly charged with an offense. The defendant was thus legally apprehended, and brought before the city justice of the peace sitting as a magistrate, who thus acquired jurisdiction both of the offense and of the defendant. State v. Sheffield, 45 Utah, 426, 146 Pac. 308. After that, and pursuant to the stipulation aforesaid, the defendant voluntarily appeared before the municipal court, and a preliminary examination was there duly held. If it were assumed, therefore, that a case may not, by stipulation, be transferred from the city justice of the peace to the municipal court, yet in view that the defendant was properly charged with an offense, and he voluntarily appeared before a

trate, and hence had power to hold a preliminary examination, which was duly held. and the defendant having been held to auswer and appear before the district court, where he did appear and was tried without protest, the objection now urged is of no avail. We are of the opinion that, in case a person is charged with an offense as required by law before a magistrate, the preliminary examination may be conducted before any other magistrate if the defendant does not object. Moreover, it has repeatedly been held by this court that a defendant may waive preliminary examination, and, unless he makes an objection that no preliminary examination has been given him before he enters his plea to the merits and proceeds to trial, he waives his right to a preliminary examination, and if a conviction follows he cannot successfully assail the conviction on that ground. State v. Gustaldi, 41 Utah, 63, 123 Pac. 897; State v. Sheffield, supra.

For the reasons stated, the judgment should be, and it accordingly is, affirmed.

McCARTY, CORFMAN, THURMAN, and GIDEON, JJ., concur.

DORSEY v. DORSEY. (No. 3169.)

(Supreme Court of Utah. April 16, 1918.)

1. DIVORCE \$\infty 298(5)\$—CUSTODY OF CHILDREN —STATUTES.

Comp. Laws 1907, § 1212, as amended by Laws 1909, c. 109, § 4, providing that if a divorce is granted, and any child has attained the age of 10 years, such child, if of sound mind, may choose the parent with whom he shall live, is not conclusive as to the question of custody and control, and, if for the best interest of the child, the court may nevertheless determine the child's custody otherwise.

2. Divorce \$\infty 298(1) -- Custody of Child -- Moral Fitness-Evidence.

In divorce proceedings, where the custody of an 11 year old child was awarded the husband, although the child preferred the mother, and the husband stipulated that she was a fit person to have its custody, evidence held not to justify a finding that the mother was morally unfit.

Appeal from District Court, Weber County; A. W. Agee, Judge.

Suit by Russell B. Dorsey against Florence V. Dorsey for divorce. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with directions.

Chez & Stine, of Ogden, for appellant. Howell & Wright and Charles R. Hollingsworth, all of Ogden, for respondent.

untarily appeared before the municipal court, and a preliminary examination was there duly held. If it were assumed, therefore, that a case may not, by stipulation, be transferred from the city justice of the peace to the municipal court, yet in view that the defendant was properly charged with an offense, and he voluntarily appeared before a court possessing all the powers of a magis-

against the wish and without the consent of the plaintiff. The complaint was filed on the 10th day of February, 1917, and on the 19th, within nine days after the same was filed, plaintiff and defendant entered into a stipulation, signed by them personally and by counsel, whereby it was agreed that, in case the court should grant plaintiff a divorce. the defendant shall receive certain household furniture and that she waived all other claims for alimony. It was further stipulated that the defendant should have the care. custody, and control of the minor child, a little girl 11 years of age, the fruit of the marriage between plaintiff and defendant, and that the plaintiff shall pay to the defendant "the sum of \$15 per month for the support, care, maintenance, and education" of said minor child. It seems the child elected to live with her mother, a right she had under our statute. It was therefore stipulated that the plaintiff should have the right to visit said child, and she should have the right to visit him "at all reasonable times." The plaintiff also agreed to pay the defendant \$25 as attorney's fees.

Upon the foregoing stipulation being filed, the defendant did not answer the complaint and did not further appear in the action. In due time the plaintiff presented his evidence to the court, from which it is made to appear that for a number of years he had been, and at the time of the hearing was, employed in the United States mail train service; that for some time he and the defendant lived at Los Angeles, and thereafter for a time at Oakland, Cal. More than a year immediately preceding the commencement of the action, however, they had lived at Ogden, Utah. During all of the time aforesaid he was employed in the government mail service upon trains, and was away from home much of the time, both day and night. It also was made to appear that the defendant, like most females was naturally gregarious and was fond of society, and that she and plaintiff. when he was at home, at times attended dances, and at times, when he was away from home, she attended some private and perhaps one or two other dances, but always with plaintiff's knowledge; that is, she informed him that she was going and with whom she was going, except perhaps in one or two instances. It was also shown that during the last few months before the bringing of the action one Robert H. Gray, who was also in the government mail service, and who was working with plaintiff, paid considerable attention to the defendant, and she seemed to become unduly friendly with him. She attended a Knights of Pythias dance with him and also one called the "Telephone Girls" dance. She also came to Salt Lake City from Ogden one night with Gray and a young man and his companion, a young girl, and a Mrs. Stead, in the young man's automobile. The testimony produced by plaintiff, however, showed that the five persons were always defendant left Ogden, and she and the child

together from the time they left Ogden until they again returned there, and that nothing out of the usual transpired. While there is much evidence from which one may readily conclude that the defendant was indiscreet, indeed on one or two occasions very indiscreet, yet there is nothing in the record which justifies a finding that she was guilty of any criminal act. Indeed, the trial court conceded that the evidence was not such as would convict her of criminal conduct. After a careful reading of the record, one becomes impressed with the fact that the defendant was prompted to do some of the things of which she is accused merely to provoke and to defy her husband. One of plaintiff's witnesses, who boarded and lived with plaintiff and the defendant some time before they moved to Ogden, and who came in touch with them while they lived there, testified that he never saw anything indicating any wrongdoing on the part of the defendant.

We can readily understand why, after the stipulation was entered into between plaintiff and defendant, she paid no further attention to the action. As is usual in ex parte hearings, one gets merely the views of the complaining party. It is also true, as all lawyers and judges well know, that in a family quarrel the conduct and acts of the spouse that is deemed in fault are unduly, and sometimes without adequate foundation, magnified and distorted. This case is perhaps no exception to that rule. If in this case there had been a vigorous cross-examination of the plaintiff and his witnesses, and if they would have been required to give a strict account of what they knew, and to give the source of their statements, and if such cross-examination had been supplemented by defendant's version of the acts of which she is accused and of her conduct, the conclusions that could legitimately be deduced from the whole evidence might be quite different. That such is the case, we think, is reflected from plaintiff's own conduct. Witnesses were called who testified that he was a man of exemplary moral character, and the court so found. If, therefore, he had believed that the defendant was an immoral woman he would not have stipulated that his only child should remain in her care, custody, and control. The plaintiff evidently believed her to be a fit person to have the care and custody of his only child. Notwithstanding the stipulation, however, and that the evidence respecting the defendant's moral unfitness to rear her own child is, to say the least, merely conjectural, and not satisfactory, the court not only refused to follow the stipulation, but made a finding "that said defendant is an immoral and otherwise incompetent and improper person tohave the care, custody, and control of said \* \* minor child."

After the stipulation was entered into and filed, and while the action was pending, the

went to her old home at Quincy, Ill, where have been quite indiscreet at times. It must, she and plaintiff were married in 1904, and from whence they came west for the purpose before stated. Defendant is now employed in Quincy, and is supporting herself by her own labor, and is caring for the child with the \$15 the plaintiff is sending from month to month. The little girl is attending school there. It was also made to appear that in view that the plaintiff is employed in the United States mail train service, and thus being away from home much of the time both day and night, and therefore not able to maintain a home, he was not and is not prepared to take the custody of the child, which the court had awarded to him, even though she were here. The court, in entering the interlocutory decree of divorce, therefore, made the order awarding the custody of the child to the plaintiff, but made a further order that she be placed in the immediate care and charge of plaintiff's mother, who lives on a farm near a town called Perry, in the state of Illinois. After the court made the foregoing finding respecting defendant's moral unfitness, and after refusing to follow the stipulation respecting the custody of the child, and after the defendant was made aware of the court's finding and order, she appealed from the order or judgment, and now insists that the court erred in its findings of facts and conclusions of law in the particular before stated. Indeed, defendant insists that the court erred in its findings in other particulars. We are, however, not disposed to enter upon a review of the findings, except the one which relates to defendant's moral unfitness to have the care, custody, and control of the little girl.

[1] While our statute (Comp. Laws 1907, \$ 1212, as amended by chapter 109, Laws Utah 1909, p. 231) provides that in case the court grants a divorce, and any child, the fruit of the marriage, has attained the age of 10 years, such child, if of sound mind, shall have the privilege of choosing the parent with whom he shall live; and while in this case the little girl selected her mother, yet in our judgment the statute is not conclusive upon the question of custody and control. think in case the parent the child selects is found to be an immoral or unfit person to have the care and custody of the child, and the court finds it to be for the best interests of the child, that the court may, nevertheless, determine the child's custody otherwise. We are of the opinion, however, that in case the parents agree upon which one should have the custody of their only child, who is a female, and it is found that the husband is a good moral man and is willing that his wife shall have the care, custody, and control of their child, then the court should follow the stipulation of the parties, unless the evidence is strong and convincing that the mother is morally unfit to have the care and custody of her own child. As we have hereinbefore however, not be overlooked that she was a young woman of perhaps 28 years of age, full of life and vigor; that her husband was necessarily away from home much of the time, and thus could not always respond to her inherent desire for social contact or to mingle with others. It is easy to understand that the young man Gray thus afforded her an opportunity to go and mingle with others from time to time, and that she willingly embraced the opportunity. Notwithstanding all this, however, there is absolutely no proof that she was guilty of any criminal act or conduct. Apart from the foregoing evidence of being indiscreet, there is not a word of evidence why she should be deprived of the care, custody, control, and companionship of her little girl. Indeed, the husband, who knew her better than any one else, not only stipulated before the hearing that the defendant was a fit and proper person to have the care and custody of their offspring, but since this case has been appealed to this court he has again most solemnly stipulated that the defendant is morally and in every other way a fit and proper person to have the care, custody, and control of the child, and that she is taking good and proper care of it, and that he consents and desires that the decree be modified in that respect, and that the defendant be awarded the care, custody, and control of said child.

[2] While, as before stated, we are of the opinion that the best interests of the child should be the guiding and controlling factor in determining its custody, yet the mere fact that the court may be justified in finding from the evidence that the mother has attended dances with others than her husband, and at times has been guilty of conduct which does not square with the court's standard of morality, is hardly sufficient to justify a finding that the mother is an immoral person, and otherwise unfit to have the care, custody, and control of her own little girl; and especially is such the case where, as here, the father of the girl, who, the court finds, is a man of exemplary moral character, has twice stipulated that the mother shall have the care and custody of his child, and that she, morally and otherwise, is a fit person to rear her. If the father is willing to trust his divorced wife with the child's custody, the court, except for the strongest reasons, should not set itself up as a moral censor; and especially not where, as under our statute, the court may at any time, upon good cause being shown, change the custody of the child. Moreover, after reading the evidence, we are of the opinion that the finding of the court "that the defendant is an immoral and otherwise incompetent and improper person to have the care, custody, and control of said child" is, under the circumstances, not supported by the evidence. Actions for divorce are equitable in the highest stated the evidence shows the defendant to sense, and while even in those actions we do

not interfere with the trial court's findings in case the evidence is conflicting, or where the findings are not clearly against the evidence, under the circumstances of this case, we are very loth to permit the finding to stand that a mother is an immoral and unfit person to have the care, custody, and companionship of her own offspring unless the evidence clearly merits such a finding. Findings of courts are solemn things, and where the moral character of a mother is involved courts should be careful not to permit their own moral standards to betray them into condemning a mother except on good and sufficient evidence. In view, therefore, of the meagerness of the evidence, and in view that it conclusively appears that the plaintiff, the father of the child, desires that she be and remain with her mother, the findings of the court and the decree are disapproved, and the cause is remanded to the district court of Weber county, with directions to set aside the finding and conclusion "that the defendant is an immoral and otherwise incompetent and improper person to have the care, custody, and control of the said Hazel Juanetta Dorsey, the minor child of the plaintiff and defendant," and substitute therefor a finding that the defendant is not an immoral or incompetent or unfit person to have the care, custody, and control of said minor child, and that she be awarded the care, custody, and control of said child as stipulated by the plaintiff and the defend-It is further ordered that the said court amend its conclusions of law, and enter a decree to conform to the foregoing directions of this court. Defendant is awarded her costs on this appeal.

McCARTY, CORFMAN, THURMAN, and GIDEON, JJ., concur.

KUCHENMEISTER v. LOS ANGELES & S. L. R. CO. (No. 3139.)

(Supreme Court of Utah. April 20, 1918.)

1. COMMERCE \$==27(1)-INJURY TO SERVANTS -FEDERAL EMPLOYERS' LIABILITY.

To recover under the Federal Employers' Liability Act (Act Cong. April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1916, \$\$ 8657-8665]), both employer and employe must at the time of injury be engaged in interstate commerce.

2. Courts \$\infty 97(5) - Following Decision of FEDERAL COURTS.

A decision of a federal court as to whether an employe is engaged in interstate commerce, especially if more recent should be followed in preference to decision of a state court, since the question involved is one upon which the federal courts have the ultimate right to speak.

8. COMMERCE \$\infty 27(8) - "INTERSTATE COM-MERCE.

Plaintiff employed in roundhouse and machine shop, injured while engaged in repairing a passenger engine which before the injury had been used exclusively in interstate commerce, was being repaired so as to be again used for the and defendant appeals. Affirmed.

same purposes, and was so used after repair, was engaged in interstate commerce.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

MASTER AND SERVANT \$==276(1) - INJURY WHILE ENGAGED IN INTERSTATE COMMERCE EVIDENCE.

In action based on Federal Employers' Liability Act, evidence held to sustain jury Ending that plaintiff, injured while repairing defend-ant's passenger engine, was engaged in interstate commerce

5. Appral and Error \$= 999(1)-Jury Find-INGS-CONCLUSIVENESS.

Plaintiff having made a prima facie case, and defendant having produced no evidence, the finding of the jury is conclusive on appeal.

6. MASTER AND SERVANT \$\sim 203(1) -- "Contributory Negligence" Distinguished FROM "Assumption of Risk."

It does not necessarily follow from a jury finding that a servant was negligent that he also assumed the risk, since "contributory negli-gence" does not necessarily arise from intelli-gent choice as does "assumption of risk."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Assumption of Risk; Contributory Negligence.]

7. Master and Servant &= 288(1), 289(1) — Contributory Negligence — Assumption

of Risk—Question for Jury.

In action for injury sustained by plaintiff while engaged in repairing defendant's passenger engine, question of contributory negligence and assumption of risk held, under the evidence, for the jury.

8. EVIDENCE \$\infty 220(3) - Declarations of THIRD PERSON.

Declarations of plaintiff's mother, relating to treatment of his eye after injury, not made in plaintiff's presence, were inadmissible.

9. Damages \$\infty 59 - Evidence - Admissi-BILITY.

In action for injuries sustained by plaintiff servant, where defendant railroad set up negligence of plaintiff in refusing to follow direction of his physician, evidence respecting acts of plaintiff's mother in treating plaintiff's eye were properly excluded.

10. WITNESSES 4=383-IMPEACHMENT. A witness cannot be impeached as to immaterial statements.

11. TRIAL \$==296(11)-INSTRUCTION NOT SUP-

PORTED BY EVIDENCE.

Although statement in charge authorizing consideration of question whether injury had affected plaintiff's earnings in the past was not supported by pleadings or proof, where jury was instructed that they must be guided by the evidence alone defendant was not prejudiced.

12. PARENT AND CHILD \$\ightharpoonup 5(3) — RIGHT OF PARENT TO EARNINGS OF CHILD.

If plaintiff, a minor, was supporting himself from his own earnings, and his parents were not claiming such earnings, he was entitled, in an action for injuries, to recover for their loss, since by Comp. Laws 1907, §§ 1544, 3243, the earnings of a minor do not absolutely belong to his parents.

Appeal from District Court, Salt Lake County; Wm. H. Bramel, Judge.

Action by Frank George Kuchenmeister, by his guardian ad litem Katherine Kuchenmeister, against Los Angeles & Salt Lake Railroad Company. Judgment for plaintiff.

Dana T. Smith, of Salt Lake City, for appellant. Marioneaux, Straup, Stott & Beck, of Salt Lake City, for respondent.

FRICK, C. J. The plaintiff, a minor past 16 years of age, by his mother as guardian ad litem, brought this action to recover damages for the loss of his eye, which he alleged he lost by reason of injury sustained through the negligence of the defendant while he was employed in its roundhouse and machine shop at Caliente, Nev., on August 21, 1916. The action is based upon the Federal Employers' Liability Act. Plaintiff, in substance, alleged that at the time of the injury the defendant was engaged in interstate commerce as a common carrier; that on the 21st day of August, 1916, while the plaintiff was engaged in repairing certain parts of defendant's passenger engine No. 3425, which was then being used in interstate commerce, he was injured in his eye through the negligence of the defendant, stating the particular acts of negligence in detail; that by reason of such injury he lost his eye and is permanently injured.

The defendant admitted that it was engaged in both interstate and intrastate commerce, but denied the alleged acts of negligence. It set up contributory negligence on the part of the plaintiff, and averred that he had assumed the risk, and also set forth the affirmative defense that the plaintiff, by his own negligence in refusing to follow the directions of his physician, had greatly aggravated the injury, and that the removal of his eye was made necessary by reason of his own negligence, etc. The defendant denied, however, that the plaintiff, at the time of the injury, was engaged in interstate commerce.

The case was submitted to a jury, which found the controlling issues in favor of the plaintiff. The jury also found that at the time of the injury both the plaintiff and the defendant were engaged in interstate commerce. The jury also found that the plaintiff was guilty of contributory negligence, but did not find whether such negligence related to the doing of the work or to plaintiff's conduct in the treatment of his eye.

The allegations respecting the two grounds of contributory negligence were supported by substantial evidence on the part of the defendant.

The jury found that plaintiff had sustained damages to the extent of \$7,500, but reduced that amount, on account of the contributory negligence of the plaintiff, in the sum of \$2,500, and thus returned a verdict in his favor in the sum of \$5,000 as the damages sustained by him. Judgment was entered on the verdict, and the defendant appeals.

Counsel for defendant has argued four assignments of error: (1) That the evidence "is wholly insufficient to support the finding that the plaintiff was engaged in interstate commerce at the time he received his injury", and that for that reason the court erred in sub-

mitting that question to the jury; (2) that plaintiff, had assumed the risk; (3) errors to the admission and exclusion of evidence; and (4) errors in charging the jury.

Counsel for defendant earnestly insists that the first assignment should prevail. As before stated, defendant admitted that it was engaged in both interstate and intrastate commerce, but denied that the plaintiff at the time of the injury was engaged in interstate commerce.

[1] It is not necessary to cite authorities upon the proposition that, in order to recover under the Federal Employers' Liability Act, both the employer and the employé must at the time of the injury be engaged in interstate commerce. Plaintiff's evidence tended to prove that plaintiff lived with his mother and sister at Caliente, Nev.; that defendant's engine No. 8425, which is the engine that was being repaired by plaintiff when he was injured, for a number of years immediately preceding the accident had been used exclusively in hauling interstate passenger trains between Caliente, Nev., and Milford, Utah; that plaintiff had seen it used for that purpose continuously for about three years immediately preceding the time the plaintiff was injured; that when the engine was not out on the road and in use it usually was in defendant's roundhouse at Caliente, Nev.; that a short time before the accident, perhaps a day or so, the engine was left at defendant's roundhouse and machine shop at Caliente, Nev., to be "overhauled"-that is, some repairs were required to be made upon it; that plaintiff had been in the employ of the defendant since June 23, 1916; that for about six weeks prior to the accident he had performed different kinds of work about the roundhouse and machine shop as he was directed from time to time by defendant's foreman who was in charge of the roundhouse and machine shop at Caliente; that on the 21st day of August, 1916, plaintiff was directed to assist another employé to do some repair work on said engine No. 3425; that in making such repairs it was necessary to grind down or reduce in size a certain pin which was a part of said engine, and plaintiff was directed to do that work on an emery wheel that was provided for that purpose by the defendant; that while plaintiff, prior to that time, had, on several occasions, used the emery wheel in question yet he was not aware of or did not realize the danger incident to the grinding of metals on emery wheels which would cause sparks and small particles to fly off from such wheels while grinding such metals; that he was not informed of such danger by defendant's foreman nor by any one else, and that no "goggles" or eye-protectors were furnished by the defendant with which to protect the eyes while grinding as aforesaid: that while he was in the act of grinding down the pin as directed, which was to be used

other hard substance which was thrown off, follow the federal court rather than the state from said emery wheel flew into and penetrated his eye, and caused the same to be sore and inflamed to such an extent that it had to be and was removed from the socket, by reason of which he became and is permanently injured; that he left the roundhouse of the defendant on the day of the accident, and that he did not know how long it took thereafter to complete the repairs on the engine aforesaid; that the next time he saw the engine it was standing dead on the side track at Milford, Utah, and in about three weeks after the accident he saw the engine in use in interstate commerce—that is, it was hauling interstate passenger trains precisely the same as was the case for the several years before the accident; that during all of the time mentioned, both before and after the accident, said engine was being operated by the same engineer. The defendant produced no evidence whatever respecting the use to which the defendant put the engine either before or after the accident. Defendant did, however, produce evidence on the other questions, and the witnesses for the defendant in some respects disagreed with plaintiff's statements, and in other respects denied his testimony and gave a different version of the accident and the care defendant had exercised in preventing the same. In view, however, that there is no contention that tnere was not substantial evidence upon every material issue except the one that the plaintiff at the time of the injury was engaged in interstate commerce, we shall refrain from stating the evidence in other particulars, except in connection with the point decided, if deemed necessary.

Defendant's counsel has cited a large number of cases which he contends sustain his contention that the plaintiff, at the time of the accident, was not engaged in interstate commerce. Among the cases cited upon that point are the following: Minneapolis & St. L. Ry. Co. v. Winters, 242 U. S. 353, 37 Sup. Ct. 170, 61 L. Ed. 358; Pedersen v. Delaware Co., 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153; Shanks v. Delaware, etc., Ry. Co., 239 U. S. 556, 36 Sup. Ct. 188, 60 L Ed. 436, L R. A. 1916C, 797; Chicago, etc., Ry. Co. v. Harrington, 241 U. S. 177, 36 Sup. Ct. 517, 60 L. Ed. 941; Pierson v. New York S. & W. Ry. Co., 83 N. J. Law, 661, 85 Atl. 233. It is not necessary to refer to the other cases cited by counsel, since all that he contends for is covered by those we have last above cited. We remark that while plaintiff's counsel concede that the Pierson Case, referred to, sustains defendant's contention, yet it must not be overlooked that that case emanates from a state court and not from a federal court.

[2] If, therefore, there is a decision from a federal court which is decisive of the question here, and especially if the federal decision is one that is more recent than the one

court, since the question involved is one upon which the federal courts have the ultimate right to speak.

[3] In our judgment the decision in the case of Law v. Illinois Cent. Ry. Co., 208 Fed. 869, 126 C. C. A. 27, L. R. A. 1915C, 17, is decisive of the question that the plaintiff. in making the repairs on the engine in question, was engaged in interstate commerce.

[4] In view of what is there said, it is also clear that the evidence in this case is sufficient to sustain the finding of the jury that the plaintiff was so engaged at the time of the accident. As before stated, the defendant produced no evidence upon that question, and hence, if there was any substantial evidence from which the jury had the right to infer that preceding the accident and before it was repaired the engine in question was being used exclusively in interstate commerce, and that after the repairs were completed it was intended to be and was again used in that capacity, the evidence was sufficient to sustain the finding that the engine was an instrumentality which was used in interstate commerce at the time of the accident, and that the plaintiff, in being engaged in repairing it so that it could be continued to be so used, was also engaged in interstate commerce. The inferences that may be deduced from the undisputed facts in the case at bar are quite different from the inferences that can legitimately be deduced from the case of Minneapolis & St. L. Ry. Co. v. Winters, supra, on which counsel relies. In that case it was stipulated that the engine on which Winters was making repairs when he was injured had, before the repairs were made, been used in both interstate and intrastate commerce. Indeed, under the facts there disclosed, the engine on one day might have been engaged in interstate commerce exclusively, while on the following or any subsequent day it might have been used exclusively in intrastate commerce. Again, it might have been used in both interstate and in intrastate commerce on the same day. The United States Supreme Court, therefore, held that, inasmuch as it must appear that the instrumentality upon which the injured employe is engaged and injured is at the time of the injury being used in interstate commerce, and that the burden of proving that fact rests upon, the injured employé who seeks to recover under the federal Employers' Liability Act, the plaintiff in that case had failed to prove that the engine there in question at the time of the injury was engaged in interstate commerce. As before stated, the inferences that may be deduced from the undisputed evidence in the case at bar are clearly to the effect that the engine in question for a long time immediately prior to and up to the time of the injury was exclusively used in interstate commerce, and that it was being repaired so that it cited from a state court, it is our duty to might be continued to be so used. Indeed,

engine used, both before and after the accident, was interstate commerce exclusively.

[5] The plaintiff had thus made a prima facie case, and, the defendant having produced no evidence upon that question, the finding of the jury is conclusive upon this court. After a careful reading of the opinion in the case of Law v. Illinois Cent. Ry. Co., 208 Fed. 869, 872 (126 C. C. A. 27, 30, L. R. A. 1915C, 17), we can see no escape from the foregoing conclusion. That case as before stated, was decided after the Pierson Case to which we have referred. In the Law Case it appears that the plaintiff was a "boilermaker's helper," and was injured while repairing what is called a "petticoat," which was a part of the boiler used on the freight engine, and which the plaintiff contended was being used in interstate commerce at the time of the injury. The controlling facts upon which the court based its decision in that case are stated in the opinion in the following words:

"In the instant case the engine was in the shop for what is called 'roundhouse overhauling.' It had been dismantled at least 21 days before It had been dismantied at least 21 days before the accident. Up to the time it was taken to the shop it was actually in use in interstate commerce. It was destined for return thereto upon completion of repairs. It actually was so returned the day following the accident. It clearly did not lose its interstate character from the were four that it was not at the time actual. the mere fact that it was not at the time actually engaged in interstate movement, no more than did the dining car in Johnson v. So. Pac. R. R. Co., 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363, while waiting for a train to make the return trip, or than did the car in the Walsh Case while standing on a track awaiting replacement of the drawbar. Were the repairs being made in of the drawbar. Were the repairs being made in the roundhouse between two regular daily trips, the engine, while under such repair, would clearly not lose its character as an instrumentality of commerce; and plaintiff, in such case, would have been engaged in interstate commerce. We have not here a case of original construction of an engine not yet become an instrumentality of interstate commerce. It had already been impressed with such use and with such character. Its preservation as such was not a matter of indifference to defendant, so far as its interstate commerce was concerned. See Pedersen Case, 229 U. S. 151-152, 33 Sup. Ct. 648, 57 L. Ed. 1125 [Ann. Cas. 1914C, 153]. Under the existing facts, can the length of time required for the repairs change the legal situation? If so, where is the line to be drawn? How many days temporary withdrawal would suffice to take it out of the purview of the act? And is it material whether the repairs take place in a roundhouse or in general shops? Is it not the test whether the withdrawal is merely temporary in character? As held in the Pedersen Case, the work of keeping the instrumentalities used in interstate commerce (which would include engines) in a proper state of repair while thus used is 'so clearly related to such commerce as to be in practice and in legal contemplation a part of it."

We remark: The case at bar is entirely different from the case of Perez v. Union Pac. Ry. Co., 173 Pac. 236, decided at this In that case the instrumentality which caused the alleged injury, although it may have been used in interstate commerce before the injury, it yet had at the time of the law that either the one or the other defense

the only purpose for which any one saw the injury been withdrawn from such or any commerce, and hence the plaintiff in that case was not injured while engaged in interstate commerce. In this case, however, the plaintiff was injured while engaged in repairing an instrumentality which before the injury had been exclusively used in interstate commerce and was being repaired so as to be again used for the same purpose and was so used after the injury.

[6] It is next contended that the plaintiff assumed the risk. In view that that defense is available as a complete defense under the Federal Employers' Liability Act, and especially in view that the jury found the plaintiff guilty of contributory negligence, counsel for defendant has urged that proposition with much vigor. It is urged that in view that the jury found that the plaintiff was guilty of contributory negligence, therefore it necessarily follows that he also had assumed the risk. Counsel insists that, in order to have found the plaintiff guilty of contributory negligence, the jury necessarily must have found that he knew and appreciated the dangers arising from the use of the emery wheel without protection to the eyes, and that the foregoing are the only essential elements in the defense of assumed risk. He insists, therefore, that we should declare as a matter of law that plaintiff had assumed the risk.

In this case two independent grounds of contributory negligence were pleaded by the defendant, both of which were supported by evidence produced by it. One of the grounds of negligence related to the plaintiff's conduct at the time of the accident, which it was contended by the defendant, was really the proximate cause of the injury complained of by the plaintiff, while the other ground of negligence arose after the accident and related to plaintiff's conduct, by which, it is contended, he had aggravated the injury to the eye and hence increased the damages. The jury, therefore, may have found that the plaintiff was negligent in his conduct respecting the treatment of his eye, and may have deducted the amount from the whole amount of damages allowed him for that reason. If that were so, counsel's contention last above stated would necessarily have no application here. Assuming, however, for the purposes of this decision, that the jury found that plaintiff's conduct at the time of the injury was negligent, and hence found him guilty of contributory negligence in that regard, yet it does not necessarily follow that counsel's contention that plaintiff assumed the risk should prevail. The defenses of assumed risk and contributory negligence are entirely independent, and in case there is a conflict in the evidence, or where the facts are such that reasonable men may legitimately draw different conclusions from the evidence, or may arrive at different conclusions, it cannot be determined as a matter of is established, and the jury may, therefore, find that one of the defenses was established and may also find that the other was not. While in some of the cases there is some confusion respecting the distinction between the two defenses, yet, as a general rule, the courts have found little difficulty in enforcing the true distinction. The distinction is, perhaps, as well and as clearly stated in a few words as that can be done in the case of Thomas v. Quartermaine, in L. R. 18, Q. B. Div. at page 697, where, in discussing the distinction, it is said:

"But the doctrine of volenti non fit injuria [assumed risk] stands outside the defense of contributory negligence and is in no way limited by it. In individual instances the two ideas sometimes seem to cover the same ground, but carelessness is not the same thing as intelligent choice." (Italics ours.)

The distinction is also very intelligently discussed and clearly stated by the author in 3 Labatt Mast. & Serv. \$ 1219 et seq. The fundamental element in assumption of risk, where it is not assumed as a matter of contract, as stated in the foregoing quotation, is "intelligent choice"; that is, the employé, before he may be charged with having assumed the risk, must not only have fully understood and appreciated the danger, but he, in the very face of the danger, must, voluntarily, have assumed the risk of injury. Nothing short of that constitutes intelligent choice. As a matter of course, whether in any case the risk was or was not assumed must be determined from all the facts and circumstances. But whatever those facts and circumstances are, it must appear therefrom that the employé voluntarily elected to continue in the hazardous work. It needs no argument, therefore, to demonstrate that while in a particular case facts may be such as to justify a finding of both contributory negligence and assumption of risk, yet contributory negligence does not necessarily arise from intelligent choice, and therefore is not necessarily included in assumption of risk, as contended for by counsel.

[7] In view of what has just been said, it was the province of the jury to say which one of the two defenses was established.

[8] It is further contended that the district court erred in excluding certain declarations attributed to plaintiff's mother relating to the treatment of his eye. The declarations of the mother not made in the presence of the plaintiff were clearly not admissible.

[9] Nor did the court err in excluding the proffered evidence respecting the acts of the mother in treating plaintiff's eye. The reason why such acts are incompetent evidence are clearly stated by Mr. Justice Thurman in the case of Farnon v. Silver King, etc., Co., 167 Pac. 675. This question was, however, submitted to the jury under proper instructions.

[10] Nor did the court err in excluding the other statements attributed to the mother. True, she had denied them on cross-examina-

tion. The questions propounded to the mother were, however, not proper cross-examination, and, in view that her statements were not material evidence, the defendant was bound by her denials. It is elementary that a witness may not be impeached unless the statements made by such witness which are sought to be impeached are material.

[11, 12] It is also contended that the court erred in charging the jury upon the question of damages. It is insisted that the court included an element of damages in its charge with respect to which there was no evidence; and, further, that the court permitted plaintiff to recover for loss of earnings before he was of age, which, it is asserted, did not belong to him, but belonged to his mother. It is true that the court charged the jury that they were "authorized to take into consideration \* \* \* whether \* \* the injuries \* \* \* have affected \* \* his \* \* \* earnings in the past." There was, however, neither allegation nor proof, nor claim of any kind, for lost services or for services during plaintiff's minority. element of damages was included in the court's charge merely because such elements are usually included in such charges. There is, however, nothing in this case to show that the plaintiff did not support himself from his own earnings, and if he did so he was certainly entitled to them. From a consideration of the court's charge, it is quite clear, however, that the defendant was not. and could not have been, prejudiced by the foregoing statement in the instruction complained of. The jury were clearly informed that they must be guided and controlled alone by the evidence produced before them in arriving at their verdict. While it is true. as a general rule, that it constitutes error to submit to a jury questions of fact or issues upon which there is no evidence, yet it does not always follow that prejudice results from an erroneous charge of that character. Where, as here, there is no claim nor evidence respecting plaintiff's earnings, it will not be assumed that, in view of the charge of the court that the jury must be governed by the evidence, they did allow anything for past earnings. This question was before the Supreme Court of Indiana in the case of Ohio & M. Ry. Co. v. Stein, 140 Ind. 61, 39 N. E. 246, and in Lytton v. Baird, 95 Ind. 349, in which cases it was held that such a charge, under the circumstances outlined above, cannot be held to be prejudicial. Moreover, it is assumed by appellant's counsel that, inasmuch as plaintiff is a minor, he necessarily may not recover anything for loss of services during his minority. That, however, does not of necessity follow, since, under our statute (Comp. Laws 1907, §§ 1544 and 3243), the earnings of a minor do not absolutely belong to the parent. If the contract for services is made with the minor alone, then, under section 1544, supra, the employer may safely settle with and pay the

minor and the parent has no claim. Here, as we have seen, the mother makes no claim whatever, and hence we cannot see how the defendant could have been prejudiced.

For the reasons stated the judgment should be, and it accordingly is, affirmed; plaintiff to recover costs.

McCARTY, CORFMAN, THURMAN, and GIDEON, JJ., concur.

COSTELLO v. GLEESON. (No. 1531.) (Supreme Court of Arizona. May 10, 1918.)

1. Mines and Minerals & 98—Creation of Trust—Evidence—Partnership.

Evidence held insufficient to warrant the finding by the trial court that defendant's testator held one-half of a mining claim in trust for an alleged partner, or that he held other mining claims in trust for the alleged partnership.

2. Trusts 4-44(3) — Creation of Partnership Trust—Evidence Required.

Proof of a consummated partnership which would have the effect of establishing a trust relation ought to be as clear and satisfactory as is required to prove the trust relation direct.

3. Mines and Minebals \$=\$97—Partnership — Establishment of Relation — Weight and Sufficiency of Evidence.

Evidence held insufficient to prove the establishment of the partnership relation.

4. Mines and Minerals ⇔100 — Partnebship—Dissolution and Accounting—Evidence.

Evidence held to show that plaintiff had received from defendant's testator a return of the money he claimed he had paid into the partnership, and had thereby dissolved the partnership, and abandoned any interest therein, if one existed, and that the alleged partnership property was the individual property of defendant's testator.

Appeal from Superior Court, Cochise County; A. C. Lockwood, Judge.

Action by John Gleeson against Mary M. Costello, as executrix of Martin Costello, deceased. From judgment for plaintiff, and an order denying new trial, defendant appeals. Reversed and remanded, with direction.

Joseph Scott and Ben Goodrich, both of Los Angeles, Cal., and Ellinwood & Ross, of Bisbee, for appellant. Eugene S. Ives, of Tucson, and Fred Sutter, of Bisbee, for appellee.

Mcalister, J. This case is before the court a second time upon practically the same pleadings, evidence, and judgment. In the former opinion it was described as:

"An equitable action prosecuted by John Gleeson, appellee, against Mary M. Costello, as executrix of the last will and testament of Martin Costello, deceased, appellant, praying for the dissolution of an alleged partnership, for an accounting, and for an order directing a conveyance to John Gleeson by the said executrix of an undivided one-third interest in the mining claims described in the second amended complaint and alleged to belong to the partnership." 15 Ariz. 280, 138 Pac. 544.

The judgment, now as then, decrees the existence of a partnership, and adjudges plaintiff, Gleeson, the owner of a one-third interest in the mining claims which are held to be the property of such partnership. From this judgment, together with the order denying defendant's motion for a new trial, an appeal to this court has been prosecuted. The case was tried by the court without a jury, and findings of fact full and complete, together with conclusions of law, were filed. Thirty-two errors, based largely on the findings, have been assigned, but we discuss only those deemed vital and necessary to a correct determination of the issues involved. Inasmuch as the pleadings are practically the same as in the former action, there is no necessity for restating here the respective claims of the parties as they appear in the third amended complaint and the second amended answer upon which the case was tried and is here for review. The executor of Reilly's estate was made a party defendant in this action, but his answer contains only an admission of Reilly's death, and the appointment and qualification of his executor, together with an allegation denying any knowledge or information on the part of the executor relative to the facts alleged in the third amended complaint and submitting any interest or claim which Reilly's estate might have in the partnership to the consideration of the court.

It appears from the findings that in December, 1901, John Gleeson, appellee, one James Reilly, and Martin Costello, decedent of appellant herein, agreed to form a partnership, having for its object the owning, working, and selling of four certain contiguous mining claims, situated in the Turquoise mining district, Cochise county, Ariz., to wit, the San Francisco, Fennard, Batavia, and Mono. By the terms of this agreement it was provided that Gleeson should contribute to the partnership an option which he then held, and on which he had paid \$350 in monthly payments of \$50 each, to purchase from one Patrick Power, for \$20,000, within 18 months from May, 1901, three of the aforesaid mining claims, to wit, the San Francisco, Fennard, and Batavia, which were valued at \$40,000; that Reilly and Costello should contribute the Mono mining claim, which was valued at \$20,000, and of which they were then the owners, but, in order that the contributions of the three partners might be equal, it was agreed that Costello and Reilly should pay the \$20,000 purchase price called for by Gleeson's option from Patrick Power, less the monthly payments already made by Gleeson.

Two months thereafter, to wit, in February, 1902, at a conference of the three partners, on the suggestion of Reilly, it was decided to extend the scope of the partnership so as to embrace a large number of other

which, in the opinion of Gleeson, Reilly, and Costello, the mining industry was then looking up. At that time Costello was the owner of over \$200,000 in cash, but was indebted to Reilly in the sum of \$90,000, and John Gleeson, on that day, became the owner of four promissory notes, aggregating \$53,000, secured by a mortgage on certain mines and mining claims of the Copper Belle Mining Company. Gleeson objected at first to Reilly's proposal to extend the scope of the partnership by the purchase of other claims upon the ground that he had not the means to enter upon such an undertaking, whereupon Costello agreed to advance the money for him, provided he would transfer to Costello the said Copper Belle notes as security for Gleeson's contributions, and provided, further, that title to all the claims acquired should be taken in the name of Costello, and so held until Gleeson and Reilly should contribute their share of the purchase price of said claims. In pursuance of this arrangement. Gleeson at that time left said notes with Reilly, representing the partnership, "as security for his obligation to contribute his share of the expenses of the partnership."

It was further agreed that Gleeson, being a man of experience in the mining industry. should contribute his knowledge and experience in acquiring such claims as they might desire; that Reilly, who was an attorney at law, should contribute the legal services necessary in the acquisition and disposition of said claims; and that Costello, a man of large means, should advance, without interest, the cash necessary to purchase said claims, subject to reimbursement by Reilly and Gleeson in proportion to their one-third interests. In pursuance of the agreement to extend its scope, the partnership purchased, between 1902 and 1908, a large number of mining claims in the Turquoise district, and took title to same in the name of Costello, who advanced from his personal funds all the money therefor, to wit, about \$80,000.

Shortly after the partnership decided to increase its holdings, the Power option, because of the decrease in value of mining property and the depressed condition of the mining industry generally in the Turquoise district, was by mutual agreement abandoned, and payments stopped thereon, under the belief that a second option could be procured later on at a less price; and thereafter, to wit, on June 6, 1903, an option on the said San Francisco, Fennard, and Batavia mining claims was taken from Patrick Power by the partnership in the name of Costello, which option was thereafter consummated by Costello's paying the purchase price of the said

In August, 1903, Gleeson, Reilly, and Costello formed a corporation, the Costello Copper Company, for the more convenient handling of the mining claims owned by the partnership. It was agreed shortly before

mining claims in the Turquoise district, in | this that when the partners were ready to begin active work on the mines, and Gleeson and Reilly had contributed their proportions of the purchase price of the said claims, Costello should deed to the corporation all the mines owned by the partnership, and that John Gleeson should have the management of the affairs of said corporation, at a salary of \$250 per month, and be paid \$60 per month for the use of his teams and wagons. The Costello Copper Company, however, transacted no business whatever, and none of the claims was deeded to it, but Martin Costello paid for all assessment work, taxes, and the expenses of making locations and procuring patents.

> Litigation arose over the Copper Belle notes not many months after their receipt by Gleeson, who, acting upon the advice of Reilly, transferred them to Martin Costello for the purpose of making more sure their collection, in consideration of the sum of \$25,-000 and other mining property situated near Tombstone. This transfer, while ostensibly evidencing a sale in fact, was, in reality, a wash sale, not bona fide, and made solely for the purpose of enabling Costello to collect the notes; it having been mutually agreed between Costello and Gleeson that when they were collected Costello should turn the proceeds over to Gleeson, the real owner of the notes.

> In September, 1907, Costello granted to L. W. Powell, representing the Calumet & Arizona Mining Company, an option to purchase certain of the partnership mining claims for the sum of \$150,000, to be paid as follows: \$15,000 down, \$35,000 on or before September 30, 1908, and \$100,000 on or before March 30, 1909. Gleeson had promised Powell, shortly before this, while Costello was in Europe, an option covering this identical property, and on the same terms, except that he required no payment down, whereas Costello demanded a 10 per cent. initial payment and refused to sign any option which did not contain such provision, whereupon Gleeson, desirous that the sale be consummated, guaranteed said L. W. Powell, representing the Calumet & Arizona Mining Company, a repayment of the 10 per cent. demanded by Costello in case said option was not completed, and, since no payments other than the initial one of \$15,000 were made thereon, the option was surrendered and Gleeson forced to return to said company \$6,250, but the agreement to return this initial payment was the individual obligation of Gleeson; the other parties having neither consented to it nor ratifled it. Gleeson was very active in the negotiations of the said option for the reason that he and one Douglas Gray were interested in an option on which L. W. Powell, representing the Calumet & Arizona Mining Company, had paid them \$15,000, and he believed that if the option on the partnership

zona Mining Company also, it would make the consummation of the option he and Gray were interested in more probable, since the properties covered by the respective options were located in the same district not very far apart. The Calumet & Arizona Mining Company, however, abandoned its option by failing to make the second payment of \$35,-000 due September 30, 1908, but thereafter, to wit, on December 16, 1908, the Copper Queen Consolidated Mining Company took option on the same property, upon which Costello received about that date the sum of \$35,000, and on June 21, 1909, a further sum of \$57.500. Thereafter said Copper Queen Consolidated Mining Company abandoned said option, making no further payments thereon.

By August, 1908, the suit on the Copper Belle notes had been decided, and the proceeds were ready to be paid over to Gleeson. Reilly wrote Gleeson on August 8, 1908, to this effect, inclosing a statement of the amount due Reilly by Gleeson on account of various legal services, and on September 13, 1908, "Gleeson called upon Reilly and Costello in Tombstone for the purpose of settling up the Copper Belle transaction, and all of his dealings with Reilly and Costello, and repaying the said Costello, such sums as were due him for money advanced on behalf of Gleeson's interest in the partnership." At the interview which the three partners then had, Reilly, who had been for years the legal adviser of both Gleeson and Costello individually, and who had acted also as legal adviser for the partnership, and kept a record of its transactions, produced a list of the partnership mining claims, with the amounts paid for each, from which the Casey claims, to wit, the Tin Horn, Hard Up, and Head Center, were omitted, and to this Gleeson objected, Costello then, for the first time, denied that either Gleeson or the partnership owned any interest in these three claims, but admitted the existence of the partnership and Gleeson's interest as to the other claims. After a heated controversy between Costello and Gleeson as to whether these three claims belonged to Costello or the partnership, Reilly suggested that, inasmuch as the money due in a few days under the option to L. W. Powell, representing the Calumet & Arizona Mining Company, was more than sufficient to pay all moneys advanced by Costello, it was not necessary that Gleeson repay Costello for his advances out of the proceeds of the Copper Belle notes, but that he should take the money and have no further dispute over the matter, and everything would be all right. Realizing that the title to the mining claim stood in Costello's name, and that the notes had been transferred to him also, and fearing that if he did not accept the proceeds of the notes as suggested by Reilly he would lose both his

property was taken by the Calumet & Ari- money and his interest in the property, he accepted from Costello, without deducting anything for his contribution to the partnership, the money due him on the Copper Belle notes, less the amounts due both Costello and Reilly on account of individual transactions, and an item of \$11,549.19 due Mrs. Reilly. Gleeson thereafter executed a deed in favor of Martin Costello conveying the mines deeded by the latter to the former as a part of the consideration for the pretended sale of the notes, and offered to deliver the same to Costello, but he refused it, as did his executrix when the offer was renewed after his death.

> The interest of James Reilly in and to the assets of said copartnership were transferred by him to Costello before the former's death, which occurred June 8, 1909. action was filed September 24, 1909, and Costello died September 15, 1911.

> The foregoing gives the substance of the court's findings and with sufficient particularity for the purposes of this decision.

> [1] The assignments of error in the main revolve around the question of the sufficiency of the evidence to support: First, the finding that Gleeson, Costello, and Reilly entered into a partnership agreement in December, 1901, relating to the four mining claims. San Francisco, Fennard, Batavia, and Mono; and, second, the finding that the scope of such partnership was extended in February, 1902, when the three partners agreed to purchase a large number of other claims in the Turquoise mining district; and, third, the further finding that Gleeson did not relinquish and abandon any interest he may have had in the partnership by the transaction or settlement of September, 1908. Appellant contends, first. that the evidence is not sufficient to support the finding that a partnership agreement relating to the three Power claims and the Mono was made and consummated, for the reason that there is nothing in the record to show that Reilly ever owned one-half of the Mono claim or contributed such one-half or any other thing of value to the alleged partnership. According to Gleeson's allegations, and the court's findings, the assets of the partnership, to begin with, consisted of four mining claims, to wit, the San Francisco, Fennard, Batavia, and Mono, valued, for partnership purposes, at \$60,000, which were contributed by Gleeson, Reilly, and Costello in equal proportions. Gleeson's contribution of \$20,000 was the Power option, of which he was then the owner, and upon which he had paid \$350 in monthly installments of \$50 each. Reilly's and Costello's contributions were onehalf each of the remaining purchase price of the San Francisco, Fennard, and Batavia claims, which was \$20,000, less the payments made by Gleeson, and one-half each of the Mono claim, valued at \$20,000, of which they were then the owners. The option contributed

by Gleeson gave him the right to purchase from Patrick Power, within 18 months from May. 1901, for \$20,000, three of the abovementioned claims, to wit, the San Francisco, Fennard, and Batavia. This option, however, was permitted to lapse on July 1, 1902. but a new one, giving the right to purchase the same three claims for \$20,000, was procured on June 6, 1903, in the name of Martin Costello, which option was exercised November 6, 1904, when a deed conveying these three claims to Martin Costello was executed by Patrick Power. It is admitted by both parties that the purchase price of \$20,000 for the three claims under the second Power option was paid by Costello, though there is a disagreement as to whether he was credited on this option with the installments paid by Gleeson on the first one. Whether one-half of this amount, however, was for the benefit of Reilly, does not appear. The record title to the Mono claim, as shown by stipulation of the parties, was in the name of Martin Costello in December, 1901, and if Reilly was the owner and contributor of a one-half interest in this claim, such facts can only be deduced from the conversation had between Gleeson, Costello, and Reilly at the latter's office in Tombstone, in December, 1901, when, and as a result of which, it is alleged and found, the partnership agreement was entered into.

Gleeson's version of the conversation is as follows:

"There was a conversation between Reilly, Costello, and myself in regard to the mining claims. Goodbody, O'Brien, Reilly, Costello, and myself were present. Judge Reilly says to Costello, 'Well, John has got this option on the Power claim for \$20,000, and we got the Mono, and I told him that we would pay the option, and we would put the Mono and Power claims into the partnership,' something to that effect; Judge Reilly made that suggestion. He made it long before this, that I would put the Power option and they would put in the Mono claim. He said him and Martin Costello owned the Mono claim. Martin Costello said, 'Yes, all right: I can't tell you all of the conversation; it was so long ago."

In the former trial of this case Gleeson testified:

"Judge Reilly never contributed a cent that I know of."

Frank O'Brien, a former probate judge of Cochise county, who had come to Tombstone from the mine with Gleeson, and who was at the time manager of the Copper Belle store and working under Gleeson, the then superintendent of the Copper Belle Mining Company, testified that in the conversation Reilly said to Costello:

"John has got this bond on the Power property, and you have got the Mono claim; he wants to throw it in together. He wants you to throw in the Mono with the Power group and make one claim of the whole property; bond and all. He will throw in his share, his bond. And Reilly said to Gleeson. 'How about that, John; is that all right?' Gleeson said, 'Yes, and then he turned to Martin and says, 'How about it, Jew; how about it?' and Martin says,

'Yes, all right; that will be all right.' That is about all the conversation I remember in respect to the Power and Mono claims."

Frank Goodbody, an attorney working in the office of Judge Reilly at the time, does not state whether Reilly used the word "we" or "you" when referring to the owner of the Mono claim, but testified:

"The Mono claim had been owned by Joe Muheim, in Bisbee, and there was a tax title from Mr. Neale, and Mr. Leavenworth and myself assisted Judge Reilly in straightening out that title and giving it to Costello. That was done in Costello's name."

Costello purchased the Mono in 1901, a short time before the alleged agreement, at a tax sale, paying for it only a nominal consideration, and at the trial of this case before Judge Campbell, in 1910, he testified:

"Judge Reilly had no interest in the Mono whatever, and was never interested in any mining claim with me."

Judge Reilly's letter of April 25, 1901, to J. Henry Work, an attorney, of New York, inquiring about the purchase of the Mono by Costello, shows very clearly that the latter's statement regarding the Mono claim was true at that time.

Lee O. Woolery, an attorney employed in Judge Reilly's office at various times between 1899 and 1908, and who returned from Indiana in June of the latter year at the request of Judge Reilly, testified as follows:

"A few weeks before Judge Reilly left Tombstone the last time [late in 1908], going to California, he told me in his office on Fourth street that he brought me out here for the reason that Costello owned a number of mining claims in the Turquoise mining district, and he was acting as attorney for Costello, and that John Gleson had a mortgage on the Copper Belle mines, and expected to get the mines through a foreclosure proceeding, but they did not get it, and it was their intention if they got those claims to organize a company and deed those claims, or the claims owned by Costello and Gleeson, to the Costello Copper Company, or a corporation owned by them, and they wanted me to act as secretary of the company; that is the reason he wanted me back out here."

Any knowledge of his decedent's interest in the alleged partnership is disclaimed in the answer of the executor of Reilly's estate, a party defendant, nothwithstanding there is nothing in the record of the former trial, nor in this one, to show that if Reilly ever owned and contributed, either directly or indirectly, a one-half interest in the Mono and one-half of the purchase price of the Power claims, as testified to by appellee, such interest, valued then for partnership purposes at \$20,000, is not now a part of the assets of his estate, for no transfer thereof to Costello was shown, or attempted to be shown, in substantiation of appellee's allegation that such had been done.

The record contains no evidence, other than Gleeson's statement, which even tends to prove that Costello paid one-half of the \$20,000 for the San Francisco, Fennard, and Batavia claims, for the benefit of Reilly, or that Reilly was the equitable owner of a one-half interest in the Mono claim, or that

he contributed such interest to the partner- | 4 N. W. 434. 2049 Revised Statutes of Arisship. And we think that such facts are not one 1913." ship. And we think that such facts are not established by appellee's testimony that Rellly, in a conversation held ten years before, used the first personal pronoun "we," meaning Costello and Reilly, instead of the second personal pronoun "you," meaning Costello alone, in the expression "we got the Mono" and "we would pay the options," and "we would put the Mono and Power claims into the partnership," to which Costello replied, "Yes, all right; that will be all right." Especially is this true in view of appellee's former statement that "Judge Reilly never contributed a cent that I know of," and Costello's testimony that "Judge Reilly had no interest in the Mono whatever, and was never interested in any mining claims with me." Costello's reply, "Yes, all right; that will be all right," even though it be held to be an admission against interest, and given the fullest weight possible, would not be sufficient in an action prosecuted by Reilly's executor to deprive Costello's estate of its legal title to any part of the mining claims which Costello purchased with his own funds. In the light of the case of Costello v. Cunningham, 16 Ariz. 447, 147 Pac. 701, such a declaration, standing alone or taken in connection with the other evidence in this record, would not warrant the court in finding that Costello held onehalf of the Mono mining claim in trust for Reilly in December, 1901, nor that he held it, together with the San Francisco, Fennard, and Batavia mining claims, in trust for the partnership, after that date. As said by this court in the Costello-Cunningham Case:

"These statements by Costello became admissible as evidence only because they were made by him against his interest. Clearly such statements, when given the most favorable effect to the plaintiffs, are simply statements to the effect that Cunningham owned a half interest with Costello in mines in the Warren mining district, and that Cunningham was a partner with Cossuch statements and declarations, standing alone, are not sufficient evidence to determine, or sufficient evidence of its nature to warrant the court in finding that Costello and Cunningham acquired mines by each paying an equal share of the expenditures laid out in their ac-quisition, and that Costello took the record ti-tle thereto \* \* \* in his name in trust for tle thereto \* \* \* in his name in trust for the use and benefit of himself and his co-owner, Patrick Cunningham. Such statements and dec-larations made by Costello are insufficient, standing alone, to establish the trust contended for. Leatherw 94 Pac. 1110. Leatherwood v. Richardson, 11 Ariz. 278, ac. 1110. \* \* \* The rule requiring the evidence to be clear and satisfactory is especially applicable where the trust is attempted to be proved by parol evidence, as well as when it is sought to convert into a trustee a person holding the title to property estensibly as absolute owner. 39 Cyc. 84, 85. The statements and declarations of a holder of the record title of declarations of a holder of the record title of mines, made against such title, can affect the holder's title only by way of working an estoppel. Oral statements or silence could never have the effect to pass title which the statute expressly declares shall be transferred by deed only. Hayes v. Livingston, 34 Mich. 384, 22 Am. Rep. 533; Nims v. Sherman, 43 Mich. 45, the properties described in said complaint,

[2, 3] A consummated partnership which would have the effect of establishing in Costello the trust relation regarding these claims ought to be proven by evidence as clear and satisfactory as would be required to show the trust relation direct, without the intervention of a partnership. If, therefore, the evidence be considered sufficient to substantiate the finding that the partnership agreement was entered into in December, 1901, as alleged, before a consummation thereof can be made to appear, it must be shown that each of the partners contributed his proportion of the agreed assets. The fact that Gleeson and Costello may have paid their proportions would not establish a partnership composed of Gleeson, Reilly, and Costello, with each contributing property valued at \$20,000, when there is no showing that Reilly, either directly or through Costello, paid his. "The mere agreement to form a partnership does not, in itself, create a partnership; nor does the advancement by any one party of his agreed share of the capital. The entire agreement and all of the attending circumstances are to be taken into consideration in determining whether a partnership was actually launched." 357.

[4] The court has found, as alleged by appellee, that a supplemental partnership, extending the scope of the original one so as to embrace a large number of other claims in the Turquoise district, was entered into by the three partners in February, 1902. This is an important finding, which has been assigned as error and fully argued by both appellant and appellee in their very exhaustive briefs, but we deem a discussion of it unnecessary, in view of the transaction of September, 1908, as it is termed in the record, and the construction which must be placed thereon. Appellant contends that even though the supplemental agreement was entered into and the claims described in the third amended complaint purchased by the partnership in pursuance thereof, a proper construction of the transaction or settlement of September, 1908, will establish the fact that appellee by that act withdrew any contribution he may have made to the partnership in its extended scope, and that the effect of such withdrawal was to dissolve any partnership theretofore existing, thus ending Gleeson's connection with the partnership and leaving Costello the owner of the equitable as well as the legal title of all claims alleged to have been purchased by the partnership. The basis for this position is found in paragraph 16 of appellee's second amend-

whether as alleged therein or otherwise, which this defendant does not admit, but, on informa-tion and belief, denies such partnership, or trust, was fully dissolved and terminated during or about the month of September, 1908, at which or about the month of September, 1908, at which time a full and complete accounting and settle-ment of the affairs of said allaged partnership was had and completed between plaintiff herein and Martin Costello; that at said time plaintiff herein voluntarily withdrew all and any contri-butions theretofore made by him to or for the herein voluntarily withdrew all and any contributions theretofore made by him to or for the benefit of said alleged partnership and received full payment thereof from Martin Costello; that in and by said accounting, settlement, and payment, plaintiff herein renounced and relinquished all and every alleged interest or claim of interest in or to any of the properties mentioned in the third amended complaint, and that his alleged interests therein, or in said alleged partnership thereupon ceased and determined; that plaintiff thereupon voluntarily relinquished all of said properties to the said Costello, who at all times thereafter, at his own expense and risk and without any cost or hazard to plaintiff herein, continued to control and care for said properties in the purchase of which he had expended approximately \$100,000 of his personal funds; that having thus freed himself of all risk or hazard of said alleged partnership enterprise, and having withdrawn all of his alleged contributions thereto, and having so continued without risk or hazard of loss, plaintiff now seeks to participate in the fruits of Costello's contributions thereto, and having so continued without risk or hazard of loss, plaintiff now seeks to participate in the fruits of Costello's successful handling of said properties, all of which was attained at the sole risk and by the sole efforts of Costello, and at his sole expense; that when plaintiff so withdrew his alleged contributions to said alleged partnership, said alleged partnership, if any there was, was largely indebted to Costello for moneys expended by him in the purchase of said properties and in perfecting and maintaining the titles thereto, no part of which was then or at any time paid by plaintiff."

In order that the transaction or settlement of 1908 and its relation to this suit may appear, a brief statement of the facts of the case of Martin Costello v. Copper Belle Mining Company, a corporation, is necessary. In February, 1904, Martin Costello filed suit in the territorial district court at Tombstone against the Copper Belle Mining Company, a corporation, on four certain promissory notes aggregating \$53,000 and executed under date of February 4, 1902, by the said Copper Belle Mining Company in favor of John Gleeson, each in the principal sum of \$13,250, and bearing interest at the rate of 3 per cent. per annum, interest payable annually. These notes matured one each year for the years 1906, 1907, 1908, and 1909, respectively, and their payment was secured by a mortgage on ten mining claims of the said Copper Belle Mining Company located in the Turquoise mining district. further alleged that in July, 1902, and before any of said notes became due, John Gleeson, for a valuable consideration, assigned and delivered them to Martin Costello, who then became and thereafter remained the owner and holder of said notes, together with the mortgage securing their payment. The Copper Belle Mining Company answered by denying, among other things, that Costello was the owner and hold-

was the real party in interest, or that Gleeson ever indorsed or delivered said notes to Costello, and alleged a lack of consideration for the notes. Gleeson, who was made a party defendant on motion of the Copper Belle Mining Company, admitted in his answer the making of a certain agreement which the said company had pleaded also as a defense, and which would probably have been good against him as plaintiff in the case, but denied that Costello had any knowledge of said agreement when the sale was made and the notes delivered. whether the sale of these notes by Gleeson to Costello was bona fide or merely simulated-done for the purpose of enabling Costello, as a bona fide purchaser for value without notice, to do for Gleeson what he probably could not do for himself-was the plyotal point in the case. Gleeson testified that Costello paid him \$25,000 in cash, and conveyed to him certain mining claims near Tombstone as consideration for the notes. Costello's testimony was to the same effect. And the trial court finally decided that Costello was a bona fide purchaser of the notes, and on July 29, 1908, gave him judgment for the amount due on them, to wit, \$63,659.32, and ordered foreclosure of the mortgage. This judgment was satisfied of record by Costello on August 28, 1908.

In addition to the foregoing facts concerning the Copper Belle suit, it was further established in this case that on August 8, 1908. following the rendition of the Copper Belle judgment, Reilly, who was then and had been for many years the legal adviser of both Costello and Gleeson in their individual capacities, wrote the latter informing him of the result of the case, and inclosed a statement of his account with Costello and Gleeson for legal services in reference to mortgages and suits concerning the Copper Belle mining claims. On September 13th, thereafter, Gleeson called upon Costello and Reilly at the latter's office in Tombstone for the purpose of settling up the Copper Belle transaction, and in consequence of the settlement reached at this time Costello accounted to Gleeson for the full amount of the Copper Belle judgment. to wit, \$63,659.32, by giving Gleeson a check for \$33,659.32, and paying, at the request of the latter, \$11,257 .-70 to Judge James Reilly, \$11,549.19 to Mrs. James Reilly, and retaining for himself \$7,-423.16 in repayment of a loan he had previously made Gleeson. In the statement inclosed in Reilly's letter to Gleeson there is an item of \$10,000 for legal services in the Copper Belle and other litigation, which amount was included in the \$11,257.70 paid Judge Reilly by Costello at Gleeson's request. It was further shown that within 14 days from the time Costello paid Gleeson by checks the \$25,000 cash consideration for the notes, which was on January 12, er of said notes and mortgage, or that he 1903, this entire amount was returned to

him by Gleeson through Reilly acting as the agent of both parties. And the trial court, notwithstanding the contrary result reached years before in the Costello-Copper Belle Mining Company case, acting principally upon the foregoing facts, came to the conclusion, and we think very properly so, that the sale of the notes to Costello by Gleeson was not bona fide, but only simulated-done for the specific purpose of enabling Costello to do for Gleeson what he probably could not do for himself, viz. collect the notes. And Costello's act in returning to Gleeson the proceeds of the notes is found by the court to have been in accordance with the understanding had between them at the time the simulated sale was agreed upon that immediately after the collection of the notes by Costello he would turn over to Gleeson, their rightful owner, the entire proceeds

Although the notes were actually transferred to Costello on July 2, 1902, "for the purpose of making more sure their collection," and though the proceeds thereof after collection were turned over to Gleeson in September, 1908, yet, during al this time and for six months prior thereto, as appears from the findings, they were performing an important, though separate and distinct, function, in connection with the partnership. This is shown by the fact that in February. 1902, when the three partners decided to extend the scope of the partnership, Gleeson was without means to embark upon such an enterprise, and Costello, upon the suggestion of Reilly, agreed to advance for him his one-third of the cost thereof, but upon two conditions, viz.: First, that Gleeson would transfer to him, as security for such advances, the Copper Belle notes which had that day come into Gleeson's possession as owner; and, second, that title to all claims acquired should be taken in his name and so held until Gleeson and Reilly should repay him their share of the purchase price of said claims. In accordance with this agreement, as found by the court, Gleeson at that time "left the Copper Belle notes in the possession of Reilly, representing the partnership, as security for his obligation to contribute his share of the expenses of the partnership," and in pursuance of this arrangement, during the succeeding six years, the partnership purchased a large number of mining claims, and took title to them in the name of Costello, who advanced from his personal funds in purchase price, assessment work, taxes, and the procuring of patents to a number of the claims, nearly \$100,-000, which was in addition to the \$20,000 he had paid for the Power claims. When. therefore, Gleeson called on Costello and Reilly in September, 1908, for the purpose of settling up the Copper Belle transaction, and, as found by the court, "for repaying Costello such sums as were due him for Costello, unless at the time there was an

money advanced on behalf of Gleeson's interest in the partnership," the amount due Costello because of such advances was onethird of approximately \$100,000, or more than \$30,000. And notwithstanding it was Gleeson's intention at that time to repay Costello out of the proceeds of these notes, and although there was no other source from which he could procure funds for this purpose, the fact remains that he accepted the full amount of the judgment, and used no part of it to reimburse Costello, and, because of such acceptance and failure to repay, the latter was left without even security for the very advances he had agreed to make only upon a promise of security, and which in fact were only made after such security had been "left in the possession of Reilly, representing the partnership."

Such action on the part of Gleeson, appellant contends, in reality constituted a withdrawal from the alleged partnership of any contributions he had made thereto, and should be construed as having effected a termination of any partnership agreement theretofore existing, as well as a relinquishment to Costello of any interest or claim Gleeson may have had in the properties belonging to the partnership before its dissolution. The terms of the agreement extending the scope of the partnership made it the duty of Gleeson to transfer the notes to Costello as security, but instead of transferring them to him individually, as the agreement required, he "left them in the possession of Reilly, representing the partnership, as security for his obligation to contribute his share of the expenses of the partnership." And this deposit with the partnership, Reilly being merely its representative for this purpose, appears to have been accepted by Costello as a sufficient compliance with the agreement to transfer to him. It is true, however, that for the purpose of making a pretended sale appear as an actual one, and thus render more probable the collection of the notes, Gleeson transferred them to Costello in July, 1902, but such transfer was in no way connected with, nor in furtherance of, the service the notes were then performing of securing Costello, and since the sale of the notes was a mere pretense and a sham, the transfer of them in aid of such an act should be regarded likewise. If, therefore, the finding that the notes in the possession of the partnership were serving as a guarantee be accepted as true, it follows necessarily that while thus engaged they were beyond Gleeson's control and so closely connected with the contribution they were then, and for years had been, responsible for that an acceptance at that time of their proceeds by him was in reality a withdrawal from the partnership, which resulted in its termination and in the relinquishment of his interest in the property which it had owned to agreement, as Gleeson testified there was, by which he was permitted to "take down" the money and retain his interest as well by paying for it in another way.

The agreement referred to by Gleeson appears in the following examination of him by the court:

"Q. How was Mr. Costello to be repaid for the money he had advanced? A. He had those Copper Belle notes of mine. Q. Then how were you to puy him for what he had put up on this property, if you got all your money back for the Copper Belle notes? A. I had to take it back. He could have said he didn't owe me anything; that there was nothing coming. Q. How was that? A. I had to take that. He could have said there was no money. There was enough money coming from the C. & A. to pay my interest outside of that. Q. He agreed to get this money from the C. & A.? A. Yes, sir; that is the reason I took it down. Q. Now, in regard to your interest in the corporation that you were to have, were you to pay for that interest in the corporation? A. Sure, the money was up all the time. Q. That is to say, that Costello agreed that you could take down your money, and he would take a chance on the C. & A. making this payment? A. I don't see that he took any chances. Q. Well, he certainly did, since it was never paid. A. I said that I took it down. Judge Reilly said, 'Call this Copper Belle transaction off. There is money enough coming from the C. & A. to pay it all. We will all get money.' I said, 'I don't want to call it off;' and Costello said, 'I never considered you an owner in the two claims and a half of the Casey,' that is why I took it down. I had nothing to show I had claims, I had money, or anything else."

It does not appear just how Reilly's sug-

It does not appear just how Reilly's suggestion that the Copper Belle transaction be called off could have furnished a reason for Gleeson's "taking down the money," since it has been established that there was no sale of the Copper Belle notes to "be called off," and that Gleeson returned to Costello within 14 days after its receipt the \$25,000 "pretendconsideration for the notes. Such transaction could have been "called off" only if the testimony given by Gleeson at the first trial of this case had been true, namely, "I put up \$25,000 to pay for my part of the mines, but when they called the transfer of the Copper Belle notes off, why, of course, I got that money back." While the second part of Reilly's suggestion, "there is enough money coming from the C. & A. to pay it all," seems to have been offered as an excuse for calling off the Copper Belle transaction—an impossible thing under the circumstances-yet Gleeson gives it, supplemented by the statement that Costello agreed to it, as one of his reasons for "taking down the money." When Reilly and Gleeson referred to the "money coming from the C. & A.," they meant the \$35,000 due September 30, 1908, and the \$100,-000 due March 30, 1909, on the option held by the Calumet & Arizona Mining Company on the Casey claims, to wit, the Tin Horn, Hard Up. and Head Center-three of the most valuable claims owned by the partnership-and two others known as the Black Hawk and the Smile of Fortune. The \$35,000 was not

agreement, as Gleeson testified there was, by paid, however, and the option lapsed on Sepwhich he was permitted to "take down" the tember 30, 1908.

Gleeson's other reason for taking down the money is found in the remark he attributes to Costello, "I never considered you an owner in the two claims and a half of the Casey," which, according to Gleeson, caused him to fear that, unless he did take the money, he might lose both his interest in the claims and the proceeds of the notes, inasmuch as he had nothing to show that he owned either. Testifying further on this point, Gleeson stated that when they were trying to settle the Copper Belle matter in September, 1908. Costello denied several times that either Gleeson or the partnership owned any interest in the Casey claims, giving as his reason the fact that he had a mortgage on them before he and Gleeson went in together. After the last denial and some argument following it, they both became angry, whereupon Gleeson said, "Give me that money," to which Costello replied, "Don't get mad about it: you are all right; you can have your interest in the other claims." Gleeson replied, "By God, I will have it all or nothing; give me that money." Then it was that Gleeson accepted the money, to wit, \$33,659.32, the balance coming to him after others had been paid at his request the amounts due them.

The court finds that Gleeson, in taking the money, acted upon Reilly's suggestion-really accepted his proposition—that since there was enough money due in a few days under the C. & A. option to more than pay all moneys advanced by Costello, "it was not necessary that the said John Gleeson repay Costello for his advances out of the proceeds of the Copper Belle notes, and that it was best for Gleeson to take all of the proceeds of such notes, and have no further dispute over the matter, and that everything would be all right." According to Gleeson's reply, "Yes, sir; that is the reason I took it down," to the court's question, "He agreed to get his money from the C. & A.?" this arrangement was satisfactory to Costello, but evidently the court was not convinced on this point, for there is no finding that Costello did agree to it. And in view of the other reason given by Gleeson, that he "took down the money" because Costello denied his interest in the Casey claims on which the "money coming from the C. & A." would be due in a few days, it is not apparent how such a finding could have been made. Gleeson did not testify that Costello indicated his consent by any spoken word, but declared that he "was right there" when Reilly made his suggestion. Costello's continued denial, however, of Gleeson's interest in the Casey claims in the presence of both Gleeson and Reilly rendered it unnecessary for him to object in specific terms to Reilly's suggestion in order that his silence might not imply an agreement by him to take the risk of getting his money Costello would not have agreed to repay himself out of the purchase price of mines he was at that very moment claiming to be his own individual property, for advances he had made in Gleeson's behalf. For him to have done so under the circumstances would have been the equivalent of promising to make Gleeson a present of a one-third interest in the partnership.

It may be, as the findings state, that Gleeson at the time he accepted the money did not intend to abandon his interest in the mining claims belonging to the partnership. Nevertheless his act in accepting the proceeds of the notes, which all these years had been the foundation stone upon which his interest in the extended partnership rested, without making any arrangement whatever for paying his proportion or furnishing other security therefor, shows conclusively the abandonment by him of his interest in the partnership property, regardless of his intention. His statement, as Costello handed him the check, that he would fight for this property as long as he lived, in view of his act, is unavailing, for "actions speak louder than words." That title to the claims stood in the name of Costello, as agreed in the beginning, that the Copper Belle notes had been transferred to him in furtherance of a sham sale. together with the fact that he denied Gleeson's interest in the Casey claims while admitting it in all the others, might have justified Gleeson in withdrawing his security in its converted form as a matter of business precaution, upon the theory of the old saying that "a bird in the hand is worth two in the bush"; but we are acquainted with no principle of law or justice which would permit him to withdraw his entire contribution because of the fear of losing both his interest and his money and afterwards recover in an equitable action the very interest which the money withdrawn was supposed to pay for. He cannot eat his cake and have it too. This principle is so plain that the citation of authorities is unnecessary.

We conclude, therefore, that if a partnership did exist, as alleged, it was terminated in September, 1908, by Gleeson's acceptance of the proceeds of the Copper Belle notes, which really amounted to a withdrawal of his interest, since no arrangement whatever was then made by him either to pay his contribution or further guarantee it. By such action, Gleeson necessarily relinquished any interest he may have owned in the partnership mining claims to Costello, who, having paid from his own personal funds the entire expense thereof, approximately \$115,000, thereby became the owner of the equitable as well as the legal title to said mining claims.

The judgment is reversed, and the case remanded, with direction to the superior

from the C. & A. In fact it is clear that | court to enter judgment in favor of appellant, declaring her, as the executrix of the last will and testament of Martin Costello, deceased, to be the owner of the mines and mining claims described in the third amended complaint, together with costs.

FRANKLIN, C. J., and ROSS, J., concur.

N. B .- Judge CUNNINGHAM being disqualified and announcing his disqualification in open court, the remaining judges, under section 3 of article 6 of the Constitution, called in Hon. A. G. McALISTER, judge of the superior court of the state of Arizona, in and for the county of Graham, to sit with them in the hearing of this cause.

ROBERTS v. STILTNER et al. (No. 14372.) (Supreme Court of Washington. April 25, 1918.)

1. EVIDENCE 4419(13)—FRAUDS, STATUTE OF 5158(2)—WRITTEN INSTRUMENTS — PAROL EVIDENCE—CONSIDERATION.

In a suit for the specific performance of a contract for the sale of real estate which recited the receipt of a certain sum of money as part of the consideration, it was not error to admit oral testimony showing that the true consider-ation consisted in retention by the defendants of part of the premises; such evidence not varying the contract terms, or being in contravention of the statute of frauds.

2. Fraudulent Conveyances 4== 295(1)—Evi-DENCE-SUFFICIENCY.

In a suit for specific performance and to set aside a deed by defendants to another as in fraud of plaintiff's rights, evidence tending to show that the land was worth \$5,000, that the consideration for the deed was only \$1,250, that the grantors and grantee were intimate friends, so that the grantee must have known of plaintiff's contract, in view of the grantee's failure to testify, though present, held to support a finding that such conveyance was fraudulently made.

Department 2. Appeal from Superior Court, King County; R. H. Back, Judge.

Suit by J. W. Roberts against Jess Stiltner and others for specific performance. Decree for plaintiff, and defendants appeal. firmed and remanded.

John F. Dore and Robert Welch, both of Seattle, for appellants. C. D. Cunningham, of Centralia, for respondent.

PARKER, J. The plaintiff, Roberts, seeks specific performance of the following contract in so far as it obligates the defendants Stiltner and wife to convey to him the S. W. 1/4 of section 24, in township 12 N., range 5 E., in Lewis county, excepting 10 acres described as the N. W. ¼ of the N. W. ¼ of the S. W. 1/4 of that section.

"Jan. 26, 1916. "We, the undersigned, agree to sell the following described property, to wit: S.14, S. W. 14, E. 14 of N. W. 14 and S. W. 14 of N. W. 14 and lot 6 in section 24, township 12 N., range 5 E., W. M., to J. W. Roberts for the following consideration, to wit, \$5,000.00 (five

thousand).

"We, the undersigned, have received this day we, the undersigned, have received this day as part of the consideration the following: One team of horses, buggy and harness, valuation \$500.00; \$2,700.00 cash as part of the purchase price of said land.

"J. W. Roberts agrees to give to Anna Stiltner and her husband a first mortgage on said

ner and her husband a first mortgage on said land for \$1,800.00 to be paid in two years at 8 per cent. interest. J. W. Roberts agrees to pay back taxes and one mortgage to C. K. Walsh for \$140.00, with interest, and agrees to give a bill of sale on said horses. Jess Stiltner and wife agrees to give J. W. Roberts 60 days to full close the deal.

"[Signed] Jess Stiltner.

"Anna Stiltner.
"J. W. Roberts."

A literal reading of this somewhat involved land description shows that it covers all the land here claimed by the plaintiff and more, that is, it covers the whole of the S. 1/2 of the section, and also land in the N. W. 14 of the section. We note that lot 6 is the fractional N. E. 1/4 of the S. W. 1/4 of the section, containing slightly less than 40 acres according to the official plat of the United States government survey. The plaintiff also seeks the setting aside of a deed executed by the defendants Stiltner and wife to the defendant McLennan on February 10, 1916, purporting to convey the whole of the S. W. 1/4 of the section. This deed, the plaintiff claims, was executed in fraud of his rights under the contract with the defendants Stiltners. Trial in the superior court for Lewis county resulted in a judgment and decree in substance as sought by the plaintiff, from which the defendants have appealed to this court.

At the time of the making of this contract Stiltner and wife were the owners of the whole of the S. W. ¼ of the section, and owned no other land or real property whatever. It is conceded by all concerned that in so far as the contract describes land other than in the S. W. 1/4 of the section it did so because of the mutual mistake of all the parties. Respondent did not seek the reformation of the contract in a technical legal sense so as to exclude from the description land outside of the S. W. 1/4 of the section, but conceded that he had no right to any land under the contract outside of the S. W. 1/4 of the section: The trial court, however, by its decree did, in form, reform the contract in accordance with the admitted fact that the description was intended by all parties to be so limited. Respondent's disclaiming of the 10 acres consisting of the N. W. 1/4 of the N. W. 1/4 of the S. W. 4 of the section was because, as he claims, of an agreement made between the parties at the time of the making of the contract, that he would allow the Stiltners to retain this 10-acre tract on which their home buildings were situated, or that he would reconvey it to them upon the final consummation of the sale and the execution of the deed by them to him in compliance with the con-

the retaining of this 10-acre tract by the Stiltners and the payment of the \$140 mortgage and the back taxes by him was the real consideration of that part of the consideration stated in the contract to have been received as \$2,700 in cash by the Stiltners. This claim of respondent did not appear in his pleadings; he merely pleading the contract which showed that the \$2,700 had been paid. He pleaded, however, that he had paid the \$140 mortgage and the back taxes and tendered the \$1,800 mortgage to be executed by him in final payment of the purchase price, all of which was done within the 60-day limit prescribed in the contract. The fact that the \$2,700 had been paid in cash was denied by the Stiltners and brought out by their counsel upon cross-examination of the respondent while upon the witness stand, and by the testimony of the Stiltners in their defense. It was in response to this showing that evidence was introduced by respondent, thus explaining the consideration in so far as the \$2,700 is concerned. The evidence, we think, clearly calls for the conclusion that this is the true meaning of the acknowledgment by the Stiltners in the contract of the payment of the \$2,700 in cash upon the purchase price.

[1] It is contended by counsel for appellants that the trial court erred in admitting oral evidence in respondent's behalf in explanation of that part of the consideration acknowledged in the contract as having been received as \$2,700 in cash by the Stiltners. The argument is that this was the admission of oral evidence to vary and contradict the written terms of the contract, and that it was therefore inadmissible. Now, if appellants can lawfully be permitted to show by oral evidence that the \$2,700 was not paid in cash in contradiction of their solemn acknowledgment in the contract that it was so paid, it seems difficult to see why respondent may not also lawfully be permitted to show that the Stiltners did, nevertheless, receive property, or a promise that they might retain property already in their possession, agreed to be worth \$2,700, in lieu of the \$2,700 in cash. However, we think it is not the law that oral evidence explaining and showing the true consideration of the purchase price of land in a contract of this nature is inadmissible, either as varying the terms of the written contract or as being in contravention of the statute of frauds. In Van Lehn v. Morse, 16 Wash. 219, 47 Pac. 435, Judge Gordon, speaking for the court, quoted with approval from an opinion of Justice Sedgwick, speaking for the court in Quarles v. Quarles, 4 Mass. 680, as follows:

"The principle is, I think, most clearly established, that when one consideration is expressed in a deed, any other consideration consistent with it may be averred and proved."

This view of the law was adhered to by tract. It is claimed by the respondent that this court in Don Yook v. Washington Mill Company, 16 Wash. 459, 7 Pac. 964, where of the evidence convinces us that it is amoral evidence was held admissible for the purpose of showing that the actual consideration for the sale of the logs was different from that expressed in the bill of sale. In Flynn v. Flynn, 68 Mich. 20, 35 N. W. 817, the same view of the law is expressed, and it is there pointed out that such evidence is admissible apart from the question of reformation of the contract; Judge Campbell, speaking for the court, observing:

"The bill of complaint prays for a reformation of the deed, so as to express the true consideration; but this was unnecessary, as the true consideration may always be shown where it be-comes material to do so, without reforming the

In the text of 17 Cyc. page 653, we read: "\* \* It is held by an uncounted multitude of authorities that the true consideration of a deed of conveyance may always be inquired into, and shown by parol evidence, for the obvious reason that a change in or contradiction of the expressed consideration does not affect in any manner the covenants of the granter or grantee, and neither enlarges nor limits the grant."

And on pages 655 and 661 the text and authorities cited in support thereof show that the rule is as applicable to contracts as to deeds, unless the statement of the manner of the payment of the consideration, or the part thereof in question, evidence an Plainly, executory contractual obligation. the mere acknowledgment of the payment of the \$2,700 is in no sense an evidencing of any contractual obligation on the part of respondent, and so far as his obligation to pay the \$140 and the back taxes is concerned the evidence clearly shows he performed those obligations within the time specified. Nor do we think the fact that the actual consideration, in so far as the \$2,700 is concerned, consisted in whole or in part of an agreement on the part of respondent to allow the Stiltners to retain the 10 acres, prevents the application of the rule of allowing oral evidence explaining the consideration in this case. They already had possession of these 10 acres and the legal title thereto, and, in its last analysis, the question of their retention of the 10 acres under the oral arrangement had to do only with the question of the explanation of the expressed consideration in so far as the acknowledged \$2,700 cash payment is concerned. We are of the opinion that the court did not commit error in admitting oral evidence explanatory of the expressed consideration in this respect.

[2] It is contended in appellants' behalf that the trial court erred in holding that the deed of the whole of the S. W. 1/4 of the section executed by the Stiltners to McLennan was made in fraud of the rights of respondent under the contract, in so far as they then conveyed the portion of the S. W. 14 of the section other than the 10 acres retained by the Stiltners. A careful review on of the farm, except labor.

ple to support the conclusion reached by the trial court upon this question. The evidence, we think, warranted the conclusion that the whole of the S. W. 14 of the section was worth approximately \$5,000; that the consideration paid by McLennan to the Stiltners therefor in no event exceeded \$1,250; that the Stiltners and McLennan were very intimate friends; and that their relations were such that McLennan must have known that there then existed this contract of sale for the land between the Stiltners and respondent. We note that McLennan did not testify upon the trial, though in the courtroom during the whole of the trial. We think it would be unprofitable to review the evidence here in detail upon this question. We conclude that the trial court correctly determined this question in favor of respondent.

The judgment and decree of the trial court are affirmed. While the decree determines the respective rights of the parties, it provides for the doing of certain things by the respective parties, such as making proper conveyances, executing the \$1,800 mortgage in proper form, and the payment of the sum of \$207.39 by respondent to McLennan in adjustment of a certain matter incident to the case which we have found it unnecessary to here notice, all to be done within 10 days following the entry of the decree, to the end that it be made effectual; we conclude that such 10-day limit, or such other further reasonable time as the trial court may determine, shall commence to run from the day of the filing of the remittitur in the superior court for Lewis county evidencing the judgment rendered by this court upon this deci-The cause is remanded to the trial sion. court for such further proceedings looking to the rendering of the judgment and decree effectual as may be necessary, not inconsistent with our views herein expressed.

ELLIS, C. J., and MOUNT, CHADWICK, and HOLCOMB, JJ., concur.

BOOKHOUT v. VUICH. (No. 14601.) (Supreme Court of Washington. April 26, 1918.)

EVIDENCE \$\infty 450(6) — PABOL EVIDENCE - EMPLOYMENT UNDER FARMING CONTRACT. - PAROL EVIDENCE -

Where a contract of employment to work upon defendant's farm, providing that plaintiff would receive one-third of the increase of all live stock then on the premises and one-third of the profits from the raising of chickens and the selling of eggs, the admission of parol evidence to interpret the contract provisions for a share of the increase of the live stock and profits was not error, in view of the vagueness of the terms of the contract, and the fact that plaintiff was to furnish everything necessary to the carrying to furnish everything necessary to the carrying

2. EVIDENCE 450(6)—UNCERTAINTY—PAROL | ting without a jury, resulted in findings and EVIDENCE.

In such case it was unnecessary to reform the contract before it could be given a meaning contended for by the plaintiff as to the under-standing that defendant would place live stock and chickens upon the farm.

3. MASTER AND SERVANT €==59 — FABM EM-PLOYMENT CONTRACT — BREACH BY DEFEND-ANT-RESCISSION.

Where there was a substantial failure on the part of defendant, the owner of a farm, to furnish live stock and chickens as agreed by him, and of which plaintiff was to have one-third of the increase and profits, plaintiff was warranted in rescinding the contract and in quitting work.

4. Landlord and Tenant €=5(1)—Relation
— Construction of Contract — Farm Em-PLOYMENT.

PLOYMENT.

A contract whereby defendant employed plaintiff to live upon defendant's farm and to pay plaintiff for his labor and services one-third of the increase of all live stock then on the premises and one-third of the profits arising from the sale of chickens, eggs, etc., and to provide everything necessary, except labor, and plaintiff was to furnish labor and to devote all his time upon the premises, and any space time. his time upon the premises, and any spare time in clearing the land, and to do the work in a suitable manner in a reasonable time and ac-cording to defendant's orders, was a contract of employment creating the relation of master and servant, rather than that of landlord and tenant, or landlord and cropper.

5. Master and Servant \$\infty 80(11) - Contract of Employment-Breach-Measure OF DAMAGES.

Upon defendant's breach of such contract by failing to furnish live stock and poultry, and after plaintiff's rescission and his quitting of work, the defendant was in no position to object to the measuring of plaintiff's recovery by the reason-able value in wages of services actually rendered for defendant's benefit, in view of the fact that plaintiff was seeking a recovery of his past wa-ges only, and that the total compensation agreed upon and the loss of prospective earnings was almost wholly a matter of guesswork, and that plaintiff's rescission was due to the defendant's fault.

Department 1. Appeal from Superior Court, Spokane County; Bruce Blake, Judge. Action by Charles Bookhout against George P. Vuich. Judgment for plaintiff, and defendant appeals. Affirmed.

F. A. McMaster, of Spokane, for appellant. Roche & Onstine, of Spokane, for respondent.

PARKER, J. The plaintiff, Bookhout, commenced this action in the superior court for Skokane county seeking recovery of wages upon quantum meruit for labor performed by the party of the first part will pay to the party him for the defendant, Vuich, upon his farm in Spokane county. The plaintiff claims he is entitled to have the amount of his recovery so measured, because of the breach of a contract of employment by which he was to work upon the defendant's farm and receive as compensation therefor shares in the crops and produce and in the increase of the live stock to result from his labor upon the farm during the period from August, 1915, to November, 1916. Trial before the court, sit-

judgment in favor of the plaintiff substantially as prayed for, from which the defendant has appealed to this court.

Appellant, the owner of the farm, is engaged in business and resides in the city of Spokane. The respondent is a farmer, fairly intelligent, and can speak and understand the English language, though he cannot read or write. In August, 1915, appellant employed respondent to work upon the farm, to assist in harvesting and caring for the crops produced thereon during that year. thereafter they entered into an oral agreement by which it became understood between them that respondent would continue to work upon the farm for appellant until November. 1916, and receive as compensation therefor shares of the crops and produce, and of the increase of the live stock to be placed thereon by appellant. It was then understood between them that their contract should be reduced to writing; this was not done, how-ever, until later, though respondent then went to work upon the farm and continued to work thereon until June 15, 1916, when he quit work, the cause of which we shall presently notice. After repeated efforts on the part of respondent to have the contract drawn up in writing, appellant caused it to be prepared and presented to respondent for signing in March, 1916. It was then read to respondent, and he apparently understood it as well as would ordinarily be expected of a person of his limited learning. To the end that the real relations of the parties may be understood, it seems necessary to here notice all the terms of the written contract; we therefore quote it in full as follows:

"This indenture made this 1st day of March,

"This indenture made this 1st day of March, 1916, by and between George P. Vuich, party of the first part [second] and Charles Bookhout, party of the second part [first].

"Whereas, the said party of the first part is the owner of the south half (S. ½) of the southwest quarter (S. W. ½) of section twenty-six (26). Tp. twenty-three (23), range forty-five (45), Spokane county. Wash, and has employed the Spokane county, Wash., and has employed the party of the second part to farm the said premparty of the second part to farm the said pren-ises and to live thereon, occupy the same for a period beginning with the 19th day of August, 1915, to the 1st day of November, 1916, and in consideration of the party of the second part consideration of the party of the second part performing the work necessary on the said premises, to plow, till, sow, harvest, and haul to market the crops to be raised thereon, and perform the work in connection therewith in a careful and husbandlike manner, it is agreed that the party of the first part will pay to the party

nished by the party of the first part without ent insists that it was understood that appelexpense to the party of the second part, and that thereafter there shall be retained a sufficient amount of grain to feed all live stock upon 3 brood mares with a view to having them

the said premises and to provide a sufficient amount of seed for the following year.

"It is further agreed that the party of the second part is to devote all of his time upon the said premises, and that if it becomes necessary to employ additional help such help shall be paid for out of the grain which is to be sold be-longing to both parties, and after such expense has been deducted then the balance shall be divided between the parties as above stated, and that the party of the second part agrees to haul all the grain to be sold to the town of Rock-ford and deliver to the party of the first part two-thirds (%) of the vegetables raised in Spo-kane, and that the delivery of said grain and products shall be without expense to the party of the first part; it being fully agreed between the parties hereto that the party of the second part is to receive no compensation for his labor except as above stated.

"It is further agreed that the party of the second part will devote what time he can in cutting wood upon the said premises and is to have one-third (1/2) of all wood that is cut for his services, and also in consideration thereof he is to perform what labor he can in the clearing of the said land in pulling stumps, the clearing of brush, and the burning of same, which is all to be done without expense to the party of the first part, except first party is to hire one man to

assist.
"It is further agreed that the second party shall keep the fences upon the said premises in shall keep the fences upon the said premises in good repair, performing all labor necessary to be performed without expense to the party of the first part, but that the party of the first part is to furnish all material necessary in connection therewith, and that the party of the second part agrees to perform all and every work on said farm in a suitable and proper manner, and at a seasonable time, and shall obey instructions and orders from the party of the first part and at a seasonable time, and snall oney instruc-tions and orders from the party of the first part in connection with said labor. And at the expi-ration of said term, the said party of the second part will peaceably quit and surrender the said premises in as good state and condition as rea-sonable use and wear thereof will permit.

"In witness whereof, the parties to these presents have hereunto set their hands and seals,

the day and year first above written.

"[Signed] George P. Vuich.
his

"Charles\_X\_Bookhout."

mark

This contract, it will be noticed, relates back to the time of the oral agreement of the parties made in August, 1915, and manifestly was intended to evidence the contract then made rather than one made at the time of the signing of the writing. While the written contract provides that respondent was entitled to have one-third of the increase of the live stock and one-third of the profits arising from the raising of chickens and sale of eggs, etc., the fact is that there were no live stock or chickens upon the farm when respondent went there in August, 1915, nor when the contract was reduced to writing in March, 1916, nor were any live stock or chickens upon the farm at any time during the term specified in the contract, other than some work horses from which it was not contemplated that there would be any increase, and to which, manifestly, the contract had no reference in so far as the inlant was to furnish and put upon the farm produce colts before the expiration of the term; also 40 hogs, 6 milch cows, and 800 chickens, one-third of the increase of all of which the respondent was to have, as well as one-third of the profits arising from the sale of milk, butter, eggs, and other produce and crops resulting from his labor on the farm.

On June 15, 1916, respondent, up to that time having in all things complied with the contract on his part and having performed much labor upon the farm resulting to the benefit of appellant, quit work because appellant had neglected to furnish or place upon the farm any brood mares, cows, hogs, or chickens. Up to this time respondent had received practically no compensation, evidently because there had not been and ordinarily would not be any returns from the working of the farm up to that time. Thereafter respondent commenced this action seeking recovery, as we have already noticed. Respondent prayed for reformation of the written contract so that it would in terms require appellant to furnish and place upon the farm brood mares, cows, hogs, and chickens in number as claimed by respondent was agreed upon in the fall of 1915. This apparently was intended to be an alternative claim to that of the right to introduce oral evidence to show such to be the meaning of the contract as written. While the trial court in its findings, in effect, decided that the contract should be so reformed, it ignored the question of reformation in the entering of its final judgment; manifestly proceeding upon the theory that the written contract was sufficiently ambiguous on the question of appellant furnishing live stock and chickens to admit oral evidence of what the contract was in that respect; in effect deciding that the meaning of the written contract in the light of the situation of the parties was as claimed by respondent in that respect; and deciding that the failure of appellant to so furnish live stock and chickens justified respondent in quitting work and rescinding the contract on June 15, 1916, that being past a reasonable time for the furnishing of live stock and chickens as agreed upon. The evidence is all but conclusive that the amount of recovery awarded to respondent by the trial court, if his recovery can be measured by reasonable wages, is proper in amount. Let us remember as we proceed that respondent is not claiming, and that he was not awarded, recovery for anything but his work rendered up to the time of his quitting work. He is not seeking damages for loss of prospective earnings thereafter.

[1, 2] It is contended in appellant's behalf that the superior court erred in receiving oral evidence of the understanding had becrease of live stock is concerned. Respond- tween the parties as to the furnishing and



placing of live stock and chickens upon the not seriously concern ourselves here with the farm by appellant. This contention is rested upon the theory that such evidence violated the rule excluding oral evidence tending to vary or contradict the terms of a written contract. It seems to us, however, that a reading of this contract as a whole, in the light of the situation of the parties. shows that this evidence neither varies nor contradicts the terms thereof, but only explains and renders effective the contract in so far as it provides that respondent should have as part of his compensation one-third of the increase of the live stock and onethird of the profits arising from the raising and sale of chickens and eggs. It seems plain that respondent was not to furnish anything but his labor, while appellant was to furnish everything else necessary to the carrying on of the farm as contemplated by the terms of the contract. We think the contract is, in any event, sufficiently vague and uncertain as to the furnishing of live stock and chickens by appellant to entitle respondent to prove by oral evidence what the contract actually means or was intended to mean in this respect. We conclude that, in view of this vagueness and uncertainty in the terms of the contract and the peculiar situation of the parties, the trial court did not err in receiving oral evidence with a view to interpreting those provisions of the contract which provide for respondent receiving one-third of the increase of the live stock and the profits arising from the raising and sale of chickens and eggs. Our decision in the late case of Holland-North America Mortgage Co. v. Masters, 94 Wash. 542. 162 Pac. 995, is in harmony with this view. We do not think our still later decision in Thompson & Stacey Co. v. Evans et al., 170 Pac. 578, expresses any view of the law to the contrary. Being of the opinion that the oral evidence was admissible because of the vagueness and uncertainty of the terms of the contract, it was unnecessary to reform the contract before it could be given the meaning contended for by respondent. Roberts v. Stiltner, 172 Pac. 738, just decided.

[3] It is next contended in appellant's behalf that the written contract and the oral evidence received in interpretation thereof does not warrant the conclusion that appellant was to furnish live stock and chickens There may be as claimed by respondent. fair room for arguing that the contract between the parties did not call for the furnishing of live stock and chickens for the year 1916 to the extent in numbers as claimed by respondent, since it could be fairly argued from the evidence that the talk between the parties touching that matter in some measure had reference to the furnishing of some live stock and chickens after 1916; it being thought possible that the employment of respondent upon the farm might continue after 1916, though no agreement to that ef-

exact measure of appellant's duty as to furnishing live stock and chickens for the year 1916. We are here concerned with his duty only to the extent of determining whether he was to furnish some substantial quantity of live stock and chickens to the end that there would be an increase thereof, and profit resulting therefrom during the term of this contract. If appellant was so obligated and failed in this respect, it does not matter that he was not obligated to furnish as large a quantity of live stock and chickens as respondent claims he should have furnished during the term of the contract. We have read the evidence with care as furnished to us in the abstracts prepared by counsel, and are convinced that there was a substantial failure on the part of appellant to furnish live stock and chickens as agreed by him, such as to fully warrant respondent in rescinding the contract and quitting work on June 15, 1916, because of such failure. That respondent would be entitled to rescind the contract and recover for a breach thereof of this nature, the same as if appellant had actually dismissed him from service and put him off the farm, seems clear as a proposition of law. 3 Sutherland, Damages, § 692.

[4, 5] It is finally contended in appellant's behalf that the trial court erred in measuring the amount of respondent's recovery by the reasonable value of his labor during the period he worked upon appellant's farm, that is, from August, 1915, to June 15, 1916, when he quit work; the trial court having measured the recovery by the customary wages per month for such work during that period. The argument is, in substance, that if respondent was entitled to recover at all it would be in damages measured by the loss of his prospective earnings, if any he could prove, by reason of his having been prevented from completing his term of service as provided by the contract. This, it seems to us, calls for a careful noticing of the real relation of the parties, and the manifest uncertainty and practical impossibility of proving prospective earnings with any degree of certainty, which uncertainty results from the fault of appellant in failing to furnish live stock and chickens. Recurring to the contract we find prominent therein these features: (1) Appellant "employed" respondent "to farm the said premises and to live thereon" for the period specified; (2) appellant agreed that he would "pay to" respondent "for such labor and services" one-third of the crops, one-third of the increase of the live stock, and one-third of the profits arising from the raising and sale of chickens, eggs, and other produce; (3) appellant agreed to provide everything necessary to that end except labor, while respondent agreed to furnish his labor only; (4) respondent by the express terms of contract was to "devote all his time upon said premises"; (5) respondent fect was entered into. However, we need was to labor as he might find time in clearing

the uncleared portion of the land; (6) it was agreed that respondent should "perform all that the architect was to be compensated by and every work on said farm in a suitable and proper manner, and in a reasonable time, and shall obey instructions and orders from the party of the first part [appellant] in connection with said labor."

of a building. The contract was in substance that the architect was to be compensated by a certain percentage of the cost of the building to be constructed. The architect having the prepared the plans, the owner breached the contract was in substance that the architect was to be compensated by a certain percentage of the cost of the building. The contract was in substance that the architect was to be compensated by a certain percentage of the cost of the building. The contract was in substance that the architect was to be compensated by a certain percentage of the cost of the building. The contract was in substance that the architect was to be compensated by a certain percentage of the cost of the building. The contract was in substance that the architect was to be compensated by a certain percentage of the cost of the building. The contract was in substance that the architect was to be compensated by a certain percentage of the cost of the building.

We note these features of the written contract to the end that it may be made plain, as we think they do, that it was a contract of employment, creating the relation of master and servant, rather than that of landlord and tenant, or landlord and cropper. The views of the courts are seemingly not in harmony touching the legal relation of parties to farming contracts where the tenant, cropper, or employé receives a share of the crop or a share of the proceeds thereof as his profit or compensation. This seeming conflict, however, arises largely out of the varying situations in which the parties find themselves by reason of the peculiar terms of such contracts in the different cases where they have been considered. See 8 R. C. L. 373. Counsel for appellant invoke the general rule that damages for breach of a contract are to be measured by the loss of the value of the advantage or profit that would result to the party so damaged which he would have if the contract were not breached and he had the opportunity of completing it and reaping the advantage and profit it would give him. We may concede this to be the rule as held by most of the authorities. even as to pure employment contracts where the contract itself furnishes a certain measure of damages, as where the employment is for a specified time at a specified lump sum. or where the compensation is determinable in a lump sum with some fair degree of certainty. In such cases it seems to be the rule that the party injured by the breach of the contract, preventing him from completing his service as contracted for, is entitled to recover, not the reasonable value of the service he may have rendered, but the value of the service so rendered, measured by a proportionate value of the whole service at the whole contract price, and also for loss of future earnings which the employé suffers by the breach of the contract which terminates his service. However, when the contract is one of employment only, and the total compensation agreed upon is as uncertain as under this contract, and the breach by the employer renders proof of prospective earnings by the employé under the contract almost wholly a matter of guesswork, we think the employer is not in position to object to the measuring of recovery by the employé by the reasonable value in wages of services actually rendered to the employer's benefit.

The early decision of this court in Noyes v. Pugin, 2 Wash. 653, 27 Pac. 548 is of interest in this connection. That case involved a contract between an owner and an architect for the services of the latter looking to the drawing of plans and the construction in the light of the Noyes and in the light of the Noyes and

that the architect was to be compensated by a certain percentage of the cost of the building to be constructed. The architect having prepared the plans, the owner breached the contract by declining to permit the architect to proceed. He sought recovery, and it was held that the measure of his recovery was, not the reasonable value of his services, but the value of his services to the extent they were rendered in proportion to the entire service to be rendered and the entire contract compensation. While in that case there was no specified fixed amount that the architect was to receive for his entire services. there was manifestly a basis upon which the entire amount could be computed and determined with a fair degree of certainty; that is, the contract itself furnished a fairly certain measure of the damages for its breach because the amount of the entire cost of the building was understood with a fair degree of certainty at the time of the making of the contract. It was upon this theory that the court held the architect was not entitled to the recovery measured by the reasonable value of his services. It was observed by Chief Justice Anders, writing the opinion, 2 Wash. at page 660, 27 Pac. 550, that:

"It was not shown in this case that it was impracticable to apportion the value of plaintiff's services according to the rate of compensation claimed to have been stipulated for, and we are therefore of the opinion that the court below should have instructed the jury that, if they found that the plaintiff performed the services claimed to have been rendered by him under a contract specifying the price to be paid for doing the whole work agreed to be done by him, the measure of his recovery would be such a proportion of the contract price as the work done bore to the whole work embraced by the terms of the agreement, and that the failure to so instruct was error."

In Chase v. Smith, 35 Wash. 631, 77 Pac. 1069, we have a somewhat similar situation. There a painter was to paint a certain number of houses for a specified lump sum; the owner was to furnish a certain part of the material and the painter to furnish a certain part of the material. Upon a breach of the contract by the owner, as in the Noyes Case, it was held that the painter was not entitled to recover the reasonable value of his services, but the value of his services measured by the contract price as a whole.

In Gabrielson v. Hague Box & Lumber Co., 55 Wash. 342, 104 Pac. 635, 133 Am. St. Rep. 1032, some observations are made indicating the view of the court that upon a breach of a simple contract by the employer the employe may, if he so elects, sue upon quantum meruit and recover the reasonable value of his labor, citing the Noyes and Chase Cases above noticed. This observation is, of course, subject to qualification as applied to varying circumstances, but it is some indication, read in the light of the Noyes and

Chase Cases, of the view of the court favorable to respondent's contentions in this case.

Now in the case before us we think it is readily to be seen that there is no measure other than one of pure guesswork of what would be the amount of respondent's recovery if he is compelled to look only to his prospective earnings under the contract, in so far as his earnings from the increase of the live stock and that resulting from the raising and sale of chickens and eggs are concerned, and it seems plain that this was to be a very large part of his earnings within the contemplation of the parties to the contract. This, we think, is wherein this case differs materially from the Noyes and Chase Cases above noticed. Under all the circumstances here shown, we are constrained to hold that since the relation between respondent and appellant was that of employer and employe, since the amount of respondent's recovery would be so uncertain by the adoption of the measure insisted upon by appellant, since respondent was placed in this position by the fault of appellant, and since respondent is seeking recovery for past services only, we think appellant should not be heard to object to the measuring of respondent's recovery by reasonable wages for the work actually performed to his benefit. We think it would not be profitable or enlightening to here review the numerous decisions dealing with farm contracts.

The judgment is affirmed.

ELLIS, C. J., and WEBSTER, MAIN, and FULLERTON, JJ., concur.

WILSON v. JOSEPH et ux. (No. 13401.) (Supreme Court of Washington. April 29, 1918.)

GIFIS \$\infty 22(2)\$\to CAUSA MOSTIS\$\text{-EVIDENCE}\$\text{-SUFFICIENCY TO SUPPOST FINDINGS.}

Evidence showing an actual delivery by deceased in her lifetime of jewelry to defendants, coupled with evidence of donor's love for defendants, and evidence of witnesses of her intention to make the gift, held sufficient to support the findings that the gift was made.

Department 1. Appeal from Superior Court, King County; Everett Smith, Judge. Action by Judson P. Wilson, as executor of the estate of Mary Helena Wilson, deceased, against Orvis B. Joseph and Nettie M. Joseph, his wife. Judgment for defendants, and plaintiff appeals. Affirmed.

Vince H. Faben, of Seattle, for appellant. Ryan & Desmond, of Seattle, for respondents.

PARKER, J. Judson P. Wilson, as executor of the estate of Mary H. Wilson, his deceased wife, claims as belonging to her estate, and seeks recovery of, jewelry consistfrom Orvis B. Joseph and Nettie M. Joseph. his wife, which jewelry is in their possession and claimed by them as a gift from Mrs. Wilson, made by her to them a short time prior to her death. The issues were raised by petition filed in the superior court for King county by Wilson in the probate proceedings, and by the answer thereto of Joseph and wife. Trial upon the merits was had upon the issues so raised, as though it were an independent action, and resulted in findings and judgment in favor of Joseph and wife, adjudging them to be the owners of the jewelry, from which the plaintiff has appealed to this court.

The jewelry in question is of the value of approximately \$1,000. The jewelry was Mrs. Wilson's separate property. She possessed a considerable amount of property, of which this jewelry was a comparatively small portion. For many years prior to her death Joseph was a very intimate friend of Mrs. Wilson. He had lived in the Wilson family as a boy, and, while not a blood relative. Mrs. Wilson had such regard and affection for him that she often referred to and addressed him as her son, and after his marriage, which occurred a few years prior to her death, she also had great regard and affection for his wife. This was evidenced by remarks to her friends, of which the following is one: "I think as much of Nettie and Orvis as if they were my own." About a year prior to her death she said to Joseph, "Son, I want you to remember that when I die this ring is yours and this pin is Nettie's." This was said relative to this jewelry, in the presence of a witness who testified to that fact, and who has no pecuniary interest in the outcome of this controversy. This fact is not disputed by any other witness. Mrs. Wilson had on one occasion when she went to a hospital for treatment, evidently fearing that she might not recover, actually placed this jewelry in the possession of Joseph and hiswife, intending it should be theirs in case she did not recover. It was, however, returned to her upon her recovery from that treatment. Thereafter, and about four months prior to her death, as Joseph testified. Mr. Wilson said to him, "I understand that mother is going to will her diamonds to you and Nettie." On July 19, 1915, Mrs. Wilson went to a hospital for treatment, and on the following day, in response to a telephone call from the hospital (at whose instance it does: not appear), Joseph and wife called upon her there, when they received possession of the ring and brooch in her presence, which have been in their possession ever since. Apparently no one else was then present. The trial. court refused to hear testimony from either Joseph or Nettie as to what Mrs. Wilson then said; evidently having in mind the statutory prohibition against a party testifying ing of a diamond ring and a diamond brooch | "in his own behalf as to any transaction had

by him with or any statement made to him | 2. by any such deceased \* \* person." See Rem. Code, § 1211. So that as to what occurred there we have the positive evidence only of the fact that Joseph and his wife then acquired possession of the jewelry in Mrs. Wilson's presence. We think there is enough in the record to warrant the conclusion that Mrs. Wilson then believed that her recovery from her then sickness was unlikely. She died without having left the hospital on August 27, 1915.

It is contended on appellant's behalf that the facts proven do not in law support a gift of the jewelry by Mrs. Wilson to Joseph and wife as claimed by them. We cannot agree with this contention. That there was an actual delivery of the jewelry to Joseph and wife by Mrs. Wilson at the time they obtained possession of it on August 20, 1915, and that she then delivered it to them with the intent to give it to them, we think is a conclusion well supported by the evidence, though we have no direct evidence of what she actually said or did at that time. Her regard and affection for Joseph and his wife, and her previously clearly evidenced intentions, there being not the least suspicion cast upon Joseph and his wife suggesting wrong on their part in acquiring possession of the jewelry, we think calls for the conclusion that they received it at the hands of Mrs. Wilson on August 20, 1915, as a gift from her. We think no decision rendered by this court is out of harmony with this conclusion, and that the views expressed in the following of our decisions support it: Phinney v. State, 36 Wash, 237, 78 Pac. 927, 68 L. R. A. 119; Davie v. Davie, 47 Wash. 231, 91 Pac. 950; Mackenzie v. Steeves, 167 Pac. 50.

It is further contended that Mrs. Wilson was mentally incompetent to make such a gift on August 20, 1915. The evidence is quite voluminous on this question. We have examined it with care as presented in the abstracts prepared by counsel, and are quite convinced that the trial court correctly held that she was then mentally competent. We think it would be unprofitable to review the evidence in detail in this opinion

The judgment is affirmed.

ELLIS, C. J., and WEBSTER, MAIN, and FULLERTON, JJ., concur.

LITTLE-WETZEL CO. v. LINCOLN et ux. (No. 13844.)

(Supreme Court of Washington. April 26, 1918.)

1. WATERS AND WATER COURSES 4=242-IE-BIGATION DITCHES.

Right of way for irrigation ditch being an easement, "ownership," as used in contract and decree, affecting rights in irrigation ditch and means ownership of the easement, but not of the subservient land.

For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

WATERS AND WATER COURSES &= 242 - RIGHTS OF DOMINANT OWNER.

Since the dominant owner cannot enlarge the easement so as to impose additional bur-dens on the servient estate, the part owner of an irrigation ditch across lands of the other part owner thereof cannot admit water thereto from new sources, without the consent of the latter. 3. WATERS AND WATER COURSES \$= 242 -

RIGHTS IN IRRIGATION DITCH.

Nor, in such case, was the first part own-because of the fact that he was a cotenant with the other owner, entitled to deposit water in such ditch from new sources without the second owner's consent, and without giving the second owner an equal right in such water, since the primary relation of the parties was that of owner of an easement and owner of a servient estate, and, even on the principles govcrning cotenancy, the introduction by one co-tenant of surplus water into the ditch ought to inure to the benefit of all.

WATERS AND WATER COURSES 242-RIGHTS IN IRRIGATION DITCH.

Where the part owner of an irrigation ditch across lands of the other part owner thereof admitted water thereto from new sources, he could not recover damages from the other own-er for the latter's use of such water, having himself commingled the waters without placing a suitable measuring device.

5. Appeal and Ebror === 1011(1) -- Scope-CONFLICTING EVIDENCE.

The trial court being better situated to judge credibility of witnesses, the court on appeal will not disturb its finding as to damages; the evidence being conflicting.

Department 1. Appeal from Superior Court, Okanogan County; E. K. Pendergast, Judge.

Suit by the Little-Wetzel Company against W. A. Lincoln and wife. Decree for plaintiff, and defendants appeal. Reversed in part, and affirmed in part.

J. W. Faulkner, of Okanogan, and Neal & Neal, of Oroville, for appellants. P. D. Smith and W. C. Gresham, both of Okanogau, for respondent.

FULLERTON, J. The parties to this action are jointly interested in two ditches constructed across the lands of appellants, for the purpose of irrigating their lands with water appropriated by the appellants and by the predecessors in interest of the respondent from the waters of Wolf creek in Okanogan county, Wash. In one ditch known as the Hess-Lincoln ditch, hereafter called the Hess ditch, both the parties own an equal interest; in the other, known as the Hess-Lincoln-Shulenbarger ditch, hereafter designated the Shulenbarger ditch, the respondent owns a two-thirds interest and the appellants a one-third interest. By means of flumes water in the Hess ditch could be diverted into the Shulenbarger ditch. By means of another private ditch the respondent deposited water appropriated by it from the Methow river in the Hess ditch near its head, and conducted such water through that ditch for use on respondent's lands when there was not sufficient water obtainable from Wolf creek. The appellants made use

of this Methow river water on the assump-| ference with appellants' right of enjoyment tion that they were entitled to one-half of any water in the Hess ditch and one-third of any water in the Shulenbarger ditch, while the respondent claimed sole ownership of all water from the Methow river placed by it in the Hess and Shulenbarger ditches up to the full capacity of its individual interest in such ditches, which was respectively one-half and two-thirds of their carrying capacity. The basis of such claim is that the respondent's interest in the ditches is not a mere easement, but is one of full ownership as a tenant in common. An action for injunctive relief and damages was brought by respondent, founded on allegations of unlawful diversion of its water by the appellants and resulting damage to its growing crops, by reason of a shortage of water thereby occasioned, in the sum of \$326.25. The answer set up the decree in a prior action between appellants and the predecessors in interest of respondent, whereby it was adjudged that appellants were entitled to one-third of all waters flowing or to flow in the Shulenbarger ditch; that the Hess ditch is carrying a volume of water in excess of one-half its capacity by reason of the mingling of the Methow river and Wolf creek waters, and that the Shulenbarger ditch is carrying in excess of twothirds of its capacity for a like reason; that the only right respondent has to deposit Methow river water in the ditches on the land of appellants is by virtue of an oral agreement that in consideration of such privilege the appellants were to have a right to the use of one-half of the Methow river water emptied into and conveyed through the Hess ditch: that the acts of respondent in carrying water from any source in the ditches in excess of its rightful proportion worked an injury to appellants to their damage in the sum of \$500; that respondent closed the headgates of the Lincoln ditch, thereby diverting all the water of Wolf creek through the Shulenbarger ditch, to appellants' damage in the sum of \$100; that the waters of Methow river and Wolf creek were commingled by respondent without the employment of any measuring devices to determine the am unt conveyed by it from Methow river: that respondent interfered with the devices of appellants for diverting water to their laterals to the injury of their crops in the sum of \$100; and that respondent, at the time appellants were harvesting their hay, turned water into the Shulenbarger ditch in excess of its carrying capacity, causing an overflow, whereby their hay cut and lying on the ground was damaged in the sum of \$50. On a trial to the court, judgment was rendered awarding respondent \$100 damages and appellants \$20 damages, and that each party pay one-half of the costs of the action; and, further, that the respondent had the right to use the ditches for Methow river water to the full extent of their carrying capacity, provided there was no inter-

in such ditches. The portions of the decree specially excepted to are as follows:

"I. That plaintiff and defendants are the owners, as tenants in common, of that certain irrigation ditch, taken out of Wolf creek, in Okanogan county, Wash., commonly known as the Hess, Lincoln & Shulenbarger ditch, with an ap-

proximate carrying capacity of 5.76 C. F. per second of time.

"II. That the interest of plaintiff in said ditch and all waters from Wolf creek flowing or to flow through the same is two-thirds, and the interest of defendants in and to said ditch and in and to all the waters flowing or to flow through said ditch from Wolf creek is one-third. "III. That the plaintiff and defendants are

"III. That the plaintiff and defendants are the owners, as tenants in common, share and share alike, of that certain other irrigation ditch taken out of Wolf creek, in Okanogan county, Wash., commonly known as the Hess & Lincoln ditch, with an approximate carrying capacity of 16 C. F. per second of time; and, after allowance has been made from Wolf creek for the carrying capacity of said Hess, Lincoln & Shulenbarger ditch, the plaintiff and defendants are the owners, share and share alike, of all water flowing or to flow from said Wolf creek through said Hess & Lincoln ditch."

"IX. That the plaintiff has and shall have the

"IX. That the plaintiff has and shall have the right to use said Hess & Lincoln ditch to the right to use said Hess & Lincoln ditch to the extent of their full carrying capacity for the transportation of waters from the Methow river, provided that in so doing it does not interfere with the rights of the defendants to carry through said ditches, as herein decreed, their waters for the irrigation of their lands to the extent of their interest in said ditches as herein adjudged and decreed; and the defendants may use either or both of said ditches for the transportation of water for the irrigation of their lands to the full capacity of either or both

transportation of water for the irrigation of their lands to the full capacity of either or both of said ditches, provided, in so doing they do not interfere with the rights of plaintiff in said ditches, as herein adjudged and decreed."

"XV. That the claim for damages of plaintiff against defendants, by reason of the unlawful use by defendants of the waters of the Methow river, from July 18 to August 4, 1915, and of all the waters of Wolf creek from August 2 to September 20, 1915, to which plaintiff is entitled, be allowed to the extent of \$100."

"XVII. That the plaintiff pay half of the legal costs and disbursements of this action, and defendants pay half of the legal costs and disbursements of this action."

The appellants contend that the court erred in finding and decreeing that respondent has the right to use the Hess and the Shulenbarger ditches to the extent of their full carrying capacity for the transportation of waters from Methow river, and in failing to find that respondent has no right to use such ditches for that purpose except upon condition that appellants be entitled to use onehalf of the Methow river water deposited in them. The issues presented and the finding of the court that the parties were tenants in common in the ditches raise the question whether the respondent had in fact any greater interest in the ditches than that of a mere right of easement.

It appears from the evidence that Hess, Lincoln, and Shulenbarger were adjoining settlers upon government land, and had appropriated water from Wolf creek through a common ditch for the irrigation of their respective tracts. Dissension arising among It will be noted that there is nothing in them Hess in the year 1898, brought an action against Lincoln and Shulenbarger for the purpose of establishing his rights in the ditch. The court decreed that this ditch located upon the lands of the three parties

"the property of plaintiffs and defendants equally, that is to say that said ditch and headgate as it now stands and exists is owned by plaintiff and defendants in the ratio of one-third to each of said parties, to wit, one-third to plain-tiff and one-third each to defendants; and that the water now running therein or to run therein is and shall be the property of said parties in the same ratio as set out above relative to the ownership of said ditch, that is to say, that each of said parties shall have the exclu-sive right to take and use one-third of the water running in said ditch or to be run therein without molestation from either of the other owners of said ditch. \* \* \* and each of said without molestation from either of the other owners of said ditch, \* \* \* \* and each of said parties are hereby enjoined from in any way molesting either of the other parties hereto in repairing said ditch and the uses of his said one-third of all water in said ditch or to be in the same by taking said water from the said ditch upon his said land in the usual way."

A month after the foregoing decree was rendered Hess and Lincoln entered into a contract to jointly build an additional ditch to the west of the Shulenbarger ditch and which was to replace an existing ditch belonging to Hess. The contract was as follows:

"Winthrop, Wash., Nov. 17, 1898.

"Article of agreement entered into this day between W. A. Lincoln and Geo. W. Hess, both of Okanogan county, state of Washington, in which they agree to take out and construct a ditch for irrigation purposes from a stream known as Wolf creek. Head of said proposed ditch will be leasted on said stream about 60 ditch will be located on said stream about 60 rods west of the west line of the farm of W. A. Lincoln and the ditch will continue from the said headgates to and across the land of W. A. Lincoln on as high land as it is possible to run water, and parallel to a ditch owned by Geo. W. Hess, the said ditch being of no farther use or benefit to the said Geo. W. Hess and by this article the said Hess agrees to abandon the same. The ditch in contemplation is to be constructed jointly and owned jointly by the said W. A. Lincoln and Geo. W. Hess. The said Geo. W. Hess in constructing the said ditch agrees to furnish team, plow, and scraper, and the said W. A. Lincoln agrees to work singlehanded furnishing his own tools in construction and continue the joint work as before stated until the said ditch is completed across the land of W. A. Lincoln. Then the labors and interest of Lincoln in said ditch ends. W. A. Lincoln waives all claim of right of way across his land provided the said ditch is completed according to agreement. It is also agreed between Geo, W. Hess and W. A. Lincoln that tween Geo, W. Hess and W. A. Lincoln that for the consideration of one dollar paid by W. A. Lincoln to Geo. W. Hess that Geo. W. Hess will allow W. A. Lincoln the use of water from Lake creek to irrigate all the land now under cultivation between the ditch they contemplate building and the said Lake creek so long as Geo. W. Hess owns and controls the same.

"W. A. Lincoln.

"Geo. W. Hess.

"Witness: "J. P. Rader.
"Geo. L. Thompson."

The respondent is the successor in interest

either the foregoing decree or the contract which divests Lincoln of the title to any portion of his land and vests it in another.

[1] Joint ownership of an irrigation ditch does not necessarily constitute a title in fee. A right of way granted for ditch purposes has never been classed as other than an easement; and, usually, when in common parlance the term "ownership" is used in describing the interest of one in a ditch upon the land of another, it is understood as referring to the ownership of the easement. It is true one may have title to a ditch the same as to any other property, but when such title originates in grant or prescription to use another's land, such title never rises above its source as an easement.

A similar question as to what was meant by ownership of a ditch arose in the case of Hoyt v. Hart, 149 Cal. 722, 87 Pac. 569. The parties were litigating over their rights in an irrigation ditch, and among other things the plaintiff set up a prior judgment by which it was determined that the plaintiff was the owner of a ditch and waterway across the lands of the defendant for the purpose of conveying waters through said lands. An estoppel by judgment was asserted as precluding defendant from denying plaintiff's ownership, but the court held:

"In plaintiff's plea of former judgment the allegation is that it had been adjudicated that she was the owner of a 'ditch and waterway' across the lands of defendant for the purpose of conveying waters. In the foregoing discussion we have treated this allegation as meaning no more than that she owned an easement or right to carry waters over his lands through a ditch or waterway, and such we think is the proper construction of the language quoted."

!] We think the same meaning inheres in the language used in the former judgment pleaded in this case which declares the Shulenbarger ditch to be the property of plaintiff and defendants equally, as well as in that employed in the contract declaring that the Hess ditch was owned jointly by Lincoln and Hess. It is well settled that the owner of the dominant estate cannot enlarge or change his easement so as to impose any additional burden upon the servient estate. White Bros., etc., v. Watson, 64 Wash. 666, 117 Pac. 497, 44 L. R. A. (N. S.) 254; Wiel, Water Rights (3d Ed.) § 502. At the time the rights of the dominant estate attached against the lands of appellants there was not in contemplation of the parties a greater servitude than that growing out of the appropriation of the waters of Wolf creek. When the owner of the dominant estate sought to deposit in the ditches a quantity of water from another source, he thereby increased the burden of the easement, which he was not entitled to do without the consent of the owner of the land, which in this case is neither alleged nor proved by the respondent. The appellants, it is true, alleged to all the rights of Hess and Shulenbarger. an agreement to allow the use of the ditches

for the flow of the extra water in case they were permitted to withdraw it from the ditches for their own irrigation, but the evidence failed to establish such a contract.

[3] Does the fact that appellants and respondent are tenants in common of the ditches and Wolf creek waters covered by their appropriation give one cotenant the right to deposit water in the common ditch in excess of his original easement? That the parties here are cotenants may be conceded. They claim their rights through the same original appropriation and from the same ditch. Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728. And their rights are determined by the size of the ditch and the original appropriation, not by any subsequent diversion. Hough v. Porter, supra. But one difficulty in resting their rights on the principle of tenancy in common is that the facts upon which the rule is invoked to establish the right of one in the ditches would equally establish the right of both parties to any waters flowing or to flow in such ditches. the dealings of the parties had relation to a joint user of both the ditches and the water. Accordingly, the introduction into the ditches by one cotenant of surplus water ought to inure to the benefit of all. contract for the Hess ditch provided that Lincoln and Hess-

"agree to take out and construct a ditch for irrigation purposes from a stream known as Wolf creek. \* \* The ditch in contemplation is to be constructed jointly and owned jointly \* \* until the said ditch is completed across the land of W. A. Lincoln, then the labor and interest of Lincoln in said ditch ends."

The judgment involving the Shulenbarger ditch decrees that such ditch is—

"the property of plaintiff and defendants equally. \* \* \* and that the water now running therein or to run therein is and shall be the property of said parties in the same ratio as set out above relative to the ownership of said ditch, that is to say, that each of said parties shall have the exclusive right to take and use one-third of the water running in said ditch or to be run therein without molestation from either of the other owners of the said ditch, \* \* \* and each of said parties are hereby enjoined from in any way molesting either of the other parties hereto in repairing said ditch and the use of his said one-third of all water in said ditch or to be in the same."

The contract as to the Hess ditch provided for a joint appropriation of waters from Wolf creek. Hess in return abandoned a prior ditch and shifted his prior appropriation of Wolf creek waters to the new ditch, as is shown by evidence aliunde the contract.

The rights under irrigation ditches in arid regions have developed largely from the necessities of the case, and existing principles of law have usually been applied to meet the situation. But they have not always done so satisfactorily, and the decisions are apparently at cross purposes because they have sought to adjust themselves to the facts in the particular case before the court.

One principle often asserted, however, is that a ditch over the land of another is nothing more than an easement. But the courts also recognize that there is a property right in such a ditch and a property right in the water, the ownership of which may be combined in one person in some cases, and in other cases that the ditch and the water may rest in separate ownership and either may be sold like any other property. Growing up with this doctrine, the right of tenancy in common in either the ditch or the water has been recognized. But we do not believe it was ever the intention to imply that such cotenancy was ever based upon a theory that the joint ownership rested upon any theory of ownership in fee. If the initiation of the right to convey water over the land of another originated as an easement, no subsequent user would convert the right into a stronger title. Grant that the easement is so far an interest in land as to render applicable the rules governing tenancy in common, the foundation for the whole superstructure of that character of title is the existence of the easement, and hence the principles of cotenancy are secondary to those applying to easements, and must be construed in connection with the doctrines of easements.

It is the rule that the owner of the dominant estate can make no larger use of his easement or change its character in any way so as to increase the burden on the servient estate. We think this rule in cases of easements is paramount to the rule that a cotenant may use the joint property to the full extent, if in so doing he interferes in no way with its enjoyment to like extent by the other joint tenant. The tenancy in common rule is afforded full scope by the user of the waters of Wolf creek, which was the only water involved when the title by cotenancy was initiated. But to say that the parties who have a joint tenancy in the ditches for the use of Wolf creek waters have such a character of ownership as will entitle them to impose an additional servitude on the servient estate would do violence to the law of easements in order to give the joint tenants more enlarged rights than were acquired at the inception of their title. The trial court finds that the appellants and respondent are tenants in common in the ditch, and consequently that respondent had the right, when the ditch was short of water, to which appellants were entitled, to deposit water therein from its private ditch and have the entire use of such added water to the exclusion of appellants. court's finding that the parties are cotenants in the ditch would necessarily give both parties the same rights in the ditch; that is, each would have the right to the possession of all the property held in cotenancy according to their respective proportionate interests. This the decree does not afford, inasmuch as it awards respondent the right to introduce Methow river waters for its sole use, while it confines appellants to the waters of Wolf creek, and does not even accord them an equal right to introduce waters from additional sources. In this we think the decree is erroneous.

But further than that, we think the court errs in not limiting the rights of the parties as tenants in common by the superior rules of easements applicable in this case, since the sole right of the respondent as a tenant in common is rested and founded upon its interest in the ditch as a mere easement. The respondent seeks to enlarge its easement right, not by grant, but by user adverse to appellants; a user which has not yet ripened into title by prescription. It seeks a use of the common property over and above any use accorded to the cotenant, which likewise imposes an additional burden on the property of appellants not in contemplation of the parties at the inception of the grant of easement rights. The added volume of water necessarily increases the deposit of silt in the ditch, subjects its banks to greater danger of overflow and of breakage and naturally augments the amount of seepage on the lands of appellants. It is not a question of whether the added servitude may in any wise prove beneficial to the appellants.

The appellants contend that the court erred in finding and decreeing that the appellants are the owners of one-half of the waters of Wolf creek flowing through the Hess ditch after allowance made for the full carrying capacity of Wolf creek waters in the Shulenbarger ditch. The evident intent of this provision of the decree was to compel the appellants to carry as much as possible of the Wolf creek water to which they were entitled through one ditch, so as to leave greater capacity in the Hess ditch for the deposit of the Methow river waters. There is no warrant in the evidence nor in the law for such decree. A certain quantity of water had been appropriated from Wolf creek and diverted through two separate ditches over the land of appellants for the use of themselves and of the predecessors in interest of the respondent. There is no evidence justifying a change in the place and mode of diversion, except that it would prove convenient for the respondent because its private ditch deposited the waters of Methow river in the Hess ditch. We do not deem this a sufficient reason for altering the mode of diversion employed by the appellants for a long period of time.

[4] The appellants contend that the allowance to respondent of \$100 damages for the use of water flowing in the ditches, which was due to respondent's deposit therein of Methow river water, was arroneous. The appellants were charged with using hair. Affirmed.

of the river water claimed by respondent from July 18 to August 2, 1915, and with using all the water from Wolf creek between August 3 and September 20, 1915. The evidence shows that by the act of respondent the waters of Methow river were commingled in the ditches with the waters of Wolf creek without the placing of suitable measuring devices. Such commingling by the respondent, even if its right of separate ownership were not lost, by the introduction of the water into ditches jointly owned by the appellants, would forfeit respondent's right to damages for the use of the water.

[5] In regard to the Wolf creek water the evidence shows that it was all used by the appellants between August 3 and September 20, 1915. The flow was not very large at that season, and in compensation the respondent had its river water flowing through appellants' ditches. The evidence of resulting loss to respondent through the use of all the Wolf creek water by appellants is not very satisfactory but, as the evidence was conflicting and the trial court was better situated to judge of the credibility of the witnesses, we are not disposed to disturb his finding that the respondent was damaged by the acts of appellants in the sum of \$100.

The decree of the lower court will be reversed in so far as it grants the respondent the right to flow its Methow river waters through the ditches on the land of appellants, and in so far as it requires appellants to conduct as much as possible of their share of Wolf creek waters through the Shulenbarger ditch. The damages and costs awarded by the trial court will stand as adjudged. The appellants will recover their costs in this court.

ELLIS, C. J., and PARKER, MAIN, and WEBSTER, JJ., concur.

SMELTZER et ux. v. WEBB et ux. (No. 14522.)

(Supreme Court of Washington. April 27, 1918.)

LANDLORD AND TENANT &==291(11)—TENANCY FROM YEAR TO YEAR—HOLDING OVER AFTER EXPIRATION OF LEASE — UNLAWFUL DETAINER.

Under Rem. Code 1915, § 813, providing that tenants of agricultural lands holding over more than 60 days after expiration of term without demand or notice to quit by landlord shall be entitled to hold for another year, an oral notice before the termination of the lease is sufficient to support an action for unlawful detainer.

Department 1. Appeal from Superior Court, Grant County; Sam B. Hill, Judge.

Action by Moses Smeltzer and wife against James B. Webb and wife. Judgment for plaintiffs, and defendants appeal. Affirmed.

pellants. S. H. Cutting, of Wilbur, J. D. Mc-Callum, of Davenport, and N. W. Washington, of Ephrata, for respondents.

PARKER, J. The plaintiffs Smeltzer and wife commenced this action to recover from the defendants Webb and wife the possession of a farm in Grant county, which the defendants theretofore held under a lease from the grantors of the plaintiffs. The action was commenced and prosecuted under our unlawful detainer statute. Trial in the superior court for Grant county, sitting with a jury, resulted in verdict and judgment in favor of the plaintiffs, from which the defendants have appealed.

The farm in question, consisting of some 600 acres of land with a dwelling and other building thereon, was on January 12, 1914, leased by the then owners, D. L. Woods and wife, for a term which by the express terms of the lease expired November 1, 1915. Some two months prior to the date of the expiration of the specified term Woods and wife sold and conveyed the farm to respondents, who thereupon, as claimed by them, demanded of appellants that they surrender possession of the farm at the expiration of the specified term. This was not a formal written notice to quit such as is required by statute to be served upon a tenant looking to the termination of a lease on tenancy, but, as claimed by respondents, was a sufficient demand and notice to prevent appellants acquiring the right to occupy the farm for another year under the terms of the lease, should they remain upon the farm 60 days after the expiration of the term, under section 813. Rem. Code, which reads:

"In all cases of tenancy upon agricultural lands, where the tenant has held over and retained possession for more than sixty days afttained possession for more than sixty days after the expiration of his term, without any demand or notice to quit by his landlord or the successor in estate of his landlord, if any there [shall] be, he shall be deemed to be holding by permission of his landlord or the successor in estate of his landlord, if any there be, and shall be entitled to hold under the terms of the lease for another full year, and shall not be guilty of an unlawful detainer during said year, and such holding over for the period aforesaid shall be taken and construed as a consent on the part of taken and construed as a consent on the part of a tenant to hold for another year."

The only evidence of this demand and notice, introduced upon the trial, was oral testimony of conversation had between Smeltzer and Webb, and of work done by Smeltzer and his three sons upon the farm, which amounted to taking possession of a large part of the land in October and November, 1915, by consent of appellants, from which testimony the jury found in effect that the demand and notice was made and given as claimed by respondents. Appellants, however, continued to occupy the dwelling and use a portion of the land for more than 60 days after the expiration of the specified

W. E. Southard, of Wilson Creek, for ap-, commenced this action to recover possession of the whole of the premises.

> The principal contention here made in appellants' behalf is that the trial court erred in admitting testimony of the making of the oral demand for possession of the farm shortly prior to the expiration of the specifled term of the lease. The argument is, in substance, that an oral demand or notice in such cases does not satisfy the requirements of section 813 above quoted, but that such demand and notice must be in writing attended by all the formalities as to contents and service as notices to quit looking to the termination of tenancies which may become forfeited or which do not have a specified fixed ending. It seems to us this contention is effectually answered by our decision in Mounts v. Goranson, 29 Wash. 261, 69 Pac. 740. In that case it is true the notice was in writing, but it was not pretended that it was such formal notice either as to contents or service as is required in other unlawful detainer cases. That action like this was commenced after the tenant had retained possession more than 60 days following the termination of the lease term, that is more than 60 days following the termination of the term as it had been extended from year to year by consent, the final termination date being May 6, 1897. After quoting the section of our statute defining unlawful detainer and section 813, Rem. Code, which sections were then sections 5527 and 5528, Bal. Code, Judge Mount, speaking for the court, said:

"It is clear from the first section quoted that the defendants were unlawful detainers for the period of sixty days after May 6, 1897, and no notice or demand to quit was necessary. Under the next section quoted, when defendants held for more than sixty days without demand or notice or than sixty days without demand or notice or than sixty days without demand or notice or demand to quit was necessary. for more than sixty days without demand or no-tice to quit, they were then entitled to hold for another year. We are of the opinion that this same condition arose at the expiration of the next year. Defendants were again unlawful detainers for sixty days, and so for each year they were permitted to occupy the premises un-der the lease: and an oral or written demand for the premises within sixty days after the ex-piration of any year or any notice prior to the piration of any year, or any notice prior to the end of the year that the lease would be termiend of the year that the lease would be terminated, was sufficient to authorize the bringing of the action. The notice required by the statute to be served, wherein the time and manner of service must be stated in the complaint. as was held by this court in Lowman v. West, 8 Wash. 355 (36 Pac. 258), is a notice which terminates the lease before the limitation of time on account of some condition broken; but such is not the case here."

This is not a case of giving statutory notice to quit looking to the termination of a tenancy, but it is a case of preventing the commencement of a new tenancy, or rather of preventing the renewal by consent of a tenancy which by express terms of the contract creating it expired on a specified date. We conclude that the trial court did not err in admitting testimony of the making of the oral demand for possession by respondents. term of the lease, and thereafter respondents | Some other contentions are made in appellants' behalf, but we think they are so clearly untenable as to not call for discussion here. The judgment is affirmed.

ELLIS, C. J., and FULLERTON, WEB-STER, and MAIN, JJ., concur.

STATE ex rel. TARO v. CITY OF EVERETT et al. (No. 14514.)

of Washington. April (Supreme Court 27, 1918.)

1. MANDAMUS \$\infty=23(1)-RIGHT TO REMEDY-INTEREST IN SUBJECT-MATTER.

A city fireman under civil service, by reason of his indirect interest in the establishment of a double plateon system whereby his hours would be shortened, may maintain mandamus to compel the inauguration of such system voted for by the citizens and refused by the council on the ground of lack of funds.

2. MUNICIPAL CORPORATIONS \$\infty\$864(1) FIRE PROTECTION-INDEBTEDNESS.

The maintenance of an efficient fire de-partment by a city is an essential of the gov-ernment for which the city may incur indebtedness in excess of the authorized indebtedness, since the constitutional limitation does not apply to obligations made mandatory by the Constitution or essential to government.

3. Mandanus = 172 - Fire Protection Double Platoon System.

While the court may inquire whether it is essential to maintain a fire department, it will not ordinarily inquire whether the double platoon system is essential, and the voters having adopted such system, there being nothing unreasonable on the face thereof, the court will require the council to put it in force.

Department 2. Appeal from Superior Court, Snohomish County; Ralph C. Bell, Judge.

Mandamus by the State, on the relation of Edward Taro, against the City of Everett and others. From an order granting peremptory writ, the city appeals. Affirmed.

Wm. A. Johnson, of Everett, for appellant. Sherwood & Mansfield, of Everett, for respondent.

FULLERTON, J. This is an appeal from an order of the superior court of Snohomish county, granting a peremptory writ of mandamus against the city council of the city of Everett compelling that body to put in force an ordinance of the city. The cause was before the trial court, and is before us, upon the allegations of the petition for the writ and the allegations of the answer thereto; the trial court having sustained a general demurrer to the answer and the answering defendants having elected to stand thereon.

The record discloses that the city of Everett is a city of the first class, operating under a freeholders' charter duly adopted by its electors. The charter creates a commission form of government. Three commissioners are provided for—a commissioner of public works, a commissioner of safety, and a commissioner of finance—who together comprise the city council, and who, in addition to hav- In his petition the relator averred that he

ing legislative functions, are charged with the executive administration of the city's affairs. The charter also provides for the method of legislation known as the initiative. This method, in so far as it is material here to inquire, authorizes the submission to the city council of proposed legislation in the form of ordinances by a definite number of the qualified electors of the city, which the council may either pass without alteration under its legislative powers or submit to the electors of the city at a general or special election, when, if an affirmative vote is in its favor, it thereby becomes a part of the city's laws.

Pursuant to the foregoing provisions of the city charter, a proposed ordinance was duly submitted to the council relating to the city's fire department. The department then consisted of one chief, one assistant chief, four captains, four lieutenants, one engineer, one assistant engineer, six auto drivers, seven pipemen, and one master mechanic, organized as a single platoon; the members remaining constantly on duty save for stated limited intervals. The proposed ordinance increased the number of pipemen from seven to sixteen and divided the department into two platoons, one for day and one for night service, thus reducing the number of hours of continuous service required of the individual employés. The ordinance was later submitted to the electors for adoption, and was by them adopted by the required majority on November 7, 1916, going into effect on January 1, 1917.

It further appears that the city council and the members thereof having the duty so to do refused to increase the number of the members of the department as required by the ordinance, and refused otherwise to carry out its provisions. As a reason for co refusing they set up in substance that before the adoption of the ordinance the city council had made its estimates and its tax levy to meet the expenses of the city government for the year 1917; that in this estimate and levy it had provided for the fire department the sum of \$36,147, and for a contingent fund the sum of \$1,000, all of which was not more than sufficient to maintain the department as it then existed; that to increase the department as required by the ordinance would cost approximately \$10,000, and that they had no means of providing for this additional expense; that the city was then indebted in a sum exceeding its constitutional limitation. and could not legally incur a further indebtedness; and that for these reasons the obligation necessary to be incurred to carry out the provisions of the ordinance would in their judgment be illegal.

[1] Certain preliminary objections were made to the proceedings prior to answering by the appellants, all of which were waived in this court save the objection to the relator's capacity to maintain the proceeding.

was a member and employe of the fire depart- the city had made its appropriations and tax ment of the city of Everett, and brought the proceeding on behalf of himself and on behalf of the other members and employes of such department. The truth of the allegation is not disputed, but attention is called to the fact that the relator does not allege that he is a citizen and taxpayer of the city of Everett, and it is argued that a mere employé of the city has no capacity as such to invoke the remedy of mandamus against the officers of the city to enforce a public duty, however much he may be benefited individually thereby; that his remedy, if any he has, for the wrongs suffered by him individually, is a private action, not the extraordinary remedy of mandamus. But however forceful this objection might be as applied to proceedings under the writ as anciently administered, this court has held that it is without application to the statutory writ of mandamus; that the writ of mandamus under the Code is not a prerogative writ issuable at the pleasure of the state in aid of a private individual, but a person who has a cause for its invocation has the same right to sue out the writ as he he has to commence a civil action to redress a private wrong. State ex rel. Race v. Cranney, 30 Wash. 594, 71 Pac. 50; State ex rel. Brown v. McQuade, 36 Wash, 579, 79 Pac. 207: State ex rel. S. T. Co. v. Superior Court. 40 Wash. 453, 82 Pac. 878; State ex rel. Gillette v. Clausen, 44 Wash. 437, 87 Pac. 498; State ex rel. Wash. Pav. Co. v. Clausen, 90 Wash. 450, 156 Pac. 554, L. R. A. 1917A, 436; State ex rel. Beach v. Olsen, 91 Wash, 56, 157 Pac. 34.

The benefit to accrue to the relator by putting in force the provisions of the ordinance are indirect, it is true. But it is a substantial benefit nevertheless. It will lessen his hours of labor-the number of hours he is required to remain continuously on duty without intermission. Nor does he hold his position at the whim or caprice of the appointing power and thus be subject against his will to be deprived of the benefits of the ordinance. It appears in the record, although not directly in this connection, that he holds under civil service rules, and is thus liable to discharge only for cause alleged and proven against him.

[2] On the merits of the controversy, the principal contention for reversal is that the writ compels the doing of an unlawful act. It is not asserted, of course, that the duty to enforce the provisions of an ordinance duly and legally enacted is discretionary with the city officers. On the contrary, it is conceded that it is their imperative duty so to do if the means lie within their power. obligation is denied in this instance because beyond the officer's powers. The reason is founded on the allegations of the answer to the effect that the ordinance could not be enforced for the year 1917 without the expenditure of approximately \$10,000; that authorities could support the department by

levies for that year without taking into account this expense, and is therefore without authority to provide for it by additional levies; that the city had reached the debt limit permitted by the Constitution and statutes, and could not legally incur an additional indebtedness; and that for want of means, or power to procure means, the enforcement of the ordinance is an impossibility.

But however sound this reasoning might be when applied to a proper state of facts, we think it unsound in the particular instance because unfounded in its principal assumption. This court early laid down, and has since consistently adhered to, the rule that the limitation on indebtedness of municipalities imposed by the Constitution was inapplicable to such obligations as were made mandatory by that instrument or were necessary to maintain the existence of the corporation. It was recognized that the maintenance of city governments was essential to the health, safety, and general welfare civil procedure under the Code, and that any of the people of the city, and consequently the limitation of indebtedness imposed could not have been intended to be so far exclusive as to necessitate the suspension of government. Rauch v. Chapman, 16 Wash. 568, 48 Pac. 253, 36 L. R. A. 407, 58 Am. St. Rep. 52; Duryee v. Friars, 18 Wash. 55, 50 Pac. 583; Gladwin v. Ames, 30 Wash. 608, 71 Pac. 189; Pilling v. Everett, 67 Wash. 109, 120 Pac. 873; Patterson v. Edmonds, 72 Wash. 88, 129 Pac. 895.

That an efficient fire department is an essential for the protection, and therefore for the existence, of a municipality of the first class does not need argument to demonstrate. Indeed, in Gladwin v. Ames, supra, we held that fire insurance on city buildings was such a well-recognized method of protection that warrants issued to cover the cost of such insurance, although in excess of the city's legal debt limit, were valid. For a much stronger reason are warrants valid issued, under like circumstances, to maintain department for the extinguishment of fires. In Lynch v. North Yakima, 37 Wash. 657, 80 Pac. 79, 12 L. R. A. (N. S.) 261; and in Cunningham v. Seattle, 40 Wash. 59, 82 Pac. 143, 4 L. R. A. (N. S.) 629, we held the fire department of municipalities to be governmental agencies for the negligent conduct of which by the employes in charge a municipality was not liable in damages; a holding in principle that they were necessary governmental functions. Without pursuing the inquiry further therefore, we conclude that the maintenance of a fire department in the city of Everett is a necessary governmental function for which the city authorities may incur an indebtedness without violating the prohibition of the Constitution limiting the indebtedness of municipalities to a certain percentage of the value of their taxable property. It follows that the city creating an indebtedness, and it was error every other attending circumstance, made the on their part to conclude that they were without power.

[3] It is contended further, however, that, while a fire department may be a necessity, a double platoon system in such a department may not be a necessity, and whether it is so or not is within the province of the courts to inquire. But the rule is hardly as broad as the contention implies. it is within the province of the court to inquire whether a fire department is such a necessity as to authorize the incurrence of an indebtedness for its maintenance beyond the legal limit, it will not ordinarily inquire into the character of the department the city maintains. This is a question within the discretion of the city authorities, whose decision will be disturbed only where there is a manifest abuse of discretion—an abuse so gross that it cannot be said that reasonable minds might reasonably differ thereon. The fact that the electors of the city here in question have concluded that a fire department with a double platoon system is a necessity for adequate fire protection does not carry on its face any presumption of unreasonableness, and nothing is alleged or shown that would indicate that it is unrea-

Other questions are touched upon in the arguments, but the conclusion reached on the questions discussed is conclusive of the objections urged, and further consideration is unnecessary.

The judgment is affirmed.

ELLIS, C. J., and CHADWICK, MOUNT, and HOLCOMB, JJ., concur.

ROCKWELL v. DAY. (No. 14533.)

(Supreme Court of Washington. April 27, 1918.)

1. Limitation of Actions \$\infty\$55(4)—Statute of Limitations—Seduction.

The general rule is that the statute of limitations, in case of seduction, runs from the time of the seduction where the action is maintained by the woman on her own behalf.

2. SEDUCTION & 5-PROMISE OF MARRIAGE.
Where seduction is alleged to have been committed under promise of marriage, or where such promise is required by statute, it must be shown that the necessary promise existed at the time of the seduction.

3. SEDUCTION \$==17-ABSENCE OF PROMISE OF MARRIAGE.

Though a formal promise of marriage is not an essential fact to be proved under the laws of Washington to sustain a charge of seduction, the lack of such a promise, considered in the light of all the testimony, may be a strong and even controlling circumstance in a civil action for damages.

4. SEDUCTION 5-5-NECESSITY FOR PROMISES. To sustain a charge of seduction, it is necessary to show that the woman's consent was obtained by promises, which, when measured by the age and experience of the parties, and lap v. Linton, 144 Pa. 335, 22 Atl. 819; Davis

struggle unequal.

5. SEDUCTION \$==17-PRESUMPTION OF CHAS-TITY

There is a presumption that plaintiff suing for seduction was chaste, but such presumption is not absolute, and is attended by a presump-tion that judgment and discretion come with age and experience, and that a woman so fortified will not readily yield.

6. SEDUCTION C=17-DEGREE OF PROOF-AGE

of Plaintiff.
Where it appears that a woman, complaining of seduction, is of mature years, and is as worldly wise as defendant, the law will hold her to a stricter degree of proof than a younger woman with less experience, and she must show more than an illicit relation.

7. SEDUCTION \$\instructure 17-Promises-Sufficiency OF EVIDENCE.

In an action for seduction by a woman of mature years, evidence held to show that plaintiff did not yield because of any promise reasonably calculated to mislead a chaste woman.

8. Limitation of Actions \$=55(1)—Statute of Limitations—Action for Tort. An action for tort accrues when the wrong

is committed. 9. Limitation of Actions \$\sim 55(4)\$—Statute OF LIMITATIONS - SEDUCTION - VOLUNTARY

PRESUMPTION OF RELATION.

Where plaintiff, after seduction, broke off her relations with defendant, but thereafter returned to him voluntarily and under no new promise, she was bound to bring her action within three years after her voluntary return.

Department 2. Appeal from Superior Court, Spokane County; John R. Mitchell. Judge.

Action by Verna Rockwell against J. W. Day. From judgment for plaintiff, defendant appeals. Reversed and remanded, with directions to enter judgment notwithstanding the verdict.

Voorhees & Canfield, of Spokane, for appellant. C. E. Ellis and Chas. W. Gillespie, both of Spokane, for respondent.

CHADWICK, J. [1] Plaintiff brought this action to recover damages for seduction. The jury returned a verdict in her favor, and the defendant has appealed. The assignments of error principally relied on are that the action is barred by the statute of limitations. and that the facts are not sufficient to sustain the verdict and judgment. These questions were preserved throughout the trial by appropriate pleadings and motions. Plaintiff alleges that the seduction occurred on or about the 9th day of April, 1909, and that the meretricious relations then begun continued until on or about the 20th day of December, 1913. This action was begun on the 5th day of December, 1916. It is the contention of defendant that the statute began to run on the 9th day of April, 1909, and that an action would be barred on the 9th day of April, 1912. He cites Rem. Code, \$ 159, which makes no exemption in favor of this class of actions, and the following cases: Wilhoit v. Hancock, 5 Bush (Ky.) 567; DunA. 258, 102 Am. St. Rep. 118, 1 Ann Cas. 386. See, also, People v. Nelson, 153 N. Y. 90, 46 N. E. 1040, 60 Am. St. Rep. 592; People v. Clark, 33 Mich. 112.

Plaintiff insists that the better rule is that the statute does not begin to run where improper relations are begun under a promise of marriage so long as the relations are continued or until the last act of intercourse; that all the acts of intercourse are one transaction; and that a continued promise of marriage is implied from time to time. She relies on Davis v. Young, 90 Tenn. 303, 16 S. W. 473, and on Ferguson v. Moore, 98 Tenn. 342, 39 S. W. 341; Gunder v. Tibbits, 153 Ind. 591, 55 N. E. 766; Breiner v. Nugent, 136 Iowa, 322, 111 N. W. 446; Baird v. Boehner, 77 Iowa, 622, 42 N. W. 454; People v. Millspaugh, 11 Mich. 278. The general rule, as most text-writers agree, is that the statute begins to run from the time of the seduction where the action is maintained by the woman on her own behalf. Wood on Limitations (2d Ed.) § 186; Burdick, Law of Torts, § 273; 35 Cyc. 1308; 25 Am. & Eng. Encyc. p. 224. But whether we call the one or the other the general or the better rule, it must be admitted that there is a very marked conflict of authority. We could base our opinion on either rule and sustain it by sound reason, for if the one rule protects the artless and confiding female, the other protects the man from the artful pretensions of women who may pretend to have been seduced in order to obtain a pecuniary compensation, or to hide a shame revealed by a subsequent pregnancy, and who may fortify their pretensions by a showing of continued illicit cohabitation as a circumstance to sustain the charge of seduction under a promise of marriage or by arts, persuasions, or promises.

There is an equity in cases of this character, it is noted by Mr. Cooley in Watson v. Watson, 53 Mich. 168, 18 N. W. 605, 51 Am. Rep. 111. In many of the cases it is confessed without notice. This court in the case of State v. Carter, 8 Wash. 272, 36 Pac. 29, upheld a seemingly improbable and untruthful statement of her case by the prosecutrix because of her "tender age." But if there be no equity, a case of seduction brought by a woman of mature years calls for cautious inquiry, holding fast to the law's first aidcommon sense.

The facts in many of the cases seem to have called for the rule that would allow or defeat the action according to the justice of the particular case. Our thought may be illustrated by reference to Franklin v. McCorkle, 16 Lea (Tenn.) 609, 1 S. W. 250, 57 Am. Rep. 244, opinion on rehearing, later overruled in Davis v. Young, 90 Tenn. 303, 16 S. W. 473. In the one case the justice of the case was with the defendant; in the other the justice of the case was with the plain- cherish her. He was resolute in his purpose

v. Boyett, 120 Ga. 649, 48 S. E. 185, 66 L. R., tiff. It was so in the state of Indiana, where, in an earlier case, the court held that the statute began to run from the first act of seduction. In a later case where it was clear that the woman had been made the victim of the man, the rule was held otherwise. Gunder v. Tibbits, 153 Ind. 591, 55 N. E. 762. We therefore at this time hesitate to lay down any rule that would be a guide for all cases, nor is it necessary, as we view the facts in this case.

> [2] Plaintiff alleges in her complaint, and counsel sought diligently to prove at the trial, that she had been seduced under a promise of marriage, and that the relations of the parties had been continued under that promise. We have studied the facts diligently, and are convinced that if the case cannot be sustained upon a promise of marriage, it cannot be sustained at all, for the "solicitation, persuasion, and promises" of defendant do not, considering the age of the plaintiff and her understanding, make out a case for seduction. Moreover, the rule is:

> "Where the seduction is alleged to have been committed under a promise of marriage, or where such a promise is required by statute, it must be shown that the necessary promise existed at the time of the seduction," etc. 25 A. & E. Enc. Law, 239.

> Plaintiff was 49 or 50 years of age at the time of the trial, 1917. She says the seduction occurred in April, 1909, so her age then was about 42. She was married in the year 1885; her husband died in 1907. She has two grown daughters; one of the age of nearly 30 years, and the other 18 months Plaintiff knew defendant before younger. her husband died. They came together thereafter in a business or social way. Their association gradually grew more friendly, and their relations more intimate. Defendant called frequently at plaintiff's rooms at the several hotels and lodging houses in which she resided. In the fall of 1908 she became ill and went to a hospital. Defendant called on her there; he paid her bill, and finally at her request removed her to the home of her niece. From the first early days of the friendship and association of these people defendant constantly and persistently importuned plaintiff to submit to sexual intercourse. According to the story of the plaintiff, and we are following her testimony as closely as we can, he let no opportunity pass when they were alone to "love her up in most every way a man can a woman"; to kiss, caress, fondle, and pet her, and at least on one occasion, as she says, he tried every way he could to "get his hand up under my clothes." The positions of the parties in this battle were so clearly defined, and if plaintiff was possessed of the understanding of the ordinary human being and the natural modesty of womankind, she must have understood that defendant had no honorable intention or highminded purpose to love and

to conjugate with her, and she was willing to be fondled, caressed, and "loved up" by a man who brought no appeal other than to the brutish instincts of the object of his lascivious desire. Knowing this situation, the attitude of defendant, and the possible consequence of further association, plaintiff, after some slight disagreement with her niece, and at the suggestion of defendant, went to work for him in his office. Defendant secured a room for her in a hotel or rooming house known as the Minnesota She stayed in the office during the day; defendant was a frequent caller by Their association was constant, and defendant was insistent when they were alone. He was always fondling and caressing her. The inference from her testimony is that defendant's sexual desire was the outstanding topic of conversation. There was no formal promise of marriage, or artful persuasion that a woman over 40 years of age and the mother of grown children could urge as a seductive influence. She had exacted no promise of marriage, and defendant had made none. Her story is:

"He would come to the office every few minutes or every short time from the shop, and come in there, and he would make love to me and caress me in every way that a man could to a woman to show his affection for her; and he said he cared more for me than any woman he had ever met. He kissed me there in the office many a time, and he has made reference to sexual intercourse there. He used to try to get me—he had his room in the back part of the office, and he used to try to get me to go in there in his room and his bed with him. That occurred very many times, and at those times he promised me that he would care for me, and we would be friends and after a while when we would be friends, and after a while when we got better acquainted, he says—that was the beginning of our acquaintance, the first year—he said, 'after we get better acquainted,' and so on, he says, 'we will have a happy home.'"

Plaintiff went to Seattle just before Christmas, 1908. At that time the virtue of plaintiff was triumphant; the vice of defendant had been baffled. Plaintiff returned to Spokane about the 20th of January. She took a room at a hotel; the next day she telephoned defendant. She threw out a skirmish line. Defendant chided her because she had not called him as soon as she had arrived, saving:

"I suppose you had some other man at your room Saturday night, and you didn't want me to know you were there."

Plaintiff was not repelled by this burning insult to chastity. The next day she went to defendant's office. He caressed her, drew ber down upon his lap, and said:

"You are in trouble and have got to tell me what it is.

She then told defendant she was in trouble concerning a piece of property. Defendant procured counsel for her; she went to his office right along, because, as she says, he was assisting her in the litigation over her property. During this time the enemy was busy. The drive was on.

"He made advances in regard to sexual intercourse. He always tried to get me to submit to him from the beginning. I don't know as anything occurred in relation to his promises to marry me.'

Plaintiff describes the persuasions and promises made before she went to his office to work:

"He was very affectionate." When sick, "he showed great affection and sympathy." "He treated me kindly." "I can remember more what he done than what he said." "He made love to me." "He caressed me." "He sat down on the bed and loved me up." "I don't know that I can particularly state the words that he

on the bed and loved me up." "I don't know that I can particularly state the words that he said." "He kissed." "He petted me." "He made love to me every way he could that night, and tried to persuade me to lay down on the lounge with him there."

"Q. And did he state anything about marriage? (Objected to as leading.) Q. Well, just state what was said then. A. He said that if I would submit to him he would care for me, and that I was not able to work; I was sick, and I didn't have the means to take care of myself, and he would see that I was taken care of, and he would do all he possibly could for me." he would do all he possibly could for me.

After going to the office:

"He made love to me, and caressed me in every way that a man could to a woman." "He said he cared for me more than any woman he ever met." "He kissed me." "He tried to get me " \* \* \* to go into his room and bed with

"Q. Make any promises? A. Well, yes; he promised me that he would care for me, and we promised me that he would care for me, and we would be friends, and after while when we got better acquainted, he says—that was the beginning of our acquaintance, the first year—he said, 'after we get better acquainted,' and so on he says, 'we will have a happy home.' He called me affectionate names. Q. Did he make any promises at that time in regard to marriage?' (Objected to.) Q. Just state what, if anything, occurred in that respect. A. Well, I don't know as anything prefetcher. I don't know as anything particular occurred in any way only that we were together out there most of the time."

Plaintiff says she submitted her person to the embrace of defendant on the 9th day of April. Her version of her final capitulation is quoted from the unchallenged abstract of her testimony:

"The way that occurred is this: He was at my room every evening; we were together every \* \* \* evening mostly, and he came up one evening and he asked me if I would get supper for him, if he would go down and get some

I believe it was oysters and crackers that he
asked me to cook that night—we would eat supper together that night, and I said I would. So per together that night, and I said I would. So we were together that evening until some time late, and the next evening he was up there again; the second evening he was up there again. And I don't remember right now whether we ate our dinner together that evening or not; but the third evening that he was up there he came up there, and we had dinner, and then after that why he read the paper while I was washing the dishes. doing my work: and after washing the dishes, doing my work; and after that we spent the evening visiting together in the usual way that most any one would, until it began to get late; he kept insisting on that he began to get late; he kept insisting on that he was not going home; he was going to go to bed; I told him the best thing he could do was to get back to the office; I told him my character was all that I had left—after that was gone I had nothing left. He stayed there and coaxed and promised that I was not able to work; that he would take care of me and we would have a home; that I would have plenty if I would take care of him; that I wouldn't have to work. He



said that he would care for me; he would see that I would have a home: I wouldn't have to work, as my financial affairs were limited at that time; my health was poor. He stayed there: I guess it must have been about 11 o'clock or so; he finally promised that he would never throw me down; he said if I would submit to him he would stay with me through thick and thin; he said he would never throw me down; he would throw down all the rest of the down; he would throw down all the rest of the women he was going with, which he said was five right now that he was going with at that time; he said he would stay by me. I suppose my conduct towards him must have been very affectionate. There was discussion about marriage at that time. The subject of marriage had not come upon the subject of marriage had not come up very frequently, but it did later on. About the 9th day of April I submitbut it did ted to sexual intercourse with him. I don't know that the subject of marriage was discussed know that the subject of marriage was discussed between me and Mr. Day right after this certain time, but later on—it was very soon afterwards. We discussed marrying before we had sexual intercourse the first time; the first evening he came up there during this, the third evening that we had the intercourse. Then he made me promises that he would care for me, as I have explained before, and he says, 'If you as I have explained before, and he says, 'It you will submit to me,' he says, 'we will never aim to part.' 'Well,' I says, now, as I explained my character was all I had, he said. 'That will not hurt your character with anybody; I will take you and take care of you and protect you.' I met him every evening after that because he was at my room. After that one certain even was at my room. After that one certain evening, why, they was most all the time that we had intercourse together a good deal of the time after that. His demeanor towards me was just as affectionate as any man could be. He did kiss me. I met him often after we had this intercourse. We lived together.

A promise to "take care" of a woman made under some circumstances might be tortured into a promise of marriage, but a woman of mature years who has voluntarily submitted herself to unrighteous solicitation for several months, and who knows what marriage is, and what a promise of marriage is. and the possible consequences of illicit cohabitation, and what it means to be "taken care of" after illicit cohabitation, who comes relying upon such a promise should be held to proof more positive than mere inference. On the 10th day of April, 1909, the defendant moved into the rooms of plaintiff, and the parties immediately set up housekeeping. After a time they moved to the Kansas House, and then back to the Minnesota House; afterwards the parties went to live in a house owned and maintained by defendant on Mallon avenue, and thereafter lived at a place owned by plaintiff at Ross Park, and thereafter at a place out on College street, and again at the Mallon avenue house. They so far maintained the ordinary domestic routine that they sometimes quarreled, and finally their relations were entirely broken off. When this occurred plaintiff was pregnant.

[3] While a formal promise of marriage is not an essential fact to be proved under the laws of this state to sustain a charge of seduction, the lack of such a promise, when considered in the light of all the testimony, may be a strong and even controlling cireight months prior to the alleged seduction plaintiff knew of the attitude and purpose of defendant, and if marriage was talked about, as she says it was, it was not suggested in a way that would overcome the natural modesty and virtuous instincts of a woman of chaste character. She does not anywhere say that she invited defendant to fulfill the promise prior to the time of the seduction or at all.

"It is a little remarkable, if the girl relied upon a promise of marriage, that after she found herself pregnant she should never have demanded or even asked marriage." People v. Millspaugh, 11 Mich. 278.

There was no impediment to marriage. either physical, moral, or legal; a license could have been obtained and the ceremony performed at any time during the months between August, 1908, and April, 1909, or within any time during the four years and nine months following. The auditor's office was only a few blocks distant, and there were parsons in plenty. Plaintiff knew the law, and could have protected her chastity by the very simple expedient of making the surrender of her favors legal. This is not a case of a young woman suffering under an impediment of minority, or the nonconsent of parents, nor is it one where the woman has been carried away by the torrential flow of the hot blood of youth. The undoing of plaintiff by her own account, as we have seen, was deliberate and formal. This was no secret liaison. The lives of the two ran on in content-They lived together openly. Defendant provided the home, and fed and clothed plaintiff, and she performed the usual duties of the housewife. They were affectionate one with the other. The world will ask, and why not the law, why, if there was a promise of marriage, it was not carried out, or at least a demand that it be performed?

[4-6] Proof of intercourse is not in itself sufficient to sustain a charge of seduction. It is necessary to go further and show that the consent of the female was obtained by promises which, when measured by the age and experience of the parties and every other attending circumstance, makes the struggle between vice and virtue unequal. The law of seduction rests upon a faith in female chastity, and although the case of a plaintiff is attended by a general presumption that she did not willingly lend her body to improper uses, for "chastity is the general law of society; a want of chastity is the exception" (Crozier v. People, 1 Parker Cr. R. [N. Y.] 453; State v. Jones, 80 Wash. 588, 142 Pac. 35), this presumption is not absolute. It does not continue forever. It is attended by a presumption equally necessary to the administration of justice, and that is, that judgment and discretion come with age and experience, and that a woman so fortified will not readily yield to the wiles of a seducer. Her testimony will be more closely scrutinized cumstance in a civil action for damages. For than that of a younger or more inexperienced

woman, for the statute is for the protection; of the pure in mind-for the innocent in heart-who may have been led astray or seduced, from the path of rectitude. Andre v. State, 5 Iowa, 391, 68 Am. Dec. 708. where it appears that the woman complaining is of mature years and as worldly wise as is her paramour, the law will hold her to a stricter degree of proof than a younger woman with less experience. She must show more than an illicit relation; she must make it reasonably clear that the citadel of her virtue fell because of something that is more than an appeal to her lust and passion or to her mercenary instincts.

"\* \* \* There should be something more than a mere 'reluctance' upon her part to com-mit the act. It should be a reluctance that enticements and persuasions could not overcome without the presence of some other potent in-fluence; such a state of facts should be proved as would convince a fair-minded person that she as would convince a fair-minded person that she had been deceived and deluded, and that her submission was in consequence of such deception and delusion. To term coaxing and persuasion of a woman to yield to the lecherous embraces of a man 'a seduction by artifice,' would be a misnomer; a virtuous minded woman would promptly spurn such approaches with indignation. And if the statute is to receive the construction last indicated—if a woman of mature years is allowed to recover damages for ture years is allowed to recover damages for the loss of reputation and character in consequence of her having permitted a man to have carnal knowledge of her—she should be required to show that she had been prudent; had exercised at least ordinary discretion; had sacrificed her virtue through an influence that was calculated to lead astray an honest minded female. An action for obtaining property fraudulently cannot be maintained without proof of facts calculated to deceive a person of ordinary pru-dence; and how can a female a long way be-yond girlhood claim to have been defrauded of that which every womanly instinct of her nature that which every womanly instinct of her nature prompts her to set the highest value upon, by 'flattery, false promises, artifice, urgent importunity, based upon professions of attachment,' unless they are of such a character as are calculated to mislead an ordinarily prudent and virtuous minded woman?"

The case of Baird v. Boehner, 72 Iowa, 318, 33 N. W. 694, was very like the one at bar. The illicit relations were brought about in about the same way; they were broken into for a time, and later renewed; they covered a period of about two years. In that case defendant threatened to go with another woman; in this case defendant promised to give up other women. The court refused to let the verdict stand, saying:

"For the purpose of this opinion, it will be conceded that there was evidence tending to show that the plaintiff had reformed, and was of chaste character in June, 1883. The first of chaste character in June, 1883. The first time the defendant was in company with the

you to I will go with some other girl.' She then was clearly and explicitly advised that his object in visiting her was to obtain sexual in-tercourse. This was before the claimed seduc-tion took place. Knowing his object, she per-mitted him to visit her frequently, and he finally 'accomplished his purpose by telling her he would abandon her, and go with some other girl, and if she would submit to him, he would stick to her.' The plaintiff, therefore, being a chaste to her.' The plaintin, therefore, being woman, yielded her person to the embrace of defendant, knowing all the time that his object. defendant, knowing an the time that his object in visiting her was to obtain sexual intercourse, simply because he told her if she did not yield to him he would abandon her and go with some other girl; that is, that he would cease to visit her. It must be remembered that there was no promise of marriage. What was said in relative to the sai tion to marriage was said in September, and the claimed seduction took place in the preceding month of June; nor was there any false promise of any kind. His declaration that he would abandon her or cease to visit her clearly cannot abandon her or cease to visit her clearly cannot be regarded as a false promise, deceit, or artifice. It is true, there is evidence tending to show that he loved her, and that she loved him, and that he said 'she had a pretty form, was very kissable, and had pretty eyea.' Whether this was said before or after the claimed seduction does not expear hut conceding it was her tion does not appear, but, conceding it was before that time, sexual intercourse was not obtained because of the expression of love, or by reason of flattery. that she yielded." It was not for these reasons

[7] From the whole testimony we think it clearly appears that plaintiff did not surrender her person because of any promise reasonably calculated to mislead a chaste woman. Her fortress did not fall by reason of any sudden assault. She was not shocked by defendant's declared purpose, or his sensual conversation. She went away from him. but returned again and again. She left on one occasion, at least, resolved that she would not return to her adulterous life. We have not discussed the record and quoted from the cases, so much to justify our belief that the court should have withheld the case from the jury, or that the jury should have decided in favor of the defendant, as to demonstrate that the case should not be held to fall within the rule of the Indiana and Tennessee cases, whatever the rule hereafter adopted by this court may be.

[8,9] An action for tort accrues at the time the wrong is committed. This rule is universal, unless modified by statute, as, for instance, the statute allowing an action to be brought within three years after a fraud is discovered, or where the courts have arbitrarily worked an exception, as has been done by some of them in seduction cases. As a premise we can all agree that plaintiff had a right of action on the 9th day of April, 1909, if at all, and we may grant that it time the defendant was in company with the plaintiff after her return from Kansas he made an improper proposal to her, and took indecent liberties with her person, that should have shocked a matured woman of chaste character. He proposed sexual intercourse, which she refused, and she objected to the liberties taken with her person. There was, however, no show of indignation on her part at either the proposal or liberties taken. He kept coming to see her, and told her that he loved her, and she thought that if she did 'not give up he would marry her'; and he told her 'if you don't do as I want to it, but who does return voluntarily and would continue until the relations were bro-



under no new promise, can hardly be said diction on the part of the superior court of to be in a position to invoke the unwritten equity which has been voiced in the opinions relied on. Plaintiff left defendant in May, June, or July, 1912, and went to Portland. She says:

"I returned in September. When I returned I went out to my own house at Ross Park. Mr. Day called to see me there. He came out there and stayed all night. I hadn't any intention when I came home of living any more with him."

Plaintiff did not exact a renewal of the promise to marry if any was ever made, and there is no showing of shame or anxiety over her situation for more than four years thereafter, when this suit was brought. Under these facts it would do violence to every rule of law to say that plaintiff was not bound to bring her action within three years after September, 1912, for at that time and after a voluntary surrender of her obligation to Hera she made of herself a willing sacrifice upon the altar of Aphrodite.

We are not justifying the wrong of defendant. His conduct has been neither moral nor legal. But the law gives no remedy in damages for illicit cohabitation, or even for seduction under a promise of marriage, unless it is brought within three years after the cause of action has accrued or, semble, the relations have been broken off. tiff ceased to be a seduced person cohabiting under a continuous promise, if ever she was, in September, 1912. When she turned back on the path of chastity which she had determined to follow, she dropped the bar and set the statute to run.

Reversed and remanded, with directions to enter a judgment notwithstanding the verdict.

ELLIS, C. J., and HOLCOMB, MOUNT, and PARKER, JJ., concur.

In re TURNER'S ESTATE. (S. F. 8693.) (Supreme Court of California. April 10, 1918.) PROHIBITION \$== 10(1)—Grounds for Relief EXCESSIVE JUBISDICTION.

Prohibition runs only against excess of jurisdiction on the part of the tribunal whose proceedings are sought to be arrested thereby.

In Bank. In the matter of the estate of Mary Elizabeth Turner, deceased. Petition for writ of prohibition against the superior court of the state and county of San Francisco. Denied.

Herbert S. Herrick, for petitioner.

PER CURIAM. Petition for a writ of prohibition.

Prohibition runs only against excess of jurisdiction on the part of the tribunal whose tion was commenced to recover for an allegproceedings are sought to be arrested thereby. No showing whatever of excess of juris-joutset that, while the agreement and the as-

the city and county of San Francisco is made by the petitioner. The petition filed herein contains much matter that is absolutely immaterial, in view of the nature of the application, impertinent, and scandalous. Certainly this is true of all of paragraphs 24 to and including paragraph 30 thereof.

It is ordered that paragraphs 24 to and including paragraph 30 be and the same are hereby stricken from the petition, and that the petition be and the same is hereby de-

DODGE v. AVERY. (Civ. 2246.)

(District Court of Appeal, Second District, California. March 18, 1918.)

LANDLORD AND TENANT & 57(2) — ASSIGNMENT OF RENT—BREACH OF CONTRACT—SUF-FICIENCY OF EVIDENCE.

Where landlord entered into contract whereby a creditor was to collect the rent from a tenant and apply a certain amount on the indebtedness each month, evidence held insufficient to show that landlord interfered with collection of such rent.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by Julia C. J. Dodge against J. F. Avery. Judgment for plaintiff, and defendant appeals. Reversed.

Geo. M. Harker, of Los Angeles, for appellant. Ira L. Brunk and Silas Cobb, both of Los Angeles, for respondent.

WORKS, Judge pro tem. The defendant and one Ira L. Brunk entered into a written agreement in which it was recited that the former, the party of the first part, was indebted to Brunk, the party of the second part, in the sum of \$1.200. The agreement then provided:

"In order to secure the \* \* \* payment of said sum of money, the first party hereby sells, said sum of money, the first party hereby sells, assigns, and sets over to the second party

\* \* \* an interest in and to that \* \* \*
lease made and executed \* \* \* by and between the first party \* \* and John H.
Strickler \* \* wherein the said Strickler becomes obligated to pay \* \* the sum of \$9,000 as rent for a certain property, \* \* and the first party herein assigns, sells, and sets over to the second party \* \* \* an interest in over to the second party \* \* \* an in and to said rents due and to become due under and by virtue of said indenture of lease to the amount of \$1,200, with the understanding that the second party herein shall collect from the lessee \* \* the said \$9,000 of rent, payable in monthly installments of \$150 per month, and shall retain for his own use and benefit the sum of \$20 out of each monthly installment of rent, the said \$20 to be applied upon the said sum of \$1,200 until the whole of said \$1,200 is fully paid."

The rights of Brunk under this agreement descended to the plaintiff through a chain of several assignments, all of which were accepted by the defendant, and the present aced breach of its terms. Let us say at the signments of it may possibly be construed as vesting in the plaintiff the right to maintain an action against the defendant upon the original obligation of the latter to pay Brunk \$1,200, that question does not arise in this action, for the complaint is plainly based upon the agreement as one which lodged in the plaintiff the right to collect the rents and to retain from each monthly collection the sum of \$20 until the payment of the full \$1,200 was accomplished.

After setting up the agreement and the assignments, the complaint alleges that \$180 had been collected on the agreement at the monthly rate of \$20 before the assignment to the plaintiff, and that after that assignment she collected \$20 monthly for a period of 23 months, up to and including April 1, 1914, or an added sum of \$460. Then occur the following allegations, omitting formal verbiage:

"That thereafter plaintiff continued to try to collect the rent, \* \* \* but was unable to do so, by reason of the fact \* \* \* that the defendant herein began to interfere with the collection of said rents by this plaintiff, by endeavoring to collect the rents himself, and \* \* \* forbidding the tenant in possession \* \* \* to pay to the plaintiff any of the rents, \* \* and demanding the payment of said rents to himself. \* \* \* That by reason of said interference, this plaintiff has been unable to collect any rent since the 1st day of April, 1914, although this plaintiff has endeavored to collect said rents and all of them since said 1st day of April, 1914."

It was also alleged that the defendant had collected some or all of the rents since April 1, 1914. The complaint then proceeds:

"That said defendant has not paid to this plaintiff the \$20 per month, according to the terms of said agreement, \* \* or any part thereof, although plaintiff has demanded payment of the same from defendant. That there is now due, owing, and unpaid from said defendant to this plaintiff, upon said written agreement hereinbefore set forth, the sum of \$560, being the balance of the amount set forth in said agreement, after the payment of the said \$180 and the said \$460."

These were all the material allegations of the complaint. The answer categorically denied all the allegations we have included within quotation marks, except the allegation as to demand made by plaintiff upon defendant. The allegation, the effect of which we have given, without quoting, that defendant had collected some or all of the rents since April 1, 1914, the defendant answered by admitting that he had collected \$750 up to and including December 15, 1914; but he denied that he had made the collections under the agreement between him and Brunk and made certain affirmative allegations as to the terms on which collections had been made.

Judgment went for plaintiff for the full amount prayed for, and the defendant appeals.

The court found that all the allegations of the complaint were true. This finding is assailed as not being supported by the eviluions as to care and disposition of injured stock.

ticular respects in which it is claimed that the finding lacks support. At the outset of the trial the court, evidently overlooking the denials contained in the answer, announced that the burden of proof was upon the defendant and required him to proceed. only evidence in the case, therefore, was evidence offered by the defendant, and it shows. without dispute, that the respondent, being about to depart from Los Angeles, where all these questions arose, left a Mrs. Anderson to act for her in her absence in the matter of the rents mentioned in the agreement: that before she left she requested the tenant of the property in question to pay only the \$20 per month to Mrs. Anderson and to pay the remaining \$130 per month to the appellant: that the respondent left Los Angeles in February or March, 1915, and returned in May or June of the same year; that Mrs. Anderson collected \$20 per month from the tenant for either one or two months, and that, for the same period, the tenant paid \$130 per month direct to the appellant; that from that period forward, for some months, the appellant was paid various amounts by the tenants on account of the rent, but he never again received as much as \$130 in any month, or for any month, the payments always being from \$40 to \$70 short, each month, of either the \$130 or the \$150, the evidence not showing which. The evidence fails to show that the respondent ever made any change in her direction to the tenant that he pay over to the appellant \$130 per month, or that he pay to Mrs. Anderson only \$20 per month. The evidence plainly fails to support the allegation of the complaint to the effect that the appellant interfered to prevent the collection of rents by respondent, and it fails to support the allegation that, in effect, the appellant collected any moneys whatever which it was his duty, under the theory advanced by the complaint, to repay to respondent. We need not mention other specific allegations of the complaint, denied by the answer, which are unsupported by the evidence.

The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

BLISS v. SOUTHERN PAC. CO. (Civ. 2139.)
(District Court of Appeal, Second District, California. March 18, 1918. Rehearing Denied by Supreme Court May 17, 1918.)

1. CARRIERS E=218(11) — SHIPMENT OF LIVE STOCK—WRITTEN NOTICE OF LOSS—WAIVER. Under contract for intrastate shipment of live stock, providing that shipper should give written notice of loss within 10 days after unloading, the carrier waived the right to notice, where after less formal notice it gave directions as to care and disposition of injured stock.

2. CARRIERS \$\infty 218(10) - Shipment of Live if they were slaughtered immediately an inSTOCK-NOTION OF LOSS-TIME

STOCK—NOTICE OF LOSS—TIME.

Shipper of live stock was not required to give written notice of loss within 10 days as specified by contract, where the extent and character of the damage could not be ascertained within such time.

Appeal from Superior Court, Los Angeles County: Paul J. McCormick, Judge.

Action by R. L. Bliss against the Southern Pacific Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Henry T. Gage and W. I. Gilbert, both of Los Angeles, for appellant. Guy E. Maurice, of Los Angeles, for respondent.

WORKS, Judge pro tem. This is an action for the recovery of damages alleged to have been suffered by plaintiff through injuries to certain of his cattle while in transit over the railroad of defendant; the point from which and the point to which the shipment was made both being within the state. Judgment was awarded to the plaintiff and the defendant appeals. The appeal is upon the judgment roll, and there is no bill of exceptions.

The findings of fact show that the cattle were shipped under a written agreement between the parties and that it contained the following provision, which we have liberally shortened by ellipsis:

"Second party \* \* \* agrees that in case any loss or damage shall have been sustained \* \* demand or claim for such loss or damage will be made \* \* \* in writing, within 10 days after unloading; \* \* \* and that in event of failure so to do, all claims for loss or damage \* \* \* are hereby expressly waived, released and made void, and it is \* \* \* agreed by second party that the amount to be by him claimed \* \* \* shall be adjusted on basis of value at time and place of shipment, not exceeding the declared value as hereinbefore set forth, \* \* \* and in no event is there to be any recovery \* \* \* for any loss of or damage to said live stock \* \* \* in excess of the declared value hereinbefore set forth."

It is also found that the respondent made no such written claim or demand within the time limited; but it is further found, in effect, that within 48 hours after unloading the cattle the respondent telephoned an agent of the appellant that they were damaged and then made demand to be compensated for the damage, and stated that he intended to slaughter the cattle and that he would. after killing them, send a claim for damage; that the agent said, "All right," stated that he would send one of the appellant's claim inspectors to be present at the time of the slaughtering to ascertain the amount of the respondent's damage; that the inspector did appear for that purpose and then requested the respondent to so handle the cattle that the least loss would result to the respondent; that it was then and there agreed between the inspector and the respondent that, by reason of the damage suffered by them, the

creased loss to the respondent would result; that the inspector requested of the respondent that the cattle be allowed to stand in the respondent's stockyard until such times as, in the judgment of the respondent, the least loss to him would be occasioned; that the respondent assented to the request and used just, fair, and reasonable discretion in determining the time the cattle should so stand and did not complete their slaughter until the closing time of the respondent's plant on the afternoon of the tenth day after the unloading of the cattle from the appellant's train; that prior to the making of the agreement under which the damaged cattle were shipped the parties had frequently executed similar agreements, containing the language above quoted from the agreement now in question; that the respondent had suffered damage to cattle shipped under such agreements; that in each and every instance of such loss the appellant required the respondent, when presenting his written claim for damages, to state his actual loss, and to ascertain the amount thereof by deducting from the local market value of the cattle when slaughtered, if they were in an undamaged condition, their local market value as damaged; that respondent did so, and in many instances he was unable to ascertain the difference in market value until after, and did not present his written claim for damage until after, 10 days from the time of unloading; that appellant did, notwithstanding the delay in presenting written claim for damage, make equitable settlements of respondent's claims; that appellant has repeatedly demanded that respondent make all his claims for losses upon the above mentioned basis and has notified respondent that unless all claims are so presented appellant will not pay them; that, in the present case, it was impossible to ascertain the market value of the cattle as damaged until after they were slaughtered; that by reason of the aforesaid facts respondent did not, within 10 days after the cattle were unloaded, ascertain the total amount of his damage: that except for the aforesaid facts he would have presented a written claim within the required 10 days; and that he did present such a written claim 24 days after the last of the cattle were slaughtered.

The respondent takes the position, and the trial court decided, that, ander the circumstances disclosed by the findings, he was excused from presenting a written claim for his damage within the 10 days limited by the terms of the agreement. The authorities which the respondent cites in support of his contention may be grouped under two statements of propositions of law.

the inspector and the respondent that, by [1] The first is that, where parties conreason of the damage suffered by them, the tract for such a written notice of damage as cattle were then unfit for slaughter and that is provided for in the agreement that is now



before us, the right to notice is waived and excused by the carrier, if, after receiving less formal notice in a given case, it proceeds to investigate the damage suffered and makes suggestion or gives direction as to the care or disposition of the damaged property. Jones v. Quincy, O. & K. C. R. Co., 117 Mo. App. 523, 94 S. W. 735; Lasky v. Sou. Exp. Co., 92 Miss. 268, 45 South. 869; Atchison, T. & S. F. Ry. Co. v. Wright, 78 Kan. 94, 95 Pac. 1132; Clubb v. St. Louis & S. F. R. Co., 136 Mo. App. 1, 117 S. W. 110; Missouri, K. & T. R. Co. v. Hood, 55 Tex. Civ. App. 636, 120 S. W. 236; Gilliland & Gaffney v. Southern Ry. Co., 85 S. C. 26, 67 S. E. 20, 27 L. R. A. (N. S.) 1106, 137 Am. St. Rep. 861.

[2] The other proposition is that, under such an agreement, the notice need not be given within the time limited in a case in which the extent or character of the damage suffered cannot be ascertained within that time. Burns v. Chicago, R. I. & P. Ry. Co., 151 Mo. App. 573, 132 S. W. 1; Pierson v. Northern Pac. Ry. Co., 61 Wash. 450, 112 Pac. 509. The position of the appellant is that a carrier has no power to waive such a provision in a contract of shipment, and several decisions of the federal courts are cited in support of the view, but all of those cases except one derive their force and effect from the fact that the provisions in question were contained in a statute or in a form of bill of lading prescribed by statute and which is in general use by railroads engaged in interstate commerce, and the damage in each case resulted to property in transit in such commerce. The remaining case is Clegg v. St. Louis & S. F. R. Co., 203 Fed. 971, 122 C. C. A. 273. It appears to be somewhat in conflict with the cases we have cited above from the state courts, although it, too, relates to an interstate commerce shipment. However, we are satisfied of the correctness of the rules announced by the state courts to which we have referred.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

## PEOPLE v. LIMA. (Cr. 720.)

(District Court of Appeal, First District, California. March 20, 1918. Rehearing Denied by Supreme Court May 17, 1918.)

 Seduction \$\limes 45\$—Promise of Marriage— Sufficiency of Evidence.

Evidence held sufficient to sustain a conviction of seduction under promise of marriage, although there was evidence that defendant threatened to commit suicide and kill prosecutrix.

2. SEDUCTION 4-45-PREVIOUS CHASTITY-SUFFICIENCY OF EVIDENCE.

Evidence in seduction case held sufficient to sustain finding that prosecutrix was previously chaste.

3. SEDUCTION \$\iff 45\to Unmarked Condition of Prosecutrix\to Sufficiency of Evidence. In seduction case, evidence held sufficient to sustain finding that prosecutrix was unmarried.

before us, the right to notice is waived and 4. CRIMINAL LAW \$388\% - REASONABLE

DOUBT—INSTRUCTIONS.

Code Civ. Proc. § 1826, relating to sufficiency of proof, is applicable to criminal cases, and was properly read to the jury, in connection with instructions on reasonable doubt.

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Manuel Lima was convicted of seduction under promise of marriage. From the judgment, and an order denying a new trial, he appeals. Affirmed.

L. Gonsalves, of Oakland, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

BEASLY, Judge pro tem. It is charged in this case that the defendant, a married man, induced the prosecuting witness to accompany him from her home in Alameda county to San Jose, and there seduced her upon his promise to marry her. He was convicted of seduction under promise of marriage, and from the judgment and order denying a new trial he appeals.

The points relied on for a reversal in this case, stated in the language of the appellant's counsel upon the oral argument, are that the evidence does not show that the promise of marriage was the sole inducement which led to the girl's seduction; second, that it does not show that the prosecutrix was of previously chaste character; and, third, that there is no proof in the record that the prosecuting witness was unmarried at the time of her seduction.

[1] Upon the first point the young woman testified that she went to San Jose for the purpose of marrying the defendant and that this was her reason for going there and permitting herself to be seduced by him. She also testified that he threatened to commit suicide and to kill her. Counsel's contention that by these threats the defendant seduced her is not convincing. It is plain from the entire evidence that the means employed by the defendant to accomplish his purpose with her was his promise to marry her reiterated upon many occasions.

[2] Upon the second point, without going into the details of the unpleasant evidence in this case, it may be said that the prosecuting witness testified that she had never had intercourse with any other man previous to her seduction; and the defendant's counsel contends that this testimony did not exclude the possibility that she may have had intercourse with the defendant himself previous to her seduction. Reading the testimony and the other questions asked her, in connection with the question which brought out the foregoing answer, it may be said that the evidence is entirely sufficient to sustain the finding of the previous chaste character of the prosecuting witness.

[8] Upon the third point, the defendant cites People v. Krusick, 93 Cal. 74, 28 Pac.

794, wherein it is held that many of the ant railroad to show deceased failed to exercise facts proven in this case were not sufficient in themselves to establish the fact that the woman in that case was unmarried. However, the evidence in this case disclosed other facts and circumstances, in addition to those appearing in the case of People v. Krusick, supporting the finding of the jury that the young woman was unmarried.

It would be better practice—indeed, it is almost the universal practice—to ask the prosecuting witness in such cases as this categorical questions as to her chastity and her unmarried status; but, although this practice was not followed here, it is impossible to read this record without coming to the conclusion that those facts were sufficiently proven. Indeed, it was admitted at the oral argument that no serious question was made at the trial as to the fact that she

[4] We have examined the instructions complained of by the defendant and given by the trial court, and find that they fairly state the law applicable to the case. Section 1826 of the Code of Civil Procedure is applicable to criminal cases, and it was proper for the court to read it to the jury in connection with the usual instructions upon the subject of reasonable doubt.

The instructions requested by the defendant, and refused, either added nothing to those given by the court, or were of such a nature as to be unnecessary, in view of the care with which the defendant's interests were guarded by the instructions given.

The judgment and order denying a new trial are affirmed.

KERRIGAN. J.: ZOOK. We concur: Judge pro tem.

ILARDI V. CENTRAL CALIFORNIA TRAC-TION CO. et al. (Civ. 1777.)

(District Court of Appeal, Third District, California. March 11, 1918. Rehearing Denied by Supreme Court May 9, 1918.)

1. Negligence == 93(1) — Impu gence—Passenger in Vehicle. - IMPUTED NEGLI-

person riding as a passenger or guest in a vehicle driven by another may not be charged with the negligence of such other which has caused injury to him, unless such passenger or guest has the right to exercise control over the driver of the vehicle, or in the eyes of the law may be said to possess such power of control, or unless it is made to appear that the passenger or guest himself actively participated in the negligence of the driver.

2. NEGLIGENCE \$\iff 68-Passenger or Guest in Vehicle-Duty.

One riding in a vehicle as passenger or guest of the driver must exercise ordinary care for his own safety.

3. Railroads &=346(5)—Death at Crossing —Contributory Negligence—Burden of PROOF.

In an action against a railroad for death at

such care for his own safety as was required of him.

4. RAILROADS \$\ightarrow 350(21) - DEATH AT CBOSS-ING—CONTRIBUTORY NEGLIGENCE.

Where a passenger in a vehicle crossing the

where a passenger in a venicle crossing the railroad track said nothing and did nothing, and looked neither up nor down the track before the horse was started across by the driver, such passenger was not negligent per se, and his acts did not justify the complaint as metter of law. not justify the conclusion as matter of law that he failed to use due care.

5. RAILBOADS =346(5)-PRESUMPTIONS-AB-SENCE OF NEGLIGENCE.

There is a disputable presumption that one killed at a railroad crossing in collision exercised due care for his own safety, having in view the surrounding conditions, with which he was familiar.

6. RAILBOADS \$\sim 350(21)\$—DEATH AT CROSSING — CONTRIBUTORY NEGLIGENCE — QUES-TION FOR JURY.

In an action against a railroad for a death in a crossing collision, the question whether de-cedent, a passenger in the wagon of another, was guilty of negligence directly causing his death, held for the jury under the circumstances in evidence.

7. RAILROADS & 350(33)—DEATH AT CROSS-ING—LAST CLEAR CHANGE —QUESTION FOR JURY.

In such action, evidence held to justify the submission to the jury of the question of last clear chance.

8. RAILROADS \$\sim 338\to DEATH AT CROSSING\to LAST CLEAR CHANCE.

If the motorman of an interurban railroad's car saw a wagon on the track at a crossing, and car saw a wagon on the trace at a revessing, and could have stopped without injury to the wagon or its passengers, but neglected to do so, so that a passenger in the wagon was killed, plaintiff, suing for the death, is entitled to verdict under the doctrine of last clear chance.

9. Negligence & S3—Contributory Negligence—Last Clear Chance.

Where an injured person claiming under the doctrine of last clear chance himself had an opportunity, of which he had knowledge, to escape from the peril into which he had negligently fallen, and with reasonable diligence could have done so and avoided the accident, but failed, his negligence placing him in the position of danger was a continuing, active, or concurring cause of his injury, and he cannot recover on any theory of last clear chance.

10. RAILROADS \$\infty 324(1)\text{—Injuries at Cross-

ING—CONTRIBUTORY NEGLIGENCE.

The mere act of passing over a railroad's public street crossing is not negligence per se, but only when the attempt is made to pass over without using reasonable care in ascertaining whether there is a train approaching or about to approach.

11. Railroads €=>350(33)—Death at Cross-ING-APPLICATION OF LAST CLEAR CHANCE
-QUESTION FOR JURY.

In an action against a railroad for death in a crossing collision, whether decedent and the driver of the wagon in which he was riding as a passenger negligently failed to extricate themplaced themselves in it, so that their original negligence was the cause of the death, and the doctrine of last clear chance had no application, held for the jury.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Action by Mary Ilardi, an infant, by Alexits crossing of one riding as passenger in the ander Fiore, guardian ad litem, against the vehicle of another, the burden was on defendander Fiore, guardian ad litem, against the poration, and Rosa Ilardi. From a judgment for plaintiff, defendant corporation appeals. Affirmed.

Butler & Swisler, of Sacramento, for appellant. Downey, Pullen & Downey and Ralph Smith, all of Sacramento, for respondent.

HART, J. The action was brought to recover from the defendant Central California Traction Company damages for its negligence in causing the death of Gandolfo Hardi, the father of plaintiff, who at the time of the commencement of the action was about 11 years of age. The defendant Rosa Ilardi is the widow of the deceased and the stepmother of plaintiff. She was joined as a defendant for the reason, as stated in the complaint, that she had refused to join as a party plaintiff. She made no appearance in the action and her default was duly entered, but she is not affected by the judgment, which was against the defendant Central California Traction Company for the sum of \$3,500. The appeal is by said company from the judgment.

Appellant owns and operates an interurban electric railroad between the cities of Sacramento and Stockton, carrying passengers and freight between said cities and way stations. Running southerly from Sacramento, for a distance of more than half a mile, trains are operated over a single-track road on the east side of, and parallel with, a public highway known as the Upper Stockton road, which road is paved along its center with asphaltum, the paved portion being about 18 feet in width, while on each side of the pavement the road has a dirt surface about 10 feet in width. The railroad track is immediately along the east side of the dirt road east of the pavement. At a point outside the city limits of Sacramento, a street, known as Vina Vista street, crosses said railroad track at a right angle and intersects with. but does not cross, said Upper Stockton road. The view from Vina Vista street for a distance of half a mile north or toward the city of Sacramento was unobstructed.

The evidence discloses that both Sansone and the deceased, who were brothers-in-law. resided on Vina Vista avenue; that the deceased, who at the time of his death was 34 years of age, had been employed in the shops of the Southern Pacific Company, in the city of Sacramento; that some two months previously to the accident whereby he lost his life he had met with an accident at the railroad shops, a piece of steel having been imbedded in his left eye; that for some time before he was killed he made daily trips to an oculist in the city of Sacramento for treatment, leaving his home in the early morning for that purpose and generally rethe latter's wagon, which was what is known as a "contractor's wagon."

The accident in which the deceased lost his life occurred on the 17th way of January, 1914, at about 4:30 o'clock p. m. Sansone had left his home in said wagon, drawn by a single horse, early in the morning and went to Sacramento city. The deceased had also gone to the city for treatment by the oculist. At about 1 o'clock on the afternoon of that day the deceased joined Sansone at Sixth and D streets, in said city, and the two started together in the wagon for their homes on Vina Vista avenue, the wagon being loaded with lumber. Sansone was the owner of the horse and wagon and Ilardi was riding with him merely as his guest, he having no interest in or control of or over the horse and wagon or the business for which Sansone used them. Sansone, who was driving, sat on the right-hand, and the deceased on the left-hand, side of the seat. They were traveling south and on the west side of the Upper Stockton road until reaching a point within a distance of about two city blocks from Vina Vista street, when a horse and wagon driven by one Fletcher, and proceeding from a driveway on the west side of the road or street, caused Sansone to pull over to the dirt road on the east side and some 8 or 10 feet from the appellant's railroad track. After passing said horse and wagon, Sansone, so he testified, turned back to the west side of the road. Upon reaching Vina Vista street, however, Sansone turned to the left and started to cross the railroad track, and at this instant of time an interurban train of two cars, traveling south from Sacramento, struck the wagon, throwing it, the horse, and the occupants of the wagon a considerable distance from the crossing. As a result of the collision, Hardi was almost instantly killed.

The evidence further shows that the day upon which the accident occurred was cloudy; that it had been raining during most of the day; and that a heavy southeast wind was prevailing at the time of the accident. Sausone testified that when he reached a point about 25 feet from the Vina Vista crossing he stopped the horse and looked to the north and to the south; that he saw or heard no train coming from either direction and then proceeded on toward the crossing; that when at a distance of 5 feet from the crossing he again halted the horse and again looked in both directions to see if there was a train approaching, and also listened for the noise or some signal of one, but that he neither saw nor heard one and so started across the track. with the result as above described.

bedded in his left eye; that for some time before he was killed he made daily trips to an oculist in the city of Sacramento for treatment, leaving his home in the early morning for that purpose and generally returning in the afternoon with Sansone in the latter's wagon, which was what is known as a "contractor's wagon."

A number of witnesses testified that the train, just before it struck the wagon, was traveling at from 30 to 40 miles an hour, and certain witnesses testified that the train, just before it struck the wagon, was traveling at from 30 to 40 miles an hour, and certain witnesses testified that the train, just before it struck the wagon, was traveling at from 30 to 40 miles an hour, and the train, just before it struck the wagon, was traveling at from 30 to 40 miles an hour, and the train, just before it struck the wagon, was traveling at from 30 to 40 miles an hour, and the train, just before it struck the wagon, was traveling at from 30 to 40 miles an hour, and the train, just before it struck the wagon, was traveling at from 30 to 40 miles an hour, and tertain witnesses testified that they heard no whistle or other signal procedule.



close succession by two short, shrill whistles. And while some of the witnesses testified that they could see up and down the track at the time of the accident a distance of five or six blocks, Sansone testified that on account of the darkness of the day, due to the cloudy skies and the lateness of the day, he could see no greater distance, either up or down the track, than 250 feet. He further testified that the deceased did not at any time, before they turned and started to cross the track, say anything or look either up or down the track. He was merely "sitting there," said the witness. The testimony further showed that Ilardi, before he received the injury to his eye, had for a long time almost daily gone to his place of employment and returned to his home on Vina Vista street on the cars of the appellant, and was, of course, familiar with the existence of the railroad track at said street.

The motorman testified that the train at the time of the accident was traveling at the rate of from 15 to 18 miles an hour. He further testified that he possibly could have stopped the train within a distance of 150 feet. He admitted that the last crossing signal he sounded before the collision was at a point between Hartley and Vine streets, and just after leaving the former street, which is north of Vine, and that he did not blow the whistle for the Vina Vista street crossing until he saw the horse and wagon in the act of crossing the track at said street. The motorman, according to his testimony, first observed the wagon in which Sansone and the deceased were riding before he reached Vine street. He said that he noticed the vehicle particularly because it was traveling on the wrong side of the road; that he kept his eyes on the wagon, thinking possibly that it might be turned to pass over one of the street crossings; that when he was near Vine street the wagon was very near Vina Vista street. The horse was traveling at a very slow rate of speed—not over 2 or 3 miles an hour according to his best judgment. It should be stated that Vina Vista street is the next street to Vine street, being south of the latter street. C. M. Elliott, a civil engineer. testified that he measured the distance from the center of Vine to the center of Vina Vista street and found it to be 345 feet.

The witness Currier, whose home was on Vine street on the west side of the Upper Stockton road, testifying for the defendant, stated that he was on his way home on foot from Sacramento and about three blocks from Vina Vista street when the collision occurred; that he heard a loud shrill whistle from the street car when it was about 50 feet from Vine street, but whether about 50 feet above or below he said that he was unable to remember; that almost simultaneously with the hearing of the whistle, he looked down the road and saw the horse driven by Sansone in the act of going upon and across the railroad track at Vina Vista in declaring that, as a matter of law, he did

street. He said that it was his best judgment that at the time the train blew its whistle the nose of the horse drawing Sansone's wagon was as far as the track.

The foregoing embraces a statement of the facts and the testimony necessary to have in view and to be considered in passing upon the points urged upon this appeal for a reversal. The grounds urged for the reversal of the judgment, generally stating them, are: (1) That the deceased failed to exercise due care to avoid the accident and was guilty of contributory negligence which proximately caused his death; (2) error in giving, modifying, and refusing to give certain instructions.

[1] 1. We may pretermit any expression of opinion upon the question whether the evidence shows that Sansone, owner and, at the time of the accident, driver of the horse and wagon, was guilty of negligence proximately causing the accident and the consequent injury to and death of Ilardi; for, as we understand counsel for the appellant, they do not claim that the negligence of Sansone is imputable to Ilardi. The cases are quite uniform in the enunciation of the rule that a person riding as a passenger or guest in a vehicle driven by another may not be charged with the negligence of the latter which has caused injury to the former, unless the passenger or guest has the right to exercise control over the driver of the vehicle, or "in the eyes of the law may be said to possess such power of control" (Bryant v. Pac. Elec. Ry. Co., 174 Cal. 739, 164 Pac. 385), or unless it is made to appear that the passenger or guest himself actively participated in the negligence of the driver. See, in addition to case above cited, the following: Wilson v. Puget Sound Co., 52 Wash. 522, 101 Pac. 50, 132 Am. St. Rep. 1044; Howe v. Minneapolis, etc., Ry. Co., 62 Minn, 71, 64 N. W. 102, 30 L. R. A. 684, 54 Am. St. Rep. 616; Clarke v. Conn. Co., 83 Conn. 219, 76 Atl. 523; United Rys. & Elec. Co., etc., v. Crain et al., 123 Md. 332, 91 Atl. 405; Hermann v. R. I. Co., 36 R. I. 447, 90 Atl. 813; Chadbourne v. Springfield St. Ry. Co., 199 Mass. 574, 85 N. E. 737; Perez v. N. O. City & L. R. Co. et al., 47 La. 1391, 17 South. 869; Lininger v. S. F. Railroad Co., 18 Cal. App. 411, 123 Pac. 235; Bresee v. Los Angeles Traction Co., 149 Cal. 131, 85 Pac. 152, 5 L. R. A. (N. S.) 1059; Fujise v. Pac. Elec. R. Co., 12 Cal. App. 207, 107 Pac. 317; Parmenter v. McDougall, 172 Cal. 306, 156 Pac. 460. But it is argued that, because the deceased, before Sansone started to drive across the track, knowing that trains at frequent intervals during the day passed over the track, failed to look up and down the track to ascertain whether or not a train was approaching, but remained passive or quietly in his seat on the wagon, saying nothing and doing nothing, this court is justified

not exercise ordinary care for his own safe-, how to manage a vehicle drawn by a horse. ty, or, in other words, that he was guilty of negligence proximately contributing to his fatal injuries.

[2-6] It is obviously true, as the above-cited cases plainly point out, that, while a guest or a passenger riding in a vehicle with another is not chargeable with the latter's negligence which has directly resulted in injury to the passenger or guest, the law nevertheless casts upon such passenger or guest in such case the duty of exercising ordinary care for his own safety, and the court in this case in clear language so instructed the jury. But unless the evidence shows beyond question that the passenger or guest failed to exercise such care as was necessary for his own safety, then the question whether he was remiss in that respect or was guilty of negligence contributing to his injury is primarily for the jury. The burden was cast upon the defendant to show that the deceased failed to exercise such care for his own safety as was required of him to charge the defendant with legal responsibility for his death. The question here, then, is whether there was any justification for the implied finding of the jury that the deceased was not culpable in that respect. There is no evidence of any overt or affirmative act of negligence on the part of Ilardi or that he participated in the negligence of Sansone, assuming the latter to have been guilty of negligence, by urging him, with knowledge of the near approach of a train, or with knowledge that he (Sansone) had not looked and listened to ascertain whether there was a train near at hand, to proceed on over the crossing. Nor is there any evidence that Sansone was an incompetent or careless driver, or that Ilardi had any reason to suppose that he was not competent to drive the horse properly, or to believe that Sansone was not doing his duty by looking for approaching trains. It is true, if we accept Sansone's testimony as to that matter, that Ilardi said nothing and did nothing and looked neither to the north nor south before the horse was started by Sansone over the crossing; but this did not constitute negligence per se or such acts of omission as to justify the conclusion or declaration, as a matter of law, that he failed to use due care for his own safety, since he was a mere guest of Sansone, riding with the latter by his permission and sufferance, and, having no interest in the plans or purposes for which Sansone was then using the horse and vehicle, and was without any right or power to exercise any control over the latter in the management of the vehicle. Moreover, the deceased knew that Sansone, having been accustomed for some time to driving over the Vina Vista crossing, knew as fully or as well as he did that trains passed frequently over the railroad track every day, and, as there is, as stated, no evidence that Sansone was

the deceased had the right to assume that Sansone would exercise reasonable care and caution in making the crossing.

Furthermore, in considering whether the deceased exercised the care which is required of a person situated as he was, the jury were entitled to and probably did take into account these facts: That the day was more or less darkened by clouds; that the accident occurred at a late hour of a midwinter day; that a strong wind was blowing from the southeast and in the opposite direction from which the train was traveling, the natural effect of which was to drive the noise which usually proceeds from a moving train from the direction and the hearing of himself and Sansone. Besides, the eyesight of the deceased was greatly impaired, and, if the jury believed Sansone when he said that he looked and saw no train approaching (and it cannot be said that they did not), then it is probable that they concluded that if the deceased did look to the north he was no more likely to see the train than was Sansone, and that they had the right to believe, notwithstanding Sansone's apparent statement to the contrary, that the deceased did look to see whether there was a train approaching the crossing over which they were about to pass, there can be no doubt, since it was made to appear that the deceased was perfectly familiar with the conditions existing as to the crossing, having passed over it innumerable times and having almost as frequently ridden on the defendant's cars from that point, and since, furthermore, the presumption is (a disputable presumption, it is true) that the deceased exercised due care for his own safety, having in view the surrounding conditions with which he was familiar. Baltimore Potomac R. R. Co. v. Landrigan, 191 U. S. 461, 24 Sup. Ct. 137, 48 L. Ed. 362; Drouillard v. S. P. Co., 172 Pac. 405. What more the deceased could have done than what he did do under all the circumstances, it is not easy to suggest. He had no right to interfere with Sansone's management of the horse and vehicle, and, as the cases say, in most instances such interference by the passenger or guest where the vehicle is about to be placed in a position of danger might prove to be gross imprudence and so disconcert the driver as to cause the disastrous result which such interference was designed to avoid. See Howe v. Minneapolis, etc., Ry. Co., 62 Minn. 71, 64 N. W. 102, 30 L. R. A. 684, 54 Am. St. Rep. 616, 620, and the other cases above named. The jury were justified in concluding that all he could do under the circumstances was to remain quiet, as he did, and to rely upon the driver, who had exclusive control and management of the horse and vehicle.

In Hermann v. Rhode Island Co., 36 R. I. 447, 90 Atl. 813, supra, the plaintiff was inordinarily a careless driver or did not know | jured as the result of a collision between the



automobile in which she was riding as the guest of the owner and driver of the machine with a railroad train of the defendant. The court in that case said:

testimony of Elliott, the civil engineer, who measured and gave the distance between Vine and Vina Vista streets, to that of the witness Currier, who testified that almost at

"In accordance with both reason and the weight of authority, any negligence on the part of Berghmann (driver of the auto) which may have contributed to bring about the collision cannot be imputed to either of these plaintiffs (husband and wife having joined in the suit), between whom and Berghmann no relation of master and servant, principal and agent, or participators in a common enterprise, existed in fact, or should be implied in law. It is the duty of such guest or passenger, in circumstances similar to the one under consideration, to use reasonable care for his own safety. Whether he has exercised such a degree of care is primarily a question for the jury. It cannot be said, as a matter of law, that such guest or passenger is guilty of negligence because he has done nothing. In many such cases, the highest degree of caution may consist of inaction. In situations of great and sudden peril meddlesome interference with those having control, either by physical act or by disturbing suggestions and needless warnings, may be exceedingly disastrous in its result. While it is true that it is the duty of such guest or passenger not to submit himself and his safety solely to the prudence of the driver of the vehicle, and that he must himself use reasonable care for his own safety, nevertheless, he should not in any case be held guilty of contributory negligence merely because he has done nothing."

The court then proceeds to state certain conditions the existence of which would justly lead to the conclusion that the guest or passenger had not used the requisite care for his own safety and so not be entitled to recover for his injury. None of the supposititious conditions so suggested, however, was shown to exist in this case. The other cases above cited, notably Wilson v. Puget Sound Elec. Ry. Co., 52 Wash. 522, 101 Pac. 50, 132 Am. St. Rep. 1044, supra, express views similar to those above reproduced herein from the Hermann Case.

Our conclusion is that the question whether the deceased was guilty of negligence which directly caused his death was, under the circumstances of the case as presented, one exclusively for the jury's determination.

[7] 2. The complaint against the court's charge is aimed at those portions thereof whereby the question was submitted to the jury whether the defendant, by the exercise of reasonable diligence, could have prevented the accident, and the failure to do so constituted the proximate cause of the accident and its consequences, notwithstanding that the deceased himself might have been guilty of antecedent negligence contributing to the collision. This proposition involves the doctrine known as the "last clear chance" or opportunity, and there was evidence justifying the court in submitting that question to the jury. In substantiation of this statement, we have only to refer to the conduct of the deceased as above described, to the testimony of Sansone that, although just before starting over the crossing he looked up and down the track, he saw no train coming

testimony of Elliott, the civil engineer, who measured and gave the distance between Vine and Vina Vista streets, to that of the witness Currier, who testified that almost at the very time he heard the whistle of the car near Vine street he saw Sansone in the act of driving over the crossing at Vina Vista street, the horse's nose then being as far as the track, and to that of the motorman who testified that he could possibly have stopped the train at the rate at which it was then going within a distance of 150 feet, and further testified that he saw Sansone and the deceased for several blocks before they reached Vina Vista street and kept close watch of their movements all the way down.

Elliott, it will be recalled, said that the distance from the center of Vine to the center of Vina Vista street was 345 feet. Currier, although not certain whether when he heard the whistle the train was 50 feet north or 50 feet south of Vine street, was reasonably certain that it was not more than 50 feet from said street on either side. Manifestly, if when the train whistled it was 50 feet north of Vine street, there was then an intervening distance between the train and Vina Vista crossing of over 400 feet. If. however, the train was 50 feet south of Vine when it blew its whistle, there was still approximately 300 feet between the train at that point and the Vina Vista crossing and, according to the motorman himself, he could have stopped the train after Sansone had driven partly on the track so as to have avoided the collision. Thus the question whether the defendant could have prevented the accident by the exercise of a proper degree of care and diligence was introduced into the case, and it was obviously proper for the court to instruct the jury upon that issue.

[8] Typical of the several instructions given by the court and addressed to that question is the following:

"One having knowledge of the dangerous situation of another and having a clear opportunity, by the exercise of proper care, to avoid injuring another, must do so, notwithstanding that the latter has placed himself in such situation of danger by his own negligence. If, therefore, you should find from the evidence that the motorman of defendant's car which collided with the wagon saw the decedent on the wagon on the track, and could have stopped the train without injury to the same or to its passengers, and by so stopping the train within the shortest time and space possible under the circumstances, could have avoided the collision, and neglected to do so, in consequence of which neglect to stop the train, the decedent was killed, the plaintiff is entitled to a verdict."

There can be no doubt that the above instruction involves a correct general statement of the rule.

ment, we have only to refer to the conduct of the deceased as above described, to the testimony of Sansone that, although just before starting over the crossing he looked up and down the track, he saw no train coming from either direction, and particularly to the had negligently placed himself, and could

have done so by the exercise of reasonable | 2. Rape €-42 — Evidence — Character of diligence and thus himself have avoided the accident, then such a situation would be presented as is to be found in several of the cases cited by the defendant. In such a case, it would be no less the duty of the party so placing himself in such a position to prevent the accident than it would be for the other party to do so, and if under such circumstances an accident occurred and damage to person or property resulted, the negligence of the party placing himself in the position of danger would be a continuing, active, concurring cause thereof. But no such a case is presented here. While a railroad crossing over a public street is itself a signal of a danger, and those attempting to make the crossing must always exercise due care and caution, still the public obviously have the right to pass over it. The mere act of passing over the crossing is not negligence per se. There is negligence only when the attempt is made to pass over the crossing without first using reasonable care in ascertaining in the proper way whether there is a train on the track approaching the crossing or about to approach it. There is evidence here that Sansone looked both ways before he started over the track and saw no train before and at the time the horse and vehicle were started over the crossing: that the train suddenly and unexpectedly came upon Sansone and the deceased; and that therefore their position unexpectedly became one of peril only when it was too late for them to withdraw therefrom in time to have avoided the accident. Thus it is clear that upon that question the case was one peculiarly for the jury, or, in other words, not a case where, as is true of the cases cited by the defendant, it can be said, as a matter of law, that the negligence of the deceased was a continuing, active, efficient, concurring cause of the accident and its consequences.

We have found no legal reason for disturbing the judgment, and it is therefore affirmed.

We concur: CHIPMAN, P. J.; BUR-NETT, J.

PEOPLE v. WEBSTER. (Cr. 672.)

(District Court of Appeal, First District, California. March 19, 1918. Rehearing Denied by Supreme Court May 17, 1918.)

1. Criminal Law 4=829(1) - Request for CAUTIONARY INSTRUCTION.

Requested cautionary instruction, in prosecution for rape, was sufficiently covered by charge to consider the matter calmly, dispassionately, and deliberately, as they would any other accusation, to be very careful, and to weigh, analyze, and consider the testimony carefully and guardedly.

ACCUSED.

In prosecution for rape, prosecuting attorney's question whether witness knew that accused had been sentenced to the penitentiary for rape was improper and unfair; ment referred to having been reversed. the judg-

3. Rape \$\infty 42 - Evidence - Character of ACCUSED.

In prosecution for rape, the assistant district attorney could properly inquire whether witnesses had heard that accused had been previously accused of rape; such accusations, even if untrue, bearing on reputation.

4. CRIMINAL LAW €=718, 7221/2—CONDUCT OF COUNSEL.

There can be no excuse for flagrantly improper conduct of assistant district attorney, in referring to prior conviction for similar offense after the court had stricken out all reference thereto, and in saying what he would do, had prosecutrix in rape case been his daughter.

5. Criminal Law == 1171(1) - Appeal -HARMLESS ERROR.

But such error was harmless, where the record of defendant's guilt was very clear and convincing.

Appeal from Superior Court, City and County of San Francisco; Geo. H. Cabaniss,

Warren M. Webster was convicted of an attempt to commit rape, and he appeals. Affirmed

Thos. P. Wickes, of San Francisco, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

ZOOK, Acting Presiding Judge pro tem. In this case, upon an information charging him with rape, the defendant was convicted of an attempt to commit rape. No useful purpose would be subserved by a recital of the facts upon which the defendant was convicted; but the evidence, which showed a prompt complaint by the little girl to her mother, an immediate medical examination, followed by the arrest of the defendant on the day of the offense, a straightforward story told by the prosecuting witness on the stand, and a rambling and incoherent tale on the part of the defendant, was amply sufficient to warrant the conviction.

[1] Only two points are urged for reversal of the judgment; one being the refusal of the court to give a cautionary instruction requested by defendant, and the other being misconduct on the part of the district attorney. While the instruction offered might well have been given, we are satisfied that the trial court fully covered the points involved therein when it instructed the jury to consider the matter "calmly, dispassionately, and deliberately," as they would any other accusation, and that they were "to be very careful in any such case," and should "carefully and guardedly weigh, analyze, and consider the testimony against the defendant."

[2, 3] On cross-examination of one of defendant's character witnesses, the assistant district attorney, Mr. McWood, asked the following question:

"Do you know that on the 28th day of February, 1896, he [the defendant] was sentenced to AND WANT OF CAPACITY—EVIDENCE. San Quentin for rape?

As the trial judge stated at the time, the judgment referred to was reversed by the Supreme Court, and the question, in the form put, was manifestly improper and unfair. However, defendant's counsel did not assign the question as misconduct, but made a request that the jury be instructed to disregard it, which request was promptly granted. In the examination of subsequent character witnesses, the district attorney asked them if they had ever heard that the defendant had been accused of rape before. This was proper, as even untrue accusations have their bearing on a person's reputation.

[4, 5] Upon the argument, Mr. McWood, in flagrant disregard of the fact that the court had stricken out all reference to the previous judgment, deliberately referred thereto again, and also made some highly inflammatory statements as to what he himself would have done, had his own daughter been treated as prosecutrix had been. There is, and can be, no excuse for this conduct on the part of the assistant district attorney, and in a case that was at all close such conduct would compel a reversal; but in this case the record of defendant's guilt is so clear and convincing that we are constrained to hold that the misconduct of the assistant district attorney has not resulted in a miscarriage of justice. It is to be noted that the trial judge endeavored to keep the assistant district attorney within bounds in every way, except by fining him for contempt, a procedure which may commend itself to trial courts in the future under similar circumstances.

The judgment is affirmed.

We concur: KERRIGAN, J.: BEASLY. Judge pro tem.

## HAIGHT et al. v. STEWART et al. (Civ. 1781.)

(District Court of Appeal, Third District, California. March 15, 1918. Rehearing Denied by Supreme Court May 13, 1918.)

A party is not only entitled to any and all relief which is appropriately within the scope of his pleading, but may be awarded such relief upon any substantial legal or equitable ground coming within the fair and reasonable import of the averments of his pleading.

JUDGMENT \$==250 - RELIEF - SCOPE OF PLEADINGS.

In a suit to annul a contract for the ex-change of real estate for certain lands and corporation bonds, where the complaint alleged that defendant had no title to the lands, and that the bonds were worthless, judgment based on failure of consideration could properly have been rendered within the pleadings, if supported by the evidence)

- FRAUD

In suit to set aside an exchange of lands by plaintiff's decedent on the ground of fraudulent representations and weakened mental capacity, evidence held to warrant a finding that plain-tiff's decedent was mentally capable of so con-ducting the transaction as to protect his own interests.

4. VENDOR AND PURCHASER 6-44-EVIDENCE. In a suit to set aside a contract for the exchange of lands between plaintiff's decedent and defendants on the ground that one of the defendants fraudulently represented his interest in the land, evidence held to warrant finding that such

representations were not false.

5. VENDOR AND PURCHASER 44-MISREP-RESENTATIONS—EVIDENCE.

In a suit to set aside a contract made by plaintiff's decedent for an exchange of lands for corporation bonds on the ground of false representation that the bonds were worth \$600 each, evidence held to warrant a finding for defendant that no such representation was made.

6. VENDOE AND PUBCHASEE 5-44-MISREP-RESENTATIONS-EVIDENCE - "SPECULATIVE

REGENTATIONS—EVIDENCE — "SPECULATIVE OB TRADING VALUE."

In a suit to set aside a contract made by plaintiff's decedent for an exchange of lands for corporation bonds alleged to be worthless, evidence held to warrant a finding that the bonds had a "speculative or trading value," that is, a value following from a possibility or probability dependent on the future management of the corporation, that they would acquire a substantial market value.

[Ed. Note.—For other definitions, see Words and Phrases, Speculative Value.]

Appeal from Superior Court, Glenn County; Wm. M. Finch, Judge.

Action by Samuel C. Haight, executor of the estate of George W. Haight, deceased. substituted as plaintiff, and another, against W. H. Stewart and others. From judgment for defendants and denial of a new trial, plaintiffs appeal. Affirmed.

Leon Martin, of San Francisco, for appellants. Duard F. Geis, of Willow, for respondents.

HART, J. George W. Haight and his wife. Mary Setchel Haight, commenced the action for the purpose of having rescinded a certain contract between the plaintiff, George W. Haight, and the defendant, W. H. Stewart, and to have declared null and void two certain deeds of conveyance. After the trial of the case and before judgment was entered, George W. Haight died, and his executor, Samuel C. Haight, was substituted as one of the plaintiffs.

The complaint shows that during the month of November, 1911, George W. Haight and W. H. Stewart were negotiating for an exchange of certain properties. On the 22d of November they entered into a written agreement by which said Haight agreed to convey to Stewart a tract of land situated in Glenn county, consisting of 760 acres, and Stewart agreed to convey to Haight his interest in certain lands in Mendocino county. subject to certain specified incumbrances, and also to deliver to him 27 bonds of the par

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dated Coal, Gas & Electric Company (hereinafter called "the bonds"). The transaction was consummated on the 27th day of November, 1911, by the delivery to defendant Myrtle J. Stewart, wife of W. H. Stewart, of a deed, executed by George W. Haight and his wife, conveying the Glenn county lands, and by the execution and delivery by said Stewart to George W. Haight of an assignment of all his right, title, and interest in and to the certificate of purchase of the Mendocino county lands, subject to certain incumbrances therein specified, and by the delivery to said Haight of 27 bonds of said corporation. On December 18, 1911, defendants, Myrtle J. Stewart and W. H. Stewart conveyed the Glenn county lands to J. L. Stewart, the father of W. H.

It is charged in the complaint that the above-described transaction was brought about by and through the false statements and representations of W. H. Stewart to Geo. W. Haight: that said Stewart represented to said Haight that he had title to the Mendocino county lands, whereas the title to said lands was never at any time vested in Stewart, but that the same was at the time of the transfer, and still is, in the United States government: that Stewart stated and represented to said Haight that the bonds were of the actual value of \$600 each, and that he (said Stewart) had a short time previously to the transaction involved herein sold some of said bonds at that price; that said bonds were then "and now" of no value whatever and are wholly worthless for any purpose. It is alleged that said Haight, believing, accepting, and relying upon the false statements and representations so made to him by Stewart, on the 22d day of November, 1911, entered into and subscribed to the written agreement with said Stewart above mentioned, and, on the 27th day of November, 1911, in pursuance of said agreement, conveyed and transferred his Glenn county lands to said Myrtle J. Stewart. It is alleged that the said Myrtle J. Stewart knew that the statements and representations made by W. H. Stewart to said Haight were false and untrue when they were so made. It is further alleged that the said Haight, at the time of the transaction, was sick, physically and mentally, and that his mental strength had been prior to the time of the said transaction, and was at said time, greatly weak-The complaint states that the said Haight and his wife, Mary S. Haight, the other plaintiff herein, did not know or have any knowledge that the said statements and representations made by the said W. H. Stewart at the time above mentioned respecting the bonds and the Mendocino county lands were not true until the 14th day of March. 1912, when they learned that said statements and representations were wholly false and

value of \$1,000 each of the Western Consoli- lutely worthless, and that the title to the Mendocino lands was still in the United States government, and not in the said W. H. Stewart. It is alleged that due notice to both W. H. Stewart and Myrtle J. Stewart was thereafter given by said Haight that he rescinded the transfer of the Glenn county lands, and that said Haight offered to restore to the Stewarts everything of value he had received from them under the agreement of November 22, 1911.

> A demurrer to the complaint on general and special grounds was overruled, and the defendants thereupon answered, denying specifically the averments of the complaint, and affirmatively stating facts disclosing the nature of the transaction and the circumstances under which it was brought about.

The court, briefly stated, found: (1) That on November 22, 1911, Geo. W. Haight was the owner and in the possession of 760 acres of land in Glenn county, having a market value of \$11,400. (2) That on said date W. H. Stewart was in possession of and had an interest in the Mendocino county lands described in the complaint under a certificate of purchase from the state of California numbered 15955, which said interest was of the value of \$6,000, and subject to the following incumbrances: A certain mortgage thereon to one V. W. Liston, amounting to \$350; a certain trust deed thereon to one H. S. Bridge in the sum of \$450; delinquent taxes amounting to \$250; the balance of the purchase price due to the state of California on said lands, amounting to the sum of \$340; and the sum of \$100 due to one H. S. Beadle, constituting a lien upon said premises. (3) That said Stewart, on the 22d day of November, 1911, was the owner and did own 27 bonds of the Western Consolidated Coal. Gas & Electric Company, having a nominal par value of \$1,000 each, that said bonds had no cash market value, but that they did have a "speculative or trading value." That George W. Haight and wife conveyed the Glenn lands to Myrtle J. Stewart at the request of W. H. Stewart, and received in exchange therefor the 27 bonds of the Western Consolidated Gas & Electric Company, and a conveyance of all W. H. Stewart's interest in and to the Mendocino lands. That in the negotiations culminating in the agreement of November 22, 1911, W. H. Stewart told George W. Haight that said bonds were of the value of \$600 each, and that he (Stewart) believed they were worth \$600 each, but that said Stewart did not tell said Haight, as the complaint alleges, that the said bonds were of the reasonable market value of \$600 each, and could actually be sold for said sum, and that said Stewart did not tell said Haight, as the complaint charges, that he (Stewart) was well acquainted with the value of the said bonds, and that he had, at a time immediately preceding said untrue, and that the said bonds were abso- 22d day of November, 1911, actually sold that said bonds were then actually being sold and could be sold for said sum. (6) That no fraud was practiced or perpetrated on Haight by Stewart, and that Haight was not induced or influenced to enter into and carry out the agreement of November 22, 1911, through any fraud or misrepresentation on the part of W. H. Stewart. That at the time the above contract was entered into George W. Haight's health and mentality were weakened, but not to such an extent that he did not fully know and understand the details of the transaction referred to herein; that W. H. Stewart was aware of Haight's illness, but did not know that his mentality was impaired in any degree.

The appeal is by the plaintiffs from the judgment and the order denying a motion interposed by them for a new trial.

A reversal is demanded upon the ground that there is no evidence to support these findings: (1) That the said bonds had a speculative or trading value; (2) that W. H. Stewart had an interest in the Mendocino county lands; (3) that W. H. Stewart was not guilty of fraud in the matter of the agreement of November 22, 1911.

The general position of the appellants is that, the said bonds and the said assignment of the interest of W. H. Stewart in the Mendocino lands being the only consideration the plaintiffs received for conveying and transferring the Glenn county lands to Myrtle J. Stewart, if it appears from the evidence that said bonds were wholly valueless, and that W. H. Stewart had no interest in the Mendocino lands, then it must necessarily be held that the Haights conveyed away 760 acres of land, having a value of \$11,400, without receiving therefor any consideration whatever; that, in such a situation, a failure of consideration is shown for which there must be a rescission of the transfer of said lands. It is contended that the evidence does show the worthlessness of the bonds, and that W. H. Stewart had no interest in the Mendocino lands, and, furthermore, that George W. Haight was in an enfeebled condition of health when the transfer and the agreement therefor were made, and that he was imposed upon and induced to enter into and consummate the transaction through the fraud of W. H. Stewart.

We may first notice the point made by the respondent that the complaint does not proceed upon the theory that there was a failure of consideration, and that such was not the theory upon which the case was tried in the court below; that the complaint is based solely upon the alleged fraud whereby the transaction was consummated, and that upon that ground alone a rescission was and is demanded; that therefore the position of appellants in this court that there was a failure of consideration is not warranted by

said bonds for said sum of \$600 each, and of, and that consequently the elaborate argument in their briefs addressed to that proposition is entirely gratuitous and without pertinency or force.

> [1] It is, of course, well settled in procedural law that a party is not only entitled to any and all relief which is appropriately within the scope of his pleading, but may be awarded such relief upon any substantial legal or equitable ground coming within the fair and reasonable import of the averments of his pleading. In this case it is plainly manifest that the complaint, assuming its averments to be true, reveals a clear case of failure of consideration.

> [2] The statements therein are that the bonds are absolutely valueless for any purpose, and that W. H. Stewart had and has no interest in the Mendocino lands. These constituted the sole consideration for the transfer by Haight to Myrtle J. Stewart of the Glenn lands. If the bonds were worthless, and Stewart had no interest in the Mendocino lands, then surely there was a failure of consideration. The allegations of fraud and of the enfeebled mental condition of Haight were proper for the purpose of showing that thus Haight was imposed upon and induced to transfer his property for nothing or for a purported consideration which it developed was worthless or without any value. The fact is that the failure of consideration is the prominent, and, indeed, the principal factor in the cause of action stated by the complaint.

> [3] We are persuaded, however, from an examination of the record, that the challenged findings are sufficiently supported to fortify them against successful attack, and that there was not a failure of consideration. We may with propriety first briefly consider the testimony relative to the mental condition of Haight for some time prior to and at the time of the making of the agreement of November 22, 1911, and the subsequent exchange of the properties above mentioned in pursuance of the provisions of said agreement.

George W. Haight was an attorney at law having offices in the city of Berkeley, and had actively practiced his profession for many years. In late years, prior to his death, in connection with his law practice, he dealt extensively in real estate, buying, selling, and exchanging real properties. While two physicians who had professionally attended him on several occasions and who likewise investigated his condition some time before and at about the time of the transaction concerned herein testified that Haight, at said times, was undergoing a decline in physical and mental strength, that he was suffering from what is known in medical science as bulbar paralysis, and that his tendency was also to a paretic condition, there was also testimony that, save a noticeable impairment of memory, he was capable of their pleading or the essential theory there- transacting business intelligently and with

good judgment. His own son, the substituted plaintiff herein, testified that for a considerable period before and down to the time of the execution of the agreement of November, 1911, he was engaged in performing certain duties in his father's office and saw him daily, and that, while he observed that his father's memory was not as good as it had formerly been, he was nevertheless in full possession of his reasoning powers. The defendant W. H. Stewart testified that he had another and different real estate transaction with Haight just prior to the deal with which we are here concerned, and that at that time, as well as in all the negotiations leading to the transfer of the Glenn county lands by Haight to his (Stewart's) wife, he observed nothing either in Haight's actions or his method of transacting business indicating that he was in the slightest degree lacking in judgment or business sagacity.

In addition to the above testimony, it was shown that Haight himself prepared the agreement of November 22, 1911, and the instrument appears to have been drawn as a lawyer of skill would prepare such a document. It is in language which clearly and unambiguously expresses the propositions to which the parties had mutually agreed. There is also medical testimony tending to impeach the medical testimony presented by the plaintiffs upon the question of Haight's mental competency at the time of the making of the said agreement, and also when subsequently he made the transfer of the Glenn lands to Myrtle J. Stewart.

As to the negotiations resulting in the making of the written agreement of November 22, 1911, and the subsequent exchange of properties between George W. Haight and W. H. Stewart, the latter testified:

That he first met George W. Haight in April, 1911, with reference to a deal for some property in Boston, which was consummated in August or September; that upon the closing of that transaction Haight asked him if he had some other things he was willing to trade; that he (Stewart) said that he had an interest in a 20 per eent. certificate of purchase representing some lands in Mendocino county. Haight asked questions about the location of the lands, the climate, etc., and said: "I want to see if it is a good hunting lodge or summer home proposition and at the same time a healthy investment for the future."

The witness proceeded:

"Haight said, 'What else have you got, Stewart?" I told him, 'I have some bonds of the Western Consolidated Coal, Gas & Electric Company,' and he said, 'Why, I think I have got some of that kind, too,' and he jumped up out of his chair and opened his safe and brought out a bunch of bonds, and he said, 'Are they like this?' and I said, 'Yes; they are the same thing; do you know anything about the bonds?' and he said, 'I have looked them up, and they represent leases and fee-simple lands and a contract for between 15,000 and 20,000 acres of land,' and I asked him what he thought of them, and he said: 'You can't cash them at the bank. I have tried to; but the reason is the coal companies are fighting among themselves and quarreling and raising money to transport the coal; they have fine mines, and I found they were

good.' I asked him where he got them, and he said: 'From Mr. Runnels in trade for West Berkeley property.' I asked him what he allowed him for them, and he said: 'I allowed him full cash value, because I think they are good bonds, although, of course, you will have to wait. What are you holding these bonds at?' and I said: 'Judge, I don't know. I don't know what they are worth. All I know is what they got me. \* \* Some of them cost me 30 cents on the dollar and some 25 cents.' The judge jumped out of his chair and said to me: 'These bonds must be valuable. Anything that has any interest in coal mines on the Pacific Coast can't help but be good things.'"

The witness said that Haight gave him a description of his Glenn county lands and asked him if he had an abstract of title to the Mendocino county lands. Stewart produced a certificate of search and handed it to Mr. Haight, who looked it over and remarked: "This shows the property in the name of Marcus D. Hyde." The witness said: "Yes; Mr. Hyde is holding it for me." Haight said: "I will look it over. I am not satisfied about the bonds, but I will look them up, too." In about a week or ten days Stewart returned to the office of Mr. Haight, who said: "I have found out that the 20 per cent. certificate of purchase is prima facie evidence of title, but, of course, the title is not in you. You have no deed or patent, but you will have title in proper time; you will be patent owner of the land. I found that it is a negotiable title, and that a man can buy or sell or borrow money, and I am satisfied." Stewart asked: "Did you look up the bonds any more?" to which Haight replied: "Yes; I looked the bonds up. \* \* \* I am willing to take a chance and wait for them to quit fighting, and when they settle down and get a railroad in the bonds will go up and if I can get them cheap enough I will take them." There was a discussion of values of the different properties and of the timber and tanbark on the Mendocino county lands, and considerable figuring was done. The witness said he figured that there was timber on the land of the value of \$6,000, and from 400 to 600 cords of tanbark worth from \$4 to \$6 per cord, and that with the \$6,000 worth of timber "that would make a total valuation of \$8,400. We wrote that down," continued Stewart, and he [Haight] asked: "How do you then figure the bonds?" The witness replied: "Judge, that is a question about the bonds. I don't know what they are worth. I am not posttive on them. You know about them better than I do." Haight then said: "I have 720 acres at Willows. If you will give me these 27 bonds and your interest in the timber lands, subject to the incumbrances against them, I will give you that land up at Willows, and you can see what you can do with it." Stewart, continuing, testified: "We figured it right here. Judge Haight and I both figured it, and the timber land figured out \$8,400, less about \$1,500 in debts against it-old incumbrances against it, and I said, 'Now, these bonds would average me between 25 and 50

cents and some 25 cents on the dollar;' and he said, "That is as much as I would allow.'" Stewart then said to Haight that he would think it over and see him later, and Haight said, "All right and I will think it over, too, and I will see if I can find out any more information about the bonds, and maybe I will do better." About one week after said conversation, which was on November 22, 1911, Stewart returned to Haight's office and met the judge, who thereupon asked Stewart what he then thought of the proposed deal. Stewart said. "In view of the fact that I had moved away from where I was, I would be willing to trade on the basis that he [Haight] proposed," and the latter replied, "Well, if you want to make the deal, I will call in the stenographer and dictate a preliminary contract so we can tie each other up." The trading agreement was thereupon dictated to the stenographer by Haight, and, being written up, was signed by Stewart and Haight on November 22, 1911. Stewart again called at Haight's office, and the papers transferring the respective properties were executed and exchanged. Among these instruments was an agreement between Stewart and Marcus D. Hyde in which the latter agreed to quitclaim the Mendocino county lands to Stewart upon the payment of \$20, which agreement Stewart assigned to Haight.

A timber cruiser and expert testified that he examined the Mendocino lands, either in January or February of the year 1911, and found thereon about 5.000,000 of feet of red fir timber, about 1,000,000 feet of redwood and about 400 cords of tanbark; that prior to making said investigation he was not acquainted with and had never met W. H. Stewart, having made the examination of the lands at the request of one Borden; that in November, 1911, he had business with Geo. W. Haight in his office, and was in the act of leaving the office when he met W. H. Stewart going into Haight's office; that Stewart requested the witness to return with him to the office of Haight and tell the latter what he knew of the lands; that he did so, drew a diagram of the land, and produced some photographs showing how much timber it contained, and told Haight of the quantity and quality of the timber on the

Samuel C. Haight testified that he knew very little of the details of the transactions between his father and W. H. Stewart, and that he had no conversation with his father regarding said transactions, except that his father "spoke of his enthusiastic desire to own a piece of timber land."

There is testimony by one witness that the \$1,000 bonds were selling for \$5 to \$10 each, and by another witness that they were worth from \$10 to \$25 each in November, 1911.

There is also some testimony tending to tween Stewart and Haight they had a "specshow that Judge Haight was very desirous ulative or trading value," that is to say, as

cents on the dollar, because some cost me 50 of securing the Mendocino lands because he cents and some 25 cents on the dollar; and believed they were suitable for a country home, which he appeared to be anxious to Stewart then said to Haight that he would think it over and see him later, and Haight were opportunities for fishing and hunting.

[4, 5] Thus we have presented herein a statement in substance of the testimony upon which the trial court grounded the findings, and nothing more need be said of it than that it is amply sufficient to support the conclusions evidenced by said findings that George W. Haight, at the time of making the agreement and the transfer in question. while not in his usual good health, was nevertheless mentally capable of intelligently, understandingly, and properly conducting those transactions so as to safeguard his own interests, and that there were no false representations by Stewart as to the nature or extent or value of his interest in the Mendocino lands, nor misrepresentations or subreption upon his part as to the bonds in question or their value. As to the bonds, it is quite clear that the court was warranted in finding that Stewart did not represent to Haight that they were of the value of \$600 each. Stewart not only denied making any such representation, but the proposition is unreasonable upon its face. It is hardly conceivable-at least it is not consistent with a reasonable view-that a sane man would have the temerity to represent or pretend that securities which, with a valuable equity in a tract of land, he was willing to exchange for a tract of land of the value of \$11,400, were actually worth, at the time of the proposed exchange, the sum of \$16,400.

[6] It is vigorously argued, however, that the bonds had no value whatever, and that the court's finding that they had a "speculative or trading value" is wholly meaningless. There is some evidence tending to show that the bonds had some value. Haight certainly believed that they had some value, and, according to the findings, based that belief upon his own personal knowledge of them. In discussing the bonds with Stewart, he, in effect, expressed the opinion, founded upon what he knew of the corporation by which they were issued, that they would develop into valuable securities if the affairs of said corporation were properly managed in the future: that is, to be more specific, he said that they would become valuable if the corporation could secure or "take in" a railroad to be used for its purposes. In brief, the general trend of his talk respecting the bonds was that he had some confidence that they would at some future time acquire substantial value. And it was doubtless upon this testimony and the testimony of other witnesses that in November, 1911, the \$1,000 bonds were worth from \$5 to \$10 each, one witness stated, and from \$10 to \$25 each, another witness stated, that the court based the finding that at the time of the deal between Stewart and Haight they had a "spec-

we understand that phrase, that they had a value following from a possibility or probability, dependent upon the future happening of certain contingencies respecting the affairs of the company issuing them, that they would in the future acquire a substantial cash market value.

It is contended, however, that Stewart having no title to the Mendocino lands, the same still being in the United States government, he had no valuable or any interest therein which he could transfer. But, in the first place, it is to be remarked that Stewart testified, and the certificate of search, which, as seen, was examined by Haight, showed, and upon this testimony the court found, that Stewart did not claim nor represent or state to Haight that he was vested with title to the lands, but stated that he had such interest therein only as was embraced within the scope of the certificate of purchase from the state of California. In the second place, it is to be observed that the lands, although the title thereto was still in the federal government, had been duly selected as lieu by the state, was open to sale by the state when Stewart received his certificate of purchase (Pol. Code, \$ 3513), and that said certificate was subject to sale by the owner or holder thereof by deed or assignment (Pol. Code, §§ 3514 and 3515). Quite clearly the cases cited by the appellants that no title to the public lands of the United States passes to the state or to purchasers from the state until the lands are certified over to the state by the Commissioner of the General Land Office are not in point here, since there is, as seen, no claim that Stewart attempted to convey the title to the Mendocino lands to Haight, nor made any pretense of being able to do so or of doing so when negotiating and consummating the deal between him and Haight.

Thus we find an answer to the contention of the appellants that there was a total failure of consideration for the transfer of the Gienn lands by Haight to Myrtle J. Stewart. There was a consideration, and a valuable one, according to the finding of the trial court. It is true that there is a wide difference between the value of the Glenn lands, as found by the court, and that of Stewart's interest in the Mendocino lands, as likewise found. But it is not necessarily to be held to follow from that fact that there was a failure of consideration or that the consideration moving to the plaintiffs for the transfer of the Glenn lands was so inadequate as to "shock the conscience," and so justify a court of equity in setting aside the transfer as involving an inequitable and unconscionable transaction. The parties to this transaction each had full and an equal opportunity for an independent and thorough investigation of the facts of the proposed transfer,

tained no relation of confidence to each other, and dealt with each other at arm's length. It is clear that Judge Haight conducted his end of the transaction with his eyes wide open. He examined the certificate of search of the Mendocino lands which plainly showed the nature of Stewart's interest therein and the incumbrances to which that interest was subject. He owned, and for a long time previously to the transfer had owned and had in his possession, bonds similar to those which he received in the deal from Stewart. He knew as well as did Stewart, if not better than the latter, what those bonds were and what they amounted to. Neither probably considered that they possessed much if any cash value then. As the learned trial judge said in deciding the case:

Both the "parties probably knew that efforts were being made to place the company on its feet. If these efforts were successful, the bonds would greatly increase in value. They were an inviting investment to one who was willing to take desperate chances of losing a small investment in the hope of repaying a profit of many hundred per cent."

rrof. Pomeroy, in his work on Eq. Juris. (3d Ed.) \$ 926, says:

"Where the parties were both in a situation to form an independent judgment concerning the transaction, and acted knowingly and intentionally, mere inadequacy in the price, accompanied by other inequitable incidents, is never of itself a sufficient ground for canceling an executed or executory contract."

See, also, the late case of Hallidie v. First Federal Trust Co., etc., 171 Pac. 431.

It is not always readily or easily determinable what is an adequate consideration in a given case for the transfer of property. Many and various elements may be necessary to be considered in determining that question. While, in most instances, the principal criterion is probably the market value of the property or the value for the purposes to which it may the most advantageously be put, yet it is often proper to consider other special motives or purposes, if any there be, of the parties in making and receiving the transfer. Sentimental or peculiar personal reasons, having no reference either to the intrinsic or market value of the property, may be the controlling motive of the sale and pur-Hence, "as Hobbes says," quoting from Ruling Case Law, vol. 6, § 85:

"The value of all things contracted for is measured by the appetite of the contractors. Accordingly the courts do not ordinarily go into the question of equality or inequality of considerations, but act upon the presumption that parties capable to contract are capable of regulating the terms of their contracts, granting relief only when the inequality is shown to have arisen from mistake, misrepresentation, or fraud. A different rule would in every case impose upon the court the necessity of inquiring into and of determining the value of the property received by the party giving the promise. Such a course is deemed to be impracticable. In all In all cases, therefore, where the assumption or undertaking is founded upon the sale or exchange of and each exercised and relied upon his own independent judgment in negotiating and consummating the transaction. They susation; that is, one recognized as legal, and of some value. It is sufficient if it is of only slight value, or such as can be of value to the promisor. Where a party contracts for the performance of an act which will afford him pleasure, gratify his ambition, please his fancy, or express his appreciation of a service another has done him, his estimate of value should be left undisturbed, unless, indeed, there is evidence of fraud. There is, in such a case, absolutely no rule by which the courts can be guided, if once they de part from the value fixed by the promisor. If they attempt to fix some standard, it must necessarily be an arbitrary one, and ascertained only by mere conjecture. If, in the class of cases mentioned, there is any legal consideration for a promise, it must be sufficient for the one made; for, if this is not so, the result is that the court substitutes its final judgment for that of the promisor, and, in doing this, makes a new

In this case as shown, there is evidence that Judge Haight was anxious to secure a country home in the mountains, and that he had an "enthusiastic desire" to own some timber land. His Glenn county lands, as the evidence shows, were what are commonly known as "goose lands," and were so plentifully charged with alkali as to render them unfit for general agricultural purposes. It further appears that he was then and for some time prior had been renting them for \$200 per year, a little more than enough to pay the taxes on them. It was probably his desire to get that unproductive and unprofitable tract off his hands and at the same time secure timber land and such a location for a country home as his heart longed for that largely influenced him to make the trade. At any rate, the evidence shows that he received a valuable consideration for his Glenn county lands, and, being perfectly competent to transact business intelligently and understandingly, that he deliberately and intentionally and in reliance upon his own independent judgment entered into and consummated the transaction. He must therefore stand by the bargain of his own making.

The judgment and the order appealed from are affirmed.

CHIPMAN, P. J.; BUR-We concur: NETT, J.

## PROPHET v. KATZENBERGER. (Civ. 2152.)

(District Court of Appeal, Second District, California. March 19, 1918.)

1. CONTRACTS \$\iffirsty 346(8) - SUFFICIENCY OF PERFORMANCE—ISSUES AND PROOF.

In action for damages due to defective drain

installed by defendant contractor in building constructed for plaintiff, where defendant admitted that according to plans and specifications he was required to place a galvanized iron drain from the light well as alleged in complaint, and the only difference between such admission and allegations of complaint was that the complaint stated that according to the specifications the

dence the specifications as a foundation for proof that work as done did not conform thereto, where no issue was raised as to the substitution of galvanized iron.

2. CONTRACTS &=350(1)—ACTION FOR DAM-AGES—SUFFICIENCY OF EVIDENCE.

In action for damages resulting from setth action for damages resulting from set-tling of building constructed by defendant for plaintiff, it being alleged that settling was due to too narrow footing for foundation and ac-cumulation of water in basement because of defective drain, evidence held to support findings for plaintiff.

APPEAL AND ERROR \$\infty 1040(11)\to Harmless Error\to Overbuling Demurrer.

Assuming that plaintiff's second and third counts were uncertain or unintelligible in some particulars. overruling defendant's demurrer thereto would not constitute any ground for reversal, where by his answer defendant raised all issues necessary for determination of action upon merits.

Appeal from Superior Court, Los Angeles County; Sidney N. Reeve, Judge.

Action by Charles Prophet against Valentin Katzenberger. Judgment for plaintiff, and defendant appeals. Affirmed.

Robt. T. Linney and Gordon L. Finley, both of Los Angeles, for appellant. Loeb, Walker & Loeb, of Los Angeles, for respond-

CONREY, P. J. By the findings of the trial court the following facts appear: On September 27, 1912, plaintiff and defendant entered into a contract in writing for the construction by the defendant of a building upon a parcel of land owned by the plaintiff. Defendant was to furnish all necessary materials and labor and to construct and complete the building in a good, skillful, and workmanlike manner, in conformity with the plans and specifications therefor. The building was constructed and paid for within the time prescribed by the contract, but it was not in all respects constructed in accordance with the terms of the contract. By the plans and specifications it was provided that the building should stand upon a concrete foundation placed immediately and continuously under the exterior walls of the building, said concrete foundation or footing to extend below the walls to a prescribed depth and to be of a thickness graduated so that the footing at its base should be of a thickness of 24 inches. Instead thereof the defendant made the foundation or footing in such manner that the thickness at the base thereof was in many places considerably and materially less than 24 inches. The plans provided that the defendant should install an iron drain beginning at the light well of the building, as shown upon the plans, extending from the light well under the cement floor of the north storeroom of the building, passing under the front wall of the building, and extending to the gutter of the street in front of the building. Instead of complying with this term of the agreement, the defendant installed and drain should have been of vitrified iron, it was the agreement, the defendant installed and unnecessary for plaintiff to introduce in evi- placed a defective drain, in this: That he in-

stalled a drain in which were two holes of tions is not supported by the evidence, in the approximate size respectively of 2 and 21/2 inches in diameter and occurring at a point in the pipe where the same lay under the cement floor of the north storeroom. The failure and neglect of defendant, as above stated, was unknown to and without the consent of the plaintiff. A little more than one year after the completion of the building, to wit, in February, 1914, there was a heavy fall of rain within the territory in which said building was located, by reason whereof a large quantity of water accumulated in and about the building, and in particular in and about the portions of the footings of the building under the north wall, the northerly portion of the front wall, and the northerly portion of the rear wall thereof, and by reason of said rain a large quantity of water passed Into the drain leading from the light well. By reason of the defective character of the drain, the water passing into the drain escaped in large quantities through the abovementioned holes and accumulated and stood in large quantities under the cement floor, by reason whereof the footing under the north wall and under the northerly portion of the front wall and northerly portion of the rear wall of the building gave way and settled, whereby the building was injured to the damage of the plaintiff in the sum of \$927.27. At the time of said injury the north storeroom was rented at the monthly rental of \$30; and by reason of the settling of the building the storeroom was vacated and remained vacant for a period of two months, to the special damage of the plaintiff in the sum of \$60. At the time when plaintiff paid. to the defendant the contract price for the construction of the building, and at all times prior to the time of said rainstorm of February, 1914, the defects of the building were concealed and latent, and were unknown to the plaintiff. In response to an issue raised by affirmative allegations of the answer, the court found that the plaintiff was not at any time during the time of construction of the building superintendent of that work, and did not personally supervise or inspect each or every portion of the work of construction as the same progressed, and did not personally give orders as to the manner of doing said work. The changes made by defendant in the erection, construction, and completion of the building from the plans and specifications were not made by the defendant with any knowledge or consent or at the suggestion of the plaintiff. The defendant's appeal is from the judgment which was rendered against him in the sum of \$987.27.

The evidence is sufficient to justify the findings in each and all of the particulars concerning which appellant is now claiming that they were not so justified.

[1] 1. Appellant's first contention, wherein he attacks the sufficiency of the findings, is that the finding that the work was not done

this, that the specifications were never offered in evidence nor shown to the court nor described by counsel or witnesses. This finding is in accordance with subdivisions (a) and (b) of paragraph IV of the complaint. The answer of the defendant admitted that the plans and specifications contained the terms, conditions, and requirements stated in subdivision (a), and that by the terms of the contract and in accordance with the terms, conditions, and requirements of the plans and specifications the defendant was required to place a galvanized iron drain from the light well as alleged. The only difference between this admission and the allegation of the complaint is that the complaint stated that according to the plans and specifications the drain should have been of vitrifled iron. This is not a material issue, since the plaintiff's action is not based upon any defect resulting from the substitution of galvanized iron for vitrifled iron. Under this state of the pleadings it was not necessary for the plaintiff to introduce in evidence the specifications as a foundation for proof that the work as done did not conform thereto.

[2] 2. The evidence was sufficient to support the finding that by reason of the heavy fall of rain referred to in the complaint a large quantity of water passed into the drain leading from the light well. There was testimony tending to show that the drainpipe as laid by the defendant was defective by reason of the fact that there were holes in it, as alleged in the complaint, that after the rain the ground in the immediate neighborhood of the opening in the pipe was wetter than at any other part of the premises, and that by reason thereof the quantity of water accumulating under the foundation was increased. The defendant's answer admitted that as a result of said fall of rain a large quantity of water did pass into said galvanized iron drain. The answer further admitted that as a result of said heavy fall of rain and the consequent softening of the ground about and under the said north wall of said building the footing under the north wall and under the northerly portion of the front wall and the northerly portion of the rear wall settled, and the building was thereby damaged. In this connection the defendant's only denial was that the damage to the building was the result of any negligence or failure on the part of the defendant.

3. The evidence was sufficient to justify the finding that by reason of the defective construction of the footing the water wnich accumulated and stood under the building caused the footing under the walls to give way and settle, whereby the building was greatly injured. In addition to the facts above noted, there is much other evidence tending in the same direction. The witness Norris, who made the repairs after the building had settled, testified to the conditions in accordance with the plans and specifica- found by him when he took charge of the He uncovered the footing under the front wall fendant in error. and measured its width at several places, whereby it appeared that the width thereof was less than 2 feet; in several places it was only 17 inches. He also found on removing the cement floor that the holes in the pipe had been covered with a piece of tin. He testified as a witness who had many years' experience in repairing buildings, and stated that in his opinion the cause of the damage was that the water came up out of the pipe and soaked the ground, and that the footing was not wide enough.

The real gist of the defense was that the plaintiff had known when the work was being done that the foundation or footing was not of the prescribed width and had agreed to that change from the specifications, and that there were in fact no breaks or imperfections in the drain pipe. Upon competent evidence the court found on these issues in favor of the plaintiff. The contention that the findings as to these matters are not sustained by the evidence is without merit.

[3] The case went to trial upon the second and third counts of the complaint and the answers thereto, after an order sustaining the demurrer to the first count. Appellant now contends that the court erred in overruling his demurrer to the second and third counts of the complaint. Each of these counts undoubtedly stated a cause of action. Assuming without deciding that counts 2 and 3 were uncertain or ambiguous or unintelligible in some of the particulars set forth in the demurrer, those errors would not constitute any proper ground for reversal of the judgment. By his answer the defendant was able to and did raise all the necessary issues for the determination of the action upon its merits. In our opinion, it was so determined.

For these reasons, the judgment is affirmed.

We concur: JAMES, J.; WORKS, Judge pro tem.

MANN et al. v. MANN. (No. 8517.) (Supreme Court of Oklahoma. Jan. 22, 1918. Rehearing Denied May 7, 1918.)

(Syllabus by the Court.)

APPEAL AND ERROR \$\infty 325-Joint Judgment -Parties.

All parties to a joint judgment must be joined in a proceeding in error in this court, either as plaintiffs in error or as defendants in error, before such judgment can be reviewed.

Commissioners' Opinion, Division No. 1. Error from District Court, Muskogee County; R. P. De Graffenried, Judge.

Action by Hazel Mann against William J. Mann and others. Judgment for plaintiff, and defendants Federal Union Surety Company and Western Indemnity Company bring error. Dismissed.

L. J. Roach, of Muskogee, for plaintiffs in error. C. W. Lively, of Sapulpa, and Am- vacate a judgment with which the said Wil-

repair work after the building had settled., brister & Ambrister, of Muskogee, for de-

RUMMONS, C. This action was commenced in the district court of Muskogee county by the defendant in error to recover upon a guardian's bond against William J. Mann and Federal Union Surety Company and Western Indemnity Company. Plaintiff had judgment against the defendants to reverse which the Federal Union Surety Company and Western Indemnity Company prosecute this proceeding in error. The defendant in error moves to dismiss this appeal for the reason that William J. Mann, one of the defendants below, was not served with summons in error and is not a party to this appeal. The trial court rendered the following judgment:

"It is therefore considered, ordered, and adjudged that the plaintiff do have and recover from the defendant Western Indemnity Company, as successor and trustee for the Federal Union Surety Company, and from the defendant William J. Mann the principal sum of \$2,692.75, with interest thereon. \* \* "

This is clearly a joint judgment against the defendant William J. Mann and Western Indemnity Company. Under repeated decisions of this court "all parties to a joint judgment must be joined in a proceeding in error in this court, either as plaintiffs in error or as defendants in error, before such judgment can be reviewed." National Surety Co. v. Oklahoma Presbyterian College for Girls, 38 Okl. 429, 132 Pac. 652; Michael v. Isom, 43 Okl. 708, 143 Pac. 1053; Arkansas Valley National Bank v. McCollom, 165 Pac. 193; Bowles v. Cooney, 45 Okl. 517, 146 Pac. 221; Grounds v. Dingman, 160 Pac. 883; Long v. Bearden et al. (United States Fidelity & Guaranty Co. v. Long et al.), 160 Pac. 467; Wade v. Hope, 162 Pac. 742.

Counsel for plaintiffs in error cites chapter 219, Sess. Laws 1917, p. 403, being an act abolishing summons in error and providing on whom the case-made may be served and the necessary parties to the petition in error. This appeal, however, was lodged in this court on August 5, 1916, long before the passage of the act relied upon by plaintiffs in error. As the act of the Legislature in question does not purport to have any restrospective effect, it cannot avail the plaintiff in error in the instant case.

It is further earnestly contended by plaintiffs in error that William J. Mann is not a necessary party to this appeal for the reason that he cannot be adversely affected by a reversal of this judgment. In view of the authorities cited above, we are constrained to hold that, being one of the parties to a joint judgment, he is a necessary party to an appeal to this court from such judgment, since a reversal of the judgment would necessitate a new trial of the cause and would are therefore unable to say that he would not be adversely affected by a reversal of such judgment.

The defendant William J. Mann not having joined in the petition in error, and not having been made a defendant in error nor served with summons in error, and not having waived service of such summons, we are without jurisdiction to review the judgment complained of.

This appeal should therefore be dismissed.

PER CURIAM. Adopted in whole.

RIVERS v. SCHOOL DIST. NO. 51. NOBLE COUNTY. (Nos. 6534-6537.)

(Supreme Court of Oklahoma. April 23, 1918.)

(Syllabus by the Court.)

1. SCHOOLS AND SCHOOL DISTRICTS \$\infty\$ 135(2, 3), 144(4) — TEACHERS — VALIDITY OF CONTRACT—RECOVERY OF SALARY.

Contracts made between teachers and officers of a school district for teaching district schools for a term extending beyond the time when the term of such officers will expire are not, for that reason, invalid; but where, on account of insufficient funds available to support the term provided for in said contracts, the electors of the district at the next annual school meeting, contrary to said contracts fixing the term of school at "eight months or less, limited to the funds available for the school year of 1913-14," fix it for eight months and reduce the number of salaries fixed in the contracts to conform to the funds available to support the said term, held, that the contracts, being inconsistent with the decision of said electors, were invalid; that the contracting teachers cannot recover thereon, but such of them as taught in lieu of other teachers later contracted with by the succeeding officers of the district pursuant to the decision of the electors at said meeting are entitled to recover the salaries fixed therein for the teachers in lieu of whom they taught.

(Additional Syllabus by Editorial Staff.)

2. APPEAL AND ERROR \$\sim 338(3)\$\to\$CROSS-AP-PEAL-TIME.

The court can consider no question sought to be brought up on cross-appeal, where more than six months have expired since the judgment before said cross-appeal was filed in the Supreme Court.

Error from County Court, Noble County; L. B. Robinson, Judge.

On rehearing. Affirmed.

For former opinion, see 156 Pac. 236.

P. W. Cress, of Perry, for plaintiffs in error. Henry S. Johnston, of Perry, for defendant in error.

TURNER, J. This suit was brought by Alpha Rivers as plaintiff below, who will hereafter be referred to as plaintiff, on a written contract of employment as a teacher in district No. 51, a rural school. At the invalid because the amounts to be paid were same time, Anna Campbell, Myrtle Lane, and in excess of the school funds provided at the Elsie Roads each brought a suit practically annual school meeting, employed new teach-

liam J. Mann appears to be satisfied. We identical in all the details and purposes against the same defendant. By agreement of counsel, the proof in this case is to apply in the others, and the decision in the one shall control all of them,

> For a cause of action plaintiff set out that she had on April 28, 1913, entered into a written contract with the officers of said school district, to wit, C. W. Swearingen, director, H. Schubert, clerk, and M. H. Whaley, treasurer, by the terms of which she was employed to teach in the school the following school year at a salary of \$50 per month; and she sued for this salary for the months of September, October, and November, 1913; that she had taught these three months, and payment according to the contract had been refused. The defendant, school district No. 51, set up numerous defenses, including the following: (1) That the contract was invalid because not made at a meeting of the board, with notice to the members, and as a board action; (2) that Schubert, at the time of signing the contract, lacked mental capacity; (3) the plea that the contract sued upon had been adjudicated to be invalid, and the plaintiff perpetually enjoined from asserting any right to teach under the same by a decree of the district court which had not been appealed from, and had therefore become final.

> The cause was tried to the court, and a decision rendered against the right of plaintiff to recover on the contract; but that this particular plaintiff and Anna Campbell were entitled to pay for the three months at the rate of \$40 per month, not because of the contract sued on, but because they had been employed to teach these three months by filling vacancies in the teaching corps employed by the new board. The other two plaintiffs, Roads and Lane, were denied a All, however, appeal, claiming recovery. rights under the contract held invalid. A brief statement of some of the material facts seems necessary, and it follows:

> In April, 1913, the school board consisted of two rival factions. A majority of the members made the contracts with the four teachers for the next year, fixing their salaries at \$60 and \$50 respectively. June 3, 1913, the electors of the school district met in the annual school meeting, and provided for an eight months' school, but decided to pay \$50 and \$40 per month salaries for the places these plaintiffs claim the right to fill; the electors also refused to vote any additional levy of funds, which would have been necessary if the higher salaries were to be paid. At this meeting, the personnel of the official board was also somewhat changed. Before the fall term of school opened, the new board, claiming that the contracts involved were

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ers for these four positions at salaries named ! by the electors. School opened with the new teachers in charge, and was run about a week, when the four teachers involved here went to the school and tried to, and probably did, take charge of the various rooms; at least for a time each room had two teachers in it, both claiming authority. The new board then appeared on the scene and put the old teachers out. At this juncture, C. W. Swearingen, a hold-over member of the board, filed a suit in equity in the district court, naming the school district as plaintiff; signing the petition "C. W. Swearingen, director of school district No. 51, Noble county, Okl.," and making the other directors and the four new teachers defendants, and asking that they all be enjoined from interfering with the contracts involved here. In this petition, plaintiff herein and the other three plaintiffs are mentioned by name, and their contracts with the old board and their rights to teach, and the threatened violation of such contracts and rights by the other members of the board and the new teachers are fully set out as a basis for the injunctive relief asked. This petition in equity is verified by this plaintiff and the other three plaintiffs, who make oath that:

"She has read the above and foregoing petition; knows the contents thereof, and that the statements therein contained are true."

One of the plaintiffs, it appears, also made affidavit of the absence of the district judge. as a basis of authority for the county judge to act. A temporary injunction was issued on this petition by the county judge, thus invested with authority, temporarily protecting the rights of plaintiffs. The defendants in that suit; the members of the school board and the new teachers, answered and pleaded over, bringing into the case the contracts affecting both the old and new sets of teachers, among other things, and the case was tried by the district court, and the contracts here involved were held invalid and these plaintiffs were perpetually enjoined from claiming rights thereunder.

[1] The court found that, while the contracts had been made by a regularly constituted board, nevertheless they were invalid because the electors of the district at the next annual meeting, held June 3, 1913, had the right to and did determine that eight months of school should be taught, and that, as the district had defeated at an election held for that purpose an extra levy, and the total amount of the salaries fixed in the contracts were \$330 in excess of the whole general fund available, leaving nothing for repairs, fuel, supplies, and janitor service, said contracts were inconsistent with the action of the district in flxing the term for eight months and reducing the salaries of the number of teachers provided for therein to correspond to the fund available, and for that reason said contracts were void. The court was right.

As Rev. Laws 1910, § 7788, provides that the qualified voters of a school district. at their annual meeting, may determine the length of time a school shall be taught in their district for the ensuing year and when, and whether the school money shall go to support a summer or a winter school, and that if such matters shall not be determined by them it shall be the duty of the district board to determine the same, it would seem that no citation of authority, aside from the statute, is required to support the proposition that, when the district board determined, as it did, in advance of the electors at the annual meeting the length of time the school should be taught for the ensuing year, and in the contract fixed the term at "eight months, or less, limited to the funds available for the school year of 1913-14," the contract to that extent was subject to be upset by the subsequent action of the annual meeting, and was upset when at that meeting it was determined to have an eight months' school and no less. And it would also seem to require no citation of authority to support the proposition that, as there was not sufficient funds available to support a school for eight months at the salaries agreed to be paid the teachers provided for in said contracts, but was sufficient to pay the salaries of the same number of teachers at the salaries voted at the meeting, it is clear that the stipulations in the contracts, both as to the length of the term and the salaries to be paid, being inconsistent with the will of the electors expressed at the meeting, must fall. It must fall, not for the reason that the teaching term provided for in said contract extends beyond the time when the term of office of the officers of the district making it expires, but, as stated, for the reason that it is contrary to the determination of the electors of the district at their next annual meeting expressed upon matters delegated to them by law. School Dist. v. Ward. 40 Okl. 97, 136 Pac. 588.

Webster v. School Dist., 16 Wis. 316, was a suit on a contract for wages, as here. The court refused to admit the contract in evidence on the ground that the officers of the district executing the same had no authority to bind the district for a greater length of time than until the expiration of their term of office. Passing on this point, the Supreme Court said:

"The contract with the plaintiff in error was not void for want of authority in the officers of the district to make it. In the absence of any special and inconsistent determination of the qualified voters at the last annual meeting, and subject to their power at the next, or of the new board, to determine with respect to the length of time a school should be taught, whether by a male or female teacher, or both, and the application to be made of the moneys received from the school fund and the town, the power of the clerk, with the consent of the director or treasurer, or both, to contract with and hire a qualified teacher, and bind the district, was general. \* \* Without such previous determination, the contract was beyond all

question good until the next annual meeting, and thereafter, provided no contrary directions were then given by the voters, or subsequently by the new board, in case the voters neglected to act. Unless rejected in one form or the other, and proper notice thereof given to the plaintiff in error, the district was still liable for all services duly performed under it. Having been entered into by competent authority, its prima facie validity continued until the contrary was shown, the burden of which was upon the district. It should therefore have been received in evidence, leaving the district to establish its invalidity by showing, if such were the fact, that it had been in due form rejected."

Such inconsistency afforded the succeeding board the right to abrogate the contract and enter into the contract with the second set of teachers, embodying the determination of the electors of the district then expressed. 35 Cyc. 1079, says:

"In the absence of a statutory provision limiting either expressly or by implication the time for which a contract for employment of a school teacher may be made to a period within the contracting school board's or officers' term of office, such board or officers may bind their successors in office by employing a teacher or superintendent for a period extending beyond their term of office, or for term of school succeeding their term of office, provided such contract is made in good faith, without fraud or collusion and for a reasonable period of time; and the succeeding board or officers cannot ignore such contract because of mere formal and technical defects, or abrogate it without a valid reason therefor."

We are therefore of opinion that, on account of the inconsistencies mentioned, the contracts sued on were avoided, and the court did right to hold them so, and that plaintiffs had no right to recover thereon the salaries therein provided; that the contract made by the succeeding board was good: and that the court did right to protect the same and the teachers operating thereunder by injunction and in restraining the enforcement of the contracts sued. But inasmuch as plaintiffs Alpha Rivers and Anna Campbell were permitted to teach, not in virtue of their contracts, but in lieu of two of the teachers under the second contract, that the judgment in their favor for \$120 each for teaching thereunder must stand.

[2] We can consider no question sought to be brought here on cross-appeal, for the reason that more than six months had expired since the rendition of the judgment before said cross-appeal was filed in this court.

Let the judgment be affirmed, and the same order be entered in causes Nos. 6535, 6536, and 6537. All the Justices concur.

SHUTTEE v. COALGATE GRAIN CO. (No. 8833.)

(Supreme Court of Oklahoma. April 30, 1918.)

(Syllabus by the Court.)

PRINCIPAL AND SURETY \$\ins118\text{--Release of Part of Sureties-Effect.}

On appeal from a judgment in a justice of O. B. Goodwin shall prosecute their appeal to the peace court to the district court, A. became effect and without unnecessary delay, and if

surety on an appeal bond for B., C., and D. In the district court the creditor settles with B. and C. for one-half the amount in dispute, and dismisses the case with prejudice as to them. Held, that the settlement with and release of B. and C., and without the consent of A., operates to release him also; and further held, that it is immaterial whether a release of all the principals is effected, as a release of any one operates to release the surety.

Commissioners' Opinion, Division No. 3. Error from District Court, Coal County; J. H. Linebaugh, Judge.

Action by the Coalgate Grain Company by way of motion or judgment on an appeal bond against Otto A. Shuttee, surety. Judgment for plaintiff, and defendant excepts and brings error. Judgment reversed, and case remanded, with directions to enter judgment for defendant.

John E. Du Mars, C. O. Blake, R. J. Roberts, and W. H. Moore, all of El Reno, and J. G. Ralls, of Atoka, for plaintiff in error.

SPRINGER, C. In this opinion the plaintiff in error will be referred to as surety, and the defendant in error will be referred to as creditor. On the 4th day of September, 1915, the creditor obtained a judgment in the justice of the peace court of Coalgate district in Coal county, Okl., against Jacob M. Dickinson and H. U. Mudge, receivers of the Chicago, Rock Island & Pacific Railway Company, and O. B. Goodwin for the sum of \$164.47 and the costs of the case. The case was taken by appeal to the district court of Coal county, with Dickinson, Mudge, and Goodwin as principals on the bond, and Otto A. Shuttee as their surety. In the district court the creditor settled with Dickinson and Mudge, as receivers of the railway company, and dismissed the case as to them. The creditor then took judgment against Goodwin for \$82.23 and the costs of the action, and issued execution thereon, which was returned nulla bona. The creditor then took action against the surety by way of motion or judgment upon the bond according to the provisions of section 5477 of Rev. Laws 1910. Among the other things, the bond provides:

"Know all men by these presents, that Jacob M. Dickinson and Henry U. Mudge, receivers of the Chicago, Rock Island & Pacific Railway Company, and O. B. Goodwin, as principals, and Otto A. Shuttee, as surety, are held and firmly bound unto the Coalgate Grain Company in the sum of four hundred dollars (\$400.00),

well and truly to be paid.

"The conditions of this obligation are such that, whereas, the plaintiff, the Coalgate Grain Company, has heretofore, on the 4th day of September, 1915, obtained judgment in the sum of one hundred sixty-four and 47/100 dollars (\$164.47) and costs against the above named defendants in the above court and cause, from which the defendants desire to appeal to the district court of Coal county. Okl.:

"Now therefore, if Jacob M. Dickinson and Henry U. Mudge, receivers of the Chicago, Rock Island & Pacific Railway Company, and O. B. Goodwin shall prosecute their appeal to effect and without unnecessary delay, and if

judgment be rendered against them on appeal, shall satisfy such judgment and costs, this undertaking shall be null and void; otherwise to remain in full force and effect," etc. to remain in full force and effect,

To the motion for judgment against the surety he appealed and filed an answer thereto, as follows:

to, as follows:

"Comes now Otto A. Shuttee and for his answer to the motion of the plaintiff to enter up judgment against him on a certain appeal bond denies any liability on the bond for the reason that one of the principals of said bond, the receivers of the Chicago, Rock Island & Pacific Railway Company, the movant herein, released from any liability on said bond. It is further denied that any consideration was paid said Otto A. Shuttee by O. B. Goodwin for said Otto A. Shuttee's services as surety.

"Wherefore Otto A. Shuttee prays judgment of the court."

of the court.

Issues being thus joined on the motion and answer thereto the case was tried to the court upon the following agreed state of facts:

"It is hereby stipulated and agreed that this motion shall be submitted on the following statements of facts: (1) That the judgment was rendered in the court of the justice of the peace for \$164.47 against receiver of the Chicago, Rock Island & Pacific Railway Company and O. B. Goodwin. Thereafter bond was filed on O. B. Goodwin. Thereafter bond was filed on behalf of O. B. Goodwin and receiver of Chibehalf of O. B. Goodwin and receiver of Chicago, Rock Island & Pacific Railway Company with Otto A. Shuttee as surety. Thereafter the receiver of the Chicago, Rock Island & Pacific Railway Company obtained a release from the plaintiff, and the action in the district court as against them was dismissed. Thereafter judgment was taken against O. B. Goodwin in the sum of \$82.23, execution was issued against O. B. Goodwin and returned no property found. sum of \$82.23, execution was issued against O. B. Goodwin and returned no property found. Thereafter notice was duly served upon Otto A. Shuttee and motion upon which the case is now pending was filed and a hearing was had on said motion this September, 5, 1916.

"Witness our hands this the 5th day of September, 1916."

The matter being thus presented, the court rendered judgment against the surety for the sum of \$82.23 and costs of the action, to which finding and judgment of the court the surety duly reserved his exception.

Section 1043, Rev. Laws 1910, provides:

"A guarantor is exonerated, except so far as he may be indemnified by the principal, if by any act of the creditor, without the consent of the guarantor, the original obligation of the principal is altered in any respect, or the reme-dies or rights of the creditor against the principal, in respect thereto, in any way impaired or suspended."

Section 1052, Rev. Laws 1910, provides: "A surety cannot be held beyond the express terms of his contract, and if such contract prescribes a penalty for its breach he cannot in any case be liable for more than the penalty."

Section 1056, Rev. Laws 1910, in part provides:

"A surety is exonerated:

"A surety is exonerated:
"First. In like manner with a guarantor.
"Second. To the extent to which he is prejudiced by any act of the creditor which would naturally prove injurious to the remedies of the surety or inconsistent with his rights, or which lessens his security.

Brandt on Suretyship and Guaranty (3d Ed.) § 164, vol. 1, furnishes the following language:

"As a general rule, if the principal is re-leased by the creditor without reservation, the surety is also thereby discharged. Thus a joint judgment was obtained against the principals and sureties on a note. The creditor agreed with one of the principals to discharge him from the judgment if he would give security for the payment of about one-fourth of the amount thereof and the security was accordingly given. Held, the sureties were thereby discharged."

This question was presented to the Supreme Court of the state of Washington in the case of Friendly v. National Surety Co. of N. Y. et al., 46 Wash. 71, 89 Pac. 177, 10 L. R. A. (N. S.) 1160, wherein it is said:

"We have no doubt that the release of Thomas by the appellant released the surety company from any liability for the default of the new partnership, for the rule is that the 'surety is only bound to the extent and in the manner only bound to the extent and in the manner and under the circumstances he consented to become liable.' Brandt Suretyship & Guaranty (2d Ed.) §§ 118, 119; 27 Am. & Eng. Enc. of Law (2d Ed.) p. 459; London & L. Ins. Co. v. Holt, 10 S. D. 171, 72 N. W. 403; Standard Oil Co. v. Armnestad, 89 N. W. 197, 6 N. D. 255, 34 L. R. A. 861, 66 Am. St. Rep. 604; White Sewing Machine Co. v. Hines, 61 Mich. 423, 28 N. W. 157; Dupree v. Blake, 148 Ill. 453, 35 N. E. 867. The respondent became surety for all three of the partners, and probably considered the responsibility of each of them when it entered into the contract. When the application was first made, the surety comthe application was first made, the surety com-pany might not have consented to become sure-It actually did so refuse before any liability accrued upon the contract. Respondent certainly had a right to make its own contract in its own way, and to stand upon the strict terms thereof. A material alteration, such as changing the contractor without its consent, was not binding upon it. The release of Thomas by the appellant had the effect to make a new contract, for which respondents never became liable. der these facts, we are clear that the judgment of dismissal as to the respondent was right. The judgment is therefore affirmed."

12 R. C. L. p. 1085, in part lays down the following rule:

"But, as a general proposition, where the release of the principal debtor is the act of the creditor and the guarantor does not consent thereto, the guarantor is discharged." Frost v. Harbert. 20 Idaho, 336, 118 Pac. 1095, 38 L. R. A. (N. S.) 875.

The principle involved in this case has been disposed of by this court in the case of Dolese Bros. Co. v. Chaney & Rickard et al., 44 Okl. 745, 145 Pac. 1119:

"In interpreting the terms of a contract or suretyship, the same rules will be observed as in the case of other contracts (section 2961, Stat. 1890; section 1053, Rev. Laws 1910); but, after being so interpreted, and the intelligible meaning of its language is ascertained, the same will be construed and applied strictly, in favor of the surety, and so as to not allow any implication against him (Lamm v. Colcord, 22 Okl. 493, 98 Pac. 355, 19 L. R. A. [N. S.] 901; Eager et al. v. Seeds et al., 21 Okl. 524, 96 Pac. 646; Penny v. Richardson et al., 12 Okl. 256, 71 Pac. 227; Lowe et al. v. City of Guthrie, 4 Okl. 287, 44 Pac. 198). A. H. Reed and C. E. Dawkins, being sureties, are not bound beyond the express terms of their are not bound beyond the express terms of their contract. Section 2960, Stat. 1890 (section 1052, Rev. Laws 1910); Lamm v. Colcord, supra; Eager et al. v. Seeds et al., supra; Penny v. Richardson, supra; Lowe et al. v. City of

Guthrie, supra. Also see section 2961, Stat. 1890 (section 1053, Rev. Laws 1910); section 2965, Stat. 1890 (section 1057, Rev. Laws 1910); Guthrie Nat. Bank v. Fidelity & Deposit Co., 14 Okl. 636, 79 Pac. 102. And sureties for one person, as for J. W. Chaney, are not liable for several, as for J. W. Chaney and C. M. Rickard, liable for one, as for J. W. Chaney and C. M. Rickard, liable for one, as for J. W. Chaney alone. 1 Brandt on Suretyship and Guaranty (3d Ed.) §§ 134, 135, pp. 284-288; Pingrey on Suretyship and Guaranty (2d Ed.) §§ 83, 84; Spencer on Suretyship, § 198; 27 Am. & Eng. Enc. L. (2d Ed.) 459, 460; 32 Cyc. 184."

The surety had a right to make his own contract and to say for whom and under what circumstances and to what extent he would become liable. Shuttee did not become surety for Goodwin alone, but for Dickinson and Mudge as well. That was the contract he made.

The creditor had no right to create an obligation for the surety without his consent. When the creditor released Dickinson and Mudge, its right of action and remedy against them was suspended, and their release operated injuriously to the remedies of the surety because he always has the right of subrogation against the principal, and when they were once released he could not recover over against them because they were discharged from debt, and owed the creditor nothing, and the surety could not recover money paid to the use of the principal as they owed nothing, and if the surety should make a payment it could not be for the use of the principal debtor. The principle on which the law operates to discharge the surety where the creditor has released the principal without his consent is his right to recover over against his principal, who, being released, owes nothing, and as the principal owes nothing, by parity of reasoning it must be asserted the surety can owe nothing. It is as if the debt had been paid by the principal.

A law that would allow the creditor to release the principal without the consent of the surety and hold him would deny his right to make his own contract and to say for whom and under what circumstances and to what extent he would become liable. would hold him against the plain command of the statute which releases him "to the extent to which he is prejudiced by any act of the creditor which would naturally prove injurious to the remedies of the surety or inconsistent with his rights, or which lessens his security," or "if by any act of the principal is altered in any respect, or the remedies or rights of the creditor against the principal, in respect thereto, in any way impaired or suspended."

On appeal from a judgment in a justice of the peace court to the district court A. became surety on an appeal bond for B., C.,

tles with B., and C. and dismisses the case with prejudice as to them. Held, that the settlement with and release of B. and C., without the consent of A., operates to release him also; and further held, that it is immaterial whether a release of all the principals is effected, as a release of any one operates to release the surety.

The judgment of the lower court is reversed and the case is remanded, with directions to render judgment for the surety.

PER CURIAM. Adopted in whole.

LUSK et al. v. RICKS. (No. 8573.) (Supreme Court of Oklahoma. April 30, 1918.)

(Syllabus by the Court.)

APPEAL AND ERROR @== 999(1)-VERDICT-RE-VIEW.

Where the issue as to whether the plaintiff below was the real party in interest was properly submitted to a jury, the verdict of the jury, being reasonably supported by the evidence, will not be disturbed upon appeal.

Commissioners' Opinion, Division No. 3. Error from District Court, Oklahoma County; John W. Hayson, Judge.

Suit by W. H. Ricks against James W. Lusk and others, receivers of the St. Louis & San Francisco Railroad Company. Judgment for plaintiff, and defendants bring error. Affirmed.

W. F. Evans, of St. Louis, Mo., and R. A. Kleinschmidt and Fred E. Suits, both of Oklahoma City, for plaintiffs in error. T. Walter and A. L. Hilpirt, both of Oklahoma City, for defendant in error.

HOOKER, C. The defendant in error instituted suit in the lower court against the plaintiffs in error to recover damages alleged to have been sustained by him by reason of the negligent shipment of 555 head of sheep from Oklahoma City to Hedrick, Okl., on or about November 26, 1914, and that on account of the careless and negligent manner in which said shipment was handled 85 head of said sheep died and others were injured. and it was asserted that damages accrued to him in the sum of \$580. The defendant in error recovered a judgment in the court below for the sum of \$300, to reverse which an appeal is had here.

The evidence discloses that in November, 1914, the defendant in error, W. H. Ricks, and one Showalter entered into a partnership agreement with reference to the purchase and handling of the sheep in question, and that they about that time purchased these sheep from a commission company at Oklahoma City, and to secure the payment thereof they executed a mortgage to the company and handled the sheep together for and D. In the district court the creditor set- a while as a partnership transaction. Shortly thereafter, and before the institution of this suit, Showalter, for reason satisfactory to himself, retired from the partnership and assigned his interest in the transaction to his former partner.

The only error complained of here by plaintiffs in error is that this action could not be maintained by Ricks alone, for it is contended that under the evidence Showalter was interested in the claim and should have been made a party to this action. At the close of the plaintiff's evidence the defendants below moved the court to instruct a verdict in favor of the company upon that ground, which was overruled by the court.

The plaintiffs in error assert that under section 4690, Rev. Laws 1910, defendant in error was not entitled to maintain this action in view of the fact that the subject-matter was jointly owned by him and Showalter. While the defendant in error asserts that the evidence establishes that the defendant in error is the sole owner of the claim, he also contends that, in view of the fact that the contract of shipment was made by the plaintiffs in error with Ricks alone, he (Ricks) would be entitled to maintain this suit for the use and benefit of himself and others interested: he being the sole party to the con-

The trial court submitted the question of the ownership of this claim at the time of the institution of this suit to the jury under proper instructions, and specifically told the jury that before the plaintiff below was entitled to recover he must show by a preponderance of the evidence that prior to the institution of the suit that he was the owner of all of the interests in the sheep transactions that had formerly been owned by Showalter and himself, and if he failed he could not recover. The jury found in favor of the defendant in error upon that proposi-An examination of the testimony of Ricks and Showalter discloses sufficient evidence to justify the jury in reaching the conclusion as to the ownership of the property involved here. Showalter testified as follows:

"Q. I will ask what you did with your interest, if any? A. I sold all my interest to W. H. Ricks last spring. Q. The sheep and all claims? A. The sheep and all claims I had; I turned it all over to him. Q. And then he paid you and took what sheep was left? A. Yes, sir; he did."

The evidence is conflicting, and in some sense contradictory, as to what Showalter did assign to Ricks, but there is some evidence to support the verdict of this jury, and, in view of the fact that Showalter himself was a witness in this case supporting the claim of Ricks against the company for the damages alleged to have been received by him, we cannot see how the rights of the plaintiffs in error can in any, way be affected in not making him a party to this action.

Considering the record as a whole, we are

of the opinion that the verdict of the jury is supported by the evidence, and it is unnecessary to decide the other question raised here as to the right of Ricks to maintain this suit alone, even if Showalter had not assigned him his claim.

The judgment of the lower court is therefore affirmed.

PER CURIAM, Adopted in whole.

CAMPBELL v. DICK et al. (No. 6475.) (Supreme Court of Oklahoma. April 30, 1918.)

(Syllabus by the Court.)

1. FRAUDULENT DEED-INADEQUATE CONSID-ERATION-MENTAL INCAPACITY -- EVIDENCE.

Evidence examined, and found to support the findings and conclusions of the trial court that the conveyance involved was obtained through fraud and for a grossly inadequate consideration, and that the grantor was at the time mentally incapacitated to execute such convevance.

veyance.

2. EVIDENCE \$\sim 501(3)\$—MENTAL CAPACITY OF GRANTOR—OPINION EVIDENCE.

In a suit to cancel a deed on the ground of mental incapacity of the grantor, nonexpert witnesses acquainted with the grantor, and who have had sufficient opportunity to inform themselves of her mental condition, having stated the facts which they observed and upon which they base their opinion, may express an opinion as to her competency to execute the conveyance. conveyance.

3. Limitation of Actions \$\iiii 19(1)\to Recovery of Real Property\text{—Incidental Re-LIEF.

In an action by plaintiff for the recovery of real property in the possession of defendants, plaintiff asked for cancellation of a deed thereto made by their ancestor and for other relief. Defendant interposed the 1, 2, 3 and 5 year statute of limitations in bar of plaintiff's right

of recovery.

Held, that the primary purpose of the action Meta, that the primary purpose of the action was the recovery of the possession of the land, and the other grounds of relief were but incidental thereto; that, such being the case, the 15-year statute of limitations, as found in the fourth subdivision of section 4655, Rev. Laws 1910, fix the period within which such action may be brought.

Error from District Court, Craig County; Preston S. Davis, Judge.

On rehearing. Affirmed.

For former opinion, see 157 Pac. 1062,

W. H. Kornegay, of Vinita, for plaintiff in error. C. Caldwell, of Vinita, for defendants in error.

SHARP, C. J. October 17, 1913, plaintiffs Annie Dick and others, heirs at law of Mary Carpenter, a deceased full-blood Shawnee Indian, instituted their action against the defendant Campbell in the district court of Craig county to recover the possession of the west 1/2 of the southeast 1/4 of section 36, township 25 north, range 18 east, being land allotted to one Mary Bread, and inherited by Mary Carpenter on the death of the allottee.

The action was brought, not only for the recovery of the possession of the lands, but for the cancellation of a deed thereto purporting to have been made and executed by Mary Carpenter to defendant Campbell July 27. 1908, and to quiet title thereto in plaintiffs, and for other relief. The petition charged mental incapacity of the grantor to execute a deed; fraud in its procurement; that the deed was not approved by the county court of Craig county in the manner required for the approval of deeds by full-blood Indian heirs; that the only consideration paid was \$50, while the value of the land at the time was \$1,200. The answer put in issue the averments of the petition, and charged that the consideration paid was "greater than \$60, and was in all respects fair." For a further answer, the defendant pleaded the 1, 2, 3, and 5 year statute of limitations.

At the conclusion of the trial, the court found that the plaintiffs were the sole heirs of Mary Carpenter, deceased; that the latter had inherited the land in controversy from Mary Bread, deceased; that both Mary Bread and Mary Carpenter were full-blood Shawnee Indians; that the land was of the value of \$1,200 at the time of the purported purchase thereof by defendant; that at the time the deed was executed Campbell paid Mary Carpenter \$75, which was the entire consideration therefor, though there was evidence of previous transactions concerning the land prior to July 27, 1908. The court further found that the consideration of \$75 was grossly inadequate; that Mary Carpenter at the time "was an aged woman, probably being something over 100 years of age, and was not mentally capacitated to make this deed at the time she attempted to make it": that the deed was void, because not approved as required by section 9 of the act of Congress approved May 27, 1908 (35 Stat. 313, c. 199). In applying the law of limitations, the court found against the defendant, and held that, the action being one for the recovery of real property, the 15-year statute of limitations controlled, and not the statutes interposed by the defendant.

[1] The defendant, Campbell, who it appears was present at the taking of the deed and in court when the trial was entered upon. did not testify as a witness. We have read the evidence, and, upon the issues of mental incapacity and fraud in the procurement of the deed, are of the opinion that the findings of the trial court are supported by the great weight of the evidence. Indeed, the transaction may properly be branded as unconscionable. Not only was the grantor a fullblood Indian, unable to read or write or understand the English language and a centenarian, but at the time was sick in bed and under medical attention. She was hard of hearing and almost blind, and there was evidence to show that she had to be cared for as ment on this branch of the case, as the evidence adduced in support both of the issue of fraud and mental incapacity is clear and convincing.

[3] Upon the legal issue of limitations, we have already noted that the primary purpose of the action was to recover possession of the land, the legal title to which purported to be in the defendant. While it is true that the plaintiffs also asked to have the deed of July 27, 1908, canceled and the title thereto quieted in plaintiffs, that relief was incidental to the main action, which was to recover The mere fact that plaintiffs the lands. charged that the deed was fraudulently procured, and the grantor therein was incapacitated at the time to make a valid conveyance. none the less made the action one for the recovery of the possession of the premises. The applicable statute, therefore, is not section 4657, Rev. Laws 1910, relied upon by plaintiffs in error, but section 4655, which prescribes the limitations in actions for the recovery of real property, or for the determination of any adverse right or interest therein. Section 4657, by its terms, includes several classes of actions "other than for the recovery of real property." Section 4656 provides for tolling the statute in actions for the recovery of real property, while section 4658 provides a different period of limitation for tolling the statute in actions other than for the recovery of real property except for a penalty or forfeiture. As the case at bar does not come within the first, second, or third subdivision of section 4655, and not being an action for the forcible entry and forcible detention or forcible detention only of real property, it must fall within the fourth subdivision of the section, which provides that an action for the recovery of real property, not included within the first three subdivisions of the article, must be brought within 15 years after the cause of action shall have accrued. These views find support in Reihl v. Likowski, 33 Kan. 515, 6 Pac. 886, and Delashmutt v. Parrent et al., 39 Kan. 548, 18 Pac. 712; also by the following decisions of other courts: Murphy v. Crowley, 140 Cal. 141, 73 Pac. 820; Shepard v. Cummings' Heirs, 44 Tex. 502; Williams v. Allison, 33 Iowa, 278; Dunn v. Miller, 96 Mo. 338, 9 S. W. 640; Names v. Names, 48 Neb. 701, 67 N. W. 751.

We are not unmindful that the rule announced in the foregoing Kansas cases seems to be in conflict with the opinion of that court in New et al. v. Smith, 86 Kan. 1, 119 Pac. 380, and 97 Kan. 580, 155 Pac. 1080. While we are unable to harmonize the opinion of the Kansas court in the latter case with the earlier well-considered opinions (to which no reference is made in the latter opinion), we are inclined to the view, for the reasons already stated, that the earlier opinions announce the correct rule. It seems, too, that our own court, in Webb et al. v. a child. It is unnecessary to further com- Logan, 48 Okl. 354, 150 Pac. 116, was inclined to the view, on the authority of New; v. Smith, supra, that in such circumstances the gist of the action was to set aside the deed on account of fraud, and must therefore be brought within two years after discovery of the fraud. In so far as that case announces a rule in conflict with the instant case, it is disapproved. The statutes of limitations should not be so construed or applied as to require the bringing of an action for the recovery of real property in an action predicated upon fraud within a shorter period of time than in the ordinary proceedings for such recovery. In Oakland v. Carpentier, 13 Cal. 540-542, the suit was in equity to set aside certain leases on the ground of fraud in procuring the same and for possession. The court, referring to the statute of limitations with respect to actions for relief on the ground of fraud, said:

"We think that this provision has no relation to an equitable proceeding to set aside a fraudulent deed of real estate, when the effect of it is to restore the possession of the premises to the defrauded party. In such a case, the action is substantially an action for the recovery of the real estate; indeed it is literally.

\* \* This is really an action for the recovery of real estate, and the plaintiff is no worse off because fraud has been committed upon him, nor the defendant in any better situation, than if the latter had innocently bought and entered under an imperfect title."

The action being in the main for the recovery of real property, we must look to the statute of limitations which affect such actions, and not to another or different statute, which, by its terms, does not include such actions. We therefore conclude that the trial court correctly decided the issue of limitations.

[2] It is urged that the court erred in permitting the witnesses Ben Carpenter, Frank Daugherty, Daisy Daugherty, and Dick to testify that the grantor, Mary Bread, did not know and understand the nature and effect of the making of a deed to her land. This, it is argued, was the real issue that was submitted for trial in the case, and therefore it was not proper to ask the opinion of the witnesses on the issue to be tried. An examination of the record discloses that each of the witnesses had previously testified as to his personal knowledge of the mental and physical condition of Mary Carpenter on July 27, 1908, and prior thereto. From such testimony it appears that the witnesses were fully informed, though nonexperts, of the condition, both mental and physical, of the grantor. Indeed, their relations and associations with her were both close and intimate, and their knowledge of her condition was acquired as a result of such acquaintanceship. In such circumstances the court did not err in permitting the witnesses to testify as they did. A very similar question was before the court in Conwill v. Eldridge, 85 Okl. 537, 130 Pac. 912, where it was held that nonexpert witnesses who testify that ants in error.

they have observed the conduct of a person whose sanity was in question, and give in evidence the facts which they had observed and upon which their opinions were based. could give their opinions as to the sanity of In Farmers' & Merchants' such person. Bank v. Haile, 46 Okl. 636, 149 Pac. 213, it was contended, as here, that the trial court erred in permitting nonexpert witnesses to express their opinions as to the plaintiff's mental capacity to transact business, without having previously detailed the particular phenomena upon which such opinions were formed. All of the witnesses testifying were neighbors, who for many years had lived near the plaintiff; one having lived in the house with him for more than a year, and all having frequently seen and conversed with him at their homes, and in his own, and at various other places. It was held that opinion evidence of such witnesses was competent. The rule is in consonance with right and justice and has the support of innumerable decisions, many of which may be found collected in Atkins v. State, 119 Tenn. 458, 105 S. W. 353, 13 L. R. A. (N. S.) 1031.

The conclusions reached upon the issue of mental incapacity and fraud in the procurement of the deed render unnecessary a determination of the question of whether the deed was approved as provided by section 9 of the act of Congress of May 27, 1908.

The judgment of the trial court is affirmed. All the Justices concur.

JONES v. SMYTH et al. (No. 8787.) (Supreme Court of Oklahoma. April 30, 1918.)

(Syllabus by the Court.)

Indians \$\infty\$=15(1)—Alienation—Validity—Conveyance on Subsequent Consideration.

Where after passage of Act Cong. May 27, 1908, c. 199, 35 Stat. 312, a member of the Choctaw Nation, of one-fourth Indian blood, during his minority executes and delivers a contract for the sale of a portion of his allotment, and at the same time delivers a warranty deed to the same person, such deed and contract is absolutely void. The said allottee, however, on attaining his majority may make a valid conveyance to the same party for a lawful and independent consideration, notwithstanding the first attempted conveyances.

Commissioners' Opinion, Division No. 3. Error from District Court, Bryan County; Jesse M. Hatchett, Judge.

Action by Samuel Jones against Thomas R. Smyth and the Commerce Trust Company, a corporation. Judgment for defendants, and plaintiff brings error. Affirmed.

Crockett & Fowler, of Durant, for plaintiff in error. Hatchett & Ferguson and Utterback & MacDonald, all of Durant, for defendants in error.

PRYOR, C. This is an action by Samuel; of the Choctaw Nation of Indians, of one-Jones, plaintiff in error, against Thomas R. Smyth and the Commerce Trust Company, a corporation, defendants in error, to recover possession of certain lands lying in Bryan county, and the quieting of title thereto by the cancellation of certain deeds made to Thomas R. Smyth by plaintiff, and a certain mortgage made by said Smyth to the said trust company.

It appears from the record that the plaintiff, Samuel Jones, is a citizen by blood of the Choctaw Nation; that he is of one-fourth Indian blood: and that the lands in controversy are part of his allotment; that on the 16th day of November, 1911, the plaintiff entered into a contract, in writing, with the defendant Thomas R. Smyth to sell and convey by warranty deed for a consideration of \$1,000 120 acres of his allotted lands; that at the time of making said contract he executed and delivered to the said Smyth a warranty deed covering the 120 acres, at which time Smyth paid the plaintiff \$150. The land in controversy here is 80 acres of the 120 included in said contract and said deed.

At the time of the execution of the foregoing contract and deed the plaintiff was a minor under the age of 21, and at the time of the execution of the contract and deed plaintiff executed to the defendant Thomas R. Smyth a title bond, with Morgan Durant as surety. On the 19th day of October, 1912, after attaining his majority, the plaintiff, in consideration of the sum of \$1,050, by warranty deed conveyed to the defendant Smyth the 80 acres in controversy in this suit. The plaintiff alleges that this deed was executed in pursuance to the said contract and for the same consideration theretofore entered into between himself and the defendant, and that said deed was a mere ratification of the first deed and for that reason void. The defense is that the execution of the deed after plaintiff had reached his majority was a new and independent transaction made upon a new consideration and without any relation to the former transaction between the plaintiff and defendant. There was judgment for the defendant denying the relief sought by plaintiff, and from this judgment the plaintiff appeals.

The first deed and contract made by the plaintiff to the defendant Smyth during his minority were void. The only question presented to the trial court for its determination, and the only question presented here, is whether or not the deed executed on the 19th day of October, 1912, after the plaintiff had attained his majority, was a ratification of the deed made by the plaintiff while he was a minor, or was the same a mere consummation of the void transaction whereby the plaintiff had agreed to sell said lands to defendant and attempted to convey same to defendant during his minority.

The evidence reasonably establishes the fol-

quarter Indian blood: that the land in controversy is a portion of his allotment. On the 16th day of November, 1911, plaintiff. while a minor, entered into a contract with the defendant Thomas R. Smyth to convey to the said Smyth 120 acres of his allotment for the consideration of \$1,000; that the defendant Smyth paid the plaintiff \$150 at the time of the execution of said contract and warranty deed, and plaintiff executed to the said Smyth title bond, with Morgan Durant as surety. After the plaintiff became of age he had a conversation with the said Morgan Durant concerning the bond, in which he stated that he had found out that the deed and bond were void, and that the surety, Durant, need not be uneasy. After plaintiff became of age he borrowed \$300 from the First State Bank of Bennington and gave a mortgage on the lands in controversy to secure the payment of same. In a conversation with Ab Winters the plaintiff stated that he could make Smyth "come to it"; that he would not let Smyth have the lands as he had first agreed; that he sold 40 acres of the 120 included in the written contract to Ab Winters for \$300, and attempted to sell the 80 acres in controversy to one Attaway at \$12 per acre, and stated at the time that Smyth had offered him \$11 an acre. Plaintiff stated to Morgan Durant after he had made the last deed to Smyth that he had "made a new deal" with Smyth. Plaintiff himself testified that he knew the contract and deed made on the 16th day of November, 1911, were void. The evidence shows that after he became of age he refused to close the contract for said land in accordance with the former understanding between Smyth and himself.

There is some dispute between the plaintiff and defendant as to the matter of payment of the consideration for the deed made on the 19th day of October, 1912. The plaintiff testified that the defendant executed to him on the 16th day of November, 1911, three notes for the sum of \$1,000, after deducting the \$150 paid. He does not contend that any notes were delivered to him at that time. The evidence clearly shows that at the time of the execution of the deed on the 19th day of October, 1912, defendant Smyth paid the note of \$300 of the plaintiff at the Bank of Bennington; that he paid the plaintiff \$50 cash, in addition to the \$150 paid on the 15th day of November, 1911, but the balance of \$1,050 was evidenced by two notes; that no notes were delivered to the plaintiff before the execution of the last deed: that after the execution and delivery of the last deed on October 19, 1912, after plaintiff had reached his majority, the plaintiff discounted said notes to a third person and secured the money therefor; that the defendant Smyth paid said notes.

The only reasonable conclusion that can lowing facts: That the plaintiff is a citizen be reached from the foregoing facts and cir-

cumstances is that reached by the trial Jackson. court, that the execution and delivery of the and plaintiff brings error. Affirmed. deed on the 19th day of October, 1912, after the plaintiff had reached his majority, was a new and independent transaction; that the conveyance on that date of the 80 acres involved in this suit was not a ratification of the deed made by the plaintiff while a minor, and was not made in pursuance to the contract made on the 16th day of November. 1911, notwithstanding the fact that the 80 acres was a part of the land included in that contract.

Under the Act of Congress of May 27, 1908 (35 Stat. 312, c. 199), the only restriction on alienation of the allottee's lands was during the minority of the allottee. After he attained his majority he had a right to dispose of his lands to whomsoever he pleased. The fact that he had attempted to sell the lands to the defendant Smyth during his minority, and had entered into a contract to sell the same to Smyth, did not within itself bar Smyth from purchasing said lands from him after he had attained his majority, and the said allottee after reaching his majority. for a lawful and independent consideration, could sell to Smyth just the same as to any other person, and his conveyance would be valid.

The conclusion here reached is fully sustained by the decisions of this court in the following cases: McKeever v. Carter, 157 Pac. 56; Lewis v. Allen, 42 Okl. 584, 142 Pac. 384: Henley v. Davis, 156 Pac. 337.

The judgment of the trial court should be affirmed.

PER CURIAM. Adopted in whole.

BERRYHILL v. JACKSON. (No. 6423.) (Supreme Court of Oklahoma. April 30, 1918.)

(Syllabus by the Court.)

GUARDIAN AND WARD &=53 - GUARDIAN'S PURCHASE OF REALTY—WARD'S TITLE—PETITION TO RECOVER PURCHASE PRICE.

Where a guardian without the authority of the county court purchases real estate for his ward, the transaction being free from fraud, and causes a deed to be made to his ward thereand causes a deed to be made to the ward therefor, the title to said property passes to the ward, and a petition filed by a subsequent guardian against the vendor in said deed to recover the purchase price paid for the same, upon the sole ground that the conveyance to the ward passed no title because the order of the court was made by a judge related to the then guard. was made by a judge related to the then guardian within the prohibited degree provided by section 5812, Rev. Laws 1910, fails to state a cause of action, and a demurrer thereto was properly sustained.

Commissioners' Opinion, Division No. 8. Error from District Court, Creek County; Wade S. Stanfield, Judge.

Suit by Gracie I. Berryhill, a minor, by her guardian, J. E. Ledbetter, against L. B. of the statute, said:

Demurrer to petition sustained.

Burke & Harrison, of Sapulpa, for plaintiff in error. Hughes & Miller, of Sapulpa. for defendant in error.

HOOKER, C. The plaintiff in error sued the defendant in error to recover the sum of \$700 paid to him by one Burnett, the former guardian of Gracie I. Berryhill, and in the petition filed in said action it is alleged that one Ledbetter is the duly authorized guardian of said Gracie I. Berryhill, and that some time prior to the appointment and qualification one Bates B. Burnett was the guardian of said infant, and while such that he had petitioned the county court of Creek county, the county wherein said guardianship proceedings were pending, for authority to purchase from the defendant, L. B. Jackson, certain real estate for the said sum of \$700, and that said petition was heard and granted by one Davis as judge of said court, he, the said Davis, being related within the prohibited degree to said petitioner, Burnett, to wit, his brotherin-law, and that acting under such authority that the said Burnett, as guardian, did buy said property and pay therefor the sum of \$700 to the said L. B. Jackson, and a deed was made by said Jackson to said infant, and duly recorded; that by reason of the fact that said petition was granted and approved by said Davis as county judge, he being a brother-in-law of said Burnett, and therefore disqualified to pass judgment thereon. that the infant, Gracie I. Berryhill, did not acquire any title to said property, and the entire transaction was void, and said infant received no consideration for said money paid to Jackson by her former guardian, and therefore said Jackson owed said infant money with interest, for which a judgment was asked.

A demurrer was filed to said petition by Jackson upon all the grounds enumerated by section 4740, Rev. Laws 1910, and was sustained by the court, from which the plaintiff below has appealed here. Section 5812. Rev. Laws 1910, formerly section 2012, Comp. Laws of 1909, is as follows:

"No judge of any court of record shall sit in any cause or proceeding in which he may be interested, or in the result of which he may be interested, or when he is related to any party be interested, or when he is related to any party to said cause within the fourth degree of consanguinity or affinity, or in which he has been of counsel for either side, or in which is called in question the validity of any judgment or proceeding in which he was of counsel or interested, or the validity of any instrument or paper prepared or signed by him as counsel or attorney, without the consent of the parties to said action entered of record: Provided, that the disqualifications herein imposed shall not exclude the disqualifications at common law." exclude the disqualifications at common law.'

This court in Hengst v. Burnett, 40 Okl. 42, 135 Pac. 1062, in construing this section "In a proceeding in the county court by a guardian to invest the money of his ward pursuant to Comp. Laws 1909, § 5513 (Rev. Laws 1910, § 6569), held, construing Comp. Laws 1909, § 5139, that the guardian is a 'party' thereto within the contemplation of said section, and that the judge of the county court, his brother-in-law, was disqualified to sit in said proceeding." said proceeding."

Assuming that the order of the county court authorizing the purchase of this property by the guardian for his ward was and is void for the reason that the same was made by a disqualified judge, and therefore afforded the guardian no protection upon his bond for an improper investment of the funds of the ward, what effect does it have upon the title to the real estate?

No question of value or fraud is raised here. There is no statute in this state prohibiting the guardian from investing the funds of his ward in real estate without the order or approval of the county court. Section 6556, Rev. Laws 1910 (section 5501, Comp. Laws 1909), provides:

"If the property be sold for the purpose of putting out or investing the proceeds, the guardian must make the investment according to his best judgment, or in pursuance of any order than may be made by the county court."

And section 6569 authorizes the court to require the guardian to invest the funds of his ward. Yet, if the guardian does so invest said funds without the order of the court, he is liable for an unwise investment upon his bond. "A guardian may invest the moneys of his ward without an order of court, but at his own risk as a general rule. In re Cardwell, 55 Cal. 137." See Brown v. Wright, 39 Ga. 96; Venable v. Howard, 68 Ga. 167; McIntyre v. People, 103 Ill. 142; Carlysle v. Carlysle, 10 Md. 440; Osborne v. Munroe (N. J.) 5 Atl. 898.

Under the authorities above quoted we must hold that the guardian bought this property at his peril, and if the same was an unwise investment, he is liable upon his bond therefor, as the order of the county court is no protection to him.

We must bear in mind that this action

giving the property to the heirs in law of John P. Vinson (testator's son), it shows that the testator looked to the death of his son as fixing the period when the legates should be ascertained. Mr. Tharp's deed does not convey to the heirs at law, but to the heirs of his brother. It is also true that more liberal construction should be given to wills in favor of persons not born than to deeds, which are contracts between the parties. In addition to what has been already said, the policy of our law favors the vesting of estates, and this is another reason for upholding the construction given to the deed in this case."

In Scanlan v. Wright, 13 Pick. (Mass.) 523, 25 Am. Dec. 344, the court holds that the estate vested in the minor, and we quote the last paragraph of the opinion:

"The circumstance of her being a minor and a feme covert did not prevent the estate from vesting; where an estate is conveyed by deed poll to a minor or married woman, the estate vests, subject only to be divested in case she should disagree to it when discovert and of full age.

In Haddon v. K. V. Neighbarger & J. T. Neighbarger, 9 Kan. App. 529, on page 532, 58 Pac. 568, on page 569, the court said:

"She has already conveyed the tract to the plaintiff, and has delivered the deed therefor. The law presumes that when a deed clearly beneficial to an infant is given to him the same is accepted by him (9 A. & B. Encycl. of L. [2d Ed.] p. 162); and withholding the deed from the record for several years did not affect the validity of the conveyance" (Tallman v. Cooke, 39 Iows. 402). 39 Iowa, 402).

In the case at bar the guardian of Gracie I. Berryhill accepted the deed, and this was a sufficient acceptance in behalf of Gracie I. Berryhill. In Spencer v. Carr et al., 45 N. Y. 406, 6 Am. Rep. 112, we quote the syllabus:

"Parents executed and delivered a deed of premises to their child of six years. When the child became sixteen, the parents executed a conveyance of the same premises, with other real estate, to S. in trust, upon which he made large advances in money. To this conveyance the name of the mother was signed by the child the name of the mother was signed, by the child, at her request. Held, that the child was not thereby estopped from claiming title to the premises under the previous deed, no fraudulent intention being proved."

In Oliver v. Houdlet, 13 Mass. 237, 7 Am. Dec. 134, we quote from the opinion:

We must bear in mind that this action does not involve the approval of the expenditure of the ward's money by her guardian, but whether the title to the lots passed from Jackson to the infant. In Tharp v. Yarbrough, 79 Ga. 382, 4 S. E. 915, 11 Am. St. Rep. 439, we quote from the last part of the opinion:

"Surely the donor did not intend to keep the title to this property in nubibus till his brother's death. He desired it to vest immediately, and this could only be accomplished by giving the deed the construction herein indicated. The case in [Vinson & Carroll v. Vinson] 33 Ga. 454, relied on by the ingenious counsel who appeared for plaintiffs in error, differs from the case at bar in two essential respects: (1) The testator there provided a trustee, to whom the title passed under the will, and it was made the duty of this trustee to hold the property for the benefit of the cestuis que trust; (2) the will gave the property in trust for the benefit of the heirs in law of John P. Vinson, and, as Chief Justice Lumpkins observes, 'By

void may purchase an estate without the consent of her husband; and the conveyance will be good, until avoided by him during coverture, or by her after his death. 2 Black. Com. 293; Co. Lit. 3a. Most clearly, then, the sales under consideration are not void. But it has been further argued that these sales, if voidable, may be avoided by the plaintiff, Clap, by virtue of his authority as guardian of the minor. No case has been cited in support of this position and we know of no position of law by which it can be maintained. The authority and interest of a guardian extend only to such things as may be for the interest and advantage of the ward. If an infant make a contract from which he derives a benefit, it cannot be avoided by his guardian; for this, being injurious to the infant, would be a violation of the guardian's duty. Bac. Abr. tit. Guardian, G; Co. Lit. 17b, 89a. The rule of the civil law is, that pupils may better their condition, but not impair it, without the authority of their tutors. Inst. tit. De Auctor, Tut. But, should it be admitted that a guardian may avoid the contracts of his ward, made without his consent, it will hardly be contended that he can be permitted to do it, when the contract, at the time of making it, was confirmed by his assent. Now one of the sales under consideration was made by Clap, the guardian, and his assent is manifest from the act itself. There is no positive proof of Clap's assent to the sale by Oliver; but there is abundant evidence from which it may be inferred, and which ought to have been submitted to the jury, if such assent be material to the issue. As the direction to the jury was not conformable to these principles, the verdict must be set aside, and a new trial granted."

In volume 22 of Cyc. at page 529, it is said:

"An infant may be a grantee in a conveyance of land, and the estate conveyed vests in him, subject only to be divested in case he disagrees to the conveyance when of full age, which he has power to do."

He does not have the power to disaffirm or disallow after the purchase is made by the guardian. His recourse in that event is to recover the purchase price from the guardian, because the guardian has power to bind the estate of the ward. In Am. Digest, Cent. Ed. vol. 27, p. 1115, § 101, it is said:

"A sale to an infant is a valid transfer of the property out of the vendor, though the infant is not bound to pay the price stipulated. Crymes v. Day, 1 Bailey (S. C.) 320."

This clearly shows that the title passed to Gracie I. Berryhill, and therefore there was no want of consideration. In Jennings v. Jennings, 104 Cal. 150, 37 Pac. 794, we quote the third paragraph of the opinion:

"The appellant further contends that the note and mortgage never became valid and binding obligations, because they were never delivered to any person authorized to receive them for the plaintiff. This contention is also, in our opinion, untenable. The case shows that the papers were properly executed, and the maker at once caused the mortgage to be duly recorded, and then delivered them both to plaintiff's mother for him. This, under the decisions in this state and elsewhere, constituted a sufficient delivery. In De Levillain v. Evans, 39 Cal. 120, the question arose as to the acceptance of a deed of gift of certain real property, and it was held that, 'if the donee be of mature years, he will be presumed to have accepted it, if it

be for his advantage, unless the contrary appears'; and that, 'if the donation be to a minor, and to his advantage, the law accepts it for him'. In Wedel v. Herman, 59 Cal. 515, it is said: 'But it is contended that the court below erred in overruling objections made to the offer in evidence of the deed to the plaintiff from his father, on the ground that it was not delivered. The deed was produced by the plaintiff. It was a deed from father to son. It showed that it had been duly acknowledged and recorded at the request of the grantor, and these constituted sufficient proof of delivery.' In Cecil v. Beaver, 28 Iowa, 241, 4 Am. Rep. 174, the court, by Dillon, C. J., said: 'Where the deed to a child is absolute in form and beneficial in effect, and the grantor and father voluntarily cause the same to be recorded, this is in law a sufficient delivery to the infant, and the title to the land will pass thereby. In such case actual manual delivery and a formal acceptance are not necessary.' And see, also, Rivard v. Walker, 39 Ill. 413; Mitchell v. Ryan, 3 Ohio St. 377; Spencer v. Carr, 45 N. Y. 406, 6 Am. Rep. 112; Gregory v. Walker, 38 Als. 26."

In De Levillain v. Evans et al., 89 Cal. 120, we quote from the last paragraph of the opinion.

"Nothing appears in the record to justify the inference that this donation was not for the advantage of the donee; and no reason is perceived why he would not be benefited by becoming the owner of so considerable a lot in a growing city. For these reasons we think the deed was operative to convey the title."

In Donner v. Palmer et al., 31 Cal. 500, we quote the last paragraph of the syllabi:

"Grant to Infant.—An alcalde's grant to an infant was valid, and the infant could take and hold under the grant."

In our opinion the title to said real estate passed from L. B. Jackson to the infant ward here, and the demurrer to said petition was rightfully sustained.

The judgment of the lower court is affirmed.

PER CURIAM. Adopted in whole.

SNYDER CO-OP. ASS'N v. BROWN et al. (No. 8764.)

(Supreme Court of Oklahoma. April 30, 1918.)

(Syllabus by the Court.)

1. WEIGHTS AND MEASURES \$==11-LIABILITY OF DEALER OR SPECULATOR IN COTTON.

A dealer or speculator in cotton who weighs cotton for the public and charges a fee therefor becomes liable to the public weigher of the county or his deputy, for the penalty provided in section 1747, Rev. Laws 1910, and the same may be recovered in a civil action for damages in any court of competent jurisdiction.

2. Weights and Measures 11 — Action for Penalty—Evidence.

An examination of the record in the instant case shows that the testimony reasonably tends to support the findings and judgment appealed from.

(Additional Syllabus by Editorial Staff.)

3. CONTINUANCE \$\iftharpoonup 20(5)\$—ABSENCE OF COUNSEL.—REPRESENTATION BY OTHER COUNSEL.

The denial of a motion for a continuance on

he will be presumed to have accepted it, if it the ground that one of the counsel for plaintiff

in error who had charge of one branch of the defense was ill and unable to be present and could not with safety to his health be consulted upon the case was not an abuse of discretion where such party was represented by two able lawyers present.

Commissioners' Opinion, Division No. 2. Error from District Court, Kiowa County; Thomas A. Edwards, Judge.

Action by J. F. Brown and B. W. Poteet against G. D. Thompson, James Grant, J. A. Krueger, and the Snyder Co-operative Association. Action dismissed as to Krueger, and verdict for Thompson and Grant, and also a judgment for Brown and Poteet against the Snyder Co-operative Association, from which it brings error. Affirmed.

Geo. L. Zink and Joseph H. Cline, both of Hobart, for plaintiff in error. Tolbert & Tolbert, of Hobart, for defendants in error.

GALBRAITH, C. This action was commenced in the trial court by the public weigher of Kiowa county, and his deputy for the Snyder precinct, against the Snyder Cooperative Association, a corporation, and others as dealers and speculators in cotton, to recover the statutory penalty provided for the benefit of the public weigher by section 1747, Rev. Laws 1910, against a dealer in cotton who shall weigh cotton for the public and charge a fee therefor. There was a trial to the court and a jury and a verdict returned against the Snyder Co-operative Association and in favor of Brown and Poteet in the sum of \$300, and judgment rendered thereon, to review which this appeal has been duly perfected.

The principal errors argued in the brief are that the judgment is contrary to law, and that it is not supported by the evidence. Section 1745, Rev. Laws 1910, provides, in part, as follows:

"No person shall be appointed as a county weigher or deputy weigher or weigh for the public who is in any wise interested as a dealer or speculator or as an agent or employé of any firm, company or corporation, in the sale or purchase of cotton, grain, live stock, hay, cotton seed, \* \* \* broom corn and all other farm products sold by weight."

Section 1746 provides for the manner of weighing cattle and provision to be made therefor. Section 1747 provides:

"Any person, firm or corporation who shall violate any of the provisions of the two preceding sections shall be liable to the public weigher for damages in a sum not to exceed five dollars for each load or draft so unlawfully weighed, to be recovered in any court having competent jurisdiction thereof."

The provision of section 1745, above quoted, is modified by the proviso in section 1749, as follows:

"Provided, however, that any person, firm or corporation may weigh any product for any other person, if such person, firm or corporation so weighing is a bona fide purchaser of such product; but no charges shall be made or received for such weighing under the penalty aforesaid."

It is alleged in the petition, and supported by the evidence, that the Snyder Co-operative

Association, whose place of business was at the town of Snyder, in Kiowa county, was an extensive dealer in cotton: that it owned and maintained a cotton yard, scales, and a cotton gin and advertised extensively in various ways that it weighed cotton for the public free; that on the printed cotton ticket issued at its scales it was recited that the weighing was done free; and that it recited a charge of 10 cents for insurance and 25 cents for yardage. It was alleged, and supported by the evidence, that this charge of 10 cents for insurance was a subterfuge by means of which a fee for weighing cotton was collected, and by so doing the association violated the statute above set out and became liable to the public weigher and his deputy for the penalty prescribed by section 1747, supra. The court in submitting the case to the jury, after stating the issues made by the pleadings, stated the issues submitted to the jury in instruction No. 5, as follows:

"You are further instructed that if you find and believe from the evidence that subsequent to the 21st day of October. 1915, and prior to and including November 6, 1915, the defendants held themselves out as public weighers or weighed for the public for compensation, then the defendants would be liable to the plaintiffs for damages in a sum not to exceed \$5 for each load or draft so unlawfully weighed during said time, not to exceed the sum of \$2,500, the amount sued for in this action."

And in instruction No. 6, as follows:

"You are instructed that if you find and believe from the evidence that the weighing of cotton by the defendants was done without charging a weighing fee therefor, then your verdict should be for the defendants; but, on the other hand, if you find and believe from the evidence that the charging of 10 cents upon each bale of cotton weighed by the defendants and designated by said defendants as an insurance fee was but a subterfuge, and was in fact a fee charged by the defendants for the weighing of such cotton, then your verdict should be for the plaintiffs."

[1, 2] The issue made by the pleadings in the instant case was whether or not the plaintiff in error did weigh cotton for the public for hire, and thereby incur the penalty provided by the statute, as claimed in the petition. It will be observed that this issue was squarely presented to the jury in the instructions quoted above. The verdict rendered by the jury was a finding upon that issue, in favor of the public weigher and against the Snyder Co-operative Association. An examination of the record shows that there is abundant testimony therein tending to support the finding and verdict of the jury. The settled rule in this jurisdiction is that the finding and verdict of the jury, in a law action, reasonably supported by the evidence, is conclusive upon the appellate court. Lynch et al. v. Halsell, 34 Okl. 307, 125 Pac. 725. An examination of the record discloses an abundance of testimony tending to support the finding of the jury. The assignment of error under consideration must therefore be overruled.

[3] There was a number of errors assigned in the petition in error, but none of these present any serious question for consideration. For instance, it is urged that the court erred in denying the motion for a continuance presented at the time the case was called for trial; the ground of the motion being that one of the counsel for the plaintiff in error who resided at Snyder, and who had charge of one branch of the defense, was seriously ill and unable to be present at the trial and was in such a mental and physical condition that he could not, with safety to his health, be consulted in regard to the case, and for that reason a postponement of the trial was asked. The court said that the party was represented by two able lawyers present, and denied the continuance. The application was addressed to the sound judicial discretion of the court. It does not appear that in this instance this discretion was abused.

Other assignments are set out in the petition, but an examination of these does not seem to call for specific enumeration or consideration.

No prejudicial error having been shown, we conclude upon the whole record that the judgment appealed from should be affirmed.

PER CURIAM. Adopted in whole.

DICKINSON et al. v. STATE. (No. 8892.) (Supreme Court of Oklahoma. April 30, 1918.)

(Syllabus by the Court.)

1. CRIMINAL LAW @== 1018 - APPELLATE JU-RISDICTION.

A violation of chapter 74, Sess. Laws 1915, is a misdemeanor, and appeal from the judgment of the trial court in an action brought under such statute lies to the Criminal Court of Appeals and not to the Supreme Court.

2. Criminal Law 🖘 1131(2)—Appellate Jurisdiction—Motion to Dismiss.

Even though no motion to dismiss appeal is made, the Supreme Court of Oklahoma will not entertain an appeal in a criminal action.

Commissioners' Opinion, Division No. 1. Error from County Court, Grant County; C. W. Stephenson, Judge.

The county attorney of Grant county filed information on behalf of the State as plaintiff against Jacob M. Dickinson and H. U. Mudge, receivers of the Chicago, Rock Island & Pacific Railway Company. Judgment for complainant, and defendants bring error. Appeal dismissed.

C. O. Blake, John E. Du Mars, R. J. Roberts, and W. H. Moore, all of El Reno, for plaintiffs in error.

STEWART, C. On the 16th day of October, 1915, the county attorney of Grant county, Okl., filed a duly verified information in the county court of such county against the defendants reading as follows, to wit:

"I, the undersigned, county attorney of said county, in the name, and by the authority, and on behalf, of the state of Oklahoma, give the court to know and be informed: That Jacob M. Dickinson and H. U. Mudge are the legally appointed, duly qualified, and acting receivers of the Chicago, Rock Island & Pacific Railway Company, a corporation. That said Jacob M. Dickinson and H. U. Mudge, as the receivers of the Chicago, Rock Island & Pacific Railway Company, a corporation, are operating a railroad runs through said state as a part and portion of what is commonly called the Rock Island System and this particular division extends from Chicago, in the state of Illinois, by way of Kansas City, Mo., and to Galveston in the state of Texas. That said railroad runs through Grant county, Okl., and through the town of Medford, sas City, Mo., and to Galveston in the state or Texas. That said railroad runs through Grant county, Okl., and through the town of Medford, in said county, which town is the county seat of said county. That said defendants Jacob M. Dickinson and H. U. Mudge, as such receivers of the said Chicago, Rock Island & Pacific Railway Company, a corporation, did then and there on the 22d day of June, 1915, run and operate on said railroad running through Medford, the county seat of Grant county and through said on said railroad running through Medford, the county seat of Grant county, and through said county and state as aforesaid a passenger train numbered 32, and commonly called and known as the Firefly, which said train was then and there run, operated, and used for conveying passengers for hire from points or stations in said state; that is to say that said train stopped at Ryan, Duncan, Chickasha, Kingfisher, and Enid in said state of Oklahoma, for the purpose of receiving passengers desiring to ride on such train and for the purpose of delivering passengers desiring to get off at such stations. That said train was engaged in intrastate passenger business in said state of Oklahoma, and passed through said town of Medford, the counpassed through said town of Medford, the county seat of Grant county, and said defendants as such receivers aforesaid did then and there unlawfully fail and refuse to stop said train at uniawrully rail and refuse to stop said train at the depot at Medford, the county seat of Grant county, for the purpose of receiving passengers desiring to ride on such train and for the pur-pose of delivering passengers desiring to get off at said station. Contrary to the form of the statute in such cases made and provided and against the peace and dignity of the state of Oklahoma." Oklahoma.

After filing demurrer to the information, which was overruled, the defendants filed a written plea which they called an answer. The cause was heard on an agreed statement of facts before the court without a jury, resulting in a finding for the state and against the defendants and a judgment against the defendants for \$100 and costs. By written stipulation it is agreed that the action was brought under chapter 74 of the Session Laws of 1915, the first section of which chapter declares it unlawful for a railroad running passenger or mixed trains through this state and engaged in intrastate passenger business, excluding trains engaged only in interstate passenger business, to fail to stop at the depot in each county seat by or through which such trains may run. The chapter consists of two sections: the latter section reading as follows:

"Any company, corporation, lessee or receiver owning or operating a railroad in this state, or running into or through this state, violating the provisions of section 1 of this act shall be guilty of a misdemeanor and upon conviction shall be fined in any sum not exceeding one hun-

dred dollars (\$100.00) for each offense, and each failure to stop any such train engaged in intrastate passenger business at any county seat for the purpose of receiving or discharging passengers shall be and will constitute a separate offense."

[1] Notwithstanding that the statute declares the offense charged to be a misdemeanor and finable as such, the defendants have appealed to this court on the theory that the action is a civil proceeding, and in support of such theory counsel cite the following cases: In re Seagraves, 4 Okl. 422. 48 Pac. 272; Chicago, Rock Island & Pacific Ry. Co. v. Territory, 25 Okl. 238, 105 Pac. 677; State v. Zillmann, 121 Wis. 472, 98 N. W. 543. We cannot agree with counsel that the proceedings had were civil in their nature, and hence reviewable in this court on appeal. To do so would render it necessary for us to construe away the plain language of the statute. No civil action is authorized, and the information was necessarily the commencement of a prosecution for a misdemeanor and not a suit by the state for the recovery of a penalty or forfeiture.

In the case of In re Seagraves, supra, cited by defendants, the court construed a statute of the United States declaring that any person who has been removed from the Indian country and shall thereafter return thereto shall be liable for a penalty of \$1,000, recoverable in an action in the nature of debt in the name of the United States. The court very correctly held that such penalty could not be enforced by criminal proceedings; the statute only authorizing the recovery in a civil action. In Chicago, Rock Island & Pacific Ry. Co. v. Territory, supra, the court construed section 4, chapter 15, of the Laws of Oklahoma Territory, 1903 Code, which authorized the county attorney to bring a civil action for a penalty of \$500 for the benefit of the common schools of his county against any common carrier who accepted and received for shipment and transportation any game the shipping of which was inhibited. The county attorney of Garfield county began a civil action against the Chicago, Rock Island & Pacific Railway Company for recovery under such statute, and the court merely held that, as the evidence showed that the offense was committed in Blaine county, the venue of the action was in that county and not in Garfield county. In State v. Zillmann, supra, the question of the action being a criminal or civil proceeding was not involved; the court therein passing upon the civil liability, under a Wisconsin statute, of members of the board of review who had intentionally omitted or agreed to omit from assessment property liable for taxation. None of the cases cited have the remotest bearing upon the proposition advanced.

[2] While there is no motion to dismiss return on the investment, the ordthe appeal, yet this court will take notice of disturbed on review in this court.

the limits of its jurisdiction, and will not assume jurisdiction vested by statute solely in the Criminal Court of Appeals.

The appeal should have been taken to the Criminal Court of Appeals, and this court is without jurisdiction to entertain the same. The appeal therefore is dismissed.

PER CURIAM. Adopted in whole.

DICKINSON et al. v. STATE. (No. 8893.) (Supreme Court of Oklahoma. April 30, 1918.)

(Syllabus by the Court.)

CRIMINAL LAW \$\infty\$ 1018, 1131(2)—APPELLATE JURISDICTION — STATUTE — MOTION TO DISMISS.

Same as on No. 8892, 172 Pac. 791.

Commissioners' Opinion, Division No. 1. Error from County Court, Grant County; C. W. Stephenson, Judge.

The county attorney of Grant county filed information on behalf of the State, as plaintiff, against Jacob M. Dickinson and H. U. Mudge, receivers of the Chicago, Rock Island & Pacific Railway Company. Judgment for the State, and defendants bring error. Dismissed.

C. O. Blake, John E. Du Mars, R. J. Roberts and W. H. Moore, all of El Reno, for plaintiffs in error.

STEWART, C. This is a companion case to No. 8892, Jacob M. Dickinson et al. v. State, 172 Pac. 791, in which an opinion has just been rendered dismissing the appeal. The two cases involve similar facts and the same propositions of law, and, by agreement, were consolidated in this court.

For the reasons given in the opinion in cause No. 8892, the appeal is dismissed.

PER CURIAM. Adopted in whole.

COMANCHE LIGHT & POWER CO. ▼.
TURNER et al. (No. 8905.)

(Supreme Court of Oklahoma. April 30, 1918.)

(Syllabus by the Court.)

1. ELECTRICITY == 11—SUPPLY—RATES—PUBLIC SERVICE COMMISSION — PRESUMPTION—APPEAL.

APPEAL.

On an appeal from an order of the Corporation Commission fixing the rates to be charged for electric light and other electric service, the presumption obtains, by reason of section 22, art. 9, of the Constitution, that the order is reasonable, just, and correct, and where there is evidence in the record reasonably tending to support the findings of fact as to the value of the property used by the electric company, as a basis for determining what is a reasonable return on the investment, the order will not be disturbed on review in this court.

MISSION-RATE ORDER - REASONABLENESS-AFFIRMANCE.

Evidence in the record examined in connection with the objections urged as to the values fixed by the commission, and held to reasonably support the findings of fact as to values, and in view of the presumption that such order is reasonable, just, and correct, the order must be

Appeal from State Corporation Commis-

Proceeding before the Corporation Commission by W. D. Turner and others against the Comanche Light & Power Company, From an order of the commission fixing its rates for service, defendant appeals. Order affirmed.

John M. Young, of Lawton, and Ames, Chambers, Lowe & Richardson, of Oklahoma City, for plaintiff in error. S. I. McElhoes, of Lawton, for defendants in error.

OWIEN, J. This is an appeal from an order of the Corporation Commission fixing the rates to be charged by the appellant for electric light and other electrical service in the city of Lawton. The only question presented on this appeal is the valuation placed by the commission on appellant's electric plant and accessories, and whether the rates fixed allow a reasonable return upon the investment. The controversy is as to the facts found by the commission and the deductions drawn from same. The principal objections are made to the values fixed for depreciation, going concern value, contractors' profits, and organization expenses.

Evidence was heard as to the value of all the property used in connection with the plant. It is urged on the part of the appellant that the finding as to the values is against the weight of the evidence. The evidence taken is both voluminous and contradictory. That offered on the part of the appellant, if taken as true and without discount, would abundantly support much higher valuations. On the other hand, the evidence offered on part of the complainant before the commission reasonably tends to support the valuations found by the commission.

[1, 2] While the values are not the same. the questions presented on this appeal are identical with the questions presented in the case of Mangum Electric Co. v. City of Mangum (No. 8904, decided this term); the witnesses in most part being the same. The questions presented here, as there, are questions of fact and the same rules of law govern. This order comes to us on appeal with the presumption, under section 22, art. 9, of the Constitution, as being prima facie just, reasonable, and correct, and under the authorities referred to in the Mangum Case, since there is testimony in the record which reasonably tends to support the findings of fact made by the commission, the order must

2. Electricity =11-Public Service Com- port of the findings, we are unable to say the testimony offered on the part of the appellant is sufficient to overcome the constitutional presumption. In re Express Rates, 40 Okl. 237. 138 Pac. 382; S. L. & S. R. R. Co. v. Travelers' Corp., 47 Okl. 374, 148 Pac. 166; Mangum Elec. Co. v. City of Mangum, supra.

The order appealed from is therefore affirmed. All the Justices concur, except TI-SINGER. J., not participating.

MUSKOGEE ELECTRIC TRACTION CO. v. DOERING. (No. 8907.)

(Supreme Court of Oklahoma. April 30, 1918.)

(Syllabus by the Court.)

1. RAILBOADS 4=224 - KILLING OF STOCK-FENCES-LIABILITY.

Where a corporation is chartered to and operates and maintains an electric street rall-way and a suburban or interurban line, for the purpose of transporting passengers, mail, and freight, and in pursuance of such power builds and operates a line from without the limits of and operates a line from without the minus of a municipal corporation to another point without such municipality, for a distance of 5½ miles, through an agricultural section, such line of road being built and operated along private rights of way of said corporation, and not along a public road, such corporation is lia-ble for damages for the killing of stock in the event that such corporation fails to fence and erect cattle guards along said line, without such nunicipal corporation, as provided by section 1435, Revised Laws of 1910, regardless of the fact that it is not guilty of other negligence than the failure to erect such fence and build such cattle guards.

2. Railboads \$\infty 224 - Killing of Stock-Statutes-"Railboad."

A railroad within the meaning of section 1435 is any road laid out and graded, having parallel rails of iron or steel for the wheels of carriages or cars to run, and on which a car is operated for the carriage of passengers or freight, without regard to the motive power by which the care are reported. by which its cars are propelled.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Railroad.]

Commissioners' Opinion. Division No. 1. Error from District Court, Muskogee County; Chas. G. Watts, Judge.

Action by Edward E. Doering against the Muskogee Electric Traction Company. From a judgment of the district court, on appeal from a judgment for plaintiff in the justice's court, directing a verdict for plaintiff, defendant excepts and brings error. Affirmed.

B. B. Blakeney and J. H. Maxey, both of Tulsa, for plaintiff in error. Wm. A. Killey, of Muskogee, for defendant in error.

COLLIER, C. This action was originally commenced in a justice court by the defendant in error, the plaintiff below, against the plaintiff in error, the defendant below, to recover damages for the killing of a horse. Hereinafter the parties will be referred to as they appeared in the court below. The be affirmed. In view of the evidence in sup- case was tried in the justice court, and a

and tried in the district court. Upon the conclusion of the evidence the court directed the jury to return a verdict for the plaintiff for the reasonable market value of the horse. as shown by the evidence, at the time it was killed, and the jury returned a verdict for plaintiff for the sum of \$85, to which the defendant duly excepted. Timely motion was made for a new trial, which was overruled, excepted to, and error brought to this court.

It was admitted in evidence that the defendant is a corporation, and the articles of incorporation of the defendant were introduced in evidence, and showed the nature of defendant's business to be as follows:

"The general nature of the business to be transacted by this corporation is to construct, own, acquire, operate and maintain an electric street railway, and suburban and interurban lines for the purpose of transporting passen-gers, mails and freight and to acquire right of way, station, and terminal grounds for the same by condemnation or purchase, to buy and sell real estate, to manufacture or produce electricity for furnishing light, heat and power and to sell and furnish the same to customers, to prospect for and produce natural gas and to sell and furnish the same to consumers for heating and lighting."

The uncontradicted evidence is that the defendant constructed and operated its lines in the city of Muskogee, and a line of road from Muskogee, beyond its corporate limits, to Hyde Park, a distance of 51/2 miles; that its road from without the corporation of Muskogee did not travel along any public road; that the lines were equipped with the usual electrical overhead equipment and cars were propelled thereon by means of electricity in the usual way; that five or six years prior to the accident, the defendant had permitted the Missouri, Oklahoma & Gulf Railway Company to haul a few cars of freight over this line with a steam engine, but the defendant owned no steam railway equipment and operated none; that the defendant had also moved, at rare intervals, carloads of freight for certain manufacturing establishments located at Hyde Park, but at the time of the accident these manufacturing establishments were closed down, and no carload lots were being moved; that the defendant also carried small packages of freight on its passenger cars for any one who desired to have them transported; that its principal business over this line was that of carrying passengers; that some years prior to the accident the defendant had erected a fence along the south line of plaintiff's property, but the fence

judgment for \$100 was given in favor of the the state; that on February 6, 1915, the plaintiff and against the defendant. From plaintiff left his horses in the barn lot this judgment an appeal was prosecuted to on his farm, and left the gate of the barn open; that the plaintiff knew that the horses could go out on the defendant's right of way; that at one particular place between his stalk field and defendant's right of way, the fence was not over a foot high; that plaintiff had known that this condition of the fence had existed for a long time; that the horses left the barn lot and went into the stalk field, and some time during the night strayed upon the defendant's right of way; that some time during the night, while a car was coming from Hyde Park to Muskogee, a horse belonging to the plaintiff jumped on the tracks in front of the car. not far from plaintiff's farm, and was struck and killed. It was also shown by the evidence that the value of the horse was from \$75 to \$100. The plaintiff announced in open court that he did not claim any negligence on the part of the defendant except the failure to maintain a fence and cattle guards, required by the general railway law. It was stipulated and agreed that plaintiff's farm was in Harris township, Muskogee county, and not within the incorporate limits of the city of Muskogee.

[1, 2] There are very many assignments of error; but, in view of the assertion in plaintiff's brief, there is only one question involved in the case, and that is, Is an electric street or suburban railway, such as the defendant in this case, within the meaning and purview of the general railroad laws of the state, requiring railroad companies to fence their rights of way? It is further stated in plaintiff's brief:

"That if the defendant is a railway com-pany within the meaning of the statutes, the plaintiff was entitled to recover, and the court plaintiff was entitled to recover, and the court should have directed a verdict in his favor. If this defendant is not a railway within the meaning of such statute and not required by that statute to fence its right of way and maintain cattle guards, then the defendant was entitled to a judgment."

It is therefore unnecessary to consider any question involved in this appeal, other than whether or not the defendant, under the statutes of this state, was required to fence its line outside of the incorporation of Muskogee, and to erect cattle guards. Section 1435, Revised Laws 1910, is as follows:

"It shall be the duty of every person or corporation owning or operating any railroad in the state of Oklahoma to fence its road, except at public highways and station grounds, with a good and lawful fence."

Section 1438, Revised Laws 1910, is as follows:

"Whenever any railroad corporation or the leasee, person, company or corporation operating any railroad, shall neglect to build and maintain such lawful fence, such railroad corhad gotten in bad repair and would not have constituted a lawful fence within the meaning of the general railroad laws of struct such fence."

this case, that to avoid liability for killing stock it was the duty of the defendant to fence its road from without the corporation of Muskogee to Hyde Park; that it was a railroad within the meaning of said section: and that having failed to do so, it was liable to the plaintiff for damages for the killing of his horse, without other negligence on the part of the defendant. And there being no conflict in the testimony, the court did not err in instructing the jury to find for the plaintiff for such an amount as might be shown by the evidence was the market value of the horse. The question involved in this appeal has not been directly decided by this court, and we are not unmindful that the authorities are in conflict, but we think that the rule announced by us is fully sustained by the weight of authority. Whether or not it is a railroad cannot be determined by the power with which its cars are operated, and if otherwise coming within the definition of a railroad, it is entirely immaterial whether its cars be operated by steam or electricity, or any other power. In 33 Cyc. p. 33A, the railroad is defined as a road specially laid out and graded, having parallel rails of iron or steel for the wheels of carriages or cars. drawn by steam or other motive power, to run upon. In Massachusetts Loan & Trust Co. et al. v. Hamilton, 88 Fed. 588, 32 C. C. A. 46, it is held:

"The word 'railroad' has no such fixed definition as to enable a court to determine whether, by its mere use in a statute, it applies to street railways or not. It may be used in its broad sense, which includes a street railroad, and any other kind of road on which rails of iron are laid for the wheels of cars to run upon, whether propelled by steam, electricity, horse, or other power, or it may be used in its technical sense, which does not apply to street railroads. As a general rule, statutes are presumed to use words in their popular sense; but the safest rule of construction is to take the entire provisions of the statute, and thereby ascertain, if possible, what the Legislature intended. The meaning must depend upon the context, and be ascertained from the occasion and necessity of the law, the mischief felt, and the object and remedy in view."

It is very clear that the law under review imposes upon a railroad company whether its cars are propelled by steam or electricity, and regardless of the fact that its principal business may be the operation of street cars within a municipality, to fence and erect cattle guards on an interurban line operated by it without a municipality, in order to avoid liability for killing stock, where stock is killed without other negligence than said corporation's failure to comply with said section 1435, Revised Laws 1910. In Riggs v. St. Francois County Railway Co., 120 Mo. App. 335, 96 S. W. 707, it is held:

"In determining whether the term 'railroad corporation' as used in section 1105, Revised Statutes of 1899, applies to a street railway in a given instance, the court must consider the context and purpose of the statute, the char-

We are of the opinion, under the facts in is case, that to avoid liability for killing ock it was the duty of the defendant to nee its road from without the corporation. Muskogee to Hyde Park; that it was a liroad within the meaning of said section; id that having failed to do so, it was liable the plaintiff for damages for the killing his horse, without other negligence on the rof the defendant. And there being no nflict in the testimony, the court did not

In the case of Hannah v. Met. St. Ry. Co., 81 Mo. App. 78, in defining a "Street Railway" the court says:

"A street railway has been variously defined. As the name indicates, the primary meaning of street railway, or street railroad, is one constructed and operated on and along the streets of a city or town for the carriage of persons from one point to another in such city or town or to and from its suburbs. It is peculiarly \* \* for the accommodation of people in cities and towns; its tracks are ordinarily laid to conform to street grades; its cars run at short intervals, stopping at street crossings to take on and discharge passengers, and its business is confined to the carriage of passengers and not freight. Booth on Str. Rys. § 1; Elliott on Roads and Streets, p. 557; Williams v. Railway (C. C.) 41 Fed. 556; Funk v. Railway, 61 Minn. 435 [63 N. W. 1099, 29 L. R. A. 208, 52 Am. St. Rep. 608]. The road in question is quite a different thing from that just described. It is not strictly local in its character; it is not used to carry passengers from corner to corner, or from one section or portion of the city to another, or to transport persons from 'down town' to and from its suburbs; it pays little attention to streets or roads, but takes its course through the country just as any other railroad. \* \* That defendant has changed the motive power from steam to electricity can make no difference; it still remains a railroad within the meaning of the act. Booth on St. Rys. sec. 1, and notes. The law was intended as a protection to stock and to human life. The change from steam power to electricity may lessen the chances for accident, but, as the present case shows, has not rendered the operation of the road entirely safe. The danger still remains, though possibly in a less degree."

In Simoneau v. Pacific Traction Co., 159 Cal. 494, 115 Pac. 320, the court cites Century Dictionary; Standard Dictionary; Bd. of R. R. Com. v. Market St. Ry., 132 Cal. 683, 64 Pac. 1065; Bloxham v. Consumers, etc., Co., 36 Fla. 539, 18 South. 444, 29 L. R. A. 507, 51 Am. St. Rep. 44; Hannah v. Met. St. Ry. Co., 81 Mo. App. 78, and many other authorities, and says:

"Whether or not a railway is a street railway does not depend on the motive power. Nichols v. A. A. & Y. S. R. Co., 87 Mich. 361, 49 N. W. 538 [16 L. R. A. 371]; McNab v. United Ry., etc., Co., 94 Md. 719, 51 Atl. 420 [421]. Various features are to be considered. Among these are the location and method of construction of the track, the manner of the operation of the cars, and the general purpose of the enterprise."

Finding no error in the record, this case is affirmed.

PER CURIAM. Adopted in whole.

STATE ex rel. MORRISON v. CITY OF MUSKOGEE et al. (No. 8884.)

(Supreme Court of Oklahoma, April 30, 1918.)

(Syllabus by the Court.)

1. Pleading 6=4-Motion to Dismiss-An-

The nature of a pleading is determined, not by the title given it by the pleader, but by the subject-matter thereof, and a pleading in the form of a motion to dismiss, and so styled, set-ting up defensive matters, cannot be considered as a motion, but may be treated as an answer.

2. MUNICIPAL CORPORATIONS &=255, 873, 999—OFFICERS—PAYMENT OF MONEY—POWERS—TAXPAYERS' SUIT.

The officers of a city are without lawful authority to pay out money of the city for the purpose of causing a railway company to establish or ratio its base. the purpose or causing a railway company to establish or retain its shops in such city, and if this is done the city officials taking part in the transaction and the railway company receiving the money are liable to the city for double the amount thereof. In case the city, after written demand of at least ten resident taxpayers refuses, fails or neglects to bring suit for the recovery of the same, any resident taxpayer may maintain an action in the name of the state in which the city is made a party defendant against such officers and the railway company for the penalty in twice the amount of the money so unlawfully appropriated; one-half of the recovery to go to the plaintiff as a reward, the remaining one-half to be recovered for the use and benefit of the city.

3. MUNICIPAL COBPOBATIONS \$\infty\$\infty\$\infty\$099 — UN-LAWFUL APPROPRIATION OF MONEY—CITY'S FAILURE TO SUE—SUIT BY TAXPAYER. When a city refuses, fails, or neglects to bring suit when money has been unlawfully paid

out or property unlawfully transferred by city out or property unlawfully transferred by city officials, after written demand by ten or more resident taxpayers that such suit be brought, and thereafter an action is begun by a resident taxpayer to recover the penalty prescribed by sections 6777 and 6778, R. L. 1910, the resident taxpayer bringing the suit has a subtraction in the suit has a substantial interest in the cause of action, which is not affected by a suit subsequently brought

-LIABILITY.

The sureties on the official bonds of city of-ficials against whom a suit has been lodged by a resident taxpayer to recover the penalty pre-scribed by sections 6777 and 6778, R. L. 1910, are not liable on such bonds to plaintiff in such suit, and are not proper parties thereto.

Commissioners' Opinion, Division No. 1. Error from Superior Court, Muskogee County; H. C. Thurman, Judge.

Action by State of Oklahoma, on the relation of G. W. R. Morrison, against the City of Muskogee and others. Judgment for defendants, and plaintiff appeals. and remanded, with directions.

Chas. Bagg, of Muskogee, for plaintiff in error. O. L. Rider, of Vinita, for defendant in error Southern Surety Co.

STEWART, C. The action in this case was brought by a resident taxpayer of the city of Muskogee under sections 6777 and 6778, which read as follows:

6777: "Every officer of any county, township, city, town, or school district, who shall order or direct the payment of any money or transfer of any property belonging to such county, township, city, town or school district in settlement of any claim known to such officers to be fraudulent or void, or in pursuance ncers to be fraudulent or void, or in pursuance of any unauthorized, unlawful or fraudulent contract or agreement made or attempted to be made, for any such county, township, city, town or school district by any officer thereof, and every person, having notice of the facts, with whom such unauthorized, unlawful or fraudulent activate the state of the facts. lent contract shall have been made, or to whom, or for whose benefit such money shall be paid or such transfer of property shall be made, shall be jointly and severally liable in damages snail be jointly and severally liable in damages to all innocent persons in any manner injured thereby, and shall be furthermore jointly and severally liable to the county, township, city, town or school district affected, for double the amount of all such sums of money so paid, and double the value of property so transferred, and double the value of property so transferred,

the amount of all such sums of money so paid, and double the value of property so transferred, as a penalty, to be recovered at the suit of the proper officers of such county, township, city, town or school district or, of any resident taxpayer thereof, as hereinafter provided."

6778: "Upon the refusal, failure or neglect of the proper officers of any county, township, city, town or school district, after written demand made upon them by ten resident taxpayers of such county, township, city, town or school district, to institute or diligently prosecute proper proceedings at law or in equity for the recovery of any money or property belonging to such county, township, city, town or school district, 'paid out or transferred by any officer thereof in pursuance of any unauthorized, unlawful, fraudulent or void contract, made, or attempted to be made, by any of its officers for any such county, township, city, town or school district, or for the penalty provided in the preceding section, any resident taxpayer of such county, township, city, town or school district affected by such payment or transfer, after serving the notice aforesaid and after giving security for cost, may, in the name of the state of Oklahoma as plaintiff, institute and maintain any proper action which the proper officers of the county, township, city, town or school district might institute and maintain for the recovery of such property, or for said penalty; and such municipality shall in tain for the recovery of such property, or for said penalty; and such municipality shall in such event be made defendant, and one-half the amount of money and one-half the value of the property recovered in any action maintained at the expense of a resident taxpayer under this section, shall be paid to such resident taxpayer as a reward."

The substantial allegations in plaintiff's petition are that the plaintiff is a resident taxpayer of the city of Muskogee, Okl., and that the defendants James King, Joe McCusker, and W. N. Patterson as the duly qualifled and acting commissioners, and the defendant Franklin Miller as the duly qualified and acting mayor of the city of Muskogee, such officers constituting the city council of such city, did on the 28th day of March, 1916, in pursuance of a contract and agreement with the defendant Midland Valley Railroad Company, cause the amount of \$70,-000 to be paid to the Midland Valley Railroad Company for the purpose of retaining the shops and general offices of such company at the city of Muskogee, such \$70,000 being appropriated out of a fund of \$80,000 arising from the sale of bonds issued by the city for



parks: that the defendant Midland Valley Railroad Company accepted and used the money so appropriated; that on the 7th day of May, 1916, and again on the 14th day of July, 1916, there was duly served upon the proper officers of the defendant city of Muskogee a written demand of more than ten resident taxpayers of such city that the city institute or cause to be instituted and prosecuted proceedings for the recovery of the penalty arising because of such money being so unlawfully appropriated and paid to the defendant Midland Valley Railroad Company; but such officers and each of them refused, failed, and neglected to do so. Plaintiff asked for judgment in the sum of \$140,000 against the defendants James King, Joe Mc-Cusker, and W. N. Patterson, Frank Miller, Midland Valley Railroad Company, and certain surety companies named who were sureties on the official bonds of the municipal officers so named; the city of Muskogee being made a party defendant as required by statute. The action of plaintiff was begun on the 1st day of September, 1916. On September 28, 1916, the defendant city of Muskogee filed a pleading which was styled "Motion to Dismiss," setting forth the following alleged grounds for dismissal, to wit:

"First. That on the 29th day of September, 1916, suit was filed by the city of Muskogee to recover the amount so unlawfully expended; the same being filed within six months after the right thereof accrued, and more than six months before said cause was barred by limitation. Second. That said cause was prematation. Second. That said cause was prematurely brought, in that the time for the bringing of such action by the city of Muskogee had not expired, nor had said city refused to bring said action or been guilty of laches. Third. That a reasonable time had not expired from the giving of the notice by the taxpayers to the city officials before the bringing of plaintiff's action." tiff's action.'

[1] The motion to dismiss, filed by the defendant city of Muskogee, is without precedent in the judicial procedure of this state. The trial court was not authorized to consider the matters set forth in a motion to dismiss. The nature of a pleading filed, however, is determined, not by the title given the same by the pleader, but by the subject-matter thereof, and it will be readily discovered that the so-called motion partook both of the nature of a demurrer and an answer. As a demurrer and an answer cannot be combined under our procedure, the utmost consideration that can be accorded the pleading would be to give it the effect of an answer and, if, considered as an answer, the same raised any material issue between the plaintiff and defendants, it was the duty of the court, in the absence of further pleading or amendment, to try the cause on the issue so raised. This the court did not do, but without the introduction of any evidence, dismissed the plaintiff's cause of action.

[2-4] It has been settled by former hold-

the purchasing of additional sites for public | forth in plaintiff's petition constitute a cause of action in favor of a resident taxpayer and against officials so appropriating the funds of the municipality and against those to whom and for whose benefit such money was paid. State ex rel. Schilling v. Oklahoma City et al., 168 Pac. 227; Territory ex rel. Johnston et al. v. Woolsey, 35 Okl. 545, 130 Pac. 934: McGuire v. Skelton et al., 36 Okl. 500, 129 Pac. 729. In State ex rel. Schilling v. Oklahoma City, it was held that the action being for a penalty fixed by statute for unlawfully allowing and paying out moneys of a municipality, the sureties on the official bonds of the municipal officers are not liable; it must therefore follow that plaintiff's petition did not state a cause of action against the surety companies mentioned as defendants. Such being the law, the dismissal of the cause of action as to such surety companies will not be disturbed. The petition, however, states a cause of action against the city officials and the Midland Valley Railroad Company, and under the statute the city of Muskogee was properly made a party defendant. Under the allegations in the petition, the plaintiff was authorized to maintain an action for the full amount sued for; one-half of the recovery to belong to the plaintiff as a reward, the remaining one-half to be for the use and benefit of the city. Considering the motion to dismiss as an answer, we must hold that the first ground does not state a defense. The action brought by the city of Muskogee on the 29th day of September, 1916, does not affect the action brought by the resident taxpayer on September 1, 1916. In State ex rel. Schilling v. Oklahoma City, supra, this court savs:

"Defendants say that the plaintiff has no real interest in the cause of action, which belongs to the city, and that he is only allowed to use the name of the state for the use and benefit of the city. In the event a recovery is had one-half of the value of the property and one-half of all moneys collected is paid to him as a reward. He is required to give security for costs so as to save the city harmless, and he therefore has a substantial interest in the subject-matter of the litigation."

The second ground cannot be said to raise an issue. Under the allegations in the petition, notice was served both on May 7, 1916, and on July 14, 1916, which is not denied in the motion to dismiss. The statutes do not afford the officers of the city any particular time within which to bring the action, after the written demand, but provide that, on "refusal, failure or neglect" to bring the action after such demand, an action may be brought by any resident taxpayer for the penalty. Assuming that a reasonable time should be allowed to bring action, we are of the opinion that the city, if the allegations of the petition are true, had ample time for such purpose. It is alleged in the so-called motion that the city "had not refused to ings of this court that such facts as are set bring the action," but it is not alleged that the same, nor is it claimed that the demandants were notified of the willingness of the city officials to bring the suit or of any steps taken toward that end.

For the reasons already advanced the third ground also fails to state a defense.

The cause is reversed and remanded for a new trial, with directions to reinstate plaintiff's petition, to allow the defendants. against whom it is herein held that the petition states a cause of action, to file answer, and that the court proceed otherwise in a manner not inconsistent with the opinion.

PER CURIAM. Adopted in whole.

## CALLAHAM et al. v. THURMOND. (No. 6333.)

(Supreme Court of Oklahoma. April 30, 1918.)

(Syllabus by the Court.)

1. BILLS AND NOTES €== 473 - DEFENSE · STRIKING ANSWER.

In an action upon a promissory note, where the answer of the defendant pleaded usury the answer of the defendant pleaded usury charged, no consideration, the existence of agency between the present payee and the cashier of the former payee, and knowledge on the part of the present payee as to usury being embraced therein, the same stated good defenses, if true, to said note, and it was error to sustain a motion to strike out that part of said pleadings which pleaded the same.

(Additional Syllabus by Editorial Staff.)

2. USUBY 6=136-RENEWAL NOTES-STATUTE. When a usurious transaction was kept alive by the execution and delivery of renewal notes after Rev. Laws 1910, § 1005, went into effect, the statute was applicable.

Commissioners' Opinion, Division No. 3. Error from County Court, Rogers Mills County; W. H. Mouser, Judge.

Action by I. C. Thurmond against Frank W. Callaham and another. Motion to strike certain paragraphs of the answer sustained. and defendants bring error. Reversed, and cause remanded for new trial.

H. P. Bailey, of Oklahoma City, for plaintiffs in error. E. L. Mitchell, of Clinton, and Perry Madden, of Cheyenne, for defendant in error.

HOOKER, C. The defendant in error on the 10th day of July, 1913, commenced his action in the county court of Rogers Mills county against the plaintiffs in error to recover a judgment upon a promissory note alleged to have been executed and delivered by them to him on the 19th day of February. 1912, whereby they promised on December 1, 1912, to pay to him, the said I. C. Thurmond. the sum of \$560.63, with interest at the rate of 10 per cent. per annum after maturity, and the further sum of \$60 as attorney fees

the city had not failed or neglected to bring said defendant in error further sought a foreclosure of a chattel mortgage given by them to secure the payment of the aforesaid note and for a sale of the property and an application of the proceeds to the satisfaction of his debt.

> The plaintiffs in error filed an answer in said cause which was as follows to wit:

> "(1) Defendants deny each and every material allegation in plaintiff's petition except such as are hereinafter admitted or specifically denied.
>
> "(2) Defendants admit they signed the note and mortgage sued on but did so under the fol-

> lowing conditions:
>
> "(3) Defendants allege that on the 30th day of November, 1908, defendant Frank W. Callaham, together with W. H. Callaham made and executed to the Cheyenne State Bank their promissory note for \$272 due and payable on the 1st day of December 1909, and at the same time executed a chattel mortgage to secure the payment of said note; that said note and mortgage were given in consideration of \$200 and no more borrowed of said bank by Frank W. Callaham and W. H. Callaham; that there was at that time 36 per cent. on the \$200 estimated thereon for the time said note had to run; to wit, one year, and was added to and made a part of the principal therein, being 26 per cent. more than the highest legal rate of interest allowed by law in the state of Oklahoma; that to secure the payment of said \$272 said F. W. and W. H. Callaham executed a mortgage on said personal

> "(4) Defendants further aver that on the 6th day of January, 1910, there was rightfully due and owing to the Cheyenne State Bank the sum and owing to the State Bank the sum and seaforesaid \$200 and \$22 of money borrowed as aforesaid \$200 and \$22 interest, making \$222; that F. W. and W. H. Callaham asked and requested by said bank in order to get an extension of time to pay their indebtedness to make and sign a note and mort-gage of \$471.22, being \$249.22 more than 10 per cent. on the sum borrowed, \$200 for the time from cent. on the sum borrowed, \$200 for the time from November 30, 1908, to the date of making said note and mortgage; that no additional sum of money was gotten by said F. W. Callaham and W. H. Callaham; that the \$249.22 was usury charged by said Cheyenne State Bank against said Callahams. Copies of said note and mortgage are herewith filed as part hereof. \* \* \* ""(5) Defendants allege that mon the 24th days

> "(5) Defendants allege that upon the 24th day of March, 1911, defendant F. W. Callaham paid the Cheyenne State Bank \$100 to be applied in payment of the indebtedness aforesaid of F. W. payment of the indebtedness atoresaid of r. w. and W. H. Callaham and that there appears on the back of said \$471.22 note a credit of \$95.64 entered upon said note on the 12th day of April, 1911, which lacked \$4.36 covering the amount paid; that again on the 15th day of April, 1911, defendant, F. W. Callaham paid said bank \$200, \$107.36 of which should have been applied in payment of the indebtedness of said Callahams aforesaid, but the same does not appear to have aforesaid, but the same does not appear to have been applied or accounted for by said bank to the credit of said Callahams; that F. W. and W. H. Callaham executed a mortgage to secure the payment of said note, what they legally ow-ed and usury as well on the same property em-

ed and usury as well on the same property embraced in the first mortgage above mentioned and other property, as shown by copy of said mortgage filed herewith as a part hereof, etc. "(6) Defendants aver that on the 4th day of May, 1911, defendant F. W. Callaham and W. H. Callaham owed the Cheyenne State Bank \$40.22, being the amount of the \$200 originally borrowed by defendant F. W. Callaham and W. H. Callaham with 10 per cent, interest thereon. H. Callaham with 10 per cent. interest thereon, subject to the payments made as aforesaid. Dein the event said note was placed in the hands of an attorney for collection, and the were asked and required by S. Jackson, cashier

of the Cheyenne State Bank, to again execute a the same is based upon a consideration which is new note and mortgage to secure the balance in part, at least, illegal and contrary to law, to of their indebtedness to said bank of the originew note and mortgage to secure the balance of their indebtedness to said bank of the original loan of \$200, which at that time rightfully and legally amounted to \$40, and no more. The defendant F. W. Callaham and W. H. Callaham being limited in education unable to compute interest by partial payments and reposing implicit confidence in Mr. S. Jackson to deal fairly and honestly with them they did on said 4th day of May, 1911, make and execute to one I. C. Thurmond their note and mortgage for \$492.63, when in truth and fact they only owed a balance of \$40.02, making said note and mortgage express an usurious indebtedness of \$456.61, which they did not and do not now owe to I. C. Thurmond, whom they did not and do not now know; never had any acquaintance with I. C. Thurmond; never got any money or other prop-erty from said I. C. Thurmond. \* \* \* "(7) Defendants aver that there appears in-dorsed upon the back of said \$492.63 note cred-

ited as follows to wit:

10–17–11 \$10 12–4–11 10 12–16–11 20

which being deducted from the balance really owing by defendants leaves \$2.12 still due from these defendants; that on the day the note and mortgage sued on was executed by defendants there was due and owing from defendant F. W. and W. H. Callaham the sum of \$2.15. At that time, as before, these defendants were requested and required by S. Jackson aforesaid to make and execute the note and mortgage sued on or suit would be commenced to foreclose the mortgage then securing the \$492.63 note. Defendants did not willingly sign said note and mortgage, but felt that they were compelled to do so to save their property from seizure and sale; said mortgage covering all the personal property they then owned.

"(8) Defendants aver that the note and mort-gage sued on is the result of one continuous transaction without any increase or change in the consideration passing to defendants since F. W. Callaham and W. H. Callaham borrowed F. W. Callaham and W. H. Callaham borrowed \$200 of the Cheyenne State Bank on the 30th day of November, 1908, hereinbefore set out; that defendants never at any time got any money or other property from I. C. Thurmond, and at the time F. W. Callaham and W. H. Callaham signed the \$492.63 note made payable to I. C. Thurmond they did not read said note and did not know that it was made payable to said did not know that it was made payable to said Thurmond; they, knowing it was a renewal of their former note to the Cheyenne State Bank, understood it to be payable to said bank; that the change of the payee in said note and mortgage was a mere plan and scheme upon the part of S. Jackson, the agent and representative of I. C. Thurmond, and formerly representing the Cheyenne State Bank, to force F. W. Callaham and W. H. Callaham and these defendants to pay a sum of money which they did not morally and legally owe.

"(9) Defendants allege that the whole of the note sued on, to wit, \$560.63, is usury, except \$2.20, which being deducted leaves \$558.43, usury charged and now sought to be collected from

ry charged and now sought to be collected from these defendants.

(10) Defendants aver that after all their indebtedness which they are, or ever have been, liable to pay plaintiff has been fully satisfied, the plaintiff then is legally indebted to them in

the sum of \$1,116.83.

"(11) Defendants aver that it was the duty of the plaintiff, I. C. Thurmond, to know and that he did know and intentionally charged the usury contained in the notes aforesaid made payable to him the note sued on; that the notes and mortgages were based upon an illegal and usurious consideration, to wit, \$558.43, aforesaid.

"(12) Defendants aver that they do not owe

wit, usury. \* \*

"The defendants pray that the plaintiff take nothing by his suit; that the note and mortgage sued on be canceled and held for naught; and that the defendants have judgment against the plaintiff for double the amount of the usury charged, in all \$950, and attorney fees," etc.

[1] Thereafter the plaintiff filed a motion in said court to strike all of paragraphs 3, 4, 5, and a certain part of paragraph 6, and all of paragraphs 7, 8, 9, 10, 11, and 12 therefrom, which motion was by the court sustained. An exception was duly saved thereto by the defendant below. And in the motion for a new trial the action of the court in sustaining said motion to strike was assigned as one of the reasons why a new trial should be granted, and the same is so assigned in the petition in error presented to this court. This constituted error. By reference to the paragraphs in said answer it can readily be seen that the defendant below pleaded usury, charged no consideration, and also specifically alleged the allegations of agency to exist between S. Jackson and the defendant in error, I. C. Thurmond, and knowledge on the part of Thurmond as to usury being charged and embraced in said And the facts and circumstances note. were specifically set forth in said answer to establish the amount of usury charged, and also it pleaded payment of certain sums of money, all of which defenses were entirely eliminated by the action of the court in striking the paragraphs from the answer.

The evidence in this case clearly establishes that the plaintiffs in error only received the sum of \$200 as the consideration for the various notes executed by them, as shown herein. This indebtedness was created on the 30th of November, 1908, and a note for the sum of \$272 payable December 1, 1909, was executed. Upon said note the interest was paid up to January 1, 1910, and on January 6, 1910, the plaintiffs in error executed another note for the sum of \$471.22 due July 1, 1910, drawing 10 per cent. interest after maturity, upon which there was paid interest from October 1, 1911, and in addition thereto there was paid on April 12, 1911, the sum of \$95.64, and on March 24, 1911, the sum of \$100 as appears from the indorsements upon said note. But all the testimony shows that the payment of March 24, 1911, was \$107.36, and that on April 12, 1911, was \$100. On May 4, 1911, a new note for said indebtedness was executed due December 1, 1911, payable to the defendant in error, I. C. Thurmond, for the sum of \$492.63. The other notes were executed to the Cheyenne State Bank, of which S. Jackson was the cashier, and at his instance Thurmond was named as payee of this note of May 4, 1911. The plaintiffs in error did not know him, did not borrow or obtain money from him, never saw him in their any part of the note sued on, for the reason that life, nor he them, and that part of the answer here which was stricken out upon motion alleges that the substitution of the payee in said note was a sham in order to cover up and shield the obligation from the usury charged. Upon this last-named note there appears three credits as follows:

 October 17, 1911
 \$10

 December 4, 1911
 10

 December 16, 1911
 20

On the 19th of February, 1912, the defendants in error executed their note for \$560.63, whereby they promised to pay I. C. Thurmond, December 1, 1912, \$560.63, with 10 per cent. interest after maturity as stated hereinabove. It appears that the more the plaintiffs in error paid upon these obligations the larger the same became.

If any justification was ever needed for the enactment of a usury law in the state of Oklahoma, the facts and circumstances of this case clearly demonstrate it. How the conscience of any individual could knowingly approve the usurious exaction established by this record is inconceivable. The original loan of \$200, upon which there has been paid more than the principal and the lawful rate of interest, leaving an-indebtedness of nearly three times the amount of the original loan, is shown by this record. While the original indebtedness was created in 1908, the subsequent renewals, by the execution of new notes, were not payments within contemplation of law, but extended all usury charged into the new obligations. See Anderson v. Tatro, 44 Okl. 219, 144 Pac. 360; Bank of Tuttle v. Gordon, 161 Pac. 1081; Bank v. Sensebaugh, 160 Pac. 456.

[2] This transaction having been kept alive by the execution and delivery of renewal notes after section 1005, Rev. Laws 1910, went into effect, the same is applicable here.

The testimony of the defendant in error is far from convincing that he in good faith acquired the ownership of the note in question. In fact to the casual observer the transaction seems to be a subterfuge used by the cashier of the Cheyenne State Bank to avoid the consequence of an unconscienable transaction, and if the allegations of the answer be true that Jackson in these transactions was the agent of the defendant in error, he (Thurmond) should be compelled to pay the penalty prescribed by section 1005, Rev. Laws 1910, for his unreasonable exactions. For the reasons stated we are of the opinion that that part of the answer which was eliminated upon motion of the plaintiff below stated a defense to the cause of action sued for herein by the plaintiff below, and the trial court committed error in so holding.

There are numerous assignments of error presented here, but it is only necessary, in our judgment, to consider the case as we have, for since this case was decided our court has construed the sections of the statute with reference to usury in several cases, and the other errors are not likely to occur upon a new trial of this action.

The judgment of the lower court therefore is reversed, and this cause remanded for a new trial.

PER CURIAM. Adopted in whole.

#### McNAMEE v. FIRST NAT. BANK OF ROSEBURG.

(Supreme Court of Oregon. May 21, 1918.)

1. NEW TRIAL \$==71-Conflicting Evidence. In a depositor's action against a bank to recover a deposit alleged to have been wrongfully withdrawn by a third person, where there was evidence on both sides as to the issue of such third person's authority, the question was for the jury, and the court below was powerless to get the results aside as not instiffed by the or to set the verdict aside as not justified by the evidence

2. WITNESSES & 219(3) — PRIVILEGED COM-MUNICATIONS—WAIVER.

MUNICATIONS—WAIVER.

In a depositor's action against a bank to recover a deposit which the bank claimed it had paid to a third person on plaintiff's authority, a letter written by him to an attorney, offering to engage his services and referring to the investment of the money withdrawn, was not privileged as a communication between client and attorney within L. O. L. § 733, subd. 2, in view of section 734, providing that if a party offer himself as a witness, it is to be deemed a consent to the examination, also of an attorney, etc., on the same subject; the plaintiff having appeared as a witness in his own behalf and having testified to the bank's indebtedness, which was the subject on which the letter was offered. the letter was offered.

Department 1. Appeal from Circuit Court, Douglas County; J. W. Hamilton, Judge. Action by G. P. McNamee against the First

National Bank of Roseburg, Or. Verdict and judgment for defendant. From an order granting a new trial, defendant appeals. Reversed.

Between January 22, 1906, and November 18, 1910, G. P. McNamee deposited \$6,057.92 with the First National Bank of Roseburg, and he withdrew \$3,101.32, leaving a balance of \$2,956.60, which he is attempting to recover in this action. The bank defended by averring that the alleged balance of \$2,956.60 had been withdrawn by T. R. Sheridan pursuant to authority conferred upon him by the plaintiff. There was a verdict and judgment for the defendant; but upon the motion of the plaintiff the court set aside the verdict and judgment and granted a new trial, and the defendant appealed.

O. P. Coshow, of Roseburg, for appellant. Frank G. Micelli, of Portland (John T. Long, of Roseburg, on the brief), for respondent.

HARRIS, J. Under date of February 9. 1913, the plaintiff mailed to O. P. Coshow, an attorney residing at Roseburg, a letter the language of which is as follows:

"Inclosed please find the copy of three let-ters which I received from Mr. T. R. Sheridan in regard to money which he drew out of the First National Bank of Roseburg to loan for me, also one from the bank examiner. Now, this money was taken out very near two years ago and I have not received any interest on it. Mr. Sheridan has not as yet sent me anything to secure me or informed me who he loaned it to although I wrote him two letters, the first he answered as you will see, the other he has not answered yet although I wrote him over a month ago. I wish you would see him or who-

ever represents him and find out who has the money and what security he has for it. I also wish you would look after this for me. See that I get proper security for it. The party whoever has it may have it for two or three party longer by significant and consider the party who we have a security in the party who was a security in the party who we have a security when the party who we have a security who who we have a security who we have a security who we have a security w years longer by giving good security in the way of mortgage by paying the interest. Let me know as soon as possible if you can do anything for me. If you want the original of those letters, let me know and I will send them to you."

Mr. Coshow, who was acting as attorney for T. R. Sheridan and had for some time been the attorney of record for the bank in certain proceedings, promptly answered and declined to represent Mr. McNamee "because of conflicting interests." Referring to the letter addressed to Mr. Coshow, the plaintiff testified thus:

"I endeavored to employ Mr. Coshow as my attorney. He, being Mr. Sheridan's attorney replied back that he could not handle the case. Then I employed another attorney.'

This action was commenced in July, 1915. Mr. Coshow appeared as the attorney of record for the defendant in this action.

The plaintiff was called as a witness in his own behalf, and on his direct examination he testified that he had on deposit in the bank a balance of \$2,956.60, which he had never withdrawn "either directly or indirectly." On cross-examination he was shown the letter which he had written to Mr. Coshow, and, upon being asked under what circumstances he had written it, he answered:

"I wrote it to him, asking him to take my case up and see if he could not get my money.

The defendant then offered the letter in evidence. The plaintiff objected "upon the ground that it relates to a matter between an attorney and client and is confidential"; but the court received the letter and allowed the plaintiff an exception. On redirect examination the plaintiff testified that he never gave Sheridan authority to withdraw the money from the bank; and, again, when called in rebuttal as a witness in his own behalf, the plaintiff testified generally upon the same subject.

The motion for a new trial assigned three grounds for setting aside the verdict.

"First. That the evidence introduced by the defendant in the trial of said cause is insuffi-cient to support the verdict or justify the same. "Second. That said verdict is contrary to

"Second. That said verdict is contrary to the evidence and against the law.

"Third. That there was error in law occurring at the trial of said cause and excepted to by plaintiff in this: First. That the court erred in permitting the introduction in evidence, over plaintiff's objection, the letter written by the plaintiff, G. P. McNamee, to Attorney O. P. Coshow, which said letter being designated as defendant's Exhibit. C' for the reaignated as defendant's 'Exhibit C' for the reaignated as detendant's 'Exhibit C' for the reason that said letter was a privileged communication between an attorney and client, and that the same was wholly inadmissible in the trial of said cause; that by reason of the introduction of said communication and letter plaintiff's cause was prejudiced in the trial of said cause before the jury."

authorized Sheridan to withdraw the money. If there was evidence upon both sides of the issue it was the duty of the court to submit the question to the jury for decision: and, after the jury decided the question, the court could not disturb the verdict, even though the court believed it to be against the weight of evidence. Sullivan v. Wakefield, 65 Or. 528, 535, 133 Pac. 641. The record presented to us does not contain any of the evidence received at the trial, except the testimony of the plaintiff and certain exhibits; and, although the bill of exceptions is not accompanied by all the evidence, nevertheless it does disclose some evidence upon which the jurors could have rested their conclusion; and consequently the court was powerless to set aside the verdict on either of the first two grounds specified in the motion for a new, trial. Kahn v. Home Tel. & Tel. Co., 78 Or. 308, 315, 152 Pac, 240,

[2] Although Mr. McNamee merely attempted to employ Mr. Coshow as an attorney, it may be assumed, for the purposes of the instant case, that the latter was "an attorney" and the former was "his client" within the meaning of section 733, subd. 2, L. O. L., and that the letter addressed to the attorney was a privileged communication entitled to the protection of the statute. Ency. of Ev. 230; 40 Cyc. 2366. However, section 734, L. O. L., provides that:

"If a party to the action, suit, or proceeding offer himself as a witness, that is to be deemed a consent to the examination also of a wife, husband, attorney, clergyman, physician, or surgeon on the same subject, within the meaning of subdivisions 1, 2, 3, and 4 of the last section" tion.

When the plaintiff appeared as a witness in his own behalf and testified that the bank had \$2,956.60 of his money which he had never withdrawn, "either directly or indirectly," he must be deemed to have consented to the examination of the attorney "on the same subject," because it is manifest that the written communication is "on the same subject" concerning which the plaintiff testified on his direct examination. The very moment the communication was uttered the law covered it with a shield for the purpose of protecting the plaintiff, but when he removed the shield by appearing as a witness for himself the communication ceased to be protected, and became subject to judicial view, and hence it could be disclosed by cross-examining the plaintiff or by calling the attorney as a witness. Fowler v. Phœnix Ins. Co., 35 Or. 559, 568, 57 Pac. 421; Young's Estate, 59 Or. 348, 354, 116 Pac. 95, 1060, Ann. Cas. 1913B, 1310; Forrest v. Portland Ry, L. & P. Co., 64 Or. 240, 244, 129 Pac. 1048; Gerlinger v. Frank, 74 Or. 517, 520, 145 Pac. 1069.

Our statute is more liberal than the statutes of most of the states which have legisOklahoma, however, have statutes similar to section 734, L. O. L., and the courts of those two states have given the same construction to their respective statutes as we have to ours. 5 Page and Adams Annotated Ohio General Code, § 11,494; King v. Barrett, 11 Ohio St. 261; Duttenhofer v. State, 34 Ohio St. 91, 32 Am. Rep. 362; 2 Rev. Laws of Oklahoma, 1910, § 5050; Tulsa v. Wicker, 42 Okl. 539, 141 Pac. 963,

It was error to set aside the verdict of the jury and the judgment appealed from is therefore reversed.

McBRIDE, C. J., and BENSON and BUR-NETT, JJ., concur.

# STATE v. FORD et al. \*

(Supreme Court of Oregon. May 14, 1918.) Forgery \$\sim 9\$—False Recital in Deed.

1. FORGERY & P-PALSE RECITAL IN DEED.

False recital in deed that E., who signed deed with defendant, was his wife, deed purporting to be deed of said parties, and being executed by E. under the name by which she was known, did not constitute forgery under L. O. L. § 1996, providing that if any person shall with intent to injure or defraud, falsely make, alter, forge, or counterfeit any deed, or shall with such intent knowingly utter or publish as true or genuine any such false, altered, forged, or counterfeited writing, shall be nunforged, or counterfeited writing, shall be punished, etc.; there being no intent to utter deed as that of others.

2. Names €==20 - Common-Law Right to

CHANGE.
L. O. L. § 7093, empowering the county court to hear and determine applications for change of names, does not abrogate the common-law right of a person to change his name. 3. EVIDENCE \$\infty 80(2)\to Presumption as to Laws of Sister State\to Common Law.

In the absence of evidence, it must be assumed that the common-law right of a person to change her name obtains in a sister state.

Department 2. Appeal from Circuit Court, Multnomah County; George N. Davis, Judge. H. N. Ford and Elizabeth G. Frary were charged with forgery, and the former was

convicted, and he appeals. Reversed.

The defendant was convicted of the crime of forging a deed in favor of J. D. McKinnon. May 12, 1914. The conviction is based on the contention of the state that he caused the deed in question to be signed by Elizabeth G. Frary, who signed her name as Elizabeth G. Ford, and who is described in the body of the deed as appellant's wife. The state claims that she was not his wife, and that he had a wife living at the date of the deed. The state also claims that the deed was executed with intent to injure and defraud.

It appears that appellant went to Alaska in 1898; that he there met Caroline C. S. Vogt, a young woman about his own age. While living in the neighborhood of Eagle City they agreed to marry. The state's evidence is to the effect that there was no clergyman or officer authorized to celebrate a marriage to be lated upon the subject of waiver. Ohio and found in that part of the country. On DeHobbs, a notary public residing at Eagle City, and entered into a contract of marriage. A certificate to this effect was issued by the notary under his official seal, and there is evidence that the notary, who was also an attorney at law, advised them that a contract of marriage so entered into was valid and lawful. The parties to the contract lived together as man and wife for ten years thereafter, visiting appellant's relatives in Michigan and North Dakota, and residing in several different places. They were everywhere treated as man and wife, appellant repeatedly acknowledging the relation. Four children were born to them, one of whom, a daughter 12 years of age, testified at the trial.

In 1908 appellant ceased to live with Caroline C. S. Ford, but he continued to contribute to her support until 1914. In 1907 appellant began living with Elizabeth G. Frary. He entered into a written contract of marriage with her, but there was no ceremony performed until after the execution of the deed on which this prosecution is based. Appellant from and after 1908 lived openly with Elizabeth G. Frary, introduced her to a number of persons as his wife, and she went under the name of Elizabeth G. Ford.

In 1914 appellant associated himself with J. D. McKinnon and F. C. Sharkey for the purchase of live stock for the Alaska market. McKinnon advanced \$15,000 to finance the enterprise, and the parties agreed to share profits and losses equally. For the purpose of indemnifying McKinnon for any loss chargeable to appellant the deed in question was executed. It purported to be a warranty deed, but was in effect a mortgage.

John C. McCue and Wm. A. Williams, both of Portland, for appellant. Charles C. Hindman, Deputy Dist. Atty., of Portland (Walter H. Evans, Dist. Atty., and John A. Collier, Deputy Dist. Atty., both of Portland, on the brief), for the State.

McCAMANT, J. (after stating the facts as above). [1] Counsel for the respective parties have lavished a wealth of learning and research on the question of the validity of the contract marriage celebrated December 24, 1898, at Eagle City, Alaska. We shall assume without deciding that this marriage was valid. Can it be said on this assumption that appellant forged the deed set out in the indictment? Section 1996, L. O. L., in so far as it is material here, is as follows:

"If any person shall, with intent to injure or defraud any one, falsely make, alter, forge, or counterfeit any \* \* \* contract, \* \* \* deed, \* \* \* or shall, with such intent, knowingly utter or publish as true or genuine any such false, altered, forged, or counterfeited \* \* \* writing \* \* \* such person, upon conviction thereof, shall be punished. \* \* \*"

This statute has been construed by the court in State v. Wheeler, 20 Or. 192, 195, 25

cember 24, 1898, they appeared before J. F. Pac. 394, 10 L. R. A. 779, 23 Am. St. Rep. 119. Hobbs, a notary public residing at Eagle It is there held that:

"The essential elements of the crime are: (1) A false making of some instrument in writing; (2) a fraudulent intent; (3) an instrument apparently capable of effecting a fraud."

Assuming that Caroline C. S. Ford was appellant's wife May 12, 1914, when the deed was executed, the deed contained a false recital in that it described Elizabeth G. Ford as the wife of H. N. Ford. The deed did not purport to be the deed of Caroline C. S. Ford, or of any one else than H. N. Ford and Elizabeth G. Ford, who signed it. In his scholarly opinion in State v. Wheeler, supra, Mr. Justice Bean says:

"The term 'falsely,' as applied to making a promissory note in order to constitute forgery, has reference not to the contract or tenor of the instrument, or the fact stated in the writing, because a note or writing containing a true statement may be forged or counterfeited as well as any other; but it implies that the writing is false, not genuine, fictitious, not a true writing, without regard to the truth or falsehood of the statement it contains. The note must in itself be false, not genuine, a counterfeit, and not the true instrument which it purports to be."

We think that there can be no doubt of the correctness of the principles so announced. The genuineness of an instrument is not dependent on the truthfulness of its recitals. A deed may falsely recite the area of the land conveyed, but if it is executed by the true parties it is still a genuine as distinguished from a false, forged, or counterfeited instrument. A deed containing such false recital may form the basis for some other criminal charge, but if it is executed by the parties purporting to convey or incumber it is not a forgery. It is said by the Iowa court in Loser v. Plainfield Bank, 149 Iowa, 672, 128 N. W. 1101, 31 L. R. A. (N. S.) 1112, 1114, 1115:

"There is no such thing as a 'legal name' of an individual in the sense that he may not lawfully adopt or acquire another, and lawfully do business under the substituted appellation. In the absence of any restrictive statute, it is the common-law right of a person to change his name, or he may by general usage or habit acquire a name notwithstanding it differs from the one given him in infancy. \* \* \* A man's name for all practical and legal purposes is the name by which he is known and called in the community where he lives and is best known."

This principle is also taught by Smith v. United States Casualty Co., 197 N. Y. 420, 90 N. E. 947, 26 L. R. A. (N. S.) 1167, 18 Ann. Cas. 701; Lafin Powder Co. v. Steytler, 146 Pa. 434, 23 Atl. 215, 14 L. R. A. 690, 695; Roberts v. Mosler, 35 Okl. 691, 132 Pac. 678, Ann. Cas. 1914D, 423; 19 R. C. L. 1332, 1333.

[2, 3] It is not believed that section 7093, L. O. L., abrogates the common-law principle announced by the foregoing authorities. This section of the Code empowers the county court to hear and determine applications for the change of names. In 1852 Pennsylvania enacted a similar statute, found in the Ses-

sion Laws for that year at page 301. It was ! held by the Supreme Court of Pennsylvania that the act "was in affirmance and aid of the common law, to make a definite point of time at which a change shall take effect," and that notwithstanding the statute a party can acquire by custom the right to use a certain name. Laflin Powder Co. v. Steytler, 146 Pa. 434, 23 Atl. 215, 14 L. R. A. 690, 695. In any event we must assume in the absence of evidence on the subject that the common-law rule obtains in Illinois and the other states in which appellant and Elizabeth G. Frary had resided from 1908 to 1914. During all of that time the latter had been known as Elizabeth G. Ford. The deed in question therefore was executed by her under the name by which she was known. In State v. Wheeler, supra, Mr. Justice Bean says:

"When a party signs a name not his own, but one which he has adopted, using it without the intent to deceive as to the identity of the person signing it, it is not a forgery.

The state cites Commonwealth v. Foster, 114 Mass. 311, 320, 19 Am. Rep. 353; State v. Farrell, 82 Iowa, 554, 558, 48 N. W. 940, and Barfield v. State, 29 Ga. 127, 131, 74 Am. Dec. 49. In all these cases the parties signing the instruments used their true names, but the instruments were signed with intent to be used as the contracts of other parties whose names were identical. In each of these cases there was a false making. The instrument was signed by one party with intent that it be uttered as that of another. We find no evidence of such intent in the instant case. At the date of the deed appellant was insisting that Elizabeth G. Ford or Elizabeth G. Frary was his wife, and that he had never married Caroline C. S. Ford. There is no evidence of intention to utter the instrument as the deed of Caroline C. S. Ford. The deed purported to be what it was in fact the deed of H. N. Ford and Elizabeth G. Ford.

The case of State v. Wheeler, 20 Or. 192, 25 Pac. 394, 10 L. R. A. 779, 23 Am. St. Rep. 119, does not stand alone in holding that a false recital of fact does not constitute forgery. The false recital that Elizabeth G. Ford was the wife of H. N. Ford did not, under the authorities, constitute a false making of the instrument. In United States v. Wentworth (C. C.) 11 Fed. 52, 55, it is said:

"To falsely make an affidavit is one thing; to make a false affidavit is another. A person may falsely make an affidavit, every sentence of which may be true in fact. Or he may actually make an affidavit, every sentence of which shall be false. It is the 'false making' which the be false. It is the 'false making' which the statute makes an offense, and this is forgery as described in all the elementary books.

In State v. Young, 46 N. H. 266, 88 Am. Dec. 212, 216, the court says:

"A man may make a statement in writing of a certain transaction, and may represent and assert ever so strongly that his statement is true, but if it should prove that by mistake he unambiguous, is in an error, and that his statement is en-

tirely wrong, that could not be forgery; suppose we go further, and admit that the statement was designedly false, when made, and so made for the purpose of defrauding some one, it does not alter the case, it is not forgery. The paper is just what it purports to be, it is the statement of the man that made it, it is a true writing or paper, though the statement it contains may be false."

To the same effect are United States v. Moore (D. C.) 60 Fed. 738, 739; United States v. Glasener (D. C.) 81 Fed. 566, 567, 568; United States v. Cameron, 3 Dak. 132, 13 N. W. 561; Territory v. Gutierrez, 13 N. M. 312, 84 Pac. 525, 5 L. R. A. (N. S.) 375; 12 R. C. L. 144.

"Where one executes and issues an instru-ment purporting on its face to be executed by him as the agent of a principal therein named, him as the agent of a principal therein named, he is not guilty of forgery, even though he has in fact no authority from such principal to execute the same." Mann v. People, 15 Hun, (N. Y.) 155, 169; People v. Bendit, 111 Cal. 274, 43 Pac. 901, 31 L. R. A. 831, 52 Am. St. Rep. 186; State v. Taylor, 46 La. Ann. 1332, 16 South. 190, 25 L. R. A. 591, 49 Am. St. Rep. 351; State v. Willson, 28 Minn. 52, 9 N. W. 28; In re Tully (C. C.) 20 Fed. 812.

We can make no distinction between a false recital of agency and a false recital of the marriage relation.

The prosecution failed to prove a false making, and the circuit court erred in denying appellant's motion for a directed verdict. The judgment is therefore reversed.

McBRIDE, C. J., and MOORE and BEAN, JJ., concur.

CROWN CO. v. COHN et al. (Supreme Court of Oregon. May 21, 1918.)

TRUSTS \$\instructerightarrow\$ 191(2) — Implied Powers of TRUSTEE—Sale of Realty.
 Under trust deed by mother to sons and

daughters, giving them express power to sell realty for support of mother during her lifetime, then at her death realty to be held in trust for said children, with provision for repayment at that time of advances made for the mother's support, held, children trustees had implied power, after death of mother, to sell realty to repay advances made for that purpose and also made for taxes and assessments.

2. TRUSTS \$\infty 205-IMPLIED POWER TO LEASE. When a trustee who has possession of lands belonging to the trust estate is charged with the payment of debts, but has no power of sale, he has implied authority to lease upon such terms and conditions as usually prevail in the city or country in which the land is situated.

3. TRUSTS \$==191(3)-SALE OF TRUST ESTATE -In Solidum.

Where trust estate comprises a single par-cel, though consisting of more than one lot, and the best interests of the estate will be sub-served by a sale in solidum, such disposition will be upheld if fairly conducted.

4. TRUSTS \$==112-DEEDS-CONSTRUCTION.
Trustor's intention should be determined from the entire language of the conveyance.

TRUSTS €==112 -- DEEDS -- CONSTRUCTION. If the words of a trust deed are plain and unambiguous, there is no necessity for judicial 6. EVIDENCE €=452 — PAROL EVIDENCE—LA- | formerly the Crown Trust Company, against TENT AMBIGUITY.

Clause of trust deed, requiring trustees to Clause of trust deed, requiring trustees to pay over to trustor's sons and daughters the rents, issues, profits, and income from the property, or the proceeds thereof, during the term of their and each of their natural lives when construed with the clause, demanding that in case of the death of either trustee the survivors should pay to the issue, if any, of the deceased trustee such portion of the income of the estate which the parent of such issue, if living, would be entitled to receive, where the income was insufficient to pay the taxes, disclosincome was insufficient to pay the taxes, disclosed a latent ambiguity as to means to be adopted to accomplish the purpose intended, and testimony of those preparing trust deed, showing that the first clause of the will, authorizing trustees to sell, mortgage, or lease, was intended by trustor to be incorporated in and read in connection with all other clauses when neces-sary to the proper execution of the power conferred, was admissible.

7. TRUSTS ♣ 191(3)—OPTION TO PURCHASE-POWERS OF TRUSTEES.

Under trust deed, empowering trustees to take possession of, manage, control, lease, mortgage, sell, and convey the land constituting the trust estate and invest the proceeds "as to my said trustees shall be deemed advisable," the trustees had power, in consideration of lessee's covenant to place buildings on the land which would enhance the value of trust estate. which would enhance the value of trust estate, to give option to purchase.

8. TRUSTS &= 205—LEASE BEYOND EXPECT-ANCY OF TRUSTEE—VALIDITY.

ANCY OF TRUSTEE—VALIDITY.
Although trust was limited to life of survivor of trustees and the youngest trustee had an expectancy of 28.18 years, a lease for 30 years would not be void, where surviving trustee was authorized to execute all powers conferred by trust deed.

9. JUDGMENT \$= 707-PARTIES CONCLUDED. One not a party to a suit for construction of a trust deed at the instance of the trustees

of a trust deed at the instance of the trustees is not concluded by decree therein.

10. Trusts &=135—Title of Trustees.

Deed, granting to trustees possession of the premises and imposing upon them the performance of active duties relating to the control and management of the estate, contemplated that legal title should vest in trustees until the contingency terminating the trust arrived, in view of L. O. L. § 7103, providing L.at it is not necessary to use the term "heirs" or other words of inheritance to convey an estate of the state of the s or other words of inheritance to convey an estate in fee simple.

11. TRUSTS = 191(3)-POWER TO SELL-AC-

TION OF COURT.

Where a trust deed expressly or impliedly authorizes trustee to sell realty belonging to trust estate, no action of the court is necessary to effect a proper execution of the power thus conferred.

12. TRUSTS \( \) 202 — SALE BY TRUSTEES —
RIGHT OF PURCHASEE.

Where deed imposes upon trustees duty of selling the land in order to convert the same into money and reinvesting the proceeds for the benefit of the trust estate, the purchaser of the land is under no obligation to see to the supplication of the purchase money. application of the purchase money.

Department 2. Appeal from Circuit Court,

Emma Cohn, Celia Friendly, Laura Rosenthal, Julius C. Friendly, and Seymour C. Friendly, individually and as trustees of Clara Friendly, deceased, to rescind their lease of real property, which demise contained an option to purchase the land, and to impress thereon a lien for the improvement thereof. on the ground that the defendants were powerless to grant such authority. The cause, being at issue, was tried, and from the evidence received the court made findings of fact, and, based thereon, decreed, October 5, 1916, that by their mother's deed the defendants as trustees then took and at all times thereafter held unrestricted power to lease, sell, and convey the land; that their deed therefor, which was tendered to the plaintiff, would, if it had been accepted, have conveyed an unincumbered title in fee simple: that if within 60 days therefrom the plaintiff paid \$200,000, the stipulated consideration, and \$750, the monthly rent of the premises from October 1, 1915, with interest on the latter sums at the rate of 8 per cent. per annum as agreed upon, the defendants should execute to it a deed containing the covenants specified in the demise, and that the plaintiff need not look to the application of the purchase money; that if such payments were not made within the time limited, then and in that event the defendants were to recover possession of the real property and the deferred installments of rent and interest thereon at the rate indicated, and thereupon the plaintiff should be strictly barred and foreclosed of all right, title, claim, interest, and estate in and to the land and the lease thereof; and that the defendants should have leave to apply, from time to time, at the foot of the decree, for such other and further orders as were or might be necessary in the premises. From this decree the plaintiff appeals.

Jay Bowerman, of Portland (Fulton & Bowerman, of Portland, on the brief), for appellant. Earl C. Bronaugh and Jerry E. Bronaugh, both of Portland (Bronaugh & Bronaugh, of Portland, on the brief), for respondents.

MOORE, J. (after stating the facts as above). The evidence shows that on the day first hereinafter stated, the grantor was the owner in fee of the real property described in a deed, which, omitting her signature and seal, the names of the witnesses to the conveyance, and the usual acknowledgment thereof, reads:

Multnomah County; Harry H. Belt, Judge.
Action by the Crown Company against
Emma Cohn and others, individually and as
trustees of Clara Friendly, deceased. From
decree rendered, plaintiff appeals. Affirmed.
This suit was commenced December 8,
1915, by the Crown Company, a corporation,

paid, the receipt whereof is hereby acknowledgpaid, the receipt whereof is hereby acknowledged, does hereby bargain, sell, assign, transfer and convey unto the said Emma Cohn. Laura Rosenthal, Celia Friendly, Julius C. Friendly and Seymour C. Friendly, as trustees, the parties of the second part herein, all the following bounded and described real property, to wit: Lots one (1) and eight (8) in block two hundred and fifty-four (254) in the city of Portland, Multnomah county, state of Oregon, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging. To have and to hold the same unto the said par To have and to hold the same unto the said parties of the second part in trust for the following

uses, to wit:

"First. To take possession of said property, manage and control the same, lease, mortgage, sell or convey the same, and to reinvest the proceeds thereof in such other property or securities as to my said trustees shall be deemed admirable and visable, and to pay over to me such sum or amounts of money as may be necessary for my support and maintenance during the term of my natural life, and for the payment of all my just debts, and to borrow money for my support, should the same be necessary, and to hold and pledge said property as security for the same. "Second. Upon my demise, after deducting

from said trust estate any sum or sums of monfrom said trust estate any sum or sums of money which may have been borrowed or advanced thereon by my said trustees or any of them with six per cent. interest thereon, my said trustees shall hold all the rest and residue of said property or the proceeds thereof in trust for the use and benefit of my said five children, Emma Cohn, Laura Rosenthal, Celia Friendly, Julius C. Friendly and Seymour C. Friendly, share and share alike, during the term of their and each of their natural lives, and shall pay over to my said children, in manner aforesaid the rents, issues, profits and income from said property, or the proceeds thereof during the term of their the proceeds thereof during the term of their and each of their natural lives.

"Third. Upon the death of any of my said children, without leaving issue then living the share or interpret belowing to call

share or interest belonging to said deceased child, under this trust, shall immediately vest in and be enjoyed by all my remaining children, then living, share and share alike.

"Fourth. Should any of my said five children above named, die leaving issue, then my said trustees shall pay over to said issue such part or portion of the income of my said estate hereby conveyed in trust, which the parent of such issue if living, would be entitled to receive under this trust, during the life or lives of such issue, or until the termination of the trust estate as hereinafter limited.

Fifth. Upon the death of the last surviving child of my said five children above mentioned. the trust estate hereby created shall terminate, and all property, rights, interests and effects of said estate shall immediately vest in the issue of any and all of my said five children, if any, then living, and to their heirs and assigns forev er, in fee simple absolute, to be held and enjoyed

"Sixth. Should there be no living issue of my "Sixth. Should there be no living issue of my said five children, or of any of them, upon the death of the last surviving child of my said five children, then the estate, rights, interests and effects of the said trust estate hereby created and the whole thereof, shall immediately vest in the heirs at law of such last surviving child of my said five children, in fee simple absolute, and this trust estate shall terminate.

"Saventh The trustees hereby appointed un-

eration of the sum of ten dollars to her in hand carried on and be executed by the said surviving trustees, or a majority of them, in the same manner and to the same extent as is herein pro-vided for all of said trustees above named, until the death of the last surviving trustee, when the trust estate hereby created shall terminate as

above provided.

"In witness whereof I have hereunto set my hand and seal the day and year above written."

Mrs. Friendly died January 22, 1910, leaving surviving her sons and daughters, the defendants herein. No other disposition of the real property so described having been made. Emma Cohn on May 23, 1911, commenced a suit in the circuit court of the state of Oregon for Multnomah county against her brothers and sisters to obtain a construction of such deed, setting forth in the complaint a copy thereof and alleging that her mother intended to invest the grantees therein named with full power to lease, mortgage, sell, and convey the premises, as well after the grantor's death as prior thereto, and to invest and reinvest the proceeds arising therefrom in other property or securities; that the real property has a frontage of 50 feet at each end thereof on Tenth and Eleventh streets, respectively, and 200 feet thereof borders on Stark street; that the buildings on those lots were old and of little value. for which reason they produced but small income; that the lots are of great value and the taxes annually levied thereon exceed the income derived from the premises; that the trustees have no funds with which to improve the premises, and if the real property remained in its then condition, the taxes levied and the municipal assessments imposed thereon would soon consume the entire trust estate, which property was in danger of being lost: that the lots could readily be sold for a large price and the proceeds derived therefrom be invested in other property or securities to the great advantage of the several beneficiaries; that as a trustee and beneficiary, the plaintiff has endeavored to cause a part of the land to be sold, but had been unable to procure a purchaser, because of the asserted uncertainty of the terms of the trust:

"That neither of the children of said Clara Friendly has any living issue and there is no person or persons beneficially interested in said estate, except the plaintiff and the defendants herein."

The prayer of the bill was for a construction of the grantor's intent as evidenced by the trust deed; that it might be decreed that the trustees were vested with full and complete power to sell the lots and every part thereof, but if any doubt on that subject existed, the court, by virtue of its plenary authority to administer trust estates so as to prevent waste and destruction there-"Seventh. The trustees hereby appointed under this indenture or a majority of them shall have power to do and perform any and all acts and things necessary and proper in the management and performance of their said trust, and upon the death of any of said trustees, all the powers hereby created, shall immediately vest in the surviving trustees, and said trust shall be needed advantage of the intent and performance of their said trust said trust. the surviving trustees, and said trust shall be purpose of the trustor, and for such other

relief as to the court might seem equitable. the land did not exceed \$1,620, while the taxes Laura Rosenthal, a defendant herein, separately answering the complaint in that suit, admitted many of the averments thereof, but as to other statements of fact contained therein she alleged that she did not have sufficient information or knowledge to form a belief as to the truth of such matters, and for that reason she denied them. The defendants herein Julius C., Seymour C., and Celia Friendly, jointly answering in that suit, admitted all the averments of the complaint, and also joined in the prayer therein contained. Based on the pleadings in that suit, the cause was tried, and from the evidence received the court made findings of fact and of law, and on June 21, 1911, rendered a decree to the effect that the trustees were authorized by their mother's deed to lease, mortgage, sell, and convey the lots, and to grant to the purchaser thereof a full, complete, and absolute title in fee simple, and that they also were empowered to reinvest the proceeds arising from a sale of the premises in other property or securities.

Julius C. Friendly, a bachelor, Emma Cohn, a widow, Celia Friendly, a spinster, Laura Rosenthal and Jacob Rosenthal, her husband, and Seymour C. Friendly and Maud Friendly, his wife, and also the defendants as trustees of Clara Friendly, deceased, on January 2, 1912, leased these lots for a term of 30 years to the plaintiff, as the Crown Trust Company, which stipulated to pay the rent reserved, to liquidate the taxes thereafter annually to be levied, and the assessments which might be imposed upon the premises, and within 5 years to erect at its own expense upon the real property a building of the value of not less than \$75,000, and to keep the structure insured to the extent of three-fourths of its worth. The lease also granted to the plaintiff, at any time within the first 5 years of the demise, the sole and exclusive right to purchase the real property for \$200,000, and at each subsequent year an additional sum of \$10,000 more than the preceding year, until the tenth year, when \$250,000 was the consideration to be paid and the limit of the option, upon the exercise of which, within the times specified, the defendants, as trustees, and Julius C. Friendly, individually, stipulated to execute to the plaintiff a deed of the lots, containing a covenant to warrant and defend the title to the premises against the lawful claims and demands of all persons whomsoever, claiming the same or any part thereof under or by virtue of any provision of the deed of Clara Friendly to them.

The trustees on April 30, 1912, jointly appeared under the title of the original suit, so instituted by Emma Cohn, and by their petition represented that pursuant to the decree construing the terms of the deed, they had leased the real property as hereinbefore annually levied thereon were more than \$2,-000, besides the cost of keeping up the repairs, paying insurance, and incurring the burdens of municipal assessments; that in order to effect an advantageous lease of the real property they were obliged to grant an option to purchase the lots, at a price greater than the then market value. A copy of the lease was made a part of the petition, the prayer of which was that the act of the trustees in such particular be ratified and confirmed, and an order to that effect be entered at the foot of the former decree in that suit, providing that when the option was exercised the trustees be authorized to execute to the purchaser a deed of the premises, and that the administration of the trust estate be continued, subject to the further order of the court. In accordance with the prayer of the petition, findings of fact were made as therein stated, and a decree was rendered, ratifying and confirming the action of the trustees in leasing the land and in granting the option to purchase it; directing that the further administration of the trust be continued subject to the order of the court; that upon an exercise of the option to purchase the real property, the trustees should report such fact to that tribunal, which would supervise the further administration of the estate, and direct what disposition should be made of the fund arising from the sale of the premises; and that the trustees have leave, from time to time, to apply to the court for further instructions relating to the discharge of their duties.

The plaintiff, relying upon the covenants contained in the lease, erected upon the lots a building at a cost of \$87.470.54, besides incurring other expenses, and on September 29, 1915, notified the defendants of its election to purchase the real property at the stipulated price of \$200,000. The trustees thereupon subscribed, caused to be sealed, witnessed, and acknowledged a deed of the lots that was tendered to the plaintiff, but it refused to accept the instrument, asserting that after their mother's death the trustees were powerless to sell and convey the premises. The plaintiff also refused to pay the monthly rental of \$750, which matured October 1, 1915, and thereupon tendered to the defendants a reassignment of the lease and demanded a repayment of the money which it had expended, amounting to \$104,-527.28. The defendants refusing to comply therewith, this suit was instituted, and resulted as hereinbefore stated.

[1] An examination of the first clause of Mrs. Friendly's deed will show that she expressly empowered her sons and daughters, as trustees, to take possession of, lease, sell, and convey the real property so described, and to invest the proceeds in other property or securities, to enable them to advance to stated; that the yearly income derived from her such sums of money as were necessary for her support and maintenance, and to pay her just debts. It is insisted by plaintiff's counsel that by the second clause of the deed the authority conferred by the first paragraph thereof, to sell and convey the lots, terminated at the grantor's death, when all the property or the proceeds thereof then remaining was to be held in trust for the beneficiaries named in the conveyance. It will be remembered that by the first clause the authority to take possession of and lease the land was as expressly granted as was the power to sell and convey the lots. seeking to ascertain Mrs. Friendly's intention, as evidenced by the conveyance, it cannot reasonably be supposed that it was her purpose, if no sale of the premises were made during her lifetime, as was the case herein, the trustees were required or expected to let the real property remain tenantless and unproductive, so that no benefits therefrom could have been obtained, though the annual taxes to be levied thereon were inevitable and the municipal assessments for public improvements probable. To impute such a design to Mrs. Friendly would be challenging the intelligence of a woman who had acquired and held for many years real property of the value of these lots.

[2] It must be admitted, however, that when a trustee who has possession of lands belonging to the trust estate, is charged with the payment of debts, but has no power of sale, he has implied authority to lease the real property upon such terms and conditions as usually prevail in the city or country in which the land is situated. 2 Beach, Trusts and Trustees, § 446; 2 Perry, Trusts and Trustees (6th Ed.) § 528. If, after Mrs. Friendly's death, the trust deed prohibited a sale of the land, then any sums of money that had been borrowed or advanced by the trustees, or either of them, to secure her support and maintenance could not be deducted from the trust estate, in case a sale of the real property was not made during the trustor's life. But, as by the second clause of the deed authority to make such deductions is expressly granted to take effect after her death, the power thereafter to sell and convey the land is necessarily implied. Brown v. Brown, 7 Or. 285. In that case it was ruled that where a testator devised his real estate to trustees to pay his debts and to hold the residue in trust for the benefit of an incorporated town, the trustees, who were also the executors of the will, had implied power to sell sufficient land to pay the debts, where the will contained no express power for that purpose. A text-writer, in discussing this legal principle, remarks:

"No particular form of words is necessary to create a power of sale. Any words which show an intention to create such power, or any form of instrument which imposes duties upon a trustee that he cannot perform without a sale, will necessarily create a power of sale in the trustee. Thus an assignment in trust to pay debts will necessarily imply a power of sale,

though none is given in words." 2 Perry, Trusts and Trustees (6th Ed.) § 766.

To the same effect see, also, 39 Cyc. 351; 1 Devlin, Real Estate (8d Ed.) § 432, note 7.

The testimony does not show what sums of money, if any, were advanced or borrowed by the defendants, or either of them, and employed in supporting their mother. There were received in evidence, however, canceled checks which had been issued by the defendant Julius C. Friendly in payment of taxes levied, and municipal assessments imposed upon the lots hereinbefore described, and tax receipts, showing that between February 25, 1907, and March 11, 1912, he had paid out for such purposes the sum of \$11,337,12. As a witness he testified that the annual income derived from the real property in question would not meet the payment of more than one-half of such exactions.

The power of the trustees to sell the land in order to meet the payment of the money so advanced is clearly implied, and such authority could legally be exercised after the death of Mrs. Friendly.

[3] The verified complaint of the defendant Emma Cohn, in her suit to obtain a judicial construction of the trust deed, alleged in effect that as a trustee and a beneficiary under that conveyance she had endeavored to cause a part of the real property to be sold, but had been unable to secure a purchaser thereof. The land consists of two contiguous lots in the city of Portland, Or.; and, while the general rule is that no more of a trust estate should be sold than is necessary to meet the payment of debts against it, the application of this legal principle does not require that small parts of an entire tract shall be segregated and sold as exigencies require, for by that method the value of the entire tract would probably be much diminished. When, as in this instance, the real property comprises a single parcel, though consisting of more than one lot, and the best interests of a trust estate will be subserved by a sale thereof in solidum, such disposition of the land will be upheld if, as in the case at bar, it has been fairly conducted.

[4, 5] In construing the terms of a trust deed, the purpose of a court should be to ascertain the trustor's intention, which design is to be determined from an inspection of the entire language of the conveyance. If the words thus employed are plain and unambiguous, there is no necessity for judicial interpretation. "But where the instrument is indefinite or inconsistent, the court can look at the declarations of the donor and consider the surrounding circumstances in determining just what the intention of the donor was." 39 Cyc. 197.

[6] The second clause of the trust deed requires the trustees to pay over to the trustor's sons and daughters "the rents, issues, profits and income from said property, or the proceeds thereof during the term of their and each of their natural lives." The fourth

either trustee, the survivors shall pay to the issue, if any, of the deceased trustee "such part or portion of the income of my said estate hereby conveyed in trust, which the parent of such issue if living, would be entitled to receive under this trust." A compliance with these provisions imposed upon the defendants the discharge of active duties to perform, which power was impliedly conferred, whereby they were authorized to adopt such reasonable means as were essential to carry out the intention of the trustor, as evidenced by the language of her deed when considered in its entirety. What these methods were to be are left somewhat in doubt by the second clause of the conveyance, which provides that upon the death of Mrs. Friendly, the trustees "shall hold all the rest and residue of said property or the proceeds thereof in trust for the use and benefit of my said five children." If the latter clause was designed to prohibit a sale of the land after the trustor's death, then it was impossible for the defendants to discharge the duties enjoined upon them in respect to any disposal of the proceeds of the property, for without a sale thereof no income therefrom was possible, since the rents would not discharge more than one-half of the taxes and other expenses. Construing together the clauses referred to, a latent ambiguity is manifest, as to the means to be adopted to accomplish the purpose clearly intended. In view of such uncertainty the testimony of the several defendants, and that of the attorney who at Mrs. Friendly's request prepared the trust deed, was properly received, showing that the provisions of the first clause of the conveyance were intended by the trustor to be incorporated in, and read in connection with all the other clauses when necessary to a proper execution of the power conferred.

We conclude, therefore, that all the powers expressly conferred by the first clause of the trust deed are applicable to all the other paragraphs thereof when essential to give validity thereto and to carry out Mrs. Friendly's intention, thereby authorizing the defendants, as well after as prior to her death, to do and perform all the acts and duties specified in the first clause of the deed, except such as relate to the care and support of the trustor.

[7] It is contended by plaintiff's counsel that the option attempted to be granted to their client, to purchase the property, was not an exercise of the power conferred upon the defendants to sell and convey the premises, for such authority does not include power to grant an option to purchase the real property. The strongest case cited to support the principle so insisted upon will be examined. Thus in Hickok v. Still, 168 Pa. 155, 31 Atl. 1100, 47 Am. St. Rep. 880, it was

clause demands that in case of the death of deprive himself of a power of sale conferred for the benefit of the trust; nor so to fetter its exercise by himself or his successor as to defeat the purposes of the trust. In deciding that case it is said:

"The power conferred is an authority to sell during the life of the husband, and a perempduring the life of the husband, and a peremptory direction to sell immediately after his death. As the husband of the testatrix was the executor, and during his life the sole possessor of the power, he might have made a sale deferring the time of settlement. This, however, he did not do. He did not sell the property but entered into an agreement with the plaintiff, which gave her the privilege of buying at any time within 3½ years. By this agreement she was entirely free; she was not bound to purchase. But he, and in the event bound to purchase. But he, and in the event of his death his successor in the trust, was bound to sell to no one else during the period fixed. The vice of the agreement is that it bound the trust estate, no matter what the detriment to it might be, without giving it any corresponding advantage. This was not a use of the power, but a surrender of it for the time. It suspended the exercise of the the time. It suspended the exercise of the discretion which had been given the executor, and defeated the direction in the will for an immediate sale upon his death."

In a note to that case it is said:

"A trustee, under a deed of trust, has no power to impose new terms or conditions, or to alter, vary, or dispense with those contained in the deed."

The trust deed herein did not contain, as the provisions of the will in the last case, a command to dispose of the real property in any designated time. By the express terms of their mother's conveyance the defendants were empowered to take possession of, manage, control, lease, mortgage, sell and convey the land and invest the proceeds thereof "as to my said trustees shall be deemed advisable." Pursuant to this grant of authority the lease which the defendants executed required the plaintiff, at its own expense, to erect upon the lots within a specified time a building of a particular value, annually to liquidate the taxes and such assessments as might be imposed upon the premises, and monthly to pay the rent reserved, unless prior to the termination of the devise the option to purchase the land was exercised. The plaintiff was not compelled to purchase the real property, but was obliged to erect thereon a building, which improvement enhanced the value of the trust estate, and made the rents thereafter to be received a decided benefit, instead of a substantial burden as it had theretofore been. The covenant to put up the building was a sufficient consideration for the option, which right of election was not void for any lack of authority on the part of the defendants to grant it.

[8] It is maintained by plaintiff's counsel that, the trust being limited to the life of the survivor of the trustees, the defendants could not lease the lots for a term to expire beyond that period of restriction. The case relied upon as supporting this assertion is that of Bergengren v. Aldrich, 139 Mass. 259. 29 N. E. 667, where it was decided that a ruled that a trustee was not permitted to will devising land to a trustee for the life

of a third person, with power to sell, a lease; the grant arises, in order that the trust executed by the trustee for a certain term, with an agreement to renew at the end of the term for another period, could not be renewed after the death of the person during whose life the trustee was to hold, since such agreement in the lease did not bind the remainderman. The lease herein was executed January 2, 1912, when the age of the youngest defendant was 40 years. Such person their had a life expectancy of 28.18 years. 20 Am. & Eng. Ency. Law (2d Ed.) 885. Though the demise was for a term of 30 years, or 1.82 years in excess of such average anticipation, the probability of the death of the youngest defendant within the limit of the term is not so certain as to render the lease void on account of the prescribed time, when it is remembered that the last surviving trustee was authorized to execute all the powers conferred by the terms of the trust deed.

[9] It is argued by plaintiff's counsel that the construction of a trust deed by a court, at the instance of trustees who themselves are the beneficiaries for life, is not binding upon possible remaindermen when no person of that class is in esse at the institution or determination of the suit. The legal principle thus insisted upon seems to be well sustained by the decisions of courts of last resort, as is illustrated by the notes to the following cases: Kent v. Church of St. Michael, 136 N. Y. 10, 32 N. E. 704, 18 L. R. A. 331, 32 Am. St. Rep. 693; Hale v. Hale, 146 III. 227, 33 N. E. 858, 20 L. R. A. 247; Gavin v. Curtin, 171 Ill. 640, 49 N. E. 523, 40 L. R. A. 776; Downey v. Seib, 185 N. Y. 427, 78 N. E. 66, 8 L. R. A. (N. S.) 49, 113 Am. St. Rep. 926; Boal v. Wood, 70 W. Va. 383, 73 S. E. 978, 42 L. R. A. (N. S.) 439. But whatever the rule may be in such a case, it can have no application to the plaintiff herein, which was not a party to the suit instituted by Emma Cohn against her brothers and sisters to secure a construction of the trust deed, and for that reason the Crown Company is not concluded by the decree rendered therein.

[10] It becomes important to determine the nature of the title which the defendants secured to the land by the execution of their mother's deed. In Oregon the term "heirs," or other words of inheritance, are not necessary to create or convey an estate in fee simple. L. O. L. § 7103. It is unnecessary to advert to the statute of uses which has never been enacted in this state. An examination of the deed hereinbefore set forth will show that the conveyance is an exception to the operation of that statute, granting to the trustees possession of the premises, and imposing upon them the performance of active duties relating to the control and management of the estate, thereby requiring that the legal title should vest in them, until the contingency referred to in

might properly be administered. 2 Beach. Trusts and Trustees, § 395; 1 Perry, Trusts and Trustees (6th Ed.) § 307. At section 373 of the latter volume the author remarks:

"So a power given to executors to rent, lease, repair, and insure implies a legal title in them.

[11] Where a trust deed expressly or impliedly authorizes a trustee to sell real property belonging to the trust estate, no action of the court is necessary to effectuate a proper execution of the power thus conferred. 39 Cyc. 346, 348. The legal title to the lots thus being in the defendants, they could, without any order of court authorizing it, by a proper deed transfer all the estate, right, title, and interest which their mother had or held in or to the land free from any claim thereon or thereto on the part of her unborn grandchildren, for whom, if any should subsequently come into being, the defendants will hold the principal of the fund derived from the sale of the real property in trust, or if no grandchildren be born then in trust for the heirs of the last survivor, the trustees appropriating to themselves, however, the rents, issues, profits, and income from such land or the income therefrom.

[12] The trust deed imposes upon the defendants the duty of selling the land in order to convert the same into money and reinvesting the proceeds for the benefit of the trust estate. In such case the purchaser of the land, as was properly held by the trial court, is under no obligation to see to the application of the purchase money. 2 Beach, Trusts and Trustees, 🚦 718.

It follows from these considerations that the decree should be affirmed; and it is so ordered.

McBRIDE, C. J., and HARRIS and BEAN, JJ., concur.

JONES v. CHICAGO, M. & ST. P. RY. CO. (No. 14387.)

(Supreme Court of Washington. May 6, 1918.)

1. Master and Servant €== 285(1) — Injury to Servant—Question for Jury.

In an employe's action against a railroad company for personal injuries sustained in falling from a carload of logs while unloading them, whether his falling was caused by stepping on a piece of bark upon the loaded car or by the sudden jerking of the car due to the operation of a Marion loader was for the jury.

2. Evidence 4=514(1)—Injury to Servant-EXPERT EVIDENCE.

In a servant's action for personal injuries in falling from a carload of logs which he was engaged in unloading, it was not error to admit expert testimony as to whether it was a safe and proper method to place the jammer upon a track alongside the load and fix the hooks from a cable in the logs and unload them in that manner.

3. MASTER AND SERVANT \$==295(1)-INJURIES | dict at the close of the respondent's case and TO SERVANT-INSTRUCTIONS-ASSUMPTION OF RISK.

In a servant's action for personal injuries sustained from falling from a carload of logs while unloading them, an instruction that to charge a servant with assumption of risk it must appear that he knew and appreciated the danger, and that, where a servant is ordered to do an act involving peril to himself, such order contains an assurance of safety, and the servant may obey unless the danger is so open, obvious, and imminent that no person of ordinary care and prudence would encounter it, was not erro-

Department 2. Appeal from Superior Court, Spokane County; R. M. Webster. Judge.

Action by Louis Jones against the Chicago, Milwaukee & St. Paul Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Cullen, Lee & Matthews, of Spokane, and Geo. W. Korte, of Seattle, for appellant. Robertson & Miller, of Spokane, for respond-

MOUNT, J. Action for personal injuries. Plaintiff recovered a judgment on the verdict of a jury in the court below. The defendant has appealed.

The action was brought under the federal Employers' Liability Act. Act Cong. April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. 1916, \$\$ 8657-8665). The respondent was employed by the appellant as a car repairer. A carload of sawlogs was being transported over the line of the appellant railway. This load of logs had spread so that it became too wide to pass through a subway upon the appellant's line. It became necessary to rearrange the load of logs by drawing in the stakes upon the sides of the car. In order to do this it was necessary to unload a part of the logs. For this purpose the load of logs was stationed upon a side track, and what is called a Marion loader was stationed alongside of the car to be unloaded. The respondent was upon the carload of logs, and his duty was to fasten tongs to the logs upon the car so that the Marion loader might lift the logs from the car. While engaged in this work the respondent fell from the car and was injured.

It was maintained by the respondent that the work was done in an unsafe manner by reason of the fact that the Marion loader was placed upon a track at the side of and parallel with the track upon which the loaded car was placed. It was also maintained that the loaded car should have been blocked so that it could not move, and that, by reason of the fact that the loaded car was not blocked when unloading the logs, the Marion loader gave the loaded car a sudden jerk which threw the respondent from the car.

[1] The appellant argues that the court

at the close of all the evidence, and in denying a motion for a judgment notwithstanding the verdict; and in this connection it is urged that the evidence is insufficient to show any negligence on the part of the appellant or its employes, and that the dangers were open and apparent, and were therefore assumed by the respondent. The appellant also contends that the cause of the respondent's injury was the fact that he negligently stepped upon a piece of loose bark upon the loaded car and in so doing fell from the car and was injured thereby. Whether the fall of the respondent was caused by his stepping upon this piece of bark or by the sudden jerking of the car upon which he was engaged in his work was, we think, a question for the jury. The jury was instructed that, if the cause of respondent's fall was his stepping upon a loose piece of bark, there could be no recovery. The jury evidently found that this was not the cause of his fall, but that the cause of his fall was the sudden jerking of the car. We have examined the abstract of the evidence, and we find testimony therein to the effect that there was a sudden movement of the car, and that this movement of the car caused the respondent's Of course, this evidence was disputed, but the credibility of it was for the jury to decide; and even though the appellant makes a strong argument to the effect that the real cause of the respondent's fall was his stepping upon the piece of bark we cannot weigh the evidence upon that question. The weight of the evidence and its credibility were questions for the jury to decide. We are satisfied that there was sufficient evidence upon this question to go to the jury. The court therefore did not err in refusing to direct a verdict or to grant a nonsuit or to enter judgment in favor of the appellant notwithstanding the verdict.

[2] Appellant next contends that the court erred in permitting an expert witness to answer a question to the effect:

"Was it a safe or proper method of unloading logs from the car to place the jammer upon a track alongside of the load of logs and fix the hooks from a cable in the logs and unload them in that manner?"

Appellant urges that the jury was competent to judge of the safety and reasonableness of the method. In the case of Luper v. Henry, 59 Wash. 33, 109 Pac. 208, we held that it was not error to permit expert testimony upon questions of this character.

[3] Appellant next argues that the court erred in giving the following instruction:

"In order to charge a servant with assumption "In order to courge a servant ......
of risk, it is necessary that it be made to appear
that the servant knew and appreciated the danger from which such injury resulted. Where a servant is ordered to do an act involving peril to himself, the order contains an assurance of safety, and the servant has a right to obey the erred in denying a motion for a directed ver- order unless the danger is so open, obvious, and

imminent that no person of ordinary care and the former opinion, 89 Wash. 187, 154 Pac. prudence would encounter it.

An instruction substantially to this effect was approved in Anustasakas v. International Contract Co., 57 Wash. 453, 107 Pac. 342. We find no reversible error in the record, and the judgment is therefore affirmed.

ELLIS, C. J., and HOLCOMB and CHAD-WICK, JJ., concur.

WEBSTER, J., took no part,

TACOMA MILL CO. v. NORTHERN PAC. RY. CO. (No. 14375.)

(Supreme Court of Washington. May 4, 1918.)

JUDGMENT & 713(2) — RES ADJUDICATA — MATTERS CONCLUDED.

Where plaintiff brought action to enjoin alleged violation of a written agreement, the question being as to the intention of the parties, a judgment in such action was a bar to a sub-sequent action to reform the instrument on sequent action to reform the instrument on the ground of mutual mistake, although mutual mistake was not pleaded in the first action, especially where plaintiff insisted in such action that the court had jurisdiction to reform, or to treat as reformed, the instrument in ques-tion, and the court decided that, even if the court had such authority under the pleadings, no grounds for reformation was shown, be-cause an adjudication by a court having ju-risdiction of the subject-matter and of the par-ties is final and conclusive, not only as to the ties is final and conclusive, not only as to the matters actually determined, but as to every other matter which the parties could and ought to have litigated as incident thereto and coming within the legitimate purview of the subject-matter of the action.

En Banc. Appeal from Superior Court, Pierce County; C. M. Easterday, Judge.

Action by the Tacoma Mill Company, a corporation, against the Northern Pacific Railway Company, a corporation. Judgment for defendant, and plaintiff appeals. Affirmed.

Hughes, McMicken, Dovell & Ramsey, of Seattle, and John D. Fletcher, of Tacoma, for appellant. Geo. T. Reid, L. B. da Ponte, and J. W. Quick, all of Tacoma, for respondent.

WEBSTER, J. Appellant brought this action to reform a written contract made between the parties on January 24, 1906, upon the ground of mutual mistake. From a judgment denying the relief sought, this appeal is prosecuted. The controversy between the parties was before this court on a former appeal, in an action brought by the appellant against the respondent for injunctive relief growing out of an alleged violation of the written agreement above referred to, by the respondent railway company in its threatened use of the right of way granted by appellant to respondent which was the subject-matter of the contract and deed involved in the former litigation. A statement of the facts

173

The complaints in both actions set forth in detail the negotiations between the parties leading up to the execution of the written contract and right of way deed, and the evidence introduced upon the second trial was identical with that presented in the first. with the exception of the additional testimony of E. C. Hughes, which was merely cumulative, and would have been pertinent to the issues raised in the former action if appellant's theory of the case had been sustained by the court. The controversy between the parties is with respect to the nature and extent of the right of way granted by appellant to the respondent; the former contending that it was merely a limited and qualified easement for the uses and purposes of the "bay side extension" of the railway company's line to be used for a freight and industrial track only, while the latter contended that the easement conveyed by the mill company is an absolute and unqualified grant of the right of way for any and all legitimate railway purposes. Appellant, in support of its position in the former case, alleged and sought to prove by oral testimony and correspondence between the parties that the intention was to grant merely the restricted privilege above stated, while the respondent insisted that the written contract was clear and unambiguous; hence not open to extraneous construction. The court below, as well as this court, on the former appeal upheld the contention of the respondent, and denied the appellant the relief prayed. In the briefs on the former appeal it was insisted by appellant that:

"Where a bill in equity states the facts showing what was the real agreement and intention of the parties and asks the enforcement or protection of plaintiff's rights thereunder, coupled with a prayer for general relief, the court will grant the full relief to which the party is entitled, either by reforming the instrument to express the intention of the parties, or by treating it as so reformed."

In considering this matter this court in the former opinion said:

"Appellant did not plead any mistake or fraud. There was no fiduciary relation between the parties. They dealt at arm's length. Each the parties. They dealt at arm's length. Fach party was represented by extremely competent counsel. They proceeded with the utmost care and deliberation. Without reviewing all the cases cited by appellant upon this phase of the case, it will be found that in nearly all of them appears some fact or circumstance tending to show fraud or mistake, aside from the mere reliance upon the representations of the other narry to the contract as to its contents." other party to the contract as to its contents."

Thus it will be seen that the court declined to adopt appellant's view for the reasons: First, that mutual mistake had not been properly pleaded; and, secondly, that the facts established did not warrant the relief sought, even though that issue had been propout of which this litigation arose appear in erly tendered by the pleadings. Whatever



its soundness, this holding became the law of the case, and is binding upon both parties and the court on this appeal. It will not be seriously contended that it was not competent for appellant in the first action to have sought a reformation of the instrument in question on the ground of mutual mistake. In fact as we have just stated it was insisted that the facts set forth in the complaint, coupled with a prayer for general relief, in the light of the evidence disclosed by the record, entitled plaintiff to this specific remedy. the court in the former opinion denied appellant the relief prayed for upon the ground that the evidence did not establish such mutual mistake as will be relieved against in equity, such holding was a decision upon the merits, and clearly foreclosed that question. If, upon the other hand, relief was denied because the issue of mutual mistake had not been properly raised by the pleadings, the responsibility for this situation rested upon the appellant. We shall not burden this opinion by the citation of cases showing that this court is committed to the doctrine that an adjudication by a court having jurisdiction of the subject-matter and of the parties is final and conclusive, not only as to the matters actually determined, but as to every other matter which the parties could and ought to have litigated as incident thereto and coming within the legitimate purview of the subject-matter of the action.

While we are impressed with the equities of appellant's case, we are impelled to the conclusion that the question sought to be litigated in this action is forclosed by the decision on the former appeal; hence respondent's plea of res adjudicata is a complete bar to plaintiff's right to maintain the present suit. This conclusion renders it unnecessary to consider the other questions presented.

The judgment is affirmed.

ELLIS, C. J., and FULLERTON, HOL-COMB, MOUNT, MAIN, and PARKER, JJ., concur.

> . In re FERGUSON'S ESTATE. GILL v. McFARLAND.

> > (No. 14595.)

(Supreme Court of Washington. May 6, 1918.)

1. APPEAL AND EBBOR €==544(2) — Scope of Review—Record—Sufficiency.

On appeal from order requiring executor to mortgage or sell realty to pay commissions which he had assigned to petitioner, where no statement of facts or bill of exceptions was in the record, and the trial judge made no finding as to the facts, the only question the court could consider was the proper construction of the order made.

may be the views of the writer concerning 2. EXECUTORS AND ADMINISTRATORS \$\infty\$ 349(1) its soundness, this holding became the law TION.

Where assignee of executor's commissions applied for order directing the executor to mortgage or sell property as required by law, an order directing the executor to mortgage or sell the property containing nothing indicating that the procedure was to be otherwise than as prescribed by law should be construed to require the executor to take the statutory steps preparatory to sale.

Department 1. Appeal from Superior Court, King County; J. T. Ronald, Judge.

Proceedings in the matter of the estate of J. J. Ferguson, deceased, wherein James F. McFarland applied for order directing Hiram C. Gill, as executor, to show cause why he should not mortgage or sell part of the estate to pay executor's commissions assigned to petitioner. From the order directing the mortgage or sale, the executor appeals. Affirmed.

Heber Hoyt and Herman S. Frye, both of Seattle, for appellant. E. H. Guie and Ballinger, Battle, Hulbert & Shorts, all of Seattle, for respondent.

MAIN, J. This is an appeal by the executor of the estate of J. J. Ferguson, deceased, from an order of the superior court directing him to mortgage or sell so much of the estate as might be necessary to raise the sum of \$11,363.43. J. J. Ferguson died on the 19th day of September, 1914, leaving a will in which as the executor thereof he named Hiram C. Gill, who thereafter became the qualified and acting executor of such last will and testament. On the 27th day of April, 1915, the executor assigned in writing to one James F. McFarland all his commissions then due or thereafter to become due or owing to him as executor. This assignment provided that the commissions when collected and paid to McFarland should be credited upon certain notes which the executor individually was owing to McFarland. During the course of the administration of the estate an order was entered fixing the fees of the executor at the sum of \$11,363.43. On December 20, 1916, the executor filed his final account and petitioned the court for an order of distribution, and the order of distribution was entered on February 1, 1917. On August 9, 1917, McFarland petitioned the probate court for an order directed to the executor requiring him to show cause why he should not take steps as by law required to either mortgage or sell such portion of the estate as might be necessary to realize a sum sufficient to pay the commissions in order that the same might be applied upon a judgment in favor of the petitioner, which had been rendered in a mortgage foreclosure action. The notes above mentioned were secured by the mortgage. On the same day an order was entered directing the executor to show cause why he should not mortgage or sell a

portion of the estate for the purpose of realiz- | H. Morrison and wife. Judgment for plaining the above-mentioned sum. This showcause order was answered by the executor, and the cause in due time was heard by the court. After the hearing an order was entered directing the executor to sell or mortgage so much of the estate as might be necessary to realize an amount sufficient to pay any balance due him as executor's fees. From this order, the executor appeals.

[1, 2] No statement of facts or bill of exceptions has been brought to this court. The trial judge made no findings as to the facts. Upon this state of the record the only question that the court can consider is that raised relative to the construction of the order entered. The appellant claims that the order is a summary direction to him to sell and mortgage, and does not contemplate that he shall take the necessary steps defined in the statute when property of an estate is to be mortgaged or sold. The respondent claims that the intent and purpose of the order was that the executor should mortgage or sell in the manner provided by law. While the order is that the executor be "directed and required to immediately either mortgage or sell such portion of said estate as is necessary to realize an amount sufficient to pay any balance payable to him as such executor upon said executor's fees allowed as aforesaid, \* " we think it plain that it was not contemplated by the order that the executor should sell or mortgage the property of the estate without taking the necessary steps provided by statute for that purpose. There being nothing in the order which would indicate that the property was to be mortgaged or sold in any other manner than that provided by statute, it seems plain that the order should be given such construction as would harmonize with the statute, rather than one which would not be in harmony therewith. Affirmed.

ELLIS, C. J., and WEBSTER, PARKER, and FULLERTON, JJ., concur.

DARAVELEAS v. MORRISON et ux. (No. 14411.)

(Supreme Court of Washington. April 30, 1918.)

MASTER AND SERVANT 6=137(1)-STARTING DANGEROUS MACHINERY-WARNING-NON-DELEGABLE DUTIES.

Where threshing machine was stopped because the cylinder was clogged, the master owed the nondelegable duty to give warning before starting to a servant, who in pursuit of his duties was in a dangerous position cleaning the cylinder.

Department 2. Appeal from Superior Court, Spokane County; Wm. A. Huneke,

tiff, and defendants appeal. Affirmed.

Graves, Kizer & Graves, of Spokane, for appellants. Nuzum, Clark & Nuzum and Geo. H. Armitage, all of Spokane, for respondent.

HOLCOMB, J. In this action to recover damages for personal injuries, alleged to have been caused while plaintiff was working on a separator threshing turnip seed on defendants' farm, plaintiff had verdict and judg-

Appellants answered by admissions and general denial and the affirmative defense of contributory negligence. They did not plead as an affirmative defense that respondent's injury was caused by the negligence of a fellow servant. They did not move for a nonsuit or a directed verdict. They did not request instructions respecting negligence of fellow servants, or any other.

The straw was run through two separators. It passed from the first or big machine through a conveyor to the cylinder of the second or little machine. Each separator was run by an independent engine. cylinder of the small separator occasionally became clogged, and it was respondent's duty to clear it, and, in pursuance thereof, to signal for the engineer to stop. The engine was about 70 feet from the cylinder of the separator, and the engineer could see plainly any one on top of the separator or working about the cylinder. Signals to stop or start were given by the hand or voice by the man on top of the separator to the engineer. It was customary for the engineer to give two short toots of the whistle before he started his engine. Prior to the time of the accident the separator had stopped, having become clogged, and while respondent was engaged in clearing the cylinder the engine suddenly started without any warning or signal, causing the injury to respondent.

Appellants assign as errors: (1) Giving instruction No. 3; (2) denying defendants' motion for judgment non obstante; (3) denying defendants' alternative motion for new trial.

Appellants excepted generally to instruction No. 3, which is:

"If the plaintiff has shown by the preponderance of the evidence that pursuant to his signal the machine was stopped, and that he signal the machine was stopped, and that he then stepped down upon the revolving belt which carried the straw into the cylinder, and was engaged in cleaning out the cylinder, and that while so engaged and without notice or warning to him, the machine was started, carrying him into the cylinder, thus injuring him, then the plaintif will be entitled to democrat then the plaintiff will be entitled to damages on account of his injuries from the defendants.'

We will concede that the above instruction would be erroneous if the fellow-servant doctrine had been an issue, and no other instruc-Action by Nick Daraveleas against Norton | tion had been given. We are not disposed

to sustain the fellow-servant theory. The injury was due to lack of warning in starting machinery while respondent was in a place of extreme danger. To give such warning is a nondelegable duty of the master, from which he cannot escape liability by delegating the duty to another. Schneider v. South Tacoma Mill Co., 65 Wash. 590, 594, 118 Pac. Threshing machines and their appliances may not be as dangerous instrumentalities as sawmills and their appliances, but any high-powered mechanical apparatus, usually operated at great speed and requiring buman labor to attend, necessarily has great potentialities of danger and injury. The mere fact that the accident happened on a farm, from machinery operated for farming purposes, furnishes no exception to the general rule above stated.

The jury found in favor of respondent, and, if there is sufficient evidence in the record upon which a judgment can be based, we will not set the verdict aside. Having concluded against appellants' fellow-servant theory and finding no error, it becomes unnecessary to extend this opinion by further discussing the motions for judgment non obstante and for new trial.

The judgment of the trial court is affirmed.

ELLIS, C. J., and PARKER and CHAD-WICK, JJ., concur.

MILLER v. REEVES et ux. (No. 14377.) (Supreme Court of Washington. April 29, 1918.)

1. Appeal and Ereor &= \$98 - Findings -Trial by Court.

In action for damages tried without a jury, the trial court having been better situated to judge the credibility of the witnesses, the court on appeal, though it tries the case de novo, will not disturb his findings unless clearly against the preponderance of the evidence.

2. Animals = 74(5) — Vicious Animals Evidence—Sufficiency.

Evidence held to sustain judgment, in favor of person who went on defendant's premises on business errand and was bitten by a vicious dog harbored by defendants.

3. Animals & 72—Vicious Animals—Injubies to Persons—Liability.

One harboring a vicious animal knowing of its vicious propensities, although not its owner, is liable in damages for the injuries it causes another.

Department 1. Appeal from Superior Court, Skagit County; Augustus Brawley, Judge.

Action by O. A. Miller against W. I. Reeves and wife. Judgment for plaintiff, and defendants appeal. Affirmed.

Cooley, Horan & Mulvihill, of Everett, and Geo. M. Mitchell, of Stanwood, for appellants. Livermore & Hanson, of Mount Vernon, for respondent. FULLERTON, J. The respondent when going on to the premises of the appellants on a business errand was bitten by a dog. For the injuries suffered he brought this action in damages. The cause was tried by the court sitting without a jury and resulted in a judgment against the appellants in the sum of \$1,000. This is an appeal from the judgment entered.

The evidence upon the part of the respondent tended to show that the dog was a stray, coming voluntarily upon the premises of the appellants where it was harbored and cared for by them. It was in evidence that the appellants at times kept the dog tied on the premises, a part of the time in the woodshed and at other times in the yard; that at one time it left the premises when one of appellants (Mrs. Reeves) went after it and brought it back; that at another time Mrs. Reeves desired to leave the home for a short time, when the dog was given in charge of an employe of the appellants to be cared for until her return. The vicious propensity of the dog was also shown, and evidence introduced tending to show knowledge on the part of the appellants of such vicious propensity. Indeed, the respondent testified that, when he reached the porch of the residence, he was heard by Mrs. Reeves, who came hurriedly down the stairway, calling to him to "look out for the dog." On the other side, much or all of this was denied by the appellants and their witnesses. The appellants testifled further that they never did harbor the dog; that they had repeatedly tried to drive it away; that they had complained to the town marshal of his presence on their premises, and had sought to have it removed by that officer; that they never fed the dog; that the only time it was tied up by them was after it had bitten the respondent; and that it was then tied so that it could be found by the marshal who had been sent for to remove and kill it.

[1, 2] The appellants' principal contention is that the evidence is insufficient to justify the judgment. It is not disputed that there was evidence sufficient to make a case for a jury, and that, had the cause been tried by a jury, a verdict in favor of the respondent would have been conclusive upon the court. But it is argued that, since this court tries the case de novo and must review the evidence, it cannot be justly found upon such a review that the evidence preponderates in favor of the respondent. Looking at the evidence from the typewritten record it must be confessed that this argument is somewhat persuasive. Certain it is that we would not reverse the court's conclusion had it been for the other side. But where a case rests for its facts entirely upon the oral evidence of witnesses testifying before the court, great weight is always given to the conclusions of the trial judge. He has a distinct advantage in determining the truth, which this court

meanor of the witnesses when testifying, which the reviewing court cannot do, and testimony appearing evenly balanced when viewed from the record may not appear so when heard from the mouths of the witnesses themselves. For this reason this court has adopted the rule in such cases that it will not disturb the findings of the trial judge unless it is made to appear clearly that the evidence preponderates against its conclusions. Here we cannot say it does so and. following the rule, must affirm the findings.

[3] That a person harboring a vicious animal, knowing of its vicious propensities, although not its owner, is liable in damages for the injuries it may cause another, is well settled by the authorities. In the English case of McKane v. Wood, 5 C. & P. 1, it fig said:

"The harboring a dog about one's premises, or allowing him to resort there, is a sufficient keeping of the dog to support this form of action.

in 3 Corpus Juris, 106, the rule is laid down in this language:

"A man may own an animal and yet not be its keeper. The word 'keeper' is equivalent to 'the person who harbors.' 'Harboring' means protecting, and one who treats a dog as living at his house, and undertakes to control his ac-tions, is the owner or keeper within the meaning of the law.

For a collection of the American cases on the question, see Wood v. Campbell, Ann. Cas. 1914B, 606, and the note thereto.

The judgment is affirmed.

ELLIS, C. J., and PARKER, MAIN, and WEBSTER, JJ., concur.

CARKONEN v. COLUMBIA & P. S. R. CO. (No. 14461.)

(Supreme Court of Washington. April 30, 1918.)

1. New Trial \$\iff 114 - Insufficiency of Evidence—Death of Trial Judge.

In view of Rem. Code 1915, \$ 67, providing that no proceeding is affected by vacancy of judge's office, and section 398, defining new trial as a re-examination of an issue in the same court, judicial discretion to grant new trial for insufficiency of evidence is vested in the court, and not the judge, so that it may be exercised by the new incumbent after death of the trial judge. judge.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, New Trial.]

2. Appeal and Error \$\iff 979(2)\$ — Scope-Conflicting Evidence.

Though it may have been error to hold the evidence insufficient to support the verdict, the order granting new trial on that ground will not be disturbed, if there is a substantial conflict in the evidence.

Department 1. Appeal from Superior Court, King County; John S. Jurey, Judge. Action by James Carkonen, as administra-

has not. He can observe the manner and de the Columbia & Puget Sound Railroad Company. From an order setting aside judgment on verdict for plaintiff, and granting new trial, plaintiff appeals. Affirmed.

> Geo. H. Rummens and Edward Brady. both of Seattle, for appellant. Farrell, Kane & Stratton and Stanley J. Padden, all of Seattle, for respondent.

> FULLERTON, J. One John Athanasiades, while engaged in labor as a section hand on respondent's line of railway, was run over and killed by one of its regular passenger trains. The appellant as administrator of the estate of the decedent brought an action under the federal Employers' Liability Act to recover for the benefit of the widow and minor children. Verdicts were returned for \$2,850 in favor of the widow, \$900 in favor of the elder daughter, and \$1,950 in favor of the younger daughter, aggregating a total of \$5.700. Judgment was entered upon the verdict, and two days thereafter the respondent moved for judgment notwithstanding the verdict, and also for a new trial. On a hearing before the trial judge the motion for judgment non obstante was granted, but no disposition was made of the motion for new trial. On an appeal from the judgment rendered notwithstanding the verdict, we held that the motion therefor was not timely made, inasmuch as judgment on the verdict had been entered prior to the filing of the motion. The judgment was reversed and the cause remanded, with instructions to the lower court to consider and determine the motion for a new trial, which was pending and undisposed of. See Carkonen v. Columbia & P. S. R. Co., 86 Wash. 473, 150 Pac. 1162. The superior judge who had tried the cause had died pending the appeal, and, when the cause was remanded for determination of the motion for a new trial, the matter was considered and determined by his successor in office, who made an order setting aside the judgment on the verdict and granting a new trial. This order is assigned by the appellant as error.

[1] The first contention urged by the appellant is that the successor of a judge who tried a cause is not vested with the same discretion as his predecessor in granting a new trial on the ground of insufficiency of the evidence, for the reason that the successor has not heard the witnesses testify, nor observed their demeanor, thus precluding his ability to pass upon the question whether the losing party has had a fair trial. Appellant argues that because of such fact the rule that the order granting a new trial will not be disturbed on appeal except upon a showing of abuse of discretion does not apply. In other words, the appellant contends that the successor in the judicial office lacks jurisdiction to exercise such a discretion. Our tor of John Athanasiades, deceased, against statute (Rem. Code, § 398) defines a new

same court. Further provision is made by Rem. Code, \$ 67, that:

"No proceeding in a court of justice, in any action, suit, or proceeding pending therein, is affected by a vacancy in the office of any or all of the judges, or by the failure of a session of the court."

It is apparent that judicial powers are vested in the court rather than in the individual exercising functions as a judge. In the case of Shephard v. Gove, 26 Wash. 452, 67 Pac. 256, where a successor in the office of judge disregarded a ruling in the same case by his predecessor, we said:

"It is insisted by the appellant that Judge Griffin had no right to overrule a decision made by Judge Jacobs in the case. But the succession of judges cannot be considered by the court; the office is a continuing one; the personality of the judge is of no legal importance. The action of Judge Griffin was in legal effect a convention of budge Griffin was in legal effect a to have been erroneous; and it were far better that he should correct it, than to perpetuate an error which would have to be corrected by this court.'

In the case of State ex rel. Rucker v. Superior Court, 18 Wash. 227, 51 Pac. 365, where the successor in the office of judge vacated a prior judgment, we said:

"The judge of the superior court, who directed the judgment of dismissal on the 29th day of December, 1896, retired from office and his successor occupied the office at the time the motion to vacate the judgment was made. The action of the superior court is that of the judge of the court, and a change in the per-sons who occupied the position does not affect the consideration of the vacation of the judgment.

That the successor in office of the judge who presided at the trial of a cause is vested with discretion to pass upon a motion for a new trial is well settled in other jurisdictions. See Hughley v. Wabasha, 69 Minn. 245, 72 N. W. 78; Benson v. Hall, 197 Mass. 517, 83 N. E. 1036; Jones v. Sanders, 103 Cal. 678, 37 Pac. 649; Southall v. Evans, 114 Va. 461, 76 S. E. 929, 43 L. R. A. (N. S.) 468, Ann. Cas. 1914B, 1229; Penn. Mut. Life Ins. Co. v. Ashe, 145 Fed. 593, 76 C. C. A. 283, 7 Ann. Cas. 491, note. Through all the decisions runs the idea that courts are continuing governmental entities, and that the individual judges are designed to guide the operation of the machinery. In the functioning of courts the law is concerned only with the personal element of the presiding judge when there is abuse of discretion or misconduct on his part. His errors of law are errors of the court. We have no doubt. therefore, that a successor in the judicial office has power to exercise his discretion in passing upon a motion for a new trial when the judge who tried the cause has met with death, or his term of office has expired.

[2] The appellant sets forth the memorandum opinion of the trial judge, and contends motion did not exercise his own judgment Judge.

trial as a re-examination of an issue in the and discretion in so doing, but rather sought to ascertain the opinion of his predecessor in office and give effect to what he believed was the opinion of such predecessor. But while the judge did make some comment to the effect that he had endeavored to ascertain his predecessor's views, we find the following in his opinion:

"The motion for new trial has been thoroughly argued and briefed before me, and upon the earnest insistence of counsel for plaintiff I have read in full the statement of facts used on the appeal. Upon the argument, briefs and statement of facts, I was satisfied that the motion for new trial should be granted, unless such was precluded by the question of last clear chance raised by counsel for plaintiff. After consideration of brief of counsel for plaintiff upon the question of last clear chance, I read over again the testimony of the engineer, upon whose testimony this question is raised. I do not understand that this question was raised on the trial. The engineer was not examined in chief, or cross-examined, or examined. ined, or questioned at all, upon any such propined, or questioned at all, upon any such proposition. He was not given any opportunity to explain some of his statements which might be taken as tending to establish the contention of counsel for plaintiff. However, in my judgment the testimony as it stands is wholly insufficient to sustain the contentions of counsel for plaintiff in this regard. For the reasons stated, the motion for new trial will be granted. A formal order to that effect if desired. ed. A formal order to that effect, if desired, may 'be prepared and presented upon due service and notice to counsel on the other side."

This, we think, shows that the judge while taking into consideration what he conceived to be the views of his predecessor in office, determined the matter from the entire record, and exercised his own judgment and discretion in so doing. This court has frequently held that it is within the province of the trial court to grant a new trial where it is convinced that the verdict of the jury is against the weight of the evidence, and that it will not hold such an order to be an abuse of discretion when it finds a substantial conflict in the evidence. It may be there was error in the original holding of a want of sufficient evidence on the part of the plaintiff to make a case for the jury, but there is no doubt as to there being a substantial conflict.

The order is affirmed.

ELLIS, C. J., and PARKER, MAIN, and WEBSTER, JJ., concur.

HATCH v. HOVER-SCHIFFNER CO. et a) (No. 14439.)

(Supreme Court of Washington. April 27, 1918.)

APPEAL AND ERBOR @== 265(1)-PRESERVATIO OF EXCEPTIONS.

Where no exceptions have been taken to the findings, and there is no statement of facts, the court must dismiss the appeal and affirm the judgment.

Appeal from Superior Department 2. therefrom that the judge passing upon the Court, Spokane County; Henry L. Kennan,

Action by Mary N. Hatch against the Ho- | orandum with the signature thereto the ver-Schiffner Company, and others. From the judgment rendered, plaintiff appeals. Affirmed.

Robertson & Miller, of Spokane, for appellant. A. E. Gallagher, of Spokane, for respondents.

PER CURIAM. In this case no exceptions were taken to any of the findings of fact and conclusions of law as made by the court, and no statement of facts or bill of exceptions is in the record, nor has any been settled or allowed by the trial court. No question is raised which is determinable apart from facts to be shown by a statement of facts. It has been repeatedly held by this court that, where no exceptions have been taken to the findings and where there is no statement of facts, there is nothing before this court to review, and we must dismiss the appeal and affirm the judgment. Beeler v. Barr, 90 Wash. 258, 155 Pac. 1040, and cases there cited.

Judgment affirmed.

## KAHLOTUS GRAIN & SUPPLY CO. v. BLAIR. (No. 14404.)

(Supreme Court of Washington. April 29, 1918.)

1. EVIDENCE 459.—PAROL—EXECUTION OF CONTRACT.

Upon question whether alleged contract between defendant and P. as agent of plaintiff was in fact made, evidence tending to show that P. made the contract as agent for another was material; the rule being that evidence tending to dispute the actual making of the contract does not violate the parol evidence rule.

2. Contracts == 141(3) - Execution - Evi-

Where all negotiations were had between defendant and P. and evidence sufficiently warranted belief that in all negotiations defendant believed that P. was acting as agent for another than plaintiff, jury might well conclude that there never was any contract between plaintiff and defendant.

3. FBAUDS, STATUTE OF €==107(2)--Мемо-BANDUM OF SALE—DESIGNATION OF PARTIES.

A purchaser as well as a seller must be designated in memorandum of contract for sale to satisfy statute of frauds.

Department 1. Appeal from Superior Court, Franklin County; John Truax, Judge. Action by the Kahlotus Grain & Supply Company against John Blair. Judgment for defendant, and plaintiff appeals. Affirmed.

M. L. Driscoll, of Pasco, and Tustin & Chandler, of Spokane, for appellant. Timothy A. Paul, of Walla Walla, for respondent.

PARKER, J. The plaintiff company seeks recovery of damages from the defendant Blair which it claims as the result of his

plaintiff claims reads as follows:

"8/5/16. "Bot from John Blair 1000 sax early Bart Wheat at 1.02 sacked per bushel 1916 October Delivery to Kahlotus Grain & Supply Co., "[Signed] John Blair.

"Kahlotus Grain & Supply Co., "Filed, 8—10—16 A. F. Phillipay Mgr."

Trial in the superior court for Franklin county, sitting with a jury, resulted in verdict and judgment in favor of the defendant from which the plaintiff has appealed to this court.

The plaintiff in its complaint having pleaded by copy the contract as above quoted, respondent demurred to the complaint upon the ground, among others, that the written memorandum pleaded is void and unenforceable as a contract, in that it does not comply with our statute of frauds. The demurrer being by the court overruled, respondent answered denying, in effect, that the contract pleaded was ever executed or entered into by the parties purporting to have signed it, and affirmatively alleged:

"(1) That no note or memorandum in writing of the alleged bargain for the sale of said wheat was made or signed by the defendant herein or by any person by him thereunto lawfully authorized.

"(2) That said alleged contract evidenced by said Exhibit A is void and not binding upon said defendant."

While it is conceded that on August 5, 1916, the respondent signed the memorandum above quoted, it was conclusively proven by the testimony and admissions of A. E. Phillipay, the manager of appellant, that he wrote the words and figures following the signature of respondent upon the memorandum some time in the month of September, a month or more after the signing of it by respondent, and that up to that time no writing was upon the paper following the signature of respondent. It is also conclusively shown that respondent had no knowledge whatever of any writing or signature of any one having been put upon the memorandum following his own signature until some time after Phillipay had written the additional words and figures thereon. In so far as the entering into of the contract between appellant and respondent became a question of fact, apart from the question of the statute of frauds, the evidence was directed almost wholly to the question of whether the contract as made or attempted to have been made was one between respondent and Phillipay, as agent of appellant, or one between respondent and Phillipay as agent of one Houser.

[1, 2] The contentions of counsel for appellant are directed almost wholly to their claims that the trial court erred in refusing failure to furnish and deliver wheat to it to strike out all evidence received upon the in compliance with a written memorandum trial other than that relating to the differof contract for the sale thereof, which mem- ence between the contract price of the wheat,

as shown by the memorandum, and its mar- | it, of course, was necessary that a purchaser ket value on October 31, 1916, which would determine the amount of appellant's recovery, if any; it being conceded that no wheat was delivered by respondent to appellant, and that the trial court erred in refusing to direct the jury to find in appellant's favor, leaving only the amount of its recovery to be determined by the jury. The argument is, in substance, that all of this evidence was, in effect, evidence tending to vary and contradict the terms of the written memorandum of contract of sale. A critical statement of the evidence might show that some of it could possibly be regarded as tending to vary the terms of a contract made or attempted to be made between respondent and Phillipay as agent for Houser. That, however, is not the contract here sued upon. In so far as the evidence touched the question of the making or attempted making of such a written contract or the varying of its terms if it was made, the evidence was material to this controversy upon the question of whether the alleged contract between respondent and Phillipay as agent of appellant was in fact made. It seems to be the settled law that the receiving of evidence for the purpose of, and which tends to dispute, the actual making of the contract sued upon, is not in violation of the rule excluding evidence varying or contradicting the terms of a written instrument, 20 Cyc. 319. In so far as the making of the alleged contract between respondent and Phillipay as agent of appellant is concerned, respondent denied the making of any such contract. He was not trying to vary the terms of any such contract, though his evidence did tend to show that the written memorandum had reference to another contract in terms differing somewhat from the memorandum: but this evidence did tend to show that there was in fact no contract entered into between respondent and appellant. All negotiations were had between respondent and Phillipay, and the evidence fully warranted the jury in believing that in all such negotiations respondent believed that Phillipay was acting as agent for Houser and not for appellant. The jury manifestly, as their verdict shows, believing this, might well conclude that there never was any contract between respondent and appellant.

[3] It might well be argued that there could in no event be any recovery upon this memorandum as a contract because it fails to name a purchaser, especially when read apart from the signature of appellant which was placed on the paper long after the date of its signing by respondent and without his knowledge. Conceding, for argument's sake, that it might not have been necessary for a purchaser to sign the memorandum to render it enforceable against respondent in so far as the statute of frauds is concerned, the ground of excusable neglect is an act which

as well as a seller should be designated in the memorandum to satisfy the statute. Arbogast v. Johnson, 80 Wash. 537. 141 Pac. 1140. However, we leave this question undecided.

The judgment is affirmed.

ELLIS, C. J., and FULLERTON, MAIN, and WEBSTER, JJ., concur.

FOLEY et ux. v. PIERCE COUNTY SCHOOL DIST. NO. 10. (No. 14559.)

(Supreme Court of Washington. April 30, 1918.)

SCHOOLS AND SCHOOL DISTRICTS == 114-Ac-TIONS AGAINST SCHOOL DISTRICTS-"MAIN-

To prosecute an appeal is to "maintain an action," within Laws 1917, p. 332, providing that certain actions shall not be maintained against school districts, although the judgment appealed from was rendered before the act went into effect.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Maintain.]

Department 2. Appeal from Superior Court, Pierce County; M. L. Clifford, Judge. Action by E. J. Foley and Mary Foley, husband and wife, against the Pierce County School District No. 10, Pierce County, Wash. Judgment for defendant, and plaintiffs ap-Affirmed. peal.

Gordon & Easterday, G. C. Nolte, and Carroll A. Gordon, all of Tacoma, for appellants. Fred G. Remann, Harry E. Phelps, and A. B. Bell, all of Tacoma, for respondent.

PER CURIAM. This action was begun or the 27th day of November, 1916, to recover damages for the death of a minor son of appellants. A trial resulted in a verdict in favor of the defendant. Judgment was entered on the 1st day of June. 1917. Thus the case presents a perfect corollary to Bruenn v. North Yakima School District No. 7, 172 Pac. 569. To prosecute an appeal is to maintain an action. The case falls under the bar of the act of 1917 (Laws 1917, p. 332).

Affirmed.

HENDRIX v. HENDRIX. (No. 14203.) (Supreme Court of Washington. April 27, 1918.)

1. Divorce € 165(2) — Vacation of Judg-MENT-GROUNDS-EXCUSABLE NEGLECT.

On showing that plaintiff in divorce suit in order to avoid payment of alimony removed from state and failed to defend against his wife's cross-complaint, on which judgment was rendered in her favor, he was not entitled to vacation of the judgment on the ground of excusable neglect.

2. Appeal and Error \$\infty 982(1)\$ — Divorce \$\infty 165(1)\$—Vacation of Judgment—Excus-

is discretionary with the trial court, and that court has power to impose such terms as may be just and reasonable as a condition to the granting of the relief; and its judgment will not be interfered with unless there is a gross and manifest abuse of discretion.

3. DIVORCE @===165(1) · - VACATION OF JUDG-MENT - DISCRETION OF COURT - IMPOSITION

OF TERMS.
Where husband having sued for divorce removed from state to defeat wife's claim in crosscomplaint for alimony, it was within the discretion of the court, as a condition to granting his motion to vacate the judgment, to require him to subject all of his property to the jurisdiction of the court and to comply with alimony and expense money orders previously made.

4. APPEAL AND ERROR 6-616(2)-Scope-Af-FIDAVITS.

Affidavits used on hearing of application for temporary alimony cannot be considered on appeal unless, by certificate of the trial judge, they are made part of record and included in the statement of facts or bill of exceptions, and it is not sufficient that they are found in the clerk's transcript.

APPEAL AND ERROR @== 931(8) -- Scope --

FINDINGS OF FACT.

Where the findings are susceptible of two constructions, one of which will sustain the judgment and the other defeat it, they will be given that construction which sustains the judg-

6. Divorce == 240(5) - Findings - Suffi-CIENCY

Findings that the husband earned about \$135 per month and was possessed of property of value between \$7,000 and \$10,000, that he abandoned his wife and child and failed and refused to support them, and that he failed and refused to comply with orders for expense money and temporary alimony, warranted a decree of divorce and the award of \$5,250 as alimony and suit money.

Department 1. Appeal from Superior Court, Spokane County; Wm. A. Huneke, Judge. Action by W. D. Hendrix against Cora M. Hendrix. Judgment for defendant on her cross-complaint. From the judgment and from the order denying plaintiff's application to vacate the judgment, plaintiff ap-Affirmed.

Tolman, King & Way, of Spokane, for appellant. F. E. Langford, of Spokane, for respondent.

MAIN, J. The parties to this action were formerly husband and wife. The plaintiff brought an action against his wife for a divorce. The wife denied the facts in the complaint upon which the divorce was sought, and by cross-complaint sought a divorce against the plaintiff. A decree was entered in favor of the wife upon the crosscomplaint which provided that she should be paid \$5,000 permanent alimony, \$200 attorney's fee, and \$50 suit money. Some time after this judgment was entered, the plaintiff made an application for the vacation thereof on the ground of excusable neglect. This application was heard upon affidavits and was denied by the superior court. The in the application to vacate the judgment | bility with the appellant, and one of them

appeals both from the judgment in the principal action and from the order denying the application to vacate.

The facts may be stated as follows: During the month of February, 1915, the divorce action was begun. Soon thereafter the respondent applied to the court for alimony pendente lite, attorney's fees, and suit money. After this application was made, the appellant departed from the state and was absent therefrom a number of months. The action was begun in Douglas county. On August 2, 1916, the respondent served her answer and cross-complaint together with a motion for change of venue to Spokane county. After a hearing upon this motion the cause was transferred to Spokane county. The motion for temporary alimony, suit money, and attorney's fees was then heard and resulted in an order directing that the appellant pay \$100 on account of attorney's fees. \$75 for suit money, and \$50 per month temporary alimony. At that time the appellant was working for the Great Northern Railway Company and was earning approximately \$135 a month. After this order was entered, the respondent's attorney was advised by the appellant's attorney that the appellant could not make any compliance with the order until his next pay day, which would occur about the 20th of October, following. A few days before this latter date, the appellant departed from the state of Washington and went to the state of California. By written stipulation between the attorneys for the respective parties, the cause was tried on the 2d day of November, 1916, and resulted in a judgment as above indicated. Neither the appellant nor his attorney was present at this trial and the prosecuting attorney appeared in the action. Soon after this judgment was entered, an action was brought thereon in the state of California, and the interest of the appellant in his deceased father's estate was attached. After this occurred, the appellant employed attorneys other than the attorney who appeared for him in the divorce action and made the application as above stated on the ground of excusable neglect. This application was heard upon

[1] The appellant claims, and his affidavit tends to support him, that he departed from the state of Washington with the intention to return thereto and contest the divorce action, and that his attorney failed to notify him of the time when the same was set for The respondent claims, and the affitrial. davits filed in her behalf show, that the appellant left the state of Washington with the intention of abandoning the action, and that he was going away "for good." There are four affidavits to this effect, any one of plaintiff in the divorce action and petitioner the affiants apparently being of equal credi-



is irresistible that when the appellant departed from the state of Washington he did not intend to return, and that he intended to abandon the action. From the record it is a reasonable inference that he thought he could go to California, receive his interest in his father's estate—which was then ready for distribution—and defeat the collection of any judgment that might be rendered against him in the divorce action, The trial court properly held that the judgment should not be disturbed on the ground of excusable neglect.

[2] At the close of the hearing in the trial court upon the application to vacate, the cause was continued until the 30th day of January, 1917, for the purpose of giving the appellant an opportunity to subject all his property to the jurisdiction of the court and to comply with the order of the court theretofore made; and if this was done the motion to vacate was to be granted. The appellant declined to comply with the conditions imposed, and the order was entered denying the application to vacate. The opening or vacating of a judgment on the ground of excusable neglect is an act which is discretionary with the trial court, and that court has power to impose such terms as may be just and reasonable as a condition to the granting of the relief; and its judgment will not be interfered with unless there is a gross and manifest abuse of discretion. Redding v. Puget Sound Iron, etc., Works, 44 Wash. 200, 87 Pac. 119; Pringle v. Pringle, 55 Wash, 93, 104 Pac. 135.

[3] The terms imposed were entirely reasonable and just. There appears to be no good reason why the appellant should not subject all of his property to the jurisdiction of the court and comply with the orders of the court previously made. As already indicated, he had not in any respect complied with the order for suit money, alimony pendente lite, and attorney's fees, and had shown no disposition to comply therewith. Had the trial judge granted the application to vacate without the imposition of the terms mentioned, it is probable, though we do not here decide the question, that his action would have been an abuse of discre-

[4] We will now consider the appeal from the judgment in the principal action. this branch of the case the cause is here to be reviewed upon the findings of fact, conclusions of law, and the judgment. are embodied in the supplemental transcript certain affidavits which were used in the trial court upon the application for temporary alimony, etc. These the appellant moves to strike. This motion must be sustained. By many decisions, which need not here be assembled, it has become the settled doctrine of this court that affidavits

being entirely disinterested. The conclusion cannot be here considered unless by the certificate of the trial judge they are made a part of the record by being included in the statement of facts or a bill of exceptions. It is not sufficient that they may be found in the clerk's transcript. Upon this appeal, it is claimed that the findings are insufficient to sustain the judgment in two respects: (a) That there was no finding as to the resources or necessities of the respondent; and (b) that the award of \$5,250 was not warranted by the court's finding as to the appellant's resources. The findings recite that the appellant and the respondent intermarried in the state of Iowa on March 19, 1890, and lived together as husband and wife until the year 1905, when at Avalon in the state of Missouri the appellant abandoned the respondent and their then four minor children, the result of the marriage; that the appellant failed to support the respondent and the minor children during the ensuing three years, at the end of which time a divorce was granted to the respondent in the state of Missouri; that subsequently on November 5, 1912, the parties remarried and with the then minor child Olive Hendrix took up a residence at Hillyard, in Spokane county, Wash., where the respondent has since resided; that from the 5th day of November, 1912, until on or about the 5th day of November, 1913, the appellant neglected the respondent and the minor child and failed to support them; that he indulged in the habits of gambling and drinking, whereby he dissipated most of his earnings; that he remained away from his home at nights without any reasonable excuse; that he neglected to pay the household bills and expenses, and neglected to furnish the respondent and the minor child with suitable raiment and the necessaries of life: that on November 5, 1913, he left his home in Hillyard and abandoned the respondent and the minor child and has ever since lived separate and apart from them; that the appellant is an able-bodied man and capable of earning about \$135 per month at his business as a railroad man; that he is possessed of real and personal property of the value of from \$7,000 to \$10,000, acquired by inheritance; that he has neglected and refused to comply with the order of the court directing him to pay to the respondent \$40 monthly alimony pendente lite, suit money, and attorney's fees; and that the sum of \$200 was a reasonable attorney's fee to be allowed to the respondent, and the sum of \$50 is a reasonable amount to be allowed her as suit money.

One of the conclusions of law was that the respondent have and recover from the appellant the sum of \$5,000 for the support and maintenance of herself and minor child, and the further sum of \$250 for suit money and attorney's fees. The decree entered ac used upon a hearing before the trial court cords with the findings and conclusions.

considered their reasonable and legitimate inferences. Where the findings are susceptible of two constructions, one of which will sustain the judgment and the other defeat it, they will be given that construction which sustains the judgment. Cantwell v. Nunn, 45 Wash. 536, 88 Pac. 1023; Dobrentai v. Piehl, 92 Wash. 433, 159 Pac. 371; Burleigh v. Consumers' Publishing Co., 95 Wash. 49, 163 Pac. 5.

We think the findings in this case sufficient to sustain the judgment.

Affirmed.

ELLIS, C. J., and PARKER, WEBSTER. and FULLERTON, JJ., concur.

#### GRIFFITH v. WASHINGTON WATER POWER CO. (No. 13888.)

(Supreme Court of Washington. May 4, 1918.)

 MASTER AND SERVANT \$\infty 276(3)\$—Injuries to Servant—Proximate Cause—Evidence. In an action for personal injuries sustained by an electrical engineer from an electric shock while adjusting a generator, evidence held insufficient to show the proximate cause of the

2. MASTER AND SERVANT \$\infty 101, 102(6) - INJURIES TO SERVANT-DEFECTIVE APPLI-ANCES.

An employer is not required to provide the newest and best appliances, but fulfills his duty when he provides machinery of ordinary character and reasonably safe.

JURIES TO SERVANT \$\instrumenture 101, 102(2)\to InJURIES TO SERVANT\to EMPLOYER AS INSURER.
Employers are not insurers, and the law recognizes that absolute safety is unattainable.

4. MASTER AND SERVANT \$\infty 206-Injuries to Servant-Assumption of Risk.

An employe assumes the risk incident to the employment.

5. MASTER AND SERVANT \$\infty 219(7)\to-Injuries

TO SERVANT—ASSUMPTION OF RISK.

The rule that a servant assumes the risk of apparent danger applies with special force to electrical appliances, where the servant is experienced in their use.

Department 2. Appeal from Superior Court, Spokane County; E. H. Sullivan, Judge.

Action by Warren Griffith against the Washington Water Power Company. From a judgment for plaintiff, defendant appeals. Reversed, with directions to dismiss.

Post, Russell, Carey & Higgins, of Spokane, for appellant. Burcham & Blair, of Spokane, for respondent.

HOLCOMB. J. In this action for personal injuries respondent had verdict and judgment. Respondent was a graduate electrical engineer of several years' experience, and had been employed by appellant some eight or nine months immediately prior to the accident at its power house at and around the generator (a machine used for generating

[5, 6] Along with the findings must be jaind obsolete, and of whose defective condition he claims he had no notice. Appellant admits the injury and pleads contributory negligence and assumed risk.

> Appellant assigns as error: (1) The court erred in overruling defendant's challenge to the evidence at the close of plaintiff's case; (2) the court erred in overruling defendant's motion for a judgment of dismissal at the close of all the evidence and in submitting the case to the jury; (3) the court erred in overruling defendant's motion for judgment non obstante veredicto and in entering judgment on the verdict.

> [1] These assignments may be taken up together. The proximate cause of the injury seems to be merely conjectural. The respondent, after describing the machinery and his duties, testified in his direct examination as to the injury on June 14, 1910:

nation as to the injury on June 14, 1910:

"Q. Now, Mr. Griffith, coming down to June 14, 1910, after you had cleaned out the commutator, state who was there at that time. Did you state? A. Mr. Rawlins. Q. What was done after the machine was cleaned out? A. Well, after it was gone over thoroughly, why then the order was given to the operator to throw it upon the line in order to get the service. You understand there is a certain procedure that has to be gone through with; the floorman has to bring the machine up to the proper speed, so as to get the proper voltage before it can be thrown; that's one of the duties of the floorman, the machine tender. Q. That's what you were doing at that time? A. Yes, that's the shift I was taking at that time. Q. Well, state what occurred then, after the machine started. A. Woll, after the machine was started and on to the line and carrying load, I don't know how much load; at that particular don't know how much load; at that particular instant, I noticed that one of these brushes in here on this side, I think it was here (indi-cating), I would say the third brush arm holder from the top, to your left as you face the com-mutator, I noticed one of the brushes sparking. so I stepped upon this board very carefully and with one hand released that little spring, and with the other hand removed that carbon brush, and scratched the under part of it with the finger, and found a little hard particle on it, and I just scratched it off with my finger it, and I just scratched it off with my finger nail and placed the brush back in position, and it worked fine, to my satisfaction; then I stepped around to the other side of the generator, and I noticed that this brush on this side, in a similar position, I noticed one of the brushes there, bucking a little bit, and I was going—I stepped upon there and I got my hands just in this position (indicating) and that's all I know, and when I came to, I was down on the floor there, badly burned. Q. Now, what caused you to fall? A. Well, the flash was so great that it dezed me, and made me unconscious; I know that." I know that,

There was no direct testimony as to the cause of the accident, but there was a great deal of testimony that this particular generator sparked a good deal of the time, and that occasionally there would be a "flash-over." Plaintiff knew that the generator was dangerous while carrying a load, and that it would "flash-over" if a brush should accidentally be dropped on the commutator, electricity), which he claims was defective and that it would flash when carrying 600 volts on the railway service. He may have ! disturbed the exciting cause of the flash.

[2] Plaintiff attributes negligence to the use of the type of generator on which he was injured, and showed that improvements have been made upon generators since 1906, by which varying loads can be better taken care of without sparking at the commutator. The generator upon which the injury occurred was of a type still in common use in electrical power plants without the latest improve-

[3, 4] We held in Hoffman v. Am. Foundry Co., 18 Wash. 287, 51 Pac. 385, that the law is well settled that the master discharges his duty when he provides machinery that is of ordinary character and reasonably safe. He is not required to provide the newest and Employers are not insurers, and the law recognizes that absolute safety is unattainable. They are liable for the results of their negligence and not for the dangers necessarily connected with the service. The risks incident to the employment are assumed by the person accepting such employment. An employer who uses machinery which is in common and ordinary use in the line of business in which he is engaged cannot be held liable for an accident which might have been prevented by the use of different machinery.

It has also been held in Le Claire v. W. W. P. Co., 83 Wash. 560, 567, 145 Pac. 584, that an employer complies with his duty to his employé when he exercises reasonable and ordinary care in the selection of instrumentalities destined for his use, when he furnishes him with such as are in common use, without radical defects in themselves. even though it may be shown that there were better appliances for the particular purpose. The machine in question was not shown to have any radical defect in itself.

[5] It is a well-settled rule that the servant assumes the risk of apparent danger. This rule will apply with equal force to such dangerous instrumentalities as electrical appliances, especially where the servant is experienced and has worked around such instruments a considerable time.

There being no evidence to sustain the verdict, the cause will be reversed, with directions to dismiss.

ELLIS, C. J., and CHADWICK, MOUNT, and PARKER, JJ., concur.

TACOMA ASS'N OF CREDIT MEN v. LYONS et al. (No. 14584.)

community obligations; and, in the absence of evidence to overcome the presumption, the mortgagee, on foreclosure, is entitled to a deficiency judgment against the community.

Appeal from Superior Department 2. Court, Grays Harbor County; George D. Abel, Judge.

Suit by the Tacoma Association of Credit Men against Frank Lyons and his wife and another. From a judgment for plaintiff entered on default, it appeals. Reversed and remanded, with directions.

W. W. Keyes, of Tacoma, for appellant. John Burton Keener, of Tacoma, for respondents.

PER CURIAM. The respondents, having given to the appellant their mortgage and notes, defaulted in this action brought thereon, and the court rendered a deficiency judgment containing the following phrase:

"It is hereby ordered, adjudged, and decreed that said plaintiff do have and recover judgment as a separate judgment only (our italics) as against the defendants, Frank Lyons, H. P. Kessinger, and Guy S. Sheldon in the sum of

It is to that portion of the judgment which we have italicized that the appellant ob-The mortgages and notes having been given by the respondents Lyons and Kessinger in the conduct of a mercantile business owned by them as partners, the obligations therefore became prima facie community obligations, and, no evidence having been introduced to overcome this presumption, the appellant was entitled to a judgment free from the phrase "as a separate judgment only." If, as a matter of fact, the judgment is not a community judgment, this question can be raised by the wives of the respondents at the proper time and in appropriate proceedings. Woste v. Rugge, 68 Wash. 90, 122 Pac. 988.

Judgment reversed and remanded, with orders to strike therefrom the phrase "as a separate judgment only."

> CITY OF SPOKANE v. KNIGHT. (No. 14483.)

(Supreme Court of Washington, April 29, 1918).

1. MUNICIPAL CORPORATIONS &----592(1) --- OCCUPATION TAX ON VEHICLES—ORDINANCE STATUTE.

The provisions of an ordinance of the city of Spokane that every person, firm, or corporation who by means of any vehicle shall carry (Supreme Court of Washington. May 7, 1918.)

HUSBAND AND WIFE \$\iff=270(10)\$—FORECLOSURE OF MORTGAGE—DEFICIENCY JUDGMENT—COMMUNITY PROPERTY—EVIDENCE.

Where notes and mortgages have been given by partners in the conduct of a mercantile business, the obligations become prima facie

TRUING WI ME BAND WHO BE ANY PROPERTY—EVIDENCE.

TRUION Who by means of any vehicle shall carry any person or persons to or from any point within the city for hire shall pay a license fee of \$5 a year, etc., were not rendered void by Laws 1915, c. 142, § 34, providing that local authorities shall have no power to pass or enforce any ordinance requiring of the owner operating any motor vehicle any license other than an occupation license or tax. 2. LICENSES \$\infty\$14(2)\to OCCUPATION TAX\to CARRIAGE FOR HIRE\to UNDERTAKER\to "OCCUPATION OF CARRYING PASSENGERS FOR HIRE\to "

An undertaker who used his automobile for hire in carrying families of deceased persons and their friends from residences to cemeteries and return while conducting funerals was engaged in the "occupation of carrying passengers for hire" within an ordinance of the city of Spokane providing that every person, firm, or corporation who by means of any vehicle shall carry any person or persons to or from any point within the city for hire shall pay a license fee of \$5 a year, etc.

Department 1. Appeal from Superior Court, Spokane County; R. M. Webster,

J. M. Knight was convicted of violation of an ordinance of the City of Spokane by carrying passengers for hire in his automobile without having paid a license fee, and he appeals. Affirmed.

Carl W. Swanson, of Spokane, for appellant.

PARKER, J. The defendant, Knight, was charged with the violation of an ordinance of the city of Spokane, in that he carried passengers for hire in his automobile without having paid the license fee therefor as required by the ordinance. He was adjudged guilty and fined in the police court of the city, and having appealed therefrom to the superior court for Spokane county, was therein again adjudged guilty and fined, from which judgment he has appealed to this

Appellant is an undertaker, maintaining his principal place of business in the city of Spokane. He has an automobile which he uses to ride in himself, in going to and returning from residences and cemeteries while conducting funerals. He did not use this automobile for hire generally, but he did use it for hire in the carrying of passengers therein, consisting of families of deceased persons and their friends, from residences to cemeteries and return, while conducting funerals, whenever opportunity offered for such use, for hire. At the time in question, while conducting a funeral, appellant conveyed the family of the deceased from a residence in the city to a cemetery outside the city and return. He charged and collected compensation for this service in addition to his charges for other services as an undertaker. He had complied with the provisions of chapter 142, Laws of 1915, as that law then existed, relating to the licensing of automobiles for hire, and had thereby procured a state license for hire for the automobile in question.

[1] At the time of so carrying these passengers for hire by appellant there was in force an ordinance of the city reading in part as follows:

"Every person, firm or corporation who shall

porate limits of the city of Spokane for hire shall pay a license fee of five dollars (5.00) per year for every vehicle so used: Provided, that nothing herein contained shall be considered to apply to railroad or street railroad cars, apply to railroad or street railroad cars, or hearses, ambulances or vehicles used exclusively for carrying pallbearers, nor to stages running on regular schedule to points outside of the city."

There was also then in force chapter 142 of the Laws of 1915, section 34 thereof reading in part as follows:

"The local authorities shall have no power "The local authorities shall have no power to pass or enforce any ordinance, rule or regulation requiring of the owner or operator of any motor vehicle, any license other than an occupation license or tax which may be levied in only one city or town when such motor vehicle is engaged in intercity service, or permit to use the public highways except as herein provided or to exclude or to prohibit any motor. provided or to exclude or to prohibit any motor vehicle whose owner has complied with the provisions of this act from the free use of the public highways, and all such rules, ordinances and regulations now in force are hereby declared to be of no validity or effect."

It is contended in appellant's behalf that the provisions of the ordinance above quoted were rendered void by the enactment of section 34 of the Laws of 1915, above quoted from, and that the city was thereby divested of the power to enforce the license provisions of the ordinance. It seems to us that but a casual reading of the law shows that this contention is untenable. The quoted portion of the ordinance purports to do nothing more than require the payment of an "occupation license tax," and the law plainly reserves this power in local authorities, though it in general terms prohibits local authorities from regulating the use of automobiles. The portion of the ordinance brought to our attention does not indicate that the license tax therein provided for is anything more than a revenue measure. The ordinance seems to us to clearly fall within the power which the Legislature has reserved to the local authorities.

[2] Contention is further made in appellant's behalf that by the operation of his automobile for hire in the manner he admits he operated it for hire on the occasion in question and other like occasions he was not doing so as an occupation. The argument seems to be that his occupation was. only that of an undertaker. Plainly this operation of his automobile for hire was not within any of the exemptions from the license tax specified in the ordinance. The argument is, in effect, that appellant could furnish and operate for hire all the passenger carrying vehicles attending funerals conducted by him without paying the ordinance license tax therefor. We are of the opinion that while, generally speaking, appellant's occupation was that of an undertaker, he was also engaged in the occupation of carrying passengers for hire when he operated by means of any vehicle carry any person or ling passengers for hire when he operated persons to or from any point within the cor- his automobile as he did on the occasion in



question and when he so operated it for hire on other like occasions.

It seems plain to us the judgment must be affirmed. It is so ordered.

FLLIS, C. J., and MAIN and FULLER-TON, JJ., concur. WEBSTER, J., took no nart.

## CITY OF SEATTLE v. ROTHWEILER. (No. 14547.)

(Supreme Court of Washington. April 29, 1918.)

1. MUNICIPAL COPOBATIONS \$\infty 708(4)\$\to\$ STATUTES \$\infty 207\$\to\$ Proviso \$\to\$ Regulation of Streets \$\infty 500 Regulations.

Laws 1917, p. 640, § 34, providing that "the local authorities shall have no power to pass or enforce any ordinance, rule, or regulations governing the speed of any motor vehicle: Provided, however, that nothing herein shall be construed as limiting the power of county commissioners or local authorities to make, enforce, and maintain regulations experning traffic. force, and maintain regulations governing traffic in addition to the provisions of this act affecting motor vehicles, but not in conflict therewith," does not authorize a municipality to with," does not authorize a municipality to enact speed regulations governing automobiles, but expressly prohibits it, since if the proviso is inconsistent with the main provisions of the enacting part of the statute it must yield.

2. MUNICIPAL CORPORATIONS \$\sim 592(1) ORDINANCES-RELATION TO STATE LAWS

A city may enact ordinances on subjects covered by the state statutes, operative within the jurisdiction of the city, when the statute does not expressly prohibit it.

Department 1. Appeal from Superior Court, King County; Kenneth Mackintosh, Judge.

H. N. Rothweiler was convicted in the police court of violating a speed ordinance. On appeal to the superior court the complaint was dismissed, and the city appeals.

Hugh M. Caldwell, Patrick M. Tammany, and George A. Meagher, all of Seattle, for appellant. Roberts, Wilson & Skeel, Alfred H. Lundin, and Everett C. Ellis, all of Seattle, for respondent.

FULLERTON, J. The respondent was accused, by a complaint filed in the police court of the city of Seattle, of having driven an automobile over one of the city streets in excess of the speed limit fixed by an ordinance of the city. On being brought before the police judge he interposed an objection to the jurisdiction of the court based on the ground that the ordinance on which the complaint was founded was invalid. His objection was overruled, whereupon he admitted the facts and was adjudged guilty and sentenced to pay a fine. From the judgment entered he appealed to the superior court, where he renewed the objection made in the police court. The objection was there sustained, and the complaint dismissed. city appeals to this court.

The ordinance of the city of Seattle under which the respondent is charged reads as follows:

"Sec. 66. No person shall drive or operate any motor vehicle at a rate of speed faster than twelve miles per hour at any crossing within the main, thickly settled, or business portion of the city, nor within 100 yards of any schoolhouse on school days between eight o'clock in the morning and five o'clock in the evening, nor in any portion of the city, faster than twenty miles per hour."

The statute held by the superior court to invalidate the ordinance is found in the Laws of 1917, at page 640, and reads:

"Sec. 34. The local authorities shall have no power to pass or enforce any ordinance, rule or regulations governing the speed of any motor vehicle, or requiring of the owner or operator of any motor vehicle, any license other than an occupation license or a tax which may be levied in only one city or town when such motor vehicle is engaged in intercity service, or permitted to use the public highways except as herein provided or to exclude or to prohibit any motor vehicle whose owner has complied with the provisions of this act from the free use of the public highways, and all such rules, ordinances, and regulations now in force are hereby declared to be of no validity or effect: Pro-vided, however, that nothing herein shall be construed as limiting the power of the county commissioners or local authorities to make, enforce, and maintain ordinances, rules and regulations governing traffic in addition to the provisions of this act affecting motor vehicles, but not in conflict therewith.

The ordinance was passed subsequent to the adjournment of the legislative assembly of 1917, and was made to take effect at the time the statute took effect.

[1] The contention of the city is that, notwithstanding a statute may supersede the existing municipal regulations governing the speed of motor vehicles which are in conflict with it, it does not supersede ordinances regulating speed, nor prevent the passage of such ordinances which are not so in conflict, and it is argued that this statute expressly permits the enactment of ordinances governing traffic by motor vehicles not in conflict therewith. But we cannot so construe the statute. In the enacting part of the statute it is expressly and in terms provided that no municipality shall have power to pass or enforce any ordinance, rule, or regulation governing the speed of motor vehicles, and all such rules and ordinances then in force are declared to be of no validity or effect. If there is any modification of the specific declaration, it is found in the proviso of the act. It would seem that the language there used could be construed as operative without nullifying these express provisions; but if this be not so, and the two provisions are contradictory, it is the provise and not the principal part of the statute which must give way. State ex rel. Chamberlin v. Daniel, 17 Wash. 111, 49 Pac. 243; Tautakawa v. Kummamoto, 53 Wash. 231, 101 Pac. 869, 102 Pac. 766; State v. Robinson, 67 Wash. 425, 121 Pac. 848; State ex

rel. Board of Com'rs v. Cameron, 90 Wash. | court for Pierce county, alleging that the 407, 156 Pac. 537.

[2] A city may, as we have many times held, enact ordinances on subjects covered by the state statutes, operative within the jurisdiction of the city, when the statute does not expressly prohibit it. Allen v. Bellingham, 95 Wash. 12, 163 Pac. 18. In this statute, however, there is such an express prohibition. An ordinance of a city on the same subject-matter is therefore void.

The judgment is affirmed.

ELLIS, C. J., and PARKER, MAIN, and WEBSTER, JJ., concur.

### STATE ex rel. SEABORN SHIPYARDS CO. v. SUPERIOR COURT OF PIERCE COUNTY. (No. 14786.)

(Supreme Court of Washington. May 7, 1918.)

1. PLEADING \$==249(3)-AMENDMENT.

One who has begun an action of unlawful detainer, a special proceeding, cannot, by filing an amended complaint, change the action, and over defendant's objection proceed with the new action as an equitable one and have entered a decree in equity.

FORCIBLE ENTRY AND DETAINER 6-6(1)-COMPLIANCE WITH STATUTORY PROVISIONS.

Unlawful detainer being a special statutory proceeding, each step prescribed by statute must be strictly complied with to confer jurisdiction upon the court.

3. FORCIBLE ENTRY AND DETAINER \$\infty 32 - Pleading \$\infty 249(4) - Amendment - Ju-RISDICTION.

Defendant having been brought into court under a special summons, and compelled to de-fend in unlawful detainer a special proceeding, the court had jurisdiction to determine the issues in such proceeding only, and could not by amendment allow proceeding to be changed into a general one either at law or in equity.

4. Prohibition \$\infty\$10(2) - Jurisdiction to Issue Injunction.

Where the court only had jurisdiction to determine the issues in a forcible entry and detainer action, it was without power to proceed in and determine an equitable action, and could not grant injunctive relief, and the writ of prohibition will issue.

En Banc. Application for writ of prohibition by the State, on the relation of the Seaborn Shipyards Company, against the Superior Court of Pierce County, to restrain said court from signing findings and conclusions of law, and entering a decree in special proceedings, wherein George P. Wright was plaintiff, and relator was defendant. Granted.

Huffer & Hayden, of Tacoma, for relator. Fletcher & Evans, of Tacoma, for respondent.

MACKINTOSH, J. In the city of Tacoma two adjoining shipyards are being operated, one by the relator and one by George P. Wright. Wright instituted an action of unlawful detainer, or forcible entry and de-

relator had entered upon a portion of the Wright premises, and had refused to remove therefrom, and praying that the premises be restored to him, and for double damages for the wrongful possession thereof. To this complaint the relator demurred, and subsequently, permission having been obtained. Wright filed in the same action an amended complaint, in which he sought to require the relator to remove certain appliances from the Wright premises, and to cease to occupy or use the same. To this amended complaint the relator demurred; one of the grounds of his demurrer being that the amended complaint did not state facts constituting a cause of action in unlawful detainer or forcible entry and detainer. The demurrer being overruled, the relator answered, and, after trial, the court found for Wright, fixed his damages, and announced that it would grant a permanent prohibitory injunction and restraining order requiring the relator to cease doing the things complained of, and requiring him to perform certain affirmative acts. The relator then applied to this court for a writ of prohibition, restraining the superior court for Pierce county from making and signing findings and conclusions, and entering a decree in conformity with the decision which it announced at the conclusion of the trial.

[1] The question for consideration in this case is: Can a person, having begun an action of unlawful detainer or forcible entry and detainer, subsequently, by filing an amended complaint, change that action over the objection of the defendant, proceed with the new action as an equitable one, and have entered a decree in equity?

[2] The action of unlawful detainer or forcible entry and detainer is a special statutory summary proceeding in derogation of the common law, and to confer jurisdiction upon the court each step provided by the statute must be strictly complied with. Big Bend Land Co. v. Huston, 98 Wash. 640, 168 Pac. 470.

[3] The relator having been brought into court under a special summons, and compelled to defend against a special proceeding. the court obtained jurisdiction of him for a special purpose only, namely, to determine the issue in an unlawful detainer or forcible entry and detainer action. The court's jurisdiction of the relator was limited, and, after having obtained that limited jurisdiction, the court could not by amendment allow the special proceedings to be transformed into a general proceeding either at law or in equity, the relator at all times objecting to the court proceeding other than to the trial of an unlawful detainer, or forcible entry and detainer, case. The court having jurisdiction only by virtue of a strict tainer, against the relator in the superior compliance with a special statute was to all

Intents and purposes sitting as a special | ment was not sufficient notice to the surety withtribunal, restricted to the determination of a special statutory proceeding, and was not sitting as a court with general legal or equitable jurisdiction, and had no jurisdiction to determine any other issue than that presentable under the special statute. The relator having appeared in the case before the filing of an amended complaint, there was no way in which he could have objected to the court's jurisdiction to try the case as an action in equity, except by such motions and demurrers as appear in this case. There is not involved in this proceeding any question of the waiver of a special appearance, for at no time was there any opportunity for the relator to have specially appeared and objected to the jurisdiction, for this case is unlike the case of Matson v. Kennecott Mines Co., 171 Pac. 1040. The court here had properly acquired jurisdiction of the relator in a special proceeding, but thereafter attempted to change the nature of the action, and the relator, having appeared generally, could not then remove himself from the case and return by way of a special appearance. This was an action in unlawful detainer, or forcible entry and detainer, because of the allegations in the original complaint, the prayer thereof, and the summons by which the relator was brought into court. As was said in Jeffries v. Spencer, 86 Wash. 133, 149 Pac. 651:

"The special summons here employed would be wholly insufficient to confer jurisdiction of the parties in an action of ejectment."

[4] The court never having had jurisdiction of the relator for any purpose other than to determine the issues in an unlawful detainer or forcible entry and detainer action, it follows that the court was without power to proceed in and determine an equitable action, and could not grant injunctive relief; hence the writ must issue.

It is so ordered.

CHADWICK, PARKER, FULLERTON, and WEBSTER, JJ., concur. ELLIS, C. J., did not participate.

ABERDEEN STATE BANK v. SPOKANE PAVING & CONSTRUCTION CO. et al. (No. 14635.)

(Supreme Court of Washington. April 30, 1918.)

COUNTIES 2123—CONTRACT AS BOND—LIABILITY OF SUBETY — NOTICE—SUFFICIENCY.
Where bank loaning money to contractor for a county road took assignment of deferred payments which failed to recite that the bank had a claim against the bond to the state for labor and materials or provisions or money ad-vanced and used for paying for such articles, and failed to name the principal or the surety on the bond or to refer to the bond, and was not signed by the claimant or filed with the county

in Rem. Code 1915, § 1161, requiring notice reciting such facts to be filed.

Appeal from Superior Department 1. Court, Grays Harbor County; Ben Sheeks.

Action by the Aberdeen State Bank against the Spokane Paving & Construction Company and others. From the judgment rendered, plaintiff appeals. Affirmed.

R. E. Taggart, of Aberdeen, for appellant. W. H. Abel, of Montesano, and Senn, Ekwall & Recken, of Portland, Or., for respond-

FULLERTON, J. In August, 1913, the county of Chehalis, the name of which has since been changed to the county of Grays Harbor, entered into a contract with the Spokane Paving & Construction Company by the terms of which the construction company agreed for a stated consideration to make certain designated improvements on a county road in that county. The contract provided that payments should be made in county warrants, partially as the work progressed on monthly estimates not to exceed 75 per cent. of the amount earned, and the remainder within ten days after the completion of the contract and its acceptance by the county. On the execution of the contract the construction company entered into a bond to the state of Washington with the respondent Ætna Accident & Liability Company as surety, conditioned as required by statute. After entering into the contract and giving the bond, the construction company made an arrangement with the appellant, Aberdeen State Bank, by which the bank agreed to advance sufficient money to take care of the pay roll of the construction company and take in repayment of the money advanced county warrants received by the contractor on the monthly estimates. Under this arrangement money was advanced by the bank, but repaid only in part; the amount unpaid amounting on December 24, 1913, to \$1,028.58. On the last-named date the bank took from the construction company an assignment of the reserved payments withheld by the county and filed the same with the county auditor. As this assignment is material in the consideration of the questions raised by the appellant, we set it forth at length:

## "Assignment of Warrants.

"To the Auditor and Treasurer of Chehalis County, Washington, and to the County Commissioners of said County:

"For a valuable consideration, the Spokane Paving & Construction Company, a corporation, does hereby set over to the Chehalis County Bank, a corporation, having its principal place of business in Aberdeen, Wash., warrants held back by the county of Chehalis, state of Washington, in the sum of \$1,028.58, heing the amount reserved by the said county auditor as a claim against the bond, the assign- being the amount reserved by the said county

under its contract with the said Spokane Paving & Construction Company for the construction of a portion of the highway in Chehalis county known and designated as the Hanson road, and said Spokane Paving & Construction Company hereby directs and authorizes the auditor of Chehalis county, Wash.. to turn over to the said Chehalis County Bank warrants in said sum, when the same becomes payable. This assignment to the said Chehalis County Bank is made in good faith, not as a release or satisfaction, but for the purpose of securing the payment to the said bank of the sum hereinbefore mentioned, which said sum of money is being advanced by the said bank to the Spokane Paving & Construction Company to pay for labor done and performed for the Spokane Paving & Construction Company in the construction of said highway. under its contract with the said Spokane Pav-

Spokane Paving & Construction Company in the construction of said highway.

"In witness whereof the said Spokane Paving & Construction Company has caused its corporate name and seal to be hereunto subscribed and affixed, and these presents to be executed by its officer thereunto duly authorized, this 24th day of December, 1913.

"Spokane Paving & Construction Co.,

"By Henry L. Lilienthal, President."

The construction company only partially completed the work, finally abandoning it early in the month of February, 1914. After the work had been so abandoned, the respondent surety company took over the work, and completed it to the satisfaction of the county on September 8, 1914, at which time the work was finally accepted. On the completion of the work the county paid to the contractor the unpaid portion of the contract price, including the reserved part earned by the construction company, covered by the appellant's assignment, leaving its claim unsatisfied. In completing the work the surety company expended over and above the amount it received the sum of \$3,641.40, suffering a loss in that sum.

In this action the appellant sought to recover against the county and the surety company for its unsatisfied claim. In the court below it relied for recovery against the county upon the assignment before set forth, and against the security company upon the same ground and the further ground that the claim was a charge against the bond of the surety company under the provisions of the bond obligating the surety to pay "all just debts, dues, and demands incurred in the performance of the work" in the payment of which the contractor should make default. A formal statutory notice of its claim was filed by the appellant with the county auditor on February 9, 1915.

On the facts shown the trial court held that there could be no recovery either against the county or the surety company. In this court the appellant concedes that the judgment is correct in so far as it rests upon the assignment feature of the written assignment before set forth, under the rule of this court announced in Title Guaranty & Surety Co. v. Coffman, Dobson & Co., 97 Wash. 211, 166 Pac. 620, and the cases there tice of its claim filed with the county auditor is insufficient to bind the surety, because given more than 30 days after the completion of the contract and the formal acceptance of the work by the affirmative action of the county commissioners. Its contention now is that the assignment itself was a sufficient notice of the claim against the surety, and, being given in time, permits a recovery against the surety as for money advanced by it to pay just debts, dues, and demands incurred by the contractor in the performance of the work.

The section of the statute relating to notice necessary to bind the surety reads as follows:

"Sec. 1161. The bond mentioned in section "Sec. 1161. The bond mentioned in section 1159 shall be in an amount equal to the full contract price agreed to be paid for such work or improvement, and shall be to the state of Washington, except in cases of cities and towns, in which cases such municipalities may by general ordinance fix and determine the amount of such bond and to whom such bond shall run: Provided, the same shall not be for a less amount than twenty-five per cent. (25%) a less amount than twenty-five per cent. (25%) of the contract price of any such improvement, and may designate that the same shall be payable to such city, and not to the state of Washington, and all such persons mentioned in said section 1159 shall have a right of action in his, her, or their own name or names on such bond for work done by such laborers or mechanics, and for materials furnished or provisions and goods supplied and furnished in the prosecution of such work, or the making of such improvements: Provided, that such persons shall not have any right of action on such bond for any sum whetour values within such bond for any sum whatever, unless within thirty (30) days from and after the completion of the contract with an acceptance of the work by the affirmative action of the board, council, commission, trustees, officer, or body acting for the state, county or municipality, or other public body, city, town or district, the laborer, mechanic or subcontractor, or materialman, or person claiming to have supplied materials, provisions or goods for the prosecution of such work, or the making of such improvement, shall work, or the making or such improvement, shall present to and file with such board, council, commission, trustees or body acting for the state, county or municipality, or other public body, city, town or district, a notice in writing in substance as follows:

"To (here insert the name of the state, county or municipality or other public body city.

ty or municipality or other public body, city,

town or district):
"Notice is hereby given that the undersigned (here insert the name of the laborer, mechanic or subcontractor, or materialman, or person claiming to have furnished labor, materials or principal and surety or sureties upon such bond)
for the work of ——— (here insert a brief mention or description of the work concerning which said bond was taken).

"(Here to be signed)

"Such notice shall be signed by the person or corporation making the claim or giving the or corporation making the claim of giving the notice, and said notice, after being presented and filed, shall be a public record open to inspection by any person, and in any suit or action brought against such surety or sureties by any such person or corporation to recover for any of the items hereinbefore specified, the claimart shall be artitled to recover in addition. wash. 211, 166 Pac. 620, and the cases there claimant shall be entitled to recover in addition cited. It concedes also that the formal no- to all other costs, attorney's fees in such sum

as the court shall adjudge reasonable: Provided, however, that no attorney's fees shall be allowed in any suit or action brought or instituted before the expiration of thirty days following the date of filing of the notice hereinbefore mentioned: Provided further, that any city may avail itself of the provisions of this act, notwithstanding any charter provisions in conflict herewith: And provided further, that any city or town may impose any other or further conditions and obligations in such bond as may be deemed necessary for its proper protection in the fulfillment of the terms of the contract secured thereby, and not in conflict herewith."

It will be noticed by comparing the written assignment with the statute that none of the requirements of the statute are thereby complied with. It contains no recital that the bank has a claim against the bond of the present surety or any surety, either for labor, materials, or provisions furnished the contractor or for money advanced to the contractor used in payment of any such labor, materials, or provisions; it does not name either the principal or surety on the bond, nor mention the bond in any way; it is not signed by the corporation making the claim, in this instance the appellant bank, nor was it filed with the county auditor as a claim against the bond. It seems plain to us that no one reading it would understand it as a claim against a surety bond, or understand it to mean other than what it purports to be -an assignment of warrants then due or thereafter to become due from the county to the assignee named therein for the construction of a public road. This is not sufficient. As we said in Rodgers v. Fidelity & Deposit Co., 89 Wash. 316, 154 Pac. 444:

"In view of the language of section 1161, above quoted, that 'such persons shall not have any right of action on such bond for any sum whatever,' unless he 'shall present to and file with such board' the prescribed notice of claim, it seems that argument is hardly necessary to demonstrate that the filing of such notice of claim is an absolute prerequisite to the claimant's right to sue the surety upon the bond.

\* \* \* It seems equally plain to us, from the language of the statute above quoted, that the claimant must, as a prerequisite of his right to sue the surety upon the bond, state in his notice, at least in substance, that he 'has a claim \* \* \* against the bond,' designating it by naming the principal and sureties, and that it is not sufficient that he make a statement in his notice of claim that amounts to nothing more than a statement of his claim against the contractor, his original debtor. The sureties upon such bonds have a right to know what claims are being made against them, by timely filing of the required notice. It is not enough that the claimant makes some claim against funds which may be due the contractor. This is the substance of our holding in Robinson Mfg. Co. v. Bradley, 71 Wash. 611, 129 Pac. 382."

Our conclusion is that the judgment below is without error. It will stand affirmed.

ELLIS, C. J., and PARKER, MAIN, and WEBSTER, JJ., concur.

HILL v. CALKINS-RICE et al. (No. 14382). (Supreme Court of Washington. May 6, 1918.) EVIDENCE \$\simes 83(1) - Presumptions - Reg-

ULARITY OF OFFICIAL ACTS.

The law presumes that the official acts of public officers are properly performed.

Department 2. Appeal from Superior Court, Pierce County; M. L. Clifford, Judge. Action by R. W. Hill against Ada M. Calkins-Rice and another, administratrix. Judgment for defendants, and plaintiff appeals. Affirmed.

H. W. Lueders, of Tacoma, for appellant. Max H. Garretson and J. W. A. Nichols, both of Tacoma, for respondents.

PER CURIAM. This case has been tried five times before juries in the lower court, and this is its second appearance in this court. It will be found reported in 91 Wash. 634, 158 Pac. 347, to which reference is made for a statement of the facts. The jury in the last trial, in addition to finding a general verdict in favor of respondents, by a special verdict found the property which the appellant is seeking to recover in this action was not the property which appellant's predecessor in interest had conveyed to the respondent Calkins, but found that the property was the property of Byron L. Aldrich. In view of this special verdict, which was based upon competent testimony, the contentions of the appellant that the tax sale through which the respondents claim title was void, by reason of certain irregularities, becomes immaterial. The jury having determined that the appellant never was the owner of the property which is the subject-matter of this controversy, it is of no importance as to whether the sale by which the respondents took title was held in strict conformity with the law or not. This disposes of the principal assignment of error urged by the appellant.

Some contention is made that error was committed in allowing a trial by jury and in allowing certain amendments to the pleading. The appellant concedes, however, that these were matters lying within the discretion of the trial court. We find there was no abuse of such discretion.

Objection is also made to the admission of certain testimony. An examination of the record leads us to believe that no prejudice resulted from the rulings in regard to the admission or rejection of testimony.

The giving and refusing of certain instructions is assigned as error; the principal complaint in this regard being that the court instructed the jury to the effect that the law presumes that the official acts of public officers are properly performed. This was a correct statement of the law. Butler v. Maples, 9 Wall. 766, 19 L. Ed. 822; Hays v. Hill, 23 Wash. 730, 63 Pac. 576. The instructions,

the law of the case to the jury as to those matters which were properly before it.

Error is assigned in the refusal to grant the motions for a judgment notwithstanding the verdict or a new trial. There was ample competent testimony to take the case to the jury, and, there having been no substantial error in the trial, both motions were properly denied.

Upon a careful consideration of the record in this case, we are of the opinion that there was no error of which the appellant is justly entitled to complain.

The judgment of the court below is therefore affirmed.

### PARKER v. INDUSTRIAL INSURANCE DEPARTMENT. (No. 14610.)

(Supreme Court of Washington. April 30, 1918.)

1. MASTER AND SERVANT \$= 417(7)-WORK-

1. MASTER AND SERVANT \$\ifsim 417(1)\$\to Work-men's Compensation Act - Review - "Question of Fact" - "Discretion." Under Rem. Code 1915, \$6604\to 20, providing that any employer, workman, beneficiary, or person feeling aggrieved at any decision of the Industrial Insurance Department affecting his interest man benefits. interest may have the same reviewed by a proceeding for that purpose in so far as such decision rests upon questions of fact, it being the intent that matters resting in the discretion of the department shall not be subject to review, the decision of the department as to the classification of an employe as to whether he is one suffering from a permanent partial disability is a question of fact subject to review, while the amount of the award is a matter of discretion for the department; questions of fact meaning all questions resting in fact, and all facts necessary to be ascertained before a workman classed as a beneficiary, and upon which his classification is made, and discretion meaning the conduct of the department with reference to all matters pertaining to the administration of the claim after the workman has properly classified.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Discretion; Second Series, Question of Fact.]

2. MASTER AND SERVANT \$\sim 393\to Workmen's Compensation Act\to Award\to Partial In--Workmen's CAPACITY.

Where an injured employe has been awarded compensation and subsequently has returned to work, but is unable to earn the wages he did before his injury, it was error to terminate did before his injury, it was error to terminate payments; he being entitled to the payment of the difference between his former earning capacity and his present earnings, under Rem. Code 1915, \$ 6804—5(d), providing that as soon as recovery is so complete that the present earning power of the workman at any kind of work is restored to that existing et the time of the is restored to that existing at the time of the injury payments shall cease, but if his earning power is only partially restored payments shall continue in the proportion which the new earning power shall bear to the old.

Department 2. Appeal from Superior Court, Spokane County; Daniel H. Carey, Judge.

Proceedings by Harry Parker under the Workmen's Compensation Act (Rem. Code

taken as a whole, fully and fairly presented tion for personal injury, opposed by the Industrial Insurance Department. An order denying him compensation as one suffering from a permanent partial disability was reversed, and the Industrial Insurance Department appeals. Reversed and remanded, with directions.

> W. V. Tanner and Howard Waterman. both of Olympia, for appellant. Nuzum, Clarke & Nuzum, of Spokane, for respondent.

> CHADWICK, J. The facts in this case are stipulated. The statute fixes no form of procedure in cases of this kind. Respondent appealed from an order of the Industrial Insurance Department denying him an award as one suffering from a permanent partial When the case came on for hearing before the court witnesses were introduced. After hearing the testimony of the attending physician and other witnesses as to the condition of the respondent, the court held that the order of the department should be reversed, and directed that an order be entered classifying respondent as one suffering from a permanent partial disability, and that an allowance be made therefor.

> Appellant maintains: First, that the decision of the department is a matter resting entirely within its discretion, and is not subject to review, or, if so, that there is no showing that it abused its discretion. This contention is rested upon the case of Sinnes v. Daggett et al., 80 Wash. 673, 142 Pac. 5, where we held that we would not review an order of the department fixing a decree of permanent partial disability and the amount of the award. But it seems to us that this case does not support appellant's contention.

> [1] After the status of an injured employé has been fixed by the department, whether acting upon its own judgment or as a legal conclusion from the testimony or admitted facts, the courts will not interfere with the discretion of the department to determine the amount to be paid from month to month, for it is provided that the discretion of the department shall not be subject to review. Rem. Code, \$\$ 6604-5, 6604-20.

> The meaning of the act is that all questions going to the classification of an injured workman and his right to participate in the insurance fund are questions of fact and subject to review, upon appeal, by court or jury; but the amount of the award upon a proper classification is a matter resting in the broad discretion of the department and will not be interfered with, "unless, possibly, their decision might be reviewed by the courts upon such a question where they are charged with capricious or arbitrary action in fixing the amount of their award." Sinnes v. Daggett et al., supra.

Whether an injured employe comes within 1915, §§ 6604—1 to 6604—32) for compensa- one class or another is a fact, and an injured workman may not be made subject to an should be reversed and the order of the erroneous classification without a right of department affirmed, because the infirmity is review. As we read the statute, this is expressly provided for:

be permanent partial disability." Rem. Code.

"Any employer, workman, beneficiary, or person feeling aggrieved at any decision of the department affecting his interests under this act may have the same reviewed by a proceeding for that purpose, in the nature of an appeal, initiated in the superior court of the county of his residence (except as otherwise provided in subdivision [1] of section numbered t604-5) in so far as such decision rests upon questions of fact, or of the proper application of the provisions of this act, it being the intent that matters resting in the discretion of the department shall not be subject to review." Rem. Code, § 6604-20.

That the department is bound by a finding of fact and may not limit its legal effect by rule is held in Kline v. Industrial Insurance Commission, 172 Pac. 343. Were we to adopt the theory of counsel it would be to hold, in effect, that there is no appeal under section 6604-20; for it could be urged that the classification of a workman was as much within the discretion of the department as the fixing of the amount of the award. "Questions of fact," within the meaning of the act, means all questions resting in fact, and all facts necessary to be ascertained before a workman is classed as a beneficiary, and upon which his classification is made. Discretion means the conduct of the department with reference to all matters pertaining to the administration of the claim after the workman is properly classified.

It is next contended that the facts sustain the findings and conclusions of the department, and that respondent has not overcome the legal presumption that the department's decision is correct. The act provides that:

"In all court proceedings under or pursuant to this act the decision of the department shall be prima facie correct, and the burden of proof shall be upon the party attacking the same." Rem. Code, § 6604—20.

The witnesses for the department all agree that respondent has a very highly nervous organism; that he is not suffering from any organic lesion; and that there is nothing shown in the reflexes that would warrant the condition of the respondent, which is described by the experts as neurosis, hysteria, hysterical paralysis, neurasthenia, and hypochondriasis. It is not contended by counsel or by the experts that the respondent is a malingerer or a faker. He drags his right leg, and is unable to advance it beyond the line of his body when walking. His right arm is affected in somewhat the same way. It has a tremor that baffles the skill and knowledge of the physicians who have examined him. They all agree, however, that his condition is real; but they agree with equal unanimity of judgment that it may pass away at any time.

[2] This being the state of the record, it is dence and determine contended that the judgment of the court properly admitted.

department affirmed, because the infirmity is not "any other injury known in surgery to be permanent partial disability." Rem. Code. § 6604-5 (f). But we think it is unnecessary to follow the theories of counsel on either side with reference to the construction of this statute. It may be that the statute is deficient, in that it will not permit an award to be made where a person is suffering from a nervous affliction so long as there is a possibility of his recovery, or because his injury or infirmity is unknown in surgery; but whether this be so or not upon the admitted facts respondent is entitled, pending his final recovery, or until such time as the physicians may be agreed that he cannot recover, to the benefits of the law. The department struck off his allowance at the time he returned to work, although the testimony shows that he was not able to do work that he had done before; that he was given very much lighter work and favored in every way by his employer; that the most that he had earned was \$3 a day, whereas his regular wage had been \$4 a day. It further appears that respondent had not been able to work all of the time. It seems to us that the law makes provision for a case like this:

"As soon as recovery is so complete that the present earning power of the workman, at any kind of work, is restored to that existing at the time of the occurrence of the injury the payments shall cease. If and so long as the present earning power is only partially restored the payments shall continue in the proportion which the new earning power shall bear to the old."

Rem. Code, § 6604—5(d).

Instead of cutting off respondent's allowance altogether, the department should have made an order covering this difference between the present earning capacity of the respondent and his former earning capacity. Considering, then, the spirit of the law, that an injured workman in extrahazardous employment shall have "a sure and certain recovery," and the letter of the law as we conceive it to be, the case will be remanded to the superior court, to be from thence transmitted to the department, with directions to make such an order as will reasonably cover the difference in the wage-earning power of the respondent.

It is so ordered.

ELLIS, C. J., and MOUNT, PARKER, and HOLCOMB, JJ., concur.

RUBENS v. RUBENS. (No. 14535.) (Supreme Court of Washington. April 29, 1918.)

1. APPEAL AND ERROR & 898 - REVIEW - TRIAL DE NOVO.

On an appeal in equity, the Supreme Court tries the case de novo, and will examine the evidence and determine the case on the evidence properly admitted.

APPEAL AND ERROR \$\sim 895(2) -POINTS NOT NECESSARY TO BE DECIDED.

On trial of an equity cause de novo in the Supreme Court, where there is sufficient testimony to sustain the judgment below, without that of a witness whose competency was challenged, the witness' competency need not be determined.

3. PARTNERSHIP \$\infty 261 - Contract - Construction-"Want."

Under a partnership contract providing that, "if second party should want the partnership dissolved" before a certain date, he should lose all his interest as a partner, the word "want" did not mean if the second party expressed a desire to dissolve the partnership it would be thereby dissolved without affirmative action by such party either by notice or abandonment, and especially where the activities of the partnership were continued thereafter.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Want.]

Department 2. Appeal from Superior Court, Spokane County; R. M. Webster, Judge.

Action by Myer S. Rubens against Max Rubens. Judgment for plaintiff, and defendant appeals. Affirmed.

Smith & Mack, of Spokane, for appellant. W. W. Clarke and Carl Ultes, Jr., both of Spokane, for respondent.

HOLCOMB. J. This action was brought by respondent for the purpose of dissolving a copartnership and for an accounting.

Respondent was a stepson of the appellant and had worked for him about 12 years prior to the execution of the contract, which is as follows:

"This agreement made and entered into the 20th day of October, 1914, between Max Rubens, party of the first part, and Myer S. Rubens, party of the second part, Witnesseth: "That whereas the said party of the first part

is the owner of the business carried on by him in the city of Spokane known as the 'Spokane Stove Repair Works' in which said second par-ty has been employed for a number of years by the mutual benefits to be derived therefrom, it is hereby agreed that after the first day of January, 1915, and for a term of ten (10) years thereafter the said business is to be carried on by said parties as a copartnership under the firm name and style of Spokane Stove Repair Works, the said first party to be the owners of two-thirds interest in all the stock of goods, of two-thirds interest in all the stock of goods, fixtures, horse and wagon, tools and implements then on hand and the second party to own one-third interest in said stock of goods, etc., and all debts if any owing for goods received in December, 1914, which shall be on hand January 1st, 1915, an inventory of said December goods to be taken on January 1st, 1915.

"No goods shall be bought from now until January 1st, 1915, without the consent of first party. All moneys outstanding on January 1st, 1915, shall solely belong to first party, but second party agrees to use his best efforts to collect the same.

lect the same.
"It is agreed that the stock of goods, fixtures, wagon, horse, tools and implements on January 1st, 1915, shall arbitrarily be valued at \$9,000,-00, just as if an inventory had been taken, the goods received in December, 1914, and still on hand on January 1st, 1915, however, to be added hereto.

"The said first party is to receive a salary of \$300.00 per month and the second party a salary of \$27.50 per week.
"The said first party shall have the right to overdraw his account \$700.00 per year, and the second party \$200.00 per year, and neither party can after the expiration of the first two years draw out more than 25 per cent. in his share of so much of the capital as shall then exshare of so much of the capital as shall then ex-

ceed \$9,000.00.
"If second party should want the partnership dissolved before January 1st, 1917, he shall lose all his interest as a partner. If he should want all his interest as a partner. If he should want to withdraw from the partnership before the first day of January, 1920, he is to lose 50 per cent. of his share of the profits then made, that is, he is to receive 16% per cent. of the net profit made during the five years: if he should withdraw after January 1st, 1920, but before January 1st, 1925, he is to lose 25 per cent. of his share of all the net profits made after January 1st, 1915 that is he shall in settlement nis share of all the net profits made after Jahruary 1st, 1915, that is, he shall in settlement be entitled only to 25 per cent, instead of 33 1/3 se entitled only to 25 per cent, instead of 35.75 per cent. of the net profits, in addition to the \$3,000.00, the value of one-third of the stock on hand on January 1st, 1915.

"All disbursements have to be made by check."

"During the life of the copartnership no goods."

can be ordered except by the consent of both

parties:
"First party agrees to advance to the copart1015 two-thirds of sum needed to pay necessary expense, to be re-paid to him as soon as possible, and second par-

"In witness whereof, the parties have hereunto and to a duplicate hereof set their hands and seals this 20th day of October, 1914.

"Max Rubens.

[Seal.]

"Max Rubens. [Seal.]"
"Myer S. Rubens. [Seal.]"

Some quarreling and bickering were engaged in between the appellant and respondent without defeating the ends of the partnership relation. No notice of dissolution was given appellant until the service of the complaint in this action, February 1, 1917.

By the decree of the court respondent was awarded the 16% per cent. of the profits, to gether with the \$3,000, the one-third interest in the partnership after deducting the overdraft, leaving a total of \$4,672.12.

The appellant makes eight assignments of

[1, 2] 1. The court erred in admitting the testimony of appellant's attorney, over the objection of the appellant. Both the appellant and respondent went, together, to the attorney's office and consulted in regard to the making of the contract. Respondent claims that the attorney's evidence was admissible, although the general rule (Rem. Code, § 1214) is that any communications made by the client to the attorney, and vice versa, in the course of professional employment, are privileged, claiming that there is a well-settled exception to this general rule where a third party is present at the time of the communication and such third party later becomes a party to a suit against the client. This being an equity case, a trial de novo, in this court we may decide it by disregarding the testimony of the attorney. On a trial de novo on appeal the Supreme Court must examine the evidence and determine what findings should have been made. Bunger v. Pruitt. 73 Wash. 569, 132 Pac. 237.

Assignments of error 2, 3, and 4 are without merit, and we will not discuss them fur-

[3] Assignments of error 5, 6, 7, and 8 relate to the entering of a judgment for the \$3,000 for respondent's one-third interest in the partnership, and may be discussed as one. This brings us to the construction of the contract and such evidence as may aid in its proper construction. In the first paragraph of the contract we find the clause:

"The said first party [appellant] to be the owners of two-thirds interest in all the stock owners or two-thirds interest in all the stock of goods, fixtures, horse and wagon, tools and implements then on hand, and the second party [respondent] to own one-third in said stock of goods," etc.

The forfeiture or dissolution clause is as follows:

"If second party should want the partnership dissolved before January 1st, 1917, he shall lose all his interest as a partner. If he should want to withdraw from the partnership before the first day of January, 1920, he is to lose 50 per cent. of his share of the profits then made, that is, he is to receive 16% per cent. of the net profits made during the five years; if he should withdraw after January 1st, 1920, but before January 1st, 1925, he is to lose 25 per cent. of his share of all the net profits made after January 1st, 1915, that is, he shall in settlement be entitled only to 25 per cent. instead of 33% per cent. of the net profits, in addition to the \$3,000, the value of one-third of the stock on hand on January 1st, 1915."

Upon reading this clause carefully it is plain that the respondent is to lose all interest in the partnership if he should want it dissolved before January 1, 1917, but if he should want to withdraw before the 1st day of January, 1920, he is to lose only 50 per cent. of his share of the profits then made; that is, he is to receive 16% per cent. of the net profit made during the five years.

There is some contention as to the meaning of the word "want," appellant asserting that, inasmuch as respondent expressed a desire or "wanted" to dissolve the partnership, that fact ipso facto dissolved the partnership and forfeited the contract. But as no affirmative action was taken by respondent either by notice or abandonment, the activities of the partnership continuing until this suit and no dissolution taking place prior to January 1, 1917, this contention can avail appellant nothing.

Although the contract could have been more certain, we find that, disregarding the testimony of appellant's attorney, there is sufficient evidence to sustain the trial judge's findings. We therefore conclude that the judgment should be affirmed. It is so ordered.

ELLIS, C. J., and CHADWICK, MOUNT, and WEBSTER, JJ., concur.

HASTINGS v. HASTINGS et ux. (No. 14464.)

(Supreme Court of Washington. April 29, 1918.)

CANCELLATION OF INSTRUMENTS

DEEDS—EFFECT OF SETTING ASIDE.

Where widow, individually and as execuwhere widow, individually and as executrix, brought action against a son to set aside a deed of community property, a judgment setting aside the deed and appointing a commissioner to reconvey to the plaintiff merely reinstated the property as that of the estate, and did not deprive the son of his right as an heir to his father's estate.

Appeal from Superior Department 2. Court, Spokane County.

Action by Elizabeth Hastings, individually and as executrix of the estate of Frank Hastings, deceased, against James Franklin Hastings and Alta Agnes Hastings, husband and wife. Judgment for plaintiff, and the lastnamed defendant appeals. Affirmed.

Harris Baldwin, of Spokane, for appellant. S. L. Americus, of Hillyard, for respondent.

MOUNT. J. The plaintiff brought this action to set aside a deed for failure of consideration. The defendant James Franklin Hastings failed to make an appearance in answer to the complaint and a default judgment was taken against him. Thereafter the plaintiff amended her complaint and the defendant Alta Agnes Hastings made answer thereto, and after trial upon issues joined the court entered a judgment setting aside the deed and appointing a commissioner to reconvey the real estate to the plaintiff. Alta Agnes Hastings alone appeals from that judgment.

But two errors are assigned, to the effect that the court erred in rendering judgment against James Franklin Hastings on the amended complaint, and in rendering judgment vesting title to the real estate in the plaintiff. We think there is no merit in either of these assignments. Counsel for the appellant argues that because no amended complaint was served on James Franklin Hastings after the default had been taken against him the court was without jurisdiction of that defendant. It is not necessary for us to decide in this case whether that defendant should have been served with the amended complaint, because the record before us shows that he was served with both the original and the amended complaints and failed to answer thereto. He appeared as a witness upon the trial. He therefore had ample opportunity to defend if he desired to do so. The court clearly had jurisdiction to render a judgment against him.

It is next argued that the court erred in rendering the judgment vesting the title in Elizabeth Hastings. The record shows without dispute that Elizabeth and Frank Hastings during the lifetime of the latter were the owners of the real estate in question as community property. They deeded this property to their son, James Franklin Hastings. The consideration expressed in the deed was \$2,000, but the complaint alleged, and the court found, that the real consideration was an agreement by the son to support his mother and father during their lifetimes. After the deed was made the son neglected and refused to support his mother and father. and after the father died the mother brought this action to set aside the deed. She brought the action in her individual capacity and in her capacity as executrix of her husband's estate. The trial court, at the conclusion of the evidence, which is not questioned here, concluded that the consideration for the deed had failed, and that the respondent was entitled to have the deed set aside and a reconveyance of the property. The effect of this judgment was to reinstate the property as that of the estate, to be distributed upon final distribution as though the deed had never been made. The judgment of the lower court does not affect the interest of James Franklin Hastings as an heir to his father's estate. It simply sets aside the deed which was made by the father and mother in the lifetime of the father, and directs that the property be reconveyed.

It seems clear that there is no merit in either of the contentions of the appellant. The judgment is therefore affirmed.

ELLIS, C. J., and HOLOOMB, WEBSTER, and CHADWICK, JJ., concur.

EMBAGI v. NORTHWESTERN IMPROVE-MENT CO. (No. 14512.)

(Supreme Court of Washington. April 27, 1918.)

CHATTEL MORTGAGES \$\infty 138(1) - PRIORITY 'PURCHASER FOR VALUE."

A creditor who in payment of his antecedent debt takes a quitclaim deed to buildings on premises owned and leased by him to the debtor and takes possession thereof, with notice of a prior chattel mortgage thereon in the form of a bill of sale, without the affidavit of good faith required by Rem. Code 1915, § 3660, and not recorded, given to secure another creditor, is a "purchaser for value" within section 3660, and has rights superior to the prior chattel mortgage or bill of sale.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Purchaser for Value.]

Department 1. Appeal from Superior Court, Kittitas County; Geo. B. Holden, Judge.

Action by John Embagi against A. W. Hendricks and the Northwestern Improvement Company. From a judgment for the Improvement Company, plaintiff appeals. Affirmed.

Pruyn & Hoeffler, of Ellensburg, for appellant. Geo. T. Reid, J. W. Quick and L. B. Da Ponte, all of Tacoma, for respondents.

MOUNT, J. The appellant brought this action to foreclose an alleged chattel mortgage, which was in the form of a bill of sale, without the affidavit of good faith required by section 3630, Rem. Code, and which was not recorded. The Northwestern Improvement Company was joined as a party because it claimed ownership of the property sought to be foreclosed against. Upon issues joined, the case was tried, and the court concluded that the property in question was the property of the Northwestern Improvement Company and entered a judgment to that effect. The plaintiff has appealed.

The facts are not disputed. They are substantially as follows: In the year 1914 the Northwestern Improvement Company was the owner of a certain tract of land in the vicinity of Cle Elum, in this state. In March, 1914, A. W. Hendricks entered into negotiations with that company to lease a portion of this tract of land. He was advised that the tract was already under lease which would not expire until the fall of 1914, but that after the expiration of that lease he could have a lease upon the land. Thereupon Hendricks entered into possession of a part of the land and commenced the construction of a dwelling house and outbuildings. He purchased the material for the construction of these buildings from the respondent, beginning on the 7th of April, 1914, and ending on the 14th of October of that year. On May 11, 1914, while the buildings were in course of construction, Hendricks borrowed from the appellant \$400, and gave the appellant a conditional bill of sale covering the buildings. This bill of sale was neither acknowledged nor accompanied by an affidavit of good faith, nor recorded. Hendricks did not pay for the materials that were purchased from the Northwestern Improvement Company, and on November 4, 1914, the improvement company filed a claim of lien against the buildings for materials used therein amounting to \$951.60. On the 18th of March, 1915, Hendricks gave to respondent a quitclaim deed to the buildings in consideration of \$1,098.85, being the amount then owing by Mr. Hendricks to the improvement company. That company took immediate possession of the buildings, which were worth not to exceed \$1,000 at that time. At the time this deed was given Mr. Hendricks informed the company that he had given a bill of sale of the buildings to the appellant. Thereafter, in August, 1915, the appellant brought this action to foreclose the bill of sale, which was alleged to be a chattel mortgage.

It is argued by the appellant that, because the respondent Northwestern Improvement Company had notice of the bill of sale given to the appellant at the time Hendricks executed the quitclaim deed and delivered possession of the property, the respondent is not a purchaser in good faith. In the case

Por other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

of Smith v. Allen, 75 Wash. 135, 138 Pac. 4. CHATTEL MORTGAGES 5 194-FAILURE TO 623. Ann Cas. 1915D. 300, we had occasion RECORD. 623, Ann Cas. 1915D, 300, we had occasion to review the cases from this court relied upon by the appellant, and a number of other cases, and we there held, as stated in the syllabus, that a creditor who takes a valid chattel mortgage to secure his antecedent debt, with notice of a prior unacknowledged chattel mortgage given to secure another creditor, is both a creditor and an incumbrancer for value and in good faith, within Rem. & Bal. Code, § 3360, providing that a chattel mortgage without acknowledgment is void as to creditors, subsequent purchasers. and incumbrancers for value and in good faith; and his mortgage is therefore superior to the prior unacknowledged mortgage. That rule is conclusive of the question presented in this case. In that case we were considering a chattel mortgage which was taken with notice of a prior unacknowledged chattel mortgage, one which did not contain the affidavit of good faith, and one which was not recorded. There is no difference in principle in the two cases. The same rule was followed in Kato v. Union Oil Co., 92 Wash. 473, 159 Pac. 692, and in Belcher v. Young, 90 Wash. 303, 155 Pac. 1060. trial court was therefore right in concluding that the appellant's bill of sale or chattel mortgage was of no effect against a quitclaim deed and possession held by the respondent Northwestern Improvement Company.

The judgment is therefore affirmed.

ELLIS, C. J., and FULLERTON, CHAD-WICK, and HOLOOMB, JJ., concur.

KEYES v. SABIN et al. (No. 14093.) (Supreme Court of Washington, April 29, 1918.)

1. Assignments for Benefit of Creditors 228 - RIGHT OF ASSIGNEE TO CONTEST

CHATTEL MORTGAGE.

Where an assignee for benefit of creditors immediately took possession of the debtors' goods, including a stock of goods which, unknown to him or the general creditors, was covered by a prior chattel to secure certain credi-tors, who had an understanding with the mortgagors that they should remain in possession and continue their business as they did prior to the continue their business as they did prior to the mortgage, but no understanding that any part of the proceeds from the business should be retained for application upon the mortgage debt, the assignee could assert the invalidity of the mortgage as representative of the general creditors, in an action by the mortgagees to establish the mortgage as a preferred claim.

2. Assignments for Benefit of Creditors 184—Title Acquired by Assignment.

By an assignment for benefit of creditors under which the assignee takes possession of the assignor's property, the general creditors acquire, not merely a lien, but at least an equitable title and ownership.

3. Sales == 239-Bona Fide Purchaser. A purchaser of property in consideration of a pre-existing debt is within the protection of

the statutes as to chattel mortgages thereon.

Where a chattel mortgage was not recorded as required by Rem. & Bal. Code 1915, § 3660, within the time limited by section 3661, nor until after the property had been assigned by the mortgagors for benefit of creditors and the assignee had taken possession thereof, it was void as to the general possible as the general as to the general creditors, since the assignment of the property for their benefit created a specific lien thereon.

En Banc. Appeal from Superior Court,

Cowlitz County; Wm. T. Darch, Judge.
Action by W. W. Keyes, trustee, against R. L. Sabin and others. From judgment for defendants, plaintiff appeals. Affirmed.

W. W. Keyes, of Tacoma, pro se. Telser & Smith, of Portland, Or., for respondents.

FULLERTON, J. On March 4, 1915, W. A. Williams and B. I. Williams, doing business as W. A. Williams & Co., were conducting a general merchandise store at Castle Rock in this state. Being then indebted to the Sperry Flour Company and the Puget Sound Flouring Mills Company, who through their agent were pressing for payment, they executed to the appellant, Keyes, as trustee for the use of the creditors named, some eight promissory notes aggregating the amount of the indebtedness, and attempted to secure the notes by a chattel mortgage covering their stock of merchandise. notes divided the indebtedness into substantially equal payments, the first becoming due on April 4, 1915, and the remainder in order monthly thereafter, the last falling due on November 4, 1915. The mortgage was in form that commonly used in this state for mortgaging specific chattels. It covenanted that, if the sum of money represented by the notes be paid according to the tenor and effect of the notes, the mortgage should be void, but that, "if default be made in the payment of said sum of money or the interest thereon or any part thereof at the time the same shall become due, or any attempt shall be made to remove any of said property from said county or to dispose of the same without the written consent of" the mortgagee, then the entire indebtedness should become due and payable and the mortgage subject to foreclosure. There was an understanding between the mortgagees and the mortgagor, shown by the testimony of the agent taking the mortgage, that the mortgagors should remain in possession of the property and continue their business as they did prior to its execution. The court found, however, that there was no agreement either in writing or by parol that any part of the proceeds arising from the conduct of the business should be retained by the mortgagees for application upon the mortgage debt.

The mortgage was not recorded until March 27, 1915. Between the date of its execution and the date of the recording. made a common-law assignment of their property to the respondent Sabin for the benefit of their creditors; the assignment including the stock of goods covered by the mortgage. Immediate possession of the property was taken by the assignee, and he was in such possession when the mortgage was recorded. It was found that the assignee had no notice of the mortgage at the time the assignment was made, and, while there is no finding on the question, it was not shown that any of the creditors of the assignors other than the beneficiaries of the mortgage had such notice.

The mortgagee did not attempt to disturb the assignee in his possession of the property, but filed his claim with the assignee as a creditor, claiming a preference over other creditors to the extent of his mortgage. The assignee continued in possession of the property until he finally disposed of it, and reduced its value to cash. He, however, refused to recognize the mortgagee's claim as a preference claim, whereupon the present action was begun to establish it as such. The trial court held the mortgage void as to the general creditors of the mortgagors; held, also, that the assignee could assert its invalidity as the representative of the creditors, and denied the claim of preference. From a judgment entered in accordance with such holdings this appeal is prosecuted.

[1] Taking up the assignments of error in a somewhat different order from that in which they are presented in the brief of the appellant, the first and principal contention is that the assignee is not in a position to assert the invalidity of the mortgage. It is argued that the assignee takes only such title as the assignor had, and as the mortgage was good as between the mortgagors and the mortgagee it is good as between the assignee and the mortgagee. But we cannot think the relation here assumed correctly represents the assignee's position. It is true, unquestionably, that if there was a valid and subsisting lien on the property assigned, good as against all the world, or if the title to any of the property was defective in the assignors, the assignee would take the property subject to such lien or defect. But it does not follow that he takes the property subject to all inchoate or imperfect liens invalid as to certain persons although valid as between the parties thereto. The assignee holds the property in trust for certain designated persons, in this instance the creditors of the assignors. In his individual right he acquired nothing by the assignment. He is but the mediary through whom the title to the assigned property was conveyed to creditors. If therefore these creditors, the actual beneficiaries of the assignment, could have acquired a valid title against any inchoate or imperfect lien upon the property by an assignment made directly to them, they can acquired property as between the mortgagee

namely, March 20, 1915, the mortgagors to another for their benefit. It cannot be doubted, we think, that, if the assignment had been made directly to the creditors and the mortgage the appellant seeks to assert is invalid as against them, they could assert its invalidity in any suit against them brought to enforce the mortgage. If they could do this in their individual capacities, there is no reason why they cannot do it through their representative.

> It will be remembered that this is a consummated assignment. Not only was there an assignment of the property, but it was taken possession of by the assignee and is still held by him although in a substituted form. Had the mortgagor obtained possession of the mortgaged property prior to the assignment under a defectively executed mortgage. or possession after the assignment but prior to the time it was reduced to possession by the assignee, it may be that the assignee could not have recovered it. But the rule that denies recovery in such instances does not rest on the ground that the assignee is not the representative of the creditors in such a way as to assert such rights as are vested in them, but rests on the ground that the creditors themselves in such cases could not assert the right.

> While it may not argue very strongly in favor of the conclusion we have reached, it is well to remember further that the appellant is himself here suing in a representative capacity. He has individually no interest in the mortgage he seeks to enforce, nor in the debt thereby attempted to be secured. He sues in the capacity of a trustee, and all the rights he is attempting to assert are rights which inhere in his cestuis que trustent. If he may in a representative capacity assert for them the validity of the mortgage, seemingly the assignee may in the same capacity assert for others its invalidity.

The question presented is not altogether new in this state. In Moore v. Terry, 17 Wash, 185, 49 Pac. 234, it appears that the copartnership of Dodge & Smith then operating a hotel gave a chattel mortgage upon the hotel furniture to secure an indebtedness owing to one Terry; the mortgage containing a provision that it should cover all furniture that should thereafter be put into the hotel by the copartnership. Dodge later succeeded to the rights of Smith and operated the hotel on his own behalf. While so operating it, he put furniture therein belonging to himself individually. Later he became insolvent and made an assignment for the benefit of his creditors. The mortgagee made claim to furniture put into the hotel by Dodge, which claim the assignee resisted. The trial court held in favor of the assignee, and on the appeal it was contended that the mortgage was valid as to the afteracquire such a right by an assignment made and Dodge, and was therefore valid as between the mortgagee and the assignee, since the debtor's property as to create such spethe assignee could acquire no greater rights in the property than Dodge had to assign. Answering the contention, the court used this language:

"The appellants contend that the assignee could have no greater rights than Dodge himself had in the premises, and that, if a lien could be maintained as against Dodge, it must be held good in this instance; and authorities are cited apon the proposition that an assignee can have no greater rights than the insolvent had. But under the holdings of this court, such a rule does not obtain here, for the assignee represented the creditors as well as the insolvent, and could assert such rights as the respective creditors could have asserted in case of a direct action. Manshave asserted in case of a direct action. Mansfield v. National Bank, 5 Wash. 665 (32 Pac. 789, 999)."

A similar principle was announced in the case of Benner v. Scandinavian American Bank, 73 Wash. 488, 131 Pac. 1149, Ann. Cas. 1914D, 702. That was a case in which Benner, a trustee in bankruptcy, sought to recover from the bank certain property transferred by the bankrupt to the bank in violation of the bankruptcy act. other contentions, the bank urged that the trustee had no such interest as enabled him to maintain the action. Stating the contentions and the governing rule, this language was used:

"But it is said that the creditors here are not seeking to sequester the property to the satisfaction of their debts; that the title to the property is in the trustee in bankruptcy, who took it from the bankrupt, the vendor in the bill of sale; that the trustee's title is no better than the bankrupt's, and, since it could not avoid the conveyance, the trustee cannot. But the trustee not only holds the legal title to the bankrupt's estate, but he represents the credi-tors of the bankrupt also. Such rights as they possessed against the claimants and holders of the bankrupt's estate, he possesses; and he can avoid any transfer or conveyance of the property which they could have avoided. In other words, the bankruptcy proceedings are in them-selves in effect an attachment and sequestration of the property of the bankrupt for the benefit of his creditors, and the trustee thereof has pleof his creditors, and the trustee thereof has plenary power to take all such steps as are necessary to subject the bankrupt's property to the satisfaction of his obligations. Bankruptcy Act, § 67c; Mueller v. Nugent, 184 U. S. 1 [22 Sup. Ct. 269, 46 L. Ed. 405]; Bank v. Sherman, 101 U. S. 403 [25 L. Ed. 866]; Bryan v. Bernheimer, 181 U. S. 188 [21 Sup. Ct. 557, 45 L. Ed. 814]; In re Pekin Plow Co., 112 Fed. 308 [50 C. C. A. 257]; In re Thorp [D. C.] 130 Fed. 371."

[2, 3] The appellant cites and relies upon the cases of Malmo v. Wash. Rendering, etc., Co., 79 Wash. 584, 140 Pac. 569, L. R. A. 1917C, 440, Eilers Music House v. Ritner, 88 Wash. 218, 152 Pac. 1008, 154 Pac. 787; and Sunel v. Riggs, 93 Wash. 314, 160 Pac. 950. In the first and second of these cases it was held that a conditional sales contract good as between the parties was good as to general creditors, that is, creditors who had not acquired a specific lien upon the property; and that the appointment of a receiver of the property of the debtor at the suit of

cific lien. The rule of these cases is seemingly contrary to the earlier cases of Willamette Casket Co. v. Cross, etc., Co., 12 Wash. 190, 40 Pac. 729, and Manhattan Trust Co. v. Seattle Coal, etc., Co., 16 Wash, 499, 48 Pac. 333, 737, in the first of which it was pointed out that the appointment of a receiver placed the general creditors at a disadvantage if it were to be held that the receiver was not so far their representative as to be able to question in their behalf liens void as to them, since the very appointment of the receiver placed it beyond their power to acquire a specific lien. Indeed, the court went so far as to say that it did not think it would be seriously questioned that a mortgage inoperative as to creditors would not be operative as to the receiver as their representative. But giving effect to the rule of the later cases, we think they are distinguishable from the present case and the cases we have cited as supporting the present case. Here the general creditors acquired more than a lien by the assignment. They acquired ownership and title: equitable title it may be, but title nevertheless. Having title through their representative, it is unsound in principle to say that they cannot question liens void as to them. and, what is the same thing, question such liens through their representative. fact that no immediate consideration passed from the assignee to the assignor, or the fact that the obligation which the assignment was intended to satisfy antedated the assignment, does not invalidate or subject the assignment to the lien of the mortgage. A purchaser of property in consideration of a pre-existing debt is within the protection of the statutes. Johnston v. Wood, 19 Wash. 441. 53 Pac. 707.

The third case, while it is not questioned that it was rightly decided, we think was rested upon an untenable ground. The conditional sale in that case was perfected by recordation prior to the time the assignment was made, and was then valid under the authority of Pacific Coast Biscuit Co. v. Perry, 77 Wash. 352, 137 Pac. 483, since the creditors had not at that time acquired either title to the property or a specific lien But the majority of the court think it wrong to the extent that it was rested upon the ground that the assignee was not so far the representative of the creditors as to be able to question a conditional sales contract void as to general creditors.

It is worthy of mention, also, that the decisions in these cases did not meet with general approval. The Legislature of the state, since the decisions were announced (Laws 1915, pp. 276, 277), has enacted statutes declaring all chattel mortgages and contracts of conditional sale void as to creditors, the creditors was not such a sequestration of | "whether or not they have or claim a lien

upon .. such property," unless executed and recorded in a prescribed manner.

Our conclusion therefore is that the assignee can question the validity of the chattel mortgage in issue, as the representati e of the general creditors of the assignors.

The further inquiry is: Was the mortgage void as to creditors? The trial court held that it was for two reasons: (1) It covered a general stock of merchandise of which the mortgagors were left in possession with power of disposition and sale in the usual course of trade, without any agreement elther oral or written to apply the proceeds or any part of the proceeds derived from such disposition or sale to the satisfaction of the mortgage debt; and (2) the mortgage was not recorded within ten days after its execution, nor until after the assignment for the benefit of creditors had been made and the assigned property had been taken possession of by the assignee.

Our conclusion on the second of these propositions renders it unnecessary to discuss the first. It may be remarked in passing, however, that such mortgages were held void per se as to creditors by the territorial court in the cases of Wineburgh v. Schaer, 2 Wash. T. 328, 5 Pac. 299, and Byrd v. Forbes, 3 Wash. T. 318, 13 Pac. 715, and no case from the state court has been pointed out to us where a contrary doctrine has been announc-We have held such mortgages valid when accompanied by an agreement, either parol or written, that the proceeds derived from the conduct of the business shall be applied to the satisfaction of the mortgage debt, or to the running expenses, the keeping up of the stock, and the satisfaction of the debt, and have held a mortgage valid where the agreement was that the mortgaged stock should not be reduced below a fixed value; but no case, as we say, holds that a mortgage is valid where the mortgagor is permitted to remain in possession of the property and dispose of it by sale in due course of trade with no obligation to account for such sales prior to the maturity of the mortgage debt. For the convenience of the curious, we cite the cases where the question has been touched upon: Warren v. His Creditors, 3 Wash. 48, 28 Pac. 257; Ephraim v. Kelleher, 4 Wash. 243, 29 Pac. 985, 18 L. R. A. 604; Benham v. Ham, 5 Wash. 128, 21 Pac. 459, 34 Am. St. Rep. 851; Sanders v. Main, 12 Wash, 665, 42 Pac. 122; Adams v. Dempsey, 22 Wash. 284, 60 Pac. 649, 79

the property for value and in good faith, unless it is accompanied by the affidavit of the mortgagor that it is made in good faith and without any design to hinder, delay, or defraud creditors, and is acknowledged and recorded in the same manner as is required by law in conveyance of real property. A subsequent statute (Id. § 3661) permits its recordation within ten days from the time of its execution, making the recording within that period a compliance with the requirement in the first section cited. By a reference to the statement of the case we have made, it will be seen that the mortgage was not recorded within the time limited by the statute nor until after the property had been assigned to the respondent and he had taken possession of the property. By the terms of the statute as construed by our decisions, the mortgage was void as to all creditors who are in a position to assert the invalidity of the mortgage by acquiring a specific lien upon the property; and, since we hold that the assignment of the property for their benefit created such a lien, it follows as of course that the mortgage is void as to them. It would seem that the words of the statute were so clear as to scarcely admit of dispute or contrary opinion, but it has nevertheless been as to its meaning the subject of controversy before this court. In Hinchman v. Point Deflance Ry. Co., 14 Wash. 349, 44 Pac. 152, one of the questions in contest was the priority of a subsequent properly executed mortgage over a defectively executed prior one, good as between the par-The court after quoting the statute. used this language:

"Manifestly, there are three classes of persons whose rights are defined by this section. They are: (1) Creditors of the mortgagor; (2) subsequent purchasers; and (3) parties in whose favor subsequent incumbrances of the property are made. As to the first class, creditors, the un-recorded mortgage is absolutely void. It is void. also, as to the two latter classes when they deal with the mortgaged property for value and in good faith.'

In Manhattan Trust Co. v. Seattle Coal & Iron Co., 16 Wash. 499, 48 Pag. 333, 737, the question was as to the validity of a mortgage upon personal property executed and recorded in the form of a mortgage upon real property. The court held the mortgage void as to creditors, because not executed in manner prescribed by the statute nor recorded so as to give constructive notice. In the course of the opinion this language was used:

v. Dempsey, 22 Wash. 284, 60 Pac. 649, 79
Am. St. Rep. 933; Van Winkle v. Mitchum,
66 Wash. 296, 119 Pac. 748; Nason & Co. v.
Stack, 81 Wash. 147, 142 Pac. 477.

[4] We are clear that the mortgage is void for the second reason stated. The statutes in force at the time the mortgage was executed (Rem. & Bal. Code, § 3660) provided that a mortgage of personal property is void as against creditors of the mortgagor, or subsequent purchaser and incumbrances of the mortgagor that any mortgage of personal property was made in good faith and without any design to hinder, delay or defraud creditors, and it is acknowledged and recorded in the same manner as is re-"There was no affidavit of the mortgagor that

quired by law in conveyance of real property.' Section 1649 provides: 'A mortgage of personal property must be recorded in the office of the county auditor of the county in which the mortgaged property is situated, in a book kept exclusively for that the property is situated.

sively for that purpose.'

The plain, literal meaning of these sections is against the contention of plaintiff that it has any lien whatever upon the personal property in the possession of the receiver as against these petitioners. There is no evidence whatever that the petitioners had any notice of the existence of any chattel mortgage in favor of the plaintiff. Counsel for plaintiff and receiver argued that, as petitioners, as creditors, have not negatived notice or knowledge on their part, it should be in-ferred against them; but this would be a novel rule and one that we have never seen applied. Such allegation and proof of notice should come from the one claiming the personal property under the alleged mortgage. But we are not prepared to decide that in any view there could be here a chattel mortgage as against these creditors."

In the more recent case of Smith v. Allen, 78 Wash. 135, 138 Pac. 683, Ann. Cas. 1915D, 300, it was held that a chattel mortgage without any certificate of acknowledgment is void as against creditors or incumbrancers for value and in good faith, under the express provisions of this statute. It was held, also, that a creditor who takes a valid chattel mortgage to secure his antecedent debt is both a creditor and incumbrancer, and that his mortgage is superior to a prior defectively executed mortgage notwithstanding he may have had knowledge of the prior mortgage.

But the inquiry need not be pursued. It is our conclusion that there is no error in the judgment sought to be reviewed. It will stand affirmed.

ELLIS, C. J., and MOUNT, MAIN, HOL-COMB, PARKER, WEBSTER, and CHAD-WICK, JJ., concur.

EDWARDS et ux. v. HEATON et al. (No. 14587.)

(Supreme Court of Washington. April 27, 1918.)

VENDOR AND PURCHASER \$== 87-EXTENSION AGREEMENT.

Where vendor of land on installment payments agreed to make a three-year extension on the payments in consideration both of repurthe payments in consideration both of repurchase at a certain price by the purchaser and another of part of the land which the purchaser had sold to a third party and an agreement that the profits from sale of the repurchased property be divided equally between them and the vendor, the purchaser was not entitled to the benefit of the proposed extension where he bought the land individually at a price exceeding the agreed price, and there was no exceeding the agreed price, and there was no sale of the land or tender of any agreement under which it could be sold and the profits di-

Department 2. Appeal from Superior Court, Snohomish County; Ralph C. Bell, Judge.

J. H. Heaton and others. From a judgment for defendants, plaintiffs appeal. Reversed and remanded, with instructions.

Williams & Davis, of Everett, and A. C. Edwards, of Tacoma, for appellants. Bausman & Oldham, of Seattle, for respondents.

FULLERTON, J. On April 8, 1915, the appellants Edwards and the respondent Heaton entered into a written contract by the terms of which the appellants agreed to sell and the respondent agreed to buy a certain described tract of real property, containing about 73 acres, situated in Snohomish county. The contract, after reciting that a substantial part of the contract price of the land had been paid, further recited that there remained a balance due thereon of \$2,-200 which the purchaser agreed to pay in yearly installments of \$200 each, the first installment to be paid one year after the date of the contract, and the remaining installments yearly thereafter, with interest on all deferred payments at the rate of 7 per cent. per annum payable semiannually.

The contract contained, among other conditions, the following:

"But in case of default in the payment of the said principal sum or part or portion thereof, or interest or part or portion thereof, or in any term or condition herein contained, the times of payment being hereby declared to be the essence of this agreement, then, or in any such an event or events, first parties, their heirs or assigns, shall have the right to declare this agreement to be null and void, after 30 days' notice, and all sums as may have been paid on account of said purchase price, and any and all rights and interests of all kinds in and to the said premises or part or portions thereof that may not have been deeded at the time of such default, and all rights and interests on the second party. his heirs or assigns, shall utterly cease and determine, as absolutely, fully and perfectly as if this agreement had never been made

The contract also contained the further provision that the purchaser might sell parts or portions of the land in tracts of five acres or more at prices stated, for which the appellants would issue deeds on the payment to him of the purchase price; the moneys received to be credited by him upon the purchase price.

Within three or four days after the execution of the principal contract the respondent Heaton entered into a contract with the defendant John H. Flora, by which he agreed to sell to Flora some 40 acres of the land. This contract is not set forth in the record, nor was its purport generally shown. It appears, however, that Flora entered into possession of the land and made valuable improvements thereon. Seemingly, also, the defendant Luthi, by an arrangement with Heaton, acquired some interest in the land. This interest, however, was not shown, and is not involved in this proceeding. Later on Flora desired to resell his interests to Heaton, and he and Luthi took the matter up Action by A. C. Edwards and wife against with the appellant Edwards. The negotiations led to a proposal by Edwards, on which Heaton and Luthi indorsed their acceptance. This appears in the record in the following form:

"Everett, Washington, April 22, 1916. "Mesers. E. S. Luthi and J. H. Heaton, Lakewood, Washington—Gentlemen: In considera-tion of your taking over and purchasing the J. H. Flora property in lot 3 and the southeast quarter of the southeast quarter of section 23, township 31 north, of range 4 east, at a price of \$2,300.00, and for the further consideration of an agreement that the property shall be sold at the best price obtainable, and the profits at the distance of the price of the property shall be sold at the price obtainable, and the profits at the price of thereon divided equally between the undersigned and yourselves, I agree that in the event it is not convenient for you to pay the payments hereafter to become due to me on my contract to you for the sale of the land, that an extension may be granted for a reasonable period, not exceeding three years, in which payments may be made.

may be made.

"In case it becomes necessary to make payments to J. H. Flora on his interest, it is agreed that the undersigned shall pay one-half of the same as it becomes due.

"A. C. Edwards.

"Approved:
"E. S. Luthi.
"John H. Heaton."

Following the acceptance of the proposition made Heaton individually repurchased the property from Flora. The terms of this purchase were not shown in their entirety. While it appears that Heaton agreed to pay therefor the sum of \$2,405, it was not shown how much of a cash payment was required to satisfy Flora. He owed something as a balance due on his contract with Heaton which was deducted from the total price agreed to be paid, but the amount remaining due does not appear. Heaton in his answer set forth that in the repurchase it was necessary to make payment to defendant Flora, and that he did make a payment to him of \$255, but does not say whether or not this was all that was due Flora, and his evidence is no more definite. It did appear clearly, however, that Luthi acquired no interest in the land by the repurchase as made, and that subsequent thereto no agreement either oral or written was entered into between the three parties, or considered by them, by which the land repurchased was to be sold for their mutual benefit and the profits divided between them, nor was any such agreement entered into or considered between Heaton and Edwards individually.

The first installment of the principal sum due under the main contract was paid by Heaton some time before it fell due. He did not pay the semiannual installment of interest falling due on April 8, 1916. amounted to \$70, and Edwards began pressing for its payment. On May 9, 1916, Heaton wrote Edwards concerning this payment, in which letter he referred to a conversation between them and to his repurchase of the Flora interest, and stated that he gathered therefrom that this payment was not to be pressed. To this Edwards answered to the effect that the matter might rest for a while.

ment, nor did he pay the semiannual installment in a like sum falling due on October & 1916. Because of the failure to make these payments Edwards served notice of forfeiture on Heaton, pursuant to the terms of the contract, on December 14, 1916. Later on he brought the present action to declare a forfeiture and to free the lands from the apparent lien of the contract. Heaton defended on the ground that payments under the contract had been extended for a three-year period by the subsequent proposal of Edwards and its acceptance by him of date April 22, 1916. The trial court took this view of the matter and refused to adjudicate a forfeiture. It took the view also that Edwards was obligated to pay one-half the sum Heaton had paid Flora, and entered a judgment against Edwards and in favor of Heaton for that sum.

It seems to us that the conclusion of the court is erroneous. In the first place, the proposal by its very terms does not include the installment of interest falling due on April 8, 1916. It is dated April 22, 1916, and refers to payments "hereinafter to become due"; so that in any event there was default as to this installment. In the second place, we cannot conclude there was such a compliance with the terms of the proposition made as to postpone the due dates of the remaining installments. The proposal and its acceptance did not alone constitute an agreement to postpone the payment of these installments for the period therein named. It was made subject to the condition that Flora's interest be purchased by Heaton and Luthi together, that the price paid Flora for his interest should not exceed \$2,300, and that the property be sold for the best price obtainable, and the profits made thereby be equally divided between Edwards, on the one part, and Heaton and Luthi, on the other. The record falls far short of showing a compliance with these conditions. The land was purchased by Heaton alone, at a price exceeding the agreed price, and there was no sale of the land nor tender of any agreement under which they could be sold and the profits of the sale divided. As we view the record, Heaton first regarded the purchase as one made in his own behalf and for his sole benefit, and asserted the contrary only after the notice of forfeiture was served upon him, and even then did not tender the land to be sold in accordance with the terms of the proposal. This was not sufficient to make the agreement to postpone the installments obligatory upon the party making the offer.

But, notwithstanding we think Heaton was in error in his construction of the effect of the proposed agreement, we cannot think that the remedy sought by appellant should be granted according to the strict prayer of his complaint. While the remedy sought is within the terms of the contract, it is never-Heaton did not subsequently make the pay- theless a harsh one, since it cuts off all

rights Heaton has in the contract and works | smaller of the two concerns, it apparently a forfeiture of the installment paid. This should not be done except in a case where the litigant has forfeited all right to equitable consideration. We have concluded, therefore, to remand the cause with instructions to the trial court to ascertain the amount due upon the contract at the date of the remittitur and grant the respondent Heaton a reasonable time, not to exceed 60 days, in which to pay the amount found due. If payment is made within that time, the action will be dismissed at Heaton's costs; if he fails to pay, a decree will be entered against him according to the prayer of the complaint.

Reversed and remanded accordingly.

ELLIS, C. J., and CHADWICK, MOUNT, and HOLCOMB, JJ., concur.

THE NUT HOUSE v. PACIFIC OIL MILLS. (No. 14219.)

(Supreme Court of Washington. May 6, 1918.)

1. Frauds, Statute of \$\insigma 106(1)\$—Memoran-DA—Abbreviations—Parol Evidence. Although an order for goods contained ab-breviations which required parol evidence to explain, it was a sufficient memorandum statute of frauds (Rem. Code 1915, § 5290).

2. JUDGMENT 5-592—ACTION BY ASSIGNEE— SET-OFF—RIGHT TO SUE ASSIGNOE FOR EX-CESS.

A party who set off a claim against an assignor of a claim against him in an action by the assignee can sue the assignor for any bal-ance due over and above the amount allowed as a set-off, because he could not get an affirma-tive judgment against the assignee.

Department 1. Appeal from Superior Court, King County; R. B. Albertson, Judge. Action by The Nut House, a corporation, against the Pacific Oil Mills, a corporation. Judgment for plaintiff, and defendant appeals. Affirmed.

Halverstadt & Clarke and S. H. Piles, all of Seattle, for appellant. Hastings & Stedman and Ewing D. Colvin, all of Seattle, for respondent.

MAIN, J. The purpose of this action was to recover the balance due as commissions on account of the sale of a large quantity of The trial resulted in a verdict in favor of the plaintiff in the sum of \$3,924.11. A motion for judgment notwithstanding the verdict, and in the alternative for a new trial, being interposed and overruled, judgment was entered upon the verdict. From this judgment, the defendant appeals.

The appellant, the Pacific Oil Mills, was a corporation engaged in the importation and wholesale of nuts in the city of Seattle. The respondent, The Nut House, a corporation, was engaged in the nut business in Seattle, but on a somewhat smaller scale than the ments of this statute. While the orders are appellant.

had superior selling facilities or advantages of which the appellant desired to avail itself. Early in January, 1914, the appellant contracted with the respondent that the latter should send a representative to certain Eastern cities for the purpose of selling peanuts. For this service respondent was to receive a commission. After this agreement was made, A. L. Delkin, the secretary of the respondent company, visited Chicago and New York, and in each of these cities took orders. One order was for 20 carloads of nuts. The facts concerning these transactions will be found more fully stated in Carstens v. Nut House, 96 Wash. 50, 164 Pac. 770. At the time the commission contract above mentioned was made, the respondent was owing the appellant for nuts which it had purchased from that company in the sum of \$4,015.89. After the sales had been made in Chicago and New York, a dispute arose between the two companies as to the commissions which the respondent claimed to have earned. The appellant assigned the amount which was owing it by the respondent to Thomas Carstens and Herman Meyer. The assignees thereupon brought suit against The Nut House for the amount of the indebtedness assigned to them. In this action The Nut House pleaded as an offset the commissions which it claimed to have earned by reason of the orders which its representative had taken in Chicago and New York. That case was tried to a jury, and resulted in a verdict sustaining the defense of The Nut House, and denying a recovery to the plaintiffs in the action After the judgment was entered upon the verdict, the plaintiffs appealed, and the judgment was affirmed. The present action was instituted to recover the commissions due over and above the amounts which were offset as a defense in the case in which Carstens and Meyer were plaintiffs, and The Nut House the defendant. This case was also tried to a jury as above stated, and resulted in a verdict and judgment sustaining the right to recover the balance of the commissions claimed to be due. In the present case only two questions appear, which were not determined in the former case.

[1] The first question is whether the orders taken in Chicago and New York were sufficient in form and substance to constitute a binding memorandum under the statute of frauds. The statute, of course (Rem. Code, § 5290), among other things, provides that:

"No contract for the sale of any goods, wares, or merchandise, for the price of fifty dollars or more, shall be good and valid, " unless some note or memorandum in writing of the bargain be made and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized."

The appellant claims that the orders taken -five in number-do not meet the require-While the respondent was the not formal contracts, the statute does not require that they should be. It is true that the orders, or some of them, are somewhat informal, but each of them contains the essential elements to satisfy the statute. thing sold is described by words or abbreviations, or by reference to sample. The price to be paid is mentioned and the terms of payment; also the party selling and the party purchasing; and each order is signed by the party to be charged. It is true that in one or more of the orders taken there were abbreviations the meaning of which it was necessary to explain upon the trial by oral testimony, but this was not proving an essential term of the contract not covered by the writing. No authority has been called to our attention which holds that where it is necessary to explain an abbreviation by oral testimony the contract necessarily fails to meet the requirements of the statute. think the orders substantially complied with the requirements of the statute. The substantial effect of a holding that these orders were void would be to require that a contract, to satisfy the statute, should be a formal one. This would be not only a serious interference with the facility with which ordinary business transactions may be conducted, but would be extending the statute beyond its scope and meaning.

[2] The other question is: Can the respondent maintain this action after having pleaded in the action of Carstens and Meyer against The Nut House the same contracts and the commissions flowing therefrom as an offset? In that action, the plaintiffs being assignees, the defendant was not entitled to an affirmative judgment against them over and above their claim. Had that action been brought by the Pacific Oil Mills, the present appellant, it is doubtless true that the defendant there would have been required to sustain its entire claim, or be barred from maintaining another action. The Pacific Oil Mills, by assigning its claim against The Nut House to Carstens and Meyer, put it out of the power of the repondent to get any affirmative relief in that action. The rule supported by the authorities is stated in 34 Cyc. p. 762, as follows:

"In an action by an assignee a claim against the assignor can be allowed as a set-off, coun-terclaim, or reconvention, only to the extent of the claim sued upon, and judgment cannot be rendered against the assignee for the excess."

The respondent, having no right in the previous action to recover an affirmative judgment against the assignees, is not by the law denied the right to maintain a subsequent action against the appellant for the balance due over and above the amount allowed as a set-off.

The judgment will be affirmed.

ELLIS, O. J., and WEBSTER and PARK-ER, JJ., concur.

In re GUARDIANSHIP OF BAYER'S ES-TATE. (No. 14302.)

(Supreme Court of Washington. April 30, 1918.)

1. INSANE PERSONS \$= 30-GUARDIANSHIP-GROUNDS.

The test in determining whether a guardian should be appointed for the estate of a person is not whether she is insane, but whether she is incapable of managing her business affairs by reason of mental unsoundness; it not being necessary that a person be an idiot or a lunatic in the strict sense of those terms before a guardian of her estate can be appointed.

2. Insane Persons == 2 - Guardianship -

SUFFICIENCY OF EVIDENCE.

Evidence held sufficient to show that petitioner's sister was incompetent to manage her business affairs, so that court erred in failing to appoint a guardian for her estate.

3. INSANE PERSONS \$==2-IMPROVIDENT BUSI-NESS TRANSACTION.

An improvident business transaction should be taken into consideration in connection with all the other evidence in determining question of mental incompetency.

Department 1. Appeal from Superior Court, Lincoln County; Joseph Sessions, Judge.

In the matter of the guardianship of the estate of Martha E. Bayer. Judgment denying guardianship, and petitioner, John Dotson, appeals. Reversed and remanded, with directions.

Samuel P. Weaver, of Sprague, for appellant. Merritt, Lantry & Merritt, of Spokane. and Clarence B. Willey, of Randolph, Neb., for respondent.

MAIN, J. The petitioner, John Dotson, brought this action for the purpose of having a guardian appointed for the estate of his sister, Martha E. Bayer, claiming that Mrs. Bayer was incompetent to manage her own affairs. The cause was tried to the court without a jury, and resulted in a judgment denying the guardianship. From this judgment, the petitioner appeals.

[1] The estate for which the guardianship was sought was a farm consisting of 960 acres of land in Lincoln county, this state. At the time of the trial of the action Mrs. Bayer was approximately 66 years of age. The question to be determined upon this appeal is not whether Mrs. Bayer was insane, but whether she was incapable of managing her business affairs by reason of mental unsoundness. It is not necessary that a person be an idiot or a lunatic in the strict sense of those terms before a guardian of the estate can be appointed. In re Wetmore's Guardianship, 6 Wash. 271, 33 Pac. 615; In re Ervay, 64 Wash. 138. 116 Pac. 591; Shafer v. Shafer, 181 Ind. 244, 104 N. E. 507.

The rule which is generally supported by the authorities is stated in 22 Cyc. p. 1139, as follows:

For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

"Generally speaking, the test of whether a guardian should be appointed for the estate of a person is whether mental unsoundness exists to such a degree that he is incapable of conducting the ordinary affairs of life, so that to leave his property in his possession and control would render him liable to become the victim of his own folly or of the fraud of others. It is not necessary in most states that the person should be an idiot or a lunatic in the strict sense of those terms. \* \* \* \*"

[2] In some states, however, the rule is otherwise. With the law as thus stated, over which we think there is no serious controversy, the question then to be determined is whether the evidence in this case shows that Mrs. Bayer was suffering from mental unsoundness to such a degree that she was incapable of conducting her business affairs.

In the spring or early summer of 1907, Mrs. Bayer, who was then living with her husband at their home in the northern part of the city of Seattle, was placed in a sanitarium at Portland, Or., for treatment for mental trouble. She returned in the fall of that year to her home, from which she was taken thereafter to another private sanitarium for the same trouble. While she was in this institution her husband, Dr. Bayer, died, and in December, 1908, a brother of hers. Jasper Dotson, was appointed her guardian. In April, 1910, the guardian caused Mrs. Bayer to be placed in the Puget Sound Sanitarium in Seattle for treatment on account of mental trouble or disease. About a year later she was removed by the guardian to another sanitarium, where she remained for a period of about three months. In September, 1912, Mrs. Bayer was placed in the state institution for the insane at Stellacoom. About a month later, a sister, Mrs. Emmaretta McClanahan, instituted proceedings to have her released therefrom, and as a result of such proceedings Mrs. Bayer was paroled and placed in the care of Mrs. Mc-About the month of February, Clanahan. 1916, Mrs. Bayer went to Carter, Wyo., where her condition and conduct were such that she was taken into custody by the sheriff because it was thought by those who observed her condition that she was not able to take care of herself. After taking her into custody the sheriff telegraphed a brother, Emanuel Dotson, at Belden, Neb., that his sister "was incompetent and has got to be taken care of." A telegram of like import was sent to Mr. D. R. Cole, who, subsequent to the discharge of Mrs. Bayer from the asylum at Steilacoom, had been managing her farm under a power of attorney. Mr. Cole remitted money with which a ticket was purchased for Mrs. Bayer to go to her brother in Nebraska. There were two other brothers. One lived in the state of Oregon, and the other at Cashmere, this state. After being with the brother in Nebraska for a few months she sold and conveyed to him the Lincoln county farm with the crop thereon,

000, for \$3,000 cash, a note for \$10,000, with interest at the rate of 5 per cent. per annum, unsecured, and the assumption of a \$7,000 mortgage which was then upon the farm. In other words, she sold the property for less than one-half of its value. The brother testifled that he purchased it because his sister wanted to sell it, and "because it was a Subsequent to the time when good buy." Dr. Bayer died and the time when Mrs. Bayer went to Nebraska, when not confined in any institution for mental treatment, she lived at various places—a portion of the time with Mrs. McClanahan, another portion with the brother in Oregon, and also with the brother in Washington, and a nephew who was operating the farm under a lease from her attorney in fact. She also spent some time in the state of California, as well as in Nevada. While at her brother's home in the state of Oregon, she refused to live in the house with the family, but lived in a little house that stood in the same yard. She refused to eat at the table with the family, but had her meals brought out to her. and then would not eat when any one was watching her. She would stay in bed with her clothes on, and often would not answer when spoken to. She would not take care of her room, bed, or fire. While staying at the other places mentioned, the same peculiarities, and others, characterized her conduct. She suffered a delusion that her husband was still alive. She would go out by the side of the street and play in the dirt. The evidence shows that as a young woman Mrs. Bayer was neat and careful of her dress and appearance, and that since the death of her husband she has become untidy and almost slovenly. The record not only contains the above facts, but much more of like import.

Upon the trial Mrs. Bayer testified in her own behalf, and sought to explain many of the things already referred to. She apparently as a witness seemed reasonably bright and competent. The expert alienists who testified on the respective sides of the case, as is not uncommon in such cases, expressed different views as to competency. The trial court, in denying the application for guardianship, seems to place considerable reliance upon the testimony of Mrs. Bayer and her appearance upon the witness stand; but the fact that she seemed a bright witness would not necessarily establish her competency to manage her business affairs. A child of immature years, incompetent both in fact and in law to conduct business affairs, may make the brightest of witnesses. Upon the trial in which Mrs. Bayer was released from the asylum for the insane she also testified, and. as the evidence shows, made a bright witness; but her condition thereafter was not different from what it had been prior to that time. So far as this record shows, the which was worth between \$45,000 and \$50,- only business transaction that Mrs. Bayer

ever had of any importance was the sale of the farm to her brother. As already pointed possession, it is not lost by an admission by this was such a transaction as would holder that possession was not adverse. out, this was such a transaction as would not tend to support her business competency. It is not claimed, either by her or by her brother, who was the beneficiary of the transaction, that it was, or was intended to be, anything else than a pure business transaction.

[3] An improvident business transaction may be competent evidence in support of an application for a guardianship, and should be taken into consideration in connection with all the other evidence in the case in determining the question of mental incompetency. Shelby et al. v. Farve et al., 33 Okl. 651, 126 Pac. 764; In re Chappel's Estate, 189 Mich. 526, 155 N. W. 569. In the case last cited it was said:

"An improvident business transaction may be competent evidence in support of an application for guardianship; most of the acts of a respondent in such a case are competent as going to show the mental condition. But such an improvident act becomes cogent proof of mental incompetency only as it is reinforced and explained by other facts and circumstances.

Without further reviewing the evidence, it may be said that after giving this record the most careful consideration, we are entirely convinced that the great weight of the evidence is to the effect that Mrs. Bayer was not competent to manage her business affairs, and that therefore the trial court erred in failing to appoint a guardian for her estate.

The judgment will be reversed, and the cause remanded, with direction to the superior court to cause letters of guardianship to be issued.

ELLIS, C. J., and FULLERTON, PAR-KER, and WEBSTER, JJ., concur.

McINNIS et ux. v. DAY LUMBER CO. No. 14487.)

(Supreme Court of Washington. April 30, 1918.)

1. WATERS AND WATER COURSES \$== 164-AP-PROPRIATION AND PRESCRIPTION.

Where defendant lumber company and its where detendant lumber company and its grantors had continuously for more than ten years maintained a sawmill dam across a creek to the height of at least 29 inches above original foundation log which is still in a fair state of preservation and in the same position, changes having been made only in portions of dam above log, it has prescriptive with dam above log, it has prescriptive right as against plaintiffs, whose land has been overflowed, to maintain dam to such height.

2. WATERS AND WATER COURSES 4== 164-AP-PROPRIATION AND PRESCRIPTION.

Where defendant's prescriptive maintain sawmill dam at a certain height was perfected in 1910, that he thereafter recognized plaintiffs' right to have dam discontinued would not deprive defendant of right to maintain dam, especially where the negotiations related to the increase of the height of the dam about the year 1910 and later rather than to the prior maintenance at said certain height,

3. Adverse Possession == 109-Nature of RIGHT ACQUIRED.

A title or right acquired by adverse posses-sion can be parted with only in the manner that a title or easement right otherwise acquired may be parted with; a title or easement right in real property being no different when acquired by adverse possession or use than when acquired by formal grant in the manner prescribed by the statute of frauds.

Department 1. Appeal from Superior Court, Skagit County; Augustus Brawley, Judge.

Action by C. F. McInnis and wife against the Day Lumber Company. From judgment rendered, plaintiffs appeal. Affirmed.

James C. Waugh, of Mt. Vernon, and J. W. Russell, of Seattle, for appellants. Thomas Smith, of Mt. Vernon, and Coleman & Gable, of Sedro-Wooley, for respondent.

PARKER, J. The plaintiffs, McInnis and wife, seek a judgment to compel the defendant, Day Lumber Company, a corporation, to remove a dam maintained by it in Nookachamps creek, at its sawmill in Skagit county, which dam the plaintiffs claim causes the overflow of their land, and also seek damages for past injuries to their land so caused. Trial in the superior court for that county resulted in findings and judgment enjoining the defendant from maintaining the dam above a certain height, and awarding the plaintiffs damages for past injuries in the sum of \$50. From this disposition of the cause the plaintiffs have appealed to this court.

[1] Plaintiffs own land bordering upon the upper end of a natural widening of the creek. caled Big Lake, some 21/2 miles above respondent's sawmill, which is situated at the lower end of the lake. In the year 1897 Parker Bros., a copartnership, built the dam in question in the creek just below the lower end of the lake for the purpose of raising the water a few feet to facilitate the handling of shingle bolts and logs brought to their mill there situated, to be manufactured into lumber and shingles. Thereafter this mill property, including the dam, was conveyed by Parker Bros. to the J. D. Day Lumber Company, a copartnership, and thereafter it was conveyed by the J. D. Day Lumber Company to respondent Day Lumber Company, a corporation, the present owner. The dam as originally constructed consisted of a cedar log about four feet in diameter laid across the bed of the creek for the foundation of the dam, and other timbers were placed on top of it so as to make the top of the dam considerably higher. Just how high the dam was originally constructed in the year 1897 is a matter of some uncertainty. We think, however, that the evidence fully

court that for more than ten years prior to ticed the fact of the maintenance of the dam the year 1910 the dam was continuously to a height of at least 29 inches above the maintained by respondent and its grantors top of the foundation log for more than ten to at least the height of 29 inches above the years prior to 1910 for the purpose of arrivtop of this foundation cedar log, which log is still in the same position as originally rights respondent had then acquired, and, placed, and in a fair state of preservation. having arrived at the conclusion that its pre-The changes of material with which the dam scriptive rights, to the extent recognized by has been maintained have been only in the the trial court, were perfected in the year portions thereof above the log. Repairs made upon the dam since about 1909 have resulted in raising it several inches, possibly a foot, higher than 29 inches above the foundation log. The exact extent of this raise we need not here notice. The trial court rendered judgment enjoining respondent from maintaining the dam at a greater height than 29 inches above the top of the foundation log, and awarded the appellants the sum of \$50 damages for injuries to their land by the overflow thereof caused by the raising of the water more than 29 inches above the top of the foundation log.

The judgment, in so far as it restrains the maintenance of the top of the dam not to exceed 29 inches above the foundation log, was, by the trial court, rested upon the theory that respondent had acquired the right in 1910 to maintain the dam at that height, by prescription, as against appellants as owners of the land which the maintenance of the dam at that height caused to be overflowed. We agree with the trial court that the evidence calls for the conclusion that for more than ten years prior to 1910 and up to the present time respondent and its grantors have continuously, without any interruption whatever, maintained the dam, at least, to the height of 29 inches above the foundation log. The evidence is quite voluminous, and is not wholly free from conflict, but that it preponderates in favor of the court's conclusion we are quite convinced. We think it would be unprofitable to review the evidence here in detail.

[2] Counsel for appellants also contend that the maintenance of the dam and the overflow of their lands caused thereby was not in law adverse to their rights, but that respondent recognized their right to have the same discontinued. This contention is rested upon negotiations commenced between respondent and appellants in February, 1910, wherein it is claimed respondent conceded the rights of appellants as claimed by them. It is not claimed, indeed, it could not be under the evidence, that there was ever anything said or done by any of the parties in interest prior to February, 1910, which would in the least impede the running of the statute in favor of respondent and its grantors in their claimed prescriptive right to maintain the dam. Besides, we think these negotiations related to the increase of the height of the dam by respondent about the year 1910 and later, rather than to the and use, to maintain the dam at the height

warrants the conclusion reached by the trial | prior maintenance of the dam. We have noing at a conclusion as to what prescriptive 1910, it would seem to be of no consequence what negotiations, amounting to less than the formal conveyance by respondent of its thus acquired prescriptive right, were had in 1910 and later. It seems to be well-settled law that:

> "Where title has become perfect by adverse possession for the statutory period, it is not lost by an admission by the holder that the posses-sion was not adverse." 2 C. J. p. 256.

> We find a clear statement of the rule announced by Chief Justice Reese, speaking for the Supreme Court of Nebraska in Towles v. Hamilton, 94 Neb. 588, 143 N. W. 935, as fol-

"It is elementary that, where the title has become fully vested by disseisin so long continued as to bar an action, it cannot be divested by parol abandonment or relinquishment or by verbal declarations of the disseisor, nor by any other act short of what would be required in a case where his title was by deed."

[8] Treating the acquired right to overflow appellants' land as a prescriptive right rather than the acquiring of title to the land so overflowed, the law applicable would be the same. Swan v. Munch, 65 Minn. 500, 67 N. W. 1022, 35 L. R. A. 743, 60 Am. St. Rep. 491; Alcorn v Sadler, 71 Miss. 634, 14 South. 444, 42 Am. St. Rep. 484. These cases are directly in point, since they have to do with the question of rights acquired by the maintenance of dams causing the overflow of lands of others for the statutory period relating to the acquisition of real property and interests thereon, by adverse possession or use. A title or easement right in real property is no different when acquired by adverse possession or use than when acquired by formal grant in the manner prescribed by the statute of frauds. It seems to follow as a matter of course that such title or right can be parted with only in the manner that a title or easement right otherwise acquired may be parted with.

Counsel for appellants cite and rely upon our decision in St. Martin v. Skamania Boom Company, 79 Wash. 393, 140 Pac. 355. critical reading of that case, we think, discloses that ten years had not elapsed since the beginning of the damages for which redress was sought, when the negotiations alleged to show use and possession by consent occurred. It seems quite clear to us that the trial court properly disposed of this case in so far as it recognized the perfected right of respondent, acquired by adverse possession of 29 inches above the top of the foundation log.

Contention is made in behalf of appellants that the damages awarded them are inadequate. We cannot so view the evidence, all of which we have read with care.

The judgment is affirmed.

ELLIS, C. J., and FULLERTON, MAIN, and WEBSTER, JJ., concur.

RUST v. WASHINGTON TOOL & HARD-WARE CO. (No. 14491.)

(Supreme Court of Washington. April 27, 1918.)

1918.)

1. EVIDENCE - 478(1)—OPINION EVIDENCE-

NONEXPERTS.

In action for injuries to customer in store by falling into elevator shaft, witnesses who saw him shortly after the accident could testify that he was not then in possession of his mental faculties when such testimony was based on their observations of his physical condition, evident suffering, incoherent speech, and acquaintance with his previous condition, since they were testifying to facts within their observation, and not giving an opinion upon a hypothetical question.

2. WITNESSES \$\infty\$369\text{-Impeachment-Interest.}\$

In action for injuries, where defendant set up release given to indemnity company by plaintiff, it was competent to show that a witness for defendant who procured the release was the agent of the indemnity company, for the purpose of showing his credibility.

3. Trial \$=228(1)-Instructions-Repeti-

TION.

Where an instruction, though capable of condensation, properly stated the law as applied to varying conditions of the evidence, it could not be held error as unnecessary repetition.

4. Trial = 129 — Abgument of Counsel - Invited Error.

In an action for injuries to store customer by falling into elevator shaft, where defendant's counsel stated that failure to prove efforts to compromise showed that plaintiff had been satisfied with the settlement made, he could not complain of argument by plaintiff's counsel that it was not competent to show efforts to compromise; that the jury did not know what had taken place between the parties, and, if it did know, the case might assume a different aspect.

5. Damages &==132(7)—Excessive Damages.
Verdict of \$2,500 was not excessive in favor of 78 year old physician who fell into elevator shaft in store, suffering dislocation of kneecap, cuts and bruises, dislocation of foot bones, was confined to his bed several weeks, and compelled to use crutches for 8 months, with permanent stiffening of the ankle, destruction of the bones of the arch, necessitating tight bandages and heavy iron brace, the effect of all of which was constant pain and suffering.

Department 1. Appeal from Superior Court, Pierce County; Ernest M. Card, Judge. Action by H. H. Rust against the Washington Tool & Hardware Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Bates & Peterson, of Tacoma, for appellant. Kelly & MacMahon, of Tacoma, for respondent.

FULLERTON, J. The respondent, while a customer in the store of appellant engaged in making purchases, fell into an open elevator shaft and injured his foot. He brought this action for damages and recovered a judgment for \$2,500. An appeal is prosecuted in which errors are assigned upon the insufficiency of the evidence, the improper admission of evidence, and the denial of a new trial based on improper instructions, misconduct of counsel, and excessiveness of the verdict.

The evidence shows that the respondent, a man 78 years of age residing in Gig Harbor, Wash., was in appellant's storeroom in the city of Tacoma purchasing various articles of hardware. Certain articles desired by him were located on the second floor of the building, and the clerk suggested that in going to the place they take the elevator. The clerk opened the door to the elevator and reached in to pull a rope to bring the car down from the floor above. The respondent, assuming that the car was in place, stepped into the shaft, and fell some three feet to the bottom of the pit. The clerk, while endeavoring to extricate him, was himself struck by the descending car and severely injured. The respondent was considerably bruised and shaken by his fall, but advised that first aid be given to the clerk, who was apparently the more severely injured. The appellant carried a liability policy of insurance on its elevator in the Fidelity & Deposit Company of Maryland. and at once summoned the local agent of the company. The appellant through the agent offered to pay the respondent for whatever damages he had suffered, and the latter, not realizing how seriously he was injured, fixed his damages at \$20 and executed a release of all claims in consideration of that sum, and at the same time made an affidavit that his injuries were due to his own fault, and that the appellant was in no wise to blame. The respondent was assisted to the steamer plying between Tacoma and his home, and those assisting him testified he was "trembling" and "kind of scared like." Passengers on the boat and others who were acquainted with him testified that he was incoherent in speech, his face pale and drawn, his body trembling; that he toppled over when he tried to walk across the cabin; that he attempted to get off the boat at a wrong wharf: that he had to be carried off the boat and home on the back of a neighbor: that he was dazed and not in possession of his mental faculties; that he continuously uttered, "Don't tell Mother;" and that subsequently he could get about only by the use of two crutches. On the trial the respondent testified he did not know what he was doing when he signed the release and the affidavit exonerating the appellant, and in this he is corroborated by a doctor called in to attend the injured clerk, who, after removing the

clerk to his home, returned to the store and I not find that there was any unwarranted repfound the respondent about an hour after the accident sitting there in a dazed condition. While there is some contradiction on minor details of the testimony, the substance of the evidence is as outlined.

[1] The appellant contends that there was error in permitting the nonexpert witnesses who were fellow passengers on the hoat with the respondent to state their opinions as to the latter's mental condition. These witnesses testified that at that time the respondent was not in possession of his mental faculties. But this testimony was based on their observations of his physical condition, his evident suffering, and his incoherent speech, in the light of their acquaintance with his previous condition. They were testifying to facts, and their opinions drawn from facts within their observation, not giving an opinion upon a hypothetical question. Such evidence is admissible. State v. Brooks, 4 Wash. 328, 30 Pac. 147; In re Gorkow's Estate, 20 Wash. 563, 56 Pac. 385; Higgins v. Nethery, 30 Wash. 239, 70 Pac. 489; State v. George. 58 Wash. 681, 109 Pac. 114; State v. Craig, 52 Wash. 66, 100 Pac. 167; Jones, Evidence (2d Ed.) § 364.

[2] It is also contended that there was error in allowing the introduction of evidence showing that the witness Hansen, who procured the release and the affidavit of exoneration from the respondent, was the agent of an insurance company which carried a liability policy on the appellant's elevator. This testimony was properly elicited for the purpose of showing Hansen's interest in the case with a view to affecting his credibility. Moy Quon v. Furuya Co., 81 Wash. 526, 143 Pac. 99.

[3] Error is assigned upon the court's charge to the jury upon the matter of the release executed by the respondent. The court gave an instruction requested by the appeliant which fully covered the matter from the standpoint of the appellant, and then went further, and covered varying features of the same question in half a dozen paragraphs outlining the law as applied to the inferences the jury might draw from the facts in favor of the one or the other of the litigants. We gather from the brief that no objection is raised to the law as stated, but that the complaint is that the court by unnecessary repetition gave undue prominence to one feature of the case, thereby tending to create an impression on the jury as to the court's opinion with regard to the facts. It is further suggested that these numerous paragraphs necessarily destroy the effect of the requested instruction given at the behest of the appellant. An examination of each portion of the charge shows that it is a proper statement of the law as applied to varying conditions of the evidence. While the charge was capable to some extent of condensation, we do | WEBSTER, JJ., concur.

etition.

[4] Misconduct of counsel for respondent in the closing argument is predicated upon the following remarks to the jury which over the objection of the appellant were allowed to stand:

"It was not competent evidence to show efforts looking towards a compromise or settlement of this action between the plaintiff and the defendant. You do not know what had taken place between these parties since the accident, and if you did know it might put a different aspect upon the case."

This remark, standing alone, would in all probability be inexcusable, but it was offered in answer to an equally improper utterance of opposing counsel, who had stated that a failure to prove efforts to compromise showed that plaintiff had been satisfied with the settlement. The error complained of by appellant was one invited by himself, and he cannot be heard now to urge it as prejudicial. Donaldson v. Great Northen R. Co., 89 Wash. 161, 154 Pac. 133.

[5] The final contention of appellant is that the award of \$2,500 for the injury sustained was excessive. The evidence shows that the respondent, although at the advanced age of 78 years and with but a short expectancy of life, is still practicing his profession as a physician, and is incommoded therein by the condition of his foot, which still causes him pain in its use. At the time of the accident the respondent suffered a dislocation of the kneecap, cuts and bruises about the head and body, and a dislocation of the bones of his foot. He was confined to his bed several weeks, and compelled for seven or eight months to use crutches. The ankle is stiffened, the bones of the foot have fallen down, there is no arch, and the heel bone is left unaided to sustain his weight. The bones are in such a condition that they must be kept in place by tight bandages of adhesive tape, and a heavy iron form must be used in the shoe so as to create an artificial arch, and a cane is necessary to assist in walking. If the respondent steps on a pebble he either falls or the rolling of the foot causes great pain. The injury is permanent and one that cannot be remedied by an operation. The respondent still suffers pain in the use of the foot and whenever the bandages are adjusted. While the award to this court appears large in view of the advanced age of the respondent, the trial court in the exercise of its discretion refused to make a reduction. We feel that we would not be warranted, under the circumstances and showing made, in interfering with the award returned by the triers of the fact.

The judgment is affirmed.

ELLIS, C. J., and PARKER, MAIN, and

SCHOMMERS v. GREAT NORTHERN RY. CO. (No. 14568.)

(Supreme Court of Washington. May 7, 1918.)

RAILBOADS \$\iiis 390 - Killing Trespasser 
"Last Clear Chance."

The duty of a locomotive engineer under the last clear chance doctrine, to a trespasser sitting on the edge of the track, begins only when he realizes his helpless condition, or it can be said as matter of law that the danger is so evident as to charge him with a duty to stop, and so not when he is 2,000 to 3,000 feet away; he not realizing till he is 500 to 600 feet away that the boy is not going to move; the rule of last clear chance not being dogmatic or self-assertive, but arising out of the facts as a legal consequence of other rules of law, and being no more than a rule of proximate cause.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Last Clear Chance.]

Department 2. Appeal from Superior Court, Spokane County; D. F. Wright, Judge. Action by J. Schommers against the Great Northern Railway Company. From an order granting a motion for new trial, defendant appeals. Reversed and remanded, with instructions.

Charles S. Albert and Thomas Balmer, both of Spokane, for appellant. Carl Ultes, Jr., of Spokane, for respondent.

CHADWICK, J. Ray Schommers, son of the respondent, aged 16 years, had attended a dance at Elmira, Wash., on the night of August 14, 1915. He left the dance between the hours of 4 and 5 o'clock in the morning. There is a public road running west from the town of Elmira parallel with and adjoining the railroad right of way. The road crosses the track about a half a mile west of Elmira, as nearly as the distance can be estimated from the testimony. The boy left Elmira going west on the railroad track. He crossed the highway and went 450 to 500 feet beyond and sat down on the edge of the track-the end of a tie-where he was seen by an early passer-by who drove his team over the track at the crossing and turned west on the highway. This witness says that the boy was sitting in a kind of stupor, holding his head between his hands. At that time the witness had turned west and was about 100 feet from the crossing. His attention was attracted by the steam popping off and the brakes coming on. The first thing he thought of was "what they were stopping for." This witness heard the rumble of the train about three minutes before the accident. He says that the engineer did not whistle for the crossing, but that he began to set the brakes about 100 feet east of the crossing, which would be approximately 600 feet from the point where the boy was killed. He estimated the speed at which the train was going at 80 miles an hour. A locomotive engineer testified that a train going 30 miles and slightly down grade could make an emergent stop in "2,000 to 2,500, maybe 8,000 feet." By deduction and calculation, the train was stopped in 600 feet plus the length of two coaches and the engine, approximately 800 feet. The court entertained a motion for a nonsuit and directed a judgment accordingly. Thereafter the court granted a motion for a new trial, and defendant has appealed.

The motion for a nonsuit was granted evidently upon the theory that the deceased was a trespasser, and that defendant owed no duty to the deceased other than to refrain from wantonly or willfully injuring him. The motion for a new trial was granted evidently upon the theory that the case fell within the doctrine of the last clear chance. for it is argued here that, although the deceased was a trespasser, the engineer should have seen the boy in time to avoid striking him, and that it was at least for the jury to say whether the engineer might have seen him in time to appreciate the fact that he was not conscious of his danger and in time to stop his train.

That the rule upon which the nonsuit was granted governs, and that respondent cannot recover, will not be gainsaid or denied, unless the rule of the last clear chance intervenes to save a right to recover. The rule of the last clear chance is never dogmatic or self-assertive. It arises out of the facts and as a legal consequence of other rules of law. It is no more than a rule of proximate cause (Mosso v. Stanton, 75 Wash. 220, 134 Pac. 941, L. R. A. 1916A, 943), and is applied or rejected as the facts of the particular case warrant its application or rejection. cepting the doctrine, does it apply in the case at bar? We think that it does not, and for reasons which we shall undertake to make plain.

The doctrine assumes, as we shall assume, that the engineer was negligent, in that he sounded no warning for the crossing. It matters not in what the negligence consisted, whether of omission or commission. The premise upon which the last clear chancedoctrine rests is that both parties are negligent; that one of them is unconscious of hisperil; and that the one charged saw or should have seen and appreciated the situation of the one injured in time to have avoided the accident. In time the last clear chancearose when the engineer realized, and should, considering all the facts, have realized, that deceased was in a situation of peril from which he was not likely to extricate himself. We have the time that the engineer realized that the boy was not going to get out of the way fixed to a moral certainty. It was when he cut off the steam and set the emergency.

"The instinct of self-preservation and the instinct to refrain from harming others are always present in emergent situations affecting personal security. These impulses prompt that



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which is done." Hartley v. Lasater, 96 Wash. 407, 414, 165 Pac. 106, 109.

We have the place fixed by the only evewitness testifying that it was about 100 feet east of the crossing, or 550 or 600 feet east of the place where the boy was sitting. The distance may have been 50 or 60 feet further. The testimony is not clear, in that it takes no account of the width of the public road. So that it is certain that the engineer began to stop his train when a distance of about 2 city blocks away. To hold him to the last clear chance would be to hold as a matter of law that the engineer of every train would have to slow down or stop his train whenever he saw a trespasser on the track, whereas the law imposes no such burden. On the contrary, the driver of a locomotive over a track fenced to protect those who operate or travel by train, and wholly intended for the use of the railroad, may assume that one who is upon the track will take some account of his own safety, at least to the extent of keeping a lookout for passing trains.

Every man who goes upon a railroad track courts danger, but it is not such a danger as will in and of itself invite the doctrine of the last clear chance, for men are not presumed, nor will the law presume, that men will walk or sleep or sit down with head bowed on knees and become unconscious in such places. The mere presence of the deceased would not therefore charge the engineer when 2,000 to 3,000 feet away-plaintiff's argument rests on the assumption that he could have seen the boy when 2,000 to 3,000 feet away, and it would have taken that distance to stop his train-that deceased was asleep or unconscious and unable to take care of himself. His duty began when he did realize it, and, considering all the facts and the authority of our own cases, we think the engineer exercised reasonable care to avoid the accident. He acted when the peril became evident and imminent. It must be borne in mind that this accident did not happen at a crossing or in a city street, where rights are reciprocal and where a duty commensurate with the dangers of legitimate passing traffic was upon the engineer, nor was deceased on a trestle or in any extremity where it could be said that he would not be likely to extricate himself.

Reduced to its lowest terms, to hold the appellant to the rule of the last clear chance would be to say that the engineer should have known of the presence of the boy and that he might be asleep or unconscious when the train was at least 2,000 to 3,000 feet away. We can only say, considering all the facts. and inference from facts, as revealed by the testimony-the fact that deceased was a trestestimony—the fact that deceased was a trespasser, the noise of the train which could have been heard for three minutes before the accident, the grinding of the wheels and the popping and hiss of escaping steam when

600 feet away, and the legitimate assumption that one in the situation of the deceased would take some care of his own safety, and the emergent stop made by the engineer—that if the engineer is to be held to the doctrine of the last clear chance he took that chance; that is, he did all that could be done in the time left to him to avoid the accident. In so holding we grant that a railroad is liable even to a trespasser who is in a situation of evident peril, if those in charge of the train discovered the party killed or injured in time to have avoided the accident, for an injury under such circumstances would be classed as willful, but the mere presence of a trespasser, although seen, is not enough to set the doctrine in motion, nor will it move until it can be said as a matter of law that the danger was so evident as to charge an engineer with a duty to stop his train in time to have avoided the accident.

The case of San Antonio & A. P. R. Co. v. McMillan, 100 Tex. 562, 102 S. W. 103, 11 Neg. & Com. Cases, note, p. 472, is as nearly like this one as can be found. The one whowas killed was sitting on the track and failed to get off when the train came along. The train was running about 85 miles an hour. He was seen, but not recognized as a human being, when the train was about 400feet away, by the fireman who rang the bell. The engineer saw him when about 300 feet away. He blew the whistle and set the brakes when about 200 feet away. It was then too late to avoid the injury, and decedent, who was sitting with "his head bowed with his face in his hands, was oblivious to the approach of the train." The facts there, as here, contradicted any suggestion that if the train had been checked he would have gotten off the track, for he was evidently not in a condition to do so whether asleep or unconscious. It was contended that the company was liable on the ground of discovered peril:

"In applying the doctrine of discovered perifthe railroad company cannot be held liable because the servant was negligent in failing to discover the person or in failing to recognize his peril, but it must appear from the evidence that the servant actually saw the man, realized his peril, and that he would not get off the track. Tex. & Pac. Ry. Co. v. Breadow, 90 Tex. 26 [36. S. W. 410]. It must also appear that the discovery of the peril was in time for the trainmen by the use of the means at hand to stop the train before coming in collision with the man." "In applying the doctrine of discovered peril-

In Southern Ry. Co. v. Stewart, 153 Ala. 133, 45 South. 51, 11 Neg. & Com. Cases, note, p. 475, after holding that a railroad company is under no duty to keep a lookout for trespassers, the court said:

"There was no evidence as to the speed of thetrain, none as to the position of the engineer on the train, none that the train could have been

authorize a reasonable inference that the engineer in fact discovered the deceased in time to have avoided the injury. The evidence shows that the deceased was lying down on the track between the rails, and there is no evidence that the engineer was looking forward at a time and place when the deceased could have been discovered in time to have stopped the train and avoided the accident, and it is a matter of common knowledge that engineers, in the operation of engines, have other duties to perform besides that of looking out, and, for aught that can be said, the engineer was at the time engaged in performance of some other of such duties. It would be an unwarranted speculation to leave it to the jury to say whether or not the engineer was at the time looking forward and did discover, or could have discovered, the deceased on the track in time to have avoided the injury by the exercise of due care."

Other cases and texts bearing upon the question presented are: Imler v. Northern Pac. Ry. Co., 89 Wash. 527, 154 Pac. 1086, L. R. A. 1916D, 702, Ann. Cas. 1917A, 933; Scharf v. Spokane & In. Emp. R. R. Co., 92 Wash. 561, 159 Pac. 797; Dotta v. Northern Pac. Ry. Co., 36 Wash. 506, 79 Pac. 32; Kroeger v. Grays Harbor Cons. Co., 83 Wash. 68, 145 Pac. 63; Hamlin v. Columbia & Puget Sound R. Co., 37 Wash. 448, 79 Pac. 991; Moore v. Great Northern Ry. Co., 58 Wash. 1, 107 Pac. 852, 28 L. R. A. (N. S.) 410; McCarthy v. N. Y., N. H. & H. R. Co., 240 Fed. 602, 153 C. C. A. 406.

The appellant being under no duty to anticipate the presence of the deceased on the tracks, being only bound to exercise reasonable care to avoid injuring him after discovering his peril, we are constrained to hold that the engineer did all that he could do within reasonable limits and within the time he had at his command.

Reversed and remanded, with instructions to overrule the motion for a new trial.

ELLIS. C. J., and HOLCOMB, MOUNT, and WEBSTER, JJ., concur.

TYNER v. STULTS et ux. (No. 14383.)

(Supreme Court of Washington. May 7, 1918.)

1. Exchange of Property \$\sim 5\$—Rescission —Condition to Action—Restoration.

Plaintiff need not have offered or tendered restitution prior to suit to rescind contract for exchange of properties, but it is enough that he makes offer in his complaint, and shows preservation of status quo.

2. MOETGAGES \$\infty 239\text{--Remedy of Assignee} \text{--Recovery of Price---Misrepresentations} \text{--Caveat Emptor.}

The purchaser of a note of a third person and a mortgage therefor made to secure it, as regards right to rescind and recover consideration for misrepresentations as to security, satisfies the demand of the law that one who buys shall take reasonable precaution to defend himself by asking for and receiving assurance from the seller that the security was ample.

Department 2. Appeal from Superior Court, Snohomish County; Raiph C. Bell, Judge.

Action by W. L. Tyner against S. S. Stults and wife. Judgment for plaintiff, and defendants appeal. Affirmed and remanded, with instructions.

Corbin & Easton, of Wenatchee, for appellants. Cooley, Horan & Mulvihill, of Everett, for respondent.

CHADWICK, J. This action was brought by respondent to rescind a contract for the exchange of certain properties. After some preliminary negotiations, respondent agreed to trade a house and lot then owned by him in the city of Everett and valued at \$2,200, the consideration being \$625, to be paid in cash and real estate, upon which there was then due \$215, and a first mortgage upon 40 acres of land for \$1,340. Respondent sought the trade in answer to an advertisement which reads as follows:

"A gilt-edge \$1,300 first mortgage to trade for residence property in Everett. See Ward S. Bowman, 412 Colby."

One payment of interest was made upon the mortgage. A payment of \$340 and interest amounting to \$53.60 became due on June 20, 1916. This was not forthcoming. spondent went over to Island county, where the land covered by the mortgage was situ-He deate and the mortgagor resided. manded payment. The mortgagor being unable to pay, the respondent looked over the security for the first time. He found the land to be denuded of timber. The land is worth, accordingly, as we read the testimony, approximately \$1,000; but there is no market for such land. This action was brought very soon thereafter. No demand was made upon appellants for a rescission, and no tender of repayment or offer to reassign the securities was made, although it is alleged in the complaint that these things were done. Respondent bases his right to rescind upon the alleged misrepresentation of the appellants and their agent as to the character of the land covered by the mortgage.

It is not contended that any inquiry was made as to the financial responsibility of the makers of the mortgage. It is insisted by respondent and his wife, who was a witness. that the agent of appellants, as well as appellant S. S. Stults, represented that the land was covered with merchantable timber which was not to be removed until the mortgage was paid; that respondent told the parties that he was busy painting a house and would be unable to go and see the security; and that, having faith in their representations and in them, they knowing of his inability to determine the value of the security for himself at that time, he made the trade which he now seeks to rescind.

At the trial, respondent, through his counsel, was invited to say that he was now in position to convey back all the property he had received from appellants, and also that he

could convey back all that he had received, ed. The thing bought was the note of a "if the court should grant a decree of rescission." We are satisfied that respondent bought the mortgage believing that the land was covered with merchantable timber, and that it was of sufficient value to make the security "gilt-edged." which means, no doubt, convertible or payable on demand.

[1] But appellants have contended from the beginning, and now contend, that no action can be maintained without proof of a previous tender, and that the decree of the court that a rescission be had, if respondent shall within ten days put appellants in statu quo, does not meet the demands of the law. The position of counsel is sustained by ample authority, but we have heretofore followed after those cases which hold that it is within the power of the court to protect all the rights of the parties by its decree, and that a previous tender or offer to rescind is not necessary under a state of facts such as we have before us. We said in Snarski v. Washington State Colonization Co., 53 Wash. 221, 101 Pac. 839, quoting from 24 Am. & Eng. Ency. Law (2d Ed.) p. **621**:

"Whether the complainant in a suit for rescission must, as a condition precedent to relief, have offered or tendered restitution to the defendant prior to the bringing of the suit, is a matter upon which the authorities are conflict-ing. The rule of the better considered cases is that it is sufficient that the plaintiff make his offer to restore or to do equity in his bill of complaint, and shows therein that he has substantially preserved the status quo on his part so as to be able to fulfill his offer. This rule proceeds upon the principle that it is always within the power of a court of equity to require that the person invoking its aid shall submit to equitable terms as a condition of relief, and that the person properly before the court the the parties being properly before the court, the court may impose upon them any terms which may be just and equitable in the premises, and may enforce compliance therewith."

See, also, Colpe v. Lindblom, 57 Wash. 106, 106 Pac. 634; Angel v. Columbia Canal Co., 69 Wash. 550, 125 Pac. 766; Robbins v. Wyman Partridge & Co., 75 Wash. 617, 135 Pac. 656; Odell v. Burnham, 61 Wis. 562, 21 N. W. 635; Owens v. Jones, 68 Or. 311, 136 Pac. 332; Gamblin v. Dickson, 18 Idaho, 734, 112 Pac. 213; Knappen v. Freeman, 47 Minn. 491, 50 N. W. 533.

[2] It is the contention of the appellants. however, that the rule of caveat emptor applies; and many of our decisions are cited. Respondent, on the other hand, cites quite as many cases to sustain his contention that courts will grant rescission where an owner of land has been deprived of it through the fraudulent misrepresentations of the vendee. We think none of the cases cited is strictly in point for either side.

Appellants did not sell, and respondent did not buy, a 40-acre tract of land, the condition and value of which he might have looked up before the trade was consummat- | tlement of a suft between the Nebraska In-

third party and a mortgage theretofore made to secure it. The demand of the law that one who buys shall take reasonable precaution to defend himself is satisfied when respondent asked for and received assurance that the security was ample so as to make the note good for the balance of the purchase price of the house and lot. We are not prepared to say that the facts found by the trial judge are not sustained by a preponderance of the evidence, and therefore affirm the judgment.

Remanded, with instructions to take an accounting of accrued rents and taxes and to enter a decree accordingly.

ELLIS, C. J., and MOUNT, MAIN, and HOLCOMB, JJ., concur.

NEBRASKA INV. CO. v. CORLETT et ux. (No. 14608.)

(Supreme Court of Washington. May 6, 1918.) 1. Compromise and Settlement 4=12-Items INCLUDED-EVIDENCE

In action on duebill, given by defendant, managing director of a lumber company, in which action defendant set up payment through settlement of a suit between plaintiff and the lumber company, heid, that amount evidenced by due bill was not included in such settlement.

JUDGMENT \$\infty 713(3)\to ITEMS EXCLUDED. Where claim represented by duebill given to plaintiff by defendant, managing director of a lumber company, was in a suit between plaintiff and the lumber company dismissed and held to be defendant's obligation, plaintiff was not pre-cluded from collecting the claim from defend-ant by a court order entered by consent in such suit, settling disputes between the parties and not mentioning such claim.

3. BILLS AND NOTES \$\infty\$ 451(1) — DEFENSES — GIVING CREDIT.

Where defendant, manager of a company, received for his own use money, and gave his own duebill therefor to plaintiff, who furnished the money, that defendant gave the company credit for the amount of the duebill would not preclude recovery from him, since one is not to be de-nied recovery simply because the person sued has dealt with a third person to his disadvan-

Department 2. Appeal from Superior Court, King County; Augustus Brawley, Judge.

Action by the Nebraska Investment Company against James E. Corlett and wife. Judgment for plaintiff, and defendants appeal. Affirmed.

Peters & Powell, of Seattle, for appellants. Donworth & Todd, of Seattle, for respondent.

CHADWICK, J. This is an action on a duebill:

"Dec. 17, 1910.

"Due Nebraska Livestand of three thousand dollars. "James E. Corlett." "Due Nebraska Investment Company, the sum

The defense is payment through the set-

vestment Company and the Moresby Island 1000 was paid on the option or loaned to Cor-Lumber Company, Limited, in British Co-

Appellant James E. Corlett was the principal stockholder and managing director of the Moresby Island Lumber Company, Limited, a British Columbia corporation. This corporation had timber holdings in British Columbia, which respondent and its associates desired to purchase. On October 5, 1910, they took an option, paying then \$26,-000, and during the following six months they made payments aggregating \$41,500. One of the sums making up this amount was the \$3,000 which respondent is seeking to recover in this action.

Appellant Corlett as managing director of the lumber company conducted all the negotiations and received payments on its behalf. W. I. Coleman, the secretary and treasurer of respondent, acted for it and its associates, and made all the payments. Pending the negotiations between respondent and the Moresby Island Lumber Company, Limited, Corlett asked for a personal loan of \$3,000. Coleman declined to make the loan to Corlett, but was willing to advance the money as a payment on the option. He drew a check payable to Corlett. Just then Coleman was called from his private office, and when he returned Corlett had gone with the check, and in lieu thereof had left a duebill drawn with his own hand, as above quoted. When Coleman returned he read the duebill and telephoned Corlett that the amount of the check would have to be treated as an advance on the timber contract, a payment to the Moresby Island Lumber Company, Limited. Corlett advised him that that would be all right. Corlett testified on the trial of this case that he had carried it in his account as part of the money furnished by respondent to the Moresby Island Lumber Company. Respondent and its associates failed to exercise their option, and the Moresby Island Lumber Company, Limited, claimed a forfeiture. The respondent and one Phelps, who had an interest in the transaction, sued the lumber company in the Supreme Court of British Columbia for \$41.500, the amount of the several payments made by Coleman to Corlett, including the \$3,000 evidenced by the duebill. Upon a garnishment auxiliary to its suit \$41,500 was paid into the registry of the court to await a determination of the suit. Corlett was not made a party.

At the trial the plaintiffs contended that the \$3,000 was paid on the option, and the lumber company contended that it was a personal loan to Corlett. Corlett so testified at the trial. The trial judge held that the option money was forfeited, and gave judgment in favor of the lumber company. On an appeal to the Court of Appeal of British Columbia the judgment was reversed, except as to the item of \$3,000. The appellate court lett personally, and as the burden of preof was on the plaintiff, the \$3,000 should be eliminated and judgment entered for \$38.-500; the ruling of the court being in part as follows:

"The item of \$3,000 stands on a different footing to that of the other items. I confess some doubt as to how this item should be treated. The witness Coleman, for the plaintiffs, said that it was paid to Corlett, the defendant's manthat it was paid to Corlett, the defendant's manager, for the same purposes as were the other sums. It is very clear that Corlett applied to Coleman for this sum for his own personal use, and told Coleman so. That sum was paid to Corlett, who gave a personal duebill for it; but if Coleman did not intend to accept it as such, he should have had the matter put right at once. I think it best to resolve what doubt I have in favor of the defendant the ones of persol have in favor of the defendant, the onus of proof being upon the plaintiffs, and leave the plain-tiffs, if they be so advised, to pursue their rem-edy against Corlett."

From this judgment the lumber company appealed to the king in council, or, as more generally spoken, the Privy Council at London. Neither party appealed from the order of the court eliminating the issue as to the \$3,000. While the appeal was pending a settlement was agreed upon, and what is called a "consent order" was entered in the Supreme Court of British Columbia on December 4, 1914. By the terms of the consent order it was decreed the action was settled without costs to either party, "and that all judgments entered herein be vacated. And this court doth further order that the moneys now standing in court to the credit of this action, together with all accrued interest thereon, shall be paid out to the firm of Bodwell & Lawson and W. J. Taylor jointly, who shall pay one-half of the said money to Eberts & Taylor as the solicitors for the plaintiffs and one-half thereof to the solicitors for the defendant; and each of the parties hereto consenting and undertaking thereto, this court doth further order that the said parties shall by their respective solicitors dismiss and vacate, without costs to either party, any appeals that have been taken from the judgment of this court. whether to the Court of Appeal or to his majesty in council, and that all matters in difference between the parties hereto and at issue in this action or in the said appeals shall be deemed to have been determined by the settlement to be carried out under this order." The appeal to the Privy Council was dismissed.

[1] Although presented in various ways, the determinative points in the case are whether the item now sued on was included in the settlement, or, if not, whether respondent is concluded by the settlement as it is evidenced by the order of the court which we have just quoted. That amount now demanded was not settled by the parties or carried into the claim of the respondent against the lumber company we are quite convinced. The Nebraska Investheld that as it was doubtful whether the \$3,- | ment Company had included it as an item in

its suit against the lumber company. It concluded by the terms of the order entered denied its liability, and offered appellant as a witness to sustain its contention. He testifled that it was his personal obligation, and that his company was in no way bound. The court held that the lumber company was not liable, and dismissed the item as a subject of controversy, leaving to the plaintiffs, "if they are so advised, to pursue their remedy against Corlett," which ruling under our practice would be called a dismissal without prejudice of the cause of action in so far as it was based upon the \$3,000 item.

As we have said, both parties to the action accepted the ruling of the court. The appeal was directed to the judgment of \$38,-500, and the items going to make up this amount would have been the only items which the Privy Council would have considered. The judgment in so far as it eliminated the item of \$3,000, in the absence of a cross-appeal, was final and conclusive upon the parties. Nor is respondent to be barred of a recovery because it did not appeal. It might have applied for a cross-appeal, but the allowance of an appeal under the English law is a matter of grace and not of right. and, furthermore, it was content, as is evidenced by the bringing of this action, to accept the ruling of the court and bring its suit against appellant, who is said to have been and is now presumably solvent. Nor was there any reason why appellant should pursue the lumber company with respect to this item. When at the trial counsel for respondent undertook to inquire into it counsel for the lumber company interrupted the proceedings, saying:

"\* \* \* But there was one item of \$3,000 that was not company money; the rest of it was company money. \* \* Mr. Corlett is ready to pay that amount. \* \* That is one of the adjustments that had to be made. You need not bother about that; you can have that at any time you ask for it—that \$3,000; you don't need to prove anything about it."

Appellant was present and made no remonstrance. While the appeal was pending and negotiations for a settlement were on, appellant prepared a memorandum of the items going into the settlement for submission to respondent. In contradiction of his former attitude he included the item of \$3.-000 as a payment made by the lumber company. The manager of respondent, to whom the proposed stipulation was submitted, refused to consider it because it included the item of \$3,000, and the whole matter was referred to their solicitors, who fixed up a stipulation to meet the settlement. Of course respondent insists that the \$3,000 was an item in the settlement, and some circumstances arising in subsequent conduct give slight color to his contention, but these are explained and can be given no probative force when measured by the record of the entire transaction.

[2] Nor do we think that respondent is

upon the stipulation. At the time it was entered appellant was in no sense a party to the action. The item of \$3,000 had been held to be his obligation, and had been dismissed out of the case. There was no identity of interest. He had no personal concern in the judgment against his company, nor had it any interest in the item which is the subject of controversy. Douthitt v. MacCulsky, 11 Wash. 601, 40 Pac. 186. Appellant knew that the respondent had refused to consider the item of \$3,000 as a subject of further negotiation or settlement, and if, as he now contends, it was to be included, it would have been the part of prudence on his part to have had it specifically men-

[3] It is further contended that respondent should not be permitted to recover because appellant testified that the lumber company had since been given credit for the \$3,000. But respondent has no concern with the mutual dealings of appellant and his company. Appellant is the managing director, and it was within his power to keep his books and the books of his company in his own way. He said in testifying:

"The \$3,000 was paid to me for my own use; for my individual business. • • It was deposited to my own account, and it was used by

What account was charged, or why the company should be credited for a \$3,000 item personal to the manager, is not for respondent to inquire into, for surely it is not to be denied a recovery if appellant has dealt with a third party to his disadvantage.

Affirmed.

ELLIS, C. J., and MOUNT and HOL-COMB, JJ., concur.

BROWN v. JAMISON et ux. (No. 14412.) (Supreme Court of Washington, May 6, 1918.)

1. TRIAL \$\infty 63(1)\$—ORDER OF TRIAL—EXCLU-SION OF EVIDENCE IN REBUTTAL.

Where plaintiff had an interest in an option contract, and testified that he was fraudulently induced to settle his interest by reason of false statement of defendant that person going to renew the option had refused to sign a letter agreement and defendant testified that he showed to plaintiff, the letter signed by such person, there was no prejudicial error in sustaining objection to evidence in rebuttal that plaintiff did not see such letter until a certain time after the settlement, because if plaintiff deemed the fact settlement, because if plaintiff deemed the fact material as to when he first saw the letter, it was his duty to go into the matter upon direct examination.

APPEAL AND ERROR 4 1064(4)—HARMLESS ERROR-INSTRUCTIONS.

If it were technical error to instruct that one claiming fraud should show the facts alleged by evidence "clear, positive and convincing," it was not prejudicial, on the ground that the word "positive" prevented the jury from prevented the jury from considering the circumstances in the case.

share in option contract, and not more than \$300, dependent on a renewal of the option, the other parties interested owed no duty to inform him at the time of settling the exact amount that the option, subsequent to such agreement, had been sold at a great profit, as far as his interest in more than \$300 was concerned.

Department 2. Appeal from Superior Court, Spokane County; Bruce Blake, Judge. Action by L. H. Brown against A. C. Jamison and Fannie B. Jamison, his wife. Judgment for defendants, and plaintiff appeals. Affirmed

Cannon & Ferris, of Spokane, for appellant. Post, Russell, Carey & Higgins and A. E. Gallagher, all of Spokane, for respondents.

MOUNT, J. This action was brought to recover \$41,389, being one-third of the selling price of certain mines in which the plaintiff claimed to be interested with the defendants. Upon issues joined, the case was tried to the court and a jury, resulting in a verdict for the defendants. The plaintiff has appealed.

It appears that in June, 1915, the respondent A. C. Jamison requested the appellant to go to Salmo, British Columbia, to secure an option to purchase certain mining claims known as the H. B. group. The appellant secured the option as desired by the respondent. Thereupon the respondent gave to the appellant a statement as follows:

"Spokane, Wash., June 24, 1915. "This is to certify that L. H. Brown is entitled to a one-third interest in the Benson and Ross option contract dated June 24, 1915, on what is known as H. B. group mines at Salmo, B. C., in consideration of his obtaining said contract for me and in my name and in consideration of said L. H. Brown paying all expenses of obtaining said contract and any necessary changes thereof. [Signed] A. C. Jamison."

Thereafter the appellant was requested to, and did, secure some changes in the option. Respondent attempted to sell these mines, but was unable to do so. After a short time it was necessary to advance money in order to protect the option. Appellant declined to advance any money for that purpose. About this time, one R. K. Neill became interested. and the respondent Jamison secured Neill to go to Salmo and get a new option upon the H. B. group and other mines in the district. Mr. Jamison informed Mr. Brown of this fact. Mr. Brown first objected, but afterwards consented, providing Mr. Neill would sign a letter which was prepared by the appellant as follows:

"Spokane, Wash., July 24, 1915. r. A. C. Jamison, Spokane, Wash.—Dear Beg to acknowledge receipt from you this "Mr. day of assignment from you to me covering all your rights in the Benson Ross option to you of the date of June 24th respecting the mining property in B. C. known as the H. B. group, and this letter will act as an acknowledgment that I received the same together with a like assignment of the Horton Billings interests cov-

3. Fraud \$\infty\$=\text{18}\$-\text{Settlement}\$-\text{Concealment} | ered by the 'Smith Curtis' option for the purpose of surrendering the same and receiving Where plaintiff agreed to take \$70 for his from the owners of said mining properties described in said options a new option or contract respecting the same and the development and purchase thereof. That the new contract or option from both sets of owners shall run to R. K. Neill and A. C. Jamison, both holding an equal interest therein, or in my name and in which case I will execute to you a proper trans-fer or assignment of a half interest therein to effect the same result.

effect the same result.

"It is understood that in all matters pertaining to these mining properties, including the Zincton group, our interests are to be equal and we are to share equally therein, subject to the interest of L. H. Brown of Spokane, Washington, therein, which shall be assumed by us both in equal shares.

"Yours truly."

After preparing this letter, the appellant gave it to Mr. Jamison to have Mr. Neill sign it. When this letter was presented to Mr. Neill by Mr. Jamison, Mr. Neill refused to sign it, but did so after making a change, so that the last paragraph thereof read as follows:

"It is understood that in all matters pertaining to these mining properties, including the Zincton group, our interests are to be equal and we are to share equally therein, subject to the one-third interest of L. H. Brown of Sponers kane, Washington, in the Benson & Ross option which shall be assumed by us both in equal shares. If R. K. Neill fails to close deal with Ross & Benson of Salmo, B. C., in that event I will return your check for one thousand dollars, including all papers and contracts made between A. C. Jamison Ross Benson. If deal closed with Billings Horton Rawson, I, R. K. Neill, will divide with A. C. Jamison. "[Signed] R. K. Neill."

After this letter was signed by Mr. Neill. he went to British Columbia and entered into new option contracts containing claims in addition to those secured by the appellant. The appellant testified that Mr. Jamison did not show him this letter, but stated that Mr. Neill refused to sign the letter. Mr. Jamison, on the other hand, testified that he took the letter the next day and showed it to Mr. Brown, and that Mr. Brown was dissatisfied with it, and proposed a settlement so that he might be released from any interest in the contract. Thereupon Mr. Jamison and Mr. Brown, on the 26th day of July, entered into a contract as follows:

"Spokane, Wash., July 26, 1915. "Received of A. C. Jamison check for seven-ty dollars covering expenses in full for two trips to Nelson, B. C., in reference to Benson & Ross option on H. B. mine at Salmo, B. C. An additional attorney fee is to be paid providing additional attorney fee is to be paid providing new option is obtained either in my name or that of R. K. Neill or any one for us, and at the time possession of the property is given said attorney fee to be whatever A. E. Gallagher considers right and proper, but not, however, to exceed three hundred dollars.

"This cancels all interest in agreement with Jamison for an interest in the previous option made by Benson and Ross or in any profits de-

made by Benson and Ross or in any profits derived therefrom, and such agreement is hereby canceled and surrendered: Provided no fee is to be paid if property is not taken over under existing or new option."

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Mr. Jamison, at the time this agreement was entered into, paid Mr. Brown the \$70 therein mentioned. Mr. Neill proceeded to British Columbia and obtained new options. Afterwards Mr. Neill and Mr. Jamison effected a sale of their interest in the property for \$125,000. Mr. Brown was not paid the balance under the agreement of July 26th. because Mr. Gallagher, mentioned in the agreement, refused to act as arbitrator. Afterwards, in September, Mr. Brown agreed with Mr. Jamison that upon the payment of \$200 he would be satisfied. At that time Mr. Brown did not know that a sale of the property in the meantime had been made. Mr. Jamison caused the \$200 to be paid, and later this action was brought by Mr. Brown to recover one-third of the selling price of the mines or one-third of \$125,000, less \$270 paid. These are in substance the facts.

[1] It was claimed upon the trial that, at the time of the agreement of the appellant to receive for his services the sum of \$70 and such other sum not exceeding \$300 as Mr. Gallagher should consider right in lieu of his one-third interest in the H. B. group of mines, the appellant did not know that Mr. Neill had signed the letter of July 24, 1915, above quoted, and because he was not so informed a fraud was perpetrated by the respondent upon the appellant, and for that reason he was not bound by the contract for expenses and the \$200 which he had accepted. Upon the trial of the case the appellant was examined with reference to the letter written by him and given to Mr. Jamison to be signed by Mr. Neill. Appellant testified. as we have stated above, that Mr. Jamison told him that Mr. Neill refused to sign that letter. Mr. Jamison testified that he showed Mr. Brown the letter as signed by Mr. Neill and that Mr. Brown was dissatisfied, and desired to have Mr. Jamison pay him his expenses and a reasonable fee, which was agreed upon not to exceed \$300, and be relieved from any interest in or further liability on account of the options. Thereafter, and in rebuttal, the appellant offered to show that the first time he saw that letter it was in the hands of Mr. Gallagher after the settlement had been made. This was objected to on the ground that it was immaterial, and the court sustained the objection. The appellant now argues this was error. If the appellant deemed the fact material as to where and when he first saw the letter, we think it was his duty to go into that upon direct examination when he was presenting his prima facie case. Not having done so. he must have concluded at that time this fact was not material. We think it was clearly not prejudicial error for the court to refuse to reopen the case in rebuttal and again go into the question as to when and where and under what circumstances the appellant claimed to have first seen the letter after it was signed by Mr. Neill.

[2] Appellant next argues that the court erred in giving instruction No. 2 to the jury. This instruction had reference to the fraud alleged, and after stating the rule with reference to vitiating a contract for fraud, the court said:

The court then proceeded to state the facts upon which the appellant claimed the right to vitiate the contract. It is urged by the appellant that the court erred in using the words "clear, positive and convincing," and it is argued at length that the use of the word "positive" was error, because it prevented the jury from considering circumstances in the case. It is not uncommon in instructing juries upon this question for the court to say that such evidence in proof of fraud must be clear and convincing. In the case of Quinn v. Parke & Lacy Machinery Co., 9 Wash. 136, 37 Pac. 288, this court said:

" • • It is as well settled that nothing short of clear, positive and convincing proof will suffice to establish the fact of such rescission against a party who denies it and seeks to sustain the integrity of the writing."

In Pronger v. Old National Bank, 20 Wash. 618, 56 Pac. 391, we approved an instruction which stated:

"\* \* \* But you cannot render a verdict against any of the defendants against whom there is not clear and positive proof."

The terms "clear," "positive," and "convincing," as used in the instruction, were not intended as descriptive of the kind of proof, but were descriptive of the measure of proof. If we were to hold that the use of the word "positive" was technical error, we are satisfied that the jury could not have been misled by the use of that word in the connection in which it was used in this instruction, and if error it would be harmless.

[3] It is next argued that the court erred in refusing to give an instruction as follows:

"The court instructs you that it was the duty of defendant to inform the plaintiff of the fact that a contract for the sale of said properties had been made with Cullen and Bacon on August 27, 1915, and that if you find from the evidence that defendant did not so inform plaintiff, and plaintiff did not know thereof, then plaintiff would not be bound by the settlement wherein he accepted \$200, unless you believe from the evidence that if plaintiff had known of said fact he would have made said settlement in any event."

We think the court properly refused to give this instruction, because the contract for the sale of the mines was made more than a, month after the agreement between the appellant and the respondent to settle for \$70 and not to exceed \$300. After that settlement was made, if it was made in good faith

as the jury found-and we have no doubt from the record that it was so made-it was clearly not the duty of the respondent to inform the appellant of a sale after that time, unless it was to show that he was entitled to \$300, rather than \$200. In this action he does not claim that he is entitled to \$300 provided for in the settlement contract, but is attempting to entirely evade that contract.

We find no reversible error in the record. The judgment is affirmed.

ELLIS, C. J., and HOLCOMB and WEB-STER, JJ., concur. CHADWICK, J., concurs in the result.

## DIXON & OLIVER v. PARKER, MORAN & PARKER et al. (No. 14469.)

(Supreme Court of Washington. May 4, 1918.)

1. MUNICIPAL CORPORATIONS 4376 CHANGE OF GRADE — LIABILITY FOR SUB-CONTRACTOR'S CLAIM.

The power of a city to compel a railroad company to make a grade separation is an incident of the general police power, and is not of a contractual nature; hence the failure of a city to take from a railway company the bond required by Rem. Code 1915, §§ 1159, 1161, for the protection of laborers, mechanics, sub-contractors, and materialmen, does not make the city liable to a subcontractor for work done in separating the grade of a railway company's track from the street.

2. Railroads ===111 - Mechanic's Lien-NOTICE OF LIEN.

A subcontractor's subcontractor, engaged in making a grade separation for a railway, cannot recover against the railway company for labor or material furnished, where the railway company has not taken a bond from the contractor to respond in lieu of lien, as required by Rem. Code 1915, § 1129, unless the lien claimant has filed the statutory lien notice required by section 1184.

3. FRAUDS, STATUTE OF \$\iff 23(2)\$ — DIBECT PROMISE — LIABILITY FOR A DEBT OF AN-OTHER.

A verbal promise by a railway company and the general contractor to see that a subcontracwas not such an original or collateral undertaking as to take it out of the statute of frauds.

4. MUNICIPAL CORPORATIONS \$\infty\$ 876 - RAIL-BOADS \$\infty\$ 111-EQUITY-LOSS OF LIEN. The mere fact that a subcontractor has performed work of value in changing a railroad grade in a city does not make the city or the railway company liable in equity, where the subcontractor has filed no lien notice; there being no privity either of contract or in law between the party sought to be charged and the party claiming relief.

Department 1 Appeal from Superior Court, Spokane County; E. H. Sullivan, Judge.

Action by Dixon & Oliver, partners, against Parker, Moran & Parker, partners, and oth-From judgment for plaintiff against the named defendants, but in favor of the other defendants, plaintiffs appeal. Modified and affirmed.

R. L. Edmiston, of Spokane, for appellants. Cannon & Ferris, of Spokane, for 'respondents.

ELLIS, C. J. This is an action at law to recover moneys claimed to be due on account of work performed by plaintiffs Dixon and Oliver for defendants Parker, Moran & Parker. The facts are as follows:

The city of Spokane in February, 1912, passed an ordinance requiring the Northern Pacific Railway Company to separate the grade of its tracks from that of the street grades within a portion of the city by elevating its tracks and changing the grade of certain streets. The ordinance required the railway company to bear all the expense of making the change and do all the work except the replacing of such sewers and city utilities as were made necessary by changes in street grades. All of the streets from and including Division and Sprague at their intersection and west of it to Seventh avenue were affected by the change. The right of way of the railway company is 400 feet wide, except where reduced to 200 feet under the decision of the Supreme Court of the United States in the Ely Case, 197 U.S. 1, 25 Sup. Ct. 802, 49 L. Ed. 639. To make the grade separation it was necessary to re-establish the grades of the streets across the right of way, and for a considerable distance beyond. The railway company was required to excavate within its right of way, and in some cases without its right of way, and to replace the streets at the new level in good condition. The ordinance is very lengthy and explicit as to how the work shall be done, and closes with a requirement that the railway company shall accept in writing the terms of the ordinance within 45 days after its passage, failing which the ordinance shall be null and void, unless time be extended by the city council. It is conceded that the terms of the ordinance were so accepted by the railway company. Because of certain litigation touching the city's power to require the grade separation (Holland v. N. P. Ry. Co., 214 Fed. 920, 131 C. C. A. 216), the actual work was not commenced until October, 1914. A contract was then entered into by the railway company, with W. J. Hoy doing business as W. J. Hoy Company, by which Hoy undertook to do the entire work, with certain minor exceptions, as general contractor. Under this contract the work was to be paid for by the railway company according to schedules made a part of the contract. Hoy sublet different parts of the work to subcontractors, among them Parker, Moran & Parker, partners, who undertook the work of excavation. This contract was executed on December 18, 1914. Parker, Moran & Parker in turn sublet to the plaintiffs Dixon and Oliver by contract dated January 7, 1915, the drilling and blasting, but not the excavation and removal

of the solid rock necessary to be removed from the right of way and streets affected, from Washington street east in order to place the streets in their new elevation. From Washington street west the work was done by others. The city through its engineer had general charge of the street changes so far as to direct what changes should be made and determined what would constitute a compliance with the ordinance. The city retained the right to construct the sewers either by day labor or contract, but the railway company was required by the ordinance to pay for such work.

Proceeding under their contract, plaintiffs undertook the performance of their contract with Parker, Moran & Parker. The railway company filed no bond, as required by section 1129 of Mechanic's Lien Law. Hoy gave a bond to the railway company conditioned for the faithful performance of his contract and to pay all obligations by him assumed thereunder. It appears that Parker, Moran & Parker agreed to give Hoy a bond, but failed to do so. Plaintiffs Dixon and Oliver gave a bond to Parker, Moran & Parker, but it does not appear in the record. No bond was filed in the office of the county auditor. Under the contract of Hoy with Parker, Moran & Parker. Hoy was to pay 90 cents per cubic yard for solid rock excavation, of which the drilling and blasting was, of course, a part. Under their contract with Parker, Moran & Parker plaintiffs were to be paid for the blasting 60 cents per cubic yard. These payments were to be made, the first on estimates received by Hoy from the railway company as to excavation, and the second on estimates received by Parker, Moran & Parker from Hoy on his estimate of the work done. The first controversy arose between Parker, Moran & Parker and plaintiffs in the latter part of May when the first estimate for the April work was given. Plaintiffs claimed that they were then entitled to \$2,000. Parker, Moran & Parker figured plaintiffs' part of the estimate at \$806.40, which plaintiffs refused. Plaintiffs appealed to E. J. Cannon, attorney for the railway company.

As to what occurred and what agreement was then made the evidence is in the sharpest conflict. Plaintiffs claim that Cannon then promised that the railway company would see that they were paid the money then and thereafter to become due for their work, and directed them to take the matter up with Hoy's office; that they then went to Hoy's office, where Hoy's purchasing agent and superintendent also agreed to see that they were paid and, in effect, guaranteed future payments. Cannon and Hoy's superintendent and purchasing agent all testified that the only promise made was to endeavor to secure orders from Parker, Moran & Parker for plaintiffs' payments on future estimates, so that plaintiffs would receive their pay directly from Hoy and in Hoy's office, court, after intimating somewhat doubtfully

Whatever the agreement it is admitted that at that time Hoy paid \$1,000, which, with the \$806.40 paid by Parker, Moran & Parker, enabled plaintiffs to meet their current pay roll. Subsequently plaintiffs also received from Hoy in Hoy's office an estimate of \$6.800 in June, and a further estimate of \$8,000 in July, 1915. These last payments, however, were made on receipts approved by Parker, Moran & Parker, thus corroborating in a measure the claim of Hoy and the railway company as to what the agreement was. Further payments were refused by Hoy on the ground that Parker, Moran & Parker had canceled and countermanded the order.

We find it unnecessary to set out the voluminous pleadings. It will suffice to say that the court sustained a demurrer of the city to the complaint, and the cause was tried to the court without a jury as against the other defendants. The court, upon appropriate findings of fact and conclusions of law, adjudged that plaintiffs recover from Parker, Moran & Parker a balance of \$10,559.20, with 6 per cent. interest from the date of the judgment, but that plaintiffs take nothing against the defendants city of Spokane, the Northern Pacific Railway Company, and the W. J. Hoy Company, as to each of which defendants the action was dismissed without day. Plaintiffs Dixon and Oliver appeal.

[1] Appellants contend that the city's demurrer to their complaint was erroneously sustained. It is urged that the city was liable to them under the terms of Rem. Code. 1160, because it failed to take from the railway company the bond required by sections 1159 and 1161 for the protection of laborers, mechanics, subcontractors, and materialmen. It is argued that the work of eliminating the grade crossings of the railroad tracks was a public work done on behalf of the city; that the ordinance requiring the separation, when accepted by the railway company, was the exercise of a contractual power not the police power; that, therefore, the work falls within the purview of the statute making the city liable because of its failure to exact the statutory bond required to be taken from persons doing work for it under contract. If the premises were sound, the conclusion would be irresistible. But the premises are not sound. Appellants' minor premise, that the relation between the city and the railway company created by the ordinance was purely contractual, is based mainly upon a decision of the Illinois Supreme Court, which contains some language which supports that contention, and much which does not. City of Chicago v. Jackson, 196 Ill. 496, 63 N. E. 1013, 1135. The sole question there involved was as to the right of a property owner, whose property had been damaged by a change of street grade necessitated by a grade separation of a street and railroad, to recover compensation from the city. The

that the ordinance was contractual rather than an exercise of the police power, uses language which plainly shows that whether the ordinance was contractual or not was wholly immaterial as between the city and the owner of abutting property. The court said:

"It seems to be thought by counsel for the city that inasmuch as the railroad company has been lawfully compelled to abandon its tracks on the street and so elevate them as to overcome the grade crossing, at great loss and expense to it, without compensation, neither should the plaintiff, who has suffered loss on account of the construction of the same work, be allowed to recover damages therefor. The position, upon first impression, seems plausible, but when carefully considered is clearly untenable. The relations of the parties to the city are entirely different. That which called for the exercise of the police power by the municipality was the operation of the railroad in running its trains across the street. Neither the location nor use of the plaintiff's property endangered the public health or safety, and it must be admitted that if the city had attempted to interfere with that property by obstructing his access thereto under any claim of a police regulation, it would have been a flagrant abuse of the police power and no defense whatever to an action for the resulting damages. The plaintiff bears no relation to the railroad company. He had nothing to do with the operation of its road. He makes no claim in his declaration on account of the elevation of the tracks. His cause of action is against the city for so changing the grade of the street as to damage his property."

Whatever may be said of the ordinance there discussed or of that court's views as to the nature of the power involved, our own decisions are controlling here. They distinctly hold that the power to compel grade separation is an incident of the general police power expressly conferred by the Constitution and statutes upon cities of the first class. State Constitution, §§ 10, 11, art. 11; Rem. Code, § 7507, subds. 7, 8, and 9. In Spokane v. Spokane & I. E. R. Co., 75 Wash. 651, 656, 135 Pac. 636, 638, we said:

"The power to be exercised in providing for a separation of grades, as here attempted, is not only attributable to the general police power vested in the city in legislating for the welfare and safety of its citizens in dealing with an admittedly dangerous situation, but is referable to another power—that of providing for changes in the grades of streets and locating railroad and street railway lines thereon, providing for changes of grade in such locations and other like powers as found in subdivisions 7, 8, and 9 of section 7507, Rem. & Bal. Code (P. O. 77, § 83)."

In Spokane v. Thompson, 69 Wash. 650, 657, 126 Pac. 47, 49, we said:

"It is also well established that a city in the exercise of its police power over the streets has authority to change the grade of a street to avoid a dangerous railroad crossing, and that such a change is for the benefit of the public, and is a public use."

See, also, Detamore v. Hindley et al., 83 Wash. 322, 145 Pac. 462.

In fact the Supreme Court of Illinois in a more recent case than that above cited has in effect repudiated the dictum relied upon by

appellants. Touching a grade separation ordinance it has said:

"The power of the council to pass such an ordinance is not an open question, nor is the source of its authority doubtful. It is from the police power that the council gets its right." Murphy v. C., R. I. & P. Ry. Co., 247 Ill. 614, 617, 93 N. E. 381, 382.

The mere fact that the railway company was required to and did accept the terms of the ordinance and in a sense thus agreed to do in a certain specified manner what it could be compelled to do in some adequate manner, did not change the character of the ordinance from an exercise of the police power into a mere exercise of the contractual function of the city. The acceptance was but an agreement to conform to the police mandate of the city in a specified manner agreeable to both parties—a mere acquiescence in the exercise of the city's police power by the railway company. True, the city in requiring the separation of grades exercised its police power in the public interest. Spokane v. Thompson, supra. The public welfare is indeed the very basis of the police power. But when the requirement was once made, the duty of performance was that of the railway company. That duty was traceable to the city's command, not to a mere contractual assumption by the railway company. In doing the work it was doing its own work, not that of the city. In fact the larger part was the modification of its own right of way and roadbed. We are clear that the statute requiring the taking of a bond from the contractor as security for labor. etc., on municipal contracts for public work. (Rem. Code, § 1159 et seq.), has no application to such a case as this. The demurrer company was liable for the labor and material furnished by appellants as subcontractors in the prosecution of the work. It is asserted that the property of an operating railroad company cannot be subjected to liens for labor or material furnished in alof the city was properly sustained.

[2] It is next contended that the railway teration or repair; that this work was a work of alteration or repair: that, therefore, the railway company was liable because it failed to take the bond required by statute (Rem. Code, § 1129) to respond in lieu of such liens. Again the premises are unsound and the conclusion correspondingly faulty. The decisions cited by the appellants in this connection go no further than to hold that the lien cannot be enforced by sale of property essential to the operation and maintenance of the road for the public purposes for which it was established. Buncombe Co. Com'rs v. Tommey, 115 U. S. 122, 5 Sup. Ct. 626, 1186, 29 L. Ed. 305; Connor v. Tenn. Cent. Ry. Co., 109 Fed. 931, 48 C. C. A. 730, 54 L. R. A. 687; Pittsburg Testing Lab. v. Milwaukee E. R. & L. Co., 110 Wis. 633, 86 N. W. 592, 84 Am. St. Rep. 948. Our statute, however, expressly accords a lien in such

cases. Rem. Code, § 1129, after providing for the lien in favor of every person performing labor, etc., in the construction, alteration, or repair of any railroad, makes the contractor, subcontractor, architect, builder, or person having charge of the work the agent of the owner for the purpose of the establishment of the lien, provides that the railroad company shall exact a bond from the contractor to respond in lieu of lien, and declares:

"And if any such railroad company shall fail to take such bond, such railroad company shall be liable to the persons herein mentioned to the full extent of all such debts so contracted by such contractor."

We have held that the bond when taken and properly filed dispenses with the agency necessary to create the lien. Laidlaw v. Portland, V. & Y. Ry. Co., 42 Wash. 292, 84 Pac. 855; Du Pont de Nemours Powder Co. v. Nat. Surety Co., 94 Wash. 461, 162 Pac. 866. It is the agency declared by the statute which creates the privity between the railroad company and the lien claimant which sustains the lien. The failure to take the bond required by the statute creates a statutory liability enforceable in personam against the railroad company, but this only when a lien has been filed invoking the statutory agency in manner and time as required by the statute. The filing of the statutory lien notice furnishes the privity between the company and the lien claimant, which would not otherwise exist, and without which a personal liability in the absence of the bond could not be maintained. This liability is but a statutory substitute for the lien in rem against the specific railroad property. It seems too plain for argument that, though the filing of the lien is not necessary where the bond is taken dispensing with the statutory agency, that if the bond be not taken the liability against the railroad company, whether asserted in rem or in personam, cannot be maintained without the filing of the lien creating the agency and supplying the privity necessary to the maintenance of the liability. Indeed, the creation of the privity by notice of lien would seem to be more imperative where a personal liability is asserted than in case of a lien in rem. In the case before us appellants were subcontractors of a subcontractor of the principal or general contractor. There was no privity of contract between the railway company and the appellants. That lack of privity was not supplied or overcome in the only way in which it could be supplied or overcome in the absence of the lieu bond; viz. by filing the notice of lien as required by Rem. Code, \$ 1134. It follows that unless there was some valid agreement on the part of the railway company to pay or a guaranty of payment for appellants' labor, they cannot recover as against the railway company. In the absence of such an agreement, the railway company was under no duty to pay appellants or to refuse to pay Hoy any part of

the estimates due to Hoy under its contract with Hoy. But appellants contend that there was a specific agreement on the part of both the railway company and Hoy to pay for the work done by appellants, and to guarantee future payments. As to whether there was such an agreement, the evidence was voluminous and extremely conflicting. cannot discuss it in detail within the reasonable limits of an opinion. An attentive examination of the evidence, however, convinces us that there was nothing more than an agreement by the railway company's attorney and assistant engineer in charge of the work for the railway company to advance money with Hoy's consent to meet a specific pay roll, which was done, and to charge the amount to Hoy, who, in turn, charged it to Parker, Moran & Parker, and a further promise to arrange for other payments on estimates through Hoy and on orders of Parker, Moran & Parker. The evidence is far from convincing that there was any agreement on the part of the railway company or any one in its behalf to pay future estimates, or to guarantee or make future payments, except on such estimates and It appears that this was done orders through an arrangement with Hoy until Parker, Moran & Parker refused further orders.

[3] It is next contended that the evidence shows that Hoy in consideration that appel lants continue the work agreed to pay for such work if Parker, Moran & Parker failed to do so. A careful consideration of the evidence touching this question impels us to the conclusion that Dunnigan, Hoy's purchasing agent, and Holman, Hoy's superintendent, promised no more than to get Moran to sign written orders on Hoy from month to month, which would justify Hoy in paying to appellants the money coming due on monthly estimates to Parker, Moran & Parker. This, as before stated, it appears was done on the next two estimates; one for \$6,800, the other for \$8,000, and the receipts for such payments bear the approval of Parker, Moran & Parker. Appellants filed no lien against the railway company which would have justifled Hoy or the railway company in making such payments without an order from Parker, Moran & Parker, nor did appellants garnishee Hoy for any amount claimed to be due from him to Parker. Moran & Parker which would have justified Hoy in withholding pay to the latter. Moreover, the alleged promise, even if the evidence justified a finding that it was made just as claimed by appellants, being verbal, would have been void under the statute of frauds. Taken in the light most favorable to appellants, the promise claimed was no more than that Hoy and the railway company would see that appellants were paid, which, as this court has frequently held, was not sufficient to create an original or collateral undertaking on the part of the railway company or of Hoy. CampWash. 73, 151 Pac. 103; Goldie-Klenert Dis-trib. Co. v. Bothwell, 67 Wash. 264, 121 Pac. 60, Ann. Cas. 1913D, 849; Pressentin v. Hawkeye Timber Co., 77 Wash. 388, 137 Pac. 999; Bresler v. Pendell, 12 Mich. 224.

[4] Finally, appellants argue that the city, the railway company and Hoy should all be held liable in equity to pay appellants the reasonable value of their work, because it contributed to the desired result, so that all of these defendants received its benefit. The same argument might be made in every case where a laborer, materialman, or subcontractor has lost his right to a lien by failure to file the lien notice as required by law. We know of no principle of equity which would sustain a judgment in such a case merely because the owner of the property had received the benefit, there being no privity either of contract or in law between the party sought to be charged and the party claiming the relief. Both Hoy and the railway company have paid to the persons to whom they were bound by contract to pay all they agreed to pay.

One other matter requires notice. court found that the amounts due from Parker, Moran & Parker to appellants became due on November 1, 1915, but allowed interest on those amounts only from the date of the judgment. This was apparently an oversight. The judgment should be modified so as to allow interest on the sums found due from November 1, 1915. In other respects the judgment is affirmed.

WEBSTER, MAIN, PARKER, and FUL-LERTON, JJ., concur.

COURTIS v. FREEBURN COAL CO. (No. 14403.)

(Supreme Court of Washington. May 7, 1918.)

APPEAL AND ERBOR \$\infty\$=1011(1) — REVIEW—TRIAL BY COURT—PREPONDERANCE OF EV-IDENCE.

Where it cannot be said that the evidence does not preponderate in support of the trial court's decision based upon conflicting evidence, the judgment will not be set aside.

Appeal from Superior Department 2. Court, Spokane County; E. H. Sullivan,

Action by T. K. Courtis against the Freeburn Coal Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Robertson & Miller, of Spokane, for appellant. Nuzum, Clark & Nuzum and Geo. H. Armitage, all of Spokane, for respondent.

PARKER, J. The plaintiff, Courtis, commenced this action seeking recovery from the defendant company of compensation claimed to have been earned by him in the form of

bell v. Weston Basket & Barrel Co., 87 services in making sales of shares of its capital stock in pursuance of a contract entered into with him. Trial in the superior court for Spokane county, sitting without a jury, resulted in findings and judgment in favor of the plaintiff from which the defendant has appealed to this court.

The contentions here made in appellant's behalf have to do only with questions of fact (1) as to the making of the contract; and (2) as to whether or not respondent's efforts were the effectual cause of the sales which were proven to have been made. Both of these questions are to be determined from evidence, which was almost wholly oral. We have read all the evidence with care. It is in serious conflict in so far as the testimony of interested witnesses is concerned. There was, however, testimony given by one or two disinterested witnesses throwing some light upon both of these questions, which we think warranted the trial court in rendering the decision it did. We cannot say that the evidence does not preponderate in support of the trial court's decision. To review the evidence here would be but to discuss it with a view of determining the comparative credibility of the witnesses. This we deem unnecessary. It is not contended that the contract was illegal. Apparently the shares of stock were held by the company under such conditions that it had a lawful right to secure their sale in this manner.

ELLIS, C. J., and MOUNT, HOLCOMB, and CHADWICK, JJ., concur.

CARLSON v. VASHON NAV. CO. et al. (No. 14659.)

(Supreme Court of Washington. April 30, 1918.)

1. APPEAL AND ERROR \$\infty\$ 110—ORDERS APPEALABLE—MOTION FOR NEW TRIAL.

An order denying a motion for a new trial is not appealable under Rem. Code 1915, § 1716, designating orders from which appeals will lie.

2. APPEAL AND ERROR 6-419(1)—NOTICE OF APPEAL—SUFFICIENCY.

A notice that a party would appeal from an order denying his motion for a new trial "and all proceedings had in said cause" was not sufficient notice of an appeal from the judgment or other prior order, under Rem. Code 1915, § 1719, providing that the appellant in his notice of appeal shall designate with reasonable certainty from what judgment or orders the appeal is taken.

3. Appeal and Error 422 - Notice of

APPEAL AMENDMENT.
Under Rem. Code 1915, \$ 1734, providing that the Supreme Court shall upon terms allow amendments in matters of form, a notice of appeal from an order denying a new trial "and all proceedings had in said cause" was deficient in substance, and could not be amended to make it notice of appeal from the judgment, in view of section 1719, providing that commissions agreed to be paid to him for his orders or judgments appealed from should be

4. APPEAL AND ERROR 430(2)-FAILURE TO

FILE NOTICE.

Rem. Code 1915, § 1784, providing that no appeal shall be dismissed by reason of formal defects in the notice of appeal, was not intended to do away with notice within time.

Department 2. Action by Oscar Carlson against the Vashon Navigation Company, a corporation, and others. Judgment for defendants, and from an order denying a motion for a new trial, plaintiff appeals. On motion to dismiss. Appeal dismissed.

E. C. Dailey, of Everett, and Saunders & Nelson, of Seattle, for appellant. J. A. Coleman, of Everett, for respondents.

MOUNT, J. Respondents move to dismiss this appeal because the order appealed from is not appealable. The action was brought to recover against 17 defendants on account of personal injuries. Upon issues made the case was tried to the court and a jury. After the plaintiff had introduced his evidence all the defendants moved the court for a directed verdict. This motion was granted by the court as to all of the defendants except Donald B. McRae, the sheriff of Snohomish county, and the surety upon his official bond. Thereupon, on the 27th day of September, 1917, the court entered a judgment for costs in favor of all the defendants who were dismissed from the case, and the trial proceeded as to the other two defendants. The case was finally submitted to the jury as to the defendant Donald B. McRae and the United States Fidelity & Guaranty Company, the surety upon his official bond; and on the 1st day of October, 1917, the jury returned a verdict in favor of these two defendants. Upon the filing of that verdict on that day, a judgment was entered by the clerk in accordance with the verdict. On October 3, 1917, the plaintiff filed a motion for a new trial. This motion was heard and determined by the trial court on the 13th day of October, 1917. At that time the motion was denied. Thereafter, on the 11th day of January, 1918, the plaintiff served upon the defendants a notice of appeal to this court, which, omitting formal parts, reads as follows:

"You and each of you are hereby notified that "You and each of you are hereby notified that the plaintiff Oscar Carlson above named, intends to and does hereby appeal to the Supreme Court of the state of Washington, from the order of the court denying his motion for a new trial herein, which order was made and filed on the 18th day of October, 1917. Said plaintiff hereby appeals from said final order and all proceedings had in said cause."

[1] We are satisfied that the motion to dismiss must be granted. The order here appealed from is the order denying a motion for a new trial. This is not appealable. Rem. Code, § 1716.

[2] If the appellant intended to appeal

designated with reasonable certainty in the tice is clearly not sufficient under the statute, because at section 1719, Rem. Code, it is provided that:

"The appellant in his notice of appeal shall designate with reasonable certainty from what judgment or orders, whether one or more, the appeal is taken, and if from part of any judgment or order, from what particular part."

There were two final judgments in this case; one upon the 27th day of September, 1917, in favor of 15 of the defendants; and another upon October 1st, as to the remaining defendants. Neither of these judgments is described in the notice of appeal. The only order described is the one which was made and filed on the 13th day of October. 1917. That was the order described in the notice, namely, the order denying the motion for a new trial. The words, "said plaintiff hereby appeals from said final order and all proceedings had in said cause," refer specifically to the order of October 13, 1917, which was the order upon the motion for a new trial. This was not an appealable order. The orders from which appeals might have been taken were not described in the notice.

[3, 4] Counsel for the appellant refers us to section 1734, Rem. Code, which provides that the court shall, upon terms, allow amendments in matters of form, curative of defects in proceedings to the end that substantial justice shall be secured to the parties, etc. It is plain to be seen that this notice was not defective in form. It is defective in substance if the appellant intended to appeal from either of the final judgments in the case. Section 1734, Rem. Code, was not intended to do away with notice within time, and it was not intended to cure defects in substance as well as form.

The order attempted to be appealed from not being an appealable order, and the notice not being sufficiently definite as to the orders which, when made, were subject to be appealed from, the motion must be sustained and the appeal dismissed.

ELLIS, C. J., and PARKER, HOLCOMB, and CHADWICK, JJ., concur.

> BEERS v. WALKER et al. SAME v. BEERS.

(No. 14557.)

(Supreme Court of Washington. April 29, 1918.)

HABEAS CORPUS \$=34-CUSTODY OF CHIL-DREN-DEFENSES.

Where the wife secured divorce with custody of both children, and the decree was modified to give the husband custody of his daughter, whereupon the wife removed from the state with the child in order to defeat the order as to custody, and on her return to the state the husband brought habeas corpus to enforce the order, [2] If the appellant intended to appeal the wife could not, on application to modify from the final judgment in the case the no- the order as to custody as a defense to the writ of habeas corpus, be heard to say that she is a fit and proper person to have the care of the child and the husband was entitled to custody of the child.

Department 2. Appeal from Superior Court, King County; Walter M. French, Judge.

Habeas corpus by Fred E. Beers against Horace Walker and others, and petition by Irene Beers against Fred E. Beers. From an order granting the writ and denying the petition, Walker and others and Irene Beers appeal. Affirmed.

Peterson & Macbride, of Seattle, for appellants. Gay & Griffin, of Seattle, for respondent.

MOUNT, J. This appeal is from an order of the lower court granting a writ of habeas corpus to the respondent for the possession of a minor child and denying to the appellants the right to modify a decree of divorce.

The admitted facts are substantially as follows: In April 1909, a decree was entered in the superior court of King county granting to Irene Beers a divorce from her husband, Fred E. Beers. The decree awarded the custody of the two minor children, Evelyn and Gladys Beers, to their mother. Afterwards, in the year 1912, Fred E. Beers filed a petition to modify the decree as to the custody of the children. Upon a hearing of this petition the court granted the modification and awarded the custody of one of the children, Gladys Beers, to her father. Upon appeal to this court that order of modification was affirmed. Beers v. Beers, 74 Wash. 458, 133 Pac. 605. Prior to the affirmance of that order Mrs. Beers took the child and was out of the state. She afterwards was married to a man by the name of Frallicciardi, and she has practically retained the custody of the child ever since and has not complied with the order of the court awarding the custody of the child to its father. In July, 1917, when the child was brought back to King county in this state, Fred E. Beers, its father, filed a petition for a writ of habeas corpus, basing his right to the child upon the decree affirmed by this court in Beers v. Beers, 74 Wash, 458, 133 Pac. 605. Upon the day after this petition was filed, Mrs. Frallicciardi filed a petition in the original action for a modification of the decree, praying to be allowed to have the custody of the child, and, in her answer to the application for writ of habeas corpus, alleged in substance that conditions had changed since the last modification of the decree; that the father had never supported the child, had not paid the alimony, and was not in a position to COMB, JJ., concur.

give the child proper care, training, and education; and that she was in a position to care for the child and its best interest demanded that it should remain with her. The child at that time was at the age of eleven years. When the petition in habeas corpus came on to be heard before the court, it was agreed that the petition to modify the decree should be taken up with the petition for habeas corpus. The trial court was of the opinion that the father was entitled to the care and custody of the child under the modified decree, and refused to consider the application for modification, apparently because the order modifying the original decree had been affirmed by this court and no permission had been obtained from this court to modify it. The trial court therefore granted the petition for habeas corpus, and this appeal followed.

The only question presented by the appellants is that the court erred in refusing to modify the decree because no permission had been obtained from this court therefor. We deem it unnecessary to enter into a discussion of that question at this time. It clearly appears from the record before us that Mrs. Beers, now Mrs. Frallicciardi, has retained possession of the child ever since the modification in 1916, has kept the child out of the jurisdiction of the court most of that time, and has failed and refused to comply with the order of modification. We are satisfied that under those circumstances she was not entitled to be heard upon her petition for modification as a defense to the writ of habeas corpus. The writ of habeas corpus was sued out to enforce the order of modification made in the year 1916 awarding the custody of this child to its father. He was clearly entitled to that relief. When it is shown that Mrs. Frallicciardi has continuously violated the order and has kept the child away from the jurisdiction of the court, she ought not to be heard to say in answer to a petition for habeas corpus that she is now a fit and proper person to have the care of the child, especially where she has designedly avoided the jurisdiction of the court. We are of the opinion therefore that the court arrived at a correct conclusion, even though permission of this court was not necessary to a modification of the modified order.

"The question before us is not whether the lower court arrived at a correct conclusion by an incorrect process of reasoning, but whether, considering all the evidence, its decision was the proper one to be entered. \* \* \* \* \* \* \* Kane v. Dawson, 52 Wash. 411, 100 Pac. 837.

The order appealed from is therefore affirmed.

ELLIS, C. J., and CHADWICK and HOL-COMB, JJ., concur. CITY OF EVERETT v. McCULLOCH, Sheriff. (No. 14592.)

(Supreme Court of Washington. April 30, 1918.)

BAILMENT 4 18(5) - FORECLOSURE

Where one who claimed a chattel lien for work on a taxicab which had been confiscated by plaintiff city proceeded to foreclose his lien by notice of sale under Rem. Code 1915, §§ 1104-1109, and defendant sheriff seized taxicab under the foreclosure proceeding, and sold it by authority of that proceeding, plaintiff, which did not contest foreclosure, could not maintain replevin against sheriff.

Department 2. Appeal from Superior Court, Snohomish County: Guy C. Alston. Indge.

Action by the City of Everett against James M. McCulloch, Sheriff, to recover possession of a taxicab. From that part of the decree awarding damages in case return could not be had, the city appeals, and from that part of the judgment to the effect that the city was entitled to possession, defendant appeals. Reversed and remanded, with directions to dismiss action.

Wm. A. Johnson, of Everett, for appellant. Ogden & Clarke and Joseph Oakland, all of Seattle, for respondent.

MOUNT, J. This action was brought by the city of Everett to recover possession of a certain Ford taxicab which was taken by the sheriff from the possession of the police officers of that city. On the trial of the case the court found that the value of the taxicab was \$250; that the only interest which the city had was the right of possession during such reasonable time as might be necessary to determine what disposition should be made of the taxicab; and that the city had no authority to confiscate the taxicab, other than to require the owner to put up a bond conditioned that the taxicab would not be used for the unlawful sale or disposal of intoxicating liquor for the period of one year. The court concluded that the city was entitled to the return of the taxicab, and, in case return could not be had, to damages in the sum of \$1. The city has appealed from that part of the decree awarding damages. and the defendant has appealed from that part of the judgment to the effect that the city was entitled to the possession of the taxicab.

The facts are as follows: In January, 1917, three persons brought the taxicab to the city of Everett. These persons escaped from the taxicab. Two of them were arrested, and the other was never apprehended. Within the taxicab was found a large amount of bottled whisky. The men who were arrested forfeited their bail, and were never brought to trial. The cases are still pending in the police court of the city of

demanded the taxicab from the police department of the city of Everett, claiming that he had a chattel lien upon the taxicab for work previously done thereon. Delivery was refused, and he thereupon proceeded to foreclose his chattel lien by notice and sale under the provisions of sections 1104 to 1109. Rem. Code. The sheriff took possession of the taxicab, served notice of sale upon the mayor, the commissioner of public safety and the chief of police of the city of Everett; and on the 11th day of April the taxicab was sold at public auction. The proceedings for the foreclosure of the lien were not removed to the superior court of Snohomish county, but prior to the sale of the taxicab and on or about the 5th day of April the plaintiff began this action against the defendant to recover possession of the taxicab.

This case is controlled by the case of Mack v. Doak, 50 Wash. 119, 96 Pac. 825. That was a case where property was mortgaged. and after the mortgage became due the mortgagee proceeded to foreclose his mortgage. The mortgagors did not contest the foreclosure in the superior court, but permitted the sheriff to proceed with the sale, as was done in this case. Thereafter the mortgagors attempted to recover damages for the wrongful taking of the property described in the mortgage. In that case we said:

"The foreclosure here involved was commenced and conducted by notice and sale in exact compliance with the requirements of Bal. Code, \$5 5870-5875 (P. C. §\$ 6535-6540). Section 5870 provides that foreclosure may be made by notice and sale; section 5871 directs what the contents of the notice shall be; and section 5872 expressly provides that such notice shall be sufficient authority for the sheriff to take the property into his immediate possession. This provision makes the notice process sufficient to authorize the sheriff to seize the property without the consent of the mortgagor, and against his protest. Any other construction would render the statute ineffective. Section 5876, supra, provides a method by which the mortgagor may protect himself against an unauthorized fore closure, or contest the amount claimed to be "The foreclosure here involved was commenced closure, or contest the amount claimed to be due. The appellants did not see fit to avail themselves of the provisions of this section, but permitted the foreclosure and sale to proceed without further protest or action upon their part, and thereafter commenced this action for damages. Under these circumstances, the sheriff was fully protected in all of his proceedings by the notice which had been delivered to him, and the appellants are not entitled to recover."

See, also, Allen v. Morris, 87 Wash. 268. 151 Pac. 827.

We think that rule is controlling in this case. Here the city attempts to maintain an action in replevin against the sheriff, who seized the property under the foreclosure proceeding and sold it by authority of that proceeding. The city now attempts to maintain that the sale was irregular because of some minor defects in the recording of the lien notice and the dates fixed for the sale: but these were matters which should have been determined by the superior court of Everett. Two months later one A. D. Scott that county if the city claimed any interest

in the taxicab. The city did not seek that remedy, and it is now too late to claim ownership or the right of possession of the taxicab. The only interest which the city could possibly have in this taxicab under the city ordinance is the right to require a bond that the taxicab shall not be used for the purpose of sale of intoxicating liquors for a period of one year. The city apparently did not require that bond to be given prior to seizure by the sheriff. The trial court therefore should have dismissed the action.

The judgment is reversed and remanded, with direction to dismiss the action.

ELLIS, C. J., and FULLERTON, CHAD-WICK, and HOLCOMB, JJ., concur.

HOTOHKIN v. McNAUGHT-COLLINS IM-PROVEMENT CO. et al. (No. 14262.)

(Supreme Court of Washington. May 17, 1918.) 1. LIMITATION OF ACTIONS 4=16-STATUTES-

TO WHAT ACTIONS APPLICABLE.

To What Actions Applicable.

Rem. Code 1915, §§ 155-157, 159, 165, and other provisions limiting period within which actions shall be prosecuted, are intended to cover every form of action maintainable either in law or equity, in view of section 153, abolishing all distinctions between actions at law and actions in equity.

2. EQUITY \$\inspec\$87(1) - Following Limita-

Courts of equity in case of concurrent jurisdiction consider themselves bound by the statutes of limitation which govern courts of law in like cases.

3. EQUITY \$\infty 87(1) - Following Limita-TTONS.

Courts of equity apply a statute of limita-tions as it would have been applied at law, and give it the same effect and operation in one court as in the other.

4. Trusts \$\infty 365(3)\text{-Express Trusts} - Ac-TION-LIMITATIONS.

Where trustees asserted their adverse claim over 10 years ago, and the fact was made known to the cestui que trust, who thereupon began to assert her claims, and litigated them to decisive and final judgment, the action is barred by laches as well as limitations, although it be conceded that statute does not run during existence of a trust which is exclusively within the jurisdiction of equity.

Department 2. Appeal from Superior Court, King County; R. B. Albertson, Judge.

Action by A. L. Hotchkin, administrator of the estate of Delia M. Hotchkin, deceased, against the McNaught-Collins Improvement Company and others. Judgment for defendants, and plaintiff appeals. Affirmed.

James Epler, of Seattle, for appellant. Ballinger, Battle, Hulbert & Shorts and Peters & Powell, all of Seattle, for respondents.

HOLCOMB, J. In this case appellant in his brief makes a comprehensive statement that the action is brought by him as administrator of the estate of his deceased wife, in whose lifetime the action, substantially as

times: and in the case as now presented the appellant has in his complaint attempted to avoid the errors upon which the decisions were rendered against the appellant in the several cases referred to, found in Collins v. Kinnear, 37 Wash. 453, 79 Pac. 995; Hotchkin v. Bussell, 46 Wash. 7, 89 Pac. 183, and 67 Wash. 206, 121 Pac. 455. For the sake of brevity, a quality increasingly to be desired in judicial opinions, those cases are referred to for the history and issues involved in the former cases as well as in this. As will be seen by reference to the former cases, the litigation has been pending in various forms since as early as 1903. On July 27, 1903, Mrs. Hotchkin, then living, filed her petition or motion to vacate the judgment in the first case wherein judgment was rendered in favor of McNaught-Collins Improvement Company in the superior court on appeal from the board of state land commissioners. The motion was denied. Appeal was taken to this court and decided in 37 Wash. 453, 79 Pac. 995, dismissing the appeal because of failure to properly prosecute it. As shown in the present complaint, she then on about May 4. 1905, filed a complaint again praying the superior court to vacate and annul the decree entered in the previous matter, which complaint being dismissed she again appealed to this court. That case is decided and reported in 46 Wash, 7, 89 Pac. 183. In that case, as in this, she alleged that the decree taken in the original proceeding was taken without notice to her, and was in violation of a contract with Collins, and that respondents had notice, actual and constructive, of her preference right to purchase the lands in ques-Upon the decision of that case Mrs. Hotchkin commenced another action against these respondents and one Trimble, which, being decided against her, was appealed to this court, and is reported in 67 Wash. 206, 121 Pac. 455, and after the decision by this court the court below dismissed the action as to all the other defendants in the case. These former cases are mentioned and referred to in the complaint in the present case, and, for the purpose of avoiding recurrence of certain deficiencies pointed out in the complaint before the court in 67 Wash. 206, 121 Pac. 455, the present complaint contains an allegation that the former decree was rendered by agreement of all parties to the proceeding who or which were in court and was rendered, as plaintiff is informed, simply upon such agreement and without the rights of the several parties being shown by testimony. and that defendant Trimble and the heirs of Collins acting for themselves and for Mrs. Hotchkin, deceased, joined in the agreement for and in consideration of the money paid to them by the McNaught-Collins Improvement Company for the preference right to here presented, was before this court three purchase the tidelands claimed by Collins

and Mrs. Hotchkin. A further allegation is included in this complaint that the motion, upon which the decision of the Supreme Court sustaining the decision of the superior court in dismissing the case as to Trimble only on the ground that the complaint did not show that Trimble shared in the proceeds of the sale of Mrs. Hotchkin's preference right to purchase, in no way affected the other defendants, and that the order dismissing that action as to the other defendants was without any proper reason and decided nothing. In the case reported in 67 Wash. 206, 121 Pac. 455, and in this case, the prayer of the complaint is that defendants, and each of them, be adjudged to pay the plaintiff such sum of money as the testimony upon the hearing of the action may show Mrs. Hotchkin's interest in said lands to be worth, and for such other and further relief as to equity may belong. In that case it was decided that, notwithstanding the prayer of the complaint, the action as to Trimble was strictly a law action for money relief only. It was then vigorously contended that the action was an equity action, and should be considered upon that basis. It is now vigorously contended that this action is purely of equitable cognizance for the enforcement of a trust against the respondents, as to which the statute of limitations does not apply, and also as to which it is claimed there was no adjudication in any of the former cases.

[1] One of the grounds of demurrer in the instant case, upon which the court sustained the demurrer and dismissed the action, is that the action is barred by the statute of limitations. Appellant insists that it is a general and well-defined principle of law that, when the demand is purely an equitable one, in other words, is one cognizable only in a court of equity, the statute of limitations does not apply, and in such cases courts do not recognize and are not controlled by the period of limitations fixed by statute-citing Depue v. Miller, 65 W. Va. 120, 64 S. E. 740, 23 L. R. A. (N. S.) 775, Newberger v. Wells, 51 W. Va. 624, 42 S. E. 625, German v. Heath, 139 Iowa, 52, 116 N. W. 1051, and many other authorities to the effect that equity applies its own limitation. In this state, by section 153, Rem. Code, it is provided that:

"There shall be in this state hereafter but one form of action for the enforcement or protection of private rights and redress of private wrongs, which shall be called a civil action."

Thus, as the Code states generally, all distinctions between actions at law and actions in equity are abolished.

It is the policy of the law in this state, as manifested by numerous legislative enactments, that periods shall be established when any claim or demand for the enforcement of any kind of rights shall be deemed too stale for enforcement. These statutes of limitation are not regarded with disfavor, being considered statutes of repose. By section 155, Rem. Code, it is provided that:

"Actions can only be commenced within the periods herein prescribed after the cause of action shall have accrued, except when in special cases a different limitation is prescribed by statute."

This section is general, and applies to any form of civil action, legal or equitable. Section 156, Rem. Code, provides that actions for the recovery of real property or for the recovery of possession thereof shall be commenced within ten years from the accrual of the cause of action. Section 157, Rem. Code, provides that actions upon any judgment or decree of any court of the United States or of any state or territory, and actions upon a contract in writing or liability, express or implied, arising out of a written agreement, shall be commenced within six years from the accrual of the cause of action. Section 159, Rem. Code, provides that actions upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument, and actions for relief upon the ground of fraud, which shall be deemed to have accrued upon the discovery by the aggrieved party of the facts constituting the fraud, shall be commenced within three years after the accrual of the cause of action. Section 165, Rem. Code, provides that actions for relief not thereinbefore provided for shall be commenced within two years after the cause of action shall have accrued. These and other statutory provisions limiting the period within which actions shall be prosecuted are manifestly intended to cover any and every form of action maintainable either in law or equity. The applicability of statutes of limitation to equitable proceedings appears to be unquestioned in those jurisdictions in which distinctions between legal and equitable remedies have been abolished. 17 R. C. L. 736; Patterson v. Hewitt, 195 U. S. 309, 25 Sup. Ct. 35, 49 L. Ed. 214; Munson v. Hallowell, 26 Tex. 475, 84 Am. Dec. 582.

[2, 3] Courts of equity in cases of concurrent jurisdiction consider themselves bound by the statutes of limitation which govern courts of law in like cases, and this is rather in obedience to the statute than by analogy. Hence if the statute would bar an action at law, it will be equally a bar in equity, the mode of relief making no difference. Courts of equity apply the statute as it would have been applied at law, and give to the statute the same effect and operation in one court as in the other. The periods prescribed by the statute are recognized in such cases as imposing a limitation on the cause of action itself, and not merely on the court in which it may be prosecuted. 17 R. C. L. 736, 737.

In the above authority an exception is stated where the relationship between the parties is that of trustee and cestui que trust. The statute of limitations will not necessarily apply, although the remedies at law and in equity are concurrent. See, also, 25 Cyc. 1056, 1058. This exception is upon the prin-

between trustee and cestui que trust as long as the trust subsists, for the possession of the trustee is the possession of the cestui que trust, and the trustee holds according to his title. In order to set the statute in motion in favor of the trustee, the trust must terminate, as by its own limitations or by settlement of the parties, or there must be a repudiation of the trust by the trustee, and an assertion of an adverse claim by him, and the fact made known to the cestui que trust. 25 Cyc. 1150. This exception also is subject to the qualification that the cestui que trust may be barred of his remedy through laches or such a lapse of time as will give rise to a presumption of discharge or extinguishment of the trust. 25 Cyc. 1151.

[4] In the present case, as shown by the history of the litigation between these parties, running through the reports covering the same heretofore, there can be no doubt that the exception with regard to an express continuing trust cannot apply in favor of appellant for the reason that it has been established that those whom Mrs. Hotchkin claimed to be her trustees of an express, contlnuing trust asserted their adverse claims as long ago as 1903, and the fact was made known to the cestul que trust, who thereupon began to assert her claims against them. She chose and elected her remedy at that time, and litigated her claims to decisive and final judgments. If she did not assert the proper equitable remedy to enforce a trust, it was her fault and her laches. Under any consideration of the case, assuming it to be one of purely equitable nature, under our statute and conceding the exception noted by the authorities cited, the action is barred by limitations as well as by laches.

This conclusion determining the case, the other questions are unnecessary to mention. The judgment is affirmed.

ELLIS, C. J., and MOUNT, J., concur.

CRANE CO. v. MUSGRAVE & BLAKE et al. (No. 14611.)

(Supreme Court of Washington. April 30, 1918.)

1. STATES \$\infty\$=101—Contractors' Bonds.

A state building contract, providing that the contractor shall not assign the contract nor sublet any portion thereof without the written consent of the Board of Control and the bonding company, means no more than that there shall be no substitution of parties in place of the contractor in his contract with the state, releasing the contractor from any obligation under the contract, without the consent of both the state and the bonding company, and an ordinary subcontract by the contractor, not consented to by

ciple that, in the case of a technical, or, in other words, direct, express, continuing trust, such as is exclusively within the jurisdiction of a court of equity, the general rule is that the statute of limitations does not run, the statute of limitations does not run, between trustee and cestul que trust as long 2. STATES \$\infty\$101—Contractors' Bonds.

Under a bond given pursuant to Rem. & Bal. Code, §§ 1159, 1161, as amended by Laws 1915, c. 28, conditioned to pay subcontractors and all persons who shall supply subcontractors with provisions and supplies for the work, the liability of the bonding company to persons furnishing subcontractors supplies for the work is not affected by absence of privity of contract between the principal contractor and such person.

Department 1. Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

Action by the Crane Company against J. G. Musgrave and E. A. Blake, copartners, and the Maryland Casualty Company, in which Musgrave & Blake filed a cross-complaint against the Casualty Company. From a judgment for plaintiff and a judgment for cross-complainants, the Casualty Company appeals. Affirmed.

Grinstead & Laube, of Seattle, for appellant. Walter S. Fulton and Farrell, Kane & Stratton, all of Seattle, for respondent.

PARKER, J. This is an action upon a bond executed by the defendant Maryland Casualty Company as surety and Beers Building Company as contractor and principal as provided by sections 1159-1161, Rem. Code, relating to bonds of contractors to secure laborers, mechanics, subcontractors, and materialmen furnishing labor and material for the carrying on of public work. Trial in the superior court for King county, sitting without a jury resulted in findings and judgment in favor of the plaintiff Crane Company and against the defendant casualty company in the sum of \$2,190.99, and a judgment in favor of the defendants Musgrave and Blake, upon their cross-complaint against the defendant casualty company in the sum of \$130.62. From this disposition of the cause the casualty company has appealed to this court.

On October 7, 1915, the state of Washington by its Board of Control entered into a contract with Beers Building Company, by which that company agreed to furnish the labor and material for and to construct the plumbing and heating system of the administration building of the State Institute for the Blind, at Vancouver, according to plans and specifications prepared therefor and by reference made a part of the contract. The specifications so made part of the contract contained, among other provisions, the following:

"The contractor shall not assign this contract nor sublet any portion thereof without the written consent of the Board of Control and the bonding company."

ng the contractor from any obligation under the contract, without the consent of both the state and the bonding company, and an ordinary subcontract by the contractor, not consented to by 260, payable in monthly installments as the

work progressed on the basis of 85 per cent. | because of the failure of Beers Building Comof the value thereof; the balance to be paid in 30 days following the completion of the work. On October 13, 1915, the bond here sued upon was executed by Beers Building Company, as principal, and the defendant Maryland Casualty Company as surety, in the It contained recitals and sum of \$7.260. conditions as the law required as follows:

"This bond is executed in pursuance of sections 1159 and 1161 of Remington and Ballinger's Annotated Codes and Statutes of the State of Washington, as amended by chapter 28 of the Session Laws of 1915, and is subject to all of the provisions thereof, and is entered into with the state of Washington, for the use and benefit of all laborers, mechanics, subcontractors and materialmen and all persons who shall supply such person or persons or subcontractors with provisions and supplies for the carrying on of the work covered by the contract entered into on the 7th day of October, 1915, between the above bounden principal, Beers Building Company, and the said state of Washington, for the plumbing and heating system of the Administration Building for the State Institution for the Blind at Vancouver, Washington, according to the terms and conditions of said contract.

"And the conditions of this obligation are such

that if the said principals shall faithfully perform all the provisions of said contract not in conflict with said chapter 28 of the Laws of 1915, and pay all laborers, mechanics, and sub-contractors and materialmen, and all persons who shall supply such person or persons, or subcontractors with provisions and supplies for the carrying on of such work • • then this obligation shall be null and void; otherwise

to remain in full force and effect.

On November 19, 1915, Beers Building Company entered into a contract with the defendants Musgrave and Blake by which they were to furnish the labor and material for and to construct the plumbing and heating system as contracted for by Beers Building Company with the state. Musgrave and Blake were to receive from Beers Building Company as compensation therefor the sum of \$7,000, payable in monthly installments as the work progressed, on the basis of 80 per cent, of the value thereof, the balance to be paid in 30 days following the completion of the work, but all such payments to be made after monthly payments made by the state to Beers Building Company on its contract. By the terms of the original contract and subcontract the work was to be completed by September 15, 1916. The work was to be done under the supervision of the state's architect, who was also to make the estimates for the monthly payments as the work progressed. Musgrave and Blake proceeded with the work under their contract, and between February 1 and June 28, 1916, Crane Company furnished to them plumbing goods and supplies for the work of the reasonable value of \$3,207.93, of which there remains unpaid and due to the Crane Company the sum of \$2,190.99. All of this material was furnished by Crane Company for and actually went into the construction of the plumbing and heating system of the building and was suitable therefor. Musgrave and Blake did not complete the work, but their failure to do so was ing more than that no assignment of the con-

pany to pay them according to the terms of their contract; Beers Building Company having received, at least, \$1,750 on May and prior installments upon its contract with the state, no part of which was paid by it to Musgrave and Blake. For this reason Musgrave and Blake quit the work the last of June, 1916, leaving it uncompleted. Beers Building Company having neglected to proceed with the work, the Board of Control declared its contract forfeited and at an end, and after tendering the completion of the work to the casualty company, as surety, and it also neglecting to proceed with the work, the Board of Control caused the work to be completed. The work and material furnished by Musgrave and Blake, including that furnished to them by the Crane Company, less the payments made to them by Beers Building Company, amounted to \$130.62 in excess of the amount due Crane Company, measured by the terms of Musgrave and Blake's contract with Beers Building Company and was reasonably worth that amount. No formal written consent was ever given by the Board of Control or the casualty company to the making of the subcontract between Beers Building Company and Musgrave and Blake. That contract was never recognized by the Board of Control or its architect as in any sense a substitution for the contract between Beers Building Company and the state. In other words, the state at all times looked to Beers Building Company for the completion of its contract, and, in so far as the Board of Control or the state's architect directed Musgrave and Blake in the performance of the work, such direction was to Musgrave and Blake merely as the representatives of Beers Building Company.

[f] It is contended in behalf of appellant casualty company that it is not liable upon its bond to either Musgrave and Blake or Crane Company, because neither it nor the state consented in writing or otherwise to the making of the subcontract between Musgrave and Blake and Beers Building Company. Many authorities are cited and reviewed by counsel to support the proposition that the stipulation in the contract between Beers Building Company and the state that it should not "assign" or "sublet" the contract, or any portion thereof, without the written consent of the "Board of Control and the bonding company," is a valid and binding stipulation. We may concede this for the sake of argument, yet we think this falls far short of calling for a holding in this case that the casualty company is not liable upon its bond to both Musgrave and Blake and Crane Company. Reading this stipulation in the contract between Beers Building Company and the state in the light of the express conditions in the bond and the statute in pursuance of which the bond was executed, it seems to us that the stipulation means nothtract and no subcontract made thereunder 1 pellant casualty company that there was no without the written consent of the Board of Control and the bonding company shall be of any avail in the working of a change in the contractual relations and the obligations arising thereunder as between the state, Beers Building Company, and the bonding company which should thereafter become surety upon the bond. In other words, this provision we think means only that there shall not be any substitution of parties in place of Beers Building Company in its contract with the state releasing that company from any obligations under its contract without the consent of both the state and the bonding company which should thereafter become surety upon the bond. Apparently, this stipulation was to guard against the possibility of an impairing of the rights of the state against Beers Building Company and the surety and also render certain that there should be no impairment of the rights of those for whose benefit the bond should be given, as against the surety thereon.

There was no effectual assignment or subletting of the original contract in this sense, because the subcontract was not consented to by either the state or the casualty company, and, besides, it seems quite apparent to us that there was no intention on the part of Beers Building Company and Musgrave and Blake that there should be any assignment or subcontract in this sense. This seems plain from a casual reading of the subcontract entered into between them. The state. as contemplated by the terms of this contract, was to pay Beers Building Company, and that company was to pay its subcontractors, Musgrave and Blake, just as it would pay laborers or materialmen. It is equally plain that the state never regarded this contract in any other light. The Board of Control continued at all times to look to Beers Building Company for the completion of its contract. until its rights thereunder became forfeited and were put an end to by the Board of Control because of its failure to perform its We conclude therefore that Musgrave and Blake were never intended to become, and never did become, subcontractors within the meaning of the above-quoted provision in the original contract between Beers Building Company and the state, prohibiting the assigning and subletting of that contract by Beers Building Company without consent of the Board of Control and the bonding company. We are equally well satisfled that Musgrave and Blake did become and were intended by all parties to become subcontractors within the meaning of the bond and the statute in pursuance of which it was executed, and that Musgrave and Blake thereby became in legal effect the agents of Beers Building Company for the purchase of plumbing supplies for the carrying on of the work, in pursuance of which agency they purchased the material from Crane Company.

privity of contract between Crane Company and Beers Building Company rendering it liable upon its bond to Crane Company. What we have already said seems to us to effectually answer this contention, in view of the express provisions of the statute and the bond. The Supreme Court of the United States, in Hill v. American Surety Co., 200 U. S. 197, 26 Sup. Ct. 168, 50 L. Ed. 437, seems to take the view that a surety upon a bond executed under a statute seemingly less comprehensive in terms than ours is liable to those furnishing material even indirectly through a subcontractor to the contractor, though the statute and bond given in pursuance thereof did not expressly so provide, but provided only for the payment by the surety to persons supplying the contractor with labor or material. That case was originally determined in the superior court for King county in this state, and there being less than \$200 involved, and that court being by our Constitution the court of last resort as to such cases, the case was taken directly by writ of error to the Supreme Court of the United States. It was a suit upon a bond given in pursuance of a federal statute entitled "An act for the protection of persons furnishing material and labor for the construction of public works" (Act Cong. Aug. 13, 1894, c. 280, 28 Stat. 278 [U. S. Comp. St. 1916, \$ 6923]), wherein it was provided that the bond should be conditioned that the contractor "shall promptly make full payments to all persons supplying it labor or materials in the prosecution of the work." The contractor sublet a portion of the work. The subcontractor employed Hill. who sought recovery upon the bond. It was argued that Hill did not come within the meaning of the statute and bond, in that he did not furnish work to the contractor because such work was not directly so furnished, but only to the subcontractor, and the statute was silent as to the furnishing of work or material to a contractor through a subcontractor. Disposing of this contention, Justice Day, speaking for the Supreme Court of the United States, said:

"In view of the declared purpose of the stab-ute, in the light of which this bond must be read, and considering that the act declares in terms the purpose to protect those who have furnished labor or material in the prosecution of the work, we think it would be giving too nar-row a construction to its terms to limit its benefits to those only who supply such labor or materials directly to the contractor. The obliga-tion is 'to make full payments to all persons sup-The obligaplying it with labor or materials in the prosecution of the work provided for in said contract. This language, read in the light of the statute, looks to the protection of those who supply the labor or materials provided for in the contract. and not to the particular contract or engage-ment under which the labor or materials were supplied. If the contractor sees fit to let the work to a subcontractor, who employs labor and buys materials which are used to carry out and fulfill the engagement of the original contract to [2] Contention is made in behalf of ap-construct a public building, he is thereby sup-



Our statute not only in express terms secures subcontractors, but in equally express terms it secures those who furnish "subcontractors with provisions and supplies for the carrying on of such work." We do not have to go even to the extent the Supreme Court of the United States did in the Hill Case in order to hold the casualty company liable to Crane Company in this case.

Contentions are made by counsel for appellant casualty company against the judgment rendered in favor of Musgrave and Blake. It seems to us that these contentions present only questions of fact; that is, as to the amount due Musgrave and Blake and as to their being in default upon their subcontract. We think the evidence fully warrants the conclusion that they were not in default and that they guit work only because Beers Building Company neglected to pay them according to the terms of their subcontract, and that the evidence also fully warrants the conclusion that Musgrave and Blake were entitled to receive from Beers Building Company the \$130.62 awarded them in excess of the \$2,190.99 awarded Crane Company who had furnished them plumbing supplies in the carrying on of the work.

Both judgments are affirmed.

ELLIS, C. J., and FULLERTON, WEB-STER, and MAIN, JJ., concur.

HAMP et ux. v. PEND OREILLE COUN-TY. (No. 14458.)

(Supreme Court of Washington. May 7, 1918.) 1. HIGHWAYS 5-ESTABLISHMENT BY PRE-SCRIPTION — TRAILS—"GO-DEVIL"—"HIGH-Ways.''

A highway may be established by prescription although it is not used for wheeled vehicles, but is merely a trail used by travelers on foot and on horseback, and for pack horses and "go-devils," consisting of two poles attached to a horse with the ends dragging behind by which goods are carried (citing Words and Phrases, Second Series, Highway).

2. HIGHWAYS \$=14 — ESTABLISHMENT BY PRESCRIPTION—WIDTH.

Where a highway has been established by prescription the right of the public is not measured by the actual beaten path, but includes a width sufficient for the requirements of travel.

Department 1. Appeal from Superior Court, Pend Oreille County; W. H. Jackson, Judge.

Action by Godfried Hamp and wife against Pend Oreille County. Judgment for defendant, and plaintiffs appeal. Affirmed.

A. C. Shaw, of Spokane, for appellants. Charles Leavy, of Newport, for respondent.

PARKER, J. The plaintiffs, Hamp and wife, seek recovery of a strip of land run-

plied with the materials and labor for the ful-fillment of his engagement as effectually as he would have been had he directly hired the labor or bought the materials." In the defendant county that the strip is a public highway, acquired by the continued adverse use thereof by the public for a period of more than ten years. Trial upon the merits in the superior court for Pend Oreille county resulted in findings and judgment denying to the plaintiffs the relief prayed for, and declaring that the public had acquired by prescription a highway along the strip in question to the extent of 12 feet in width, being 6 feet on each side of a described center line following the center of the traveled portion of the highway. From this disposition of the cause the plaintiffs have appealed to this court.

> The way here in question is a trail rather than a road, in a popular sense; that is, it has been used by the public for travel by means other than that by wheeled vehicles. It was commenced to be used by white men about the year 1889, and has been continuously used by the public ever since. Prior to that time it was apparently used by the aborigines in their travels north and south over the rough and mountainous country in the extreme northeast corner of the state. From 1889 to 1914 it was the only practicable way of travel from the town of Metaline, in Pend Oreille county, north to and beyond the Canadian boundary, and acquired the name of the "Boundary Trail." During all of those years it was the constant way of much travel by people on foot and on horseback, and of the transportation of goods by means of pack horses and by crude conveyances called "godevils," consisting of two poles attached one to each side of a horse with the ends dragging behind, somewhat like a sled, on which goods would be carried. The actual traveled trail consisted of little else than the part over which people and horses walked, and was some 18 and 24 inches wide, the "godevil" occupying a somewhat wider space. While the county never expended any money in the improvement of this trail, it was improved in some measure from time to time by those interested in its use, and in later years this improvement consisted in cutting out trees and brush to a width of some 8 feet. This was done across appellants' land, not only with their consent, but with their assistance to some extent. The trail seems to have been used somewhat less since 1914 than prior thereto because of the construction of another road, but it is still used, and necessarily so, by a number of settlers in the neighborhood, in going to and from their homes. It is plain from the evidence that the use of the trail during all these years has been open and adverse to the rights of all owners of land across which it runs.

[1] While this trail was not traveled over

by wheeled vehicles, except possibly to a tion, to the extent of at least 12 feet in small extent in very recent years, it was, we think, nevertheless used as a highway because of its use for public travel in the way suited to the conditions there prevailing. Travel and transportation of goods by wheeled vehicles is not the only use to which a highway may be put. One walking or riding horseback, or transporting goods by pack horse, over a way which the public is constantly using, is a use of such way as a highway, in a legal sense. 13 R. C. L. 17; 37 Cyc. 15; 1 Elliott, Roads & Streets (3d Ed.) 4; 2 Words and Phrases, 882. This being the law, it seems to follow as a matter of course that a highway of the nature here in question can be established by prescription as well as if it were used by wheeled vehicles. The contentions made in behalf of appellants that the use of this trail has not been such as to result in the public acquiring a highway along it by prescription, we think, is untenable in the light of the evidence showing the facts as above summarized. Seattle v. Smithers, 37 Wash. 119, 79 Pac. 615.

[2] It is further contended in appellants' behalf that the trial court erred in decreeing that the public had acquired a highway along this trail to the extent of 12 feet in width. The argument seems to be that the public's right in this regard is measured by the portion of the trail actually used for travel; that is, the actual track or path made by the walking of people and horses. It seems to us that this contention is answered by our decision in Yakima County v. Conrad, 26 Wash. 155, 66 Pac. 411, and by our later decision in Olympia v. Lemon, 93 Wash. 508, 161 Pac. 363. In the Conrad Case Judge White, speaking for the court, observed:

"After the right to a highway has been acactured by usage, the public are not limited to such width as has actually been used. The right acquired by prescription and use carries with it such width as is reasonably necessary for the public easement of travel, and the width must be determined from a consideration of the must be determined from a consideration of the facts and circumstances peculiar to the case. Whatever may be the width in any particular case, the easement, when acquired by user, cannot be limited to the actual beaten path. Whitesides v. Green, 13 Utah, 341, 44 Pac. 1032, 57 Am. St. Rep. 740; Elliott, Roads & Streets (2d Ed.) § 174, and cases cited. It is generally a question of fact to be determined under the circumstances of each particular case, and the assement may have here against the assement may have here the public and the easement may be as broad as the public require for passing as well as traveling in one direction. Davis v. Clinton, 58 Iowa, 389 (10 direction. D. N. W. 768)."

See, also, Montgomery v. Somers, 50 Or. 259, 90 Pac. 675; Marchand v. Town of Maple Grove, 48 Minn. 271, 51 N. W. 606; Arndt v. Thomas, 93 Minn. 1, 100 N. W. 378, 106 Am. St. Rep. 418, 2 Ann. Cas. 972.

It seems quite clear to us that the use of this trail was such as to warrant the trial court in concluding that the public had acguired a highway right therein by prescrip- versed and remanded.

width.

The judgment is affirmed.

ELLIS, C. J., and FULLERTON, MAIN, and WEBSTER, JJ., concur.

## In re PETERS' ESTATE. NUHSE et al. v. PETERSON et al.

(No. 14525.)

(Supreme Court of Washington. April 27, 1918.)

1. WILLS \$\infty\$=440—Construction.

The testator's intention must be gathered from the language of the will, construing all of its provisions together.

WILLS \$= 561(1)—Construction—Estates CREATED.

Where testator owned a quarter section, on the southeast quarter of which his house was located, his will granting 40 acres between his northeast corner and the south line of an ad-jacent section to the north should be construed to grant the northeast quarter of the quarter section owned by testator.

WILLS 462—Construction—Supplying Words.

Omitted words will be supplied in a will where it is evident the testator has not expressed himself as he intended.

4. WILLS \$\infty\$ 440—Construction—Intent.

A court is bound to give that construction to a will which will effectuate the intention of the testator if such intention can be gathered from the terms of the will itself, and the intention is to be gathered from everything contained within the four corners of the instrument.

WILLS \$== 449 - Construction - Partial

INTESTACY. In the absence of residuary clause, and where the testator's intention can be gathered from the will, a construction causing partial intestacy should not be given to the will.

6. WILLS 4348 RIGHT TO MAKE WILL.
The right to dispose of one's property by will is a valuable right, and will be sustained when possible.

7. Wills &==561(1) — Construction — Lands COVERED.

COVERED.

Where testator owned a section through which, diagonally crossing the northwest quarter and the southeast quarter, a road ran, and he devised to one person property "on the east side of the northwest quarter," and to another the southeast quarter, and to another the southeast quarter, and also "all left of the northwest quarter," the first devisee took the northeast quarter and that part of the northwest quarter east of the road, and the third devisee took the southwest quarter, and that part of the northwest quarter west of the road.

Ellis C. I. dissenting

Ellis, C. J., dissenting.

Department 2. Appeal from Superior Court, Snohomish County; Guy C. Alston, Judge.

Petition by John Nuhse and Henry Hoffman for the construction of the will of John J. Peters, deceased, against Mrs. Anna Peterson and Mrs. Mark Bartlett. To review the decree rendered, petitioners appeal. ReG. W. Hinman, of Granite Falls, for appellants. Peter Husby, of Everett, for respondents.

HOLCOMB, J. This is a petition for the purpose of construing the clauses of a will. Part of paragraph 2 of the will is as follows:

"I hereby give and bequeath unto John Nuhse

\* \* \* also 40 acres lying between my northeast corner and the south line of John Nuhse property; also all property I own on the east side of the N. W. 1/4 of sec. 33, T. 31 N., R. 6 E., W. M."

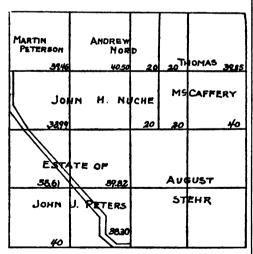
## Paragraph 3:

"I hereby give and bequeath unto Henry Hoffman the S. E. ¼ of the S. W. ¼ of sec. 33, T. 31 N., range 6 E., W. M., in Snohomish county, Washington."

## Paragraph 6:

"I hereby give, devise and bequeath unto Mrs Anna Peterson, of Tacoma, Washington, and Mrs. Mark Bartlett, of Seattle, Washington, the S. W ¼ of the S. W. ¼ of sec. 33, T. 31 N, R. 6 E., W. M.; also all left of the N. W. ¼ of the same section, township and range."

It is conceded that the decedent owned only the southwest quarter of section 33, T. 31 N., R. 6 E., W. M., and that he properly devised the southeast quarter of the southwest quarter in paragraph 3 of his will and the southwest quarter of the southwest quarter of the section, etc. It is claimed by petitioners, and the trial court found, that for indefiniteness of description testator's will was a nullity as to the north 80 acres owned by him. For the purpose of clarity a plat of the section is set forth as has been admitted by the trial court in the record as follows:



[1] It is evident from reading the will that the testator intended to devise all his estate in different portions to different persons, although he did not express himself as clearly as should have been done.

"The testator's intention must be gathered from the language of the will, construing all the provisions together." McCullough v. Lauman, 38 Wash. 227, 80 Pac. 441.

[2, 3] Now let us return to the clause "also 40 acres lying between my northeast corner and the south line of John Nuhse property." The home place of the testator was on the southeast quarter of the southwest quarter of the section. It seems plain that he intended to give the 40 acres between the northeast corner of his home place and the 40 acres south of the south line of John Nuhse, as John Nuhse's property was the entire northern boundary of the testator's property. Omitted words will be supplied in a will where it is evident the testator has not expressed himself as he intended. Butler v. Moore, 94 Ind. 359; Espitallier, Estate of (Cal.) 6 Cof. Prob. Dec. 299.

[4] A court is bound to give that construction to a will which will effectuate the intention of the testator if such intention can be gathered from the terms of the will itself, and the intention is to be gathered from everything contained within the four corners of the instrument. In re Woodward's Estate, 84 Minn. 161, 86 N. W. 1004.

The other clauses read (to John Nuhse) "also all property I own on the east side of the N. W. ¼ of sec. 33, T. 31 N., R. 6 E., W. M." (paragraph 2 of the will), and (to Mrs. Bartlett and Mrs. Peterson) "also all left of the N. W. 1/4 of the same section, township and range" (paragraph 6 of will). A county road runs through the northwest quarter of the southwest quarter of testator's property in a northwesterly and southeasterly direction, as shown by the plat. The question is: Did the testator intend the portion on the east side of the road of the northwest 40 of his estate for Nuhse, or the east side of the northwest quarter of the section which he did not own, and further did he intend to devise to Bartlett and Peterson all that was left of the northwest forty of his estate or all that was left of the northwest quarter of the section, township and range, which he did not own? It seems plain that the testator did not express himself in apt words. Mistakes in writing descriptions are numerous: even the respondents in their brief (on page 8) used the words "northeast quarter" three times when they intended the southwest quarter.

[5] There was no residuary clause in the will, and the testator depended upon two attorneys to properly express his intentions to devise all his property. Should we hold that the contested clauses of the will are void, we would in effect hold that the testator did not intend to devise the north 80 acres of his estate. This should not be done contrary to the plain intent of the testator when it can be gathered from the wording of the will and the location and ownership of the estate.

"Where, upon examination of a will, taken as a whole, the intention of the testator appears clear, but its plain and definite purposes are endangered by inapt or inaccurate modes of expression, the court may, and it is its duty to, subordinate the language to the intention; it

may reject words and limitations, supply or transpose them to get at the correct meaning." Phillips v. Davies, 92 N. Y. 199; In re Miner, 146 N. Y. 121, 40 N. E. 788.

Alford v. Bennett, 279 Ill. 375, 117 N. E. 89, is a late case with similar misdescription in a will, and where the court construed the description in the will to be of the land that the devisor actually owned. The testator owned the northeast quarter of the northwest quarter of a section, but did not own any of the northeast quarter of the section. A devise to one daughter of the north 25 acres of the northeast quarter of the section, following a devise to another daughter of 15 acres "off the south side of the northeast quarter of the northwest quarter" of the section, was a devise of the north 25 acres of the northeast quarter of the northwest quarter, being remaining land in the estate undisposed of by the testator, and the will containing no residuary clause.

The trial judge in his memorandum decision says:

"(1) That clause which read as follows: 'Also "(1) That clause which read as follows: 'Also 40 acres lying between my northeast corner and the south line of John Nuhse's property; also all property I own on the east side of the northwest quarter of section thirty-three, township thirty-one north, range six E. W. M.'—is extremely hard for me to construe.

"(2) I recognize the rule of law to be that the court should give effect to the intention of the

"(2) I recognize the rule of law to be that the court should give effect to the intention of the testator if that can be gathered from the words employed by him in his will. In this case the testator describes property which cannot exist, for the reason that he could have possessed no land between his northeast corner and the south line of any other real estate. I have not no land between his northeast corner and the south line of any other real estate. I have not lost eight of the fact that, according to the plat introduced in evidence, by construing the language used to read as follows:

"(3) 'I give and devise unto John Nuhse the northeast quarter of the southwest quarter;

northeast quarter of the southwest quarter; also all property which I own on the east side of the county road in the northwest quarter of the southwest quarter of section thirty-three, township thirty-one north, range six E. W. M., and if I should also construe the language with reference to the property conveyed to Mrs. Anna Peterson and Mrs. Mark Bartlett as fol-

"(4) 'The southwest quarter of the southwest "(4) "The southwest quarter of the southwest quarter of section thirty-three, township thirty-one north, range six E. W. M.; also all property lying on the west side of the county road in the northwest quarter of the southwest quarter of section thirty-three, township thirty-one north, range six E. W. M.,' the will would dispose of all real estate which the testator owned at the time of big death.

at the time of his death.

"(5) However, it occurs to me that the court would be practically making a will for the testator to give it the construction above suggested. If the testator was in a mental condition to dispose of his property, I can see no reason or excuse for his not giving a better description

of it than he has.

"(6) Under the evidence he owned no property in the northwest quarter of the section mentioned: neither did he own any property on mentioned: neitner did no own any property on the east side of the northwest quarter of said section. If, as a matter of fact, the court should add to the description and make it read: "(7) 'Also all property I own on the east side of the northwest quarter of the southwest quar-ter of said section,' that would include the

northeast quarter of the southwest quarter of said section but it would not include any part of the northwest quarter of the southwest quarter.

quarter.

"(8) There is no residuary devise in the will. However, the same rule would apply, in my opinion, in the construction of the will that would were there a residuary devise, since all property not disposed of by the will descends to the heirs at law. The law makes a very equitable disposition of property where one dies without a will, and I think, before one should be permitted to change the descent of his property by will, he should do so in a way that would enable the court to determine, from the language employed, how he intended to dispose of his property. He should also do so in a way that would indicate that he appreciated what he was doing. That, in my opinion, the testator in the case under consideration has not done. Therefore I shall hold that he died intestate as to the north half of the southwest quarter of section 33, township 31 north, range quarter of section 33, township 31 north, range 6 E. W. M."

Section 1339, Rem. Code, which was reenacted (Laws 1917, c. 156, § 45, p. 653), is as follows:

"All courts and others concerned in the execution of last wills shall have due regard to the direction of the will, and the true intent and meaning of the testator, in all matters brought before them."

We held, in Webster v. Thorndyke, 11 Wash. 398, 39 Pac. 679:

"If of two constructions of an instrument one "If of two constructions of an instrument one will give effect to all the objects which it is evident were sought to be accomplished by its execution, and another will not, the one which will should be adopted, if the language used can be approximated as to allow such construction." be so interpreted as to allow such construction.

[8] The right to dispose of one's property by will is a valuable right and will be sustained when possible. Points v. Nier, 91 Wash. 20, 157 Pac. 44, Ann. Cas. 1918A, 1046; Pond's Estate v. Faust, 95 Wash. 346, 163 Pac. 753; In re Murphy's Estate, 98 Wash. 548, 168 Pac. 175. While there are cases found in the books strictly construing such devises against the devisor for uncertainty and indefiniteness, we are disposed to as liberal a construction as possible to effect the carrying out of the intention of a testator, when possible to determine it from all the surroundings and context of the devise.

[7] From a reading of the will in this case the intent of the testator is apparent that he desired to dispose of all his property. It is our opinion that the will should have effect and be given that construction as set forth in paragraphs 3 and 4 of the trial judge's memorandum decision above quoted.

Reversed, and remanded for entry of judgment as herein indicated.

MOUNT, CHADWICK, and MAIN, JJ., concur.

ELLIS, C. J. What the testator intended by the language used seems to me a matter of conjecture. It seems to me that the majority have rewritten, rather than construed his will. I therefore dissent.

EMPSON v. FORTUNE et al. (No. 14466.) (Supreme Court of Washington. April 30, 1918.)

BOND-EFFECT OF REVERSAL.
Where the Supreme Court in form reversed where the supreme Court in form reversed judgment for respondents, but directed the same judgment, with other relief, to be entered in their favor, the sureties on appellant's supersedeas bond were liable thereon for the payment of the independent directed to be entered in view of the judgment directed to be entered, in view of Rem. Code 1915, § 1722, requiring the appeal bond to be conditioned that appellant will satisfy and perform the judgment in case it shall be affirmed "and any judgment or order which the Supreme Court may render or make or or-der to be rendered or made."

APPEAL AND ERROR 4 1236 SUPERSEDEAS

BOND-JUDGMENT.

Under Rem. Code 1915, § 1739, relating to the rendering of judgment against sureties on a supersedeas bond by the Supreme Court, that court has no power to render such judgment except when it affirms a judgment of the superior court for the payment of which the bond was

3. Appeal and Ebror \$\isin 1207(1)\$ — Supersedeas Bond—Judgment.

Since, after an appeal and remittitur the superior court has no power to enter any other judgment than that directed by the appellate court, it has no power to render a judgment against the sureties on a supersedeas bond where the Supreme Court, in directing judgment, does not provide therefor. not provide therefor.

A. APPEAL AND ERROR &=1239—SUPERSEDEAS
BOND—CUMULATIVE REMEDIES.
Whatever statutory right a successful party
upon appeal may have to a summary judgment
against sureties on a supersedeas bond is merely cumulative of the common-law remedy and
does not affect his right to maintain an indemendent setion on the bond in lieu thereof pendent action on the bond in lieu thereof.

5. EXECUTORS AND ADMINISTRATORS @== 227(2) -PRESENTATION OF CLAIMS-LIABILITY ON

SUPERSEDEAS BOND.

As preliminary to an action on a supersedeas As preliminary to an action on a supersedeas bond against the executors of a deceased surety, the requirement of Rem. Code 1915, §§ 1472-1479, of presentation of the claim to the executors, was not complied with by presentation merely of the abstract of the judgment against the principal rendered by the superior court by direction of the Supreme Court, which abstract was certified to by the clerk of the superior court; there being nothing on the face of the abstract indicating it was a claim against the sureties or the executors of the estate of the desureties or the executors of the estate of the deceased surety.

6. EXECUTORS AND ADMINISTRATORS &= 227(3)
-PRESENTATION OF CLAIMS-VERIFICATION.
Under Rem. Code 1915, § 1473, a claim
against the executors of a deceased surety on a supersedeas bond based on his liability on the

bond must be supported by oath.

7. EXECUTORS AND ADMINISTRATORS \$== 228(5), 431(2) — Presentation of Claims — Estop-PEL

Under Rem. Code 1915. §§ 1472-1479, as to presentation of claims against a decedent's estate, the proper presentation of a claim is a fact to be proven essential to the cause of action, and the personal representative cannot waive such presentation so as to estop himself from defending on the ground of want of proper presentation.

8. PRINCIPAL AND SURETY @=== 116-RELEASE

bound cosureties will release the other at least to the extent that the right of contribution of the to the extent that the right of contribution of the other surety against the one so released is impaired hereby, failure of obligee on supersedeas bond to properly present claim for liability thereon against estate of a deceased surety on the bond, resulting in the obligee's failure to recover on such liability in action against the executors of such estate and the surviving surety, did not release the surviving surety where the action was commenced within the year for the presenrelease the surviving surety where the action was commenced within the year for the presentation of claims to executors, since not only was there no release of the estate or the executors by any contract or understanding with them, but the surviving surety had ample time to present to the executors his contingent claim for contribution which might result from recovery of judgment against him for the whole amount of the bond, so that his right of contribution was not impaired.

9 APPEAR AND FRANCE CALCAGE.

9. APPEAL AND ERROR 4 1234(1) - SUPERSE-DEAS BOND - JOINT AND SEVERAL OBLIGA-TIONS.

A supersedeas bond, not in express terms either joint or several, providing that the principal and "K. and F., sureties, are held and firmly bound unto defendants," was joint and several.

Department 1. Appeal from Superior Court, King County; Everett Smith, Judge.

Action by Alice Empson against John Fortune and Max Kreielsheimer and another, as executors of the estate of Jacob Kreielsheimer, deceased. There was a judgment for plaintiff against John Fortune, but in favor of Max Kreielsheimer and another, executors, and plaintiff and John Fortune appeal. Affirmed.

John F. Murphy, Andrew J. Balliet, J. W. Robinson, and C. H. Steffen, all of Seattle, for appellants. Jay C. Allen, of Seattle, for respondents.

PARKER, J. Alice Empson seeks recovery upon a supersedeas bond executed by John Fortune and Jacob Kreielsheimer, as sureties, and Hayes & Porter, Incorporated, as principal. Trial in the superior court for King county resulted in findings and judgment in favor of Alice Empson, awarding her recovery against John Fortune but denying her recovery against the executors of the estate of Jacob Krelelsheimer, de-John Fortune has appealed from ceased. the judgment rendered against him, and Alice Empson has appealed from the judgment in so far as it denies her recovery against the estate of Jacob Kreielsheimer, deceased.

The controlling facts may be summarized as follows: On March 20, 1914, in an action pending in the superior court for King county, wherein Hayes & Porter, Incorporated, was plaintiff, and Alice Empson and Amos Wood were defendants, there was rendered upon the defendants' cross-complaint a money judgment in their favor against Hayes & Porter, Incorporated, for the sum of \$1,500. Hayes & Porter appealed therefrom to this court and stayed execution OF COSURETY.

Under the general rule that the release by the beneficiary's contract of one of two jointly in the cause in the superior court a superthereon by causing to be executed and filed

section 1722, Rem. Code, which bond was executed by John Fortune and Jacob Kreielsheimer, as sureties. On March 26, 1915, Jacob Kreielsheimer died, and thereafter on April 16, 1915, Max and Simon Kreielsheimer were duly appointed and became the acting executors of his estate. On July 14, 1915, the case was disposed of by this court as

"The judgment will be reversed, therefore, and the cause remanded with instructions to enter a judgment in favor of the respondents: (1) Canceling the contract of sale of the hotel property; (2) directing that the notes given to evidence the deferred payments be delivered up and canceled; (3) for a recovery against the appellant in the sum of \$1,500; and (4) a judgment in favor of the appellant against the respondents confirming its possession of the hotel property. Neither party will recover costs in this court." Hayes & Porter v. Wood, 86 Wash. 254, 150 Pac. 1.

This disposition of the cause, while in form a reversal of the \$1,500 judgment rendered by the superior court, was a direction to that court to enter the same judgment and in addition thereto to grant other relief which had been prayed for by Wood and Empson in their cross-complaint. The only error of the trial court consisted in its failure to grant this additional relief, as is rendered plain by a reading of this court's This court did not render any judgment against the sureties upon the supersedeas bond nor direct the superior court to render any such judgment. On November 22, 1915, the remittitur from this court having been transmitted to the superior court, that court entered its judgment and decree as directed by this court. Thereafter Amos Wood duly assigned in writing to Alice Empson all his interest in the judgment rendered by the superior court by direction of the Supreme Court, she thereby becoming the sole owner of the judgment. Thereafter. Alice Empson being unable to collect her \$1,500 judgment, or any part thereof, from Hayes & Porter, commenced this action on March 10, 1916, against John Fortune and the executors of Jacob Kreielsheimer, as sureties upon the supersedeas bond. Thereafter judgment in this action was rendered on February 7, 1917, as above noticed. Other facts will be noticed as may become necessary in connection with our discussion of the several contentions made by counsel.

[1] It is contended in behalf of appellant Fortune that, because the decision of this court in the case of Hayes & Porter against Wood and Empson in form reversed the judgment of the superior court and directed another judgment to be entered in that cause by that court, the sureties upon the supersedeas bond are not liable thereon. The argument is, in substance, that no judgment can be rendered against sureties upon a supersedeas bond unless the judgment appealed from is affirmed by the Supreme Court. We shall assume, for argument's sake, that the in this respect became in effect res adjudi-

sedeas bond in due form as prescribed by disposition of the cause in this court was a reversal of the first \$1,500 judgment rendered by the superior court, though there seems to be fair ground for arguing that it was a reversal not in substance but in form only. in view of the fact that this court in the same decision directed exactly the same judgment to be entered in favor of and against the same parties, with the granting of other A number of the decisions of the courts of other states are called to our attention which hold in substance as stated in the text of 2 R. C. L. 270, as follows:

"When an order is entered in an appellate court reversing a judgment, it is forthwith va-cated and no longer remains in existence."

This is a thought which counsel seeks to emphasize. But we think it is not controlling here in the light of our statute. Section 1722, Rem. Code, in so far as it relates to supersedeas bonds reads as follows:

"An appeal shall not stay proceedings on the judgment or order appealed from or any part thereof, unless the original or a subsequent appeal bond be further conditioned that the ap-pellant will satisfy and perform the judgment or order appealed from in case it shall be affirmed, and any judgment or order which the supreme court may render or make, or order to be rendered or made by the superior court.

This language, it seems to us, renders it plain that a supersedeas bond secures something more than the mere payment of an affirmed judgment. If not, then we are wholly unable to assign any intelligible meaning to the concluding words of this quoted provision. This language seems peculiarly applicable to this case. Nothing could seem farther from the thought of this court when it in form reversed the money judgment in favor of Wood and Empson than an intent on its part to deny them recovery in that sum against Hayes & Porter, for in its same decision it directed a judgment in that amount to be entered by the superior court in favor of Wood and Empson against Hayes & Porter, together with judgment for other relief as to which the superior court had erred in failing to grant, as held by this court. We conclude therefore that the sureties, to wit, Fortune and the estate of Jacob Kreielsheimer, were liable upon the supersedeas bond for the payment of the judgment so directed to be entered by this court.

It is also contended in appellant Fortune's behalf that he was released as surety upon the supersedeas bond because this court did not render any judgment against him as surety when it remanded the cause to the superior court and did not direct that court to render any judgment against him as surety, and also because the superior court did not render any judgment against him as surety when it entered the judgment against Hayes & Porter, which was directed by this court to be rendered. The theory of counsel seems to be that the failure of action of the courts cata in his favor, upon the question of his liability upon the bond.

to render judgment against Fortune and

[2] In so far as the failure of this court to render any judgment against the sureties is concerned, it seems plain from the language of section 1739, Rem. Code, relating to the rendering of judgments against sureties upon a supersedeas bond by this court, upon the final disposition of an appeal, that this court has no power to render such judgment except when it affirms a judgment of the superior court for the payment of which a supersedeas bond is given. That section reads:

"Upon the affirmance of a judgment or (on) appeal for the payment of money, the Supreme Court shall render judgment against both the appellant and his sureties in the appeal bond for the amount of the judgment appealed from (in case the bond was conditioned so as to support such judgment) and for the damages and costs awarded on the appeal; and in any other case of affirmance the Supreme Court shall likewise render judgment against both the appellant and his sureties in the appeal bond for the amount recoverable according to the condition of the bond, in case such amount can be ascertained by the court without an issue and trial."

No other statute authorizes this court to render a judgment against the sureties on such a bond, nor does any statute authorize this court to direct the superior court to render judgment against the sureties upon such a bond when rendering a judgment in pursuance of direction of this court. Plainly, we think, the failure of this court to render judgment against the sureties or to direct such judgment to be rendered by the superior court was not res adjudicate of Wood and Empson's rights as against the sureties Fortune and Kreielsheimer.

[3] In so far as the failure of the superior court to render such a judgment against the sureties Fortune and Kreielsheimer is concerned, it seems equally plain that a superior court has no power to render such a judgment in connection with a judgment it is by this court directed to render, because there is no statute authorizing a superior court to render such a judgment. Besides, as said in Richardson v. Sears, 87 Wash. 212, 151 Pac. 504:

"We have held in a long line of cases that the trial court, after an appeal and remittitur, has no power to enter any other judgment or decree in the cause than that directed by the appellate court."

And, as we have seen, this court did not direct the superior court to render any judgment against the sureties upon the bond.

[4] It seems to be well-settled law that whatever statutory right a successful party upon an appeal may have to a summary judgment rendered by the appellate court against sureties upon a supersedeas bond in connection with the final disposition of the case by the appellate court is a remedy merely cumulative of the common-law remedy, and does not affect the right of such successful parties to maintain an independent action upon such a bond in lieu of such statutory remedy. 2 R. C. L. 319. We conclude that the

failure of this court and the superior court to render judgment against Fortune and Kreielsheimer as sureties upon the supersedeas bond when the case of Hayes & Porter against Wood and Empson was finally disposed of did not in the least impair the right of Wood and Empson to seek recovery in an independent action upon the supersedeas bond.

[5-7] It is contended in behalf of appellant Alice Empson that the superior court erred in denying her judgment against the executors of the estate of Jacob Kreielsheimer who had executed the supersedeas bond as surety with Fortune. The superior court denied recovery so claimed, because there had not been presented to the executors any claim preliminary to this action, as required by sections 1472-1479, Rem. Code. The only thing done by Wood or Empson looking to the presentation of such a claim was the presentation to the executors of an abstract of the judgment for \$1,500, rendered by the superior court against Hayes & Porter by direction of this court, which abstract was certified to by the clerk of the superior court. This abstract fails entirely to show or to suggest any liability on the part of Fortune and Kreielsheimer as sureties upon the supersedeas bond. Indeed, there is nothing upon its face indicating that it is a claim against the sureties or the executors of the estate of Jacob Kreielsheimer. Besides, it is not supported by the oath of any one as required by section 1473, Rem. Code. It is argued by counsel for Empson: First, that it is not such an obligation as is required to be supported by oath upon presentation to an executor or administrator; and, second, that these executors waived formal presentation thereof by writing Wood and Empson a note rejecting a claim but not designating this one. These contentions are both effectually answered by our holding in Barto v. Stewart, 21 Wash. 605, 59 Pac. 480; Ward v. Magaha. 71 Wash. 679, 129 Pac. 395; Seattle National Bank v. Dickinson, 72 Wash. 403, 130 Pac. 372; Butterworth v. Bredemeyer, 89 Wash, 677, 155 Pac. 152; and Zuhn v. Horst. 170 Pac. 1033. By these decisions it has become the settled law of this state that the proper presentation of a claim is a fact to be proven essential to the cause of action, and that an executor or administrator cannot, because of the mandatory provisions of our claim statute, waive such presentation so as to estop himself from defending upon the ground of want of such proper presentation. This alleged claim, in its last analysis, was not presented in writing at all, but a paper was presented which it is claimed, supplemented by oral evidence, constituted a claim, but which upon its face was not a claim against the estate of Kreielsheimer. Presentation of the claim was denied, and one of the questions of fact tried in the case. Plainly, we think, the trial court did not err in denying recovery

from liability upon the supersedeas bond because of Empson's failure to present a proper claim to the executors of the estate of Jacob Kreielsheimer, which resulted in her failure to recover against them. Counsel rely upon the general rule that the release by the beneficiary of one of two jointly bound cosureties will effect the release of the other, at least to the extent that the right of contribution of the other surety against the one so released is impaired thereby. We may concede, for argument sake, this to be the law applicable when the release of one surety is effected by contract made with him by the beneficiary. However, no authority has been brought to our attention holding where one of two sureties is released, as were these executors, that such release impairs the beneficiary's rights to recover the full amount of the bond from the other, providing the bond upon which he sues is a several as well as a joint obligation, permitting his suing upon the bond and recovery in an action against one alone. It seems to us that Empson is in no less favorable position here than as if she had sued Fortune alone. If she could have done that, she could not now be held without right of recovery against him for the full amount, by reason of her present situation relative to the executors. Plainly, she did not release the executors by any contract or understanding had with them; besides, she commenced this action on March 10, 1916, plainly within the year for the presentation of claims to the executors, since they were appointed as such April 16, 1915. As to when thereafter they gave notice to creditors we are not advised, so that, in so far as the impairing of Fortune's right of contribution is concerned, he had ample time to present his contingent claim of contribution to the executors which might result from the recovery of the judgment against him for the whole amount of the bond. It would seem therefore that, if Empson was at all bound to take notice of the contribution rights which might arise as between the sureties, she, in any event, did not prevent Fortune from protecting his contribution right as against the executors. We do not express any opinion in regard to her legal duty in that behalf.

[9] Our inquiry must go back to the question of whether or not Fortune could be sued and recovered against as upon a several liability: that is, was his liability under this surety bond several as well as joint with Kreielsheimer? The surety bond here sued upon is not in express terms either joint or several. Aside from its conditions it reads as follows:

against the executors for want of proper presentation of the claim sued upon.

[8] It is further contended in behalf of appellant Fortune that he was in law released

being the plaintiff herein, and J. Kreielsheimer, and John Fortune, sureties, are held and firmly bound unto the defendants, Amos Wood and Alice Empson in the full sum of \$3,400 lawful money of the United States, in which sum we bind ourselves, our assigns, heirs, executors and administrators firmly by these presents.

> Counsel have not given us the benefit of the citation of any authorities throwing light upon the question of whether or not the bond is, in law, several as well as joint. What independent investigation we have found time to make upon the subject convinces us that after all it is a question of intent on the part of those who execute such obligations, to be determined from the language of the instrument and the circumstances of each particular case. Looked at in this light, and having in view the purpose of the execution of such bonds and the statutes requiring their execution in order to stay proceedings upon appeal, we feel constrained to adopt the view that this is in law a several as well as a joint obligation. Having arrived at this conclusion, we think it follows as a matter of course that Fortune could have been sued upon the bond separately, and that he was severally as well as jointly liable for the whole amount recovered thereon. This being so and Empson being no more unfavorably situated than as if she had sued Fortune separately it was not error to render judgment in her favor against Fortune alone, though she was unable to recover against the executors of his cosurety's estate.

We conclude that the judgment must be affirmed. It is so ordered. Neither Empson nor Fortune will recover costs in this court, but the executors will recover costs in this court against Empson.

ELLIS, C. J., and WEBSTER, MAIN, and FULLERTON, JJ., concur.

EAST ABERDEEN LAND CO. v. GRAYS HARBOR COUNTY. (No. 14392.)

(Supreme Court of Washington. May 7, 1918.)

1. Taxation \$\iiii348-Valuation of Lands-TIDELANDS.

If tidelands have a large value by reason of the fact that the owner can force the upland owner to pay a great price for it, there is no such taxable value where the tideland and upland are owned by the same person.

TAXATION @=348-VALUATION OF LAND-

COMPARISON WITH OTHER LAND.

The law will not tolerate for taxation of lands a valuation fixed by comparisons, where the testimony is overwhelming that the particular tracts in controversy have no such value.

3. TAXATION 6=499-VALUATION OF LAND EVIDENCE.

as follows:

"Know all men by these presents, that we of taxes, evidence held to show that valuation Hayes & Porter, Inc., a corporation, as principal of tideland as fixed by assessor was excessive.

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Department 2. Appeal from Superior Court, Grays Harbor County; R. H. Back, Judge.

Action by the East Aberdeen Land Company to compel Grays Harbor County to accept a tender of taxes. Judgment for defendant, and plaintiff appeals. Reversed. with instructions.

Morgan & Brewer, of Hoquiam, for appellant. W. H. Tucker and J. E. Stewart, both of Aberdeen, for respondent.

CHADWICK, J. This is an action brought by the appellant to compel the county of Grays Harbor to accept a tender of taxes upon certain tidelands bordering the shores of the Chehalis river.

The Chehalis river empties into Grays Harbor, and for several miles from its mouth is navigable for ocean-going vessels. The cities of Hoquiam, Aberdeen, and Cosmopolis are located on the river. The tidelands affected by this suit are located across the river from the city of Cosmopolis and from thence down the stream to a point at about the east boundary of the city of Aberdeen. The uplands abutting the shore are unimproved logged-off land of the character known as tideland swamp. They have a potential value for factory and mill sites and are assessed at from \$50 to \$100 per acre.

Harbor areas were established in the Chehalis river in 1892. The inner harbor line was so established with reference to the meander line that several strips or threads of land were left between the inner line and the meander line. These the state has claimed as tidelands. It afterwards caused them to be surveyed in six tracts. were offered for sale in September, 1912, at public auction by appellant, the owner of the upland, for the sum of \$735.69. Each strip varies in width, from a feather edge to 100 feet at a point in one of the strips. The tracts are numbered and have a total area of 2.73 acres. They were assessed in 1913 and 1914 as shown below. The basis of actual valuation for 1914 is shown:

Tract	Acres	Assessed 1913	Assessed 1914	Basis actual valuation
41	57/100	\$ 340	\$ 4335	\$15210
36	17/100	240	2040	2400
37	93/100	140	1785	3838
27	48/100	320	1190	4962
28	7/100	45	400	11428
26	51/100	135	1105	4334
		\$1,220	\$10855	

The basis for valuation in each year was 50 per cent. of the actual value. The tender made by appellant was based upon a value of \$658.60 per acre. There is no testimony tending in any way to show that there had been any increase in the value of the lands. The land was assessed under a theory or plan advanced by a deputy assessor who selected a tract of tideland about midway of the water front of Aberdeen, and about 200 feet.

deep, and then fixed zones running in either direction. Property was assessed by graduated valuations with reference to the value of the primary unit, 80 per cent. being fixed on account of water frontage and 20 per cent. on account of area. The assessment is further defended on the ground that the tidelands were of greater value than other lands would be, because, as it is conceived, the owner of the tidelands would have, under the laws of this state, a preference right to lease the harbor area.

When this case was heard, the late Judge Morris was sitting with the court. After consultation, three of the judges, including Judge Morris, were of the opinion that the assessment had been made upon a fundamentally wrong basis, in that the zone system, if sustained by an arbitrary holding of value within the zone, was based upon the value of the central unit rather than upon the full fair cash value of the property taxed, which may be greater or less, depending entirely upon its situation and adaptability for commercial uses. And for the further reason that the assessors' theory of preference right to lease the harbor area could not be sustained, for the time has long since passed when a preferential right could be exercised. Two of the judges were of the opinion that the case should be reversed on the evidence of value, and it is upon this ground that the judgment will be questioned.

The consensus of opinion of no less than twelve of the most prominent property holders in Grays Harbor county is to the effect that the tideland tracts have no practical value apart from the uplands, and that the whole property tideland and upland when considered as one property is not worth to exceed \$40 to \$50 per acre. It will be borne in mind that the upland is assessed on a valuation of \$100.

The agent of the owner of the land, Mr. Heermans, testified that he has the whole tract, 450 acres of upland and the 2.73 acres of tideland listed for sale at \$25,000, less than \$60 per acre, with no offers, and that:

"It can be purchased at a good deal less money than that too. I am authorized to sell to any taker at these figures without calling upon the owner, and I am instructed to submit any other offer made."

[1] The witnesses who were interrogated upon the subject say that the tideland tracts cannot be put to any use apart from the uplands, and that there was no demand for such lands at the time they were assessed. As one witness says:

"These lands have a value if you consider the upland and the tideland and the harbor area together; that is, if there was any demand for it. \* \* I would consider it merely a nominal value. Good to hold up the owner of the inside in the hands of an unscrupulous person."

a tract of tideland about midway of the This sentiment is concurred in by some of water front of Aberdeen, and about 200 feet the other witnesses, and, when the testimony

of the deputy assessor is sifted, it is really the basis upon which he fixed values so greatly in excess of the values for market or for practical uses. He says:

"In making this assessment I made it under the theory or belief that the law permitted the adjacent owner to control the adjacent harbor area. I took into consideration that they were using the entire lot of 38 and didn't confine themselves to the 88 feet. (Ab. 89.) And in assessing all of this we took into account the fact, or supposed fact, that the adjacent owner had the preference right to lease the harbor area in front of it. (Ab. 90)."

Counsel for respondent says:

"The tideland owner holds the key to the situation and values his lands accordingly. He has a special class of property because of its peculiar situation, and, inasmuch as he can demand a high price for such property, he holds it accordingly."

But as applied to this case the theory is not sound. If a third party owned the show strings along the river and it seemed reasonable that he would be able to sell them to an upland owner now or at some future time, it might be that an assessor could capitalize his hope for him, at least so far as the tax rolls are concerned, and that the courts would sustain his paper profits as a true fair cash market value; but where the same party owns the two tracts, and there is no possibility of a sale to the upland owner so that he may get access to deep water, and the tideland strips have no value potential or prospective for building purposes, there is no possible ground upon which to base the fanciful values fixed by the assessor.

There is a popular tradition launched in the years of the state's adolescence that tidelands as distinguished from other land have some mysterious quality to which value attaches, and which will not brook the interference of doubt or argument; but after all tidelands are only lands. They may be of great value or they may have little value. But all things are to be considered, the same elements which give value to one class of land will give it to another, and, when land which for the purpose of classification is listed as tideland and sold by the state, it is no longer to be regarded as of a class, but as property and to be valued according to its fair cash value.

This case is very much stronger upon its facts than is the case of Grays Harbor Const. Co. v. Grays Harbor County, 168 Pac. 1138, where we refused to sustain an assessment based upon a value more than three times greater than the salable value of the property.

It is insisted that the judgment should be sustained because it is shown that the Standard Oil Company bought a tract, 11/2 acres, of tidelands, and about two acres of upland having a frontage of 575 feet, for \$7,500 in 1914. The tidelands were assessed at \$2,125 and the upland at \$1,200.

[2] It may be that the property was well worth that sum, and that other tracts would sustain a greater value; but the law will not tolerate a valuation fixed by comparisons, where the testimony overwhelms that the particular tracts in controversy have no such value. But we find no argument in these figures. The tideland sold to the Standard Oil Company was assessed upon a valuation of \$4,250 per acre. Let this compare with the assessment of appellant's property, which is confessedly less valuable. Tract 41 is assessed at \$15,200 per acre. Tract 36 is assessed at \$24,000 per acre. Tract 37 is assessed at \$3,838 per acre. Tract 27 is assessed at \$4,962 per acre. Tract 28 is assessed at \$11,428 per acre. Tract 26 is assessed at \$4,334 per acre. And the assessment of other water front property not shown to be less valuable than appellant's property at from \$10 to \$250 per acre.

[3] The valuation is not sustained by the testimony, nor is the assessment equal and uniform with other like property. State ex rel. Wolfe v. Parmenter, 50 Wash. 164, 96 Pac. 1047, 19 L. R. A. (N. S.) 707; Spokane & Eastern Trust Co. v. Spokane County, 70 Wash. 48, 126 Pac. 54, Ann. Cas. 1914B, 641; Savage v. Pierce County, 68 Wash. 625, 123 Pac. 1088; State ex rel. Oregon R. & N. Co., v. Clausen, 63 Wash. 535, 116 Pac. 7.

Tender having been made upon a valuation of \$630 per acre, which is far above the fair cash value of the property as shown by the testimony, the case will be reversed, with instructions to enter a judgment in favor of appellant.

ELLIS, C. J., and MOUNT, J., concur.

HOLCOMB, J. I concur in the result.

NORTHERN PAC. RY. CO. v. SNOHOMISH COUNTY. (No. 14591.)

(Supreme Court of Washington. April 29, 1918.)

1. JUDGMENT €==702 - RES JUDICATA - CON-CURRENCE OF IDENTITY.

Decree in a mandamus proceeding by the mayor of a city to compel county tax assessor to extend upon the county tax rolls certain taxes levied by the city would not be res judicata in an action by a taxpayer against the county to strike such levy from the tax rolls.

2. JUDGMENT €==634-"RES JUDICATA"--CON-

CURRENCE OF IDENTITY.

To make a judgment res judicata in a subsequent action there must be concurrence of identity in four respects: (1) Of subject-matter; (2) of cause of action; (3) of persons and parties; and (4) in the quality of the persons for or against whom the claim is made.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Res Adju-

dicata.]

3. Courts \$3-Rule of Stare Decisis. Decision in mandamus proceeding by the mayor of a city to compel county tax assessor

to extend upon county rolls certain excess taxes! levied by the city, not having been appealed from, will not be adhered to under doctrine of stare decisis; there being no evidence of a general acquiescence of taxpayers affected or that any vested rights had been acquired under such deci-

4. MUNICIPAL CORPORATIONS \$\iff 956(1)\$ — STATUTE—VALIDATING EXCESS TAX LEVIES—CONSTRUCTION—"ATTEMPT TO COLLECT." Under Laws 1915, c. 176, \$\frac{1}{8}\$ 1, validating certain excess tax levies for the year 1913 and 1914 in cities of third class, "provided, this act to collect such levies," there could be no re-covery of excess tax by a city in which no taxpayer had paid the excess tax at the time of the passage of the act; the words "attempt to colpass-lect" meaning at least a partially successful attempt to do the final act of raising the excess revenue, namely, the procuring of the money from the taxpayers by the county treasurer or

5. STATUTES \$== 206 - Proviso - Construc-TION.

It is the duty of a court within the bounds of reason to give to a proviso of a statute some meaning rather than none.

MUNICIPAL CORPORATIONS \$\infty\$956(1) STATUTE—VALIDATING EXCESS LEVIES—( 6. MUNICIPAL CORPORATIONS STRUCTION-ATTEMPT TO COLLECT.

Conceding that mandamus by the mayor of the city of the third class to compel county assessor to extend upon county rolls excess levy claimed to be validated by Laws 1915, c. 176, 1, was an "attempt to collect," it came too late, since under the proviso of said section tax can be collected only where there has been an attempt to collect prior to passage of act.

Holcomb, J., dissenting.

Department 2. Appeal from Superior Court, Snohomish County; Ralph C. Bell, Judge.

Action by the Northern Pacific Railway Company against Snohomish County. Decree for plaintiff, and defendant appeals. firmed.

Lloyd L. Black and John Sandidge, both of Everett, and E. W. Klein, of Snohomish, for appellant. Geo. I. Reid, J. W. Quick, L. B. Da Ponte, and C. A. Murray, all of Tacoma, for respondent.

ELLIS, C. J. Plaintiff brought this action to cancel and strike from the tax rolls of Snohomish county certain taxes against its property based upon the levy for city purposes by the city of Snohomish, a city of the third class, for the year 1913, and extended upon the county tax rolls for the year 1916.

The agreed facts are as follows: The city made a levy for the year 1913 of 19.25 mills for all city purposes. That levy was certifled for extension on the tax rolls of Snohomish county, but at the suit of a taxpayer against the county assessor the extension as to all of the levy in excess of 4.8 mills was by the superior court enjoined as illegal and excessive. On appeal to this court the decree of injunction was affirmed. Whitfield v. Davies, Assessor, 78 Wash. 256, 138 Pac. 883. mills which was not enjoined was extended upon the county tax rolls for the year 1913, and the resulting tax as against the property of the plaintiff herein was paid. No attempt was then or thereafter made by the city or county of Snohomish to extend or collect the 14.45 mills which had been so adjudged excessive and illegal until after the passage by the Legislature of 1915 of chapter 176, Laws of 1915, p. 587, entitled "An act relating to the validation of certain tax levies in cities of the third class, and providing for their collection."

Subsequent to the passage of the act of 1915 in an action styled State ex rel. Watson. Mayor of the City of Snohomish, v. Davies, County Assessor, a writ of mandate was issued from the superior court for Snohomish county directing the assessor to extend upon the county rolls for the year 1916 the excessive 14.45 mills of the 1913 levy. The extension was accordingly made upon the basis of the 1913 valuation; hence this suit.

Upon these facts the trial court in this action entered a decree canceling the tax levy as against plaintiff's property. The county appeals.

Appellant contends: (1) That the decree in State ex rel. Watson, Mayor, v. Davies, Assessor, supra, is res judicata in this case, or in any event should be followed on the principle of stare decisis; and (2) that the trial court placed an erroneous construction upon chapter 176, Laws 1915. We shall consider these in the order stated.

[1, 2] 1. Is the mandate issued in the suit of the mayor of the city against the assessor of the county a bar to this action? We think not. To make a judgment res judicata in a subsequent action there must be a concurrence of identity in four respects: (1) Of subject-matter; (2) of cause of action; (3) of persons and parties; and (4) in the quality of the persons for or against whom the claim is made. 1 Freeman, Judgments (4th Ed.) 252; 8 Bouvier's Law Dictionary, Rawles' 3d Rev., p. 2910; Atchison, etc., R. Co. v. Com'rs of Jefferson County, 12 Kan. 127, 135, 136; Turner Township v. Williams, 17 S. D. 548, 97 N. W. 842.

Manifestly there is no such concurrence of identity in these two suits. It may be conceded that the subject-matter is the same, and, in a broad sense, that the causes of action are identical, but there the identity vanishes. The parties are not the same elther actually or by privity. Neither the plaintiff nor the defendant in the other action appeared in the same quality or capacity as does the plaintiff in this action. The mayor's action was not in his personal quality or capacity as a taxpayer on his own behalf and on behalf of others similarly situated, nor did the county assessor defend in the capacity of a taxpayer. The mayor did not sue nor the as-Thereafter the levy to the extent of the 4.8 sessor defend as a member of a class for him-

stance, in the case of a stockholder's action. Respondent was not a party to the other action either actually or potentially by representation as a member of a class. On the contrary. respondent's interest was and is adverse to that of both parties to the other action in the capacity in which they there appeared. In fact, that whole proceeding was in its purpose adverse to respondent's interest. Respondent had no day in court in that action. The judgment there is not a bar to its action here.

"Of course, to say that a decree rendered pro confesso in an action between two parties, both of whose interests are adverse to the plaintiff's concludes this plaintiff, and bars its rights, is absurd." Atchison, etc., R. Co. v. Com'rs of Jefferson County, supra.

The rule announced in Stallcup v. Tacoma. 13 Wash, 141, 42 Pac. 541, 52 Am. St. Rep. 25, relied upon by appellant, has no application to the facts here. The other case cited by appellant in this connection, Waldron v. Snohomish, 41 Wash. 566, 83 Pac. 1106, is even less apposite. It rested upon specific statutory provisions governing reassessments for local improvements. The general doctrine of res judicata was not involved.

[3] The claim that the decision in the suit of the mayor against the county assessor which was not appealed from should be adhered to under the doctrine of stare decisis is untenable. That doctrine is invoked to preserve rules of law established by decisions of long standing, usually of courts of last resort. There is no evidence in this case that there has been any general acquiescence by the taxpayers affected, in the judgment entered in the mayor's action nor that any vested rights have been acquired thereunder.

[4] 2. Did the trial court place an erroneous construction on chapter 176 of the Laws of 1915? We think not. That act, omitting title, reads as follows:

"Section 1. That the tax levies made by cities of the third class for the years 1913, 1914 and prior years are hereby ratified and validated wherever the only reason of the invalidity of such tax levy or levies is that the same were such tax levy or levies is that the same were made in excess of the limitation prescribed by statute, or were not apportioned according to the provisions of chapter 108, Laws of 1913; and upon the taking effect of this act, the proper officers are hereby authorized and directed to proceed with the extension, collection and enforcement of the lien of such taxes; and collections heretofore upde are hereby retified. Protions heretofore made are hereby ratified: Provided, this act shall not apply to such cities as did not attempt to collect such levies or which cancelled the same."

It was sustained by this court as constitutional in Owings v. Olympia, 88 Wash, 289, 152 Pac. 1019. Appellant relies upon the body of the act as validating the excess levy of 1913 as extended on the rolls for 1916. Respondent relies upon the proviso as excluding that excess from the purview of the act. The meaning of the body of the act is expressed with reasonable certainty, but it would be difficult to achieve a greater inac- can create or occasion, and subject-matter of

self and others of the same class, as, for in- | curacy in terms in the same number of words than that presented in the proviso. In the first place, a levy is neither collected nor collectible until it is merged into a tax in specific sums against specific properties by the action of the county commissioners. Accurately speaking, cities do not make levies, but merely estimates to guide the commissioners in levying taxes for city purposes. State v. Snohomish County, 71 Wash. 320, 128 Pac. 667. In the second place, cities in this state cannot collect taxes, much less incipient levies, and presumably never attempt to do so. The collection of taxes is by statute imposed upon the county authorities. In the third place, cities do not cancel tax levies in any literal sense. We shall assume that the city might effectively repeal or amend the ordinance making the incipient levy or estimate for city purposes at any time before the expiration of the period for certification to the county officials for extension on the tax rolls, but in this case such a course would have been an idle formality. That period had passed before the decision of the superior court enjoining the extension of the levy as a tax, which decision was affirmed in the case of Whitfield v. Davies, supra. That decision effectually canceled the incipient levy in the only manner in which it then could be canceled. It annulled it.

[5] Literally construed, it is obvious that the proviso cannot apply to any city or any levy or any tax. But the Legislature must have meant something by this proviso. It is our duty within the bounds of reason to give it some meaning rather than none. Let us therefore assume that the word "collect" was not used in a literal sense, but in a broad sense, embracing the whole process or system by which cities of the third class through the county machinery raise revenue by taxation. Giving the word "collect" this broad significance, appellant contends that the city of Snohomish, by making the initial levy and by certifying it for extension on the county rolls. did all that it legally could do towards a collection, and only failed because of the injunction in the Whitfield Case, and therefore these things must be held an "attempt to collect" by the city within the meaning of the proviso. But so to construe those proceedings makes the proviso, when read with the body of the act, absurd because meaningless. The act deals with excess levies, and nothing else. It validates them and authorizes their extension on the rolls and the collection of the resulting tax. It ratifies collection theretofore made. It is self-evident that, where there is no excess levy, there is nothing to validate, nothing needing an authorization to extend or collect, nothing to ratify, in short, nothing to which either the act or the proviso can apply. If, therefore, the very proceedings, the excess levy and certification for extension of that excess, which alone



the body of the act, are to be construed as an ; this must have been the purpose in the legis-"attempt to collect" within the proviso, then the act with the first clause of the proviso means just what it would mean without it. The first clause of the proviso would add nothing, except nothing, provide nothing, and the Legislature would stand convicted of a deliberate absurdity.

To avoid this absurdity and give any meaning to the first clause of the proviso, the words "attempt to collect" must mean at least a partially successful attempt to do the final act of raising the excess revenue, namely, the procuring of the money from the taxpayers by the county treasurer for the city. In cities where the attempt had been wholly successful and all of the excess taxes had been paid, the ratification of collections met the whole purpose of the act. But in those cities where the illegal excess tax had not been aborted, either by abandonment or court decree, before it reached the final stage of collection, and there had been an attempt to collect, partially but not wholly successful, something more than ratification was necessary to complete the collection. The tax must be validated and collection authorized in addition to the ratification of collections already made. things are supplied by the other parts of the act, which but for the proviso would apply to all cities which had made and certified excess levies whether any part of the excess had been collected or not. But the proviso, as we must construe it, limits the application of those provisions by declaring that they shall not apply to cities the excess levies of which there had been no attempt to consummate the final act of collection. This view was well expressed by the trial court as follows:

"Chapter 176 means that all the excess levies mentioned in it are validated, their collection authorized and directed, and any collections on account of such made prior to the taking effect of chapter 176 in June, 1915, ratified except where for any reason whatsoever, be it the de-cree of injunction in the case of the City of Snohomish (Whitfield y. Davies, supra) or some voluntary action, regularly or irregularly taken in some other of the third class cities of the state, no payment of any of the excess levy has been made by a taxpayer."

This view is further justified by the fact that it leads to equality of taxation of all persons in third-class cities similarly situated. In every city of the third class where there was an excess levy, and no taxpayer of such city had paid the excess tax at the time of the passage of the validating act, no taxpayer should be compelled to pay, as there was an equality of burden without such payment; hence the proviso, as we construe it, that the act should not apply to such city. But in any city where any of the taxpayers had paid the excess tax the act creates an equality by making it incumbent on all other taxpayers of such city to pay it. Looking to the prior law, the mischief, and the remedy,

lative mind in passing the proviso.

[6] The suggestion that the mandamus action of the mayor against the county assessor was an attempt by the city to collect the tax is answered by the fact that, even so considered, it came too late. It was long after the passage of the validating act, while the proviso in terms relates to attempts to collect prior to that time.

We hold that on the agreed facts before us neither the city of Snohomish nor the county treasurer for it had attempted to collect the excess tax within the meaning of the proviso, but that the excess tax levy had been canceled and annulled by the decree in Whitfield v. Davies, supra, in the only way in which it could be canceled after the time for certification for extension on the rolls had expired, namely, by the judgment of a court. Construing the proviso in the only way which gives it any force, the tax here falls within both the contingencies contemplated by the proviso as excepting it from the validating effect of the body of the act.

The judgment is affirmed.

MOUNT, FULLERTON, and CHADWICK, JJ., concur.

HOLCOMB, J. In my opinion, the proviso in question is uncertain, meaningless, or repugnant to the purview of the body of the act if given any meaning and effect, and should be declared void. I therefore dissent.

WHITAKER et ux. v. ELLIS. (No. 14524.) (Supreme Court of Washington. April 30, 1918.)

INSANE PERSONS 5 97 - GUARDIAN AD LITEM-PLEADING.

Where purchasers at tax sale brought suit to quiet title against an incompetent who formerly owned the land, since they must recover on the strength of their own title, the guardian ad litem of the former owner being under duty to hold plaintiffs to strict proof, which could be accomplished by general denial, was not bound to plead any affirmative defenses, nor ask affirmative relief by cross-comnor ask affirmative relief by cross-complaint.

2. Appeal and Error \$\sim 1170(1)\$—Reversal —Technical Errors.

Where the case was fully tried and all the facts put before the court, it cannot be sent back for retrial on an objection which is wholly technical in view of Rem. Code 1915, § 307, prohibiting reversal for harmless error.

3. TAXATION 5-743 - TAX SALES - GOOD-FAITH PURCHASER.

A brother-in-law and friend of a purchaser from an incompetent, knowing the whole situation and that the purchaser was bound to ation and that the purchaser was bound to pay taxes, and who purchased from a purchaser at tax sale for inadequate consideration, was not a good-faith purchaser, but the tax title was not void, nor could he be barred of legal rights because his action to quiet title was wanting in equity. 4. TAXATION \$\infty 59-Property of Incompetents.

FAITH PURCHASER.

Where acquaintance of a mental incompetent who owned land and had agreed to convey it to a mutual friend purchased from the purchaser at tax sale for inadequate consideration, having knowledge of all the facts and that the incompetent would thereby be defrauded, and then sued to quiet title asking equitable relief, he was entitled to recover the amount due for taxes, but not to have his title quieted, and the incompetent should be allowed opportunity to redeem.

Department 2. Appeal from Superior Court, Yakima County; Geo. B. Holden, Judge.

Action by E. F. Whitaker and wife against John H. Ellis. Decree for defendant, and plaintiffs appeal. Affirmed on condition, and otherwise reversed.

Roberts & Udell, of North Yakima, for appellants. John F. Chesterley, of North Yakima, for respondent.

CHADWICK, J. John H. Ellis was committed to the hospital for the insane in 1895, again in 1897, and again in 1898. In each instance he was discharged as "improved." This means, according to the letters of the superintendent of the hospital which were introduced in evidence, that one so discharged is not necessarily cured. but may be so improved as not to be dangerous to go at large. Ellis was discharged the last time in 1902. In November, 1916, N. H. Massie, a brother-in-law of the plaintiff, filed a complaint charging Ellis with being an insane person. He was examined by a number of physicians, who made findings that he was "not insane necessarily, but incapable of looking after himself. We recommend a guardian be appointed by the court; mentally below par." The witnesses described Ellis variously as "sane," "insane," "queer," "off," and "cracked." That he meets up with some of these descriptions we have no doubt. The trial judge found him to have been at all times material to this inquiry a paranoiac and unfit to attend to his own business. It will be unnecessary to review the evidence. We are satisfied that a preponderance of the evidence is with the defendant upon this issue.

Ellis was the owner of 80 acres of land, which he contracted to sell to N. H. Massie, a brother-in-law of plaintiff, in 1912 for a consideration of \$8,000. Massie paid \$150 down and made a mortgage for \$7,850 to secure the remainder. Massie paid no more than \$300 on the interest, and no taxes whatever, although he had the full legal and equitable title, subject only to the lien of the mortgage. At the time of the sale the last half of the 1911 taxes were due and unpaid

and they were not thereafter paid by Ellis or Massie. Massie, being unable or unwilling to meet the payments due upon his mortgage, proposed a reconveyance of the land. Out of the negotiations of the parties, Ellis agreed to remit the sum of \$500 upon condition that Massie would retain the land and plant 40 acres to orchard. This he did. In the summer of 1916 Massie had an understanding with plaintiff Whitaker that he (Whitaker) would buy the land if he could get it for \$2,000 or less. A foreclosure proceeding had been brought by one Huston, who had theretofore taken out certificates of delinquency. Massie borrowed the money of Mr. Heath's bank to pay the amount due at the time of sale and procured Mr. Heath to bid in the land. The sale occurred on July 29, 1916, and on the very next day Mr. Heath conveyed the land by quitclaim deed to plaintiff. The tax sale did not cover all of the land. There were two small fractional pieces that were not included. The John Deere Plow Company had theretofore obtained a judgment against Ellis. Massie solicited a friend in the East to buy this judgment, and in order to make title to all of the land. including the part not included in the tax sale. he caused an execution to issue, and the land was sold in September, 1916, and bid in by Mr. Heath. The money to pay this judgment was borrowed of the bank upon the note of Massie. In April, 1916, after Massie had notice of the pendency of the tax foreclosure proceeding, he took up the matter of reconveying the land to Ellis, and it was agreed that Ellis would take the land back. Massie executed a deed in April. About ten days before the tax sale, or about the 20th of July, he left it at the bank for Ellis. We are not entirely satisfied that the testimony shows a legal delivery, but we shall assume that it was. The note and mortgage were surrendered, but they were never canceled of record. On January 6, 1917, Heath assigned his certificate of sale to plaintiff. Plaintiff then put the certificate and the deed which had been executed by Mr. Heath in July of record, and on February 3d began this action to quiet his title. He set up his ownership of the land; that the mortgage was outstanding and unsatisfied; and that Ellis persisted in claiming to be the owner of the land. Ellis made default, after which counsel for plaintiff moved that the default be opened and a guardian ad litem appointed for the reason:

"That the mind of the defendant John H. Ellis may have become deranged by reason of the loss of his property through legal proceedings, so that he is in need of the care and attention of a guardian ad litem, and that no general guardian has been appointed."

ever, although he had the full legal and equitable title, subject only to the lien of the mortgage. At the time of the sale the last half of the 1911 taxes were due and unpaid, insane and so mentally incompetent that his



ment and sale, and that Whitaker was not an innocent purchaser for value of the land; and (2) that the plaintiff and Massie were legally bound to pay all the taxes, that they conspired to bring about the tax foreclosure proceeding by the nonpayment of the taxes, and that they conspired to defeat the title and interest of Ellis by purchasing, through the intervention of an agent, the outstanding judgment, and afterwards caused the property to be sold on execution and bid in by another acting for them, all for the purpose and with the intent of defeating the lien of the mortgage theretofore made by Massle. The court found that Ellis was at all times mentally irresponsible, and refused to grant the relief prayed for.

[1] Counsel first insist that the decree of the court should be reversed because the guardian ad litem did not plead any affirmative defenses, nor did he ask any affirmative relief by way of cross-complaint. It is complained that the method pursued by the guardian ad litem is a collateral attack, and that he should have filed a cross-complaint so as to bring the issue before the court directly. It is hard for us to follow the reasoning of counsel. It was the duty of the guardian ad litem to hold plaintiff to strict proof, and this could be done by a general denial, for whatever presumptions attend the record title of plaintiff, when he began his action to quiet title he opened all the doors of equity, for, as in ejectment, he must recover upon the strength of his own title, and not upon the weakness of that of his adversary. Brown v. Bremerton, 69 Wash. 474, 125 Pac. 785.

[2] Moreover, the case has been tried and all the facts have been put before the court; and we could not send a case back for a retrial upon an objection which in the light of the whole record has become technical. Under the statute (Rem. Code, § 307), we are warranted in treating the defenses as affirmative defenses.

[3] Plaintiff is brother-in-law and friend of Massie, and a friend and neighbor of Ellis. He knew the situation; he knew that Massie was legally and morally bound to pay the taxes accruing since 1911. He offered, himself, or was persuaded, to be a purchaser of the land if it could be bought for \$2,000 or less, knowing that it could not be so bought unless the mortgage of \$7,850 was paid off or disposed of in some other way. On the very next day after the property had been bought in by Mr. Heath he accepted a deed from Heath; the consideration being the amount paid at the sale and no more; although the law charged him with a knowledge of the law and the fact that the tax title destroyed all other titles, and that the owner of the land, granting that Mr. Heath

estate would not be bound by the tax judg-|least was entitled to receive a full or fair value. He did not put his deed of record until after the property had been again sold under the execution thereafter issued on the John Deere Plow Company judgment, showing clearly that the second sale was procured for no other purpose than to aid the tax title and in pursuance of the purpose of plaintiff to buy, and of Massie to procure, the land for him for a sum less than \$2,000, and at the same time discharge his own obligation. Plaintiff was not a purchaser in good faith, and can claim no title in virtue of the negotiations had between Ellis and Massie, or in virtue of the execution sale, but it does not follow that the tax title is void, or that plaintiff is to be barred of his legal rights because his case is wanting in equity.

> [4] The land was subject to the taxes levied upon it. The property of persons laboring under a disability is subject to taxation as is other property, unless it is exempted by statute. "The fact that land belongs to a person who is under legal disabilities, as a minor or a feme covert, does not prevent the sale of the same for the nonpayment of taxes assessed against it, nor will it prevent the title to the same from passing by a tax deed issued pursuant to such sale. It is true that the statutes almost invariably allow the persons so circumstanced a sufficient period after the removal of the disability within which to exercise the right of redemption from a tax sale." Black, Tax Titles (2d Ed.) § 270, p. 334.

> Our statute provides for the redemption of the property of an insane person when sold "If the real property of any for taxes. minor heir, or any insane person, be sold for nonpayment of taxes or assessments, the same may be redeemed at any time after sale and before the expiration of one year after such disability has been removed upon the terms specified in this section on the payment of interest at the rate of twelve per cent. per annum on the amount for which the same was sold, from and after the date of sale, and in addition the redemptioner shall pay the reasonable value of all improvements made in good faith on the property, less the value of the use thereof, which redemption may be made by themselves, or by any person in their behalf." Rem. Code, § 9259, as amended Laws 1917, p. 586.

[5] We are willing to subscribe to the decree of the lower court in so far as it holds that all contracts made with Ellis in the carrying out of the plan to get title to the land are voidable, but we cannot deny plaintiff the right which the statute gives him; that is, a right to be reimbursed for the amount of taxes that he has paid out. At the time this action was begun Ellis had a right under the statute to redeem, and was the owner of it, was in a position to plaintiff, having asked for equity, should be convey the full title, and presumptively at content with no less than equity. The equities of the case demand that Ellis be now i sions and decree therefore necessarily folgiven an opportunity to redeem.

It is said in the brief, although it is no part of the record, that a general guardian has been appointed for the defendant. If this be not so, we suggest that upon the going down of the remittitur a guardian be appointed: that he be made a party to this action; and that he be given the privilege of redeeming the land upon the payment of the amount which plaintiff paid upon the tax sale and interest (see Rem. Code, § 9259), and the amount that plaintiff paid for the judgment of the John Deere Plow Company, with interest at 6 per cent. per annum from the time of payment until redemption.

We do not direct a redemption; we leave this question to the judgment of the general guardian, subject, of course, to the approval and order of the court below. If a redemption is not made within 90 days after the remittitur goes down, the judgment will be reversed. Appellant will recover his costs in this court.

ELLIS, C. J., and MOUNT and HOL-COMB, JJ., concur.

## FELDMAN v. FELDMAN. (No. 14506.)

(Supreme Court of Washington. April 27, 1918.)

APPEAL AND ERROR 544(2)-MATTERS RE-VIEWABLE-RECORD.

Statement of facts having been stricken on motion, the finding is binding on appeal and conclusions of the court necessarily follow the same.

Department 2. Appeal from Superior Court, Whatcom County; Ed E. Hardin,

Action by Bertha Feldman against Samuel L. Feldman. Decree for plaintiff, and defendant appeals. Affirmed.

Eimon L. Wienir, of Seattle, for appellant. S. M. Bruce, of Bellingham, for respondent.

HOLCOMB. J. The statement of facts on appeal having been stricken on motion, all claims of error by appellant are eliminated save those as to the conclusions of the court, to the effect that respondent should have judgment dissolving the marriage, that she be awarded one-half the lands of the parties, and the decree to the same effect, and providing alternatively that appellant should pay to respondent \$2,000 in lieu of her rights in and to the property set apart to appellant, with a lien therefor upon the property.

The complaint states a cause of action for divorce for cruelty and abuse. The court found the allegations true, setting out specific conduct constituting cruelty and abuse. Such being the finding, and the record not being before us, we are bound by it. The conclu-

lowed.

Affirmed.

ELLIS, C. J., and MOUNT, FULLERTON. and CHADWICK, JJ., concur.

## FLOOD v. VON MARCARD et al. (No. 14579.)

(Supreme Court of Washington. May 6, 1918.) 1. VENDOR AND PURCHASER \$== 82-Action to RECOVER EARNEST MONEY-EVIDENCE.

In an action to recover earnest money paid on the purchase of land on account of failure to furnish good title, evidence held not to warrant a finding that vendee agreed to extend the time within which such title should be furnished.

2. VENDOB AND PURCHASER 4=130(1)-TITLE MERCHANTABILITY.

In an action by a vendee to recover earnest money paid on the purchase price of certain land because of failure of title, evidence that a title insurance company refused to guarantee the title and its general counsel would not approve it held to warrant a finding that a title offered by vendor was not merchantable.

3. VENDOR AND PURCHASER \$\infty 130(2)\to "MERCHANTABLE TITLE."

A purchaser is entitled to a merchantable title—a marketable title—such a one as will bring in the market as high a price with as without the objection to its sufficiency.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Merchantable.]

4. VENDOR AND PURCHASER \$== 130(2)-TITLE

4. VENDOB AND FURCHASER (2012)—TITLE
—SUFFICIENCY.
While the law will not countenance the scruples of one interested in withholding the purchase money, it will not compel one who seems to be acting in good faith to accept a title, if there be reasonable probability of a lawsuit to convince a purchaser on resale or to quiet title.

5. VENDOR AND PURCHASER \$== 130(4)-TITLE SUFFICIENCY.

In an action to recover earnest money paid on a land purchase, a title the validity of which depended on a question of descent, turning on the open question as to whether the state law or the law of Germany controlled, was insufficient as against an objection that a merchantable title hed here offered ble title had been offered.

Department 2. Appeal from Superior Court, King County; Walter M. French, Judge.

Action by Frank W. Flood against Adolph Eduard von Marcard and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Charles Bedford and C. E. Stevens, both of Tacoma, for appellants. Eugene R. West, of Seattle, for respondent.

CHADWICK, J. Respondent brought this action to recover the sum of \$500 earnest money paid upon the purchase price of certain lands. The land was sold under an offer made by respondent as evidenced by a receipt signed by the agent of the appellants. The receipt is in part as follows:

"(1) If the owners of said land accept the offer of \$10,000 the balance of the purchase price, \$9,500, shall be paid within 60 days after written notice is given said Frank W. Flood and abstract of title delivered to him. Conveyance to be by good and sufficient deed free and clear

to be by good and sufficient deed free and clear of incumbrance, and the owners to pay the taxes for the year 1915.

"(2) If the owners decline or fail to accept said offer within 90 days from the date hereof, the amount paid, \$500, will be returned to the Title Trust Company.

"(3) Should said Frank W. Flood fail to pay the balance of the purchase price, \$9,500, within 60 days after being notified in writing of the acceptance of his offer, then the \$500 hereby acknowledged shall be considered earnest money and forfeited to the owners. G. H. Plummer."

The owners accepted the offer upon the terms mentioned in the receipt, and on the 27th day of March, 1916, tendered an abstract of title. Respondent's attorney noted certain liens and incumbrances, and further questioned the title upon grounds growing out of the descent of the property. Mr. Plummer and his attorneys confessed the liens and incumbrances, and after clearing the record of them resubmitted the abstract. They refused to correct other objections, taking the position that the abstract showed a good title, and that respondent was bound to accept it under his contract. Respondent and his attorney were equally as insistent that the title was not good, and that the abstract failed to show a good or marketable title.

There were some negotiations between the parties and between the attorneys. It seems reasonably clear that between May 18 and May 22, 1916, there were several conversations and several letters passed between the interested parties; Mr. Plummer saying that, although he and his attorney insisted that the title was good, they would as an act of courtesy procure certain quitclaim deeds from the heirs of Kreigk, all of whom lived in Germany, but that all the expenses to be incurred should be borne by respondent, and that it was then understood and agreed that such deeds should be procured, and that the time for the payment of the balance of the purchase price should be extended for 60 days. Respondent admits having conversation with Mr. Plummer, but denies that such an agreement was entered into, and asserts that he rescinded the sale at that time and demanded the repayment of his earnest money. On June 8th the parties, after some correspondence, met again. Mr. Plummer insists that it was then understood that the deeds were forthcoming, but on account of the uncertainty and delay in the mails they had not yet arrived. Appellant, on the other hand, testified that he again demanded the repayment of his earnest money, but agreed with Mr. Plummer that he would take the title as it stood, and pay \$2,000 down and \$2,000 a year for four years at 7 per cent. interest, provided the title was guaranteed by a title insurance company. He says that Mr. Plummer objected to this, assigning as his reasons for so doing that he had already gotten an accept-

ance of the other offers, and that it would cause considerable delay and expense and would require time. Respondent again demanded his money.

The fact remains, however, that the title was submitted to a title insurance company at Seattle. Insurance was refused. One of the attorneys for appellants took the matter up personally with the insurance company. Failing to convince it of its error, the matter was referred to the general counsel for the company, who rendered an opinion that the title was not insurable to the extent at least of a one-sixth interest. Respondent saw the attorney for appellants on July 19th. Respondent met Mr. Plummer on the same day.

"A. Well, I called first at Mr. Stevens' office and I told him that having finally received the general counsel of the Washington Title Insurgeneral counsel of the Washington Title Insurance Company's refusal to insure that title I presumed he would be now ready to return my money, and asked him if he hadn't changed his mind and he said, 'Not a bit.' 'whereupon I said, 'I am going down and see if I can see Mr. Plummer. I will see if he has not changed his towards returning my money;' expected fully that after the Washington Title Insurance Company—after they had acceded to my belief. then that after the Washington Title Insurance Company—after they had acceded to my belief, then that they would certainly return that \$500. Couldn't see upon what grounds they could refuse. Q. You went to see Mr. Plummer? What conversation did you have with Mr. Plummer? A. Well, Mr. Plummer, he still refused to return it on the ground that the title was good. Ignored it. \* \* \* Q. When was the next conversation you had with Mr. Stevens or with Mr. Plummer in regard to this matter? A. After July 19th. Well, I had no conversations whatever after that with either of them regarding this land. Q. With either one of them? A. No, sir. \* \* \* A. Well. I would like to tell you one more thing regarding my conversation you one more thing regarding my conversation with Mr. Plummer. I had forgotten it. I don't remember, but Mr. Plummer, he said— I said, 'Mr. Plummer, regarding this matter of this 80 acres, I have considered your contract rescinded ever since I first notified you. That is a dead letter, except for me to bring suit for my money, unless you return it to me."

Each party undertook to fortify his position by a writing. On July 20th respondent wrote Mr. Plummer as follows:

"Dear Sir: I agreed to accept the title offered me on west ½ S. E. ¼, Sec. 25—24—4 E., provided the Washington Title Insurance Company would insure the same, and it has been finally and firmly rejected after a thorough examination by the company's expert title lawyers, and finally going to its general counsels of I amination by the company's expert title lawyers, and finally going to its general counsel, so I went over to see you yesterday, trusting I would be able to end the matter by getting the return of my earnest money. I was unsuccessful in this, and must notify you now that unless this money, with interest from date of deposit, is sent me at once, I shall have suit instituted. Will you kindly let me have a reply by next mail? Yours truly. Frank W. Flood."

Mr. Plummer replied:

"Dear Sir: I am in receipt of your letter 20th instant. As previously explained to you, I take the position that we have offered you good title to the W. ½ of S. E. ¼, Sec. 25—24—4 E., and stand ready to convey the land by good and sufficient deed, free and clear of incumbrance, as provided in the receipt for \$500 paid on account of purchase price thereof, dated February 4, 1916. To comply with the request of

your attorney and upon his assurance to me that you would complete the purchase upon securing a deed from Adolph Eduard von Marcard. I wrote the Deutsche Bank, Berlin, May 31st, inclosing for signature of Adolph Eduard von Marcard a form of quitclaim deed to the property, and I expect to receive same in course of time, though as you know, the mails between the United States and Germany are interfered with and delayed. I desire to repeat that I do not consider that the quitclaim deed from Mr. Von Marcard is necessary to perfect title; I take the position that the title which we have submitted to you is good, and therefore must de-cline to return the earnest money paid, \$500. The agreement of February 4, 1916, called for the payment of the balance of purchase price within 60 days after you were notified in writing of the acceptance of the offer and delivery of abstract of title, which notice of acceptance was given March 20th and abstract was delivered March 27th. Upon your attorney's assurance that you would close the purchase immediately upon the delivery of the quitclein dead distaly upon the delivery of the quitclein dead ance that you would close the purchase immediately upon the delivery of the quitclaim deed from Mr. Von Marcard, I extended the time for payment of the balance of purchase price 60 days, which extended time will expire July 27th, but as I am leaving next Sunday for a trip to Alaska and do not expect to return until August 10th Julian as a constant of the sunday to the sunday th Alaska and do not expect to return until August 10th, I will, as suggested in our conversation of 19th instant, grant further extension to August 15th, unless the quitclaim deed is received in the meantime, in which event I will expect you to close the transaction promptly. I am leaving the matter in the hands of Mr. C. E. Stevens during my absence, with authority to complete same. "Yours truly,

G. H. Plummer."

Respondent's attorney denies that he ever agreed to waive other objections and accept the title if supported by a quitclaim deed from Adolph Eduard von Marcard.

Mr. Plummer testified to his understanding as follows:

"A. Mr. West called me on the telephone from his office in Seattle, and stated that in fact that the title was not satisfactory to them. to his client, and he demanded a return of the earnest money. I told Mr. West that we did not take his view of the title; that we considered it marketable, but that I would make an effort to secure the three deeds that he claimed en it marketable, but that I would make an effort to secure the three deeds that he claimed were necessary to perfect the title; one from Dr. Fester, another from Adolph von Marcard, and a third from Mr. Schlossmacher. \* \* \* However, if there was any expense attached to it I would expect them to stand that expense. \* \* \* I told Mr. West also that inasmuch as I told Mr. West also that inasmuch as the option expired about that time—I have forgotten the exact date, probably the 26th or 27th -that we would not take snap judgment on them and declare the money forfeited, but that I would extend the time, and I then extended the time 60 days, extended the option 60 days, the time to days, extended the option of days, thinking that we might be able to get the deeds within that time. Q. What did he say as to that, as to whether it was satisfactory or not? A. Mr. West did not express any disapproval of that. I don't recall that he expressed any disapproval of that course at all, and as a matter of fact assuming that that course was set. ter of fact, assuming that that course was satisfactory to Mr. Flood and his attorney, two or three days later than that I sent to Germany for the deed."

But we think this is not sufficiently definite to make a contract, granting, but without deciding, that an attorney would have a right to contract for his client for an extension of time upon an option contract for the purchase of land.

Late in December, 1916, Mr. Plummer received the deeds from Germany and notified respondent that he was ready, able, and willing to deliver them to respondent. Appellants have maintained throughout that: (a) The title was good: and (b) that respondent was granted an extension of time and that the deeds were delivered within a reasonable time.

[1] We hold that the testimony is not sufficient to warrant a holding that there was an extension of time granted to respondent. or, if were to be so held, the extension by agreement expired 60 days after June 8th. and any other extension was immaterial and not binding on the respondent. He was not bound to accept an extension, and his letter of July 20th negatives an acceptance of a further grant. So that the question of procuring the deeds from Germany within a reasonable time is not a question which can in any sense be held to control respondent's rights.

[2] On the other proposition we are convinced that the title was not free from reasonable doubt under the rule announced in Moore v. Elliott, 76 Wash. 520, 136 Pac. 849. That it was not such a title as a buyer would take when exercising ordinary prudence in the conduct of his affairs is sufficiently evidenced by the refusal of the title insurance company to guarantee it, and the refusal of its general counsel, whose learning and skill in the law cannot be questioned, to approve the title. Neither of these had any interest in the main transaction, and we can conceive of no higher evidence of a want of marketability of title as that term has been construed by this court than these opinions. Few titles are good to a mathematical certainty, nor does the law demand that they shall be so, but the value of a title on a resale is an element to be considered.

[3] "A purchaser is entitled to a merchantable title—a marketable title—such a one as will bring in the market as high a price with. as without the objection." Parmly v. Head, 33 Ill. App. 134.

[4] While the law will not countenance the idle scruples of one interested in withholding the purchase money (Brown v. Witter, 10 Ohio 143) it will not compel one who seems to be acting in good faith to accept a title if there be reasonable probability of a lawsuit to convince a purchaser on resale. or to quiet the title (Moore v. Elliott, supra).

[5] In the case at bar the objection seems to have been founded in reason. There was a question of descent to be decided by applying the law of Germany or the law of this state. Which law would govern was an open question, and that the objections of respondent were not made idly for the purpose of withholding the purchase price is sufficiently evidenced by his offer made as late as June 8, This action was begun in September, 1916. | 1916, to take the title and pay the full price if a company engaged in the business would guarantee it.

We find no error. Affirmed.

ELLIS, C. J., and HOLCOMB, PARKER. and MOUNT, JJ., concur.

ASKEY v. NEW YORK LIFE INS. CO. (No. 14479.)

(Supreme Court of Washington. April 30, 1918.)

1. Insurance \$== 550 - Death Certificate -EVIDENCE.

In an action on a life insurance policy, the death certificate is not proof of any disease suffered by the insured prior to death, and is conclusive only of the fact of the death.

2. INSURANCE \$\infty\$688(7)—ACTION ON POLICY—MISREPRESENTATION—QUESTIONS OF FACT.

In an action on a life insurance policy, wherein it was claimed that the assured represented in it was claimed that the assured represented that he had suffered from pneumonia, when in fact it was tuberculosis, the question as to his intent to deceive was on conflicting evidence for the jury, in view of Rem. Code 1915, § 6059—34, providing that no oral or written misrepresentation by the insured shall be deemed material or avoid the policy, unless made with intent to deceive.

3. Evidence = 474(3) - Opinion - Bodily CONDITION.

In an action on a life insurance policy, it was not error to admit on question of intentional misrepresentations the testimony of the wife and mother-in-law of the insured as to his physical condition, and the absence of indications of tubercular disease; nonexpert opinion evidence of the physical condition and appearance of an individual being generally admissible.

4. APPEAL AND ERROR \$\insuperscript{ sion or evidence by the beneficiary that the at-tending physician had never imparted to her the information that insured was tubercular was harmless error, being negative evidence neither proving nor disproving any of the issues.

5. Insurance \$\iff=655(2)\to Action on Policy-EVIDENCE.

In an action on a life insurance policy, wherein it was claimed that assured failed to disclose that he had suffered from tuberculosis, it was error to admit on the question of good faith declarations of the insured tending to show that he believed he was suffering from pneu-

6. INSURANCE \$==655(2)-ACCIDENT POLICY-EVIDENCE.

In an action on a life insurance policy, defended on the ground of false representations in the application, evidence as to the character of insured for truth and veracity was properly admitted; fraud having been imputed to decedent at the time of the trial.

APPEAL AND ERROR \$\infty\$=1051(1)\to Review-Harmless Error\to Admission of Evidence.

In an action on a life insurance policy, admission of evidence by the wife of insured, who was the beneficiary, that insured had told her that the attending physician said he had stomach trouble was not prejudicial, where it was otherwise proven that he did suffer from such ail-

Department 2. Appeal from Superior Court, King County; John S. Jurey, Judge. Action by Amy L. Askey against the New York Life Insurance Company on a life insurance policy. Judgment for plaintiff, and defendant appeals. Affirmed.

H. T. Granger, of Seattle, and Jas. H. Mc-Intosh of New York City, for appellant. Bausman, Oldham & Goodale, of Seattle, for respondent.

PER CURIAM. The respondent, as beneficlary in a policy of insurance issued by the appellant upon the life of her husband. George M. Askey, who died on August 9. 1916, brought suit to recover thereon. The appellant set up as an affirmative defense that the insured made application for insurance on July 30, 1915, and in response to the question, "Have you ever suffered from any ailment or disease of the heart or lungs?" answered that in 1911 he suffered a severe attack of pneumonia for several weeks from which he had recovered, the only physician consulted by him being Dr. Klamke, of Port Gamble, Wash. To the questions whether he had ever suffered from "disease of the stomach or intestines, liver, kidneys or bladder" and "Have you consulted a physician for any ailment or disease not included in your above answers?" his response was "No." The answer to the complaint then sets forth that:

"The defendant further alleges: That the said statements in said application were false, and were known by the said George M. Askey to be false at the time the said statements were to be false at the time the said statements were made. That they were material, and that the same were made for the purpose of deceiving and defrauding this defendant in this: That the said Askey stated that he had suffered from the disease of pneumonia in 1911, and that he had not consulted a physician for any ailment or disease not included in said answers, whereas in truth and in fact the said George M. Askey, suffered in 1911 and 1912 from the disease of tuberculosis and consulted and was treated by tuberculosis, and consulted and was treated by one Dr. Klamke for tuberculosis at that time. That had the defendant known that said statements were false it would not have issued the policy sued upon in this cause. That it relied upon said statements and believed the same to be true, and was induced thereby to execute and deliver the said policy of life insurance.

The cause was tried to a jury, which returned a verdict for the beneficiary for the amount of the policy upon which judgment was rendered in favor of the respondent. The insurance company appeals, assigning as errors the insufficiency of the evidence and the improper admission of evidence.

Our statute governing contracts of insurance provides that:

"No oral or written misrepresentation or warranty made in the negotiation of a contract or policy of insurance, by the assured or in his be-half, shall be deemed material or defeat or avoid the policy or prevent its attaching, unless such misrepresentation or warranty is made with the intent to deceive." Rem. Code, § 6059—34.

In the recent case of Brigham v. Mutual cate was probably true. Such statement Life Ins. Co., 95 Wash. 196, 163 Pac. 380, we held that under this statute the falsity of representations in the application for insurance would not defeat the policy, unless it should be further found that they were made with intent to deceive the insurance company. The affirmative defense set up in this case imposed the burden of establishing such fraudulent intent on the appellant. The evidence shows that the insured in the latter part of the year 1911, while residing at Port Gamble, Wash., was suffering from some ailment, which he represented in his application for insurance as being pneumonia. On the advice of his attending physician, Dr. Klamke, he went to California in January, 1912. He obtained employment there, and remained for about one year and a half, returning to Port Gamble, where he intermarried with the respondent in July, 1913. He made application to appellant for insurance on July 30, 1915, being at that date 26 years of age. A careful physical examination of him was made by the appellant's medical examiner, who found no indications of tubercular trouble. An analysis of his urine made at the time showed indications of albuminuria, and on that account the appellant would not issue a policy unless the applicant agreed that his age for premium purposes be advanced from 26 to 39 years, and that he would pay the increased premium exacted for the latter age. The policy as amended to this effect was issued on September 27, 1915. The insured began to have trouble with his stomach and intestines in February, 1916, and had difficulty it: retaining his food. In the latter part of May, 1916, he was operated on for abscess of the appendix. He never regained his health, and died in less than three months after the operation. Among the proofs of death presented to the appellant was the affidavit of Dr. Klamke, in which he stated that he treated the insured for "tuberculosis of the lungs, first time in 1912 (1911); sent him to California": that the immediate cause of his death was "general tuberculosis, lungs, larynx, appendix," for which the insured had consulted him "4 years ago." This affidavit of Dr. Klamke is the only evidence tending to show that the insured had suffered from pulmonary trouble, other than pneumonia. If in truth the insured had tuberculosis, there is no evidence showing that he had knowledge of the fact, other than the natural inference that one really suffering from such a disease would probably know it. Dr. Klamke was not called as a witness, and there is no proof that he ever informed his patient that he was suffering with tuberculosis.

[1] The death certificate filed by the respondent was not proof of any disease suffered by the insured 4 or 5 years prior to death. It constituted an admission by the respondent that the statement in the death certifi- insured that he was suffering at the time

constituted prima facie evidence which was subject to refutation; and, even allowing it full force to establish the physical condition of the insured, it was not proof of the insured's intent to deceive the company. weight of authority is that the proof of death of an insured is conclusive only of the fact of death, and is merely prima facie evidence of any statements contained as to the past health of the insured. Spencer v. Citizens' Mut. Life Ins. Co., 3 Misc. Rep. 458, 23 N. Y. Supp. 179; John Hancock Mut. Life Ins. Co. v. Dick, 117 Mich. 518, 76 N. W. 9, 44 L. R. A. 846; Fidelity Life Ass'n v. Ficklin, 74 Md. 172, 21 Atl. 680, 23 Atl. 197; May on Insurance (4th Ed.) \$\ 460, 465; Insurance Co. v. Newton, 22 Wall. 32, 22 L. Ed. 793; Insurance Co. v. Higginbotham, 95 U. S. 380, 390, 24 L. Ed. 499. See, also, Boylan v. Prudential Ins. Co., 18 Misc. Rep. 444, 42 N. Y. Supp. 52, where the testimony of the mother of the assured contradicting the physician's certificate was held admissible as proof of the veracity of health statements in the application for insurance and sufficient to raise an issue upon that fact.

[2] In rebuttal of the inference of George M. Askey's knowledge of his condition raised by the affidavit of Dr. Klamke there is the testimony of the physician of the insurance company, who made a thorough examination of the insured and found no indications of tubercular trouble. There is also the testimony of the soliciting agent of the insurance company that the applicant had no appearance of consumptive disease and was regarded by him as a good risk. The wife and mother-in-law of the insured also testified that he had no indications of pulmonary trouble. In view of the evidence it is apparent that the appellant failed to conclusively establish intent to deceive on the part of the insured. Viewing the evidence in the light most favorable to the appellant, it must be held that it presented such a conflict as to raise a question for the jury.

[3] The appellant contends that it was error on the part of the court to admit the testimony of the wife and mother-in-law of the insured as to his physical condition and the absence of indications of tubercular disease. Nonexpert opinion evidence of the physical condition and appearance of an individual is generally held to be admissible. Jones, Blue Book of Evidence, § 360; Ferguson v. Davis Co., 57 Iowa, 601, 10 N. W. 906; Billings v. Metropolitan Life Ins. Co., 70 Vt. 477, 41 Atl. 516.

We have held such evidence competent upon the issue of intent in the case of Goertz v. Continental Life Ins. and Inv. Co., 95 Wash. 358, 163 Pac. 938, where the testimony of acquaintances and associates who had adequate opportunity for observation was admitted for the purpose of rebutting any presumption of knowledge on the part of the

with the disease from which he afterward fering with pneumonia, such testimony should died.

[4] Objection is also urged against the admissibility of the testimony by the respondent to the effect that Dr. Klamke, at no time prior to her marriage nor the birth of her children, ever imparted to her information that the insured was tubercular. We think such evidence was inadmissible, but constituted nothing more than harmless error, insufficient in the light of the other facts in the case to warrant the granting of a new trial. It was negative evidence of the flimsiest character, neither proving nor disproving any of the issues.

[5] The appellant contends that the court committed prejudicial error in allowing the respondent to testify that the insured told her, just prior to leaving for California on account of his health, that he had pneumonia: that this evidence was clearly hearsay, and lacks the elements of res gestæ. respondent contends that, inasmuch as the insured was charged with making false representations as to his physical condition, the declaration was admissible in order to show what he thought was the trouble with him, and hence was evidence addressed to the question of his good faith, and tending to show want of knowledge on his part that he was afflicted with any tubercular disease. The authorities are somewhat at variance upon the question of the admissibility of prior declarations of an insured in an action by his beneficiary, and fine distinctions are made in the admission or rejection of such evidence, each case often being governed by its particular facts. In Bacon on Life and Accident Insurance (4th Ed.) \$ 636, it is said:

"\* \* In an action by the assignee or beneficiary of the policy, declarations and admissions of the assured made at a time prior to and remote from the application, and disconnected with any act or fact showing his condition of health, are incompetent for the purpose of contradicting the statements made in the application; but, if it appear otherwise than by the declarations of assured that such statements were untrue, then his prior declarations are admissible to show knowledge on his part of the falsity of such answers; and statements made by the assured shortly prior to his application concerning his health, in connection with facts exhibiting his then state of health, are probably admissible upon the question of the truthfulness of the answers made by him in such application."

While the last clause of the foregoing statement would seem to sustain the contention of respondent, the authorities cited as supporting it are addressed to declarations in contradiction of statements in the application for insurance. In the present case we are concerned with declarations of the insured confirming his application, and testified to by the beneficiary as made directly with herself. They were made at a time when the decedent was not contemplating insurance and when he was suffering from disease. As evidence that the insured at that time was suf-

be closely scrutinized, coming as it does from the party in interest. But, bearing in mind that one of the issues is the good faith and lack of intent to deceive on the part of the insured, the question is, Should the evidence be admissible for that purpose? While the general rule is that a statement made by the insured in his application for insurance cannot be impeached by evidence of his prior declarations, it is fairly well settled that, where there is substantive evidence of the falsity of such statement, proof of prior declarations is admissible for the purpose of showing knowledge of such falsity. Dilleber v. Home Life Ins. Co., 69 N. Y. 256, 25 Am. Rep. 182; Rawson v. Mut. Life Ins. Co., 115 Wis. 641, 92 N. W. 378; Union Cent. Life Ins. Co. v. Pollard, 94 Va. 146, 26 S. E. 421, 36 L. R. A. 271, 64 Am. St. Rep. 715; Haughton v. Ætna Life Ins. Co., 165 Ind. 32, 73 N. E. 592, 74 N. E. 613.

If such declarations are admissible for the purpose of showing deceit, they ought, by parity of reasoning, to be admissible to show good faith. This principle is recognized in a Canadian decision, where an insured's declaration, prior to making an application for insurance, stating his age, was admitted in evidence for the purpose of showing good faith in the misstatement of his age in the application. Dillon v. Mut. Res. Fund Life Ass'n, 5 Ont. L. R. 434.

The question is one of first impression in this court, and seems to have seldom arisen elsewhere. The rule is stated in 4 Chamberlayne, Modern Law of Evidence, § 2683, as follows:

"The nature of the issue in any particular case may render good or bad faith constituently relevant as component parts of the right or liability asserted in the action. If so, not being subject to direct observation, these phases of the mind must, like other psychological facts, be established circumstantially. Among facts which may properly be employed in such a connection are unsworn statements."

Section 2652 states the rule in other language as follows:

"The existence of good faith or its opposite may be proved, in part at least, by extrajudicial statements whenever this fact is relevant. The only effective limits which can be set to the scope of such declarations are those prescribed by probative or deliberative relevancy."

Jones, Blue Book of Evidence, after discussing the relevancy of collateral facts to establish bad faith, adds in section 146:

"But, of course, on the same principle, facts apparently collateral may be proved, if they show good faith or prudence or the knowledge or information on which a person has acted when such fact is in issue."

See, also, Knights of Honor v. Dickson, 102 Tenn. 255, 52 S. W. 862, where it is said:

"Falsehood may be predicated of a misstatement of fact, but not of a mistaken opinion as to whether a man has a disease when it is latent and it can only be a matter of opinion. As to what a person may have died of may be largely, if not altogether, a matter of opinion, about which attending physicians often disagree,

and as to such matters their statement made can only be treated as representations and not as warranties; and, if made in good faith and on the best information had or obtainable, they will not vitiate a policy if incorrect and not willfully untrue."

This rule is in line with that announced in the cases holding evidence of one's intent in doing an act may be shown by his prior declarations. See Mutual Life Ins. Co. v. Hillmon, 145 U. S. 285, 12 Sup. Ct. 909, 36 L. Ed. 706. Inasmuch as our statute makes the insured's intent to deceive the controlling question in avoiding a policy because of false statements as to health made to the insurer, the question of good faith is a very material one, and we must hold that prior declarations of the insured which tend to show good faith are admissible in evidence.

[6] The appellant contends that the court erred in admitting evidence as to the character of the insured as to truth and veracity. One of the issues was that the insured was guilty of fraud upon the insurance company in making false representations as to his health. An exception to the general rule against this character of testimony in civil actions is allowed where fraud is imputed against a man deceased at the time of trial. Bowerman v. Bowerman, 76 Hun, 46, 27 N. Y. Supp. 579.

This court has applied the rule under such circumstances in the case of Rasmusson v. North Coast Ins. Co., 83 Wash. 569, 145 Pac. 610, L. R. A. 1915C, 1179, declaring such evidence admissible where the defense was that the insured had sworn falsely in making proofs of loss upon a fire insurance policy, and by reason of his death prior to trial the insured was unable to testify in denial of the charge. We think there was no error in the admission of character evidence under the circumstances of this case.

[7] A further contention is made that the court erred in permitting the respondent to testify that her husband told her in February, 1916, that Dr. Klamke informed him he had stomach trouble. The objection is made that this testimony was incompetent, irrelevant, and immaterial, and that under the statute (Rem. Code, § 1214) a wife could not testify to communications made to her by her husband during marriage. Whether or not such testimony was improperly admitted on any ground, its admission was not prejudicial, since there was evidence that the deceased at the period testified to did have trouble with his stomach and appendix, undergoing an operation upon the latter organ, and that he continued in a debilitated condition until his death a few months later. The nature of the physical trouble prior to the death of the insured having been proved, any error in the admission of testimony of conversation addressed to that fact was harm-

death following an operation for appendicitis was to rebut the prima facie evidence contained in the proof of death, and raise a conflict in the evidence for the determination of the jury.

A careful examination of the record leads us to the conclusion that no prejudicial error occurred in the trial.

The judgment is affirmed.

STATE ex rel. TACOMA RY. & POWER CO. v. PUBLIC SERVICE COMMISSION OF WASHINGTON et al. (No. 14706.)

(Supreme Court of Washington. April 27, 1918.)

1. STREET RAILBOADS &=651/4, New, vol. 16
Key-No. Series — REGULATION BY PUBLIC SERVICE COMMISSION.

Under Public Service Commission Law (Laws 1911, p. 571) § 53, giving the commission power to regulate rates and service, where the income of a street railroad, operating under a franchise granted under the Enabling Act (Rem. Code 1915, § 7507), prior to the Public Service Commission Law, is not sufficient to pay a reasonable return and provide an adequate and sufficient service, the commission has no power to relieve the street railroad from its franchise provisions, requiring the company to pave between its tracks, and one foot on either side, to contribute to the cost of bridges, to pay a certain percentage of its gross earnings to the city, and to permit officers or employés of the city free transportation.

2. Carbiers ← 12(4) — Street Car Fabes — Regulation by Public Service Commission.

Public Service Commission Law, § 53, providing that, if rates or fares are insufficient to yield a reasonable compensation, the commission shall determine and order reasonable or sufficient rates or fares, and section 9, providing that charges shall be reasonable and sufficient, and requiring adequate and sufficient service, do not authorize the commission to increase the fares which may be charged by a street railroad within the city limits to more than five cents, although the company's income is not sufficient to pay a reasonable return and provide an adequate and sufficient service, in view of section 25, expressly providing that no street railroad shall charge more than five cents for one continuous ride within city limits, and section 112, providing that the act shall be construed as a continuation of the prior railroad commission law.

8. STATUTES \$\infty 207\to Construction\to Inconsistent Sections.

Different sections or provisions of the same statute should be so construed as to harmonize and give effect to each; but, if there is an irreconcilable conflict, the subsequent one prevails.

4. EVIDENCE \$==18 -JUDICIAL NOTICE-MAX-IMUM STREET CAR FARE.

It is a matter of common knowledge that at least up to the time the Public Service Commission Act was passed the economic judgment of society was that the maximum fare to be charged by a street railroad company for one continuous ride within the corporate limits of a city was five cents.

of the insured having been proved, any in the admission of testimony of conton addressed to that fact was harm-left feet of this evidence showing ed to the Public Service Commission of the

State of Washington, E. F. Blaine, Chair-, The franchise provisions complained of are man, Arthur A. Lewis and Frank R. Spin- those requiring the street car company, the ning, Commissioners. Writ denied.

James B. Howe, of Seattle, and F. D. Oakley, of Tacoma, for relator. W. V. Tanner, Atty. Gen., Hance H. Cleland, Asst. Atty. Gen., U. E. Harmon, Frank M. Carnahan, and Lyle & Henderson, all of Tacoma, Hugh M. Caldwell, of Seattle, D. W. Featherkile, of Bellingham, J. M. Geraghty, of Spokane, and Fitch, Jacobs & Arntson, of Tacoma, for respond-

MAIN, J. This is an original application in this court for a writ of mandate directed the Public Service Commission. petitioner, the Tacoma Railway & Power Company, is a corporation, and is now, and has been for a number of years last past. engaged in operating a street railway system in the city of Tacoma under certain franchises granted by that city. In May, 1917, J. E. Bloomberg and others filed a complaint with the Public Service Commission claiming that the service given by the street car company upon certain streets was inadequate and not sufficient, and asking that the company be required to give an adequate and sufficient service. This complaint was answered by the company, and a hearing was had before the commission. After the hearing the commission found that the service complained of was inadequate and insufficient, but declined to order that the service be improved, because the income of the company was not sufficient to pay a reasonable return on the value of the property devoted to the public service unless the company could be relieved of certain franchise provisions or be permitted to charge a fare of more than five cents for one continuous ride within the corporate limits of the city. The majority of the commission was of the opinion that it had no power either to relieve from the franchise provisions complained of, or to authorize a fare of more than five cents per passenger within the corporate limits of the city. The commission thereupon declined to order an adequate and sufficient service and dismissed the cause. For the purpose of this case the findings of the commission must be accepted as true, since the evidence upon which the findings are based is not before us.

Whether the writ prayed for should be issued depends upon whether the Public Service Commission, under the authority conferred upon it by the Public Service Commission Law, has the right to relieve from franchise provisions or direct that a fare greater than five cents may be charged. If it has such power, the action of the commission in dismissing the complaint for want of jurisdiction was erroneous, and the writ prayed for should issue. If the commission has not been given power by the Public Service Commission Law to either modify franchise provision Law to either modify franchise provisions or increase the fare to more than five cents, the writ prayed for should be denied. | 7507, subd. 7 (P. C. 77, § 83), expressly emsions or increase the fare to more than five

petitioner, to pave between its tracks and one foot on either side, to contribute to the costs of bridges, to pay a certain percentage of its gross earnings to the city, and to permit certain officers or employes of the city free transportation. The franchises containing these provisions were all granted prior to the passage of the Public Service Commission Law.

[1] The first question is whether the Public Service Commission is authorized by the statute to relieve from the franchise provisions complained of when the income of the company is not sufficient to pay a reasonable return upon the value of the property devoted to the public service and provide an adequate and sufficient service. In 1890 the Legislature passed what is commonly called the Enabling Act, relating to cities. Section 5, subd. 9, of this act (Rem. Code, § 7507) contains the following grant of power:

"To authorize or prohibit the locating and constructing of any railroad or street railroad in any street, alley, or public place in such city, and to prescribe the terms and conditions upon which any such railroad or street railroad shall be located or constructed. \* \* ""

In pursuance of the authority granted by this section, the city of Tacoma granted franchises and placed the conditions therein above referred to. With these conditions the franchises were accepted.

As we understand the argument, it is not claimed that these franchise provisions are illegal or void, or that the city did not have the power to impose such conditions when it granted the franchises. It is claimed, however, that, this being a matter within the police power, the state had a right in the exercise of that power by a subsequent statute to confer upon the Public Service Commission the right to abrogate franchise provisions, and did in fact in the Public Service Commission Law confer that power upon the Public Service Commission. It will be noted that the section of the statute quoted expressly empowers cities of the first class to regulate and control the use of its streets and to authorize or prohibit the use of its streets, and to prescribe the "terms and conditions upon which any such railroad or street railroad shall be located or constructed." Here is a clear and specific grant by the state to the city to impose terms and conditions upon which any of its streets may be used by a street railroad. In Tacoma R. & Power Co. v. Tacoma, 79 Wash. 508, 140 Pac. 565, it was held that by this statute the Legislature intended to, and did, vest the city with the whole of the state's police power touching the subject-matter; the subject-matter being the right to impose terms and conditions upon a railroad or street railroad as a condition precedent to the location or construction of any such railroad or street railroad upon a

any of the streets, 'and to prescribe the terms and conditions upon which the same may be used, and to regulate the use thereof.' Broader language could hardly be used. It is obvious that the Legislature intended to, and did, vest the city with the whole of the state's police power touching the subject-matter"—citing authori-

To the same effect, see State ex rel. Tacoma v. Sunset Tel. & Tel. Co., 86 Wash. 309, 150 Pac. 427, L. R. A. 1917B, 1178.

In Cleveland v. Cleveland City R. Co., 194 U. S. 517, 24 Sup. Ct. 756, 48 L. Ed. 1102, the court had occasion to construe a section of the Revised Statutes of the state of Ohio which authorized cities "to fix the terms and conditions upon which such \* \* railways may be constructed, operated, extended, and consolidated," and it was there held that this statute was an express authorization to the city to impose conditions when granting a franchise.

The question then arises whether the Public Service Commission Law either by its terms or by necessary implication attempted to confer power upon the Public Service Commission to modify or abrogate franchise provisions which had previously been imposed by the city when granting the franchises under the express authorization of the Legislature. Section 53 of the Public Service Commission Law (page 571, c. 117, Laws of 1911) is as follows:

"Whenever the commission shall find, after a hearing had upon its own motion or upon complaint, as herein provided, that the rates, fares or charges demanded, exacted, charged or collected by any common carrier for the transportation of persons or property within the state or in connection therewith, or that the regulations practices of such common carrier affecting such rates are unjust, unreasonable, unjustly discriminatory, or unduly preferential, or in any wise in violation of the provisions of law, or that such rates, fares or charges are insufficient to yield a reasonable compensation for the service rendered, the commission shall determine

the just, reasonable or sufficient rates, fares or charges, regulations or practices to be thereafter observed and enforced and shall fix the same by order as hereinafter provided.

"Whenever the commission shall find, after such hearing, that the rules, regulations, practices, equipment, appliances, facilities or service of any such common carrier in respect to the transportation of persons or property are untransportation of persons or property are unjust, unreasonable, unsafe, improper, inadequate or insufficient, the commission shall determine the just, reasonable, safe, adequate, sufficient and proper rules, regulations, practices, equipment, appliances, facilities or service to be observed, furnished, constructed or enforced and be used in the transportation of persons and property by rules company corrier and for the property by such common carrier, and fix the same by its order or rule as hereinafter provided."

If the law confers power upon the commission to modify or abrogate franchise provisions, it must be found in this section. A critical examination of the language used will disclose that there is there conferred upon the commission the power to deal with

powers cities of the first class to regulate and control the use of streets, and to 'authorize or prohibit' the use of electricity at, in, or upon the commission rower to deal with the subthe commission power to deal with the subject of rates and service. There is nothing in this section which either expressly or by necessary implication confers power upon the Public Service Commission to deal with the question of franchises or to modify any of the terms or conditions that may have previously been imposed therein. The law will be searched in vain for any provision which confers such power upon the commission. The right to deal with the question of rates and service is an entirely different matter from the right to grant franchises or abrogate the provisions thereof. franchises in question having been granted under the clear and express authority of a statute enacted long prior to the Public Service Commission Law, it seems plain that it was not the intent of the latter law to grant power to the commission to abrogate franchise provisions. Had the Legislature desired to confer this power upon the commission, it would have been easy to have said so in such language as would have made the intent plain. The history of the legislation, however, is such as to indicate an affirmative intention on the part of the Legislature not to confer such power upon the Public Service Commission.

The first bill introduced in the Legislature in 1911 for the purpose of extending the scope of the previous Railroad Commission Law was Senate Bill No. 102. This contained a provision which conferred upon the commission "power and authority to grant, modify, revoke, and generally regulate the the terms and provisions of such permit, license or franchise. \* \* \* " Neither this provision nor any similar provision appears in the law which was enacted by the Legislature and which is known as the Public Service Commission Law above referred to. Had the Legislature intended that the commission should have power to deal with franchises in cities or abrogate provisions of franchises which had previously been amended by the cities, there certainly would have been embodied in the law as passed some provision relating to that subject-matter. As already stated, the subject-matter of granting franchises and imposing conditions therein and the subjectmatter of rates and service are entirely different. Whether the Legislature has the power to confer upon the Public Service Commission the right to abrogate the conditions in franchises to street railroad companies which had been granted prior to the passage of the Public Service Commission Law is a question not before us at this time, and we neither express nor intimate any opinion thereon.

[2] The other question to be determined upon this application is: Does the Public the questions of safety, efficiency, rates, Service Commission have the power to in-

crease the fare which the petitioner may charge within the city limits of Tacoma to more than five cents, since, as found by the commission, the income of the petitioner is not sufficient to pay a reasonable return upon the value of the property devoted to the public service and provide an adequate and sufficient service? This question, like the one previously considered, involves a consideration of the power conferred upon the commission by the Public Service Commission Law. In Laws of 1905, c. 81, the Legislature passed what was known as the Railroad Commission Act. This law applied to railroads and express companies. It did not include street railroad companies. In 1907 the Legislature passed an act (chapter 226, Laws of 1907) amending the previous act relating to railroads and express companies. By this amended act street railroad companies were not included within its pro-In 1911 the Legislature passed visions. what is known as the Public Service Commission Law (chapter 117, Laws of 1911). This law was much more comprehensive than the previous statute, and brought within its provisions public utilities which had not been included within the earlier enactments. among them street railroad companies. Section 9 of this latter act provides, among other things, that all charges for any service rendered in the transportation of persons or property by any common carrier "shall be just, fair, reasonable and sufficient," and also that every common carrier shall construct, furnish, maintain, and provide safe, "adequate and sufficient service" to enable it to expeditiously and safely transport all persons offered or received by it for transportation. Section 25 of the act is as follows:

"No street railroad company shall charge, demand or collect more than five cents for one continuous ride within the corporate limits of any city or town. \* \* \* "

As already pointed out, section 53, above quoted, is the one which confers power upon the commission to regulate service and rates,

Section 112, which is the last section of the act, provides that, in so far as it embraces the same subject-matter, the act shall be construed as a continuation of chapter 81 of the Laws of 1905 (the Railroad Commission Law) and the acts amendatory thereof and supplemental thereto.

[3,4] The petitioner contends that, since its income is not sufficient to pay a reasonable return upon the value of the property used in the public service and furnish an adequate and sufficient service, the commission has the power under section 53 to increase the rate to more than five cents, even though that limitation is provided in section 25 of the statute itself, a portion of which is above quoted. It is a familiar canon of construction that the different sections or provisions of the same statute should be so constructed as to harmonize and give effect to

each: but if there is an irreconcilable conflict the subsequent one prevails. The argument here is that there is an irreconcilable conflict between section 25, which limits the fare to five cents and section 53 which confers upon the commission power to deal with the question of rates and service. If section 53 abrogates section 25 of the same act, it must be by implication only, as it is not expressly so done. It is also a well-settled rule of construction that repeals by implication are not favored. It is true by section 9 of the act there is imposed upon the carrier the duty to provide adequate and sufficient service. The various sections referred to should be harmonized, if possible, rather than holding that one section of the act was intended to repeal by implication a prior section. It is a matter of common knowledge that at least up to the time this statute was passed the economic judgment of society was that the maximum fare to be charged by a street railroad company for one continuous ride within the corporate limits of a city was five cents. It is also a fact generally known, but possibly one of which the court would not be justified in taking judicial knowledge, that most all street railroad franchises contain such a limitation. When the act of 1911 was passed, as already stated, street railroad companies had not been subject to regulation by the laws passed prior to that time. That act extended the previous Railroad Commission Act to include street railroad companies and other public utilities, and at the same time embodied in section 25 an express mandate of the Legislature that no street railroad company should charge, demand, or collect more than five cents for one continuous ride within the corporate limits of any city or town. It was evidently not the thought of the Legislature that by section 53 there was conferred upon the Public Service Commission power to abrogate this express declaration. The commission undoubtedly has the power to regulate rates, so long as it does not exceed the limit of five cents, and to require an adequate and sufficient service within this limitation, having due regard to the right of the company to earn a reasonable return upon the value of the property devoted to the public use. Giving the statute such a construction harmonizes its various provisions and, as we think, declares the plain intent of the Legislature. The case of State ex rel. Great N. R. Co. v. R. R. Com., 52 Wash. 33, 100 Pac. 184, does not authorize or direct a different conclusion. case it was held that the maximum rate acts passed by the Legislatures of 1893 and 1897 were repealed by necessary implication by the subsequent Railroad Commission Act passed in 1905 and the amendatory act of 1907. There the court was evidently of the opinion that the later act superseded all

prised the sole system of legislation on the subject of rates. But the situation as it appeared in that case is not the same as in the present case. Here, as has been pointed out, when the street railroads were first made subject to the jurisdiction of the Public Service Commission, there was an express provision in the same act which provided that no street railroad company should charge more than five cents. It cannot therefore be held that it was the intention of the Legislature, by continuing in section 53 substantially the same provisions that had been embodied in the prior law relating to railroad and express companies and making such provisions applicable to all public utilities brought within the provisions of the law, to thereby grant to the Public Service Commission the right to fix a rate in excess of five cents and disregard the provision in section 25 limiting the rate to that sum. The Missouri cases (State ex rel. Missouri Southern R. Co. v. Public Service Commission of Missouri, 259 Mo. 704, 168 S. W. 1156, and State ex rel. Rhodes v. Public Service Commission of Missouri, 270 Mo. 547, 194 S. W. 287) are, in their facts, substantially like the case of State ex rel. Great N. R. Co. v. R. R. Com., supra,

The case of People ex rel. Ulster & D. R. Co. v. Public Service Commission of State of New York, Second Dist., 171 App. Div. 607, 156 N. Y. Supp. 1065, and 218 N. Y. 643, 112 N. E. 1071, is also distinguishable. In the state of New York there was what was known as the Railroad Law (Consol. Laws, c. 49), and also the Public Service Commission Law (Consol. Laws, c. 48). These were each revised and amended by the Legislature in 1910, the Railroad Law declaring that the power of railroad corporations was subject to the limitations and requirements of the Public Service Commission Law. section of the law relating to the question of rates of fare was also made subject to the provisions of the Public Service Commission While the court in that case considered the Railroad Law and the Public Service Commission Law as one, and held that the Public Service Commission was not bound by the maximum rates fixed in the Railroad Law, the provisions referred to in the Railroad Law making it subject to the provisions of the Public Service Commission Law do not make the case applicable to the facts here presented. Had the Legislature of this state intended that the Public Service Commission might authorize the charge by a street railroad company of a greater fare than five cents, it would have been easy, when fixing the five-cent maximum, as it appears in section 25, to have added the provision that a greater rate might be charged when authorized by the commission upon a proper showing of the necessity therefor. This is substantially what the New York statute does. It is there expressly provided in section 49 of the amendatory act of 1911 that, whenever the commission shall be of the opinion that the maximum rates collected or charged are insufficient to yield reasonable compensation for the service rendered and are unjust and unreasonable, the commission shall determine and prescribe the reasonable and just rates to be thereafter observed and enforced as the maximum to be charged.

It is doubtless true that the Public Service Commission Law is remedial legislation, and should be given a liberal construction for the purpose of carrying out the will of the Legislature, as was pointed out in State ex rel. R. R. Com. v. Great N. R. Co., 68 Wash. 257, 123 Pac. 8; but the rule authorizing a liberal construction does not mean that the court shall write conditions or provisos into the statute where the Legislature has placed none, or write out of the act a section which the Legislature has placed there, when the various sections of the statute are not in irreconcilable conflict and may be harmonized. If, as found by the commission, the revenue of the petitioner based upon a five-cent fare is not sufficient to provide an adequate and sufficient service, and at the same time afford a reasonable and proper income to the petitioner, the remedy is with the legislative branch of the government, and not with the court. It is the duty of the court to construe the law as it finds it.

The writ will be denied.

ELLIS, C. J., and MOUNT, PARKER, FULLERTON, HOLCOMB, WEBSTER, and CHADWICK, JJ., concur.

LANIGAN et al. v. MILES (LANDIS, Intervener). (No. 14362.)

(Supreme Court of Washington. May 4, 1918.) . Husband and Wife \$\ins133(1)\\_Separate Property\\_Degree of Proof.

If property acquired after marriage has stood in the name of the husband, and he has been the active agent in the care, management, and disposition thereof, his widow, or any one and disposition thereof, his widow, or any one claiming under her, will be put to a greater bur-den than a mere preponderance of testimony, where it is claimed that the property was the separate property of the wife.

2. HUSBAND AND WIFE & 262(1)—COMMUNITY PROPERTY—BURDEN OF PROOF.
Where a course of dealings between spouses running over a period of from 30 to 50 years is not only consistent with but confirmatory of the claim of the one who asserts a separate estate, the presumption that all property acquired after marriage is community property is over-come at least to the extent of putting the burden on the one who asserts the contrary.

3. Husband and Wife ===119(3) FROM THIRD PERSON TO WIFE-V. FROM THIRD PERSON TO WIFE—VALIDITY.
In view of Rem. Code 1915, § 5919, provid-

ing that husband and wife may contract with reference to the status or disposition of property, section 5925 providing that every married person may acquire, hold, enjoy, and dispose of property as if he or she were unmarried, section 8771 and section 8766 providing that bona

fide purchaser of property from the holder of girls working in and about the house. The the record title will be protected, and that one spouse may convey directly to the other by deed, purchased lot 3 block G of A A Denny's where a husband procures a deed in wife's name, and so conducts himself with reference thereto as to evidence no claim or interest therein, the deed should, as between the spouses, there being no creditor objecting, be considered as creating separate estate in wife.

4. HUSBAND AND WIFE \$== 274(1)--PROPERTY ACQUIRED DURING COVERTURE - RIGHTS OF HETES

Children and their issue claiming through husband would have no greater right in property acquired during marriage than he could have claimed during his lifetime.

5. HUSBAND AND WIFE 4=133(4)—SEPARATE PROPERTY OF WIFE — SUFFICIENCY OF EVI-DENCE.

That husband caused his wife's name to be inserted as grantee, directed the word "homeas grantee, directed the word home-stead" to be indorsed on margin of deed, and never thereafter had aught to do with property except to live there with his wife and family for a period of 22 years, held to warrant conclusion in conformity with wife's testimony that it was always understood between the husband and wife that he had no interest whatsoever in the property.

6. TRUSTS == 29-EXPRESS TRUSTS.

A deed executed by mother to son in full confidence that upon her death son would make proper adjustment of her relations to other children, but leaving such adjustment solely and exclusively to such son, did not evidence an express trust.

7. Trusts = 17, 18(1)—Express Trusts. An express trust must be evidenced in writ-

8. Trusts &= 44(3) — Express Trusts — De-Gree of Proof.

An express trust will not be declared as against a deed absolute, unless the intention of grantor is clear, and the interest of one claiming as cestui que trust is made to appear with reasonable certainty.

Department 2. Appeal from Superior Court, King County; John S. Jurey, Judge. Action by John T. Lanigan and others against Thomas W. Miles, in which action Etta Landis intervened as plaintiff. Decree for defendant, and plaintiffs appeal. firmed.

Vanderveer & Cummings, H. McC, Billingsley, and Welch & Dorr, all of Seattle, for appellants. Farrell, Kane & Stratton and Jones & Riddell, all of Seattle, for respond-

CHADWICK, J. Thomas W. Miles and his wife. Catherine, natives of Ireland, were married in the state of Pennsylvania. They came to the state of Washington in 1861, and settled near Vancouver. They purchased a farm. The title to the land was taken in the name of Catherine Miles. In 1875 the family, then consisting of the parents and six children, Mary, afterwards Mary Lanigan, the mother of the plaintiffs, Etta, now Etta Landis, the intervener, John, James, Catherine W., and Thomas W., moved to Newcastle in King county, while the father and two of the boys worked in the coal mines. mother for a time kept boarders, the older sue joined. Mrs. Landis now disclaims any

purchased lot 3, block G, of A. A. Denny's addition to Seattle, for the sum of \$1,000. The purchase price was paid in cash. Thomas Miles went to work in the yards of his old employer, the Columbia & Puget Sound Railroad Company. He continued in this service for about 20 years, or until one year before his death, which occurred in 1902. After the fire of 1888, a hotel building was built on lot 2 at a cost of \$6.500. To meet this obligation, two mortgages were executed, one for \$2,500, in favor of Alonzo F. Hill, the other for \$4,000, in favor of one Bersch, a son-in-law, then husband of intervener, Etta Landis. These mortgages were executed by Catherine Miles and Thomas Miles. The obligation represented by the Hill mortgage was later renewed. When renewed, the note and mortgage were signed by Catherine Miles alone. Mr. Bersch operated the hotel, and his mortgage was absorbed by credits for rent. In 1891, or 1892, he and his wife gave up the hotel, which was thereafter conducted by Mrs. Miles.

In 1897 a Mrs. Welch, a friend of the family, gave Mrs. Miles lot 3, in block 37, A. A. Denny's addition. This property was later improved with a building suitable for a rooming house with stores on the ground floor. In 1902, at a time when all the children were of full age, Thomas Miles, the father, died intestate. No petition for the administration of his estate was ever filed. Mrs. Miles continued to operate the two properties until 1907, when she deeded both lots to her son, Thomas W. Miles, who has since conducted the business as his own. The deed to Thomas W. Miles is, in form, a warranty deed, without exceptions or limitations. It purports to convey the full title. In 1909 Mary Lanigan, the oldest daughter, brought an action, her sister Etta Landis, being joined as plaintiff, against her mother and her brothers, John, James, and Thomas W. and her sister Catherine, to have apportioned and set aside to them a one-twelfth interest in the property as an estate of inheritance from their father, Thomas Miles. They set up the intestacy of the father, that no administration of his estate had been had, that there were no debts, and no reason for an administration, and asked that their respective shares be set aside to them. Issues were joined, the defendants denying that the property was other than the separate property of Catherine Miles, and affirmatively alleging that Catherine Miles had conveyed the property to her son, Thomas W., as the owner. and the plaintiffs had no interest as owners, or otherwise, therein.

The case never came to trial, but was dis-The missed upon stipulation of counsel after is-

interest in the action brought by Mrs. Lanigan, and repudiates the authority of the attorney of record, and while we think the record hardly bears her out in this, our view of the case is such that we may admit that she is right in her contention, and that the judgment of dismissal did not operate as an estoppel against her, or as res adjudicata of her right to intervene in this case. And we may also admit that the present plaintiffs, although prosecuting the action as the heirs at law of Mary Lanigan, deceased, are not estopped by the record of the former case to maintain this action to recover their mother's share of the joint estate of Thomas and Catherine Miles.

We are referring to the former action solely for the purpose of introducing the deposition of Catherine Miles, taken while that action was pending, and for use at the time of the trial, if her death should occur before the case could be heard. Mrs. Miles there testified that she was the owner of the property, that she had bought it with her own savings, that it had always been understood between her husband and herself that he had no interest in it, and that he did not want anv.

The testimony of Mrs. Miles is borne out by the records. The title to the Seattle property was taken in her name, the word "homestead" was indorsed on the margin of the deed, and if, as Mrs. Landis, the intervener, insists, Mr. Miles negotiated the trade, and Mrs. Miles had nothing to do with it, it would seem to be clear that the case would fall within the rule of several of our own decisions. It is undisputed that Mrs. Miles, although unable to read or write, transacted all business pertaining to the property, that it was assessed in her name, she paid the taxes, and as the property was improved. she met all taxes and assessments of a special or local character, and discharged the mortgages out of the earnings of the building. There is no testimony which even tends to show that the husband, whose pay never exceeded \$75 a month, ever paid or contributed anything to the improvement or upkeep of the property. If he ever kept a bank account, or participated in any one business transaction, it is not recalled by any of the witnesses. The only testimony going to the disposition of his earnings is that of Mrs. Miles, who says that he never earned more than enough to support the family.

Counsel rely with seeming confidence upon several of our own decisions, holding upon the premise of the presumption that all property acquired after marriage is community property, and that testimony must be clear, and the fact apparent, that the husband intended to divest himself and the community of all interest in the property, and to set it apart to the separate use of the wife before a court will so hold.

show that we have built up two lines of decisions covering the right of one or the other of married persons to assert a separate interest in property. In the one line the court has had to do with the claims of creditors, or the interests of third persons having some tangible equity in a lien upon the property sought to be recovered or levied upon. In the other line, the court has had to deal with husband and wife as free contracting agents, unhampered and unhindered by the claims of creditors, or by any one having direct interest in, or lien upon, the property. In all of the first line of cases, the court has had to deal with circumstances which, if unexplained by testimony, at once clear and convincing, would amount to badges of fraud. In the second line of cases it appears that a husband and wife may freely contract, or give one to the other, and thus provide for the holding of property then or thereafter to be acquired as a separate estate.

[1, 2] To make ourselves clear, if the property herein involved had stood in the name of Thomas W. Miles, and he had been the active agent in the care, management, and disposition of it during his lifetime, his widow, or any one claiming under her, would be put to a greater burden than a mere preponderance of the testimony, if it were claimed that the property was her separate property, for the husband's conduct with reference to the property would have been consistent with the usual practice, and not inconsistent with the ordinary methods of management of community property, funds. or business. But where a course of dealing between spouses, and this running over a period of from 30 to 50 years, is consistentis not only consistent with, but confirmatory of the claim of the one who asserts a separate estate-we see no reason for saying that the presumption that all property acquired after marriage is community property is not overcome, at least to the extent of putting a burden on the one who asserts the contrary.

The community property law as originally enacted seems not to have contemplated gifts or contracts between husband and wife with reference to community property, or that community property could ever be given the status of separate property. But by gradual accretion it is now provided that every married person may acquire, hold. enjoy, and dispose of property as if he or she were unmarried. Rem. Code, § 5925. The husband and wife may contract with reference to the status or disposition of property. Rem. Code, § 5919. That a bona fide purchaser of property from the holder of the record title will be protected (Rem. Code, \$ 8771), and that one spouse may convey directly to the other by deed (Rem. Code, \$ 8766).

Reference to the opinions of this court will [3] If a husband can convey directly to a

reference to the property as to evidence im or interest in it, we see no reason the deed from the stranger should not. ween the spouses-there being no credpresent and objecting—be given the legal effect as if the property had been d to the husband, and by him in turn wife. Counsel's main reliance is Ab-. Wetherby, 6 Wash. 507, 33 Pac. 1070, a. St. Rep. 176, and Fielding v. Ketler, ash, 194, 149 Pac. 667. The right of a or, a third party, was involved in each ese cases. An understanding on the of the spouses, or either of them, was ermitted to overcome the presumption ed by the statute, and it was held that ainst creditors, existing or subsequent, band and wife should not be permitted al between themselves by any secret standing, for the statute affords a d by which the property may be placed e one spouse in the hands of another.

distinction we have endeavored to is clearly drawn in Marsh v. Fisher, ish, 570, 125 Pac. 951, where the spousd entered into an agreement that the nd would operate a threshing machine receive the proceeds as his separate rty, and the wife would run the farm, ing the proceeds thereof as her sepproperty. The court maintained the of a creditor, who had no notice of the ment, to satisfy an execution out of rty claimed by the wife. After noting ule of Yake v. Pugh, 13 Wash. 78, 42 528, 52 Am. St. Rep. 17, and Dobbins xter Horton & Co., 62 Wash, 423, 113 1088, holding that a husband and wife gree between themselves as to the charof their earnings and property, the fixed a limitation of the rule, i. e., that agreements will not affect the rights ditors existent at the time of the agreeor subsequent creditors where the parontinue to live together. Our most repinion covering this phase of the law ion Savings & Trust Co. v. Manney, 172 251.

i] The plaintiffs and intervener can no greater right in the property than as Miles could have claimed in his life. The fact that he negotiated the puraccepting the testimony of the interas true, and granting for the nonce he purchase price was paid out of the 1gs of the community, a fact denied by Miles in her lifetime, and caused his name to be inserted as grantee, an al thing, and directed the word "home- to be indorsed on the margin of the when coupled with the fact that he nevereafter had aught to do with the propexcept to live there with his wife and 7, and this over a period of 22 years, 172 P.—57

it would seem that if he procures a gives confirmation to Mrs. Miles' testimony in her name, and so conducts himself reference to the property as to evidence aim or interest in it, we see no reason the deed from the stranger should not, tween the spouses—there being no cred-present and objecting—be given the gives confirmation to Mrs. Miles' testimony that it was the intention of her husband to comply with her desire to have her own home, and her own property, separate and apart from the community, even to the waiver of his interests. We may go further and present and objecting—be given the

"It is true that, if we look in this evidence for some such specific agreement at some specific time, we may not be able to find it in clear and formal language; but taking her testimony as to the general understanding between herself and husband, in contradiction of which there is not a syllable of evidence, and the fact of the management of her earnings and the property acquired thereby without the slightest control of or interference by her husband, we cannot escape the conclusion that it was at all times since their marriage well understood by both of them that her earnings were to be her separate property." Dobbins v. Dexter Horton Company, 62 Wash. 423, 113 Pac. 1088.

See, also, Ballard v. Slyfield, 47 Wash. 174, 91 Pac. 642.

"The status of the property was fixed at the time it was purchased." In re Deschamps Estate, 77 Wash. 514, 187 Pac. 1009; Guye v. Guye, 63 Wash. 340, 115 Pac. 731, 37 L. R. A. (N. S.) 186.

[6,7] We hold that the property, lot 3, block G, was the separate property of Catherine Miles, and that the title, as well as the title to lot 3 in block 37, rests in defendant Thomas W. Miles, unless, as plaintiffs and the intervener contend, the property was deeded in trust for the benefit of all the heirs. Like the trial judge, we have had some difficulty in following the theory of counsel. They have not committed themselves, but argue generally that the trust is an express trust, or if not an express trust, a constructive trust, or if neither of these, a trust ex maleficio. We think, without pursuing the arguments of counsel, that plaintiffs and the intervener must recover, if at all, on the theory of an express trust. has long since been settled as the law in this state that an express trust must be evidenced in writing. The evidence relied upon to create a trust is found in the answer filed in the suit brought by Mrs. Lanigan, in which the intervener was joined as plaintiff to recover a share of their father's estate. The answer was subscribed by Thomas W. Miles. the grantee in the deed.

After setting up that the property had been bought with the earnings and savings of Catherine Miles and the agreement between her and her husband that the property was to be her separate property, and that it had ever since been so treated, defendants further alleged:

name to be inserted as grantee, an al thing, and directed the word "home" to be indorsed on the margin of the when coupled with the fact that he nevereafter had aught to do with the propexcept to live there with his wife and y, and this over a period of 22 years, in the defendant Catherine Miles is an old lady, being more than 75 years of age. and on or about the 21st day of June, 1907, deeming that her time on earth was limited, of her own will, and without any influence from any person on earth, went to the office of Richard Saxe Jones, an attorney in the city of Seattle, county of King, and state of Washington, and requested him to prepare a deed to her youngest son

Thomas W. Miles, of the entire property known and described as lot three (3) in block 'G' of A. and described as lot three (3) in block 'G' of A. A. Denny's addition to the city of Seattle, which deed was then and there prepared by said Jones, signed and executed by the defendant Catherine Miles, and delivered to Thomas W. Miles, her son, freely and voluntarily, as the express will and desire of said Catherine Miles, and said Catherine Miles, and said Catherine Miles then and there expressing to her attorney her full confidence that upon her death attorney her full confidence that upon her death the said Thomas W. Miles would make proper adjustment of her relations as mother to the plaintiffs and defendants in this action, leaving such adjustment solely and exclusively to the said Thomas W. Miles without any interference of any kind by any of the other children of said Catherine Miles."

These allegations were denied in the reply, excepting in so far as it was alleged that Catherine Miles had deeded lot 3 in block G to defendant Thomas W. Miles.

Granting that a trust may be declared, or rather acknowledged by a trustee by a subsequent writing, even though informal (Holmes v. Holmes, 65 Wash. 572, 118 Pac. 733, 38 L. R. A. [N. S.] 645, Ann. Cas. 1913B, 1021), and that a declaration in an answer filed in a suit involving the same subjectmatter, but for different relief, is sufficient to satisfy the statute of frauds, we still think that the declaration relied on is not enough to charge the defendant Thomas W. Miles as a trustee. Although bent with years, Mrs. Miles was under no disability of mind; indeed, her testimony, taken in the former action, shows that she was keenly alert to her own interests, and mindful of her own intentions. If the answer were no more than an admission that the deed had been made by Catherine Miles in "full confidence that upon her death the said Thomas W. Miles would make proper adjustment of her relations as mother to the plaintiffs and defendants in this action," it might be that the admission would support an offer of oral proof to make the several shares or interests certain to the end that the true intent and purpose of the trustor should be carried out. In that event a court could reasonably hold that it was the intention of the donor that each child should take an amount, or interest, equal to its inheritable interest. But the answer proceeds:

"Leaving such adjustment solely and exclusively to the said Thomas W. Miles without any interference of any kind by any of the other children of Catherine Miles."

[8] Keeping in mind that this answer was filed after the deed was made, and that the testimony of Catherine Miles was taken pending a trial, and that she was not interrogated by counsel upon the subject of a trust, that there was no offer to amend the complaint, or after the dismissal of the suit any action brought by either of the then plaintiffs to declare a trust, and that Mrs. Miles lived 51/2 years thereafter, herself making no complaint that her intentions were not being carried out, we think the case falls squarely within the principle announc-

385, which is to be read as a part of this opinion. The court there said:

"This court is asked to create and declare a trust where the grantor \* \* \* not only failed, but positively declined, to do so"

-which is but another way of saying that an express trust will not be declared as against a deed absolute, unless the intention of the grantor is clear and the interest of the one claiming as cestui que trust is made to appear with reasonable certainty. In other words, a court of equity will not declare a trust, unless the object of the trust, and the extent of interest, could be enforced by a decree of the court, not as a matter of equity, but as the certain will of the trustor.

"If there is an absolute conveyance of the legal title to a supposed trustee, and there is no declaration of a trust prior to or at the time of the conveyance by the grantor, and the cestui que trust attempts to charge the grantee with a trust in respect to the land, he must produce some writing signed by the grantee of the legal title in order to charge him with the trust. It is only when there is no dispute concerning the is only when there is no dispute concerning the existence of a trust, or when the trust arises by

existence of a trust, or when the trust arises by operation of law as a resulting or implied trust, that the cestui que trust himself, can declare its terms." Perry on Trusts (6th Ed.) § 83.
"Wherever, therefore, the objects of the supposed recommendatory trusts are not certain or definite, wherever the property to which it is to attach is not certain or definite, wherever a clear discretion and choice to act or not to act is given, wherever the prior dispositions of the is given, wherever the prior dispositions of the property import absolute and uncontrollable ownership, in all such cases courts of equity will not create a trust from words of this character.

Story's Equity Jurisprudence (18th Ed.) § 1070.
"Nor will a trust be implied if there is uncertainty as to the property to be subjected to the trust, or as to the persons to be benefited by the trust, or as to the manner in which the property is to be applied. Lord Alvanley stated the rule to be 'that a trust would be implied only where the testator points out the objects, the property, and the way in which it shall go.' If the subjects of the supposed trust are left. jects and objects of the supposed trust are left uncertain by a testator, the court will infer that no obligation was intended to be imposed upon the donee, but that the whole disposition was left to his discretion. So if a mere power to appoint is given to the first taker, to be exercised or not at his discretion, no trust will be implied. And no trust will be implied, if, taking the whole instrument and all the circumstances together, it is more probable than otherwise that the testator intended to communicate a discre-tion and not an obligation." Perry on Trusts

In Wright v. Atkyns, 1 Turn. & Russ. 157, Lord Eldon said that in order to determine whether a trust of this sort is a trust which a court of equity will interfere with, it is matter of observation: First, that the words should be imperative; secondly, that the subject must be certain; and, thirdly, that the object must be as certain as the subject.

The words of the answer which are relied on as an acknowledgment of a trust are that Thomas W. Miles "would make proper adjustment" and "leaving such adjustment solely and exclusively to the said Thomas W. Miles without any interference of any kind by any of the other children of said Catherine Miles." These words are simied in Boyer v. Robison, 43 Wash. 97, 86 Pac. | lar to words often employed by grantors and makers of wills, and are as frequently relied | the right of persons residing in the city to the on by those who undertake to have a recommendatory trust declared. In Knight v. Knight, 3 Beav. 148, Lord Langdale, after subscribing to the formulæ that a trust would not be declared upon a recommendation, unless the words used upon the whole ought to be construed as imperative, that the subjects of the recommendation are certain, and that the objects are persons intended to have the benefit of the recommendation are certain, considered the words "free and unfet-We take it that words when relied on as an acknowledgment of a trust are to be given no greater weight than similar words used in deeds and wills. We also think it will not be denied that the words relied on in this case are the legal equivalent of the words "free and unfettered." these words, his Lordship says:

"Any words by which it is expressed, or from "Any words by which it is expressed, or from which it may be implied, that the first taker may apply any part of the subject to his own use, are held to prevent the subject of the gift from being considered certain; and a vague description of the object, that is, a description by which the giver neither clearly defines the object himself nor names a distinct class out of which the first taker is to select, or which leaves it doubtful what interest the object or class of objects is to take, will prevent the object. class of objects is to take, will prevent the objects from being certain within the meaning of the rule.'

Finding nothing in the record that would indicate that Mrs. Miles did not have a lively interest in her affairs, we feel warranted in adopting the language of the Supreme Court of the state of Connecticut in Gilbert v. Chapin, 19 Conn. 342:

"We must presume that the testator well knew the difference between a direction and a requestbetween an imperative disposition of his estate and a mere recommendation; and having, as owner of the property, equal power to direct as to recommend that he meant what he said. We cannot safely interpret written instruments, deliberately and solemnly made, upon any other hypothesis; and when we depart from this, we shall find ourselves employed rather in the making of wills and deeds, than in giving them effect, when made by others.'

Finding no error, the decree is affirmed.

ELLIS, C. J., and MOUNT and HOLCOMB, JJ., concur.

STATE ex rel. ELLERTSEN v. HOME TEL-EPHONE & TELEGRAPH CO. OF SPOKANE. (No. 14567.)

(Supreme Court of Washington. May 7, 1918.)

1. TELEGRAPHS AND TELEPHONES \$\infty\$=10(8)—
USE OF STREETS—FRANCHISES—CONTRACTS.
Under Rem. & Bal. Code, \$ 9314, providing telephone companies shall obtain the consent of the city council to construct and maintain city lines, the city may contract for a minimum monthly charge to users within the city as a condition for a franchise.

2. Constitutional Law €== 135—Obligation OF CONTRACT—FRANCHISE ORDINANCE.

An accepted telephone franchise ordinance

is a contract, and the company cannot destroy furnish service for a single party residence

minimum service rate provided therein by de-claring the provision abrogated so long as it operates thereunder.

3. TELEGRAPHS AND TELEPHONES \$=33(1)-FRANCHISE RATES - PUBLIC SERVICE COM-MISSION

If the Public Service Commission can change the minimum rate to users of telephones as fixed by the franchise ordinance, the franchise rate must remain in effect until the commission has acted, and cannot be terminated by the telephone company filing a schedule with the commission.

4. Telegraphs and Telephones €==33(1) —
Telephone Rates — Public Service Com-MISSION-JURISDICTION OF COURT.

An action to compel a telephone company to render service to plaintiff at the minimum rate provided in the franchise ordinance, where the Public Service Commission has not acted, involves a contract, and not the reasonableness of the rate, and plaintiff's remedy was in the courts, and not in the commission.

Department 2. Appeal from Superior Court, Spokane County: Wm. A. Huneke.

Action by the State, on the relation of Harvig Ellertsen, against the Home Telephone & Telegraph Company of Spokane. Judgment for plaintiff, and defendant appeals. Affirmed.

Post, Russell, Carey & Higgins, of Spokane, for appellant. J. M. Geraghty and Alex. M. Winston, both of Spokane, for respondent.

WEBSTER, J. The appellant has been operating since 1905 a telephone system in the city of Spokane. The franchise granted it provided that the charge for telephones installed in private residences should not exceed \$2.25, with a discount of 25 cents per month for cash payments made before the 10th day of the month in which the service is rendered. For the sake of brevity we will refer to this as the \$2 rate. After the passage of the Public Service Commission Law in 1911, the appellant filed with the Public Service Commission a copy of its franchise showing the above rate. Subsequently the appellant consolidated with another telephone company which had theretofore been operating in Spokane, but which had lost its franchise, and on January 18, 1915, the appellant filed with the Public Service Commission a rate schedule to be effective on February 20, 1915, naming as its rate for a single party residence telephone the sum of \$3 per month, instead of the \$2 rate as provided in appellant's franchise. The relator brought this action seeking a writ of mandate directing the appellant to install in his residence a single party telephone service at the \$2 rate. The peremptory writ was issued by the superior court, and this appeal followed. The question presented thereby is whether the superior court, by mandamus, has jurisdiction to compel the appellant to

telephone at the \$2 rate, that rate being lower than the rate set forth in the tariff filed by the appellant with the Public Service Commission.

[1, 2] The contention of the appellant is that the rate provision in the franchise never was a contract, and that the city in granting a franchise had no authority to fix a rate, and that even assuming that the franchise rate was valid and enforceable it was superseded by the enactment of the Public Service Commission Law, and the filing by the appellant of a tariff under the provisions of that act.

Section 9314, Rem. & Bal. Code, provides:

"Any telephone or telegraph corporation or company, or the lessees thereof, doing business in this state, shall have the right to construct and maintain all necessary lines of telegraph or telephone for public traffic along and upon any public road, street, or highway: \* \* \* Provided, further, that where the right of way, as herein contemplated, is within the corporate limits of any incorporated city, the consent of the city council thereof shall be first obtained before such telegraph or telephone lines can be erected thereon."

In State ex rel. Telephone Co. v. Spokane, 24 Wash. 53, 63 Pac. 1116, this court held:

"The contention of counsel for appellant that the statute limits the authority of the city council to reasonable and proper regulations, and to prescribing the method in which telegraph and telephone companies shall construct and operate their lines, cannot be conceded. As has been seen, by another statute, the authority to regulate and of complete control of such lines has been given. The power to refuse is correlative with the power to consent, and such power is plainly authorized by the statute."

In the case of Commercial Electric Light & Power Co. v. Tacoma, 17 Wash. 661, 50 Pac. 592, in which the court was considering an ordinance granting a franchise to an electric company to furnish power to business portions of Tacoma, this court, in referring to the franchise ordinance, said:

"The ordinance which was sought to be repealed was in the nature of a contract, and it was not in the power of one of the contracting parties to destroy the rights and property of the other by merely declaring the contract abrogated."

The appellant, however, contends that there is no express delegation by the state to the city of the power to impose terms as to rates in the granting of consent to operate a telephone system. This express question was passed on adversely to this contention in State ex rel. Tacoma v. Sunset Tel. & Tel. Co., 86 Wash. 309, 150 Pac. 427, where Judge Holcomb, speaking for the court, said:

"We are not impressed with appellant's contentions (1) that the city had no power to attach conditions to the Webster franchise; and (2) that, even if it had the power to attach conditions, the conditions attached were void. The state had previously delegated to cities of the first class, of which relator is one, the general power 'to lay out, establish \* \* \* streets, alleys \* \* and to regulate and control the use thereof, \* \* and to authorise or prohibit the use of electricity at, in, or upon any of said streets, or for other purposes, and to prescribe the terms and conditions upon

which the same may be so used, and to regulate the use thereof.' Rem. & Bal. Code, § 7507, subd. 7. Though appellant insists that this statutory provision is not a grant of power in regard to telephone franchises, because "it does not, in express terms, refer to telephone lines, or purport to confer the right to grant telephone franchises,' we do not agree therewith. The power is both generally and specifically conferred. Again, appellant urges that, even if the power were conferred by section 7507, supra, it was repealed by the subsequent enactment by the same Legislature of section 9314, Rem. & Bal. Code (Laws 1890, pp. 292-294; Rem. & Bal. Code, § 9300 et seq.), being the general telephone franchise act. These contentions were certainly decided adversely to appellant's views in State ex rel. Spokane & B. C. Tel. Co. v. Spokane, 24 Wash. 53, 63 Pac. 1116, and in Tacoma R. & Power Co. v. Tacoma, 79 Wash. 508, 140 Pac. 565. Notwithstanding appellant's argument to the contrary, in both the cases mentioned, it was distinctly held that the power to regulate and control the use of the streets was conferred by section 7507, subd. 7, supra, including the power to attach conditions. The question is not open to debate. All the conditions imposed were within the city's corporate powers and valid conditions attaching to the franchise. Indeed, if not then, Webster never obtained the city's assent to the use of the streets, and never had a franchise therefor."

In the later case of State ex rel. Walker v. Superior Court, 87 Wash. 582, 152 Pac. 11, the Tacoma Case was cited with approval, and we said:

al, and we said:

"In the proviso in section 9314, it is said that the highways within the corporate limits of a city cannot be used without the consent of the city council. By the subdivision of section 7507 quoted, the city, in its corporate capacity, is given the powers therein specified. By the decision of this court in the case last cited, it is held, as already noted, that by that statute (section 7507) the power is both generally and specifically conferred in regard to telephone franchises and right to impose conditions. The power of the city, therefore, with regard to telephone franchises and the right to impose conditions when such franchises are granted flows from a statute which gives that power to the city, as distinct from a statute conferring such power upon the legislative authority of the city. Herein lies the distinction between this case and the Benton, Ewing, and Dolan Cases [50 Wash. 156, 96 Pac. 1033; 55 Wash. 229, 104 Pac. 259; 72 Wash. 343, 130 Pac. 353]. Whether, under the proviso in section 9314, which requires the consent of the city council before highways within the city can be used, the city council had the right to impose conditions, we need not here inquire, because it has already been held that the power to impose such conditions is derived from the other section of the statute referred to."

Thus the law is settled that the city of Spokane had the authority to fix in the appellant's franchise the telephone rates to be charged. If it is true that the city had the right to withhold its consent before a telephone company would be allowed to use its streets, and to impose as a condition of granting its consent to the maintenance of certain rates to be charged to users of the telephone service, the telephone company accepting such franchise is, as long as it operates thereunder, bound by its terms, unless relieved therefrom by the Public Service Commission Law. And it matters not what nomenclatur's may be used to describe

the obligation of the franchise holder; held in State ex rel. Tacoma v. Sunset Tel. whether it be called a condition, a contract, or as, in State ex rel. Webster v. Superior Court, 67 Wash. 37, 120 Pac. 861, L. R. A. 1915C, 287 Ann. Cas. 1913D, 78, a grant, license, or reservation. For, as said in that case, "the power to fix and determine rates being within the police power, the city might establish rates, but that could not, under the delegation quoted, contract so as to bind itself or the other party as against the exercise of the police power," which merely means that the rate established in the franchise is binding until the sovereign police power cuts the bond. A franchise obligation is no less a contract because it may ultimately be abrogated by the state in the exercise of its police power than was the obligation set aside in the case of Raymond Lumber Co. v. /Raymond Light & Water Co., 92 Wash. 330, 159 Pac. 133, L. R. A. 1917C, 574, not a contract because revocable. No one would suggest that until the Public Service Commission interfered the relation between the two parties to that suit had not been that of two parties to a

A different situation is presented by the fixing of rates in the franchise from that which arises in those cases where after the granting of the franchise, the city has attempted to fix rates. This distinguishes the case of Tacoma Electric Co. v. Tacoma, 14 Wash. 288, 44 Pac. 655, from the case at bar, for here the city could have consented, or refused to have consented, to the granting of a franchise; but, having consented, it included in the franchise the terms upon which that consent rested. "These terms were accepted by the company, and the ordinance discloses the contract between them. If the terms were distasteful to the company, it could have refused them, or, at the least, protested against them." Southern Bell Telephone, etc., v. Richmond, 103 Fed. 31. 44 C. C. A. 147.

The appellant and the city of Spokane having agreed upon the terms under which the appellant was allowed to operate thereby entered into a contract which each of them had authority to make, and good faith and fair dealing will not permit the appellant to occupy the streets of Spokane by virtue of its franchise, and at the same time refuse to comply with the conditions thereof. It received from the city what it at the time deemed adequate consideration for its contract, and as long as it retains that consideration it must in receipt therefor perform the service at the price agreed upon. except as it may be relieved of those terms and conditions by the operation of the Public Service Commission Law.

[3] That brings us to the consideration of the question of the effect of the filing of a schedule of rates by the appellant with the Public Service Commission Law, the city Public Service Commission. It having been no longer had any power in regard to rates

& Tel. Co., supra, that:

"In general, the provision was a valid condition with valid reasons to support it, and was an agreed provision of the contract. It was not, as appellant supposes, void as against public policy, nor ultra vires and void, as beyond the corporate power of the city"

it is not necessary to, and we do not, decide in the determination of this case that the Public Service Commission Law interferes with the provisions contained in the appellant's franchise, but assuming that by the act the state did give the Public Service Commission the right to modify the franchise rates, those rates would remain in effect until such time as the appellant has complied with the requirements of the act. Section 43 of the Public Service Commission Law (Rem. Code 1915, § 8626-43) provides:

"Nothing in this act shall be construed to prevent any telegraph company or telephone company from continuing to furnish the use of its line, equipment or service under any contract or contracts in force at the date this act takes effect or upon the taking effect of any schedule or schedules or rates subsequently filed with the commission, as herein provided, at the rates fixed in such contract or contracts: Provided, however, that the commission shall have power, in its discretion, to direct by order that such contract or contracts shall be terminated by the telephone company or telegraph company party thereto, and thereupon such contract or contracts shall be terminated by such telephone company or telegraph company as and when directed by such order."

We having decided that the rate provision in the franchise is a contract, it follows that section 43 covers the obligation owing from the appellant to the relator, for, under well-settled principles, those citizens desiring telephone service, being the beneficiaries of that provision of the franchise, would become to that extent parties to the contract. and the obligation of appellant would become a direct obligation to them. Before the appellant can charge a greater rate than \$2 per month, the Public Service Commission must have done more than merely receive in its files a new schedule of rates. There must be affirmative action by the commission relieving the appellant of its contractual obligation to the users of its telephone service.

The Public Service Commission not having acted upon the schedule filed by the appellant, and not having directed "by order that such contract shall be terminated by the telephone company," the contract still continues in effect. As was said in the case of Seattle Electric Co. v. Seattle, 78 Wash. 203, 138 Pac. 892:

"While the passage of a public utilities law does not abrogate contracts until the commission has fixed a different rate, it does not follow that the passage of a public utilities law may not withdraw from the city the right to exercise police power from and after the date it became effective.'

In other words, after the passage of the

charged by appellant, but the rates already ; provided for in the franchise remained in effect until the Public Service Commission had taken some action regarding them. The mere filing of a new schedule of rates was insufficient to establish that schedule as a basis for the appellant's charges for service such as is demanded by the relator in view of the provisions of section 43.

[4] The question presented here is not the question of the reasonableness of the rates, but the question involves the contractual rate, and there is nothing in the Public Service Commission Law which provides that the relator must seek his remedy before any special tribunal. In seeking to compel the appellant to furnish the service, which service it contracted to furnish, the relator had the right to apply to the courts for his relief, and not only had he the right, but he is seeking his relief before the only tribunal which could afford him a plain, speedy, and adequate remedy. The Public Service Commission, as is said by the judge of the superior court who heard this case, "is not concerned with the enforcement of any contract, but is only concerned with the question as to the reasonableness of the rates about which the contract may speak." There is no conflict of authority between the commission and the court, for the reason that the commission has not yet attempted to take jurisdiction of the rates provided for in the franchise, and until such time jurisdiction to enforce that contract rests with the court.

The city of Spokane having had the power to fix the rates in the appellant's franchise, and having done so, and the Public Service Commission not having as yet assumed jurisdiction, as provided in section 43 of the Public Service Commission Law, it follows that relator was entitled to the installation of the telephone at the rate provided in the franchise, and the superior court was correct in issuing the writ prayed for. The judgment will be affirmed.

ELLIS, C. J., and MOUNT, CHADWICK,

and HOLCOMB, JJ., concur.

STATE v. POSTAL TELEGRAPH-CABLE CO. OF WASHINGTON. (No. 14209.)

(Supreme Court of Washington. April 29, 1918.)

1. Pleading €=>8(2) - Workmen's Compen-SATION ACT—STATE INSURANCE—HAZARDOUS OCCUPATIONS.

OCCUPATIONS.

In state's action for premiums on compensation insurance against telegraph company, where it was alleged that construction work was extrahazardous, the defendant's denial that such is the character of the work was of no effect, where it admitted that it was in the telegraph business, in view of Rem. Code 1915, §§ 6601—2 and 6604—3, leclaring construction of telegraph lines to be extrahazardous: the Legislature's

declaration being conclusive where the court cannot take judicial notice to the contrary.

2. COMMERCE &== 28-WORKMEN'S COMPENSA-TION ACTS-INSURANCE-"INTERSTATE COM-MERCE."

Employés engaged in constructing telegraph lines were not engaged in interstate commerce, although the company employing them was sc engaged.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

3. Taxation €==6-Agency of Federal Gov-ERNMENT

Conceding that a telegraph company is an agent of the United States, by virtue of its acceptance of the provisions of Act Cong. July 24. 1866 (R. S. 5263-5269 [U. S. Comp. St. 1916, §§ 10072-10079]), and construction of lines along post roads, etc., the Industrial Insurance Act (Rem. Code 1915, § 6604—1 et seq.), requiring employers to new premiums for companyation in employers to pay premiums for compensation insurance, is not, as applied to such a company by providing for employes injured in construc-tion of a telegraph system in the state, either a tax or attempt to regulate the business of the company, since Congress could not have intended to exempt telegraph companies from obedience to state law, and in any event the premiums demanded are not a tax.

4. Constitutional Law €== 154(1) - Master

4. CONSTITUTIONAL LAW \$\inspeces\$ 154(1) — MASTER AND SERVANT \$\inspeces\$ 347.

Rem. Code 1915, \$ 6604—1 et seq., requiring employers of persons engaged in constructing telegraph lines to pay premiums for industrial insurance, is not invalid as impairing the obligations of the contract between the company and its employes as members of an employes association by which they became entitled to pay during incapacity, since the act is a valid exercise of the police power.

5. MASTEE AND SERVANT 365—INTERSTATE COMMERCE—WORKMEN'S COMPENSATION ACT TELEGRAPH COMPANIES.

Under Industrial Insurance Act, providing that the act shall apply to employers and em-ployes in both intrastate and interstate commerce to the extent only that intrastate work is clearly separable from interstate commerce, the act does not apply to interstate telegraph com-pany's operators handling interstate as well as intrastate messages, where it is impossible to separate the time when they are engaged in in-terstate commerce from the time they are en-gaged in intrastate commerce.

En Banc. Appeal from Superior Court, King County; Kenneth Mackintosh, Judge. Action by the State against the Postal Telegraph-Cable Company of Washington. Judgment dismissing the action, and the State appeals. Reversed and remanded, with instructions.

W. V. Tanner, Atty. Gen., and John H. Dunbar, for the State. O. L. Willeth, of Seattle (W. W. Cook, of New York City, or counsel), for respondent.

MOUNT, J. This action was brought to recover premiums alleged to be due on the pay roll of the workmen of the respondent company, under the provisions of chapter 74, Laws of 1911 (Rem. Code, § 6604—1 et seq.), commonly known as the Industrial Insurance Act.

The complaint alleged, in substance, that lines to be extrahazardous; the Legislature's the respondent was engaged in the business

during the years 1911 and 1912, and remiums upon the pay roll of the workimployed by the respondent in such uction amounted to \$288.57, that rent was also engaged in operating telsystems within the state, and that emiums upon the pay roll of workuployed in such operation amounted to m of \$261.66, and that these amounts ayable under the provisions of the inil insurance law. The appellant prayjudgment in the sum of \$550.23. An was filed which denied that the rent was engaged in hazardous or exardous work. The answer sets forth l affirmative defenses which alleged, stance:

that the respondent is doing both rastate and an interstate business in ng and transmitting messages, that it ossible to segregate the time of its és between local and interstate busind that the claim of the state thereby in an illegal burden and tax upon ate commerce.

nd, that the respondent has accepted wisions of the act of Congress of July 66 (R. S. U. S. §§ 5263-5269 [U. S. St. 1916, §§ 10072-10079]), commonly as the Post Roads Act, and, pursuant , has constructed and maintains lines graph through and over portions of olic domain of the United States, over ong military and post roads of the States, and over, under, and across le streams and waters of the Unittes, and that, by reason of such ace, it is an agent of the United States. i. that the Industrial Insurance Act, ied to the respondent, is an unauthorid unconstitutional interference with wer of Congress to establish post to raise and support armies, etc. th, that the act violates the Four-Amendment of the Constitution of the States, providing that no state shall any person of life, liberty, or propithout due process of law, and that e shall deny any person within its tion the equal protection of the laws. that the act violates the Fifth nent of the Constitution of the Unittes, providing that private property ot be taken for public use without mpensation.

. that the act violates section 3 of 1 of the Constitution of the state of gton, providing that no person shall ived of property without due process

ith, that the act violates section 16 le 1 of the state Constitution, prothat property shall not be taken for use nor for public use without just

structing telegraph systems within the its employes, had made provision for benefits in case of disability by an agreement entered into prior to the passage of the Industrial Insurance Act, and that the act unnecessarily interferes with, and attempts to destroy, interests vested under such contractual arrangements.

After this answer was filed, the appellant moved for a judgment upon the pleadings. The respondent also moved for a judgment upon the pleadings. The trial court, after hearing these motions, directed judgment for the respondent. Thereafter the state filed a reply, denying some of the affirmative matter set forth in the amended answer. The court then entered a judgment, dismissing the action. From this judgment of dismissal the state has appealed.

From this statement of the case it will be noticed that the allegations of the complaint are all admitted, except the answer denies that the workmen employed by the respondent were engaged in hazardous or extrahazardous employment. It is admitted. therefore, as alleged in the complaint, that the respondent was engaged in constructing and operating telegraph lines within the state during the time alleged. It is admitted that the premiums due under the Industrial Insurance Act were the amounts stated in the complaint, namely, \$288.57 for employés engaged in construction work, and \$261.66 for employes engaged in the work of operating telegraph systems, in case these employments were extrahazardous.

The Legislature, in the act mentioned, at page 346, \$ 2, Laws of 1911 (Rem. Code, \$ 6604-2), provides:

"There is a hazard in all employment, but cer-There is a nazard in all employment, but certain employments have come to be, and to be recognized as being inherently constantly dangerous. This act is intended to apply to all such inherently hazardous works and occupations, and it is the purpose to embrace all of them. which are within the legislative jurisdiction of the state in the following enumeration. tion of the state, in the following enumeration, and they are intended to be embraced within the term 'extrahazardous' wherever used in this act, to wit."

Then, after naming a number of employments, the act designates:

"Engineering works; \* \* \* telegraph \* \* \*

And then, in the next section (Rem. Code. § 6604—3), engineering work is defined to mean:

"Any work of construction, \* \* \* of \* telegraph and telephone plants and lines. \* \* \* "

So that the Legislature has defined the work of constructing telegraph lines as "extrabazardous."

In the case of State v. Powles & Co., 94 Wash. 416, at page 420, 162 Pac. 569, at page 570, we said:

"The Legislature, no doubt, has the power to determine directly, by its own enactment, what occupations are extrahagardous, as it has done by the specific enumeration in section 2 of the act."

[1] The Legislature having defined the construction of telegraph lines as extrahazardous is conclusive of the fact, especially where judicial notice cannot be taken to the contrary. It seems certain we cannot take notice that the erection of telegraph poles and the stringing of wires thereon is not hazardous or extrahazardous. In view of the fact that the Legislature has determined this class of work to be extrahazardous, it follows that an answer which admits the respondent has been engaged in constructing telegraph lines must necessarily admit that such work is extrahazardous; for respondent cannot be heard to dispute a legislative declaration.

In the case of Mountain Timber Co. v. Washington, 243 U.S. 219, at page 242, 37 Sup. Ct. 260, at page 266 (61 L. Ed. 685, Ann. Cas. 1917D, 642), the Supreme Court of the United States, in passing upon many constitutional questions therein raised, referred to the classification of extrahazardous occupations in this act, and said:

"We may conveniently answer at this point the objection that the act goes too far in classifying as hazardous large numbers of occupations that are not in their nature hazardous. might be sufficient to say that this is no concern of plaintiff in error, since it is not contended that its businesses of logging timber, operating a logging railroad, and operating a sawmill with power-driven machinery, or either of them, are nonhazardous. Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531, 544 [34 Sup. Ct. 359, 58 L. Ed. 713]. But further, the question whether any of the industries enumerated in section 4 (2) is nonhazardous will be proved by experience, and the provisions of the act themselves give sufficient assumes that if in our income selves give sufficient assurance that if in any industry there be no accident there will be no as-sessment, unless for expenses of administra-

The court in that case did not pass directly upon the question whether the occupations named in section 2 could be classified as extrahazardous by the Legislature. We are of the opinion that, unless the courts may take notice of the fact that an occupation is not hazardous, it is within the power of the Legislature to classify the same as hazardous. The construction of telegraph lines has been declared by the Legislature of this state to be an extrahazardous occupation. We are of the opinion, therefore, that the denial of the respondent that it was engaged in an extrahazardous occupation is of no effect, because it is a denial of a legislative declaration. The trial court erred in granting the respondent a judgment upon the pleadings unless some of the affirmative defenses are sufficient to defeat the action.

The first, second, and third affirmative defenses are to the effect that the respondent, during the times mentioned in the complaint, was engaged in interstate commerce as an agent of the government, and that the tax here sought to be collected is an unlawful attempt to regulate interstate commerce by the intrastate business is not clearly separable from the interstate business.

[2] Conceding for the present that the employés engaged in sending and receiving messages and in operating the telegraph system were engaged in interstate commerce, it is plain that the other class of employes engaged in construction work was not engaged in interstate commerce. These employes, according to the complaint, were engaged in original construction of lines of telegraph. The amount of premiums, upon the pay roll of workmen so employed, was, according to the complaint, \$288.57.

In the case of Raymond v. Chicago, Milwaukee & St. Paul Railway Co., 243 U. S. 43, at page 45, 37 Sup. Ct. 268, at page 269 (61 L. Ed. 583), where an employé was engaged in shortening the main line of a railway within this state, and was injured by an explosion of a charge of dynamite, while he was working in a tunnel, it was held that such employé was not engaged in interstate commerce at the time of his injury, and that he was relegated for relief to the Workmen's Compensation Act above referred to. The court there said:

"And this result is controlling even although it be conceded that the railroad company was in a general sense engaged in interstate commerce, a general sense engaged in interstate commerce, since it has been also this day decided that that fact does not prevent the operation of a state workmen's compensation act. New York Central R. R. Co. v. White [243 U. S.] 188 [37 Sup. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629]."

For the same reason it necessarily follows that, even though the telegraph company, the respondent here, is engaged in interstate commerce, its employés engaged in construction work come under the terms of the Employers' Liability Act. Killes v. Great Northern R. Co., 93 Wash. 416, 161 Pac. 69.

[3] Conceding that the telegraph company is an agent of the United States, it does not follow that the provision made for injured employés in the construction of a telegraph system within this state is either a tax or an attempt to regulate the business of the telegraph company. As was said in Western Union Telegraph Co. v. Attorney General of the Commonwealth of Massachusetts, 125 U. S. 530, at page 549, 8 Sup. Ct. 961, at page 963 (31 L. Ed. 790):

"This authority of the government this telegraph company, as well as to all others of a similar character who accept its provisions, the right to run their lines over the roads and bridges which have been declared to be post roads of the United States. If the principle now contended for be sound, every railroad in the country should be exempt from taxation, because they have all been declared to be post roads; and the same reasoning would apply with equal force to every bridge and navigable stream throughout the land. And if they were not exempt from the burden of taxation simply because they were post roads, they would be so relieved whenever a telegraph company chose to make use of one of these roads or bridges placing a burden upon the business, and that along or over which to run its lines.

And at page 548 of 125 U. S., at page 963 of 8 Sup. Ct. (31 L. Ed. 790), in the same opinion, it was said:

"While the state could not interfere by any specific statute to prevent a corporation from placing its lines along these post roads, or stop the use of them after they were placed there, nevertheless the company receiving the benefit of the laws of the state for the protection of its property and its rights is liable to be taxed upon its real or personal property as any other person would be. It never could have been intended by the Congress of the United States, in conferring upon a corporation of one state the authority to enter the territory of any other state and erect its poles and lines therein, to establish the proposition that such a company owed no obedience to the laws of the state into which it thus entered, and was under no obligation to pay its fair proportion of the taxes necessary to its support."

The same is true in this case. It never could have been the intention of Congress that a company constructing a telegraph line in this state owed no obedience to the laws of the state which it has entered. This industrial insurance law was enacted primarily for the purpose of protecting injured employes engaged in occupations declared to be hazardous. It is for the benefit of the employer as well as for the employes. The tax, if it may be called such, is a part of the cost of construction of the lines. It is not a tax upon the industry for the privilege of carrying it on, nor is it in the nature of a liceuse tax.

In so far as the construction of the line is concerned, the employés were clearly not engaged in interstate commerce, and the payment of the so-called tax does not affect the receipts from intrastate commerce any more than the cost of construction affects such receipts.

[4] It is further alleged that the employes of the respondent became members of the Postal Telegraph Employés Association, and that there was a contract and agreement between the respondent and its employes by which the respondent agreed to pay its employés for any incapacity happening during the time of their employment at a rate as set forth in the complaint; that the majority of the employes who worked during the years 1911 and 1912 entered the employment of the respondent before the passage of the Workmen's Compensation Act; that the said act illegally interferes with the rights of the respondent and attempts to destroy vested interests under the contract. The answer to this contention is found in State ex rel. Pratt v. Seattle, 73 Wash. 396, at page 402, 132 Pac. 45, at page 48, where we said:

"A more precise statement of the contention is that it violates the obligations of such contracts. But we cannot agree with this contention. The Workmen's Compensation Act, under which these premiums are sought to be collected, is a police regulation, and is a valid exercise of the police power of the state. State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466. 'All contracts are subject to this power, the exercise of which is neither abridged nor delayed by rea-

son of existing contracts.' Seattle v. Hurst, 50 Wash. 424, 97 Pac. 454, 18 L. R. A. (N. S.) 169. 'In its broadest acceptation it means the general power of the state to preserve and promote the public welfare even at the expense of private rights.' Tacoma v. Boutelle, 61 Wash. 434, 112 Pac. 661. 'The strength of the police power lies in the fact that it is not a subject of contract; that it cannot be bartered or bargained away.' State ex rel. Webster v. Superior Court, 67 Wash. 37, 120 Pac. 861 [L. R. A. 1915C, 287, Ann. Cas. 1913D, 78]. 'That the exercise of such power may be hampered or restricted to any extent by contracts previously made between individuals or corporations is inconceivable.' Cowley v. Northern Pac. R. (O., S.) 559. The foregoing principles make it clear that it is within the power of the state to enact and enforce police regulations, even though to do so may render less valuable certain contracts between individuals and totally abrogate others. If the principle were not sound, the result would be that individuals and corporations could, by private contract between themselves, in anticipation of legislation, render of no avail the police regulations of the state, no matter how vital or necessary such regulations might prove to be for the public good. But the reasoning upon which the principle rests is fully stated in the cases above cited, and it is not necessary to enlarge upon it here. It is sufficient to say that the contract between the city and the interveners is not unlawfully affected by the act of the Legislature here in question.'

[5] We are of the opinion, therefore, that, as to the employes of the respondent engaged in construction work, the state was entitled to a judgment for the amount alleged in the complaint. As to the employes engaged in the operation of the lines of the respondent, we are of the opinion that the act does not apply to them under the allegations of the answer to the effect that the respondent is engaged in interstate commerce; that such employés are engaged in operating the system for handling interstate messages; that a large percentage of the business actually done for the years mentioned in the complaint consisted in interstate messages; and that it is impossible to segregate or separate the time when the employes were engaged in interstate commerce from the time that they were engaged in intrastate commerce. Section 18 of the act under consideration (chapter 74, Laws of 1911, p. 367; Rem. Code, § 6604-18) provides as follows:

"The provisions of this act shall apply to employers and workmen engaged in intrastate and also in interstate or foreign commerce, for whom a rule of liability or method of compensation has been or may be established by the Congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate or foreign commerce. \* \* \* "

The employés who are engaged in operating the telegraph lines and in handling interstate and intrastate messages are, no doubt, engaged in interstate commerce. It is clear that the Congress of the United States may establish a rule of liability and a method of compensation for such employés. This act therefore, by its terms, applies to such persons only to the extent of their mu-

tual connection with intrastate work, which iny. Judgment for defendant, and plaintiffs shall be clearly separable and distinguishable from interstate or foreign commerce. Under the allegation of the answer, this work is not clearly separable and distinguishable as to those employes. If this is true, the act does not apply.

All the constitutional questions raised by the answer have been decided by this court and by the Supreme Court of the United States in State ex rel. Davis-Smith Co. v. Clausen, 65 Wash, 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466, State v. Mountain Timber Co., 75 Wash, 581, 135 Pac, 645, L. R. A. 1917D, 10, and Mountain Timber Co. v. State of Washington, 243 U.S. 219, 37 Sup. Ct. 260, 61 L. Ed. 685, Ann. Cas. 1917D, 642, and it is therefore unnecessary to again enter into a discussion of those questions.

For the reasons hereinabove stated, the judgment of dismissal is reversed, and the cause is remanded, with instructions to enter a judgment in favor of the appellant for the compensation due for employés who were engaged in the construction of telegraph lines, and to permit a reply to the answer of the respondent alleging, in substance, that the time of the employés engaged in intrastate work is not clearly separable from the time of those engaged in interstate commerce.

ELLIS, C. J., and PARKER, FULLER-TON, MAIN, and HOLCOMB, JJ., concur.

DOUGLASS et al. v. F. R. WOODBURY LUMBER CO. (No. 14531.)

(Supreme Court of Washington. April 29, 1918.)

Logs and Logging ←30 — Lien — Pur-CHASER OF LUMBER—PRESUMPTION.

CHASER OF LUMBER—PRESUMPTION.

Rem. Code 1915, § 1177, declaring a conclusive presumption that one purchasing "property liened upon" within the 30 days given to file liens is not a bona fide purchaser, has no application to lumber sold and delivered by the manufacturer before filing of lien notice by one who performed labor thereon; for section 1163. who performed labor thereon; for section 1163 gives such a person a lien upon such lumber only while the same remains at the mill where manufactured, or in the possession or under the control of the manufacturer.

2. Logs and Logging =31 - Liens -ELOIGNMENT.

As Rem. Code 1915, § 1163, gives one performing labor in manufacturing logs into lumber a lien on the lumber only while it remains at the mill, or in the possession or under control of the manufacturer, section 1181, making a person who eloigns logs or lumber "on which there is a lien" liable to the lienholder, gives no right against one to whom lumber is sold and delivered at a distance before lien notice is filed.

Department 1. Appeal from Superior Court, Okanogan County; A. W. Frater,

Action by Cameron Douglass and others

appeal. Affirmed.

J. Henry Smith, of Okanogan, and Peter McPherson, of Brewster, for appellants. A. J. O'Connor, of Okanogan, and Kerr & Mc-Cord, of Seattle, for respondent.

PARKER, J. The plaintiffs seek recovery of a money judgment against the defendant lumber company in the sum of \$2,142, being the amount of the purchase price of lumber sold and delivered by Edward Johnson, the manufacturer thereof, to the defendant, upon which lumber the plaintiffs claim they were entitled to liens aggregating more than that sum for labor performed by them for Johnson in the manufacture of the lumber. Trial in the superior court for Okanogan county, sitting without a jury, resulted in judgment in favor of the defendant, denying to the plaintiffs the relief prayed for, from which they have appealed to this court. The facts may be summarized as follows:

On June 26, 1915, Edward Johnson was, and for a considerable time prior thereto had been, the owner and operator of a sawmill in Okanogan county. On that day Johnson sold and delivered to respondent lumber company, in the usual course of business, lumber which had been manufactured by him at his mill of the value and for the agreed price of \$2,142. The lumber was delivered by Johnson to respondent at the town of Brewster, in Okanogan county, which is some 10 miles distant from the mill, which lumber thereupon passed entirely out of the possession and control of Johnson to respondent. On and prior to June 26, 1915, appellants were employed by Johnson in the operation of the mill, and while so employed performed labor in the manufacture of this and other lumber. On that day appellants ceased to perform such labor, at which time there was due then from Johnson for labor so performed in the aggregate the sum of \$2,738. Thereafter. and after the sale and delivery of the lumber by Johnson to respondent, and within 30 days after appellants had ceased to perform such labor, they "filed in the office of the county auditor of said county their several notices of lien upon and against all of said lumber, boxes, and box materials and other products of said sawnill and box factory that was then remaining in or about the same, or within the possession or under the control of the said Edward Johnson." This quoted language is from appellants' complaint. The lien notices are not in the record before us. Thereafter and within the time prescribed by statute they commenced an action in the superior court for Okanogan county, seeking foreclosure of their several liens as against Johnson, respondent not being a party to that action, in which action judgment of foreclosure was accordingly renagainst the F. R. Woodbury Lumber Compa-1 dered against Johnson as prayed for together with a personal judgment against him in favor of the several appellants aggregating the sum of \$2,738. Thereafter, under an execution and order of sale issued upon the judgment of foreclosure, "all of the said property of the said Edward Johnson so liened upon was by the sheriff of said county duly and regularly sold, as provided by law, and the proceeds of such sale were duly applied toward the satisfaction of plaintiffs' several judgments and those of other lien claimants who were entitled thereto, pro rata, according to the amount of their several judgments, and after deducting the amount of the proceeds of said sale and any and all other payments that have been made on account of said judgments, there remains due and owing thereon by the said Edward Johnson to these plaintiffs the sum of \$2,575." This quoted language is also from appellants' complaint. Thereafter in June, 1916, appellants commenced this action, seeking recovery of the \$2,142 purchase price of the lumber sold and delivered by Johnson to respondent, apparently upon the theory that their lien rights extended to that lumber, and that respondent was liable to them for the value thereof. This statement of the facts is as favorable to appellants as the record will admit of. Indeed, there are other facts appearing in the record which seem to render the case as a whole less favorable to appellants, but our view of the law renders it unnecessary to notice other facts here.

The provisions of our statutes relating to liens upon logs and lumber for labor performed thereon, which it seems necessary for us to notice here, referring to sections of Remington's Code, are as follows. Section 1162 reads in part as follows:

"Every person performing labor upon, or who shall assist in obtaining or securing sawlogs, spars, piles, cordwood, shingle bolts, or other timber \* \* \* shall have a lien upon the same for the work."

This section does not in terms limit the lien rights of loggers to logs while in the possession and control of the owner thereof for whom the labor was performed. Section 1163 reads in part as follows:

"Every person performing work or labor or assisting in manufacturing sawlogs and other timber into lumber and shingles, has a lien upon such lumber while the same remains at the mill where it was manufactured, or in the possession or under the control of the manufacturer.

We have italicized the portion of this section to be particularly noticed as showing the difference in the lien rights of loggers and those performing labor in the manufacture of lumber. Section 1177 reads as follows:

"It shall be conclusively presumed by the court that a party purchasing the property liened upon within thirty days given herein to claimants wherein to file their liens, is not an innocent third party, nor that he has become a bona fide owner of the property liened upon, unless it shall appear that he has paid full value for the said property, and has seen that the purchase

money of the said property has been applied to the payment of such bona fide claims as are entitled to liens upon the said property under the provisions of this chapter, according to the priorites herein established."

Section 1181 reads as follows:

"Any person who shall eloign, injure or destroy, or who shall render difficult, uncertain or impossible of identification any sawlogs, spars, piles, shingles or other timber upon which there is a lien as herein provided, without the express consent of the person entitled to such lien shall be liable to the lienholder for the damages to the amount secured by his lien, and it being shown to the court in the civil action to enforce said lien, it shall be the duty of the court to enter a personal judgment for the amount in such action against the said person, provided he be a party to such action, or the damages may be recovered by a civil action against such person."

[1, 2] The theory upon which recovery is sought in this action against respondent seems to be that of eloignment on the part of respondent, rendering it liable under sections 1177 and 1181 above quoted. It should be remembered in this connection that respondent was not a party to the lien foreclosure action, nor did the lien notices or the foreclosure judgment assume to claim or establish any lien against the lumber sold and delivered by Johnson to respondent before the filing of the lien notices. Counsel for appellants rely particularly upon the provisions of section 1177 above quoted. section, however, does not give a right of action, but only prescribes a rule of evidence touching the good faith of the party purchasing "property liened upon," and it seems to us cannot, in any event, have reference to the purchase of property other than that upon which there is a lien right which can follow the property after it has passed from the possession and control of the owner. This rule would seem applicable to the foreclosure of loggers' liens under section 1162 above quoted from, since that section contains no limit, in terms, as to the lien right there given as the same might be affected by the location or possession of the logs. This rule would also seem applicable in an action claiming recovery under section 1181 above quoted, relating to eloignment. The weakness of counsel's contention lies in the fact that the only liens appellants were entitled to assert were liens upon lumber "while the same remains at the mill where it was manufactured, or in the possession or under the control of the manufacturer." Manifestly, whatever lien rights appellants had upon the lumber sold and delivered by Johnson to respondent ceased when that sale and delivery were actually made, which, as we have seen, was before appellants filed their lien notices in the office of the county auditor. It is not claimed that this sale and delivery of the lumber were fraudulent on the part of either Johnson or the respondent, in that the transaction was had with any intent on the part of either to defraud appellants.

It seems to us that our decision in Akers v. Lord, 67 Wash. 179, 121 Pac. 51, is decisive

of this question in favor of respondent. While that case involved claims of liens made by loggers, the liens were claimed under section 1163 above quoted because the logs upon which the labor had been performed had gone to a mill and been manufactured into lumber: the lumber thereafter being sold and its possession and control having passed from the millowner, the manufacturer, to a third party before the filing of the lien claims in the office of the county auditor. Disposing of the lien claims in so far as this manufactured and sold lumber was concerned, Judge Morris, speaking for this court, said:

"It is manifest no lien could be enforced against the lumber after it had been delivered to the railway company and passed beyond the possession and control of appellants. This court has extended the provisions of Rem. & Bal. Code, § 1163, providing a lien upon lumber while the same remains at the mill where it was manufactured on in the possession or under the conufactured, or in the possession or under the control of the manufacturer, to the logger who assists in getting out the logs from which the lumber was manufactured, and who files his lien under section 1162. But the lien cannot be extended beyond the possession and control of the mill company. When, therefore, the mill compa-ny delivered this lumber to the railway company upon its right of way, it lost its possession and control thereof, and no lien could be subsequentcontrol thereof, and no lien could be subsequently filed against it. Robins v. Paulson, 30 Wash. 459, 70 Pac, 1113; O'Connor v. Burnham, 49 Wash. 443, 95 Pac. 1013. These liens were filed December 10th. Any eloignment affecting them must have taken place subsequent to that date. There is not a particle of evidence in this record that it did, in so far as the lumber delivered to the railway is concerned. The lower court seems to have been of the opinion that the liens could be sustained so long as the lumber was canable of identification, and that any ber was capable of identification, and that any attempt on the part of the millowner to change the identification would be an eloignment. The statute, however, makes 'possession and control' the foundation of the lien upon the manufactured product, and not identification; and when the mill man loses his possession and control, the lien claimant loses his lien."

It may be said that this is the first positive holding of this court upon the question here presented. It appears, however, that this court has on former occasions expressed views quite in harmony with this holding, though possibly not wholly necessary to a decision of the question directly involved. See Campbell v. Sterling Mfg. Co., 11 Wash. 204, 39 Pac. 451; Munroe v. Sedro Lumber & Shingle Co., 16 Wash. 694, 48 Pac. 405; Robins v. Paulson, 30 Wash. 459, 70 Pac. 1113; Forsberg v. Lundgren, 64 Wash. 427, 117 Pac. 244.

Some other questions are presented in the briefs, but since our conclusion upon the facts, even as claimed by appellants, is that there can in no event be any recovery by them as against respondent, these questions need not be here noticed.

The judgment is affirmed.

ELLIS, C. J., and FULLERTON, MAIN, and WEBSTER, JJ., concur.

PARKES v. BURKHART et al. (No. 14509.) (Supreme Court of Washington. April 29, 1918.)

43(2) — JUDICIAL NOTICE — 1. EVIDENCE JUDICIAL PROCEEDINGS.

On appeal from an order sustaining a demurrer to a petition in a probate proceeding, the Supreme Court will take judicial notice of the entire probate proceedings, and hence will not strike a transcript of such proceedings from the record, because such proceedings must be considered a part of the petitioner's petition.

2. WILLS 4=781 - ELECTION-INCONSISTENT

REMEDIES. One cannot take under a will and at the same time set up a claim to the entire estate on the ground that the testator agreed to will him the entire estate.

3. Trusts \$\iff 35(3). 70, 96—Nature of Trust —Agreement Between Heirs.

Where an heir let another heir keep his share of an estate under an agreement that the latter should will him the entire estate, if there was any trust at all, it was an express trust, and not an implied, constructive, or resulting trust.

4. Trusts €==66-- "Implied Trust."

An implied trust arises only from the language of the parties, where no express trust is declared, but words are used from which the courts infer or imply a trust was intended.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Implied Trust.1

5. Trusts \$\infty 91\\_"Constructive Trust"\\_
"Trust ex Maleficio."

A constructive trust, sometimes called a trust ex maleficio, only arises where one clothed with some fiduciary or like character by fraud or otherwise gains some advantage to himself which the law will not permit him to retain.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Constructive Trust; Trust ex Maleficio.]

6. TRUSTS €==62-"RESULTING TRUST."

A resulting trust can never arise from any contract or agreement of parties, but is one which the law presumes from their acts.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Resulting Trust.]

7. Feauds, Statute of \$\infty\$=125(2)\to Damages for Breach of Contract within Statute.

Where an heir conveyed to another heir his share of real estate under oral agreement of share of real estate under oral agreement of the latter to will him the entire estate, such agreement cannot be proved, and no damages can be had from the estate for its breach nor claim be allowed in probate proceedings.

8. Executors and Administrators \$\sim 241\to Filing and Allowance of Claims \to Ef-

Filing of claim for services and expenditures in probate court was not a waiver of items of like character, and allowance of such claim did not operate as a former adjudication.

SERCUTORS AND ADMINISTRATORS \$\infty\$227(1)

STATEMENT OF CLAIMS—PARTICULARITY.

It is not essential that claims against estates should recite facts with the precision and particularity of a complaint, and a claim against a relation for services need not state facts to overcome the presumption that they were gratuitous, as such matter is one that can be determined when claimant is called upon to substantiate the claim.

Department 2. Appeal from Superior Court. Pierce County; Ernest M. Card, Judge.

Petition by Charles H. Parkes in the probate proceedings upon the estate of Mary M. Parkes, deceased. Treated as a complaint and answered by J. H. Burkhart, Frank A. Burkhart, C. G. Burkhart, Charles Flindt, Homer Flindt, Vella Ledwith, and Frankie Ewing. From an order sustaining a demurrer, petitioner appeals. Sustained in part and reversed in part, and remanded with instructions.

Hoppe & Hoppe and Frank H. Kelley, all of Tacoma, for appellant. Guy E. Kelly and Thomas MacMahon, both of Tacoma, for respondents.

PER CURIAM. Appellant filed a petition in the probate proceedings upon the estate of Mary M. Parkes, deceased, in which he set forth that his father, Charles R. Parkes, died intestate at Tacoma on August 25, 1909, leaving him surviving his widow, Mary M. Parkes, and appellant; that all of the property accumulated by Charles R. Parkes in his lifetime was the community estate of himself and Mary M. Parkes; that Mary M. Parkes was not the mother of appellant, but, by reason of her marriage to appellant's father while appellant was of tender years, the same love, affection, and confidence existed between them as if the relation between them had been that of mother and son; that while the community estate of Charles R. Parkes was in process of settlement Mary M. Parkes, fearing that if the estate were distributed according to law-that is, one half to Mary M. Parkes and the remaining half to appellant—the share of Mary M. Parkes would be insufficient to support and maintain her, proposed to the appellant that, if he would convey to her all his right, title, and interest in his father's estate, she would make a will devising and bequeathing all of the property of which she should die possessed to appellant; that actuated by his affection, and having confidence in Mary M. Parkes, appellant agreed to this proposal and in accordance therewith duly conveyed all his right, title, and interest in his father's estate to Mary M. Parkes; that the proposition and acceptance relied upon were oral; that this oral agreement was partly performed by a conveyance of certain described real estate from Mary M. Parkes to the appellant on December 15, 1913, which property so conveyed was a part of the property received by Mary M. Parkes from the estate of her husband under the agreement between Mary M. Parkes and appellant; that Mary M. Parkes died testate on June 28, 1916, leaving a will in which she named appellant as executor, devised to him certain real estate and bequeathed to him certain personal property, disposing of the remainder, constituting the greater part of her estate, to certain of her collateral relatives. Appellant then alleges that the value of his distributive share in his father's estate,

and Mary M. Parkes he conveyed to her, was \$6,000. He then prays: (1) For a decree establishing the oral agreement between himself and Mary M. Parkes, and that the collateral devisee under the will of Mary M. Parkes be charged with a trust in his favor as to all property received by them under the will of Mary M. Parkes; (2) if this relief be not granted, then that he be allowed a claim against the estate of Mary M. Parkes in the sum of \$6,000, with interest from the date of his conveyance to Mary M. Parkes under the alleged agreement. On the same day and as part of the same petition he filed a second claim in which he recited that for seven years between the death of her husband and her own death he rendered certain personal services to Mary M. Parkes and incurred certain expenses for her use and benefit in the sum of \$1,675.80; that theretofore he had filed a claim against the estate of Mary M. Parkes for a part of the above services to the extent only of \$624, under the mistaken belief that he could recover from the estate only for such services as had been performed within three years prior to the death of Mary M. Parkes. This petition was treated as a complaint, and a demurrer thereto was interposed by respondents, which was sustained, and from which this appeal follows.

[1] Respondents have filed in this court a transcript of the probate proceedings in the estate of Mary M. Parkes, which appellant moves to strike. The purpose of that transcript is, of course, to acquaint this court with the various steps taken by appellant, as executor of the estate of Mary M. Parkes, in the settlement and probate of her estate. The motion to strike will be denied. It would serve appellant no good purpose if it were granted, as this court would, for the purposes of the appeal, take judicial notice of all that the lower court properly noticed. The only purpose served by this transcript, then, is to bring before this court in an orderly way the matters and things of which the lower court took judicial notice. lower court would, without doubt, take judicial notice of its own records in the very proceeding in which appellant had filed his petition and in which it was called upon to act, and these matters of judicial notice were just as much a part of appellant's petition and as properly considered by the court in ruling thereon as if specific reference had been made to them. French v. Senate, 146 Cal. 604, 80 Pac. 1031, 69 L. R. A. 556, 2 Ann. Cas. 756.

1916, leaving a will in which she named appellant as executor, devised to him certain real estate and bequeathed to him certain personal property, disposing of the remainder, constituting the greater part of her estate, to certain of her collateral relatives. Appellant then alleges that the value of his distributive share in his father's estate, which under the agreement between himself

addresses of these respondents and giving the estimated value of their shares, and also setting forth that the real property given to him by the terms of the will had been deeded to him in the lifetime of decedent; the will which he offered for probate bequeathed to him all the money, notes, and mortgages of the estate, and nominated him as executor thereof: he obtained his appointment as executor and filed his oath as such; on July 27, 1916, he inventoried this property as the property of decedent, and caused it to be appraised as such, and caused this inventory and appraisement to be served on the state board of tax commissioners; on August 2, 1916, September 28, 1916, October 26, 1916, January 17, 1917, April 5, 1917, and May 23, 1917, appellant petitioned for and obtained orders permitting him as executor to repair the dwellings in the estate which had been devised to respondents; on August 7, 1916, appellant petitioned for and obtained an order permitting him as executor to sell the personal property, heirlooms, etc., devised to respondents, and actually did sell them at public auction for less than \$162; on December 28, 1916, as a legatee under the will, he petitioned for a partial distribution to him on his money legacy, and the court upon this petition did distribute to him as legatee under the terms of the will the sum of \$500; on May 23, 1917, appellant petitioned for an order to sell the real property devised to respondents in order to pay to himself the alleged debt which he had established upon an ex parte application; and by various orders in which he describes the property which he wishes to sell as the property of the estate he has continued the hearing upon this petition to May 1, 1918, in order that in the event that this appeal is decided against him, he may still go on with his petition; on June, 30, 1917, exactly one year after his appointment as executor, as executor he instituted the present contest.

These facts make a proper case for the application of the doctrine of election. Appellant is seeking to take under the will and at the same time set up a right or claim which, if well founded, would defeat the will in so far as it affects respondents. The will expresses a clear intention on the part of the testatrix to pass certain property to appellant and to pass certain other property in fee to respondents. It is well to remember that appellant was not an heir of Mary M. Parkes; unless, therefore, he takes under the will he can have no interest in her estate. He cannot, then, offer the will as a valid testamentary disposition of the estate of Mary M. Parkes in so far as it passes property to him, but regard it of no effect and virtually set it aside as to its other features. It is too well settled that one who accepts a benefit under a will must ac-

commissioners setting forth the names and of it. In re Goss' Estate, 73 Wash. 330, 132 addresses of these respondents and giving Pac. 409.

[3-6] Appellant, if we understand his position, does not ask us to disregard this principle. He says he is seeking to sustain the will in all things, but to obtain a decree which shall find that the respondents, as devisees under the will, are trustees in equity for appellant. If the will is given effect, then respondents are, and from the death of Mary M. Parkes have been, the owners in fee of whatever was devised to them under the will. If owners in fee, they cannot be held to hold in trust for appellant or any other person. Appellant says this trust he seeks is an implied trust arising by operation of law. In another section of his brief he says:

"The facts stated charged the decedent with a constructive or resulting trust, and that her devisees would take under the will charged with the same trust."

Under the generally accepted meaning of these terms the facts disclose no implied trust, neither a constructive nor resulting trust. It cannot be an implied trust, for such a trust arises only from the language of the parties, where no express trust is declared; but words are used from which the courts infer or imply a trust was intended. Perry on Trusts, § 25. The facts show nothing of this character. It cannot be a constructive trust, or, as it is sometimes called, a trust ex maleficio, as such a trust only arises where one clothed with some fiduciary or like character by fraud or otherwise gains some advantage to himself which the law will not permit him to retain, but decrees that he hold it in trust for the one whom he has defrauded. Perry on Trusts, § 26. Nothing of this kind is pleaded. It is not a resulting trust, for such a trust can never arise from any contract or agreement of parties, but is one which the law presumes from their acts. Perry on Trusts, §§ 27, 134.

[7] It is plain that, if any trust is here created, it arises, not out of the law in the absence of agreement, but directly out of the agreement of the parties pleaded by appellant in his complaint. Appellant is directly seeking the enforcement of the agreement he alleges; 'an express agreement and an express trust. The facts pleaded can fit no other form of trust. Where two parties enter into an express agreement in relation to their property, there is no semblance of an implied or resulting trust; if trust of any nature, it is an express trust, and subject to all the limitations of such a trust, among which is that it cannot be established by parol where it seeks to affect the title to real property. Many of our cases have so declared the law, and they will be found cited in Arnold v. Hall, 72 Wash. 50, 129 Pac. 914, 44 L. R. A. (N. S.) 349, and Nichols v. Capen, 79 Wash. 120, 139 Pac, 868.

who accepts a benefit under a will must accept the whole will and ratify every portion lant's second prayer for relief, the \$6,000

not be established by proving the alleged agreement. Since it cannot be proved, its failure cannot be proved, and no recovery awarded appellant because Mary M. Parkes failed to carry out her agreement.

What appellant is really seeking to do under this part of his complaint is to recover damages for the breach of a contract he cannot prove. The fact that he seeks to establish it as a claim against the estate does not change its nature. He says in effect:

"If the courts will not enforce my agreement with the decedent, then I am entitled to recover the extent of my damage because (1) the decedent breached the agreement, and (2) because under the law the courts cannot enforce it.

The agreement is clearly one relating to real property and, since it cannot be proved there is no way in which the breach or failure can be established.

[8] Appellant's third contention is that the lower court erred in not permitting him to file an additional claim against the estate. Appellant had already presented, and the court had allowed, a claim in the sum of \$624, of the same character but covering different years, and the lower court was of the opinion that the filing of the first claim was a waiver of all items of like character not included. and its allowance operates as a former adjudication. The second claim was filed within the time for presenting claims against the estate, and may therefore be regarded as an original claim. We cannot agree with the lower court that, when a claimant against an estate has filed his claim and the same has been allowed, this is a waiver of all liens of a like nature not included; neither can the allowance of a claim have the effect of a judgment so as to raise the bar of res adjudi-The allowance of the claim is its establishment as a charge of indebtedness against the estate. But this allowance is only a qualified allowance, since the heirs and distributees may question it as they may question any expenditure of the funds of the estate upon the hearing of executor's reports, or at any other due and suitable time.

[9] Respondents argue in support of this part of the judgment that because of the relationship between the appellant and the deceased the services will be presumed to be a gratuity, and that there is no plea of any fact that will overcome this presumption. It is not essential that claims against estates should recite the facts with the precision and particularity of a complaint. Whether appellant can substantiate his claim will be determined when he is called upon to do so. Hence the only question now is, Is he entitled to present it to the lower court and be accorded a hearing on it? We think he is. The demurrer to this part of the complaint should have been overruled.

The order appealed from is therefore sus- 166, 162 Pac. 1.

claim against the estate. This claim could, tained as to part 1 of the complaint and reversed as to part 2. The cause is remanded, with instructions to the lower court to permit the filing of appellant's second claim. Appellant will recover appeal costs.

> IRWIN v. J. K. LUMBER CO. (No. 14406.) (Supreme Court of Washington, May 4, 1918.) EMINENT DOMAIN \$==273-WRONGFUL TAK-

ING-INJUNCTION.

A corporation with the power of eminent domain, having taken land, though in a wrongful manner, and devoted it to its corporate uses, will not be enjoined; but the complaining party will be left to his remedy at law.

Department 2. Appeal from Superior Court, Skamania County; Wm. T. Darch. Judge.

Action by E. L. Irwin against the J. K. Lumber Company. Judgment for plaintiff, and defendant appeals. Reversed, with directions.

Douglas, Lane & Douglas, of Seattle, and Guy C. H. Corliss, of Portland, Or., for appellant. Miller & Wilkinson, of Vancouver, for respondent.

CHADWICK, J. Respondent is the owner of a license to fish in the waters of the Columbia river at a place abutting the riparian lands of the appellant. Appellant is the owner of timber lands lying back from the river, and has acquired lands bordering on the shores of the stream for the purpose of making its terminals, log dumps, and booming grounds. It constructed a logging railway from the river into the interior, and has erected its trestles, dumps, and booming grounds along the shores, and, as respondent contends, over his fishing grounds, to the exclusion of his right to set his nets and maintain his fishery.

It is unnecessary to go into the merit of the case. Appellant is a public service corporation having the right of eminent domain, and, having erected its terminal works, and having put them to its corporate uses, the courts will not interfere by injunction, but will leave the complaining party to his remedy at law. The case falls within the rule first insinuated in Colby v. Spokane, 12 Wash. 690, 42 Pac. 112, then declared in Kakeldy v. Columbia & Puget Sound Railway Co., 37 Wash. 675, 80 Pac. 205, and adhered to in a long line of decisions.

"In the interest of public policy, this court has held that the state or a municipal corpohas held that the state or a municipal corporation, or a corporation exercising the privileges of the sovereignty, will not be ousted if it has wrongfully taken possession of the land and is, in fact, devoting it to a public use. The owner will be left to his remedy at law to recover damages. The cases are collected in Domrese v. Roslyn, 89 Wash. 106, 154 Pac. 140." State ex rel. Peel v. Clausen, 94 Wash. 166, 162 Pac. 1

The wrong, if any, being only in the manner of taking, equity will afford no remedy. The judgment of the lower court is reversed, with directions to dismiss without prejudice to the right of plaintiff to maintain an action at law.

ELLIS, C. J., and MOUNT, MAIN, and HOLCOMB, JJ., concur.

GATES et al. v. HERR. (No. 14563.)

(Supreme Court of Washington. May 6, 1918.)

1. Pleading \$=309-Exhibits-Demand. Where a motion is made for an order to require plaintiff to furnish a copy of a written contract which has been pleaded according to

its legal effect, neither a written demand under Rem. Code 1915, \$ 284, nor notice under section 1262 is necessary.

2. Contracts 52-Consideration-Detri-

MENT TO PROMISEE. Where an executor as an individual under-took by an agreement with a legatee to buy from himself as executor a half interest in decedent's

estate and to apply the agreed price upon the legacy, neither the legatee's agreement to accept such agreed price nor the acceleration of payment of her legacy constituted a valuable consideration, since no detriment was suffered by the legatee, the promisee.

3. EXECUTORS AND ADMINISTRATORS \$\infty 96 - EXECUTOR'S CONTRACT.

Where an executor entered into an agreement with a legatee to buy a half interest in decedent's separate property and to apply the proceeds on the payment of the legacy, such agreement did not render the executor personally lighly for such payment. ally liable for such payment.

4. CONTRACTS 4-48-CONSIDERATION-AGREE-

MENT UNDER SEAL.

That an agreement is under seal imports a consideration only prima facie, and the want thereof may be shown as a matter of defense.

Department 2. Appeal from Superior Court, King County; A. W. Frater, Judge.

Suit by B. L. Gates and another, as executors of the last will and testament of Philena Richards, deceased, against Willis B. Herr, as executor of the estate of William Holt, deceased. Judgment for defendant, and plaintiffs appeal. Affirmed.

T. B. McMartin and Griffin & Griffin, all of Seattle, for appellants. Herr, Bayley & Croson, of Seattle, for respondent.

PER CURIAM. Albert J. Richards died on February 14, 1914, leaving an estate consisting of community and separate property inventoried at \$34,946. By the terms of his will a bequest of \$6,000 was to be paid to his mother. Philena Richards, out of his separate estate. William Holt, the partner of Richards in the business of conducting the Grand Central Hotel in Seattle, was named as executor under the provisions of the will, which was of the character known as a non-lntervention will, and letters testamentary were issued to him on February 16, 1914. Richards in the business of conducting the

One month later the executor and the legatee Philena Richards entered into the following agreement:

"Memorandum of agreement, made and entered "Memorandum of agreement, made and entered into this 16th day of March, 1914, by and between Philena Richards, party of the first part, and William Holt, party of the second part, both of Seattle, Wash., witnesseth:

"Whereas, on the 10th day of February, 1914, Albert J. Richards died at Seattle, Wash., testate leaving by his will a league of six thousand

tate, leaving by his will a legacy of six thousand dollars (\$6,000) to the party of the first part to be paid out of his separate estate; and whereas, a portion of the separate estate of said Albert J. Richards, deceased, consists of an undivided one-half interest in and to what is known as the Grand Central Hotel, located in the Latimer building, on the corner of First Avenue South and Main street, in the city of Seattle, Wash., said hotel being up to the time of the death of said Albert J. Richards owned and conducted jointly by William Holt, party of the second part, and said Albert J. Richards, deceased, share and share alike; and whereas second part, and share alike; and whereas, said William Holt, as the executor and surviving partner of said Albert J. Richards, deceased, desires to wind up the affairs of said partnerships and to convert the interest of said Albert J. Bichards, deceased, desires to wind up the affairs of said Albert J. Bichards and to convert the interest of said Albert J. Bichards and the said nerships and to convert the interest of said Arbert J. Richards, deceased, in said hotel into cash for the purpose of raising funds with which to pay said legacy; and whereas, the parties hereto have had the said interest appraised by disinterested appraisers who have agreed that the reasonable value of such interest dear not exceed the sum of thirty-fix huns.

agreed that the reasonable value of such interest does not exceed the sum of thirty-five hundred dollars (\$3,500):

"Now therefore, in consideration of the premises, and of one dollar (\$1) in cash paid by the party of the second part to the party of the first part, receipt whereof is hereby acknowledged. ed, the party of the first part agrees that the party of the second part may purchase said one-half interest in said hotel, together with the furniture and fixtures therein contained, as surviving partner, at and for the said sum of thirty-five hundred dollars (\$3,500), and the said party of the second part agrees to purchase the same in order to wind up the affairs of said partnership at said price on the following terms, to wit: The sum of one thousand dollars (\$1,000) in cash on or before the 1st day of April, 1914; the sum of five hundred dollars (\$500) on or before the 1st day of July, 1914; the sum of five hundred dollars (\$500) on or before the 1st day of January, 1915; the sum of five hundred dollars (\$500) on or before the 1st day of March, 1915; the sum of five hundred dollars (\$500) on or before the 1st day of March, 1915; the sum of five hundred dollars (\$500) on or before the 1st day of March, 1915; the sum of five hundred dollars (\$500) on or before the 1st day of June, 1915. Said deferred payments to be evidenced by the promissory notes of the party of the second furniture and fixtures therein contained, as surpromissory notes of the party of the second part with interest thereon at the rate of 6 per cent. per annum, payable at maturity, and said deferred payments will be secured by the party of the second part by a chattel mortgage on said Grand Central Hotel and the furniture and said Grand Central Hotel and the furniture and fixtures thereof and a mortgage upon lots one (1), two (2), three (3), and four (4) of block two (2) Scaside addition to Alki Point as per the recorded plat thereof. And the party of the first part covenants and agrees to accept from said party of the second part said amount of thirty-five hundred dollars (\$3,500) so to be paid as aforesaid as a credit upon and in part navment of said legacy of six thousand dollars

For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

"In witness whereof the said parties have hereunto set their hands and seals the day and year first above written.

"[Signed] Philena Richards
"William Holt. [Seal.]

"Witness: A. B. L. Dent.
"The party of the second part agrees to keep all of the said personal property and the building upon the lots herein described insured for not less than twenty-five hundred dollars for not less than twenty-five hundred dollars (\$2,500) in a company or companies satisfactory to the party of the first part; loss if any to be paid to the party of the first part as her interest may appear, to be applied to the payment or partial payment of the notes in the order they shall become due in the event of any loss or damage to the property insured or any por-tion thereof. Wm. Holt." tion thereof.

No payments had been made under this contract by the executor at the time of his death on November 17, 1915. After the death of the executor, Minnie Richards, the widow of the testator, was appointed administratrix de bonis non of her deceased husband's estate, and thereafter sold her decedent's half interest in the Grand Central Hotel under order of the court. Philena Richards died on November 30, 1915, and the appellants B. L. Gates and Alfred R. T. Dent were appointed executors under her last will. They instituted this action against Willis B. Herr, as executor of the estate of William Holt, to enforce payment for their claim of \$3,500, with interest, alleged to be due under the foregoing agreement, which claim had been rejected by the executor of Holt's estate. An affirmative defense was interposed, setting up that it was understood between William Holt and Philena Richards that a one-half interest in the hotel was the separate property of Albert J. Richards, in which his wife had no right, and that the agreement was entered into with a view to securing the consent of Philena Richards to the sale to Holt and a waiver of her right to appear and object to an order of sale, and was for the purpose of raising funds to apply on her legacy; that there was no consideration for the agreement; that on application for an order of court authorizing the sale of Richard's half interest his widow objected to the jurisdiction of the court on the ground that the will was nonintervention in character, and, further, that she claimed such interest as community property and had notified Holt not to apply any portion on account of the legacy; that since the death of Holt Minnie Richards as administratrix de bonis non of the estate of her deceased husband has sold and disposed of the one-half interest in the hotel and appropriated the money to her own use; and that owing to the dispute as to the character of the property such interest was never purchased by Holt. The complaint alleged and the answer denied that the one-half interest of Richards in the hotel property was his separate estate.

The court found that the undivided half interest in dispute had been sold by the ad-

court; that such half interest never was the property of Philena Richards, deceased, nor did she ever have the right to possess or dispose of same; that Holt never received any consideration for the agreement with Philena Richards; that he never received the undivided one-half interest in the hotel; that the estate of William Holt, deceased, has never received any benefit or profit by reason of entering into such stipulation; that Philena Richards or her representatives have never been in a position to transfer or convey to William Holt, or his estate, such undivided half interest, and that the provisions of the written stipulation between Philena Richards and William Holt have never been complied with. As a conclusion of law, the court found the respondent was entitled to a judgment dismissing the action. From such judgment this appeal is prosecuted.

[1] The appellants assign as error an order of the court requiring them to furnish respondent with a copy of a written contract which had been pleaded by them according to its legal effect. They contend that there was no "demand in writing" as required by Rem. Code. \$ 284; that it was not "upon notice" as required by Id. § 1262; and that the motion therefor was not accompanied by any showing of necessity made upon affidavit. The motion itself was sufficient to satisfy the requirement of notice and written demand. The sufficiency of any showing of necessity was a matter within the discretion of the trial court. We think this assignment is without merit.

The issues presented by the pleadings are, Was the half interest of the deceased, Richards, in the Grand Central Hotel property, community or separate estate? and if the latter, Did the surviving partner, who was also executor without the intervention of the court, enter into a valid agreement binding upon himself, whereby title to such half interest passed from Richards' estate to himself, thus rendering him personally liable to Philena Richards? The court did not expressly find that Richards' one-half interest in the hotel was either separate or community property, although appellants requested a finding that it was separate property. In view of the conclusion we have reached upon the merits of the case, the failure of the court to find as to the separate character of the property was immaterial.

The claim in behalf of the estate of Philena Richards against the estate of William Holt is founded on the written agreement wherein Holt as an individual undertakes to buy from himself as an executor of Albert J. Richards' estate the one-half interest of such estate in the Grand Central Hotel property and apply the agreed price upon the legacy to Philena Richards. This half interest had never been distributed to Philena Richards. The will of Albert J. Richards bequeathed to ministratrix de bonis non under order of the Philena Richards "the sum of six thousand

dollars (\$6,000) in cash • • to be paid out of my separate estate." The bequest did not give Philena Richards title to any specific property of the estate. It merely gave her a contingent right to the sum of \$6,000, or whatever less sum should develop as pertaining to the decedent's separate property on final distribution of the estate.

[2] In making the agreement with Holt Philena Richards parted with nothing of value. The half interest in the hotel was inventoried as separate property in which she would have some interest under the will, but her agreement to accept from the executor its agreed valuation to be applied on her bequest would not constitute a valuable consideration. Her agreement to consent to an order of court for the contemplated disposition of this property was nothing more than a waiver of any right to object. The only party really bound to do anything under the contract was William Holt, thus constituting it a pseudo-unilateral one. But in a sense he was not bound. The agreement called for the sanction of an order of court, and this was never obtained. The evidence does not show there was any attempt of the parties to proceed with the agreement after the refusal of the court to order the sale. There is no evidence that Holt ever attempted to assert title to his deceased partner's interest, and it must be presumed that the arrangement between the parties was abandoned. This action is maintained on the theory that the agreement constituted a valid indebtedness on the part of Holt, enforceable as a claim against his estate. The most favorable view possible is that the agreement was an executory contract remaining unperformed. No attempt was ever made to enforce the performance of the agreement against either Holt or the executors of his estate. The record shows merely a claim based upon Holt's contract to buy from himself in his trust capacity as executor and apply the proceeds of the sale upon a bequest owing by his trust estate, if the court would sanction it.

[3] We are satisfied that the appellants have no valid claim against the respondent. The record further shows that the hotel half interest which was covered by the agreement upon which appellants found their claim was subsequently sold by Holt's successor in administering Richards' estate by order of the court under due process. Whether the property thus disposed of was separate property of Richards subject to the bequest in favor of his mother is not a matter for determination here. Nor does there seem to be any question of the rights and liabilities of a surviving partner in the case, inasmuch as the surviving partner, who was also the executor, made no attempt to administer the partnership portion of the estate in any other capacity than that provided by the statutes governing the administration of decedents' estates.

The appellants contend that their right of recovery is supported by the rule which makes an executor personally liable for the debts and legacies of the testator, where the estate possessed assets sufficient and the executor promised payment to the creditor or legatee. If that rule were recognized as going to the extent of binding the executor personally on a promise to pay a legacy, instead of a debt, we have no such promise in this case. The promise was merely conditional that, if the court would by its order legalize the sale by himself as executor to himself as an individual, he would pay the .purchase price out of his own funds as a pro tanto application on the legacy. Although the generally accepted rule is that an executor cannot purchase at his own sale, it may be conceded. that the present case might afford an exception to the rule, since the transaction would have been for the best interests of the estate in disposing of a partnership interest at what the evidence shows was an advantageous price, inasmuch as this interest on a subsequent sale realized \$2,000 less than this offer. But we are confronted with the fact that the property in no sense belonged to Philena Richards. Her interest in the estate was for a cash legacy contingent on the realization of that sum from the assets constituting the separate estate of the decedent. Her right to such legacy is still intact. Holt's agreement in his dual capacity to buy and pay for the one-half interest in the hotel would not form a contract with Philena Richards. His promise to pay her therefor, if viewed from the standpoint of contractual relations, was void, since it was not hers to dispose of. While the acquisition of the whole interest in the hotel might have been a benefit to him, there was no element of detriment to her. She was entitled to payment of the legacy, and it was the executor's duty to discharge the bequest. The only element of consideration affecting her was the benefit in expediting part payment of a legacy due her. One of the rules relating to consideration is stated in 9 Cyc. p. 316, as follows:

"There is no consideration for a promise where no benefit is conferred upon the promisor nor detriment suffered by the promisee, and the promisor neither undertakes to do anything which he is not bound to do nor forbears to do anything which he has a right to do. \* \* \* The detriment to the promisee which suffices as a consideration for a contract must be a detriment on entering into the contract, not from the breach of it."

[4] It is plain the agreement shows a nudum pactum so far as Philena Richards is concerned. Counsel contend, however, that because the agreement was under seal it imported a consideration. That is only prima facie so, and the rule in such cases is that want of consideration may be shown as a matter of defense. Considine v. Gallagher, 31 Wash. 669, 72 Pac. 469.

Finding no prejudicial error in the case, the judgment is affirmed.

STATE v. DUNCAN. (No. 14352.) (Supreme Court of Washington, April 27, 1918.)

1. HOMICIDE @==14(1)—INSTRUCTIONS—"PRE-MEDITATED DESIGN."
"Premeditated design" is a mental operation

of thinking upon an act before doing it, or upon an inclination before carrying it out.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Premeditated Design.]

2. Homicide == 286(3)—Instructions.

In a prosecution for murder, instruction that malice aforethought or premeditated malice occurs where the intention unlawfully to take life is deliberately formed and meditated upon before the actual killing, and that there need be no fixed time between the formation of intent and the act, it being sufficient if the act is preceded by a concurrence of will, is not errone-ous as doing away with deliberation.

3. Homicide \$==151(1), 152 - Presumption

AND BURDEN OF PROOF.

If the killing of one human being by another is proved beyond a reasonable doubt, the pre-sumption of law is that it is murder in the sec-ond degree, and if defendant seeks to justify the act he has the burden of so doing.

4. Criminal Law \$\infty\$1137(3) — Appeal—Instructions—Invited Instructions.

Accused in prosecution for murder, having requested instruction on the subject of alibi and introduced evidence attempting to establish alibi, could not complain of the giving of a differ-ent instruction on alibi, which was more com-plete and accurate than the one he requested.

5. Criminal Law \$= 829(16) - Instructions

-REOUESTS.

/In prosecution for murder, instruction that /in prosecution for murder, instruction that the jury should consider the conduct of the witnesses, the reasonableness of their story, and all the facts, and were not bound to believe the witnesses, sufficiently covered requested instruction that evidence of statements alleged to have been made by defendant should be received with great caption considering the lightly than the with great caution, considering the liability to mistake or misunderstanding.

6. Criminal Law \$\infty 406(1)\$—Evidence—"Ad-

MISSION.

An "admission" is a concession or voluntary acknowledgment of the existence or truth of a fact, or a statement suggesting any inference to an issuable fact made by an interested party.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Admission.]

7. CRIMINAL LAW \$\infty 814(16) — EVIDENCE - "ADMISSION."

In prosecution for murder, statements of accused showing his relations with deceased from which the inference of motive of jealousy and revenge could be drawn were not, strictly speaking, admissions, so that it was not error to refuse requested charge on the weight to be given admissions.

8. CRIMINAL LAW \$==409 - EVIDENCE - AD-

MISSIONS.

While evidence of admissions should be received with caution, admissions deliberately made and clearly proved are very strong and satis-factory evidence against the party making them.

9. CRIMINAL LAW & 741(3) — ADMISSIONS — QUESTIONS FOR JURY.

The weight to be given admissions is to be

determined by the jury. 10. Homicide == 253(2) - Murder in First DEGREE.

In a prosecution for murder, evidence largely circumstantial, held to sustain verdict of first degree murder.

11. Criminal Law 6-964 - New Trial -

TIME FOR MOTION.
In view of Rem. Code 1915, § 2181, requiring motion for new trial in a criminal case to be made before judgment, and section 402, requiring motion for new trial to be made within two days after the verdict, where motion for new trial was made in two days and disposed of and judgment was then entered, whereupon accused moved to set aside the former order and resubmit the motion for new trial, the court had lost jurisdiction.

12. CRIMINAL LAW \$\infty\$1083\to Appeal\to JurisDiction of Lower Court.

Notice of appeal in criminal cases constitut-ing defendant's appeal, trial court has no jurisdiction to set aside an order denying new trial, where motion to set aside is made after notice of appeal.

Department 2. Appeal from Superior Court, Whatcom County: Ed E. Hardin.

Richard Duncan was convicted of murder in the first degree, and he appeals. Affirmed.

Walter A. Martin, of Bellingham, and Walter B. Allen and Bell & Hodge, all of Seattle, for appellant. W. P. Brown and Loomis Baldrey, both of Bellingham, for the State.

HOLCOMB, J. The verdict of the jury. convicting appellant of the crime of murder in the first degree, was returned and filed on April 3, 1917. A motion for a new trial upon the statutory grounds in the language of the statute was served and filed April 4, 1917. The motion was argued in the court below and by it denied on April 24, 1917. and on the same date the judgment and sentence of the court on the verdict was filed and entered. On April 25, 1917, appellant served and filed his notice of appeal to this court, and, no bond being required in a criminal case, the notice of appeal constituted his appeal to this court. Thereafter on May 9, 1917, appellant served and filed a motion to set aside the order of April 24, 1917, denying his motion for new trial, and at the same time moved for an extension and enlargement of the time for submission of a motion for a new trial and reargument thereof and supported the same by affidavits, which motion was on May 14, 1917, upon notice, brought on for hearing in the court below and after argument was denied by the court upon the ground that it had lost jurisdiction of the matter under the statute by reason of the appellant's having appealed to the Supreme Court.

[1] Appellant first complains of the giving of an instruction by the court quoted in part as follows:

"Premeditated design is a mental operation of thinking upon an act before doing it or upon an inclination before carrying it out.

This instruction was given in one stating all the elements and legal terms defining murder in the first degree. Almost the exact language of this instruction was approved in State v. Straub, 16 Wash. 111, 47 Pac.

227. The same definition of premeditation with approved declarations of this court. or premeditated design is given in 31 Cyc.

Complaint is also made of instruction No. 11 given by the court as follows:

"You are further instructed that malice aforethought or malice with premeditation, or pre-meditated malice, which is another way of put-ting it, in a case of this kind, is where the in-tention to unlawfully take life is deliberately formed in the mind, and that determination meditated upon before the fatal shot is fired. There need be no fixed or definite length of time There need be no nixed or dennite length of time between the formation of the intention to kill and the killing, but there must be actual time for meditation between the formation of the intention to kill and the homicide. It is sufficient if the act of killing be preceded by a concurrence of will, deliberation, and premeditation on the part of the slayer, though but a moment on the part of the stayer, though but a moment be taken in the formation of the design to kill and in the deliberation upon and meditation of such design before carrying it into effect."

[2] It is contended that this instruction is identical with one disapproved by this court in State v. Rutten. 13 Wash. 203, 43 Pac. 30, and similarly in State v. Moody, 18 Wash. 165, 51 Pac. 356. The contention is that the instruction did away with the idea of deliberation. The instruction in this case is very similar to the one approved in State v. Straub, supra, distinguishing the instruction in that case and the one in the Rutten Case; and the language in the instruction here:

"It is sufficient if the act of killing be pre-ceded by a concurrence of will, deliberation, and premeditation on the part of the slayer, though but a moment be taken in the formation of the design to kill and in the deliberation upon and meditation of such design before carrying it into effect'

met with the approval of the court in the Straub Case, supra. It was not erroneous.

[3] The next complaint is that the court instructed the jury:

"You are further instructed that, if the killing of one human being by another is proven beyond a reasonable doubt, the presumption of law is that it is murder in the second degree.

\* \* If the defendant seeks to justify the acts in such case the burden is upon the defendant so to do."

That such instruction states the law as declared in this state is settled by the following cases: State v. Payne, 10 Wash. 545, 39 Pac. 157; State v. Clark, 58 Wash. 128, 107 Pac. 1047; State v. Drummond, 70 Wash. 260, 126 Pac. 541; State v. Hawkins, 89 Wash. 449, 154 Pac. 827.

[4] The next complaint is of an instruction given by the court which appellant says told the jury that the defense of appellant was an alibi, and, further, in discussing the evidence of an alibi, says that the evidence of an alibi should account for the defendant during the whole period in which the jury should find that the offense charged was committed. It is asserted that the instruction was prejudicial to the appellant because the defense was not necessarily an alibi as a matter of fact, but that the defense was simply one of not guilty. The instruction was that one of the defenses interposed by the appellant was sonableness of the story told by them, and all

and stating how an alibi was to be proven by the accused, not by evidence beyond a reasonable doubt or even by a preponderance of the evidence, but if the evidence upon the proposition raised a reasonable doubt in the minds of the jury as to whether the accused was at another place than that at which the crime was committed at the time of its commission, if committed, it would be sufficient. Appellant is not in a position to complain of the giving of the instruction upon the subject of alibi, because appellant himself submitted an instruction upon that same subject and introduced evidence in his own behalf attempting to establish an alibi. The instruction given was more complete and accurate than the one requested by appellant, and he is not prejudiced thereby.

Appellant requested the court to give seventeen instructions, and argues that two of the requested instructions should have been given, and that the court erred in not giving them. One of these, the sixth, was a request upon circumstantial evidence. The court gave a very elaborate and accurate instruction upon the subject of circumstantial evidence, its weight and value in criminal cases, which has been approved in 2 Blashfield's Instructions to Juries, §§ 2414, 2454. The instruction was, in fact, more instructive to the jury than that offered by appellant.

[5] The next assertion is that requested instruction No. 8 should have been given as follows:

"A part of the evidence of the state consists of certain declarations or statements alleged to have been made by the defendant and testified to by witnesses in this case; the court instructs to by witnesses in this case; the court instructs you that the law is that such evidence should be received with great caution as the liability to mistake on the part of the witnesses may occur in the repetition of language, the understanding of what was said, or the speaker may not have conveyed fully to the witness the idea. intended by the language used; therefore for such rensons such testimony is to be received by you with great caution and weighed with great care."

No authorities are cited to sustain the propriety of the foregoing instruction. The court did, by other instructions, instruct generally upon the question of the credibility of witnesses, the manner of judging testimony, and the duty to harmonize same, and without singling out any class of witnesses or line of testimony, and instructed the jury upon that question in a manner generally approved. The jury were instructed that they were the sole and exclusive judges of the credibility of the witnesses who testified; that they should take into consideration the interest of the witnesses who testified in the result of the case, if any such interest was proven, their conduct and demeanor while testifying, their appearent fairness or bias, if any such appeared, their opportunity for seeing or knowing the things about which they testified, the reasonableness or unreaan alibi; then defining an alibi in accordance the evidence and facts and circumstances

proven in the case and tending to corroborate or contradict such witnesses if any such appear; that they were not bound to believe anything to be a fact because a witness had stated it to be so, if they believed from all the evidence that such witness was mistaken or knowingly testified falsely. The latter part of the instruction given, in a general way and without particularizing any testimony or calling attention to any particular witnesses, covered the ground requested by appellant. If the requested instruction was intended to apply to the class of evidence known as confessions made by the accused, there was nothing in the evidence in the case that the alleged statements by appellant were made under inducement or fear in any way, and the above instruction does not cover that subject.

[6] Furthermore, the instruction requested referred to declarations or statements made by the defendant and testified to by witnesses. The instruction stated the law with reference to admissions. Admissions are distinguishable from confessions. Admissions are concessions or voluntary acknowledgments made by a party of the existence or truth of certain facts. Bouvier's Law Dictionary. Recognition as fact or truth; acknowledgment; concession; also the expression in which such assent is conveyed. Anderson's Law Dictionary. An admission is a statement, oral or written, suggesting any inference as to any fact in issue relative, or deemed to be relative, to any such fact, made by or on behalf of any party to a proceeding. Stevens' Digest of Evidence, § 39.

[7-9] The evidence of witnesses as to statements of appellant consisted of detailed accounts of the whereabouts of appellant on the day in question, his acts, an account of a quarrel with the deceased, her whereabouts on that day, and facts from which the jury could, with other circumstances shown by evidence as to the manner of the killing of the deceased, infer a motive on the part of the appellant to kill the deceased, viz. jealousy and revenge. However, there was nothing in the way of direct admissions on the part of appellant in the statements testified to of any connection on his part with the crime itself, but they were rather in the nature of denials and avoidance of admissions of any connection with the crime. The statements did, however, as said, show his relations with the woman and, circumstantially, a motive for the crime. These were to be derived from the facts as stated by him as to his relations with the woman, together with the manher and circumstances of the killing as shown. But, strictly speaking, they were not to be considered as admissions. The instruction requested the law to be given as if the statements shown were admissions or declarations. As to them it is true the law is that the weight to be given to evidence of admissions may depend upon various matters affecting its accuracy, as, for example, the

liability to mistake what has been said, resulting either from the frailty of human memory, the natural inability to detail what has been said by another precisely as it was said, and the liability to purposely color or . mistake what was said. Consequently it is stated to be the rule that evidence of admissions, particularly mere verbal admissions, should be received with caution. But it is equally well settled that admissions deliberately made and clearly proved are very strong and satisfactory evidence as against the party making them. The weight to be given to admissions is to be determined by the jury under proper instructions by the court. 1 Enc. Ev. 610-612. It is also said to be a general rule that it is not unfair to take a man at his word (Robinson v. Stuart, 68 Me. 61), and that admissions may be the best or the weakest kind of evidence (Parker v. McNeill, 12 Smedes & M. [Miss.] 355). From the nature of the testimony referred to, the instruction requested was not appropriate, and it was not error to refuse it.

[10] The next ground of error is the denial of the motion for a new trial. This is based largely upon the giving of the instruction heretofore discussed to the effect that, if the killing of one human being by another is proven beyond a reasonable doubt, the presumption of law is that it is murder in the second degree, and if the defendant seeks to justify the acts in such a case the burden is upon him so to do, and, further, upon the alleged insufficiency of the evidence to fustify a finding by the jury that the appellant was guilty of homicide. The evidence was largely circumstantial, and the record is very voluminous, but in our opinion there was ample evidentiary support for the verdict of the jury. There being no attempt on the part of the appellant by evidence to justify the killing or to show the elements constituting manslaughter or murder in the second degree only or self-defense or anything of that kind which would reduce the offense from murder in the first degree or justify the killing, the verdict was proper.

There is nothing to support the contention of appellant that:

"If the evidence points to Duncan as the guilty party, equally as strong is it that, if he killed her, it was the result of a sudden and unexpected quarrel, done in the heat of passion and under extreme provocation. She was the aggressor."

[11, 12] The last error claimed is that the court erred in denying the motion to set aside the order denying the new trial and to resubmit the same. Section 2181, Rem. Code, provides that an application for a new trial in a criminal case must be made before judgment providing the grounds therefor. Section 402, Rem. Code, provides that the party moving for a new trial must move therefor within two days after the verdict of the jury, or within such further time as the court within which the action is pending or

the judgment thereof may allow. Appellant filed his motion within two days and had it disposed of, and the judgment had been entered when the motion to set aside the former order and resubmit the same was filed. The court had then lost jurisdiction of the matter, and it had further lost jurisdiction by reason of the fact that appellant had served and filed his notice of appeal to this court. The court below had no jurisdiction to pass upon the motion to resubmit the motion for a new trial, and the case was then appealed to this court. The matters in support of that motion are therefore not properly in the record nor before us, and cannot now be considered. State v. Scott, 172 Pac. 234, just decided; White v. Sanders, 168 Pac. 1140. The last-cited case being a civil case appeal was not perfected until a bond had been filed. This case being a criminal case and no bond being required, appeal is complete upon giving the notice of appeal.

There being no errors found in the record, which we can consider, justifying a reversal, the judgment is affirmed.

ELLIS, C. J., and MOUNT and FULLER-TON, JJ., concur.

# PRATT v. ARCADIA ORCHARDS CO. (No. 14431.)

(Supreme Court of Washington. April 29, 1918.)

1. VENDOR AND PURCHASER \$\infty\$147-DEMAND FOR DEED.

Under a contract for sale of land, providing that where buyer has paid one-fourth or more of the purchase price he can, after five years, demand a deed for a proportional amount of land, a notice by letter before the expiration of the five-year period that he desired a deed for a proportional part was sufficient notice of election, although it also suggested that he be given a deed of the entire tract and be allowed to give a mortgage for the purchase price.

2. VENDOR AND PURCHASER \$== 168-DEMAND FOR DEED.

A contract for sale of land, which provided that on payment of one-fourth or more of the purchase price the purchaser could cease payments and demand a deed for such an amount of land as the amount paid shall bear to the purchase price and accrued interest at the end of five years, the amount necessary to be paid to demand a deed need be only one-fourth of the purchase price, without interest, although the land received might be less than that proportion.

3. VENDOR AND PURCHASER \$\infty\$145\to Right to DEED\to ABANDONMENT.

Where buyer of land under contract, after paying a certain part, had the option of demanding a deed for a proportionate amount of land, to be conveyed after five years, and gave notice of such election, the fact that he remained on the land and tilled the entire amount and paid vendor for caring for trees after the expiration of the five-year period was not an abandonment of his right to a deed for the smaller amount.

Department 2. Appeal from Superior Court, Spokane County; Wm. A. Huneke, Judge.

Action by D. O. Pratt against the Arcadia Orchards Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Cullen, Lee & Matthews, of Spokane, for appellant. Post, Russell, Carey & Higgins, of Spokane, for respondent.

HOLCOMB, J. The same form of contract as that in controversy here was construed, and the measure of recovery by the vendee determined in Johnson v. Arcadia Orchards Co., 91 Wash. 289, 157 Pac. 685.

In this case the expiration of the contract was December 1, 1914. At that time respondent pleaded, appellant admitted, and the court found, that respondent had paid on the contract a total of \$930 upon the purchase of ten acres, while the purchase price of \$2,500 with interest accrued then amounted to \$3,576.80, as alleged, admitted, and found. The contract providing that no fractional parts of an acre should be conveyed under the option contained in paragraph 9 (see Johnson Case, supra), the court found that upon the expiration of the contract respondent, in accordance with the decision in the Johnson Case, was entitled to two acres as fully paid for, of the pro rata value of \$500.

[1] Appellant contends that the court erred in making finding No. 4 as follows:

"And on or about April 1, 1914, the plaintiff notified the defendant of his election to take such proportionate part of said ten-acre tract as he would be entitled to receive under said paragraph 9 of said contract of December 1, 1909."

In the Johnson Case it was said:

"He could not demand a deed before the

expiration of the contract; and, inasmuch as the contract did not require him to
demand it at all, and since, from the fact of respondent having ceased to make payments when
he had paid more than one-fourth of the purchase price, it was to be presumed by appellant that he would avail himself of the alternative stipulation in his contract to receive the one
acre of land selected by appellant, there was
nothing for respondent to do but wait until
January 20, 1915, for his deed to one acre."

hile, as there stated, the purchaser could not demand or enforce a deed before the date of the expiration of the contract under the option in the contract, nevertheless he could notify the vendor that he would avail himself of the option contained in the contract at any time when he was in default, and had paid sufficient to be entitled to one acre or more, excluding fractional parts of acres. Respondent notified appellant by letter on April 1, 1914, in response to some notice or demand of appellant, that he desired that the company make him an absolute deed to a certain amount of land covering the amount of money which he had already paid as provided for in the contract. It is true the letter contains a further suggestion that the company make him a deed for the remainder of the land and allow him in return to make a mortgage for the remainder of the purchase



latter suggestion or notice in the contract, and appellant was at liberty to disregard it.

On June 15, 1916, appellant gave notice of cancellation of contract to respondent, and on July 7, 1916, respondent renewed his demand for the conveyance of the pro rata part of the land to which the money that he had paid would entitle him under the option contained in paragraph 9 of the contract.

[2] Paragraph 9 was certainly clear and explicit, and meant what it said. It gave the option to the purchaser, when he had paid at least one-fourth of the purchase price, to cease further payments and be entitled, at the expiration of five years from the date of the contract, to such a proportionate part of the land as the amount so paid shall bear to the purchase price and accrued interest, except that no fractional part of an acre shall be deeded under this provision. Under the contract, therefore, respondent, having paid more than one-fourth of the purchase price, but not quite enough to obtain one-fourth of the land or the value thereof under the fractional part of an acre provision, was entitled to as many acres as his money would pay for or the value thereof; in this case, one-fifth of the acres purchased, or two acres. And having been in default in payment of some installments on April 1, 1914, prior to the expiration of the contract, he gave sufficient notice to appellant that he desired to take the proportionate part of the ten-acre tract to which he was entitled under the option contained in the contract. This was sufficient to constitute notice of his election and to require respondent to comply with the option.

It is also contended that the court erred in making finding of fact No. 6, finding the amounts due and the amounts paid by respondent. These allegations were admitted by the pleadings, and the finding cannot be questioned.

[3] It is further contended by appellant that respondent by his conduct elected to perform that part of the contract which related to the purchase of the ten acres in its entirety, and, by so electing and not making his demand within the time prescribed by the agreement, waived and abandoned any and all rights which he might have had to the two acres of land according to the terms of paragraph 9 of the agreement. This contention is based upon the fact that respondent cultivated the entire ten acres in the spring and summer of 1915, after the date of the expiration of the contract, and raised potatoes between the trees on the land, and also paid a small sum to appellant for caring for the orchard; thus, as appellant claims, reaffirming the contract as an entirety.

These acts certainly did not mislead ap-

money. But there was no provision for the tion contained in the contract. Although the five years had expired and the respondent was delinquent in his payments on the tenacre tract, he still had the clear and positive right to the option contained in the contract. That right had matured.

> The judgment of the trial court was correct, and is affirmed.

> ELLIS, C. J., and MOUNT, CHADWICK. and WEBSTER, JJ., concur.

> MOHNEY v. DAVIS et al. (No. 14237.) (Supreme Court of Washington, May 7, 1918.) APPEAL AND EBROR \$=334(7)-DEATH PEND-ING APPEAL - SUBSTITUTION OF PARTIES-TIME TO PROCEED.

TIME TO PROCEED.
Under Rem. Code 1915, § 1743, providing that death of a party after rendition of final judgment in the superior court shall not affect appeal taken, but the proper representative may be made party at the instance of another party, as in case of death of a party pending an action in the superior court, motion for substitution must, as provided by Laws 1917, c. 156, § 116, in case of death of party pending an action against him, be served on his executor or administrator within 90 days after first publication of notice to creditors. of notice to creditors.

Department 2. Action by J. M. Mohney against Walter Davis and another. From the judgment, plaintiff appealed, and defendants took cross-appeals. Heard on motion for substitution of parties. Granted in part, and denied in part.

Voorhees & Canfield and C. E. H. Maloy, all of Spokane, for appellant. Wakefield & Witherspoon, of Spokane, Hanna & Hanna, of Colfax, and M. F. Gose, of Pomeroy, for respondents.

HOLCOMB, J. This cause is before us on applications to substitute representatives of deceased parties on appeal. brought this action for fraud and conspiracy upon eleven causes of action, ten of which were assigned to him. He recovered judgment against Beck and Davis upon seven causes of action. Plaintiff appealed from the judgment dismissing the first, fourth, ninth, and tenth causes of action, and defendants Beck and Davis appealed on September 27, 1916, from the judgment against them, and thereafter on April 18, 1917, gave a supersedeas bond which stayed the collection of the judgment against them until the disposition of the appeal. On May 18, 1917, defendant and cross-appellant Beck died, Edith M. Riggs was appointed executrix of his estate. and notice to creditors was given July 5, 1917. On October 22, 1917, defendant and cross-appellant Davis died, James M. Davis was appointed executor of his estate, and notice to creditors was published December 14, 1917. Motions for substitution of parties were made and served by plaintiff on the pellant to its injury with respect to the op- 28th and 29th of January, 1918. The executrix and executor resist this motion on the ground that the cause of action has abated. and that the motion is untimely under section 116, c. 156, Laws 1917, which is:

"If any action be pending against the testator or intestate at the time of his death, the plaintiff shall within ninety days after first publication of notice to creditors, serve on the executor or administrator a motion to have such executor or administrator, as such, substituted as defendant in such action, and, upon the hearing of such motion, such executor or administrator shall be so substituted, unless, at or prior to such hearing, the claim of plaintiff, together with costs, be allowed by the executor or administrator and the court. After the substitution of such executor or administrator, the court shall proceed to hear and determine the action as in other civil cases."

We will concede the effect of this statute if this action were pending in the superior court. It does not attempt to legislate on the subject of appeals, nor does the Probate Code explicitly repeal Rem. Code, § 1743. The power of this court to substitute parties in appealed cases must be gathered from this statute. Rem. Code. \$ 1743. is:

"The death of a party after the rendition of a final judgment in the superior court shall not affect any appeal taken, or the right to take an appeal; but the proper representatives in personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in and be admitted parties to the cause, or may be made parties at the instance of anor may be made parties at the instance of another party, as may be proper, as in case of death of a party pending an action in the superior court, and thereupon the appeal may proceed or be taken as in other cases; and the time necessary to enable such representatives to be admitted or brought in as parties shall not be computed as part of the time in this act limited for taking an appeal, or for taking any step in the progress thereof."

The probate procedure of these two deceased parties would come under Laws 1917. c. 156. It is plain that the clause in section 1743, supra, "as in case of death of a party pending an action in the superior court," refers us to the law in force at the time for substituting parties in case of death in the superior court. Laws 1917, c. 156, § 116, as above quoted, provides that, within 90 days after first publication of notice to creditors. plaintiff shall serve a motion on such executor or administrator to have a substitution of defendant made. This statute is mandatory. It will therefore be seen that the motion for substitution of Edith M. Riggs, executrix, for George C. Beck, defendant, is untimely and must be denied, the motion having been made more than 90 days from the date of first publication of notice to creditors. The motion for substituting James M. Davis, executor, for the defendant Walter Davis, having been made within 90 days from the date of the first publication to creditors, will be granted, and it is ordered that James M. Davis, executor, be substituted as defendant in place of Walter Davis, deceased.

ELLIS, C. J., and MOUNT and PARKER, JJ., concur.

GIBSON v. NEW YORK LIFE INS. CO. (No. 14436.)

(Supreme Court of Washington. May 7, 1918)

1. INSURANCE \$\ightharpoonup 354(3) — LIFE INSURANCE—PAYMENT OF PREMIUMS.

Under Insurance Code, \$ 180 (Laws 1911, c. 49), providing that no life insurance company shall make a contract of insurance other than plainly expressed in the policy, it appearing that part of the last premium was paid after the time limited in the policy, and to the soliciting agent, without the receipt, signed by an officer of the company, required by the policy, and not appearing that the premium was actually received by the company, recovery cannot be had in an action on the policy.

2. TRIAL \$\infty \text{353} \infty DOCUMENTS PART OF (ON-2. TRIAL @==39-DOCUMENTS-PART OF CON-

Plaintiff, in action on an insurance policy, offering in evidence only part of the contract between the company and the soliciting agent, it is properly rejected; the powers of the agent being determinable only from the entire con-

Department 1. Appeal from Superior Court, King County; A. W. Frater, Judge. Action by Alice E. C. Gibson against the New York Life Insurance Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Vince H. Faben, of Seattle, for appellant. H. T. Granger, of Seattle, and Jas. H. Mc-Intosh, of New York City, for respondent.

MAIN, J. The plaintiff, being the beneficiary named in a life insurance policy, brought this action upon the policy. After the issues were framed, the cause in due time came on for trial before the court and a jury. At the conclusion of the plaintiff's evidence, the defendant challenged the legal sufficiency thereof, and moved the court for a judgment of dismissal. This motion was sustained, and a judgment entered as requested. From this judgment the plaintiff appeals.

The facts are these: On August 4, 1913, one Winfield Fuller, then the soliciting agent for the respondent company, took an application from William C. Gibson, the husband of the appellant, for a \$10,000 life insurance policy. On September 4, 1913, the policy was issued and delivered to the insured. The annual premium on this policy was \$596.80. The first premium was paid at the time the policy was issued. The subsequent premiums, in like amount, were to be paid on the 4th day of September in every year during the continuance of the policy until the death of the insured. William C. Gibson, the insured, died on the 9th day of June, 1915. After the death of the insured, the respondent declined to pay the beneficiary the sum mentioned in the policy, claiming that the policy had lapsed because the second year's premium had not been paid when due, or at all. On December 10, 1914, the beneficiary paid the soliciting agent \$185 as the balance



be assumed that prior to this time—the exact date of which is not fixed-the insured paid to the soliciting agent the second year's premium, except the \$185 mentioned as being paid on December 10th. The evidence does not show that the respondent at any time received the money for the second year's premium. The fair inference from the evidence is that it did not receive it. The policy contained a provision that all premiums were payable on or before the due date at the home office of the company or to an agent of the company upon delivery of a receipt signed by the president or other specified officer of the company and countersigned by the agent. When the \$185 was paid by the beneficiary, she received no receipt therefor, as required by this provision of the policy. Another provision of the policy was that the premium was always considered as payable annually in advance, but by agreement in writing, and not otherwise, might be made payable semiannually or quarterly. was no agreement such as required by this provision of the policy, whereby the payments should be made other than annually in advance. There was also a provision that the policy and the application should constitute the entire contract between the parties, and that no agent was authorized to waive forfeitures, or to make, modify, or discharge contracts, or to extend the time for paying a premium. The application provided that only the president, a vice president, a second vice president, a secretary or the treasurer of the company could make, modify, or discharge contracts, or waive any of the company's rights or requirements, and that none of these acts could be done by the agent taking the application. In section 180 of the Insurance Code (chapter 49, Laws of 1911), it is provided that no life insurance company doing business in this state, or agent, subagent, or broker thereof, shall make "any contract of insurance or agreement as to such contract, other than is plainly expressed in the policy. \* \* \*" According to subdivision (3) of section 184, it is provided that a life insurance policy such as the one upon which this action is based must contain a provision that the policy and the application therefor "shall constitute the entire contract between the parties. \* \* \* " This law was passed prior to the time that the application for the insurance here involved was taken.

[1] It is not claimed that the policy in any respect fails to meet the requirements of the statute. From what has already been said. it appears: First, that the full premium was not paid in advance, as required by the terms of the policy; and, second, that it was paid to the soliciting agent, who had no right to receive it because he did not deliver a re-

due upon the second year's premium. It will ceipt therefor as specified in the contract. The appellant cites the case of Hall v. Union Central Life Insurance Co., 23 Wash. 610, 63 Pac. 505, 51 L. R. A. 288, 83 Am. St. Rep. 844, as controlling. The respondent cites the case of Nixon v. Travelers' Insurance Company, 25 Wash. 254, 65 Pac. 195, as supporting its contention. It is unnecessary to review those cases. They were both decided prior to the passage of the Insurance Code by the Legislature in 1911. Under the facts in this case as to the payment of the second year's premium and the terms of the policy, it is plain that the judgment of the trial court was right. One of the purposes of the statute was to require that the policy and the application should constitute the entire contract. The insured and the beneficiary, as well as the insurer, are charged with knowledge of this requirement. Had it been shown by the evidence that the second year's premium had been actually received by the respondent, even though not paid at the time and in the manner required by the contract, a different question would be presented, upon which we here express no opinion.

[2] Upon the trial, the appellant offered in evidence two provisions of the contract between the company and the soliciting agent, but did not offer the entire contract; and for this reason the offer was rejected. There was no error in this ruling. The powers of the soliciting agent could only be determined by a reading of the entire contract. In addition to this, the provisions offered, if received, would not have changed the result, as the agent's authority was not substantially different from that specified in the policy.

The judgment will be affirmed.

ELLIS, C. J., and PARKER, FULLER-TON and WEBSTER, JJ., concur.

RIDDLE et al. v. HUDSON. (No. 5891.) (Supreme Court of Oklahoma. Sept. 11, 1917. Rehearing Denied May 21, 1918.)

(Syllabus by the Court.)

"SUFFICIENT CONSIDERATION" — PROMISE—BENEFIT OF THIED PERSON—COVENANT OF SEISIN—BEACH—RIGHT OF ACTION.
Where, under the laws in force in the Indian Territory, prior to statehood, R. and O. have undertaken to convey to B. and W. certain lands, including a tract to which R. holds a dead falsely purporting to have conveyed the a deed, falsely purporting to have conveyed the title to him, for himself and in trust for O. as his partner therein, but, before such conveyance is attempted to B. and W., they, for a valuable consideration received by them from H., procure R. and wife, who have no right nor title to said tract because their grantors had none, to execute a deed purporting to convey said tract to H., with a covenant therein that R. and his wife are "lawfully seised in their own right of an absolute and indefeasible estate of

inheritance, in fee simple, of and in all and singular the above granted and described premises with the appurtmentage" such coverent ises, with the appurtenances," such covenant is breached, and such breach gives H. a cause and right of action against R. and his wife for the value of the consideration given by H. to B. and W., as her damages for the same, to-gether with lawful interest thereon, at and from the time of the delivery of such deed to H., al-though H., having never gone into possession of said tract, has not been evicted therefrom.

(a) Under the laws in force in the Indian (a) Under the laws in force in the indian Territory prior to statehood, as in this state, a covenant of seisin in a purported deed of conveyance of lands to which the grantors have no right or title is breached at the time of the execution and delivery of such deed, and gives a cause and right of action at and from such

a cause and right of action at and from such time, notwithstanding the grantee has never been evicted from such land.
(b) Under the laws in force in the Indian Territory prior to statehood, as in this state, any detriment to a promise, suffered at the request of the promisor is a sufficient consideration to sustain such promise, even though the promisor receives no benefit therefrom.

(c) Where the detriment suffered by the promisee is a benefit to a third person, instead of to the promisor, it will be implied under the facts above stated, that such benefit was at the request of the promisee.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Sufficient Consideration.

### (Additional Syllabus by Editorial Staff.)

2. Damages 4== 2 - What Law Governs-CONTRACTS.

In an action upon a contract, the measure of damages is that given by the law of the place of the contract at the time it was enter-

Error from District Court, Grady County; Frank M. Bailey, Judge.

Action by Mrs. S. C. Hudson against Finis E. Riddle and Letitia Riddle to recover the value of the consideration given for lands, together with interest on such value from the date of the passing of such consideration, based upon a breach of the latter's covenant of seisin of such lands. Judgment for plaintiff, and defendants bring error. Affirmed in part, and reversed in part.

Harry Hammerly, of Chickasha, for plaintiffs in error. Barefoot & Carmichael, of Chickasha, for defendant in error.

THACKER, J. The plaintiffs in error will be designated as defendants, and the defendant in error as plaintiff, in accord with their respective titles in the trial court.

[1] On July 9, 1904, the defendant Finis E. Riddle and one E. G. Owen had, for a valuable consideration, undertaken to convey to Bohart & Wells certain lands, including the following tract situated in Grady county, Okl., to which said Finis E. Riddle then held, in part for himself and in part in trust for his associate, E. G. Owen, a purported title by virtue of a purported conveyance of the N. E. 1/4 of the S. W. 1/4 of section 7, township 6 N., range 7 W. I. M., containing 40 acres, allotted without authority of law in the name of a dead Indian through whom Riddle's this state, upon the question involved in this

grantors claimed to have inherited. On that date Bohart & Wells, in consideration of a music box and some jewelry, of the value of \$700, then purchased by them of the plaintiff, had undertaken to convey said 40 acres to her. On that date the defendants, at the instance and request of said Bohart & Wells. and in satisfaction of the undertaking of Finis E. Riddle and E. G. Owen to convey said 40 acres to Bohart & Wells, and also in satisfaction of the undertaking of the latter to convey to the plaintiffs, executed and delivered their general warranty deed, purporting to convey to her said 40 acres of land, containing the following covenant of seisin and warranty:

"And said Finis E. Riddle and Letitia Riddle, for their heirs, executors and administracle, for their heirs, executors and administra-tors, do hereby covenant, promise and agree to and with said party of the second part, that at the delivery of these presents being lawfully seised in their own right of an absolute and indefeasible estate of inheritance, in fee simple. of and in all and singular the above granted and described premises, with the appurtenances; that the same are free, clear, discharged and unincumbered of and from all former and other grants, titles, charges, estates, judgments. other grants, titles, charges, estates, judgments, taxes, assessments and incumbrances of what nature and kind soever; and that they will warrant and forever defend the same unto said party of the second part, her heirs and assigns, against said parties of the first part, their heirs and all and every person or persons whomsoever, lawfully claiming or to claim the same.

The dead Indian allottee, baving died before September 25, 1902, was not entitled to the allotment of this land, and his name was afterwards stricken from the rolls of the Five Civilized Tribes; and the defendants, being not "seised in their own right of an absolute and indefeasible state of inheritance in fee simple, of and in all and singular the above granted and described premises, with the appurtenances," nor of any estate whatever in these lands, their deed of July 9, 1904, conveyed to the plaintiff no estate whatever in the same. The plaintiff did not enter into the possession of and was not actually evicted from this land or any part of the same; but, alleging the pertinent facts hereinbefore shown, she brought this action to recover \$700 as the value of the aforesaid consideration for the same, together with interest thereon from that date until paid, under the laws of Arkansas, then in force in the Indian Territory. The court gave her judgment for \$725, which was \$25 more than she claimed or was entitled to recover, together with interest thereon at the rate of 6 per cent. per annum from July 9, 1904, until paid, and the defendants bring the case here for review.

Their contention as well as our answer to the same will be understood from the following statement of our view of the applicable law: Under the laws in force in the Indian Territory prior to statehood, as in



case (Faller v. Davis, 30 Okl. 56, 118 Pac. 382, Ann. Cas. 1913B, 1181, and notes 1185), such a covenant of seisin is a covenant in præsenti, and is broken, if at all, as soon as made if the covenantor is not legally seised of the property (Logan v. Moulder, 1 Ark. 313, 33 Am. Dec. 338; Barnett v. Hughey, 54 Ark. 195, 15 S. W. 464; Carvill v. Jacks, 43 Ark. 439, 454; Brady v. Bank of C., 41 Okl. 473, 138 Pac. 1020, Ann. Cas. 1915B,

In Logan v. Moulder, supra, it was held: "Where the plaintiff declares, therefore, on a covenant of seisin, or of good right full pow-er and lawful authority to convey, it is unnec-essary to allege an eviction; for the covenant is broken, if at all, at the very moment it is

In an editorial note in Ann. Cas. to Faller v. Davis, supra, it is said:

"In the great majority of American jurisdictions the covenants of seisin and of good right to convey are considered as covenants in præsenti, broken, if at all, as soon as made if the covenantor is not legally seised of the property sought to be conveyed."

Passing now to the next question in this case: Our section 833, Stats. 1890 (section 926, Rev. Laws 1910), and the decisions thereunder (Eastman Land & Investment Co. v. Long-Bell Lumber Co., 30 Okl. 555, 120 Pac. 276: Ball v. White, 150 Pac. 901), are not controlling, as this is an Indian Territory contract; but in Doherty v. Ark. & Okla. R. Co., 5 Ind. Ter. 537, 82 S. W. 899, it was, in substantial accord with our own decisions, held:

"Any benefit accrued to one making a promise or any loss, trouble, or disadvantage under-gone by or charge imposed upon him to whom it is made is a sufficient consideration to sus-tain a promise."

And this decision, in respect of the effect of a "disadvantage undergone" by the promisee, is in substantial accord with the general law upon the question of the sufficiency of a consideration to support a promise in a contract. In 1 Mod. Am. Law, p. 428, it is said:

"Anson defines consideration to be 'something done, forborne or suffered, or promised to be done, forborne or suffered, by the promisee in respect of the promise. The modern conception of the principles of consideration declares that the real test of a sufficient consideration is whether or not there is a detribute of the promise and that the premise and the the premise sideration is whether or not there is a detriment to the promisee, and that the presence of a benefit to the promisor is unnecessary. Thus, in Devecmon v. Shaw, the plaintiff went on a pleasure trip to Europe when his uncle told him that he would pay his expenses. Later, the uncle refused to pay. The nephew was ter, the uncle refused to pay. The nephew was allowed to recover in an action for breach of contract on the ground that he did something he was not going to do, nor was bound to do, namely, to go to Europe. \* \* In another case (Hamer v. Sidway), the uncle promised to give his nephew \$5,000 on his twenty-first birthday, if he did not drink liquor, use tobacco, swear or gamble before he was twenty-one years of age. The nephew fulfilled the terms of the offer. In an action for breach of contract, this forbearance was held to be a contract. tract, this forbearance was held to be a con-

a right to do. In neither of the two cases cited was the uncle benefited, but in both did the plaintiff do or give up something he was not bound to do or give up. \* \* \* To do something one is not bound to do, as to give a promise, to do an act, or to pay money, constitutes a sufficient consideration. A legal detriment, and not a benefit, is the necessary element of a consideration."

In 6 R. C. L. Contracts, § 67, pp. 655, 656,

"Occasionally it is stated expressly that a benefit to the promisor is a suffcient consideration for a promise. The fact is, however, that the cases in which there is a benefit to the promisor invariably involve a detriment to the promisee. But the converse of this proposition is not true. There are many cases in which there is a detriment to the promisee with no corresponding benefit to the promisor. Sometimes the benefit is derived solely by a third person. Hence the consideration to support a promise need not involve a benefit to the promisor. It is sufficient when it consists in a detisor. It is sufficient when it consists in a detriment to the person to whom it is made. Apparently based on this principle is the familiar rule that the confidence induced by undertaking even a gratuitous service for another is a sufficient consideration to create a duty in the performance of such service. The vesting of title to property in another is, moreover, a sufficient consideration to support his agreement to hold the property in trust for and to convey the same to other persons."

In 1 Elliott on Contracts, § 203, it is said: "It is quite generally stated that a consideration sufficient to support a contract may be either a benefit accruing to the promisor, or a loss or disadvantage sustained by the promisee. However, it will be found that in practically every case the element of benefit to the promisor was accompanied by a detriment to the promisee, while on the other hand, detriment to the promisee unaccompanied by any benefit to the promisor is sufficient consideration to sustain the contract.

In Id. § 250, it is said:

"As has already been stated, the common definition of consideration is: 'A benefit to the promisor, or to a third person at his request, or an injury, detriment, loss, change or inconvenience, or the actual risk thereof, to the promisee.'"

In Id. § 252, it is said:

"It need not pass directly to the latter, but, under the prevailing rule, may move from the promisee to a third person at the promisor's request."

And as shown by Id. § 252, such requests may be implied, and it seems clear that such request must be implied under the facts stated. It will thus be seen that if we should concede that, since the defendants receive no benefit moving from the plaintiff directly to them for executing their deed to her, to whom they were under no obligations to execute the same, and, as we do not, that there was, in this respect, no sufficient consideration for this covenant (Doherty v. Ark. & Okla. Ry. Co., supra), or, as we do not (Elliott on Contracts, § 2111, pp. 306, 307), that plaintiff could not predicate her demand upon the contract between Finis E. Riddle and E. G. Owen with Bohart and Wells and upsideration, for the nephew gave up what he had on the consideration passing from the latter,

there is clearly a sufficient consideration for the same in the detriment to the promisee, who parted with her property to Bohart and Wells in consideration of the deed in question from the defendants.

[2] This action is clearly one upon a contract, and the measure of the plaintiff's damages is clearly that given by the law of the place of the contract at the time the same was entered into, so that section 2623, Stats. 1890 (section 2856, Rev. L. 1910), is inapplicable. The plaintiff is directed to file a remittitur of said \$25 in this cause, and the judgment below for \$700, with interest thereon at the rate of 6 per cent. from July Under section 4458, 9, 1904, is affirmed. Stats. 1893 (section 5261, Rev. L. 1910), when a judgment is reversed in part and affirmed in part, as in the instant case, the cost must be equally divided between the parties; and the clerk is directed to tax same accordingly. Fitch v. Green, 39 Okl. 18, 134 Pac. 34.

Reversed in part, and affirmed in part. All the Justices concurring, except Justice OWEN, who was absent, and Justice TURN-

ER not participating.

### IOWA NAT. BANK v. CITIZENS' NAT. BANK OF WOONSOCKET, R. I., et al. (No. 8735.)

(Supreme Court of Oklahoma, April 30, 1918.)

(Syllabus by the Court.)

1. CHATTEL MORTGAGES 4=147-PRIORITY OF LIEN-KNOWLEDGE.

Where the owner of personal property, without fraud, executes a bill of sale therefor to another, said bill of sale being executed without consideration, and for the purpose of procuring money for the owner, the owner of the property retaining the actual possession of the property, and the one to whom such bill of sale is made, with the knowledge and approval of the owner with the knowledge and approval of the owner of the property, executes a mortgage upon the property, and the proceeds resulting from the sale and assignment of said mortgage is delivered to the owner of the property, such mortgage is a prior lien on said property to that of a mortgage subsequently executed by the owner of said property to secure a past indebtedness, where the mortgagee of said subsequent mortgage at the time of taking said mortgage from the owner of said property has actual knowledge of the prior mortgages, and the manner in which the same were brought about.

2. Appeal and Error \$\infty 757(3)-Rejection

OF EVIDENCE—BRIEF.

In order to have reviewed by this court the action of the trial court in the admission or rejection of evidence, the brief must clearly show the evidence complained of, and the ground upon which the objection to such evidence is predicated.

APPEAL AND ERROB \$== 1002—CONFLICTING EVIDENCE-CONCLUSIVENESS OF VERDICT.

Where the evidence in an action at law is in conflict, if there is sufficient competent evidence to reasonably sustain the verdict rendered, this court will not disturb the verdict.

4. Replevin €== 72-Judgment-Evidence. The evidence in this case carefully examined, and the weight thereof found not to be against the judgment rendered.

Commissioners' Opinion, Division No. 1. Error from District Court, Kiowa County; Thos. A. Edwards, Judge.

Action in replevin by the Citizens' National Bank of Woonsocket, R. I., against E. F. Paxson and another, in which the Iowa National Bank and the National Reserve Bank of Kansas City, intervened. the denial of its motion to set aside special findings of fact and its motion for a new trial, the Iowa National Bank, intervener, brings error. Affirmed.

A. J. Morris, of Anadarko, for plaintiff Tolbert & Tolbert and Zink & in error. Cline, all of Hobart, and Pew & Proctor, of Kansas City, Mo., for defendants in error.

COLLIER, C. The Citizens' National Bank of Woonsocket, R. I., hereinafter called plaintiff, instituted an action of replevin against E. F. Paxson and T. E. Givens, hereinafter called defendants, for the recovery of certain cattle described in the petition in this case, basing their claim on same upon a mortgage executed October 5, 1914, by E. F. Paxson to L. C. West and G. E. Givens. and by said West and Givens assigned to the Arnold Brokerage Company, and by said company transferred and assigned to the Citizens' National Bank of Woonsocket, R. I., which said mortgage was filed of record in the office of the register of deeds of Kiowa county on October 5, 1914. The Iowa National Bank, hereinafter styled intervener, intervened in said action, and set up a claim to said cattle described in the petition in this case, under and by virtue of two mortgages, one of which was executed on the 29th day of September, 1914, and filed of record on the 12th day of October, A. D. 1914, at 9 o'clock a. m., upon which there is a credit of \$800, which mortgage was to secure the payment of \$2,000 by T. E. Givens, the alleged owner of the cattle here sued for. to the Security National Bank of Oklahoma City, and by said Security National Bank sold and assigned to said intervener, in November, 1914, and upon another mortgage executed by said T. E. Givens on the 2d day of January, 1915, and filed for record January 5, 1915, to the Iowa National Bank of Des Moines, Iowa, which said mortgage was given to secure the payment of any and all notes bearing the indorsement of T. E. Givens. The National Reserve Bank of Kansas City, hereinafter called the second intervener, also intervened in said cases, claiming said cattle under and by virtue of a mortgage executed on the 12th day of October, 1914, by E. F. Paxson in the sum of \$1,275, and filed for record October 14, 1914, which mortgage was executed to the Farmers' & Merchants' Bank of Mountain View, Okl., and transferred and assigned in due course before maturity and for a valuable consid-

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eration by the said Farmers' & Merchants' Bank to the said second intervener.

The several mortgages hereinbefore described, were offered in evidence, together with a bill of sale made by T. E. Givens to his son-in-law, Paxson, for the cattle in controversy, which bill of sale was not recorded. The uncontradicted evidence shows that E. F. Paxson never had or owned any interest in the cattle in controversy, for which he received the bill of sale, and that T. E. Givens authorized Paxson to make the mortgage to himself and West, and T. E. Givens indorsed the note for \$2,000 which was assigned to the Arnold Brokerage Company, and that he (Givens) got the proceeds from that note and mortgage, and that he (Givens) was fully aware of all of the facts and circumstances surrounding the execution of the bill of sale, the execution of the note, and the giving of the chattel mortgage; that the execution of said bill of sale was given for the purpose of securing the indorsement of two persons who were engaged in banking, and there is no proof of any fraud in connection with said transaction.

The evidence is in conflict as to whether or not the Iowa National Bank had actual notice of the said mortgages executed by E. F. Paxson, which had been assigned to the Citizens' National Bank of Woonsocket. R. I., and the one assigned to the National Reserve Bank of Kansas City, Mo., prior to the taking of the mortgage that was executed by Givens to the Iowa National Bank on the 2d day of January, 1915. It was denied by Mr. Butler, vice president and agent of the Iowa National Bank, who took the mortgage executed by Givens January 2, 1915, that he had any knowledge of the bill of sale and the execution of the said mortgages by E. F. Paxson, while it is testified by D. M. Proctor and other witnesses that the Iowa National Bank by its vice president and agent, who took the mortgage bearing date of January 2. 1915, prior to the taking of said mortgage had notice of the said mortgages executed by Paxson, and the circumstances of their execution which were respectively assigned to the said intervener, and to the second intervener. The unquestioned evidence in the case was that the bill of sale executed by T. E. Givens to E. F. Paxson was without consideration.

The court made the following findings of fact and conclusions of law:

"(1) The court finds that during the year 1914 T. E. Givens was the owner of certain cattle in-T. E. Givens was the owner of certain cattle involved in this action; that on the 21st day of March, 1914, the said T. E. Givens made, executed, and delivered to E. F. Paxson a bill of sale upon said cattle, which bill of sale was not recorded; that said bill of sale was without consideration, and that said E. F. Paxson was a son-in-law of the said T. E. Givens; that in order for the said T. E. Givens to negotiate notes secured by said cattle, it was necessary that two persons engaged in banking indorse such paper, and in order that T. E. Givens and

L. C. West, who were engaged in banking, might indorse such paper, the bill of sale was given to E. F. Paxson that he might make the note to be indorsed by West and Givens.

"(2) The court further finds that at the time

of the execution of the said bill of sale from Givens to Paxson there was no open and notorious change of possession, and that said bill of sale was given by Givens for the purpose of satisfying a requirement that two officers of the Farmers' & Merchants' Bank should indorse Paxson at the time of the execution of the note and mortgage to West and Givens was not the actual owner of said cattle.

actual owner of said cattle.

"(3) The court further finds that on the 5th day of October, 1914, the said E. F. Paxson made a note in the sum of \$2,000, payable April 1, 1915, to L. C. West and T. E. Givens, secur-1, 1910, to L. U. West and T. E. Givens, secured by a mortgage upon the cattle described in said bill of sale, which mortgage was filed for record on October 5, 1914, and which note was indorsed by T. E. Givens and L. C. West, negotiated to the Arnold Investment Company, and by the Arnold Investment Company to the Citizens' National Bank of Woonsocket, R. I., the polinitiff herein plaintiff herein.

"(4) The court further finds that on October 12, 1914, the said E. F. Paxson executed and delivered to the Farmers' & Merchants' Bank of Mountain View, Okl., a note in the sum of \$1,-275, secured by a mortgage on the cattle involved in this action, which mortgage was filed for record on October 14, 1914, and by the said Farmers' & Merchants' Bank negotiated to the

National Reserve Bank.

"(5) The court further finds that on the 29th day of September, 1914, T. E. Givens executed and delivered to the Security National Bank of Oklahoma City his note for \$2,000, secured by a mortgage upon said cattle, which mortgage was filed for record on October 12, 1914, and that there was paid on said note on December 2, 1914, the sum of \$800, and that said note in due course was transferred to the Iowa National Bank of Des Moines, one of the interveners

Bank, secured by a mortgage upon said cattle. Bank, secured by a mortgage upon said cattle, which mortgage was filed for record on the 5th day of January, 1915, and was given to secure any and all notes bearing the indorsement of said T. E. Givens.

"(8) The court further finds that at the time of the taking by said Iowa National Bank and said National Reserve Bank of the mortgages of a serionments hereinhefore mentioned, said

or assignments hereinbefore mentioned, said Iowa National Bank and National Reserve Bank had no actual knowledge of the giving said E. F. Paxson to L. C. West and T. E. Givens of said mortgage dated October 5, 1914.

"(9) The court further finds that the mort-gage given on January 2, 1915, by T. E. Givens to the Iowa National Bank, to secure any and all notes bearing the indorsement of the said T. E. Givens, was not given for a present consideration passing between said parties.
"(10) The court further finds that on January

2, 1915, and at the time of the taking of the mortgage from T. E. Givens to the Iowa National Bank, Butler, the officer of said bank taking said mortgage, had actual knowledge of the existence of the mortgage bearing date of October 5, 1914, in the sum of \$2,000, and of the mortgage bearing date of October 12, 1914, in the sum of \$1,275. "Conclusions of Law.

"(1) The court concludes as a matter of law that the giving of the bill of sale by Givens to Paxson for the purpose of mortgaging the cattle, and the giving of the note and mortgage up-on said cattle by Paxson to West and Givens, would constitute a valid lien upon said cattle as between the parties thereto, but, not being fol-lowed by an open and notorious change of pos-

lowed by an open and notorious change of possession, would not be notice to third parties, except those having actual notice thereof.

"(2) The court further concludes as a matter of law that the note dated September 29, 1914, in the sum of \$2,000, to the Security National Bank, and by it transferred to the Iowa National Bank, and upon which there remains unpaid the sum of \$1,200 and interest, is a first lieu upon said cattle.

"(3) The court further concludes as a matter of law that the priorities of mortgages now outstanding are as follows:

"First, The balance of \$1,200 and interest upon the note of September 29, 1914, to the Security National Bank, now held by the Iowa National Bank,

"Second. The mortgage for \$2,000, with interest, made by Paxson on October 5, 1914, to West and Givens, now held by plaintiff. "Third. The mortgage of \$1,275, with interest, dated October 12, 1914, made by E. F. Paxson to the Farmers' & Merchants' Bank, and which was indorsed to the National Reserve Bank.

"Fourth. The mortgage dated January 2, 1915, made by T. E. Givens to the Iowa National Bank to secure the indorsements upon the notes indorsed by T. E. Givens.

Done at Hobart, Okl., this 9th day of May, 1916.

"Thomas A. Edwards, District Judge."

Thereupon the intervener moved the court to set aside the special findings of fact Nos. 9 and 10, upon the ground that the same are not sustained by sufficient evidence, and are contrary to the evidence in said case, which motion was overruled and excepted to by the Thereafter timely motion was intervener. made by the intervener for a new trial, which motion was overruled, excepted to, and this case brought by the intervener to this court.

[1, 2] It is contended by all of the parties to the record that this is an equity case, and that therefore this court should review the entire evidence and determine whether or not the weight of the evidence is clearly against the judgment rendered, and with this contention we cannot agree. The action commenced, being one of replevin, was a law case, and therefore if there is competent evidence, though in conflict, to reasonably sustain the judgment rendered, the judgment will not be disturbed.

The errors assigned are:

"(1) In making finding of fact No. 9; (2) in making finding of fact No. 10; (3) error in overruling the motion of the plaintiff in error to set aside said findings of fact Nos. 9 and 10; (4) said court erred in admitting, over the objection of the plaintiff in error, certain incompetent, irrelevant, and immaterial evidence; (5) said court erred in excluding certain competent, material, and relevant evidence tendered by the plaintiff in error; (6) said court erred in rendering said judgment against this plaintiff in error, in that it is not sustained by sufficient evidence, and is contrary to law; (7) said court erred in overruling the motion for a new trial filed by the plaintiff in error."

There is not set out in the brief the evidence complained of, and the ground upon which objection to such evidence was predicated, therefore this court will not consider said assignments 4 and 5. "In order to have reviewed by this court the action of the trial court in the admission or rejection of evidence, it must be clearly shown by the brief the evidence complained of and the ground upon which objection to such evidence is predicated." Connelly et al. v. Adams et al., 152 Pac. 607; First Bank of Maysville et al. v. Alexander, 49 Okl. 418, 153 Pac. 646.

[3, 4] The sixth assignment of error presents the most serious proposition involved in the case, the sufficiency of the evidence to support the judgment rendered by the court. and the important question involved therein is as to the validity of the mortgages executed by E. F. Paxson and assigned to the intervener, and the validity of the mortgage executed by Paxson and assigned to the second intervener. The undisputed evidence is that at the time of the execution of said two mortgages Paxson did not own the cattle mortgage; that the same belonged to T. E. Givens, and that the bill of sale given by Givens to Paxson was given without consideration, and the possession of the cattle retained by Givens; that the said mortgages were executed with the full knowledge of Givens; that he recognized the debts secured by said mortgage as his own debts, and indorsed the notes which said mortgages were given to secure, and that Givens received the proceeds of said mortgages; and that subsequent to the execution of said mortgages by Paxson, Givens, the owner of said cattle, with knowledge of the plaintiff of the Paxson mortgages and the manner in which created. mortgaged the cattle to the plaintiff to secure a prior indebtedness. We are therefore of the opinion that in said transaction the said Paxson was the mere agent of Givens, a mere vehicle by which in effect Givens executed the mortgages which were assigned to the intervener and to the second intervener, and that said mortgages were valid and binding obligations as against all parties having actual notice of the transaction, which resulted in the execution of said mortgages. "A mortgage made under an assumed name by the owner of the land is binding; the identity of the mortgagor as the owner being proved." Jones on Mortgages (7th Ed.) § 63.

In John S. Brittain Dry Goods Co. v. Blanchard et al., 60 Kan. 263, 56 Pac. 474, it is held:

"F. arranged with B., S. & R. for a loan of money to enable him to purchase a herd of cattle; agreeing to execute a bill of sale of them, when purchased, to V., and that V. should, in turn, execute notes and mortgages upon them to secure the money, and representing that he did not wish to execute the securities in his own name, because to do so might affect the credit of a bank of which he was president. The ara bank of which he was president. The arrangement was carried out, except that F. did not execute the bill of sale to V. Held that, in the absence of a showing of fraudulent purpose

In the body of the opinion it is said:

"It is true that Vinson had no interest in the cattle. He was employed as a mere intermediary through whom to transmit a mortgage lien upon them to the defendants in error. But the plaintiff in error does not claim that the arrangement by which he was to so act was entered into by the defendants in error with fraudulent purpose upon their part. Blanchard, ulent purpose upon their part. Blanchard, Shelly & Rogers agreed to accept securities from Vinson upon the assurance by Foltz that he would transfer the legal title to Vinson by bill of sale. They did not agree to accept them from Vinson in order to aid Foltz to cover up the title to his property, but to avoid the credit of Foltz's bank becoming affected, as it was rep-resented it might be, if Foltz, its president, were to execute a mortgage in his own name. Their to execute a mortgage in his own name. assent to this arrangement for this reason may not have been laudable or praiseworthy, but it was not fraudulent in fact, as against Foltz's creditors."

In Dendy et al. v. First Nat. Bank of Cobleskill, N. Y., 76 Kan. 301, 91 Pac. 682, it is

"The attack upon the validity of the mortgage is based upon the circumstance that Hyre, the is based upon the circumstance that have, the nominal mortgagor, never had any real interest in the cattle. They were owned by the commission company of which Hyre was an employe. He signed the note and mortgage at the request of the company, and for its purposes. The de-He signed the note and mortgage at the request of the company, and for its purposes. The defendants argue that, as Hyre had no title, a mortgage executed by him could create no lien. There was an effort on the part of the plaintiff to show that as a part of the transaction the company gave Hyre a bill of sale of the cattle, thereby vesting in him the legal title as a basis for his making the mortgage. Probably the execution of his bill of sale was not established; the reference to it in the avidence falls. lished; the reference to it in the evidence fall-ing short of technical proof of that fact. But the omission is not important. The was the actual owner of the cattle. The company was one actual owner of the cattle. In accepting and assigning the mortgage, it recognized Hyre as their formal owner—as the holder of the legal title. The execution of a bill of sale could add nothing to the force of such recognition. By the purchase of the note the bank acquired a valid lien on the cattle." In accept-

In Wogan v. Citizens' Nat. Bank of Ft. Scott et al., 95 Kan. 774, 149 Pac. 411, it is

"An owner of personal property represented that it had been transferred to another, and he with such other applied for a loan of money secured by a chattel mortgage executed by such vendee on the property represented to have been It was not a bona fide sale of the property, but the owner not only represented to the mortgagee that it was an actual sale, and aided in the obtaining of the loan upon the mortgage. but he also indorsed the note which was secured by the mortgage. The property was sufficiently described in the mortgage, which was duly filed for record. Held, that the mortgage was valid, not only as between the parties to its execution, but also as against a third party, who subsequently obtained a mortgage upon the same property executed by the owner."

We think the finding as to the time the plaintiff took the mortgage from Givens dated January 2, 1915, to secure the indorsement of notes heretofore made by Givens, is supported by the weight of the testimony, and therefore

upon the part of B., S. & R. the mortgage was prior in right to the said mortgage executed not invalid as to third persons because of V.'s by Givens to the plaintiff on the 2d day of lack of property interest in the cattle."

January, 1915, and that therefore the judgeby Givens to the plaintiff on the 2d day of January, 1915, and that therefore the judgment of the court as to the priority of the several mortgages involved in this controversy is sufficiently supported by competent testimony. The motion for a new trial we think was properly overruled.

It is true that in the seventh finding of facts, the court errs in stating "that T. E. Givens executed a note in \$---- to the Iowa National Bank, secured by a mortgage upon said cattle, which was given to secure any and all notes bearing the indorsement of the said T. E. Givens." as no note was given: only a mortgage was executed to secure said indorsements; but such error is an error without injury.

It may not be improper for us to say that, while we have held that this case was a law case, and decided it along that line, even if it were an equity case we feel confident that we could not say that the weight of the evidence is clearly against the finding of the court and the judgment rendered.

Finding no error in the record, this cause is affirmed.

Commissioner RUMMONS, having been of counsel in the lower court, did not participate in this opinion.

PER CURIAM. Adopted in whole.

LONGEST v. LANGFORD et al. (No. 8670.) (Supreme Court of Oklahoma. April 9, 1918. Rehearing Denied May 21, 1918.)

(Syllabus by the Court.)

TRIAL @==141-DIRECTED VERDICT-EVIDENCE. Where, in an action involving the title to a tract of land, the uncontradicted and undisputed evidence shows the legal and equitable title in the plaintiffs, and the defendant does not introduce any evidence tending to prove a superior title in himself, or any defense to the plaintiffs' action, it is not error for the trial court to instruct a verdict for the plaintiffs.

Error from District Court, Jefferson County; Cham Jones, Judge.

Action by W. C. Langford and another against C. J. Longest. Judgment for plaintiffs upon a directed verdict, motion for new trial overruled, and defendant brings error. Affirmed.

See, also, 169 Pac. 493.

Cruce & Potter, of Ardmore, and J. H. Harper, of Waurika, for plaintiff in error. Guy Green, of Waurika, for defendants in

RAINEY, J. The parties to this appeal will be designated as they appeared in the trial court. The plaintiffs, W. C. Langford and Sallie Langford, instituted this action the said mortgages executed by Paxson were against the defendant, C. J. Longest, to re-

cover the possession of a 140-acre tract of land allotted to W. H. Bourland, a duly enrolled citizen of the Chickasaw Nation, and for rents for the years 1913, 1914, and 1915. The plaintiffs, in their petition and in the evidence offered by them, deraigned their title from the allottee in two separate ways: First, through an executor's deed from W. F. Bourland to J. P. Bourland, executed pursuant to an order of the probate court of Carter county, a deed from J. P. Bourland to A. W. Melton, and a deed from A. W. Melton to Melton & Spivey, the grantors of the plaintiffs; second, through deeds from two of the heirs of W. H. Bourland, deceased, to plaintiffs' grantors, and through deeds from other heirs to plaintiffs. In his answer, the defendant admitted the execution of the deed from J. P. Bourland to A. W. Melton, and alleged that J. P. Bourland had title to the land, and the right to convey the same at the time of its execution, but further alleged that Mr. Melton refused to accept the deed when tendered to him, and refused to and did not pay for the land. The defense made to the title sought to be established through the deeds from the heirs of the decedent to the plaintiffs was that said conveyances were insufficient to convey title, since none of the grantors therein had been in possession of the land for more than one year next preceding the execution of said deeds, and that the same were therefore champertous and void as to the defendant. As a further defense to these deeds the defendant pleaded that the grantors therein did not have any title to the land conveyed at the time of the execution of their deeds, because of the fact that the title to the land had already vested in J. P. Bourland by virtue of the deed executed to him by W. F. Bourland, as executor. Defendant also alleged title in himself, based upon a deed executed to him by J. P. Bourland on the 26th day of April, 1915. Trial was had to a jury, and at the conclusion of the evidence offered by the plaintiffs and the defendant the court instructed a verdict for the plaintiffs. The defendant's motion for a new trial was overruled, and he has brought the case here for review.

During the course of the trial it was agreed by the plaintiffs and the defendant that the executor's deed from W. F. Bourland to J. P. Bourland conveyed to the latter a good and perfect title, as alleged in the defendant's answer, and for this reason it becomes unnecessary for us to consider plaintiffs' claim of title based upon the deeds subsequently executed by the heirs to them and to their grantors, and the defense made to this claim of title; the effect of the agreement being to eliminate this issue from the case.

The undisputed evidence in the case is that the reof. The deed executed by J. P. Bourthe defendant went into possession of the land to A. W. Melton was delivered to Mr. land as the tenant of plaintiffs' grantors, Melton by W. F. Bourland, and Mr. Melton Melton & Spivey, and that he had been in took the deed and submitted the abstract of

continuous possession thereof for seven years at the time of the trial. At the inception of the tenancy the plaintiffs' grantors controlled this land, together with other lands, by virtue of a lease from the allottee, which expired December 31, 1913. Before the expiration of this lease, and on, to wit, November 25, 1912, plaintiffs' grantors secured a deed from J. P. Bourland, dated November 25, 1912, and recorded April 9, 1913.

There are several questions argued in the briefs, and it is earnestly insisted by counsel for defendants in error that the defendant, Longest, having remained in possession of the land after the expiration of his lease, is estopped to dispute the title of the plaintiffs, who are the grantees of the defendant's landlord. Counsel for defendant contend that. since there was a change in the title of the landlord after the inception of the tenancy, the defendant is not estopped. After having carefully examined and considered the record, we find that it is unnecessary to pass on this question, for the reason, if we assume without deciding that the defendant is in a position to dispute the title of the plaintiffs, we are of the opinion that the plaintiffs have proven a superior and paramount title.

As hereinbefore stated, the plaintiffs and the defendant have agreed that the deed from W. F. Bourland, executor, to J. P. Bourland, conveyed the fee-simple title to the land to the said J. P. Bourland, from whom both plaintiffs and defendant deraign their respective titles. Then when plaintiffs offered in evidence the deed from J. P. Bourland to their grantor, A. W. Melton, the deed from Melton to Melton & Spivey, and the deed from Melton & Spivey to themselves, they made a prima facie case. Now the only defense made to this chain of title was that Mr. Melton did not accept the deed from J. P. Bourland, and refused to pay for the land. In support of this claim counsel for defendant offered the testimony of Mr. A. W. Melton, whom they made their witness for this purpose. Melton testified positively that he did accept the deed, and that he paid \$1,000 on the total purchase price of \$2,500. The circumstances surrounding the transaction, which are somewhat unusual, may be briefly stated as follows: The will of W. H. Bourland, deceased, is not in the record, and we are not advised in any way as to the terms thereof, but it appears that Mrs. M. E. Bourland, his widow, and Lula C. Watkins, his daughter, quitclaimed all their right, title, and interest in the land in controversy to W. F. Bourland, executor; that W. F. Bourland. as executor, sold the land under the authority of the probate court of Carter county, to J. P. Bourland, for a consideration of \$2,500, and accounted in said court for the proceeds thereof. The deed executed by J. P. Bourland to A. W. Melton was delivered to Mr. Melton by W. F. Bourland, and Mr. Melton

attorneys were doubtful as to whether the executor's deed conveyed all the litle to the land, but advised Mr. Melton that it conveyed at least a two-fifths interest: that they were not positive as to some of the other interests being conveyed by this deed, on account of an appearance made for some of the minor heirs in some court proceeding. It was insisted by W. F. Bourland that the deed did convey all the title, and by Mr. Melton, on the advice of his attorneys, that it did not, and for this reason Mr. Melton did not immediately put the deed of record or pay for the land, but later, and in November, 1913, he and Frank Bourland met in Ft. Worth, Tex., and had a settlement, whereby Mr. Melton accepted the executor's deed, together with another deed to the same land from Frank Bourland, paid \$1,000, and entered into a contract to pay \$1,500, the remainder of the purchase price, when the title was perfected, the \$1,000 representing the consideration for the interest of W. F. Bourland and that of J. P. Bourland, which at least was conceded to have been conveyed by the two deeds.

We would be unable to say from the evidence in the record in this case whether the J. P. Bourland deed to A. W. Melton conveyed more than the interest J. P. Bourland may have inherited in the land, were it not for the fact, as above recited, that the parties have stipulated that he had the fee-simple title to all the interest of all the heirs at the time he executed this deed. We deem it unnecessary to incorporate in this opinion Mr. Melton's testimony in full. It is substantially as we have stated. We do not think the court or jury would have been justified in drawing any conclusion therefrom other than that Mr. Melton accepted the J. P. Bourland deed for whatever interest it did convey, paid the \$1,000 thereon, and agreed to pay the balance due on the purchase price when the title was perfected. It seems to have been understood between him and W. F. Bourland that quitclaim deeds from the remaining three heirs would make the title free from doubt, and Mr. W. F. Bourland agreed to secure such deeds from these heirs.

The record does not disclose what arrangements had been made between W. F. Bourland and J. P. Bourland as to the distribution of the money received as purchase price for the land, but the authority of W. F. Bourland to act for J. P. Bourland in the transaction is not questioned.

Under these circumstances we are of the opinion that, although Mr. Melton questioned the extent of the title conveyed by the J. P. Bourland deed, and at first refused to accept the same and to pay any consideration therefor, later, and long prior to the time defendant secured his deed from J. P. Bourland, & San Francisco Railroad.

title to his attorneys for examination. The Mr. Melton did accept the deed for whatever interest it conveyed. It follows that whatever title J. P. Bourland had at the time of the delivery of the deed to Mr. Melton, which is here stipulated to be the fee-simple title, passed to Mr. Melton and subsequently passed to Melton and Spivey and from Melton and Spivey to the plaintiffs. This being true, there was no outstanding title to pass to the defendant by virtue of the deed executed to him by J. P. Bourland on April 29, 1915.

It follows that the trial court was right in directing a verdict for the plaintiffs, and the judgment is therefore affirmed. All the Justices concur.

LUSK et al. v. WILKES. (No. 8265.) (Supreme Court of Oklahonia. Jan. 9, 1918. Rehearing Denied May 21, 1918.)

(Syllabus by the Court.)

1. Carriers 4 241 - "Passengers" - Postal CLERKS.

Postal clerks, while on duty in charge of mail in the course of transportation, are pas-sengers for reward, and the carrier owes them the same duty as it does its other passengers.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Passenger.]

2. Carriers 🖚 280(1) — Passengers — Care REQUIRED.

A carrier of persons for reward must use the utmost care and diligence for their safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill.

3. Negligence \$\Rightarrow 1 -- "Actionable Negli-gence"-Elements.

In every case involving actionable negligence, there are necessary three elements: (1) The existence of a duty on the part of the defendant to protect the plaintiff from the injury of which he complains; (2) a failure by the defendant to perform that duty; and (3) an injury to the plaintiff, proximately caused from such failure of the defendant.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Actionable Negligence.]

4. Carriers €=269, 290(1) - Transfer of PASSENGERS — INJURY TO POSTAL CLERK-LIABILITY—"ACTIONABLE NEGLIGENCE."

LIABILITY—"ACTIONABLE NEGLIGENCE.
Where a transfer is made necessary by reason of a wreck and delay occasioned thereby, and the carrier pending such transfer provides for the use of its plassengers suitable coaches properly heated, open for their use, in which they might take refuge at all times, it has performed its full duty. And the fact that the curlowment of a presenger as a railway mail clerk prevents him from occupying such coaches, but requires that he remain outside in charge of the mail, and he thereby contracts an illness, the failure of the carrier to provide him shelter and warmth at the place where such mail is transferred, other than the coaches referred to, does not constitute actionable negligence.

Commissioners' Opinion, Division No. 4. Error from District Court, Pontotoc County; Tom D. McKeown, Judge.

Action by M. D. Wilkes against James W. Lusk and others, receivers of the St. Louis Judgment for plaintiff, and defendants bring error. Reversed.

W. F. Evans, of St. Louis, Mo., and R. A. Kleinschmidt and E. H. Foster, both of Oklahoma City, for plaintiffs in error. J. A. L. Wolfe and J. H. Wood, both of Sherman, Tex., and Wimbish & Duncan, of Ada, for defendant in error.

EDWARDS, C. The defendant in error will be referred to as plaintiff, and the plaintiffs in error as defendants, according to their position in the lower court.

This action was instituted by the plaintiff in the district court upon a petition setting out two causes of action. In the first cause of action it is alleged that the plaintiff was, at the time of the injury sued for, in the employ of the United States government as a railway mail clerk, and was engaged in the performance of his duties as such, on a train operated between the cities of Denison, Tex., and Sapulpa, Okl.; that on the 23d day of December, 1913, said train was stopped by a wreck that blocked the track, and the conductor of the train upon which plaintiff was at work ordered the mail taken out of the mail car and carried to a point beyond the wreck, to be loaded upon another train, and it was necessary, under the postal regulations, that plaintiff remain with and watch such mail; no train was provided on the further side of said wreck for more than three hours after said mail was so placed: that it was bitterly cold, and plaintiff complained to defendants' superintendent in charge, and asked to have a fire built, which the superintendent agreed to have done, but which not being done, plaintiff requested the said superintendent to put the mail on a work train and have same carried to the next station north, which request was refused; that plaintiff was insufficiently clad, and as a consequence contracted a severe cold, with incipient pneumonia; that his feet were frost bitten, and he was confined to his bed for a period of two weeks, and was unable to perform his duties as mail clerk for about two months. The second cause of action is for injuries alleged to have been sustained at a later period, and upon the issue raised on this cause of action the verdict of the jury was in favor of the defendants, and the same is not involved in this appeal.

The answer of the defendants is, first, a general denial, and, second, a plea of contributory negligence. The case was tried to a jury, and a verdict returned in favor of the plaintiff upon the first cause of action, and in favor of the defendants upon the second cause of action. From the judgment in favor of the plaintiff, the defendants have appealed to this court.

The evidence discloses that at Scullin, the last depot south of the wreck, a distance of about two miles, there was a depot for the accommodation of passengers. At this point 23 N. E. 774; McGoffin v. M. P. R. Co., 102

also was cut out the regular passenger coaches, that the passengers might remain therein in comfort while the transfer at the wreck was being carried out; it being the purpose not to transport the passengers to the scene of the wreck until the train from the north to which the transfer was to be made should arrive ready to proceed on the way to Sapulpa. After the mail was unloaded from the mail car at the scene of the wreck. that car also was returned to Scullin. On the north side of the wreck was a work train. consisting of three or four cars, among which was a caboose and a dining car. This work train was near the spot where the mail was deposited to await the train from the north, and was open to the plaintiff, and he was invited to occupy same, and did in fact occupy it for some 20 minutes before the train from the north finally arrived. There was nothing to prevent the plaintiff from remaining with the other passengers in the regular passenger coaches at Scullin, nor from returning to that point from the scene of the wreck in the mail car, when it was returned there, nor from occupying the caboose of the work train during the delay, except the duty owed by him to his employer, the government, of watching the mail while waiting for the transfer to be completed.

[1] Several assignments of error are argued as grounds for reversal, but the determination of the second assignment will, in our judgment, dispose of the case. This assignment relates to the action of the trial court in overruling defendants' demurrer to plaintiff's evidence and in overruling defendants' motion for a peremptory instruction. Under this assignment it is necessary that this court determine whether or not a carrier of passengers is liable to a railway mail clerk while being transported upon its line. in the discharge of his duties as such mail clerk, for injuries arising from exposure in guarding the mail during a transfer at a point other than a regular transfer point. made necessary by a wreck upon the line of the carrier. It has often been held and is conceded that the relation of carrier and passenger for reward exists between a railroad company and a railway mail clerk while such clerk is in charge of the mail in course of transportation, and that the carrier is liable in case of injury due to collision, derailment, defective conditions of track or anpliances, or through negligent operation, in which cases a mail clerk would have the same right to recover as any other passenger. Southern Ry. Co. v. Harrington, 166 Ala. 630, 52 South. 57, 139 Am. St. Rep. 59; Arrowsmith v. N. & D. R. Co. (C. C.) 57 Fed. 165; Gleeson v. Va. Midland R. Co., 140 U. S. 435, 11 Sup. Ct. 859, 35 L. Ed. 458; C., C., C. & St. L. R. Co. v. Ketcham, 133 Ind. 346. 33 N. E. 116, 19 L. R. A. 339, 36 Am. St. Rep.

i

Mo. 540, 15 S. W. 76; Mellor v. M. P. B. Co., 105 Mo. 455, 16 S. W. 849, 10 L. R. A. 36; Nolton v. Western R. Corp., 15 N. Y. 444, 69 Am. Dec. 623; H. & T. C. Ry. Co., v. Hampton, 64 Tex. 427; G. C. & S. F. Ry. Co. v. Wilson, 79 Tex. 371, 15 S. W. 280, 11 L. R. A. 486, 23 Am. St. Rep. 345; Hammond v. N. E. R. Co., 6 S. C. 130, 24 Am. Rep. 467; I. & G. N. Ry. Co. v. Davis, 17 Tex. Civ. App. 340, 43 S. W. 540; Lindsey v. P. Ry. Co., 26 App. D. C. 125, 3 L. R. A. (N. S.) 218: W. & O. D. Ry. Co. v. Carter, 117 Va. 424, 85 S. E. 484; Webber v. C., R. I. & P. Ry. Co., 175 Iowa, 358, 151 N. W. 852, L. R. A. 1918A, 626; Farmer v. St. L., I. M. & S. Ry. Co., 178 Mo. App. 579, 161 S. W. 327; Lasater v. St. L., I. M. & S. Ry. Co., 177 Mo. App. 584, 160 S. W. 818; Barker v. C. P. & St. L. Ry. Co., 243 Ill. 482, 90 N. E. 1057, 26 L. R. A. (N. S.) 1058, 134 Am. St. Rep. 382; Schuyler v. S. P. Ry. Co., 37 Utah, 612, 109 Pac. 1025: Hoskins v. N. P. Ry. Co., 39 Mont. 394, 102 Pac. 988. The case of M., K. & T. Ry. Co. v. West, 38 Okl. 581, 134 Pac. 655, while being a case involving an express messenger instead of a mail clerk, is analogous. But no case seems to have been decided upon the precise point here involved, and both plaintiff and defendants admit that this particular question may be regarded as one of first impression. The theory of the plaintiff is that the mail was in the course of transportation while being transferred around the wreck, and while awaiting reloading at the scene of the wreck, as much as while upon the car of the defendants, and that the plaintiff did not lose his status as passenger while in charge of the mail during such transfer, and that it was the duty of the defendants to provide for the comfort and safety of the plaintiff in the course of such transfer. The theory of the defendants is that the duty devolving upon the defendants was to furnish proper appliances and equipment for the transfer of the mail, properly warmed for the comfort of the persons in charge, and that there was no duty to furnish the plaintiff shelter and fire while engaged in guarding or watching the mail pending a transfer, apart from that furnished other passengers; that the liability of the carrier to the mail clerk is limited to cases of personal injury attributable to negligence in the operation of trains, and does not extend to mere contractual duties ordinarily owing by a carrier to its passengers for hire.

[2] It has been held and is settled law that a passenger does not lose his status as such while transferring from one car to another. Watson v. Oxanna Land Co., 92 Ala. 320, 8 South. 770; Chicago, etc., R. Co. v. Winters, 175 Ill. 293, 51 N. E. 901; Baltimore, etc., R. Co. v. State, 60 Md. 449; St. L. S. W. R. Co. v. Griffith, 12 Tex. Civ. App. 631, 35 S. W. 741.

[3,4] The difficulty, however, in applying required by the defendants and over which the principle announced in the cases just cit- they had no control. It is true that they

ed to the position of plaintiff in this case is evident, since in the cases just cited there was no duty devolving upon the passenger requiring the exposure or contributing to the injury sustained. In the case at bar, however, the exposure and wait in the cold was not occasioned by the fact that the plaintiff was a passenger and conveniences for his comfort were not provided, but was made necessary in the discharge of a duty owed by the plaintiff to his employer to guard the mail in the course of transfer. In the case of Price v. Pennsylvania R. R. Co., 113 U. S. 218, 5 Sup. Ct. 427, 28 L. Ed. 980, the court says:

"The person thus to be carried with the mail matter, without extra charge, is no more a passenger because he is in charge of the mail, nor because no other compensation is made for his transportation, than if he had no such charge, nor does the fact that he is in the employment of the United States, and that defendant is bound by contract with the government to carry him, affect the question. It would be just the same if the company had contracted with any other person who had charge of freight on the train to carry him without additional compensation. The statutes of the United States which authorize this employment and direct this service do not, therefore, make the person so engaged a passenger, nor deprive him of that character, in construing the Pennsylvania statute."

See, also, Martin v. P. & L. E. R. Co., 203 U. S. 284, 27 Sup. Ct. 100, 51 L. Ed. 184, 8 Ann. Cas. 87.

It has often been held that to constitute actionable negligence there must be a concurrence of three essential elements: (1) The existence of a duty on the part of the defendant to protect the plaintiff from the injury of which he complains; (2) a failure by the defendant to perform that duty; and (3) an injury to the plaintiff proximately due to the failure of the defendant. Faurot v. Oklahoma Wholesale Gro. Co., 21 Okl. 104, 95 Pac. 463, 17 L. R. A. (N. S.) 136; Rogers v. C., R. I. & P. Ry. Co., 32 Okl. 109, 120 Pac. 1093.

Here the defendants undoubtedly owed the plaintiff the duty of exercising the utmost care and diligence for his safe carriage and to provide everything necessary for that purpose. Section 800, Revised Laws 1910. Unless there was a failure on the part of the defendants to perform that duty, and from such failure the plaintiff sustained the injury complained of, no cause of action exists. If there was a failure, and he sustained injury thereby, he may recover. The only complaint is that a fire was not provided for the plaintiff at the scene of the wreck, so plaintiff might watch the mail without retiring to the coaches provided, and that the failure to provide a fire is negligence entitling the plaintiff to recover damage. The duty owed by the plaintiff to his employer to watch the mail was disassociated from his status as passenger; it was something not required by the defendants and over which

had control of the mail in moving the same come at once to Ardmore and execute the from the car in which it was transported at the scene of the wreck to the place where it was to be loaded upon another car, and until the same was so loaded; but the action of the plaintiff in remaining out of the coaches provided by the defendants, to watch the mail, was a matter of contract between him and the government, and if in so doing he exposed himself and sustained injury without fault on the part of the defendants they are not liable therefor. It was the duty the plaintiff owed his employer, the government, which prevented him from taking advantage of the accommodations provided, and required him to guard the mail and thereby expose himself. This exposure we think cannot be attributed to any negligence on the part of the carrier or failure on its part to provide those things necessary to fulfill its obligations toward the plaintiff as a nassenger.

It follows that the demurrer of the defendants to plaintiff's evidence should have been sustained.

The judgment is therefore reversed.

PER CURIAM. Adopted in whole.

STRICKLAND v. PALMER. (No. 7178.) (Supreme Court of Oklahoma. April 9, 1918. Rehearing Denied May 21, 1918.)

(Syllabus by the Court.)

Brokers @==63(1)-Action for Commission-DEFENSES.

In an action for a commission for the leasing of some land for oil and gas purposes, it is no defense that the agent did not procure a written lease or contract, where the lessor failed to comply with his contract, and the nonprocurement of the contract or lease was due to his

Commissioners' Opinion, Division No. 8. Error from County Court, Carter County; W. F. Freeman, Judge.

Action by J. H. Palmer against R. P. Strickland. Judgment for plaintiff, and defendant brings error. Affirmed.

Brown, Brown & Brown, of Ardmore, for plaintiff in error. Sigler & Howard, of Ardmore, for defendant in error.

HOOKER, C. Palmer sued Strickland in the lower court to recover commission for leasing of the land of defendant below for oil and gas purposes. He won, and defendant below has appealed here.

Plaintiff below asserted that he made a contract with defendant below by the terms of which it was agreed that he (Palmer) was to have one-fourth of whatever sum he could procure for an oil and gas lease on

lease, and that acting under said contract he found several parties who were ready. willing, and able to execute and accept said lease, and that he demanded of Strickland that he come to Ardmore at once and make said lease, which he failed to do, and that when he did come to Ardmore the parties who wanted to buy or purchase said lease had scattered and on account of the delay and subsequent developments, changed their minds, and that by reason of the facts so stated Palmer sought judgment for \$100, being one-fourth of the lease price over \$2.50 per acre. This was all denied by the defendant below, who asserted that he was unable to come to Ardmore when notified on account of the serious illness of his mother, but as soon as he could leave her he went to Ardmore and was ready to make the lease, but said parties could not be found to execute the same. These issues were submitted to the jury upon proper instructions of the court, and the issues of fact were found by the jury in favor of plaintiff below and duly approved by the court.

The defendant below has appealed here. and now contends that recovery should not be allowed in this action for the reason that plaintiff below did not bring the parties together, nor did he procure from the intended lessee any written contract, agreement, or lease. It was the theory of plaintiff below that under his agreement with defendant he was entitled to his commission as he had found a party ready, willing, and able to lease the property of defendant upon the terms and conditions demanded by defendant, and they were at the place and time stipulated by defendant to execute the lease and pay the money, and that defendant's failure to come within a reasonable time and execute the lease prevented the lease from being made.

This case must be considered upon the theory that the nonexecution of the lease by the intended lessee, and the inability of the defendant to procure the money, were due to the conduct of the plaintiff in error and to his failure to comply with his agreement stated above. That being true, he is not in a position to assert that the defendant in error is not entitled to his commission for the reason that the contract was never consummated or the lease executed.

In Young v. Hunter, 6 N. Y. 203, it is said: "It is a well settled and salutary rule that a party cannot insist upon a condition precedent, when its nonperformance has been caused by himself."

This court in Bleecker v. Miller, 40 Okl. 386, 138 Pac. 814, said:

"When the defendant sold the land to another Strickland's 160 acres over and above \$2.50 purchaser, he, by his own act, stopped the transper acre or \$400, and that it was agreed that when the parties were found who would lease the same plaintiff in error here would the property which had already been sold to another. • • • (Authorities cited.) The instructions, among other things, tell the jury that it was the duty of the plaintiffs to furnish a purchaser who was ready, able, and willing to purchase the property upon the terms and conditions prescribed by the defendant. The defendant contends that this purchaser was not ready, able, and willing to buy this property. That was a question of fact which was submitted to the jury under proper instructions, and there is evidence in the record tending to support the conclusions reached by the jury."

The jury said by the verdict rendered in this cause that Palmer had procured a party who was ready to execute this lease under the terms and conditions imposed by Strickland, and that the failure to have the contract closed and the lease executed was due to the conduct of the plaintiff in error.

There being evidence to support the verdict of the jury, and the cause having been submitted to the jury under proper instructions, the judgment of the lower court is affirmed.

PER CURIAM. Adopted in whole.

# KNIGHTS AND LADIES OF SECURITY V. GREY. (No. 8808.)

(Supreme Court of Oklahoma. March 12, 1918. Rehearing Denied May 21, 1918.)

(Syllabus by the Court.)

1. Insurance 4 723(2) — Life Insurance — Warranties—Effect.

An applicant for life insurance warranted in his application that the answers made by him to the questions propounded by the medical examiner were true, full, and correct, and agreed that the same, together with the application, should form the basis of his agreement with the order and should constitute a warranty. The certificate issued upon said application recited that the application and the report of the medical examiner are true in all respects, and that each and every part shall be held to be a warranty and to form the only basis of liability of the order, and, if not true, the certificate shall be null and void. Held, that the answers of the insured to the questions propounded by the medical examiner were warranties, and a false statement made by the insured as to his having applied to the Knights and Ladies of Security, or any other life insurance company, or association, or society, and been rejected, rendered the policy void.

(Additional Syllabus by Editorial Staff.)

2. INSURANCE &=723(11) — STATUTE — "COM-PANY"—"INSURANCE COMPANY"—"OB ANY OTHER LIFE INSURANCE COMPANY"—"OTH-BR."

Under Rev. Laws 1910, \$.3402, providing that the word "company" or "insurance company" shall include all corporations engaged as principals in the insurance business, except fraternal and benevolent orders, a question on a medical examination as to whether the applicant had ever applied for membership with the insurer or "any other life insurance company" embraced life insurance companies of the general kind, and was not limited to organizations or societies of the same nature as the insurer.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Other; Company; Insurance Company.]

Commissioners' Opinion, Division No. 8. Error from District Court, Oklahoma County; Edward Dewes Oldfield, Judge.

Action by Fannie A. Grey against the Knights and Ladies of Security. Judgment for plaintiff, and defendant brings error. Reversed, and cause remanded for new trial.

Hainer, Burns & Toney, of Oklahoma City, for plaintiff in error. T. J. McComb and Stephen C. Treadwell, both of Oklahoma City, for defendant in error.

HOOKER, C. The plaintiff in error on October 18, 1912, issued a beneficiary certificate to Henry H. Grey payable to his wife. He died in March, 1914, and upon the refusal of the plaintiff in error to pay the amount claimed to be due upon said policy the beneficiary instituted this action.

In the petition it is alleged that the policy was issued upon the life of said Henry H. Grey, payable upon his death to the defendant in error, and that the said insured had died in March, 1914, and there was due by virtue thereof a certain fixed sum.

The answer admits the execution of the insurance contract, etc., but denied liability upon several grounds, all of which save one has been decided adversely to plaintiff in error in the case of M. B. A. v. White, 168 Pac. 795.

[1] It is claimed by plaintiff in error that it issued said certificate and thereby promised to pay the beneficiary said sum only upon the said Henry H. Grey having complied with all of the terms and provisions of said certificate, and with the by-laws and constitution of the society and with the warranties, representations, and agreements contained in the written application for said insurance by the said insured, together with the statements made by him in his answers to the questions propounded to him in his medical examination, and that said insured falsely and fraudulently represented to its medical examiner that he had never applied for membership to any other life insurance company, or association, or society and been rejected, whereas, in truth and in fact, he had prior to the time his application was made here and his answer given to said medical examiner or said certificate issued to him made an application to the Mutual Life Insurance Company of New York for insurance, and had been rejected, and that by the terms and conditions of the certificate sued upon the application and the medical examiner's report constituted a part thereof, and was a warranty that the insured had never applied to any other life insurance company, or association, or society, and been rejected, and that by virtue thereof said warranty was broken and said policy rendered void, and no liability accrued to it on account thereof.

The certificate sued upon contains the fol-wing stimulations: of a representation that no application had been lowing stipulations:

"(1) That the application for membership in this order made by the said member, together with the report of the medical examiner which is on file in the office of the National Secretary, is on file in the office of the National Secretary, and both of which are made a part hereof, are true in all respects, and each and every part thereof shall be held to be a strict warranty and to form the only basis of the liability of the order to said member, or said member's beneficiaries, the same as if fully set forth in this certificate.

examination shall not be true in each and every part thereof, then this beneficiary certificate shall, as to said member, or said member's beneficiaries, be absolutely null and void.

"(3) This certificate is issued in consideration

of the warranties and agreements made by the person named in this certificate in said member's application to become a member of this order and in said member's medical examination.

In the application or medical examination of the insured, the following questions and answers thereto appear:

"25. (a) Have you ever applied for membership in the Knights and Ladies of Security, or any other life insurance company or association or society, and been rejected? No. \* \*

or society, and been rejected: 170.

"28. Have you ever made application to any life insurance company, association, or society and withdrawn it before rejection, or been advised by any medical examiner that he could not pass you on account of your physical condition, or personal or family history? No."

And in addition thereto the following agreement is twice embraced therein:

"I hereby make application for a beneficiary And I hereby declare that certificate. the foregoing answers and statements and the answers to the questions propounded to me by the medical examiner are warranted to be true, full and correct, and I acknowledge and agree that the said answers and statements, with this application shall form the basis of my agreement with the order and constitute a warranty. I hereby make my medical examination a part of this application, and the medical examination shall be considered a part of my beneficiary cer-tificate."

In Woodmen v. Prater, 24 Okl. 214, 103 Pac. 558, 23 L. R. A. (N. S.) 917, 20 Ann. Cas. 287, it is held:

"(2) An applicant for a life insurance policy warranted in her application that her answers to the medical examiner on the reverse side of to the medical examiner on the reverse side of her application were 'true and accurate,' and that they should constitute the basis for the covenant. The policy recited that it was exe-cuted in consideration of the warranties made in the application, and that the application should be made a part of the covenant. Held, that the answers of the insured to the medical examiner were her warranties, and that a false statement made therein by her rendered the policy void."

In 14 R. C. L. p. 1080, it is said:

"A statement as to previous rejections is material as a matter of law, and, if false, avoids the policy regardless of the good faith of the applicant, and a fortiori where the truthfulness of all statements in the application is made a condition to the validity of the policy, a false statement that the insured has not applied for other insurance avoids the policy. A representation of the policy. other insurance avoids the policy. A representation by an applicant that no application for insurance by him had not been granted is untrue where he had withdrawn an application to avoid a rejection. And the same is true tion 3402, Rev. Laws 1910, where it is said

See, also, the following cases: Owen v. United States Surety Co., 38 Okl. 123, 131 Pac. 1091; Cobb v. Covenant Mutual Ben. Ass'n, 153 Mass. 176, 26 N. E. 230, 10 L. R. A. 666, 25 Am. St. Rep. 619; Metro. Life Ins. Co. v. McTague, 49 N. J. Law, 587, 9 Atl. 766, 60 Am. Rep. 661; Brady v. United States Life Ins. Ass'n, 60 Fed. 727, 9 C. C. A. 252; Sladden v. N. Y. Mut. Life Ins. Co., 88 Fed. 102, 29 C. C. A. 598; Pennsylvania Mut. Life Ins. Co. v. Mechanics' Savings Bank & Trust Co., 72 Fed. 413, 19 C. C. A. 286, 28 L. R. A. 33; Home Friendly Society v. Berry, 94 Ga. 606, 21 S. E. 583; Aloe v. Mut. Reserve Life Ass'n, 147 Mo. 561. 49 S. W. 558; McCollum v. Mut. Life Ins. Co., 55 Hun, 103, 8 N. Y. Supp. 249; Id., 27 N. E. 412; March v. Met. Life Ins. Co., 186 Pa. 629, 40 Atl. 1100, 65 Am. St. Rep. 887; Moore v. Mut. Res. Fund Life Ass'n, 133 Mich. 526, 95 N. W. 573; Germania Life Ins. Co. v. Lunkenheimer, 127 Ind. 536, 26 N. E. 1082; Silverman v. Empire Life Ins. Co., 24 Misc. Rep. 399, 53 N. Y. Supp. 407; Finch v. M. W. A., 113 Mich. 646, 71 N. W. 1104; Am. Mut. Aid Society v. Bronger, 11 Ky. Law Rep. 902; Id., 91 Ky. 406, 15 S. W. 1118, 12 Ky. Law Rep. 971; and Clemans v. Sup. Assembly Royal Soc. of Good Fellows, 131 N. Y. 485, 30 N. E. 496, 16 L. R. A. 33.

Under the authority of Con. Cas. Co. v. Owen, 38 Okl. 107, 131 Pac. 1084, and of Shawnee Life Ins. Co. v. Watkins, 156 Pac. 181, the provisions of section 3467, Rev. Laws 1910, are not applicable to the contract involved in the present case.

In 6 R. C. L. § 227, p. 837, it is said:

"The whole context is to be considered in ascertaining the intention of the parties, even though the immediate object of inquiry is the meaning of an isolated clause.

And in 9 Cyc. p. 577, it is said:

"The first and main rule of construction is that the intent of the parties as expressed in the words they have used must govern."

Applying the rules above given to the words used in questions and answers above cited, how must they be construed and what is their meaning?

It is asserted by the beneficiary that the doctrine of ejusdem generis should be applied here, and, when so applied, that the words "or any other life insurance company or association or society" must be construed to mean organizations of a kindred nature to the Knights and Ladies of Security. With this contention we cannot agree.

The intention and aim of the interrogatories was to embrace all character of insurance companies. Not alone the Knights and Ladies of Security and other kindred societies or organizations, but all insurance companies issuing policies. This is apparent from question 26, immediately following.

[2] It might not be amiss to refer to sec-

that the word "company" or "Insurance company" shall include all corporations engaged as principals in the insurance business except fraternal and benevolent orders. Viewing the words, "or any other life insurance company" within the light of this statute. we must hold the same sufficient to embrace life insurance companies of the general kind, and not limit the same to organizations or societies of a kindred nature to plaintiff in error. When it is apparent that the parties intended the general words to extend beyond the class designated, the doctrine of "ejusdem generis" does not apply. In dealing with this doctrine of "ejusdem generis" as applied to the construction of statutes, this court, in K. C. So. Ry. Co. v. Wallace, 38 Okl. 233, 132 Pac. 908, 46 L. R. A. (N. S.) 112, said:

"(3) The rule of ejusdem generis is resorted to merely as an aid in construction. If, upon consideration of the whole law upon the subject, and the purposes sought to be effected, it is apparent the Legislature intended the general words to go beyond the class specially designated, the rule does not apply. Moreover, where the particular words exhaust the class, then the general word must be given a meaning then the general word must be given a meaning beyond the class."

And in the opinion it is said:

"It is a fundamental rule that courts favor a construction which will render every word operative rather than one which makes some words idle and nugatory. Bohart et al. v. Anderson, 24 Okl. 82 [103 Pac. 742, 20 Ann. Cas. 142].

And in 38 Okl. on page 239, 132 Pac. on page 911, the court says:

"It is true that, under the doctrine ejusdem generis, general words, such as those just referred to, for the purpose of ascertaining the intent of the Legislature, are generally restricted in their scope to the specific class of objects named. But, as is said by the Supreme Court of Missouri in the case of State v. Smith, 238 Mo. 242, 135 S. W. 465, 33 L. R. A. (N. S.) 179: "The rule of ejusdem generis is \* \* resorted to merely as an aid in construction. If, upon consideration of the whole law upon the subject, and the purposes sought to be effected, it is apparent that the Legislature intended the general words to go beyond the class specifically designated, the rule does not apply. If the particular words exhaust the class, then the general words must have a meaning beyond the class or be discarded altogether."

"Other authorities supporting these general propositions and instructive on this phase of the case may be noted as follows: 2 Lewis' Sutherland, Statutory Construction (2d Ed.) secs. 436, 437, 438; 36 Cyc. 1119-1122; United States Cement Co. v. Cooper, 172 Ind. 599, 88 N. E. 69; Weiss v. Swift & Co., 36 Pa. Super. Ct. 376; Strange v. Board of Com'rs, 173 Ind. 340, 91 N. E. 242; State v. Brown et al., 163 Mo. App. 30, 145 S. W. 1180; Mears Mining Co. v. Maryland Casualty Co., 162 Mo. App. 178, 144 S. W. 883; State v. Pabst Brewing Co., 128 La. 770, 55 South. 349.

"The Supreme Court of Indiana, in the case of United States Cement Co. v. Cooper, supra, speaking to this subject, says: 'In the construction of statutes or written contracts the doctrine of ejusdem generis is applicable, not in all, but in a certain class of cases when general words are not accorded their usual and ordinary meaning, but restricted to things of the same kind, or genus, as those designated by the particular words. "It is true that, under the doctrine ejusdem

ing, but restricted to things of the same kind, or genus, as those designated by the particular words. 2 Lewis' Sutherland, Ct. Con. (2d Ed.)

§ 437; Foster v. Blount, 18 Ala. 687-689. The office of the rule, however, like that of all other canons of construction, is to afford aid to the court in developing the true meaning of the statute, and cannot be employed or restrict the operation of an act within narrower limits than operation of an act within narrower limits than was intended by the lawmakers. Woodworth v. State, 26 Ohio St. 196; Willis v. Mabon, 48 Minn. 140-156, 50 N. W. 1110, 16 L. R. A. 281, 31 Am. St. Rep. 626; Lewis' Sutherland, St. Con. (2d Ed.) § 437. It is never used in an arbitrary sense, but operates as a sort of suggestion to the judicial mind that, when specific words of definite and certain meaning in a statute are deemed advisable by the framers, it may be that they intended the general words to extend only to persons or objects of the same kind or class as those embraced within the particular words, or they might not have gone to the pains of any specific enumeration. Whether the doctrine should be applied in any case particular words, or they might not have gone to the pains of any specific enumeration. Whether the doctrine should be applied in any case depends largely upon the character and contents of the act as a whole, having due regard for that primary rule of construction that the object of a law must be sought from the entire act, including the title, and from a consideration of the evil to be remedied, the state of public sentiment existing at the time of the passage of the law, and the general purpose of the act, as derived from a consideration of every section. If the general purpose of the Legislature clearly appears from a study of all the parts, that purpose cannot be defeated or limited by the doctrine we are considering. Webber v. Chicago, 148 III. 313–318, 36 N. E. 70; Gillock v. People, 171 III. 307, 49 N. E. 712; Winters v. Duluth, 82 Minn. 127, 84 N. W. 788; Lynch v. Murphy, 119 Mo. 163, 24 S. W. 774; Woodworth v. State, 26 Ohio St. 196; Lewis' Sutherland, Stat. Const. (2d Ed.) § 437; State v. Villines (1904) 107 Mo. App. 593–598, 81 S. W. 212; State v. Harter (1905) 188 Mo. 516, 87 S. W. 941–944. Another potential rule of construction has peculiar application to the facts of this case, namely, that when the particular words embrace all the persons or objects of the class mentioned, and thereby exhaust the class, in such case there can be nothing ejusdem generis left for the rule to operate upon, and we must give the general words a meaning different from that indicatcan be nothing ejusdem generis left for the rule to operate upon, and we must give the general words a meaning different from that indicated by specific words, or ascribe to them no meaning at all. Bank of Commerce v. Ripley, 161 Mo. 126-132, 61 S. W. 587; Ruckert v. Railroad Co. (1901) 163 Mo. 260-276, 63 S. W. 814; Gage v. Cameron, 212 Ill. 146-161, 72 N. E. 204; Gillock v. People, 171 Ill. 307, 49 N. E. 712; Ellis v. Murray, 28 Miss. 129-142; Fenwick v. Schmalz, 3 C. P. L. R. 313; Lewis' Sutherland, Stat. Const. (2d Ed.) § 437; Maxwell's Interp. of Stat. (3d Ed.) p. 478; Endlich, Interp. of Stat. § 409. This result must be avoided, if possible, at the behest of another canon of construction, that a statute must be construed so as to give effect to all its words.'"

Applying these rules to the questions and answers involved here, it must be held that the parties intended the general words to go beyond the class specifically designated, and that the rule of ejusdem generis does not

We are of the opinion that the representation by the insured that he had never applied for membership in the Knights and Ladies of Security or any other life insurance company, or association or society, and been rejected, considered in connection with the subsequent question and answer, and with the whole context of the application, constituted a warranty, and, if untrue, was suffition to cover this view of the question was asked by plaintiff in error and refused. This was error.

The judgment of the lower court is reversed and this cause remanded for a new trial.

PER CURIAM. Adopted in whole.

GWINNUP V. WALTON TRUST CO. (No. 7021.)

April 30, (Supreme Court of Oklahoma.

#### (Syllabus by the Court.)

1. TRIAL \$\infty\$=178 - Motion to Dibeot Ver-dict-Question Presented.

The question presented to a trial court on a motion to direct a verdict is whether, admitting the truth of all the evidence that has been given in favor of the party against whom the motion is directed, together with such reasonable inferences and conclusions as may be drawn therefrom, there is enough competent evidence to reasonably sustain the verdict, if the jury find in accordance therewith.

2. Partnership \$==37-Liability-Holding

OUT AS PARTNER.

In an action to charge one for the debts of a partnership because of having held himself out, or having permitted himself to be held out, as a partner, one, who never understood or supposed him to be a partner at the time of dealing with and giving credit to the partnership, cannot charge the ostensible partner with liability, if he was not a partner in fact.

3. Partnership \$\infty 34, 218(3)—Holding out as Partner-Liability—Estoppel—Reli-

ANCE.

The liability of one who has held himself out, or permitted himself to be held out, as a out, or permitted himself to be held out, as a partner, rests upon the ground that he cannot be permitted to deny a partnership, which, though not existing in fact, he has asserted or permitted to appear to exist, against one dealing with such partnership, knowing and relying upon such assertion or permission and who has been induced to change his position thereby, and, as in other cases of estoppel in pais, whether or not in reliance upon such assertion or permission he dealt with the partnership is a question of fact for the jury and nership is a question of fact for the jury and not of law for the court.

Commissioners' Opinion, Division No. 1. Error from Superior Court, Muskogee County; Farrar L. McCain, Judge.

Action by H. G. Gwinnup against the Walton Trust Company, a corporation. ment for defendant, and plaintiff brings error. Reversed and remanded.

H. G. Gwinnup, of Tulsa, and Ames, Chambers, Lowe & Richardson, of Oklahoma City, for plaintiff in error. Furry & Motter, of Muskogee, for defendant in error.

RUMMONS, C. The parties will be referred to here as they appeared in the court below. The plaintiff commenced this action against the defendant, alleging that, in consideration of \$4,150 paid by plaintiff to de-

cient to render the policy void. An instruc-; ing farm loans in Northeast Oklahoma at Vinita and Muskogee: that the defendant refused to comply with its agreement and failed and neglected to make the plaintiff its agent as agreed. The petition prays the recovery of the sum of \$4,150 paid defendant by plaintiff and \$25,000 as damages for breach of the contract. The defendant filed an answer and amendment thereto denying the allegations of the petition and alleging that F. M. Gwinnup and plaintiff were partners, doing business under the firm name of F. M. Gwinnup & Son, engaged in the farm loan business as agents of the defendant, having offices at Vinita and Muskogee; that such partnership had existed from 1907 to 1913 when it was dissolved by the death of F. M. Gwinnup; that during said period the said partnership had been extensively engaged in making farm loans for the defendant; and that at the time of the death of F. M. Gwinnup said firm was indebted to the defendant in the sum of \$4,150, being money paid to said firm by the defendant upon loans approved by the defendant, but which money had not been paid by said firm to the borrowers, and interest due the defendant collected by said firm and not paid over to defendant. The defendant further alleged that the sum of \$4,150 paid by plaintiff to the defendant was paid in satisfaction of the indebtedness of said firm of F. M. Gwinnup & Son to the defendant which the plaintiff as a member of said firm was legally liable to pay the defendant; that the agreement alleged in the petition of plaintiff, if made, was without consideration and void and unenforceable. By an amendment to its answer the defendant alleged that the plaintiff by means of the stationery used by him in his correspondence with the defendant had held himself out as a member of the firm of F. M. Gwinnup & Son, and he had permitted F. M. Gwinnup to hold him out to the defendant as a member of said firm: that defendant relied upon the representations of the plaintiff and the representations of F. M. Gwinnup, made with the knowledge of plaintiff, and believed that the plaintiff was a member of the firm of F. M. Gwinnup & Son; and that, acting upon such belief, the defendant did business with said firm and advanced the sum of \$4,150 subsequently paid by plaintiff to defendant; that by his acts and conduct in so holding and permitting himself to be held out as a member of said firm of F. M. Gwinnup & Son, and by reason of the fact that defendant relying upon such ostensible partnership had advanced said sums of money, the plaintiff was estopped from denying that a partnership actually existed between him and said F. M. Gwinnup. The plaintiff replied denying the allegations in the answer and the amendfendant, the defendant agreed to appoint ment thereto. At the conclusion of the eviplaintiff as its agent in soliciting and procur- dence the court directed a verdict for the

Judgment being rendered upon this verdict, the plaintiff brings this proceeding in error to reverse the judgment of the trial court.

The evidence in this case is very voluminous, covering correspondence between the plaintiff and his father, F. M. Gwinnup, and the defendant over a period of about six years. We will not attempt to set out and review all of the same, but will content ourselves by setting forth the contentions of the respective parties upon the evidence. the contention of the plaintiff that his father was engaged in the farm loan business for himself alone at Vinita, Okl., doing business under the name of F. M. Gwinnup & Son; that he was engaged in the farm loan business at Muskogee, doing business under the firm name of F. M. Gwinnup & Son; that his father was the agent of the defendant and he was a subagent of his father; that his father paid the expenses of the Vinita office and received all the profits of the business of that office: that he paid the expenses of the Muskogee office and received all the profits of that office; that he had other connections in the farm loan business at Muskogee; that the farm loans that he secured for the defendant were all closed through his father's office at Vinita; that he had repeatedly attempted to get the defendant to recognize him as its agent and do business with his Muskogee office direct, but it had always refused to do so; that there was a division of territory between him and his father, and his father paid him all the commissions on business obtained by him; that when his father died his father was short in his accounts with defendant in the sum of \$4,150, which sum he paid to the defendant upon the defendant's agreement that it would transfer his father's business to him and make him their agent in Northeast Oklahoma, which agreement it subsequently refused to carry out.

It is the contention of the defendant that the agreement to employ plaintiff as its agent, after his father's death, was never entered into; that its first connection with the plaintiff or his father arose from an application written by his father upon a letter head entitled "F. M. Gwinnup & Son, Offices at Vinita and Muskogee," in which his father solicited the farm loan business of the defendant in Northeast Oklahoma; in that letter it was stated that the firm had offices at Vinita and Muskogee; that F. M. Gwinnup & Son were employed as the agents in Northeast Oklahoma of the defendant and an account opened up by defendant with F. M. Gwinnup & Son; that most of the checks for loans were made payable to F. M. Gwinnup & Son; that the plaintiff deposited checks payable to F. M. Gwinnup & Son indorsed in the firm name by himself as a member of the firm; that during all of the

defendant, the plaintiff excepting thereto. | the defendant continually held himself out as a member of the firm; that defendant relied upon such representation; that after the death of F. M. Gwinnup, there being some funds in a bank at Pryor to the credit of F. M. Gwinnup & Son, plaintiff drew a check for said funds, signing the same F. M. Gwinnup & Son, by H. G. Gwinnup, surviving partner; that plaintiff made an affidavit and secured the affidavit of his mother and sister, the only other heirs of F. M. Gwinnup, to the effect that the firm of F. M. Gwinnup & Son consisted of F. M. Gwinnup and H. G. Gwinnup and no other person had any interest therein.

> The plaintiff explained the giving of the check and the making and procuring of affidavits, on the ground that, the funds in the Pryor bank being the property of the defendant, the check was drawn and the affidavits made at the suggestion of counsel for defendant in order that defendant might procure the funds without the expense of an administration of the estate of F. M. Gwinnup. It is further contended by plaintiff that the defendant never believed that he was a member of the firm of F. M. Gwinnup & Son and never treated him as such and that defendant regarded F. M. Gwinnup as their only agent in that part of Oklahoma.

> [1] The rule as to the determination of whether or not a trial court was right in directing a verdict is well established in this state as laid down in Reed Grocery Co. v. Miller, 36 Okl. 134, 128 Pac. 271, as follows:

> "The question presented to a trial court on a motion to direct a verdict is whether, admitting the truth of all the evidence that has been given in favor of the party against whom the action is contemplated, together with such inferences and conclusions as may be reasonably drawn therefore there is enough competent. drawn therefrom, there is enough competent evidence to reasonably sustain a verdict, should the jury find in accordance therewith.'

> This rule has been followed by this court in numerous cases.

> [2, 3] There was evidence in the case entitling the plaintiff to go to the jury upon the question of whether or not he was a partner in the firm of F. M. Gwinnup & Son, unless the evidence conclusively established the fact that he was estopped from denying such partnership because he had held himself out to defendant as such partner and the defendant relying thereon had extended credit to the firm. If there was any competent evidence from which the jury might have concluded that the plaintiff was not thus estopped, the trial court erred in directing a verdict for the defendant.

> The rule as to the liability of a person as a partner, because he has held or permitted himself to be held out as such, when in fact no partnership existed, is well stated in the case of Thompson v. First National Bank of Toledo, 111 U. S. 529, 4 Sup. Ct. 689, 28 L. Ed. 507, as follows:

"A person who is not in fact a partner, who period plaintiff in his correspondence with has no interest in the business of the partner-

having held himself out, or permitted himself to be held out, as a partner, cannot be made liable upon contracts of the partnership, ex-cept with those who have contracted with the partnership upon the faith of such holding out. In such a case, the only ground of charging him as a partner is that by his conduct in nim as a partner is that by his conduct in holding himself out as a partner he has induced persons dealing with the partnership to believe him to be a partner, and, by reason of such belief, to give credit to the partnership. As his liability rests solely upon the ground that he cannot be permitted to deny a particitation. pation which, though not existing in fact, he has asserted, or permitted to appear to exist, there is no reason why a creditor of the part-nership, who has neither known of nor acted upon the assertion or permission, should hold as a partner one who never was in fact, and whom he never understood or supposed to be, a part-ner, at the time of dealing with or giving credit

ner, at the time of dealing with or giving credit to the partnership.

"There may be cases in which the holding out has been so public and so long continued that the jury may infer that one dealing with the partnership knew it and relied upon it, without direct testimony to that effect. But the question whether the plaintiff was induced to change his position by acts done by the defendant or by his authority is, as in other cases of estoppel in pais, a question of fact for the jury, and not of law for the court. The nature and amount of evidence requisite to satisfy the jury may vary according to circumstants. stances. But the rule of law is always the same; that one who had no knowledge or besame; that one who had no knowledge or be-lief that the defendant was held out as a partner, and did nothing on the faith of such as knowledge or belief, cannot charge him with liability as a partner if he was not a partner in

fact."

If the defendant did not believe that the plaintiff was a partner in the firm of F. M. Gwinnup & Son and did not consider him a member of the firm in its dealings with such firm, the plaintiff is charged with no liability for moneys advanced F. M. Gwinnup & Son, if in fact the plaintiff was not a member of such firm.

There are in the record two pieces of evidence which are pertinent to this question. The plaintiff testified that on the day of his father's death he had a conversation in his father's office at Vinita with Mr. Frank Allen, the secretary of the defendant, in which Mr. Allen said:

"Harry, this is a great shock to me to lose your father. He has been a very valuable agent and understood the business, and he has built up a wonderful business here and it is worth a great deal of money to a man who would step in here and take over the business. Now, Mr. Burris has told me, and I know that you did not know a thing about that shortage, and I know that we cannot hold you responsible, lawfully, for it; but you cannot expect to jump in here and take over this big business and get the benefits from it unless you will go in and pay that shortage and put this business in straight circumstances with the company."

Plaintiff was corroborated by his brotherin-law as to this conversation.

On October 21, 1912, Frank Allen, secretary of defendant, wrote plaintiff the following letter:

"Dear Sir: I have your letter of the 17th, in the presence of his brother-in-law by Mr. with application of Kenny for loan of \$1,200. Allen, to the effect that the plaintiff was not

ship and does not share in its profits, and is 00. Papers will be sent you for execution and sought to be charged for its debts because of we will make it draw interest from December

1st, as requested.
"I note your remarks regarding your father and I certainly regret very much that he is ill and unable to attend to business. I have been expecting that, owing to your father's age that it was only a matter of time until he would be unable to take care of the large and profitable business he has worked up at Vinitary and it has offern converted to a that Vinita, and it has often occurred to me that you, being in the same business and having knowledge of same, would be a great deal of help to your father in his old age. Under the circumstances I believe he has more business to attend to than his time and strength will permit. I can very easily understand why a permit. I can very easily understand why a city life is more attractive to a young man like yourself and that no doubt it is more agreeable to you to live in a city than to live in a small town like Vinita. I don't know how you feel about it, under the circumstances if it were my father I would go to him and stay with him and do all in my power for him although I had to sacrifice some myself. A boy's first duty is to his parents, all other things come second.

"We have never wanted to have an agent at Muskogee, but we do think a good deal of the business at Vinita and realize the fact that we have a large business there. Should your fahave a large business there. Should your father become unable to work and attend to this business, so far as I am concerned I don't know who would attend to it. Mr. Burris is doing the best he can to take care of it. He is a good man, but we need Mr. Burris on the road examining farms. I don't see how we are

road examining farms. I don't see how we are going to get along without him, neither do I see how he is going to take care of that work and take care of the office work of Gwinnup & Son at Vinita.

"Personally I have a very high regard for your father and I have done what I could to encourage him in the loan business, I should regret very much indeed if he should drop it, but I would feel if you were there to help Mr. Burris that the business would go on as usual

"Pardon these suggestions from some one who as no right to make them. That is the way

"Pardon these suggestions from some one who has no right to make them. That is the way I look at it, and I believe I am right.
"It is the policy of the Walton Trust Company, not to have very many agents. At present we only have two in Oklahoma and up to this time have found that number sufficient. I makes it easier for us to handle the business. "Would be pleased to hear from you again on this subject. Yours truly, Frank Allen. FA. J. N."

The moneys which were claimed by the defendant and which were repaid by the plaintiff were transmitted to F. M. Gwinnup at Vinita, between March 1, 1913, and the time of his death, so that the indebtedness arose after the writing of the letter of October 21, 1912. The language used in that letter, to the effect that, if plaintiff's father became unable to attend to the business, so far as the writer was concerned, he did not know who would attend to it, is hardly compatible with the theory that the defendant was writing to a member of the firm who was doing its business. Other expressions in the letter also are hardly reconcilable with the theory of the defendant that it regarded the plaintiff as a member of the firm of F. M. Gwinnup & Son. The statement alleged to have been made to the plaintiff in the presence of his brother-in-law by Mr.

responsible for the shortage and could not be legally held for it, is clearly incompatible with defendant's theory. If the defendant believed that plaintiff was a member of the firm of F. M. Gwinnup & Son to whom it had furnished these funds, its secretary would hardly be expected to make a statement that the plaintiff could not legally be held liable for them. Under the rule set out in Thompson v. First National Bank of Toledo, supra:

"The question, whether the plaintiff was induced to change his position by acts done by the defendant or by his authority is, as in other cases of estoppel in pais, a question of fact for the jury and not of law for the court. The nature and amount of evidence required to satisfy the jury may vary according to circumstances."

If the jury believed the evidence of the plaintiff as to the conversation with Allen, it was a circumstance which they were entitled to consider in determining whether or not the defendant acted in reliance upon the representation that plaintiff was a member of the firm. The jury was also entitled to draw its own conclusion from the letter written by the defendant before the indebtedness arose as to whether or not the defendant regarded plaintiff as a member of the firm. We therefore conclude, under the rule laid down in Reed Grocery Co. v. Miller, supra, that, admitting the truth of the evidence given in favor of the plaintiff and such inferences and conclusions as may be drawn therefrom, there was evidence in the record entitling the plaintiff to have the question of whether or not he was estopped from denying that he was a member of the firm of F. M. Gwinnup & Son submitted to the jury. The trial court therefore erred in directing a verdict.

The judgment of the trial court should be reversed, and the cause remanded for a new trial.

PER CURIAM, Adopted in whole.

LUCAS et al. v. KING. (No. 6173.)
(Supreme Court of Oklahoma. March 12, 1918.
Rehearing Denied May 21, 1918.)

(Syllabus by the Court.)

REPLEVIN \$\infty\$72—JUDGMENT—EVIDENCE.

The evidence in this cause is examined, and held, that there is not sufficient legal evidence to sustain the verdict and judgment of the trial court.

Commissioners' Opinion, Division No. 3. Error from District Court, Caddo County; J. T. Johnson, Judge.

Replevin action by G. L. King against J. E. Lucas and another. Verdict and judgment for plaintiff, and defendants bring error. Reversed and remanded, with directions to grant a new trial.

See, also, 165 Pac. 165.

Riddle & Hammerly, of Chickasha, and Bernstein & Spiers and Warren K. Snyder, all of Oklahoma City, for plaintiffs in error. Bond, Melton & Melton, of Chickasha, for defendant in error.

PRYOR, C. This is a replevin action commenced on the 11th day of January, 1913. in the district court of Caddo county, by the defendant in error, G. L. King, against the plaintiffs in error, J. E. Lucas and Matt Cunyan. The parties will be referred to as they appeared in the trial court. The petition by the plaintiff contains the ordinary allegations in a replevin action and fixes the value of the property at \$2,705, and asks for damages for the wrongful detention thereof in the sum of \$2,500. The answer of the defendant is a general denial. The defense of the defendants was that the defendant J. E. Lucas held the possession of the property sought to be recovered under and by virtue of a chattel mortgage given and executed to him by the plaintiff to secure the payment of a promissory note in the sum of \$1,881. plaintiff meets this contention of the defendant by claiming that the defendant and the plaintiff and W. C. King, brother of the plaintiff, for several years were engaged in grading and construction work; that he and his brother owned the teams and equipment necessary for carrying on such work, and that it was agreed between the parties that the defendant. Lucas, should finance the construction business and should apply the profits to the payment of the indebtedness; and claiming that there had been enough profits made out of the business and received by said Lucas to discharge all the indebtedness that the plaintiff owed the defendant. The jury returned a verdict in favor of the plaintiff for the possession of the property or its value thereof, and awarded the defendant \$2,800 damages for the wrongful detention thereof, and the defendants appeal.

The only question presented on appeal for consideration is whether or not the evidence is sufficient to sustain the verdict of the jury. The parties, by attempting to adjust all of their disputes arising out of the business relations of the plaintiff and defendants, have, in fact, made this an action for an accounting, involving in the trial thereof many complications, difficulties, and numerous accounts and transactions. The record and the evidence are exceedingly complicated and confused, and it would seem practically impossible for a jury to have arrived at a correct verdict.

A thorough examination of the evidence in this case clearly and convincingly establishes the fact that the verdict of the jury is not supported by the evidence. If the plaintiff is given credit for all of the items in his favor about which there is no dispute, together with all of the doubtful and disputed ones,

those items in his favor in regard to which there is no dispute, there is still a balance in favor of the defendant Lucas. Further, it was the contention of the plaintiff that a part of the property involved in the controversy was sold by the defendant Lucas under a chattel mortgage that he held against the plaintiff, and purchased the property himself at the sale, but claims that the sale was fraudulent; however, the evidence totally fails to establish that this sale by Lucas was not a bona fide sale, and that the property brought its true value, and that the defendant Lucas gave the plaintiff full credit therefor. On this issue the court clearly committed prejudicial error in refusing to instruct the jury that it should not take into consideration this property in determining whether or not the plaintiff had fully paid the defendant. Further, the verdict and judgment for the possession of the property is against both J. E. Lucas and Matt Cunyan; also the verdict and judgment were jointly rendered against J. E. Lucas and Matt Cunyan for damages in the sum of \$2,300 for the wrongful detention thereof. There is no evidence whatever tending to support this judgment for damages against the defendant Matt Cunyan.

This cause should be reversed, with the suggestion that was made in the case of Lucas v. King. 165 Pac. 165:

"If the parties continue to treat this cause as a suit for an accounting, it should be tried as such, and complete findings made which would enable this court on review to ascertain with some degree of certainty the specific items of account found to be established by the evidence." dence.

The judgment of the trial court is therefore reversed and remanded, with directions to grant a new trial.

PER CURIAM. Adopted in whole.

LEVIN v. HUNT. (No. 7352.)

(Supreme Court of Oklahoma. April 9, 1918.)

(Syllabus by the Court.)

1. CONTRACTS & 238(2)—CONTRACT IN WRITING—ORAL RESCISSION AND SUBSTITUTION OF NEW CONTRACT.

While under section 988, Rev. Laws 1910, the parties to a written contract cannot alter the same by parol, they may, independent of the statute, rescind the written contract by, parol and substitute therefor a new parol contract; said section has no application to the new contract. traet.

2. CONTRACTS \$\( \)324(1) - SPECIFIC PERFORM-ANCE-BREACH-REMEDIES.

ANCE—BREACH—REMEDIES.

On breach of contract the injured party has his choice of three remedies in a proper case. He may sue on the contract for the damages he has sustained by reason of the breach, or he may consider the contract terminated by the breach and sue on the quantum meruit under an implied contract, and recover for his services and the amount expended by him on the con-

and defendant Lucas given credit for only tract, or he may have recourse to equity and compel a specific performance of the contract.

> Commissioners' Opinion, Division No. 3. Error from District Court, Muskogee County: R. P. De Graffenried. Judge.

> Action by M. E. Hunt against Rachel T. Levin. Judgment for plaintiff, and defendant brings error. Affirmed on rehearing.

> D. A. Kline, of Muskogee, and B. B. Blakeney and J. H. Maxey, both of Tulsa, for plaintiff in error. Neff & Neff and Fred S. Zick, all of Muskogee, for defendant in er-

> PRYOR, C. On the 19th day of February, 1914, the defendant in error commenced this action against the plaintiff in error in the district court of Muskogee county for the recovery of the sum of \$1,107 for services, materials furnished, and money advanced to the plaintiff in error by the defendant in error. On the 11th day of November, 1914, the defendant in error recovered judgment against the plaintiff in error in the sum of \$880, from which judgment the plaintiff ap-

> The parties will be referred to as they appeared in the court below.

> The petition of the plaintiff in the court below alleged, in substance, that the defendant was indebted to her in the sum of \$1,-107: that said indebtedness arose out of the following circumstances: About the 1st day of May, 1912, the plaintiff and the defendant entered into a written rental contract whereby defendant leased to plaintiff what is known as the Frances Hotel, situated in Muskogee, Okl.; said lease was to run for the term of five years, and the plaintiff was to pay the defendant the sum of \$450 per month; that the plaintiff was induced to enter into said lease by representations made by the agent of the defendant that said premises would earn over and above all expenses the sum of \$300 per month; that within a few days after taking possession of said premises the plaintiff learned that the representations made by the defendant as to what the hotel would earn were false, and that she went to the agent of the defendant and informed him that she intended to surrender said premises on account of the fraudulent representations, and further that no one could live up to the agreement and run said hotel; that the defendant agreed to rescind the old contract and the parties entered into a new agreement, whereby the plaintiff was to keep the hotel open and in running condition during the summer months, was to pay whatever was necessary on the indebtedness against the furniture and furnishings of the hotel and keep the dining room open for the said period, and was to pay the defendant whatever she could after complying with the above terms, and

during the winter months, when the season | man v. Cigar Co., 9 Colo. App. 299, 48 Pac. was good, it was agreed that she should pay only the sum of \$200 per month as rental and reimburse herself as to whatever disbursements she had made during the summer months. The defendant further agreed that he would help the plaintiff dispose of the premises for at least \$1,200 or \$1,500 profit during the winter months while it was a paying concern. The petition further alleges that on or about the 30th day of October, 1912, the defendant wrongfully dispossessed the plaintiff of the hotel, and took possession of all of its furnishings and furniture. The answer of the defendant was in effect a general denial and cross-petition for rents for the summer months.

[1] The defendant on appeal makes two contentions: First. That the alleged new contract was nothing more than an attempt to alter the terms of the old contract by parol, in violation of section 988, Revised Laws of 1910, which provides:

"A contract in writing may be altered by a contract in writing, or by an executed parol agreement, and not otherwise.'

The evidence of the plaintiff reasonably supports the averments of her petition. It shows that the agent of the defendant agreed with the plaintiff that, if she would keep the hotel a going concern, put in certain necessary furnishings, and would pay whatever she could out of the earnings of the hotel on the amount due on the furniture and furnishings, keep the dining room open and pay whatever she could to the agent of the defendant, the old contract might be discharged and rescinded, and that he would let her have the premises during the winter months when business was good for the sum of \$200 per month, and he would further assist her in disposing of said hotel at a good profit. Her evidence shows that she kept this agreement, and had paid \$515 on the furniture and \$400 for furnishings and other necessary expenses in connection with the conducting of the hotel. She had also paid the agent of the defendant the sum of \$800.

It seems that there could be no question that there was an intention on the part of the parties to abrogate and rescind the old contract and to enter into a new one, and that these parties by parol agreement, as above set forth, did rescind their old contract and enter into a new contract.

While under the above-quoted statute, it is plain that the parties to a written contract cannot alter the same by parol agreement, it is well settled that they may, by parol, rescind, discharge, or terminate a written contract, or may enter into a new contract as a substitute for the old. Adler v. Friedman, 16 Cal. 139; Credit Clearance Bureau v. Hochbann Contracting Co., 25 Cal. App. 546, 144 Pac. 315; Pearsall v. Henry, 153 Cal. 314, 95 Pac. 154, 159; Bowman v. Wright, 65 Neb. 661, 91 N. W. 580, 92 N. W. 580; Hy-plaintiff for her services and trouble in con-

671: Copper v. Fretnosansky (Com. Pl.) 16 N. Y. Supp. 866; Evans v. McKanna, 89 Iowa, 362, 56 N. W. 527.

The defendant lays much stress upon the fact that the plaintiff never surrendered to the defendant possession of the premises, and contends that this was necessary before a new agreement could have been entered into between the parties, and, having failed to do this, whatever the understanding between the plaintiff and defendant might have been, it amounted only to an attempted alteration of the written lease. It will not do to say that the parties were powerless to make a new contract concerning these premises without going through the formality of changing the possession. Besides, according to her testimony, plaintiff was about to surrender the premises to the defendant, and offered to do so, but was induced by defendant to retain them.

The obligations of the new contract on both parties were entirely different; every element of a new contract is contained in the new agreement; the only thing common to both was the subject-matter, the premises. Therefore, under the evidence of plaintiff. which the jury, as they must, have believed as shown by the verdict, there was a new contract between the parties as contended by the plaintiff.

[2] Second. The defendant contends that there is error on account of the nature of damages allowed to the plaintiff by the jury and court, and error in the application of the rule for the measurement thereof. Where one party to a contract has breached the contract and prevented the other party from performing his obligations thereunder, Elliott on Contracts gives the rule as to the remedy of the injured party as follows:

"Sec. 2095. Remedies Available. On breach of contract the injured party has his choice of three remedies in a proper case. He may sue on the contract for the damages he has sustained by reason of the breach, or he may consider the contract terminated by the breach and sue on the quantum meruit under an implied contract and recover for his services and the amount expended by him on the contract, or he may have recourse to equity and compel a specific per-formance of the contract."

The plaintiff in this case, upon her eviction from the premises by the defendant. elected to sue on the quantum meruit, and the trial court permitted her to maintain her action and recover for the services rendered, etc. This position is well sustained by the rule announced above, and the great weight of authority. 9 Cyc. 688; Hemminger v. Western Assurance Co., 95 Mich. 355, 54 N. W. 950; Richards Mach. Co. v. Swartzel, 70 Kan. 773, 79 Pac. 660; 6 R. C. L. 389; United States v. Behan, 110 U. S. 338, 4 Sup. Ct. 81, 28 L. Ed. 168.

Under the substituted contract, there was no provision for any compensation to the

ducting the hotel during the summer months, | Bank to the Bank of Commerce, and at that other than the profits contemplated during the winter months, and, the contract being wrongfully terminated by the defendant, thereby preventing her from reimbursing herself under the contract, certainly she had a right, if she elected to do so, to sue for the reasonable value of her services and the money advanced and material furnished.

A careful examination of the instructions in this cause discloses that, the court properly and fairly submitted the issues to the jury, and committed no prejudicial error in stating to the jury the law of the case in said instructions.

Therefore the judgment of the lower court should be affirmed.

PER CURIAM. Adopted in whole.

BANK OF COMMERCE OF SULPHUR V. WEBSTER et al. (No. 8861.)

(Supreme Court of Oklahoma. April 30, 1918. Rehearing Denied May 21, 1918.)

(Syllabus by the Court.)

UABANTY \$==53(1) CHANGE OF PARTIES. - DISCHARGE GUABANTY

Under sections 4174 and 4175, Revised Laws 1910, which provide that any alteration made without the assent of the party or parties liable thereon which observes the number of parties liable. thereon which changes the number or relation of thereon which changes the number or relation or the parties to a negotiable instrument avoids the instrument as to such parties, the procuring of an additional signer to a promissory note by the holders thereof without the assent of parties who have guaranteed the payment of said note and subsequent to the execution of the guaranty discharges the guarantors from liability on their guaranty as between them and the holders.

Commissioners' Opinion, Division No. 3. Error from District Court, Murray County; F. B. Swank, Judge.

Action by the Bank of Commerce of Sulphur, Okl., against C. J. Webster and anoth-Judgment for defendants, and plaintiff brings error. Affirmed.

Jno. A. McClure, of Sulphur, for plaintiff in error. Geo. M. Nicholson, of Sulphur, for defendants in error.

PRYOR, C. The plaintiff in error, the Bank of Commerce of Sulphur, Okl., commenced this action in the district court of Murray county against C. J. Webster and T. E. Molacek, defendants in error, to recover on a written guaranty as follows:

"Sulphur, Okl., 6-19-11. "For value received, we hereby guarantee to the Bank of Commerce of Sulphur, Okl., payment of one note of D. A. Crafton, dated 2—6—11, \$1,450.00 and one note of D. A. Crafton, dated 1—30—11, \$204.00, both of said notes made payable to the Security State Bank.

"C. J. Webster."

Molacek."

"T. E. Molacek."

The notes named in the written guaranty

time the defendants executed and delivered to the Bank of Commerce the above set forth guaranty. At the time of such transfer the Security State Bank was in the hands of the banking board, which was liquidating the bank's assets. The defendants interposed the defense to said action that the notes which were guaranteed by the defendants were altered, after the execution and delivery of said guaranty, by the plaintiff's having Lizzie M. Crafton, wife of the maker of said notes, to sign the same. The trial court held that the signing of said notes by Lizzie M. Crafton at the instance of the plaintiff, without the consent and knowledge of the guarantors, the defendants, was an alteration which defeated the guaranty, and rendered judgment for the defendants. From this judgment the plaintiff appeals.

The only question presented on appeal is whether or not the plaintiff's procuring the signing of said notes by Lizzle M. Crafton after the execution and delivery of the contract of guaranty without the consent and knowledge of the defendants released and discharged the defendants from their contract of guaranty.

As to what constitutes material alteration of a negotiable instrument without the assent of the parties thereto, and avoids the guaranty, section 4175, Revised Laws 1910, "Any alteration which changes provides: \* \* (4) the number or the relations of the parties." It seems that this court has never construed this provision relative to questions of the character presented here. The Supreme Court of the State of Washington, in construing a provision identical with the one above, held:

"Under Rem. & Ball. Code, § 3515, providing that an alteration that changes the number or the relation of the parties is a material altera-tion, the addition of new signatures to procure their discount is a material alteration, which discharges an accommodation indorser who had no notice of the alteration." Handsaker v. Pedersen, 71 Wash. 218, 128 Pac. 230.

The authorities on this question, independent of the statute, seem to be in conflict; but the greater weight of authority is to the effect that the adding of an additional party to a negotiable instrument subsequent to its execution and delivery discharges the original parties when such change is made without their knowledge or consent. Taylor v. Johnson, 17 Ga. 521; Nicholson v. Combs, 90 Ind. 515, 48 Am. Rep. 229; Dickerman v. Miner, 48 Iowa, 508; Berryman v. Manker, 56 Iowa, 150, 9 N. W. 103; Windle v. Williams, 18 Ind. App. 158, 47 N. E. 680; Ford v. First National Bank (Tex. Civ. App.) 34 S. W. 684; Wallace v. Jewell, 21 Ohio St. 163, 8 Am, Rep. 48; Brown v. Johnson Bros., 127 Ala. 292, 28 South. 579, 51 L. R. A. 403, 85 Am. St. Rep. 134; Fowler v. were transferred from the Security State Lachenmyer, 198 Ill. App. 547; McVean v.



Scott, 46 Barb. (N. Y.) 379; Rumley Co. v. 1 Wilcher (Ky.) 66 S. W. 7.

In the case of Taylor v. Johnson, 17 Ga. 521, the Supreme Court of Georgia said:

"The rule of law is not disputed that the liability of a surety cannot be extended beyond the actual terms of his engagement, and that his liability will be extinguished by any act or omission which alters the terms of the contract, unless it be with his consent. And for myself I am satisfied that the uniform doctrine of the books, supported by numerous decisions, is that it matters not that the alteration be for the benefit of the surety, because he has a right to stand upon the very terms of his agreement. And it is no answer to a surety to say that the alteration is not material. He has a right to atteration is not material. He has a right to determine for himself whether he will or will not consent to the alteration—whether he thinks it material or immaterial. No power of man can alter his engagement, and his liability to be retained. He has a right to stand upon the very terms of his contract, and without his consent any variation of it is fatal."

In discussing the proposition as to how the addition of the name of another to an instrument might materially alter its character and change the identity of such instrument, the Supreme Court of Texas in Ford v. First National Bank (Tex. Civ. App.) 34 S. W. 684, uses the following language:

"The reason why the addition of a name to a note, as a joint maker, after its issuance, materially alters it, is because it changes the number of parties and their relative rights; it changes the rate of contribution; and it changes the character and description of the instrument. The original obligor may thereby be subjected to a suit in a county other than that of his residence, and suffer inconvenience and injury, as was done in this very case.

The Supreme Court of Ohio, in Wallace v. Jewell, 21 Ohio St. 163, 8 Am. Rep. 48, holds:

"Adding the name of a person as maker of a joint and several promissory note after delivery, without the knowledge or consent of the original signers, is a material alteration, and vitiates the note as to such original signers."

And in the body of the opinion the court says:

"Such an addition gives a different legal char-cter to the instrument. The defendants might, acter to the instrument. by the altered condition of the note now in ques-tion, have been subjected to change of jurisdic-

tion in the event of any litigation arising in re-lation to it between the parties. \* \* \* "If the legal operation of the instrument in its altered condition is different from the one they executed, it is sufficient for them to say of the contract evidenced by the altered instru-

ment, into this we never entered. \* \* \*
"If the parties intended to do what they have apparently done, added a new party to the note in the character of maker, its vitiating effect cannot be avoided by the conceptions of the plaintiff as to the character of the act, nor by his design in respect to the future use of the

It seems therefore that the alteration complained of, independent of the statutes and the construction placed thereon by the Supreme Court of Washington, by the great weight of authority, discharged the guarantors-the defendants herein-from any liability on the said instrument.

"Whether an alteration is material does not "Whether an alteration is material does not depend upon whether it increases or diminishes the maker's liability. The test is whether the instrument, after the alteration, expresses the same contract; whether it will have the same operation and effect after the alteration as before. If the change enlarges or lessens the liability, it is material, and vitiates the contract." Commonwealth National Bank of Dallas v. Baughman, 27 Okl. 175, 111 Pac. 332.

Section 1043, Revised Laws of 1910, provides:

"A guarantor is exonerated, except so far as he may be indemnified by the principal, if by any act of the creditor, without the consent of the guarantor, the original obligation of the principal is altered in any respect, or the remedies or rights of the creditor against the principal, in respect thereto, in any way impaired or suspended."

It is clear, in the light of the statutes and the great weight of authority, that the addition of the name of Lizzie M. Crafton to the note, payment of which the defendants guaranteed, changed the identity of said note and its effect and operation, and such alteration being made without the assent or knowledge of the defendants, the guarantors, operated to discharge the defendants from any liability on their guaranty.

Therefore the judgment of the trial court is affirmed.

PER CURIAM. Adopted in whole.

BANK OF COMMERCE OF SULPHUR v. WEBSTER et al. (No. 8862.)

(Supreme Court of Oklahoma. April 30, 1918. Rehearing Denied May 21, 1918.)

(Syllabus by the Court.)

1. BILLS AND NOTES \$== 90-GUARANTY \$== 14 -Consideration.

A promissory note must be supported by a lawful consideration; also, a contract of guaranty to answer for the obligations of another, made subsequent to the original obligation, must be supported by a distinct consideration.

(Additional Syllabus by Editorial Staff.)

2. Appeal and Error @===237(3)-Sufficien-

CY OF EVIDENCE—REVIEW.

Where the sufficiency of the evidence to sustain the verdict was not challenged by de-murrer or motion to direct a verdict, no assignment of error can be predicated on the insuffi-ciency of the evidence.

3. JUDGMENT 4=199(3)—SUFFICIENCY OF EVI-DENCE.

A motion for judgment notwithstanding the verdict does not raise the question of the sufficiency of the evidence to sustain the verdict.

EVIDENCE 4319(1)-BILLS AND NOTES-CONSIDERATION-STATUTE

Under Rev. Laws 1910, \$ 4066, making delivery essential to validity, and section 4078, relating to failure of consideration as a defense, and the contracts under which it was received are not conclusive as to consideration and the purpose for which the instruments were

Commissioners' Opinion, Division No. 3. Error from District Court, Murray County; F. B. Swank, Judge.

Action by the Bank of Commerce of Sulphur, Okl., against C. J. Webster and T. E. Molacek. Judgment for defendants, and plaintiff brings error. Affirmed.

Jno. A. McClure, of Sulphur, for plaintiff in error. Geo. M. Nicholson, of Sulphur, for defendants in error.

PRYOR, C. This action was commenced by the Bank of Commerce of Sulphur, Okl., plaintiff in error, against C. J. Webster and T. E. Molacek, defendants in error, to recover on a certain promissory note, together with interest, amounting to \$3,198.77. The defense interposed to the action on said note is that said note was executed and delivered to the said bank without consideration and only for the convenience and accommodation of the bank.

At the time of the execution and delivery of the note, and as a part of the same trans action, the defendants executed and delivered to the bank the following agreement: "Sulphur, Okl., April 9, 1911.

"To the Bank of Commerce, Sulphur, Okl.: You are hereby authorized to accept a note carrying the amount of indebtedness due you by W. J. and Frances I. Williams for the amount of \$2,654.06, the same being the propoamount of \$2,654.06, the same being the proposition which we guaranteed in written instruction to you June 19, 1912. It is agreed and understood that this instrument does not in any way invalidate, change or affect said former guaranty, and it is strictly understood that this note signed by us this date for \$2,654.06 and due June 9, 1912, is only for the convenience of the Bank of Commerce until said bank can realize on security which is behind the original realize on security which is behind the original proposition. And further it is understood that this said new note of this date does not bind us only in so far as it carries out our first and original guaranty above referred to.
"C. J. Webster,
"T. E. Molacek."

The contract of guaranty above referred

to is as follows: "Sulphur, Okl., June 19, 1912.

"We hereby guarantee the Bank of Commerce of Sulphur, Okl., payment of the W. J. Williams note for \$2,457.81, dated July 1, 1910, No. 1888, with the understanding that the security shall all be exhausted before any claim No. 1830, real curity shall all be exhausted is made on us as guarantors.

"C. J. Webster,

"T. E. Molacek."

There was a jury trial of said cause, which resulted in favor of the defendants. From judgment in favor of the defendants, the plaintiff appeals.

[2] The sufficiency of the evidence to sustain the verdict of the jury was not challenged by demurrer or motion to direct verdict in the trial court, and no assignment of error can be predicated on the insufficiency of the evidence. Simpson v. Mauldin, 160 Pac. 481; Reed v. Scott, 151 Pac. 484; Muskogee Electric Traction Co. v. Reed, 85 Okl. 334, 130 Pac. 157.

[3] The plaintiff, however, made motion for judgment in its favor, notwithstanding the verdict of the jury, and insists that this is a sufficient challenge to the sufficiency of the evidence. A motion for judgment notwithstanding the verdict does not raise the question of the sufficiency of the evidence to sustain the verdict. Oaks v. Samples, 157 Pac. 739; Barnes v. Universal Tire Protector Co., 165 Pac. 176.

[1] The plaintiff contends that the court erred in refusing to give certain requested instructions to the jury, and erred in its instructions to the jury.

The plaintiff requested the court to give the following instructions:

"You are instructed that defendants in this case have set up as defense to any liability on the note sued on herein that said note was given by defendants to plaintiff without consideration, and for the agreed purpose between plaintiff and defendants that plaintiff might have said note to exhibit to the bank examiner in the state of Oklahoma as an asset to said plaintiff's bank.

"In this connection, you are told that said defense is not a valid defense, and that, if you find from the testimony that said defendants did give said note to plaintiff to enable plaintiff to exhibit the same to the bank examiner of the state of Oklahoma as an asset of said bank defendants are not permitted at of said bank, defendants are not permitted at this time to urge same as a defense to their

liability on said note.

"You are instructed that the giving of the note sued on herein, together with the instrument executed by the defendants at the time of the execution of the note sued on, constitute a new contract; that is, the defendants, by their art in giving the note sued on and execution of the note sued on and executions. their act in giving the note sued on and executing the written agreement at the same time, substituted the said note sued on herein and the said written agreement for their original agreement of guaranty. agreement of guaranty.

The first of these instructions improperly states the law for the reason that, after stating that the defense of plaintiff is want of consideration for the note and that the note was executed merely to be exhibited to the bank commissioner as an asset of plaintiff's bank, then proceeds to instruct the jury that such defense is not valid. Both are valid defenses.

The second instruction improperly states the law for the reason that it is in effect a peremptory instruction, in that it instructs the jury that the giving of the note and contract constituted a new contract and was a substitution for the original written guar-

The facts and circumstances as disclosed by the evidence do not justify this instruction. The only theory upon which this instruction could be justified is that the contemporaneous contract and the note are conclusive as to consideration and as to the purpose of the making of the note. It is difficult to determine from the contract its true import and the true intention of the parties. Taking in consideration the fact that the contract expressly provides that the same shall not change the effect of the former

guaranty and that said note is only given for the convenience of the Bank of Commerce until it can realize upon the surety behind the original proposition, and construing the contract as a whole, it cannot reasonably be given the effect of replacing and substituting the original guaranty. Neither can it be conclusively presumed from said contract and the giving of said note that the note is based upon consideration. Such presumption must be indulged and the findings of the jury disregarded, before this instruction would be justifiable. The court therefore committed no prejudicial error in refusing to give the instructions requested as above set out.

The instruction given of which the plaintiff complained is as follows:

"You are instructed that if you find from the evidence that the plaintiff retained the original contract of guaranty of the Williams note, and that the note sued on was not given in settlement of said contract of guaranty, but was simply given for the convenience and accommodation of plaintiff and that dependent received ply given for the convenience and accommodation of plaintiff, and that defendant received no benefit, and the plaintiff suffered no detriment by reason of the execution of said note, then said note is without consideration, and defendants are not liable thereon, and your verdict should be for the defendants."

This instruction reasonably and fairly states the law as to the particular question in controversy. It is undisputed in this case that the guaranty and note were given for the purpose of answering for the obligations of the makers of the original note, W. J. Williams and Frances I. Williams, and the law is well settled that a contract or guaranty made subsequent and not at the time of the creation of the original obligation must be supported by a distinct consideration. Clements et al. v. Jackson County Oil & Gas Co. et al., 161 Pac. 216, L. R. A. 1917C, 437; Hetherington v. Hixon, 46 Ala. 297. court therefore committed no prejudicial error in the giving of said instruction.

[4] Under the questions presented here; the only theory upon which the plaintiff could prevail would be that the note and contract is conclusive as to consideration and purpose for which the instruments were given. That is not the law. Section 4066, R. L. 1910; section 4078, R. L. 1910.

The Supreme Court of Kansas held on this avestion:

"Although the terms of a written obligation, assumed to be valid, cannot be varied by parol, it may be shown by parol what caused the party thus to obligate himself, and thereby test the question whether he is legally bound, as the writing imports, or whether he is by any cause wholly or partially freed from liability thereon." Rice v. Rice, 101 Kan. 20, 165 Pac. 799; 3 R. C. L. 943, 924.

The judgment of the lower court should therefore be affirmed.

PER CURIAM. Adopted in whole.

PARTEE v. CLEVELAND TRINIDAD PAV-ING CO. (No. 8851.)

(Supreme Court of Oklahoma, May 7, 1918.)

(Syllabus by the Court.)

MUNICIPAL CORPORATIONS \$\infty\$ 489, 489(5) - Public Improvement—Tax Bill—Injunc-TION.

When a city acquires jurisdiction by the proper preliminary proceedings to pave certain of its streets, the owner of property within the improvement district who sees such improvements made with the knowledge that the city authorities intend to levy and collect a special tax against his property, and that those who do such work cannot be compensated in any other way, and fails to prosecute a suit testing the validity of the ordinance creating the paving district or an assessment made thereunder within the time provided by the charter of the city enacting said ordinance, cannot thereafter main-tain an action to enjoin the collection of the sessment against his property on the ground of alleged irregularities.

Commissioners' Opinion, Division No. 3. Error from District Court, Tulsa County: Conn Linn, Judge.

Action by the Cleveland Trinidad Paving Company against L. P. Partee. Judgment for plaintiff, and defendant brings error. Af-

G. W. Hutchins and Gregg & Martin, all of Tulsa, for plaintiff in error. Randolph, Haver & Shirk, of Tulsa, for defendant in er-

HOOKER, C. This action was brought by the defendant in error to foreclose a certain tax bill issued by the city of Tulsa to it, same being designated as special tax bill No. 2190, in street improvement district No. 52-A, and alleged to be a first and prior lien against all that part of lot 1 in block 54 lying westerly of the westerly line of the right of way of the Missouri, Kansas & Texas Railway in said city.

The answer of the plaintiff in error sets up two defenses against this action, namely: (1) That the resolution providing for the improvement in said district and the ordinance passed in pursuance thereof included not only the grading, curbing, paving, and guttering of the street, but included as well the construction of the catch-basins at the intersections of the streets and the storm sewer drainage, which under the law the plaintiff in error contends cannot be combined in one assessment, but must be made under separate ordinances and by a separate and distinct proceeding as provided by the provisions of the charter of the city of Tulsa and the statutes of the state of Oklahoma: (2) that all of the improvements placed in Archer street under the resolution and ordinance involved here, consisting of grading, curbing, and guttering, were made upon that portion of Archer street and Greenwood avenue occupied



by the right of way of the said railroad company where the same crosses Archer street, with the exception of a small portion of the intersection formed by the crossing of Archer street and Greenwood avenue, and that all of the cost of said grading, curbing, guttering, and paving of the right of way of said company, which right of way was 100 feet wide and entirely across Archer street, with the exception of 2 feet on the outside of the track of said railroad company crossing said street, was in fact taxed against the property in the abutting blocks, and as a result thereof one-half of the cost of making said improvements was taxed against the north half of block 54 in said city, which included the fractional part of lot 1 owned by the plaintiff in error.

The record herein discloses that Archer street runs east and west and Greenwood avenue north and south; that blocks 46 and 54 are west of Greenwood avenue; and that said blocks are separated by Archer street. Lot 1 in block 54 fronts north on Archer street 140 feet and east on Greenwood avenue 100 feet. The right of way of said company as found by the court takes a triangular piece of ground out of the northeast corner of lot 1 of about 81 feet facing on Greenwood avenue and 75 feet facing north on Archer street.

It appears further from the evidence that the improvements in district No. 52-A involved in this action commenced at the westerly line of the right of way of the said company and extended easterly on Archer street, and it is contended by the plaintiff in error that his property involved here, that is, that part of lot 1 in block 54 not occupied by the right of way of said company, does not abut any of the improvements made in said district No. 52-A, but it is conceded by him that his property is liable for a certain part of said improvements caused by the improvements at the intersection of Greenwood avenue and Archer street for catch-basins and storm sewer drainage.

Upon the trial of this cause in the court below the court made the following findings of fact:

"That all of that portion of Archer street lying west of the center of 'the alley running north and south through blocks 54 and 46 of the city of Tulsa up to the intersection of the west line of the right of way of the Missouri, Kansas & Texas Railway had been paved under a prior ordinance, and its portion of the cost thereof assessed against lot 1 in block 54, belonging to the defendant; that of the paving done under the ordinance providing for the improvement of Archer street by paving the unpaved portion of said street from the east intersection of Archer street and Greenwood avenue westerly to the center of the alley running north and south through blocks 54 and 46 of the city of Tulsa, and under which tax certificate No. 2190 was issued, 100 feet of the said paving on said Archer street was included within the right of way of the Missouri, Kansas & Texas Railway Company, and should under the city charter have been taxed and assessed against asid railroad company.

"The court further finds from the proof offered that a portion of the improvements of the intersection formed by the crossing of Archer street and Greenwood avenue were properly taxable against the property in the northeast quarter of block 54, and that some portion of the expense of said improvement of said intersection was properly taxable against lot 1, the property of the defendant

was properly taxable against lot 1, the proper notice of the defendant.

"The court further finds that proper notice was given of the making of said improvements and the apportionment of the costs; that the defendant, L. P. Partee, appeared and filed his protest with the city commissioners of the city of Tulsa, protesting against the apportionment of the cost of said improvements made by said city and assessed against his property, being lot 1 in block 54 of the city of Tulsa, and that a hearing was had thereon before the city commission holding against said defendant; that the said L. P. Partee failed and neglected to appeal from the decision of the commissioners of the city of Tulsa and from the apportionment made by them, upon which apportionment certificate No. 2190 was duly issued.

"The court further finds that under the charter of the city of Tulsa that portion of the cost of paving of the right of way of the Missouri, Kansas & Texas Railway Company should be assessed against the Missouri, Kansas & Texas Railway Company.

"The court further finds that because of the failure of the defendant, L. P. Partee, to prosecute his appeal from the decision of the city commissioners in making the apportionment of the expense of the improvements on Archer street, as made by them, and upon which the certificate No. 2190 was issued by the city of Tulsa to the paving company, the rights of the holder of said certificate have become absolute, and the defendant, L. P. Partee, is estopped from questioning the validity of said apportionment, because he did not prosecute his appeal within ten days thereafter as provided by the city charter, and that he cannot in this proceeding try out the question of the equitable or inequitable apportionment made by the city of Tulsa of the expense of said improvement on Archer street and upon which apportionment certificate No. 2190 was issued.

"The court further finds that under the facts as proven and the law applicable thereto plaintiff is entitled to recover judgment against the defendant, L. P. Partee, for the amount due on said certificate No. 2190, and that the same is a first lien on all the right, title, estate, and interest of the defendant, L. P. Partee, in and to lot 1 in block 54, original town, now city, of Tulsa; that the plaintiff is entitled to a foreclosure of its lien and to an order for the sale of said property to secure its said judgment in event the same is not paid."

It is now asserted that the court did not properly apply the law to the facts as found by the court in the trial of said cause: that under the provision of section 14 of article 9 of the charter of the city of Tulsa it is mandatory and compulsory upon the city to tax the entire expense of the improvements of this nature on the right of way against the railway company; and that under the provisions of the charter the city had no authority or right to apportion the expense therefor to private property abutting the street crossed and occupied by said right of way, but that the entire cost thereof must be paid by the railway company, and no part can be assessed against the abutting property.

The provisions of the charter applicable here are as follows:

"Sec. 4. The cost of grading, paving, curbing, and guttering any street, avenue, or alley may be paid in part by the city or in part by the owners of property benefited by such improvement and abutting upon the property, street, or alley or portion thereof ordered to be improved, and any resolution or ordinance passed and adopted by the board of commissioners declaring the processity for such construction declaring the necessity for such construction shall provide what proportionate part, if any, of the costs of such improvement shall be paid by the city, and the proportion of the costs that by the city, and the proportion of the costs that shall be borne by the owners of property abuting on such street or alley or part of street or alley ordered to be made: Provided that, when any person, firm, or corporation owns any railroad or street railroad or railroad switch of any kind on such street or alley or portion thereof ordered to be improved, such person, firm, or corporation shall pay the whole costs of such improvement between the rails and tracks and for two feet on such side of the rails. tracks and for two feet on each side of the rails tracks and for two feet on each side of the rails of such railroad or street railroad, and the city and abutting property owners shall be relieved of the part of the costs to be paid by such road. The pro rata of the cost of such improvement payable under the terms hereof by any railroad or street railroad or the owners thereof, together with all costs of collecting the same, shall be a special tax against and secured by a lien upon the railroad, ties, rails, fixtures, rights, and franchises of such railroad or street railroad and the owners thereof, and whenever a contract shall be let for any such improvement the board of commissioners shall levy a special the board of commissioners shall levy a special tax upon the railroad, ties, rails, fixtures, rights, and franchises of such railroad or street railroad, for the pro rata share due from such road for improvement between their tracks and rails for improvement between their tracks and rails and two feet on each side thereof. Said tax shall be levied at or after the time such contract is let on executed, and shall become due and delinquent as the ordinance levying the same may specify, and shall be a lien from the time of levying, and the proceeds thereof shall be used for the payment of the costs of such improvement. If said taxes be not paid as provided for by ordinance, then collection shall be enforced as the collection of other taxes by adenforced as the collection of other taxes by adenforced as the collection of other taxes by advertisement and sale of the property, rights, and franchises levied upon: Provided, it shall not be necessary to sell at the same time as for delinquent ad valorem taxes. At any such sale the city tax collector or such other officers as shall be designated by the board shall execute to the purchaser a deed similar to the one executed when the property is sold for ad valorem taxes. Such assessment and lien may also be enforced by suit brought in any court having jurisdiction thereof. The lien provided for shall be a first and prior lien paramount to all incumbrances and prior lien paramount to all incumbrances except taxes, upon the roadbed, ties, rails, fixtures, rights and franchises of the person, firm, or corporation or company owning the railroad or street railroads aforesaid:

"Provided, further, that when any street, avenue, or alley is ordered graded, paved, curbed, or guttered as herein provided any person, firm, or corporation having right of way or operating a railroad intersecting or crossing such street, avenue, or alley so ordered improved shall bear the entire expense of grading, paving, curbing, and guttering and laying sidewalks over and across their tracks and right of way for the full width of such right of way. \* \*

"Sec. 6. After excluding the costs of making any improvements between and two feet on each side of the track and rails of railroads or street railroads, and the entire cost of any improvements crossing the right of way of any railroad, which costs are to be assessed against, and wholly paid by, the owners of such railroads as herein provided.

"Sec. 7. The contract or contracts for such improvements and the bond or bonds having been executed and approved by the board, it shall be the duty of the city engineer to at once prepare a written statement which shall contain the names of such persons, firms, or corporations or estate that may own property abutavenue, or alleys paved, to be improved, the number of front feet owned by each, and describing the property owned by each by block and lot, number, or otherwise, so describing such property as to identify the same; and such statement shall also contain an estimate of the total costs of such improvement, the proportion and amount of such costs to be assessed against abutting property, the amount per front foot to be assessed against abutting property, and the total estimated amount to be assessed against each owner. Such statement shall be submitted to the board, which shall examine the same and correct any errors which may appear therein; but no error, omission, or mistake in such statebut no error, omission, or mistake in such statement shall in any manner invalidate any assessment made, or lien or claim fixed, thereunder. When such statement has been examined and approved by the board, and it shall have determined to assess the costs of such improvements against such property, it shall so declare by resolution, directing notices thereof to be given unto the owners aforesaid by publication for five consecutive days in a daily newspaper of general circulation in the city of Tulsa, and also to mail to such owners a copy of such notice by mail to such owners a copy of such notice by registered letter deposited in the post office in the city of Tulsa, directed to the address of such owner, if known, or if such address be not such owner, if known, or if such address be not known then to the agent or attorney of such person, if known, provided that the registered letter aforesaid shall be deposited in such post office in the city of Tulsa within ten days prior to the date set for hearing hereinafter provided for, and provided further that the method herein prescribed for service of notice by registered letter shall be merely cumulative of the service of notice by publication above mentioned, and provided that in all cases where personal service by registered letter shall not be obtained said service by publication shall nevertheless be deemed valid and binding. The certificate of the city auditor or such other officer as shall be designated by the board to the effect that the address of such owner or owners or their agent or attorney is unknown to him, and personal or attorney is unknown to him, and personal service cannot be had upon them, shall be deemed conclusive of such fact. The notice aforesaid shall state the time of the hearing hereinsaid shall state the time of the hearing hereinafter provided for, the general character of the
improvements determined upon by the board,
the street or part thereof to be improved, and
the proportionate part and amount per front
foot of the total cost of the proposed improvement which it is contemplated shall be assessed ment which it is contemplated shall be assessed against the property and the owners thereof abutting upon such street or alley to be improved. On the date stated in the notice aforesaid, or any time thereafter, before any special assessment is actually levied, any person, firm, or corporation interested in any property which is claimed to be subject to assessment for the or corporation interested in any property which is claimed to be subject to assessment for the purpose of paying the cost of any improvement, in whole or in part, shall be entitled to a full and fair hearing before said board as to all matters affecting such property, or the benefit thereto of such improvements or any claim of liability or objection to the making of such improvements of any invalidity or irregularity in any of the proceedings in reference to making any of the proceedings in reference to making such improvements or any other objection thereto. Such person, firm, or corporation shall file their objections in writing, and thereafter the board of commissioners shall hear and determine the same, and full opportunity shall be given to the persons, firms, or corporations filing such objections to produce evidence subpreme such objections to produce evidence, subpœna witnesses, and to appear in person or by attor-

ney, and a full and fair hearing thereof shall be given by the said board, which hearing may be adjourned from time to time without further notice, and the board of commissioners shall have full power to inquire into and determine the facts necessary to the adjudication of such objects and the ascertainment of special benefits to such owners by means of such improvements, and shall make such order in such case as may be just and proper. Any objections to the reg-ularity of proceedings with reference to the making of such improvements as herein provided or to the validity of any assessment against said property or the validity of any assessment against said property or the owners thereof shall be deemed waived, unless presented at the time and in the manner herein specified. The time as set for such hearing shall be not less than ten days from the time of the first publica-tion of such notice. When the hearing above mentioned has been concluded, the board shall by ordinance assess against the several owners of property, and against their property abutting upon the public street or alley or part thereof ordered to be improved, such proportionate part of the costs of said improvements as by such board may have been adjudged against such respective owners and their property. Said ordinance shall fix a lien upon such property for the respective amounts to be assessed, and shall state the time and manner of payment of such assessment, and said board may order that the said assessment shall be payable in installments, and prescribe the amount, time, and manner of payment of such installment, which, however, except as hereinafter provided, shall not exceed ten years from the completion of said improvement, and its acceptance by the city. This said ordinance shall also prescribe the rate of interest to be charged upon deferred payments, not exceeding 7 per cent. per annum, and may provide for the maturity of all defer-red payments, and their collection, upon default in the payment of any installment of principal or interest. Each property owner, his heirs, asor interest. Each property owner, his heirs, assigns, or successors, however, shall have the privilege of discharging the whole amount assessed against him or any installment thereof, at any time before maturity, upon payment thereof with accrued interest. Upon the payment by any property owner of his assessment in full, the city shall cause to be executed by its mayor and duly school of the country of the same 

occur in any proceedings provided for in this charter, it shall be the duty of the board to correct the same, and whenever it shall have been finally determined in any suit that any assessment against any property or its owner or lien against such property fixed or attempted to nen against such property inxed or attempted to be fixed under the terms hereof is for any reason invalid, unlawful, or not enforceable, then it shall be the duty of the board to at once proceed to reassess against such property such proportion of the costs of making such improvements as shall be proper, lawful, and just, and fix a lian against such property. ments as shall be proper, lawful, and just, and fix a lien against such property; and such board shall have power, and it shall be its duty, by ordinance or resolution, to adopt such rules and regulations, and to make such orders as shall, in compliance with the law, provide for correcting such mistakes and making a valid reassessment against such property and fix a valid lien thereon. Said board shall have power and it shall be its duty to adopt such rules and regulations for a hearing to the owners of such property before such reassessment which may property before such reassessment which may be necessary or proper, in order to legally bind such owners and their property by such reassessment, and shall have power to adopt all other rules and regulations which may be requisite to a valid reassessment of such property. Subject to the provisions of this charter, the cost of any such improvement or improvements, after deducting the proportion of such costs as from maintaining this action.

may be assessed against any railroad or street railroad, and the proportion of said costs which may have been finally assessed against prop-erty abutting upon the street or alley or section or portion thereof ordered to be improved and against the owners of such property shall be borne and paid by the city.

"Sec. 14. At any time within ten days after hearing in section 7 of this article provided for has been concluded, any person or persons, cor-poration or corporations, having an interest in any real estate which may be subject to assessment under this charter, or otherwise having any financial interest in such improvement or improvements, or in the manner in which the cost thereof is to be paid, who may desire to contest on any ground the validity of any pro-ceeding that may have been had with reference to the making of such improvements, or the vato the making of such improvements, or the validity in whole or in part, or any assessment lien fixed by said proceedings, may institute suit for that purpose in any court of competent jurisdiction. Any person or persons, corporation or corporations, who shall fail to institute such suit within a period of ten days, or who shall fail to diligently prosecute such suit in good faith to final judgment, shall be forever barred from making any such contest or contests, and faith to final judgment, shall be forever barred from making any such contest or contests, and this estoppel shall bind their heirs, successors, administrators, and assigns. The city of Tulsa, or the person or persons to whom the contract has been awarded, shall be made defendants in such suit, and any other proper parties may be joined therein. There shall be attached to plaintiff's petition an affidavit of the truth of the matter therein alleged, except such matters as are alleged on information and belief, and that such suit is brought in good faith, and not to are alleged on information and belief, and that such suit is brought in good faith, and not to injure or delay the city or contractor, or any owner of real estate abutting on the improve-ment. Unless the provisions of this section are complied with by plaintiff or plaintiffs, such suit shall be dismissed on motion of any defendant, and in that event plaintiff or plaintiffs shall be shall be dismissed on motion of any defendant, and in that event plaintiff or plaintiffs shall be barred and estopped to the same extent as if suit had not been brought. In any case where a suit is brought as provided for in this section, then the performance of the work may be suspended at the election of either the city or the contractors until such suit shall be finally determined in the court of original jurisdiction or any appellate court to which the same may determined in the court of original jurisdiction or any appellate court to which the same may be taken by appeal or writ of error: Provided, that any appeal or writ of error shall be perfected within 30 days from the adjournment of the term of court of original jurisdiction at which final judgment was rendered in such suit: And provided, that no appeal or writ of error to review the judgment of such court, may thereafter be taken or sued out by either party.

From a careful review of the evidence we have reached the conclusion that the property of the plaintiff in error was improperly assessed, or, in other words, that the assessment placed by the city authorities upon that part of lot 1 in said block owned by plaintiff in error far exceeds the amount which should properly have been assessed against his property; yet it is admittedly true that his property was within the improvement district and subject to some tax. This is conceded by him. Under the provisions of the charter he was entitled to and did receive due notice of this assessment, and duly appeared before the proper authority and made his protest and had his hearing thereon, but he failed to prosecute an appeal therefrom or to institute a suit within the time provided by the charter, and as a result thereof he is now barred

It appears from the record that the plaintiff 147 Pac. 1002; Grier v. Kramer, 162 Pac. in error paid the first installment or assessment against his property, and when the second assessment matured more than two years after the same was made, he instituted this action to enjoin the collection thereof. He cannot recover here unless he shows that the board of commissioners of Tulsa was wholly without jurisdiction to levy this assessment. This he has not done; for, as stated, it is admittedly true that his property was within the improvement district and subject unquestionably to a portion of this assessment. If for any reason this assessment was unfair or improperly apportioned, the city charter gave him the right to redress any grievance he had and to correct the same in a court of competent jurisdiction. This he failed to do.

It appears that the bone of contention here is whether the railway company had a right of way 100 feet right across Archer street: the city contending that the company did not possess such right of way, while the plaintiff in error contends that the company did. The trial court, with the evidence before it, found that the company did possess a right of way across Archer street 100 feet wide; yet this is a question that could have been determined in an action instituted by the plaintiff in error within the time provided by the charter, and if any improper assessment had been made on account of this mistaken view of the situation, the same could have been corrected in due manner and form as provided by the provisions of said charter.

This court in a number of cases has held that, when a city acquires jurisdiction by the proper preliminary proceedings to pave certain of its streets, a property owner who sits by and sees such improvements made with the knowledge that the city authorities intend to levy and collect a special tax against his property, and that those who do such work cannot be compensated in any other way, and there is no objection thereto until complete performance of the work has been made, cannot thereafter maintain an action to enjoin the collection of assessments against his property on the ground of alleged irregularities in the proceedings subsequent to the time the jurisdiction to perform such work had attached.

In City of Muskogee v. Rambo, 40 Okl. 672, 138 Pac. 567, this court, through Mr. Justice Kane, quoting from Perry v. Davis et al., 18 Okl. 427, 90 Pac. 865, said:

"It was the plain duty of the defendants in error, upon the publication of the ordinance creating the sewer district, or when they learned that labor and money were being expended in the actual construction of the sewer, to vigorously oppose and protest against it; then was an opportune time to test, by injunction or other proceedings, the legality of the various steps being taken."

See City of Chickasha v. O'Brien, 159 Pac.

490; City of Muskogee v. Rambo, 40 Okl. 672, 138 Pac. 567; Norris v. City of Lawton, 47 Okl. 213, 148 Pac. 123; City of Coalgate v. Gentilini, 152 Pac. 95; Weaver v. City of Chickasha, 36 Okl. 226, 128 Pac. 305.

The other contentions of the plaintiff in error are untenable, and the decision of the lower court being in accord with the established rule in this jurisdiction as appears from the foregoing cases, the judgment of the lower court is therefore affirmed.

PER CURIAM. Adopted in whole.

EDWARDS v. PHILLIPS. (No. 8581.) (Supreme Court of Oklahoma. 1918.) April 30.

(Syllabus by the Court.)

APPEAL AND EBBOR \$\instructure 171(1)\to Frauds, Statute of \$\instructure 110(4)\to Theory of Case Below \to Description of Real Estate.

The parties upon appeal are bound by the same theories upon which they tried their case in the lower court, and, applying that rule to the case at bar, it is held, that the descriptions of the real estate embraced in said contents of the real estate embraced in said contents. tract is sufficient to take the transaction with-out the statute of frauds, and that the con-tract is valid, binding, and enforceable.

Commissioners' Opinion, Division No. 3. Error from District Court, Oklahoma County; John W. Hayson, Judge.

Action by W. T. Phillips against R. J. Edwards. Judgment for plaintiff, and defendant brings error. Affirmed.

Keaton, Wells & Johnston, of Oklahoma City, for plaintiff in error. Riddle & Hammerly, of Chickasha, and Lawrence Mills, of Oklahoma City, for defendant in error.

HOOKER, C. This case was tried by the parties in the lower court upon the sole theory as to whether the contract constituting the basis of the action alleged to have been entered into by and between Edwards and Griffin was an enforceable contract under the statute; the plaintiff below, Phillips, contending that it was an enforceable contract, and that therefore Edwards was liable to him for his commission, and the defendant below, Edwards, contending that the real estate agent was not entitled to his commission for the reason he had not caused the intended purchaser to enter into an enforceable contract. The case will be considered here upon that theory. Therefore it follows that if the contract was within the statute of frauds on account of the insufficient description of the property intended to be conveyed by Edwards to the purchaser, Griffin, then the plaintiff in error is entitled to prevail here, and if the description of said property in said contract is sufficient, then the defendant in error must prevail. 282; City of Norman v. Allen, 47 Okl. 74, This court has held in a number of cases

<sup>·</sup> compror other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

that the parties are bound by the theories C., 'be admissible to assist the court in de-upon which their cause was tried in the lower court and the rule will be adhered to lower court, and the rule will be adhered to here. See Queen Ins. Co. of A. v. Cotney, 25 Okl. 125, 105 Pac. 651; Herbert v. Wagg, 27 Okl. 674, 117 Pac. 209; Checotah v. Hardridge, 31 Okl. 742, 123 Pac. 846; Watson v. Taylor, 35 Okl. 768, 131 Pac. 922; Bank v. Hinkle, 162 Pac. 1092,

The description of the property in said contract is as follows:

"Party of the first part agrees to sell and de-"Party of the first part agrees to sell and deliver to second party and convey by general warranty deed to second party 975 acres of land, more or less, situated in Grady county, Oklahoma, in sections 28-27-34 and 35 in township 7, north of range 6 west, and known as the Beeler Farm." \* \* \*

"The party of the second part agrees and binds himself \* \* to deliver good and sufficient title to said first party to a two-story."

ounds himself \* \* \* to deliver good and sufficient title to said first party to a two-story brick building in Foss, Oklahoma, and to a one-story brick business house, and a two-story residence in Foss, Oklahoma; same being the property heretofore inspected by the first party."

The plaintiff in error defended this action in the lower court upon the theory that this description was insufficient, and he has urged here the same proposition that the contract was not an enforceable one, and therefore he is not liable for the commission. The defendant in error prosecuted his action in the court below upon said theory that this contract was an enforceable one, and the cause was tried and the jury instructed along this theory, and the verdict of the jury under the instructions of the court was based upon the theory that the contract was an enforce-

The only question necessary, as we view it, to determine, is whether this is an enforceable contract under the statute of this state: that is, whether the contract is within the statute of frauds. In 36 Cyc. 591, the author says in dealing with the question of specific performance:

"The description must be such as to enable the court to determine with certainty, with the aid of such extrinsic evidence as is admissible under the rules of evidence, what property was intended by the parties to be covered thereby. The description need not be given with such particularity as to make a resort to extrinsic evidence unnecessary. Reasonable certainty is all that is required. Extrinsic proof is allowed in order to apply, not to alter or vary, the written agreement."

In Woods on the Statute of Frauds, \$ 353. p. 680, it is said:

"It is not necessary that the agreement

to the right interpretation of the agreement.

\* \* \* ' If the note or memorandum does not contain either in itself, or by reference to any other writing, the means of identifying the property, it is insufficient. \* \* But where the writing within itself or by reference to other writings contains sufficient data, so that by the aid of parol evidence no question as to the intention of the party can arise it is sufficient. the intention of the party can arise, it is sufficient. Thus a memorandum describing the property as 'my estates' located in certain towns is sufficient, if it is shown that the party owned no other estates in the towns named, because the writing can be definitely applied to the subject-matter, by the aid of parol evidence without raising any question as to the real intention of the party, except such as is apparent from the writing itself. So such descriptions as 'the land bought of Mr. Peters,' 'Mr. Ogilvie's house,' 'the property in Cable street,' or 'a house on Church street,' or 'the house in Newport,' 'my house,' 'the intended new public house at Putney,' 'the mill property, including cottages in Esher village,' have been held to be sufficient. A description of the property in a title bond, as 'a steammill and distillery, with all the machinery,' etc., 'situate in the county of Smith, and state of Tennessee, near the village of Rome, in civil district No. 13, on the banks of the Cumberland river, supposed to contain one and a half acres of land, to the subject-matter, by the aid of parol eviposed to contain one and a half acres of land. was held to be sufficient, and parol evidence to be admissible for the identification of the premises. So a written contract to convey a premises. So a written contract to convey a house on a certain street named is a contract to convey the house of the grantor there, and is sufficiently definite within the statute; and if it is shown aliunde that there are other houses on that street, it may be shown that there is no other owned by the grantor. houses on that street, it may be shown that there is no other owned by the grantor. \* \* \* A memorandum describing the estate in this form was also held sufficient: 'Ellsworth, Dec. 15, 1854; received of D. B. and C. S. C. \$1.-000, to be accounted for, if they shall furnish me satisfactory security for certain lands on the Naragaugus rivers, said 119,000 acres for \$113,000, on or before Friday morning next; otherwise to be forfeited. John Black—because in such a case parol evidence is admissible to show what land John Black owned on the river named, and that he owned no other land there than that described. In order to render a written contract for the sale of real estate binding under the statute of frauds, it is not essential that the description should have such particulars and tokens of identification as to render a resort to extrinsic aid entirely needless when the writing comes to be applied to the subjectmatter. The terms may be abstract and of a general nature, but they must be sufficient to fit and comprehend the property which is the subject of the transaction; so that with the assistance of external evidence the description, without being contracted or added to, can be connected with and applied to the very property assistance of external evidence the description, without being contracted or added to, can be connected with and applied to the very property intended and to the exclusion of all other property. The circumstances that in any case a conflict arises in the outside evidence cannot be "It is not necessary that the agreement should contain a very precise description of the property to be sold, as parol evidence is admissible to identify it, where the memorandum or note contains sufficient data to apply the description to the subject-matter by the aid of such evidence, without requiring any aid from such evidence, without requiring any aid from such evidence as to the intention of the person sought to be charged, where he owns other property to which the writing might spelly. If reference is so made thereto in the apply. If reference is so made thereto in the subject-matter of the agreement with reasonable certainty, "facts existing at the time of making the agreement may," said Wigram, V. allowed the force of proof that the written de-scription is in itself insufficient to satisfy the statute. Whether the description answers the

bring about a conflict in the outside testimony. If the description is such that it can be identified beyond a doubt, it is sufficient. \* \* \* But there is a tendency to relax the rigor of the rule as to the admissibility of parol evidence in such cases, and where the note or memorandum contains sufficient data, so that it can, with the aid of parol testimony, be certainly applied to the land, it is, in some of the states, held to be sufficient. Thus in a Massachusetts case, S., in a writing signed by himself and P., agreed to convey to P. 'my estates located as follows: Three houses in the town of R. as shown this day; two are Frenchroof, and valued at \$3,000 each; the other is a pitchroof house, and valued at \$6,000; together with all the land as now fenced; the whole being valued at \$12,000. Also, three tenement houses on B. street in C. as shown this day, and valued at \$8,000, subject to \$2,000 mortgage; all the aforementioned estates having an equity of \$18,000.' On a bill brought by P. and wife for specific performance, it was held that the contract, though not signed by the wife, was a sufficient memorandum within the statute of frauds, and that a demurrer to the bill must be overruled."

In Reed on the Statute of Frauds, vol. 1, § 410, p. 715, it is said:

"So, also, a memorandum as follows is sufficient: 'I have this day sold the house, etc., in Newport, to J. Owen for \* \* as soon as the deeds can be had from Mr. Deerc,' as a reference to the latter would show what house was meant. Where the property has a name, a reference to it by such name is enough.

\* \* The location of the property as being in a certain town may be definite enough.

By reference to the contract in question it is readily ascertainable that the farm to be conveyed by the purchaser to Edwards is described by its local appellation, and in addition thereto same is located by sections 26, 27, 34, and 35 in township 7, north of range 6 west. This, in our judgment, is a sufficient description to identify the property and to exempt the same from the statute of frauds, and renders that certain which is capable of being made certain. The following cases support our view upon this proposition: Richards v. Edick, 17 Barb. (N. Y.) 260; Tewksbury v. Howard, 138 Ind. 103, 37 N. E. 355: Price v. McKay, 53 N. J. Eq. 588, 32 Atl. 130; Scanlan v. Goddes, 112 Mass. 15; Mead v. Parker, 115 Mass. 413, 15 Am. Rep. 110; Lente v. Clarke, 22 Fla. 515, 1 South. 149; Hollis v. Burgess, 37 Kan. 487, 15 Pac. 536; Winn v. Henry, 84 Ky. 48; Francis v. Barry, 69 Mich. 311, 37 N. W. 353; Cherry v. Long, 61 N. C. 466; Ross v. Baker, 72 Pa. 186; Farris v. Caperton, 1 Head (38 Tenn.) 606, and cases cited at note P, on page 716, Reed on the Statute of Frauds. In Hollis v. Burgess, supra, the Supreme Court of Kansas said:

"To answer the requirements of the statute of frauds, the written contract should describe the land sold with certainty; but it is not essential that the description should be given with such particularity as to make a resort to extrinsic evidence unnecessary. Where the land sold is described in the written contract as the 'Snow Farm,' and is commonly designated in the neighborhood where situated, and by all the parties to the contract, by the same name, and

the court can without doubt, by the aid of extrinsic evidence, apply the description to the very land intended to be sold, held, that such agreement, being otherwise sufficient, will be enforced."

With reference to the description of the property in Foss, owned by Edwards as described in this contract, the writer is not free from doubt as to the views herein expressed, but from an examination of the authorities is of the opinion that the same is sufficient to take the contract out of the statute of frauds. In Carson v. Ray, 52 N. C. 609, 78 Am. Dec. 267, the court held:

"'My house and lot in the town of Jefferson, in Ashe county, North Carolina,' the grantor having a house and lot, and only one, in that town, was held to be a sufficient description of the premises to pass them by deed."

And in the body of the opinion rendered in that cause it is said:

"But 'my house and lot' imports a particular house and lot, rendered certain by the description that it is one which belongs to me, and, upon the face of the instrument, is quite as definite as if it had been described as the house and lot in which I now live, which is undoubtedly good. Where the deed or will does not itself show that the grantor or devisor had more than one house and lot, it will not be presumed that he had more than one, so that there is no patent ambiguity, and if it be shown that he has more than one, it must be extrinsic proof, and the case will then be one of a latent ambiguity, which may be explained by similar proof."

In Hurley v. Brown, 98 Mass. 545, 96 Am. Dec. 671, it is held:

"In a written contract to convey real estate, the words used to describe the estate agreed to be conveyed are presumed to relate to estate owned at the time of the contract by the party agreeing to make the conveyance; and if the agreement is to convey 'a' house and lot of land on a certain street, and, in a suit in equity to compel specific performance thereof, it appears that there are several lots of land, with houses, on that street, oral evidence is admissible to apply this description to a particular house and lot of land so situated, and so owned."

And in the body of the opinion the court said:

"In a deed, the words of description are, of course, intended to relate to an estate owned by the grantor. And, in our opinion, this is also the presumption in construing a contract for a future conveyance. If the party who enters into the agreement in fact owns a parcel answering to the description, and only one such, that must be regarded as the one to which the description refers. With the aid of this presumption, the words 'a house and lot' on a street where the party who uses the language owns only one estate are as definite and precise as the words 'my house and lot' would be; a description the sufficiency of which has been placed beyond all doubt by very numerous authorities. \* \* In both cases the same extrinsic evidence must be resorted to, by the aid of which all uncertainty is removed. Where the words used are 'my estate' in a particular locality, oral evidence is necessary to show what estate the vendor did own. A latent ambiguity always exists where the party owns two parcels, to each of which the description used is equally applicable. In the present case the writing does not show that there is more than one house and lot on Amity street. This fact

was disclosed by the oral evidence at the trial; and the familiar rule would seem to apply that parol evidence is admissible to explain and remove a latent ambiguity. If there had been only one house and lot on the street, there would have been no indefiniteness in the description. The supposed uncertainty having been created by parol, evidence of the same character may be resorted to for its removal. But, without relying much upon this consideration, we regard the fair construction of the words used to be that they relate to a house and lot owned, at the time the memorandum was signed, by the parties who subscribed it. Thus interpreted, they are sufficiently certain, and the oral evidence is needed only to apply the description. This must be done by extrinsic evidence in every contract or conveyance, however minutely the boundaries of the estate may be set forth. The maxim 'Id certum est quod certum reddi potest,' is the established rule of construction in suits for specific performance." was disclosed by the oral evidence at the trial; by the first party. Under the authorities

In Moore v. Kidder, 55 N. H. 488, the court

"A return by an officer that he has attached all the real estate owned by the defendant in the town of K. constitutes a valid attachment of all lands which come within that description, and it makes no difference that at the time of the attachment the defendant had conveyed away all his lands in the town of K. by a deed which had not then been recorded."

In Mead v. Parker, 115 Mass. 413, 15 Am. Rep. 110, construing a contract as follows:

"This is to certify that I, Jonas Parker, have sold to Franklin Mead a house on Church street for the sum of fifty-five hundred dollars," ote.

#### -the court said:

—the court said:

"It is not a question of the sufficiency of the writing under the statute of frauds, so much as it is of the right to resort to parol evidence in aid of the writing, where an ambiguity exists in respect to the property intended to be sold, or to which the contract relates. The most specific and precise description of the property intended requires some parol proof to complete its identification. A more general description requires more. When all the circumstances of possession, ownership, all the circumstances of possession, ownership, to each other and to the property, as they were when the negotiations took place and the writing was made, are disclosed, if the meaning and application of the writing, read in the light of those circumstances, are certain and plain, the parties will be bound by it as a sufficient writ-ten contract or memorandum of their agree-ment. That parol evidence is competent to furment. That parol evidence is competent to furnish these means of interpreting and applying written agreements is settled by the uniform current of authorities."

And in Slater v. Smith, 117 Mass. 96, it is

said:

"A bill in equity was brought by husband and wife for the specific performance of a contract signed by the husband and the defendant, by which the defendant agreed to convey to the husband, "my estates located as follows: Three houses in the town of R., as shown this day," etc. The defendant demurred, setting up the statute of frauds. Held, that the contract, though not signed by the wife, was a sufficient memorandum within the statute of frauds, and that the demurrer must be overruled."

The contract in question designates the property as located in the town of Foss, and above cited, we are of the opinion that the description is sufficient to enable the court to apply the description to the property, and to take the same without the statute of frands.

This question being the sole question presented here by the plaintiff in error, and the one upon which he relies for reversal of this case, and being of the opinion that his position is not well taken, the judgment of the lower court is affirmed.

PER CURIAM. Adopted in whole.

McCORNACK et al. v. FLEMING et al. (No. 8082.)

(Supreme Court of Oklahoma. Dec. 11, 1917. Rehearing Denied May 21, 1918.)

(Syllabus by the Court.) 1. JUDGMENT \$\infty 342(3) - VACATION OF MODIFICATION - POWER OF DISTRICT COURT -

STATUTE.

The district court has no power to vacate or modify its judgment on account of "an irregularity in obtaining a judgment or order," under subdivision 3 of section 5267, Rev. Laws 1910, upon a motion filed after the adjournment of the term at which such judgment was rendered and entered.

2. JUDGMENT \$\sim 338\to Vacation of Modification\to Power of Trial Court\to Motion for New Trial.

The power of the trial courts to vacate or modify their judgments or orders at or after the term does not authorize the setting aside of a judgment or final order at a subsequent term for mere errors of law which were properly subject to review upon motion for new trial at the term when rendered or made.

8. MORTGAGES (\$\infty\)528(2) — CONFIRMATION OF SALE—IRREGULARITIES—CONSIDERATION.

SALE—IRREGULARTIES—CONSIDERATION.
Where objections to confirmation of sale of mortgaged premises under foreclosure, raised no jurisdictional question, and are directed merely at certain irregularities in the trial of the cause, such irregularities are concluded by the judgment rendered; and, upon failure of defendant to except thereto and appeal therefrom, said errors cannot be considered.

Commissioners' Opinion, Division No. 2. Error from District Court, Oklahoma County; John W. Hayson, Judge.

Action on notes and to foreclose a mortgage by Fred W. Fleming against James M. McCornack and Elizabeth J. McCornack. Judgment for plaintiff, with order of sale, motion to vacate judgment overruled, and J. H. Everest, assignee under the sale, moved to confirm the sale, and from an order confirming the sale, defendants bring error. Affirmed.

W. F. Harn, of Oklahoma City, for plaintiffs in error. Everest & Campbell, of Oklahoma City, for defendants in error.

WEST, O. This cause was originally instituted in the district court of Oklahoma being the same property heretofore inspected | county on the 9th day of June, 1914, by Fred W. Fleming against John M. McCornack trial court in arriving at the amount of the and Elizabeth J. McCornack, to recover on a principal note for \$10,000 and three commission notes of \$750 each, and foreclosure of mortgage. The parties will be referred to herein as they appeared in the court below.

Defendants filed answer, and on January 21, 1915, plaintiff appeared in person and by attorney and defendant appeared by attorney, and upon trial of said cause judgment was rendered on said date in favor of plaintiffs and against defendants in the sum of \$11,614.48, with interest at the rate of 10 per cent. per annum and \$1,000 attorney's fee as stipulated and set forth in the mortgage. On August 6th, plaintiff had execution and order of sale issued upon this judgment, and on August 7th, sheriff advertised said property to be sold on September 7th. On August 25, 1915, defendants filed motion to vacate judgment; same was overruled. On September 20th special execution or order of sale was returned by sheriff, showing the property had been sold to J. H. Everest, assignee. On September 22d the assignee filed motion to conform sheriff's sale. On September 25th defendants filed objection to and motion to set aside sheriff's sale. On October 9th defendants filed objection to the confirmation of sheriff's sale, and on same date the court overruled said motions, and confirmed said sale, from which order defendants have appealed, and bring the action of the court upon the objection to the confirmation of the sale here for review.

There was no motion for new trial filed, no appeal taken to review the action of the trial court in rendering the original judgment, and the matters raised here upon the motions objecting to the confirmation raises no jurisdictional questions, and only attacks certain irregularities with reference to the trial of said cause. Defendants, on page 33 of their brief, use the following language:

"In this appeal two general propositions are involved, namely, the validity of the original judgment (on which the sheriff's sale is based), and the validity of the sale itself and the order confirming and proceedings in connection therewith. The proceedings now before this court is a direct appeal from the judgment overruling the objections to the sheriff's sale and confirming the same."

[1] As we understand the record before us, the only thing to be reviewed is the action of the court overruling the objection to the confirmation of the sale. However, the defendants in their brief argue the grounds raised in their motion to vacate the judgment, but it does not appear that any appeal was taken from this action of the court. However this may be, this motion was filed after the term at which the original judgment was rendered, and raises no jurisdictional question and no question enumerated in section 5267, R. L. 1910, which may be raised by motions of the kind filed, and only attacks certain irregularities of the

trial court in arriving at the amount of the judgment. Practically the same errors are assigned in both motions, some of which might be well taken if exceptions had been saved at the trial, and had been raised upon appeal from the original judgment, but this is not the case, and not one of them come within the class that may be urged here upon an appeal from the action of the court upon objections filed, for the reason that the court had jurisdiction of the subjectmatter, jurisdiction of the parties, and judgment was after all parties appeared at the trial, and no motion for new trial filed, and no appeal taken from the action of the court in rendering the judgment.

The questions raised are: First, that the cause was not regularly docketed upon the trial calendar for the term at which it was heard; second, that too much interest had been included in computing the amount of the judgment; third, that the property was sold for an inadequate consideration, and other objections which could not be seriously considered. If the motion directed at the computation of the interest had been directed at the excess, and shown wherein the court was wrong, it might have been available: but this was alleged as a reason for vacating the entire judgment, and it was alleged that said judgment was void because it contained an overcharge of interest.

[2, 3] From the reading of the record in this case it appears to have been an appeal to delay the effect of the judgment rather than to correct errors thereof. However, none of the matters alleged in said motions would render the judgment void, and are, as we think, concluded by the decree rendered and the failure of the defendant to except thereto and appeal therefrom. Said errors cannot now be considered upon the motion before this court. In case of Guy v. Guy, 150 Pac. 1058, first paragraph of the syllabus is as follows:

"The district court has no power to vacate or modify its judgment on account of 'an irregularity in obtaining a judgment or order,' under subdivision 3 of section 5267. Rev. Laws 1910, upon a motion filed after the adjournment of the term at which such judgment was rendered and entered."

See McAdams v. Latham, 21 Okl. 511, 96 Pac. 584; Le Force v. Haymes, 25 Okl. 190, 105 Pac. 644.

In case of Clark v. Roman et al., 151 Pac. 479, the syllabus is as follows:

"The power of trial courts to vacate or modify their judgments or orders at or after the term does not authorize the setting aside of a judgment or final order at a subsequent term for mere errors of law which were properly subject to review upon motion for new trial at the term when rendered or made."

We have carefully read the record, and find no error in the action of the trial court in overruling the motions complained of. Cause is therefore affirmed.

PER CURIAM. Adopted in whole.

WESTERN CASUALTY & GUARANTY INS. CO. v. CAPITOL STATE BANK OF OKLAHOMA CITY. (No. 8868.)

(Supreme Court of Oklahoma. March 5, 1918. Rehearing Denied May 21, 1918.)

#### (Byllabus by the Court.)

1. APPEAL AND ERROR &= 1097(1)—Decision of Supreme Court—Law of the Case.

A question decided by the Supreme Court

on a former appeal becomes the law of the case in all its stages, and will not ordinarily be reversed on a second appeal of the same case when the facts are substantially the same.

2. Banks and Banking \$=65—Insolvency —Reorganization—Statute.

An insolvent bank may be reorganized under authority of section 306, Rev. Laws 1910, by the stockholders complying with the requirements of said section which are set out in the body of this opinion, and not otherwise.

3. BANKS AND BANKING === 23 ARTICLES OF INCORPORATION-STATUTE.

Amended articles of incorporation may be executed and filed by all the directors and officers of a corporation under the authority contained in section 1225, Rev. Laws 1910, and an amended charter issued, which when issued relate back and form a part of the original articles of incorporation to the same effect as if originally contained therein.

4. Banks and Banking \$\sim 23, 65—Amended Articles of Incorporation—Insolvency—

STATUTE.

Where a state bank became hopelessly insolvent and was taken in charge by the bank commissioner, who sold a part of its assets to B. and associates, who executed articles of incorporation and filed same, upon which a charter was issued authorizing them to do a banking business under the corporate name of Capitol State Bank of Oklahoma City, and where B. and his associates were in no wise connected with the insolvent institution at any time, held, this did not constitute a reorganization of the failed bank, nor an amendment to its articles of incorporation.

Error from District Court, Oklahoma County; Edward Dewes Oldfield, Judge.

Action by the Western Casualty & Guaranty Insurance Company against the Capitol State Bank of Oklahoma City. Judgment for defendant on a directed verdict, and plaintiff brings error. Affirmed.

Ledbetter, Stuart & Bell, of Oklahoma City, tor plaintiff in error. Wilson, Tomerlin & Buckholts, of Oklahoma City, for defendant in error.

HARDY, J. This action was commenced by Western Casualty & Guaranty Company, a corporation, against the Capitol State Bank of Oklahoma City, a corporation, to recover \$10,000, with interest thereon, and an attorney's fee of \$1,000, on account of plaintiff being required to pay \$10,000 because of its being surety upon an indemnity bond executed by defendant under its alleged former name of State Bank of Capitol Hill which had been given to protect a deposit of \$10,000 made by the commissioners of the

filed plaintiff demurred thereto, which demurrer was by the court sustained, and, defendant electing to stand upon its answer, judgment was rendered in favor of plaintiff and an appeal prosecuted to this court where the judgment was reversed. Capitol State Bank of Oklahoma City v. Western Casualty & Guaranty Insurance Co., 47 Okl. 549, 149 Pac. 149. The facts alleged in said answer are fully set out in the former opinion, and reference is made thereto for a statement thereof. Upon remand of the case reply was filed and the issues were tried to a jury, at the conclusion of which the court instructed a verdict for defendant and plaintiff prosecutes this appeal.

Many questions are urged, but they all resolve themselves into this one proposition, whether the court did right in instructing a verdict for defendant. A determination of this question requires an examination of the evidence.

In 1913 the State Bank of Capitol Hill was engaged in a general banking business at Capitol Hill, which at the time was an independent town, but was later incorporated into and became a part of Oklahoma City. About the first of 1913, said State Bank of Capitol Hill being in a failing condition, the bank commissioner took possession thereof and exercised a qualified control over it until the 25th of April, 1913, when its doors were closed and it ceased to do a banking business. Prior to this a deposit of \$10,000 had been made in said institution by the commissioners of the land office, and for the purpose of protecting said deposit the Western Casualty & Guaranty Insurance Company had executed a bond of indemnity. Upon the bank being closed the plaintiff paid the amount of said deposit with interest thereon. On April 26, 1913, the bank commissioner entered into an arrangement with Bonner. Dennis, and Clark by which he sold to Bonner and his associates certain of the assets of the State Bank of Capitol Hill, for which he received full value in cash. Certain other assets of the bank amounting approximately to \$54,000 were retained by the bank commissioner for the purpose of reimbursing the guaranty fund, which was called upon to pay out approximately the sum of \$32,000. Bank guaranty warrants were issued for this amount which were paid by Bonner and his associates, who also paid to the bank commissioner a premium of about \$2,200 on the transaction, and an agreement was entered into whereby Bonner, Dennis, and Clark should organize a new banking institution and pay up a capital of \$10,000. Thereupon Bonner, Dennia, and Clark executed and later filed in the office of the secretary of state what was denominated "amended articles of incorland office in said bank. Upon answer being poration" of the Capitol State Bank of Oklahoma City, which articles were complete and full in every particular, but in the first paragraph thereon it was stated that instead of the name "State Bank of Capitol Hill this bank shall be known as Capitol State Bank of Oklahoma City." Said articles were approved by the bank commissioner and a charter issued to the Capitol State Bank of Oklahoma City, whereupon Bonner, Dennis, and Clark paid up a capital of \$10,000 in cash, held a stockholders meeting, elected directors and officers, none of whom were interested in or connected with the State Bank of Capitol Hill, appointed reserve agents, issued certificates of stock to the stockholders, and proceeded to carry on a banking business in all respects as required by law. It was expressly understood and agreed between the bank commissioner and Bonner, Dennis, and Clark that said Bonner and his associates did not assume the obligation to pay the deposit made by the commissioners of the land office and secured by the bond of plaintiff; it being expressly understood that same was excluded from the terms of their agreement. The question, as we view it, is, Did the transaction between the bank commissioner, Bonner, Dennis, and Clark and the subsequent conduct of Bonner and his associates amount to a reorganization of the State Bank of Capitol Hill, or was it the institution of a new and different bank?

[1-4] The question whether the Capitol State Bank of Oklahoma City was legally incorporated or paid the fees required by law is a question in which plaintiff is not interested. If in fact said bank was not legally incorporated and is not a reorganization of the State Bank of Capitol Hill, plaintiff's action must fail. The manner of reorganizing a bank under the laws of this state is prescribed by section 306, Rev. Laws 1910, under the authority of which a failed bank may be reorganized by complying with the following particulars: The stockholders must repair its credit, restore or substitute its reserve, and place it in condition so that it is qualified to do a general banking business as before it was taken possession of by the bank commissioner, and its credits and funds must be repaired in all respects, and all advances, if any, made from the depositor's guaranty fund must be fully paid before it is permitted again to reopen for business. When all of these conditions have been complied with the bank commissioner is authorized to issue a written permission for reopening said bank in the same manner as permission is granted to do business after original incorporation thereof. This section authorizes stockholders of the failed bank to comply with the conditions enumerated and to reorganize the insolvent institution. right is not conferred directly or by implica-

holders of the State Bank of Capitol Hill complied with any of the conditions stated. Neither did they surrender their stock to Bonner, Dennis, and Clark. The stock held by them was never canceled, but so far as the record is concerned is still in their hands. The charter of that bank was never taken up by the bank commissioner nor delivered to Bonner and his associates, nor is it, or has it ever been, in their possession. Clearly this was not a reorganization of the failed bank.

The conclusion here reached is not in conflict with the case of First State Bank of Oklahoma City v. Lee, 166 Pac. 186. In that case it was agreed that the First State Bank of Oklahoma City was the same institution as the First State Bank of Oklahoma City before it became insolvent. An assessment was made against the stockholders after its failure for 100 per cent. to repair its capital stock, which assessment was paid, and the stockholders transferred their stock to Menefee and his associates, who canceled same on the books of the corporation and issued new certificates in their place to themselves. The capital of the failed institution was repaired and the reserve substituted and the requirements of section 306 substantially complied with. In addition to this, the subject-matter of that action was the leasehold, which was sold to Menefee and his associates, and after its reorganization the bank occupied the building for a period of time, paying the rent thereon according to the terms of the lease which had been executed by the bank prior to its insolvency. The facts are so dissimilar that a statement of them distinguishes the case from this. No assessment was made against the stockholders of the State Bank of Capitol Hill to restore or substitute its capital or reserve, or to place it in a solvent condition, and none of the stock was acquired by Bonner, Dennis, and Clark, being retained by the old stockholders. Upon this state of facts the law of the case is stated in the former appeal where it was said:

"It cannot be said that by virtue of the contract between the bank commissioner and Bonner, Dennis, and associates and their action thereunder, a solvent institution arose, phenix-like, from the ashes of the old defunct corporation, which became liable, not only for the amounts due the general depositors whom it agreed to pay, but also for the debts due to another class of creditors who were not entitled to participate in the proceeds derived from the sale of the assets, and who were excluded from payment by the purchasers of the assets by the express terms of the contract. In our judgment, the liability of Bonner, Dennis, and associates and of the new banking institution launched by them by permission of the state bank commissioner is limited by their agreement with the bank commissioner, and this agreement does not contemplate the payment by them, or the institution formed by them, of any of the debts of the old bank, except those mentioned in the contract, to wit, the claims of the general depositors."

reorganize the insolvent institution. This The articles of incorporation filed by Bonright is not conferred directly or by implicance, Dennis, and Clark on April 26th were tion upon any one else. None of the stock-incorporation as con-

tended, even though denominated as such. By virtue of section 1225. Rev. Laws 1910, amended articles of incorporation may be executed and an amended charter issued which when issued shall relate back and be considered and be a part of the original articles of incorporation to the same effect as if originally set forth therein, but in order to amend its articles of incorporation it is necessary for the new articles to be filed signed by all the directors and officers of the company. The mere fact that the paper executed was denominated "amended articles of incorporation" could not make it such unless executed in pursuance to the authority of section 1225, which was not done. None of the officers, directors, or stockholders of the State Bank of Capitol Hill were interested in or participated in the execution of the so-called amended articles of incorporation. This instrument was nothing more nor less than original articles of incorporation executed by persons who were strangers to or had no interest in or connection with the State Bank of Capitol Hill.

The judgment must be affirmed. All the Justices concur.

SOUTHWESTERN SURETY INS. CO. v. CAPITOL STATE BANK OF OKLA-HOMA CITY. (No. 9095.)

(Supreme Court of Oklahoma. March 5, 1918. Rehearing Denied May 21, 1918.)

Error from District Court, Oklahoma County; Edward Dewes Oldfield, Judge.

Action between the Southwestern Surety Insurance Company and the Capitol State Bank of Oklahoma City. Judgment for the latter, and the former brings error. Affirmed.

Embry, Crockett & Johnson, of Oklahoma City, for plaintiff in error. Wilson, Tomerlin & Buckholts, of Oklahoma City, for defendant

HARDY, J. This case involves an issue between the Southwestern Surety Insurance Company and the Capitol State Bank of Oklahoma City. In June, 1913, the board of county commissioners of Oklahoma county commenced an action against the State Bank of Capitol Hill and plaintiff herein to recover the sum of \$5,000, which sum was alleged to have been deposited by the county treasurer of Oklahoma county in said State Bank of Capitol Hill to secure the payment of which the Southwestern Surety Insurance Company had executed a depository bond. Judgment was rendered in favor of the board of county commissioners for said sum with interest thereon, and it is to resaid sum with interest thereon, and it is to recover this sum that this action is brought; it being alleged that the Capitol State Bank of Oklahoma City was originally incorporated un-der the name of State Bank of Capitol Hill, and was and is the same institution as reor-ganized. The facts in this case with the ex-ceptions stated are identical with those in the case of Western Casualty & Guaranty Insurance Co. v. Capitol State Bank of Oklahoma City, 172 Pac. 954, and the questions of law involved are identical.

Upon authority of that case the judgment is affirmed. All the Justices concur.

CRANE CO. v. NAYLOR et al. (No. 8335.) (Supreme Court of Oklahoma. March 5, 1918. Rehearing Denied May 21, 1918.)

(Syllabus by the Court.)

1. MECHANICS' LIENS = 132(14) - SUBCON-

TRACTOR'S LIEN—STATUTE.

Under section 3864 Rev. Laws 1910, the theory upon which the lien of a subcontractor may be sustained is that his material or lien has benefited the owner's premises; and if the lien statement is filed in the proper office within 60 days from the time the material is last furnished to the owner by the subcontractor, the statement is filed within the time authorized by stat-

2. SUFFICIENCY OF EVIDENCE.

The evidence in this case examined, and it appearing that the material furnished by the subcontractor was delivered to the premises of the owner on December 3, 1917, and the lieu statement was filed by the subcontractor within an analysis of the subcontractor within the subcontractor within the subcontractor within the subcontractor is subcontractor. 60 days thereafter, the subcontractor is entitled to a lien upon said property to secure the payment of his claim.

Commissioners' Opinion, Division No. 3. Error from District Court, Pittsburg County: W. R. Higgins, Judge.

Action by the Crane Company against Sim Naylor and others. Judgment for defendants, and plaintiff brings error. Reversed and remanded for new trial.

A. C. Markley, of McAlester, for plaintiff in error. W. H. H. Clayton, Jr., and Gordon & McInnis, all of McAlester, for defendants in error.

HOOKER, C. The record shows that in the month of March, 1913, William Weaver, the owner of the real estate here, entered into a verbal contract with Liddell & Mann. by the terms of which they were to install three sections of an Ideal boiler, with trimmings and fixtures, and to furnish the labor and material therefor in a building located on said real estate, for which they were to receive the sum of \$225, to be paid when the work was completed; that before the work was done Liddell retired from the partnership, and David Mann performed the contract with Weaver, and completed the same about the 7th of November, 1913; that about the 8th of October, 1913, the firm of Liddell & Mann ordered the materials which they were to furnish to William Weaver under said contract from Crane Company at the agreed price of \$157, and the said Crane Company on the 16th day of October, 1913, shipped said materials, no freight allowance, to Liddell & Mann, and said materials arrived in McAlester on the 3d of November, 1913, at which time they were taken by David Mann from the freight depot and installed in their place on the William Weaver property. Crane Company, not receiving the purchase price, on the 27th day of December, 1913, duly executed and filed with the clerk of the district court of Pittsburg county its affidavit and itemized statement of its account and mechanic's lien statement containing the amount and value of said material as provided by statute, for the purpose of establishing a lien upon said property to secure the payment of its indebtedness. It appears from the evidence that this material thus furnished by Crane Company to Liddell & Mann was ordered from the American Radiator Company, at Buffalo, N. Y., and that the same was consigned by the American Radiator Company to Liddell & Mann on the 16th day of October, 1913, and delivery made to the common carrier on that date, to be transported for Liddell & Mann as above stated.

It is contended by the plaintiff in error here that inasmuch as a delivery of this material was not made at McAlester until November 3, 1913, that its lien claim filed on December 27, 1913, was within the 60 days' time allowed a subcontractor by virtue of section 3864, Revised Laws 1910, and that said company is entitled to a lien upon said premises; while upon the contrary it is claimed by the defendants in error that the material was furnished and delivered on the 16th of October, 1913, to Liddell & Mann by Crane Company, as on that date the same was delivered to a common carrier for transportation to said firm at McAlester, f. o. b. Buffalo, N. Y., and that by virtue thereof the furnishing and delivery was completed upon said day, and that said Crane Company, under the statute aforesaid, was allowed only 60 days from that date in which to file a lien upon said property, and, not having done so, it is not entitled to recover in this action.

[1, 2] The question involved here is. When was the delivery of said material to be made by Crane Company to Liddell & Mann? The record is silent as to the terms of the contract between them as to where this delivery was to be made, but the material was to be used by Liddell & Mann at McAlester, Okl. Our statute (section 3864, Revised Laws 1910) provides that the lien statement must be filed within 60 days after the date upon which materials were last furnished or labor last performed. As stated, there is no conflict as to the date when the shipment was made by the American Radiator Company for Crane Company to Liddell & Mann at McAlester, Okl., which was on October 16, 1913, nor is there any dispute as to the date said material arrived at McAlester and was received by Liddell & Mann, which was November 3, 1913. Section 3864, Rev. Laws 1910, provides that:

"Any person who shall furnish any such material or perform such labor as a subcontractor, etc., may obtain a lien upon such land, or improvements, or both, from the same time, in the same manner and to the same extent as the original contractor, for the amount due him for such material and labor. \* \* \* \*

So the question presented here is, When was this material furnished so as to entitle the subcontractor to a lien upon this property? In 18 R. C. L. 922, it is said:

Even in those jurisdictions in which a lien may be acquired for material furnished though it has not actually been incorporated in the building, structure or improvement, it is generally held that the lien cannot attach in the absence of a delivery of the material upon the premises, or other act equivalent thereto, as notice to or an implied assent by the owner."

In Barker Lbr. Co. v. Marathon P. M. Co., 146 Wis. 16, 130 N. W. 867, 36 L. R. A. (N. S.) 877, the Supreme Court of Wisconsin said:

"But if the subcontractor delivers material to the principal contractor at the latter's place of business, which materials are neither incorporated into the structure, delivered upon the premises, nor placed under control of the owner of the structure, no lien arises, because the material cannot be said to have been furnished for, in, or about the erection of the structure."

The theory upon which the lien of subcontractors is sustained is that the subcontractor's material or labor has benefited the owner's premises, and the subcontractor could not possibly have any lien, unless his material or labor improved the owner's premises, so it would seem that a reasonable meaning of the statute would be that when the material is last furnished to the owner and not when last furnished to the contractor. In Smalley v. Gearing, 121 Mich. 190, 79 N. W. 1114, 80 N. W. 797, the Supreme Court of Michigan said:

"The other defendants are lien claimants, and the complainants, as well as the defendant owners, attack their respective claims upon several different grounds. Claim of Ashland Brownstone Company: It appears that in April, 1895, the company had a quantity of stone at the dock in the city of Detroit. It was sold to Gearing for this building for \$1,841.88, and freight from the dock to Gearing's yard, to be delivered there. It was delivered thereon May 14th. Mr. Gearing stated that it was to be used in that building, and it was sold for that purpose. In June following, another quantity was sold for \$787.85, and delivered at Gearing's yard. Notes were taken on these sales. The first stone sold was cut at Gearing's yard at his expense. On account of the delay in the building, none of this stone was put into the building until after September 11, 1895. Between this date and October 1st, he took this stone, from time to time, to the building. Some of the stone was not put in until October 1st. The statement of lien was filed by the company November 9, 1895. It is claimed by complainants that, this claim not being filed until 5 months after the last stone was delivered at Gearing's yard, the lien cannot attach. It is also claimed that about 1,000 cubic feet of this stone never went into the building. The total amount of the claim of the company is \$2,-629.73. The court below disallowed the claim for the stone not put in the building, and allowed the balance at \$1,949.73. The statute of 1891, by section 5, provides that 'verified statement or account shall be filed within sixty days from the date on which the last of the materials shall have been performed by the person claiming the lien.' It is claimed by the stone company that the 60 days began to run from the date that the materials were delivered at the building. On the other hand, it is contended by complainants that the 60 days began to run from the date that the materials were delivered at the building. On the other hand, it is contended by complainants that the

law was enacted for the benefit and protection 2. EQUITY \$\infty\$ 65(2)—Deeds—Relief-of laborers and materialmen, and should be construed liberally. The verified statement of active where a deed is executed and placed count must be filed within 60 days from the date on which the last of the materials shall have been furnished. We think the meaning of the statute is that the 60 days begin to run from the date when the last materials shall have been furnished to the owner or delivered at the building. The materialman furnishes the material to the owner through the contractor, the same as the laborer performs labor for the owner under the laborer performs labor for the owner under the direction and authority of the contractor. The stone company, it is true, delivered the stone at the yard of Gearing; but it was deliv-ered there at the request of Gearing, to be dress-ed and afterwards delivered at the building. Had Gearing filed a claim of lien for this ma-terial at the time it was filed by the stone comterial at the time it was filed by the stone company, no question could be raised as to the time. The claim of lien would have been filed in time. It was purchased for the very purpose of being put into this building. The claimant could not have filed a claim of lien for the materials until they were delivered to the owner of the building. In Wentworth v. Tubbs, 53 Minn. 388, 55 N. W. 543, it was held, under the statute of that state, that 'materials for a building are usually said to be furnished when they are delivered on the premises on which they are to be used.' The court below was not in error in deducting from the claim the value of the stone not used in the building. The equity of a lien claim for labor or materials arises from the fact that the value of the property to which they have been applied has been increased. The language of the act giving the lien provides that 'every person, who shall as contractor, laborer or material-man perform any labor or furnish material to such original contractor or any subcontractor in carrying forward or completing such contract, about heave a lien therefor.'" terial at the time it was filed by the stone com-pany, no question could be raised as to the time. carrying forward or completing such contract, shall have a lien therefor."

Applying the rule announced to the facts in this case, it is apparent that the lien statement of the subcontractor was filed within 60 days from the time the material was furnished to the owner, and the plaintiff in error is entitled to a lien upon said property to secure the payment of its indebtedness.

The judgment of the lower court is therefore reversed, and this cause remanded for a new trial.

PER CURIAM. Adopted in whole.

KING v. ANTRIM LUMBER CO. et al. (No. 8274.)

(Supreme Court of Oklahoma. Dec. 11, 1917. Rehearing Denied May 21, 1918)

(Syllabus by the Court.)

1. DEEDS \$== 59(4)—Conveyance of Title-DELIVERY.

DELIVERY.

Where a deed is made without consideration to an infant of tender years not of kin to the grantor, and placed by the grantor upon record, and after the deed is recorded it is returned to the grantor and never delivered to the grantee or any one for her, and the intention of the grantor in making the deed was not to pass title to the grantee, but to place the property where it could not be reached for a legal liability of the grantor, and the possession of the property continuously remained in the grantor, there was not such a delivery of the deed as necessary to convey title thereby to the grantee, and such infant is not entitled to recover such property of such grantor.

Where a deed is executed and placed on recwhere a deed is executed and placed on rec-ord by a grantor for the purpose alone of plac-ing the property beyond the reach of his credi-tors, and such deed is not delivered by the grantor to the grantee or any one for her, but is surreptitiously taken by and is in her possesis surreputiously taken by and is in her posses-sion, and the grantor brings action praying for the removal of the cloud created by such deed upon such property, and for the cancellation of the deed and record thereof, equity will deny such relief for the reason that the grantor does not come into court "with clean hands," and therefore "equity leaves him where it finds him." him."

Commissioners' Opinion, Division No. 1. Error from District Court, Washita County; Thomas A. Edwards, Judge.

Action by the Antrim Lumber Company to foreclose a mechanic's lien against W. B. King and Minnie Zschornack, in which Minnie Zschornack was permitted to interplead, with answer and cross-petition by W. B. King to the petition of intervention, and in which the Antrim Lumber Company by demurrer to the evidence was eliminated from the case. Judgment for intervener quieting her title against defendant King, his motion for a new trial overruled, and he brings error. Reversed and remanded, with instructions to dismiss the intervention and the cross-action. vention and the cross-action.

A. M. Beets, of Cordell, for plaintiff in error. Richard A. Billups, of Cordell, for defendants in error.

COLLIER, C. This action was brought by the Antrim Lumber Company to foreclose a mechanic's lien on lots described in the petition against the defendant W. B. King and Minnie Zschornack, alleging that the title to said property was in Minnie Zschornack, but that transfer from the defendant King to Minnie Zschornack was void as being without consideration. Thereafter R. Brett, as amicus curiæ. filed motion to make Minnie Zschornack a party to the cause. Minnie Zschornack was permitted to interplead and set up her rights in said cause; the important part of said interplea being as follows:

"(3) Your interpleader further states to the court: That she is and has been the owner in fee of the real property set out in plaintiff's petition, to wit: Lots twenty-one (21), twenty-two (22), and twenty-three (23), in block fifty-eight (58), in the town of New Cordell, Okl., and lots seventeen (17) and eighteen (18), in block fifteen (15), East Hill addition to New Cordell, Okl., since the 19th day of April, 1906. That on said day and date W. B. King, then a single man, conveyed said real property and all of the same to this interpleader by good and sufficient warranty deed, which deed is now and all of the same to this interpleader by good and sufficient warranty deed, which deed is now held by this interpleader, and is on record in the office of the register of deeds of Washita county, Okl.; same having been filed for record the 19th day of April, 1906, at 8:10 o'clock a. m. of said date, and recorded in volume 14, page 233, of the records of said office; a copy of said deed is filed herewith, as a part hereof, marked Exhibit A. That the said W. B. King has no right, title, or interest in said property, nor any part thereof. That no other person or persons have any right, title, or interest in and to said property or any part thereof, except your interpleader herein, who is the legal holder and owner of all of said real property.

"(4) Your interpleader further states that the register of deeds, in copying and recording said

register of deeds, in copying and recording said deed to said property, incorrectly copied the name of the grantee in said deed, the name of

said grantee appearing of record as Minnie S. to the said Minnie Zechornack be set aside, Schormack, instead of Minnie Zechornack, which is the real and true name which appears in the original deed presented for record; that your that the court declare the said Minnie Zechornack; or is the real and true name which appears in the original deed presented for record; that your interpleader did not know of said mistake in the recorder's office until her attention was called to same upon the filing of this suit, but pre-sumed that said register of deeds had correctly recorded the deed presented for record as was

recorded the deed presented for record as was his duty to do.

"(5) Your interpleader specifically denies that the plaintiff herein has any interest in or lien upon the above-described property of your interpleader, by reason of the pretended lien statement filed herein, but states, as aforesaid: That this interpleader was at that time, and has been ever since, and is now, a minor under the age of 21 years, and of the age of 16 years at this time, and owes the plaintiff nothing.

"(6) That said pretended lien statement is a cloud upon the title of this interpleader, and said cloud should be removed.

"Wherefore, your interpleader prays that the plaintiff take nothing of her by reason of said lien; that said lien statement be declared void as a lien against the property of this interpleader, and that the cloud on the title created by reason of said lien statement be removed, and that the record in the office of the register

by reason of said lien statement be removed, and that the record in the office of the register of deeds be corrected and made to show the real name of the grantee in said deed as shown by the original deed to said property, and that she go hence with her costs in this behalf expended, and for other proper relief."

W. B. King filed his answer and crossaction to the petition of intervention filed by the interpleader, Minnie Zschornack; the material averments of said amended answer and cross-action being as follows:

First. That he denies each and every material

First. That he denies each and every material allegation contained in said interplea.

Second. For his second and further answer to said interplea, the said defendant alleges and states that he is the owner in fee simple of lots 21, 22, and 23, in block 58, in the city of New Cordell, Okl., and lots 17 and 18, in block 15, East Hill addition to the city of New Cordell, Okl., all in Washita county, as described in said plea of intervention. That said intervener has no right, title, or interest in said premises, but alleges the fact to be that on the 19th day of April, 1906, the said defendant W. B. King executed a deed to said property to Minnie Zschornack, but that said deed was executed without consideration and was not delivered to without consideration and was not delivered to the said Minnie Zschornack or said interpleader the said Minnie Zscnornack or said interpleauer or any other person for her benefit, and that the title to said premises was not intended to pass and did not pass from said defendant. That said defendant was at said time, and has been at all times since, in possession of said premises, and has paid the taxes and made valuable improvements thereon. Defendant further states that the dead so made at said time and placed on recommendations. ments thereon. Derendant rurtner states that the deed so made at said time and placed on record is a cloud upon defendant's title, and that unless the same is canceled, set aside, and held for naught said defendant will be unable to dispose of said property. Defendant furtner dispose of said property. Defendant further says that, if the intervener herein has posses-sion of said deed as alleged in said petition of intervention, the same was surreptitiously and fraudulently obtained without the consent of the said defendant.

Third. Defendant further states that, in the event that the court should hold that the deed herein involved was delivered to the interpleader as a matter of law, then said defendant alleges the facts to be that said interpleader holds the legal title to said described property in trust for the use and benefit of this defendant W. B. King. That the said W. B. King is the owner of the equitable title thereto, and that said interpleader has no right whatever in the equi-

table title to said property.

Wherefore said defendant prays that the deed heretofore executed by the said W. B. King

nack to hold the title in trust for the said de-fendant W. B. King, and for such other and further relief as the court may deem the defendant entitled to in law and equity.

To said amended answer and cross-action the interpleader, Minnie Zschornack, filed a general denial. The Antrim Lumber Company, by demurrer to its evidence, was eliminated from the case, and the trial of the case proceeded upon the issue joined between the interpleader, Minnie Zschornack, and W. B. King.

The material evidence is that W. B. King was a single man and owned the property in litigation; that the mother of Minnie Zschornack was keeping house for him; that Minnie was then a little girl about six years old; and that King got into some difficulty regarding a suit which he had against some parties, and fearing the result of the litigation executed a deed to the little girl, and placed the deed on record; that after the deed was recorded it was returned to King and remained in his possession for several years, and never was delivered to the interpleader; that King married the interpleader's mother and the interpleader lived with King and his wife; that thereafter trouble arose between the parties, and the interpleader took the deed from King's possession without his knowledge and left home; that King continued to remain in possession of the property, paid the taxes thereon, and received the rents; that he made improvements from time to time, which he paid for; that said King about the time of the execution of the deed informed the interpleader that he was deeding the property in controversy to her; that subsequently when the interpleader in the interest of said King was summoned to court she was instructed by King to swear that she came by the property in controversy from money she had inherited from her father, and that King had borrowed from the interpleader's mother, and that her mother told King just to deed the property to interpleader instead of replacing the money.

King testified that he met J. K. Little, the attorney on the other side of the case, down at the Finerty Bank, who said, "I think we can get the costs on to you;" that caused him to put this property into somebody's name for safe-keeping; that he went to Mr. Coker and had this deed written up and had it recorded; that after its record the recorder delivered the deed to him; that when the intervener left home he missed the deed; that he positively never intended to deliver the deed to Minnie Zschornack or convey the property to the intervener; that he had been constantly in possession of the property in controversy, and also of the deed until the intervener took the deed. The intervener testified that she had never paid any consideration for the property involved; that she had never been in possession of or paid taxes on said property; and that she had never been in possession of the deed until she took it from the papers at home, and that no one was present when she took it

Judgment was rendered for the intervener "that the title to the real estate involved in this action both legal and equitable be, and the same is, vested in said Minnie Duncan, formerly Minnie Zschornack, and that the defendant W. B. King be and is forever denied any right, title, or interest in and to said lots or either of them, and the title of the said Minnie Zschornack Duncan to said lots is forever quieted as against the said W. B. King, or any person or persons claiming or to claim under him." To the rendition of said decree the said W. B. King duly excepted. The Antrim Lumber Company was adjudged to pay costs, but did not except thereto. W. B. King made timely motion for a new trial, which was overruled and excepted to, and error brought to this court. The Antrim Lumber Company not having excepted to or appealed from the judgment rendered against it, no question is presented as to the action of the court in rendering judgment against said company on the demurrer interposed to its evidence or in taxing it with costs; the appeal being taken by W. B. King alone.

We do not think that, as contended by the plaintiff in error, and to which question the discussion of both briefs is principally directed, the transaction under consideration created a trust in favor of W. B. King, or that a question of trust is at all involved therein. We are of the opinion that there are but two questions for proper determination of this cause: (1) Was there such a delivery of the deed executed by the grantor to the intervener as to pass title to the intervener? (2) Does the evidence show that King was entitled to the relief prayed for in his cross-action? We are of the opinion, and so hold, that both of said questions must be answered in the negative.

[\$] In Powers v. Rude, 14 Okl. 381, 79 Pac. 89, it is held:

"A deed does not take effect or operate to pass title until it is delivered."

In Hunter, etc., Co. v. Spencer, 21 Okl. 155, 95 Pac. 757, 17 L. R. A. (N. S.) 622:

"No title will pass by a deed which is not delivered by the grantor or some one duly authorized by him."

In Daniel et al. v. John P. London Co. et al., 44 Okl. 297, 144 Pac. 596, it is held:

"A deed signed and acknowledged, but not delivered, is not effective as a conveyance, and does not transfer or pass title."

[1, 2] It is not even contended by the intervener that there was a manual delivery of the deed from W. B. King to her or to any one for her, and thus the deed did not convey title to her, unless under the evidence herein the record thereof was a delivery to her. We are not cited in either

brief to, and have not been able to find, any opinion by this court in which the question of the effect of recording a deed by the grantor and the retention of the deed by him as to delivery to the grantee has been determined, but we are of the opinion, and so hold, that, while the authorities are not entirely harmonious, the great weight of authority is that the recording of a deed to a minor is not such delivery as would pass title to such minor, unless it was the intention of the grantor that such recording was to operate as a delivery, so shown by evidence.

The registry of a deed by the grantor might, perhaps, in the absence of opposing evidence, justify a presumption of delivery, but such presumption is repelled where the registry was made without the knowledge or assent of the grantee, and the property it purported to convey always remained in the possession and under the control of the grantor. Younge v. Guilbeau, 3 Wall. 636, 18 L. Ed. 262.

The recording of a deed by a grantor does not of itself constitute a delivery. It depends upon the grantor's intention. Humiston v. Preston, 66 Conn. 579, 34 Atl. 544; Moore v. Giles, 49 Conn. 570; Jamison v. Craven, 4 Del. Ch. 311: Masterson v. Cheek, 23 Ill. 72: Weber v. Christen, 121 Ill. 98, 11 N. E. 893 [2 Am. St. Rep. 68]; Hutton v. Smith, 88 Iowa, 238, 55 N. W. 326; Berkshire Mut. F. Ins. Co. v. Sturgis, 13 Gray [Mass.] 177; Glaze v. Three Rivers Farmers' Mut. F. Ins. Co., 87 Mich. 349, 49 N. W. 310 [595]; Babbitt v. Bennett, 68 Minn. 260, 71 N. W. 22; Doorley v. O'Gorman, 6 App. Div. 591, 39 N. Y. Supp. 768; Hayes v. Davis, 18 N. H. 600; Thompson v. Jones, 1 Head [Tenn.] 576; Chess v. Chess, 1 Pen. & W. 32, 21 Am. Dec. 350.

"The fact that the grantor executed the deed and had it recorded does not amount to a delivery where it is proven as a fact that he never intended to make it his deed except under a contingency which never happened." Jones v. Bush. 4 Har. (Del.) 1.

Bush, 4 Har. (Del.) 1.
"The registration of a deed by the grantor does not of itself operate as a delivery, nor does it supersede the necessity of proof of a delivery."
Hawkes v. Pike, 105 Mass. 560, 7 Am. Rep. 554.

In Barnes v. Barnes, 161 Mass. 381, 37 N. E. 379, the delivery of a deed was held not to be shown, in a controversy between the grantor and the grantee, under the following circumstances: The plaintiff signed and sealed a deed to the defendant, and caused it to be recorded, intending at the time to pass the title to the defendant, but without doing or saying anything else to manifest that intention. He afterwards received the deed back from the recorder and it was never in the possession of the defendant, or of any one representing her, and, when requested by her counsel to surrender the deed, refused to do so. Before such request, but after he had received the deed back from the registry, he communicated its existence to the defendant, and spoke to her of the land described in it

as hers, as he then supposed it was. The defendant assented, so far as she could, to the transaction. The ground of the decision is that there was no act or declaration on the part of the grantor manifesting his intention that the recording of the deed should be regarded as a delivery; the court holding that it was necessary that such intention be manifested by some act or declaration, other than the mere recording of the deed itself.

In Beckett v. Heston, 49 N. J. Eq. 510, 23 Atl. 1014, where the grantor herself sought to set aside a deed to her son, the court held that there was no delivery, and that she was entitled to the relief sought, notwithstanding that after having executed the deed in question she left it with the conveyancer to have it recorded, and that it was recorded accordingly. It appeared in this case that after the deed was recorded it was sent to the grantor, and that, upon receiving it, she informed her son of its execution, but did not part with its possession or control at any time. The court said that when she sent the deed to be recorded it was not with the intention to have the registration operate as a delivery.

In Moore v. Giles, 49 Conn. 570, an action by a father to remove as a cloud upon his title a deed executed by him to an infant and placed on record by him, the trial court found as a fact that the grantor, influenced by fear of a creditor, as well as by affection for the grantee "with the intent and purpose of giving to the said \* \* \* [grantee] his title to said land, \* \* \* executed said deed and caused the same to be recorded." The appellate court held that such finding was determinative of the question of delivery, and that the proved facts that a month elapsed between the execution and delivery of the deed to the town clerk, that the grantor did not place it in the hands of the grantee, and that he retained possession of the land, of necessity exhausted their force upon the minds of the court below, and were not to be considered by the appellate court.

"Where a father executes a voluntary deed to where a father executes a voluntary deed to his minor children and has it recorded, and then takes it and keeps it in his possession, there is no delivery to the children, and no estoppel against the father to deny a delivery, where he did not do such acts for the purpose of giving effect to the deed, but to protect himself against a threatened claim for alimony." Kopplemann v. Kopplemann [94 Tex. 40] 57 S. W. 570.

The unquestioned evidence is that the deed was never in fact delivered to the intervener, but was surreptitiously taken by her many years after the execution of the deed; that the deed after it had been placed upon record was returned to and retained by the grantor, together with possession of the property conveyed thereby, and that the intention of the grantor in executing the deed was not to convey title to the intervener but to place the property where it could not be reached for a legal liability that might arise against him.

In Johnson et al. v. Craig et al., 37 Okl.

378, 130 Pac. 581, it is held: 172 P.-61

"Where there is a question as to whether there had been a delivery of a deed of conveyance, the real test is the intention of the grantor, which intention may be manifested by mere acts or by words or both combined, and such acts and words and the circumstances relevant thereto are susceptible of parol proof."

In the body of the opinion, it is said:

"That such question is one of fact to be determined by the circumstances, actions, statements, and intention of the grantor is the consensus of authorities. 14 Ballard on Real Property, §§ 148-152: 3 Devlin on Deeds (3d Ed.) § 285; 9 Am. & Eng. (2d Ed.) 154; 13 Cyc. 750, and authorities cited by the foregoing text-writers." text-writers."

It is placed beyond question by the evidence in this case, especially the retention of the deed after its record, and the possession and enjoyment of the property as his own by King, and the uncontradicted evidence of King as to his intention in executing and recording the deed, that the intention of King was for the sole purpose to protect the property from a legal liability, and therefore said deed did not pass title to the intervener, and she was not entitled to recover the prop-The intervener not having paid any consideration for the property, or assumed any liability on account thereof, and never having been in possession of the property, nor the deed delivered to her, was entirely without the right to any equitable consideration in her behalf.

The unquestioned evidence is that the purpose of King in executing and placing the deed upon record was a fraudulent act, and therefore King "does not come into court with clean hands," and consequently equity will not grant him the relief prayed for. "but will leave him where it found him." It is a well-settled maxim of equity that he who comes into equity must come with clean hands.

hands.

"The principle of the maxim is that a court of equity will leave the guilty party seeking its aid where it finds him. Not only does it refuse, as has been seen, to carry to fruition a fraudulent, illegal, or otherwise unconscionable transaction, but where such transaction has been in whole or in part carried out it refuses to undo it on the application of a guilty participant, and refuses to relieve him from legal liabilities or other consequences of his misconduct." 16 Cyc. 145, § 3, and the very many authorities there cited. authorities there cited.

It follows that the court did not err in refusing the relief prayed for by King for the cancellation of the deed and the record there of, and the removal of such cloud from the title to the property involved. The interpleader not being entitled to recover in this action as sought by her interplea, the court committed reversible error in overruling the motion for a new trial.

This cause is reversed and remanded, with instructions to the trial court to dismiss the intervention of the intervener, and to dismiss the cross-action of the plaintiff in error. and tax the plaintiff in error with costs, other than the costs heretofore awarded against the Antrim Lumber Company.

PER CURIAM. Adopted in whole.

## WILHITE et al. v. CRUCE et al. (No. 8814.)

(Supreme Court of Oklahoma, April 30, 1918. Rehearing Denied May 21, 1918.)

### (Syllabus by the Court.)

1. CONSTITUTIONAL LAW \$==251-"DUE PRO-

CESS OF LAW."

By due process of law is meant the enforcement of right or prevention of wrong before a legally constituted tribunal having jurisdiction over the class of cases to which the one in question belongs, with notice to the party upon whom the law exhausts itself or upon whose property rights it operates, with an opportunity to appear and he heard in his owner. portunity to appear and be heard in his own defense.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Due Process of Law.]

2. Constitutional Law &=318-"Due Process of Law" - Exercise of Powers of Commissioners of Land Office.

The commissioners of the land office have authority to exercise such ministerial and juauthority to exercise such ministerial and judicial functions respecting the state's school lands as may be conferred upon them by the Legislature, and the exercise of such powers is not a denial of "due process of law" under either the Fourteenth Amendment to the federal Constitution or section 7, art. 2, of the state Constitution.

Commissioners' Opinion, Division No. 3. Error from District Court, Kay County; Wm. M. Browles, Judge.

Action by Charles A. Wilhite and Catherine M. Wilhite against Lee Cruce and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

G. A. Campbell, of Newkirk, for plaintiffs in error. F. C. Duvall, Co. Atty., and Claude Duval, both of Newkirk, S. P. Freeling, Atty. Gen., and W. R. Bleakmore, Asst. Atty. Gen., for defendants in error.

SPRINGER, C. The parties, occupying the same position in this court as in the court below, will be referred to, as a matter of convenience in this opinion, as plaintiffs and defendants.

The plaintiffs instituted suit against the defendants in the district court of Kay county, Okl., to recover possession of the southwest quarter (S. W. 1/4) of 16, 29 north, 1 west, the same being state school lands, from which they alleged to have been ousted from possession without due process of law. the petition is attached a copy of the lease, notice of appraisement, notice of forfeiture for nonpayment of rent, notice of sale of lease rights and improvements, notice that forfeiture had been made, and all the various proceedings and orders and findings of the commissioners of the land office, all of which it is alleged that plaintiffs had due notice and knowledge, and all of which appear to be regular and in due form. The court below sustained a general demurrer interposed by

tiffs elected to stand on their amended petition, and refused to plead further, and the court rendered judgment dismissing the case.

It is not contended by the plaintiffs that the commissioners of the land office did not act in all respects in conformity to the provisions of the statute; nor is the claim made that the commissioners of the land office in any way exceeded the authority conferred upon them by statutory enactment. It is, however, claimed that the act of the Legislature. conferring upon the commissioners of the land office the powers which they exercised respecting the leasehold of the plaintiffs, is illegal and void because it invaded their constitutional rights, as occupants of the state's school land to a trial in the justice of the peace court in an action of fofcible detainer.

The record in this case discloses that the plaintiffs discontinued the payment of the rentals to the state in contravention of the terms of the lease, and denied the property right of the state in the premises by attempting a homestead filing on the land under the homestead laws of the United States. land in dispute here, being a part of section 16, became the property of the state by the adoption of the Constitution. Section 9 of the Enabling Act provides:

"That said sections sixteen and thirty-six. and lands taken in lieu thereof, herein granted for the support of the common schools, if sold, may be appraised and sold at public sale in one hundred and sixty acre tracts or less, under such rules and regulations as the Legislature of the said state may prescribe, preference right to purchase at the highest bid being given to the lessee at the time of such sale, the pro-ceeds to constitute a permanent school fund, the interest of which only shall be expended in the support of such schools. But said lands may, under such regulations as the Legislature may, under such regulations as the Legislature may prescribe, be leased for periods not to exceed ten years; and such lands shall not be subject to homestead entry or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for school purposes only."

Section 1, art. 11, of the Constitution accepts the grant:

"The state hereby accepts all grants of land and donations of money made by the United States under the provisions of the Enabling Act, and any other acts of Congress for the uses and purposes and upon the conditions, and under the limitations for which the same are granted or donated.

Section 32, art. 6, of the Constitution provides:

"The Governor, Secretary of State, State Auditor, Superintendent of Public Instruction, and the President of the Board of Agriculture, shall constitute the commissioners of the land office, who shall have charge of the sale, rental, disposal, and managing of the school lands and other public lands of the state, and of the funds and proceeds derived therefrom, under rules and regulations prescribed by the Legis-lature."

The commissioners of the land office is obviously a constitutional body, with authority all of the various defendants, and the plain- to sell, rent, dispose of, and manage the



school lands and other public lands of the | determine protests and contests growing out state, and of the funds and proceeds derived therefrom "under such rules and regulations as may be prescribed by the Legislature." The Legislature has, from time to time, enacted laws conferring upon the commissioners of the land office authority to manage the public lands of the state, and the funds and proceeds derived therefrom, and providing rules and regulations therefor.

The land in dispute here was duly appraised, together with improvements thereon according to article 2, c. 49, S. L. 1907-08, and the plaintiffs were duly notified of such appraisement. There were never any objections filed with the commissioners of the land office, nor claim made that the appraisement of the lands and improvements was not fair and just, nor was there any appeal taken from such appraisement as provided by section 7184, Rev. Laws 1910. Section 7177, Rev. Laws 1910, provides:

"If the lessee of any of the lands enumerated herein shall be in default of the annual rental due the state for a period of three months, the commissioners of the land office shall cause notice to be given such delinquent lessee, that if such delinquency is not paid within thirty days from the service of such notice his lease will be declared, at their option, forfeited to the state by the commissioners of the land office. If the amounts due are not not paid within fice. If the amounts due are not paid within thirty days from the date of the service of such notice, the said lease shall be declared for-feited and the land therein described shall revert to the state, the same as though such lease had never been made. The order making such forfeitures shall be spread upon the rec-ords of the commissioners of the land office. ords of the commissioners of the land office. The service of the notice herein contemplated shall be made by registered letter; in case the post office address of the owner of such lease be unknown, the notice herein contemplated shall be published in two consecutive issues of some weekly newspaper published in or of general circulation in the county where the land is eral circulation in the county where the land is situate. The forfeiture may be entered by said board after thirty days from the date of such published or registered notice: Provided, that the lessee of any land so forfeited may redeem the lessee of any land so forfeited may redeem the same by paying all delinquencies, fees and costs of forfeiture at any time before such land is advertised to be leased, as provided by this article. \* \* The improvements on land so reverting to the state shall be sold under the direction of the commissioners of the land office at public or private sale, upon due notice to the lessee, and the proceeds received there-from shall inure to the holder of the delinquent lease after payment shall have been made to the state for all delinquencies and rents and expense incurred in making such sale.

This statute is the one by virtue of which the commissioners of the land office took action against the plaintiffs, excepting the appraisement and notice thereof was made and given under the Laws of 1907-08. The record in this case discloses that every provision of the law was studiously observed and strictly followed by the commissioners of the land office, and plaintiffs given every opportunity afforded by law to pay their rent and redeem their lease. Section 7186, Rev. Laws 1910, confers upon the commissioners of the land office the authority to hear and vidual rights as those maxims prescribe for

of any lease or assignment, and make such order in relation thereto as the evidence and law justifies. And section 7187, Rev. Laws 1910, provides:

"From all decisions of the commissioners of the land office an appeal may be taken by any person affected thereby to the district court of the county where the land is situated.

It is, however, claimed by the plaintiffs that the proceedings of the commissioners of the land office, under section 7177, by which their interest in an unexpired lease was forfeited and the improvements sold, did not afford to them and their property rights due process of law; that the commissioners of the land office had no authority to exercise judicial functions, render judgment, and enforce its decree, ousting them from possession of the lands, and that by so doing their constitutional rights were invaded under the Constitution of the United States and of this state. In order to test a piece of legislation to determine whether it is a denial of due process of law, resort must first be had to the Constitution itself, to see whether it conflicts with any of its provisions. If not found to be in conflict with any of the constitutional provisions, we must look to those settled usages and principles of the law to determine whether it denies the necessity of notice and the right to appear and be heard before judgment; these being fundamental and established rights. Section 1, art. 7, of the state Constitution, provides:

"The judicial power of this state shall be vested in the Senate, sitting as a court of impeachment, a Supreme Court, district courts, peachment, a supreme Court, district courts, county courts, courts of justices of the peace, municipal courts, and such other courts, commissions or boards, inferior to the Supreme Court, as may be established by law."

It is well to bear in mind that the legislative department of the state has all the powers not prohibited by the state Consti-The state Constitution never enlarges the powers of the legislative department, but restricts them, and the only limitation upon the legislative department, with reference to the creation of judicial bodies. is that courts, commissions, and boards created by it shall be inferior to the Supreme Obviously the Legislature had the authority to vest a portion of the judicial power of this state in other tribunals than those specifically named and designated in the Constitution.

[1] A definition of "due process of law" applicable to all cases is difficult, if not impossible, to give. A definition applicable to the particular case under consideration has been given by various courts, and text-writ-"'Due process of law' in each particers. ular case means such an exertion of the powers of government as the settled maxims of the law permit and sanction, and under such safeguards for the protection of indithe class of cases to which the one in ques- | erty rights it operates, with an opportunity tion belongs." Cooley on Const. Lim. § 356; Lent v. Tillson, 72 Cal. 404, 14 Pac. 71.

In his argument in the Dartmouth College Case. Daniel Webster defined it as:

"A law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial." Dartmouth College v. Woodward, 4 Wheat. 518, 4 L. Ed. 629.

It has also been defined as:

"Law in its regular course of administration through courts of justice." 2 Kent. Comm. 10; San Jose Ranch Co. v. San Jose Land, etc., Co., 126 Cal. 322, 58 Pac. 824.

The term "due process of law" as used in the federal Constitution has repeatedly been declared to be the equivalent of the phrase "law of the land," as used in Magna Charta, The English courts applied the phrase "law of the land" as having reference to the common and statutory law then existing in England, and when embodied in the Constitution of the United States and the Constitution of the various states it had reference to the same common law as previously modified and as far as suited to the varying political conditions and wants and usages of the people. "Due process of law," or, as some courts use the phrase, "law of the land," simply means a general and public law operating equally on all persons in like circumstances. It does not mean a partial law operating upon the rights of a particular person in a way in which the same rights of all persons in like circumstances are not affected. The law must embrace all persons in like circumstances, and the classification must be just and reasonable, and not arbitrary and capricious. Due process of law is denied when any individual of a particular class is singled out and hampered with the imposition of restraint, not borne by all members of the same class or community at large. A law which operates and exhausts itself upon a particular person, denying him rights that are enjoyed by other persons in like circumstances in the community as a whole cannot be upheld, as it denies equal protection of the law.

The essential elements of due process of law are a tribunal with jurisdiction to adjudicate upon the subject-matter of the controversy, notice to appear, and an opportunity for each side to be heard in person or by counsel respecting the matters in dispute. A law which requires notice to be given and the right to a hearing before judgment, with ample opportunity to present all the evidence and argument which the party deems important, is all that can be adjudged vital under due process of law. By due process of law is meant the enforcement of right or prevention of wrong, before a legally constituted tribunal having jurisdiction over the class of cases to which the one in question belongs, with notice to the party upon whom the law exhausts itself, or upon whose prop-

to appear and be heard in his own defense.

[2] The question naturally arises. Were the plaintiffs in this case denied the benefit of its application? The Fourteenth Amendment to the federal Constitution in no way limits the power of the legislative department of this state to say what forum shall determine the property rights of its citizens, nor by what procedure legal rights may be asserted or legal obligations enforced. The Fourteenth Amendment contemplates only that fundamental and established rights shall be preserved; that is, a legally constituted tribunal having jurisdiction over a particular class of cases to which the one in question belongs, with notice and an opportunity to appear and be heard in one's own behalf. The law assailed by the plaintiffs denied them no rights vouchsafed under either the Fourteenth Amendment to the federal Constitution nor section 7 of the Bill of Rights of this state.

The commissioners of the land office is the only tribunal in which may be initiated proceedings for the determination of the rights of a particular class of persons. The law provides for notice to be given, and affords opportunity to appear and be heard before the commissioners, and for appeals from their decisions to the district court of the county where the lands are located, and in that tribunal a trial de novo shall be had. Under the statute the commissioners of the land office have authority to prescribe rules and regulations governing the sale, rental, disposal, and management of the state school lands, and the funds and proceeds derived therefrom, to hear and determine protests and contests and make findings of fact, and to exercise such ministerial and judicial powers and functions as may be conferred upon them by the Legislature.

It follows that the judgment of the lower court must be affirmed; and it is so ordered.

PER CURIAM. Adopted in whole.

MARSHALL, County Judge, v. SITTON. (No. 8416.)

(Supreme Court of Oklahoma. Feb. 12, 1918. Rehearing Denied May 14, 1918.)

(Syllabus by the Court.)

1. CEIMINAL LAW ⊕⇒221 — EXAMINATION—CHANGE OF VENUE—RIGHT OF ACCUSED.

Where a person charged with the commis-

where a person charged with the commission of a felony is brought before a magistrate for the purpose of a preliminary examination, and such person, in compliance with section 6149, Rev. Laws 1910, makes application for a change of venue, the right to such change is absolute, and the duty of such magistrate to great the change is mandatory and invalence the grant the change is mandatory, and involves the exercise of no judicial discretion.

2. Mandamus \$== 61-Refusal of Change of 1

Where application for a change of venue is made under and in accordance with the prois made under and in accordance with the pro-visions of section 6149, Rev. Laws 1910, and the magistrate to whom such application is made wrongfully refuses to grant the same, mandamus is the proper remedy.

3. MANDAMUS @=== 141-PEREMPTORY WRIT -

3. MANDAMUS \$\infty\$=141-PEREMPTORY WRIT JURISDICTION OF DISTRICT COURT.

The district court may issue a writ of mandamus directing an examining magistrate to
grant a change of venue in a preliminary examination when application therefor has been
properly made under section 6149, Rev. Laws
1010 and properfully refuged by such magis-1910, and wrongfully refused by such magistrate

Error from District Court, Stephens Countv: Cham Jones, Judge.

Mandamus by H. W. Sitton against J. W. Marshall, County Judge. From the issuance of a peremptory writ of mandamus, the defendant brings error. Affirmed.

T. B. Reeder, of Duncan, for plaintiff in error, Womack & Brown, J. B. Wilkinson, and Bond & Kolb, all of Duncan, for defendant in error.

HARDY, J. On May 29 and June 3, 1916, respectively, verified complaints were filed before J. W. Marshall, county judge of Stephens county, charging H. W. Sitton with the crime of embezzlement. Upon being arrested and brought before said county judge said Sitton filed verified motions for change of venue which were duly presented and overruled. On June 6, 1916, upon application by Sitton, who will be designated as plaintiff, to the district court of Stephens county, a peremptory writ of mandamus was issued commanding said Marshall, as county judge, who will be designated as defendant, to grant the change of venue prayed and transmit the records and files in said causes to the nearest impartial justice of the peace. From this order the said defendant appeals, and urges that the district court of Stephens county was without jurisdiction to entertain the petition and grant the writ, and cites in support of this contention certain decisions of the Criminal Court of Appeals of this state holding that that court has exclusive appellate jurisdiction in criminal cases, and which announce the rule that the judge of a superior tribunal may not issue a writ of mandamus to the judge of a court of record in cases where the aggrieved party had an adequate remedy at law. Counsel also cite in support of the position assumed by them section 5811 et seq. Rev. Laws 1910, where a provision is made for a change of judge or change of venue upon the final trial of a cause in a court of record having jurisdiction thereof. The authorities cited and the statutes relied upon have no reference to a preliminary examination.

[3] Section 4907, Rev. Laws 1910, provides that the writ of mandamus may be issued by any justice or judge thereof, during term time, or at chambers, to any inferior tribunal. corporation, board, or person, to compel the performance of any act which the law specially enjoins as a duty resulting from an office, trust, or station, and, though the writ may require an inferior tribunal to exercise its judgment or proceed to the discharge of any of its functions, it cannot control judicial discrefion. Under this section the district court had authority to issue the writ if the act commanded to be done was enjoined upon the defendant as a duty resulting from the office held by him, and did not involve the exercise of judicial discretion.

[1, 2] It is also urged that the writ should not issue because the county court is a court of record, and in passing upon an application for a change of venue is required to exercise judicial discretion in determining whether the application is sufficient to entitle defendant to the change sought.

Section 17, art. 7, of the Constitution providea.

"County courts shall also have and exercise the jurisdiction of examining and committing magistrates in all criminal cases."

And section 17, art. 2, provides:

"No person shall be prosecuted for a felony by information without having had a prelimi-nary examination before an examining magistrate, or having waived such preliminary examination. Prosecutions may be instituted in courts not of record upon a duly verified complaint."

It seems clear from the foregoing provisions that in all cases where prosecution is instituted against a person for felony by information he is first entitled to a preliminary examination before an examining magistrate. and the intent of the two provisions combined was that, when the judge of the county court sits as an examining and committing magistrate in a preliminary examination before him, his powers and duties should be the same as those exercised in like cases by any other examining and committing magistrate.

An investigation upon preliminary examination by a magistrate of a person who has been charged with crime is not a final determination of any issue on the question of such person's guilt. The only order made is to hold the person accused, or to discharge him from custody. If held to answer, a trial upon the charge may be had in a court of record. The object of a preliminary examination is to inform the defendant of the nature and character of the crime charged against him and to lay a preliminary foundation for the prosecution in a court of record, to inquire concerning the commission of the crime charged and the connection of the accused therewith, and to determine whether there is probable cause to believe him guilty so that the state may take the necessary steps to perpetuate testimony and determine the amount of bail which will the Supreme Court, or the district court, or probably secure the attendance of the accused to answer. State v. Pigg, 80 Kan. 481, 103 Pac. 121, 18 Ann. Cas. 521; Harris v. Rolette, 16 N. D. 204, 112 N. W. 971; Bishop's New Criminal Procedure, § 239. The conduct of such examination is not the exercise of any part of the judicial power of the county court as a court of record, but the county judge in the conduct thereof exercises only the powers and jurisdiction that a justice of the peace would exercise when acting as a magistrate in preliminary examinations. State v. Pigg, supra; United States v. Hughes (D. C.) 70 Fed. 972; State v. Nast, 209 Mo. 708, 108 S. W. 563; Bishop's New Criminal Procedure, § 237.

When application is made by a person charged with a crime for a change of venue in compliance with section 6149, Rev. Laws 1910, before preliminary examination is held, the magistrate is vested with no discretion as to whether such change shall be granted, nor is he authorized to determine the truth of the allegations. The duty to be performed by him is purely ministerial, and the right to the change is absolute.

Section 6149 provides that a person brought before a magistrate charged with a crime upon which a preliminary examination is to be held may at any time before subpænas are issued have a change of venue when he or some one for him files an affidavit that he has reason to believe and does believe that he cannot have a fair and impartial examination or trial as the case may be before the justice or county judge, and upon the filing of such affidavit by the defendant, or in his behalf, authorizes the county attorney, or some one for him, to file an affidavit alleging the same disqualifications against any one justice to whom it is proposed to send the case for further proceedings, and it is thereupon made the duty of the examining magistrate to send the cause to the next nearest justice who is not in any way related to defendant or prosecuting witness or party injured, who is not a witness, and has not been an attorney in the cause, and who may not be absent or physically be unable to act. When the defendant has filed his application for change, and the county attorney has filed an affidavit alleging like disqualifications against any other justice, the parties are then authorized to agree upon a justice to whom the case may be sent, whereupon it is made the duty of the magistrate to which such application is made to transfer the cause to the justice agreed upon. Said section further provides that no witnesses shall be subpænaed for either party until the defendant has been brought before the justice and has been offered an opportunity to change the venue, or has changed it, if he elects to change, and the date for the hearing has been fixed. Section 5668 also provides that at any time before an examination is begun a change of venue may be had in

cused to answer. State v. Pigg, 80 Kan. 481, ner and be transmitted to another justice as 103 Pac. 121, 18 Ann. Cas. 521; Harris v. in cases formerly triable before a justice of Rolette, 16 N. D. 204, 112 N. W. 971; Bish-the peace.

It seems clear from these provisions of these statutes that the right to the change is absolute, and does not depend upon the discretion of the magistrate to whom the application is made, but becomes complete when the affidavit required by said section has been filed by the defendant or some one in his behalf.

It is further urged that, though the right to the change be absolute, and the magistrate without discretion, the writ should not have issued, because the defendant had an adequate remedy at law. Authorities in civil cases have no controlling application here, because the situation is entirely different. Where a change of venue in a civil case is denied by a justice of the peace, the order denying the change may be reviewed on appeal to the county or district court by bill of exception. Talley v. Maupin, 166 Pac. 734, L. R. A. 1917F, 912; Winfry v. Benton, 25 Okl. 445, 106 Pac. 853.

An appeal will not lie from an order of an examining magistrate denying a change of venue, but if such change is wrongfully refused, the defendant may be held to answer any charge that may be lodged against him in the district or superior court, and be required in that court to plead thereto.

By section 4907, Rev. Laws 1910, the writ of mandamus may be issued to an inferior tribunal to compel performance of any act which the law specially enjoins as a duty upon such inferior tribunal. This section sustains the right of the plaintiff to the writ in this case. The duty of the county judge to grant the change upon compliance with the statute was imposed upon him by the positive mandate of the law without regard to his own judgment or opinion concerning the propriety or impropriety of the act thus enjoined upon him. Where this is true, the duty to be performed is ministerial, and may be compelled by mandamus where an adequate remedy does not otherwise exist.

In State v. McMillan, Judge, 21 Okl. 384, 96 Pac. 618, it was held that mandamus would issue to require the approval of a bond tendered by relator where said bond was in all respects regular, and respondent refused to approve same on grounds other than that of its insufficiency.

In Smock v. Farmers' Union State Bank, 22 Okl. 825, 98 Pac. 945, mandamus was issued to compel the bank commissioner to issue a certificate to the defendant in error, Union State Bank, showing that it had been organized, its capital paid in, and that it was authorized to transact a general banking business.

ing has been fixed. Section 5668 also provides that at any time before an examination is begun a change of venue may be had in preliminary examinations for the same manigudge of the district court, as the successor

of the United States Court in the Indian particular case. There is no general rule Territory, formerly located in the territory embraced by the county in which such district court sits to cause, by proper order, all matters, proceedings, records, books, papers, and documents pertaining to all original causes or proceedings relating to estates transferred to such district court from said United States courts to be transferred to the county court of such county.

In McKee et al. v. De Graffenreid et al., 33 Okl. 136, 124 Pac. 303, the writ was awarded to require a judge of the district court to grant the petitioner who was accused of violating or disobeying, when not in the presence or hearing of the court, or judge, sitting as such, an order of injunction or restraint made and entered by such court, or judge, a trial by jury before penalty or punishment was imposed.

Where in any cause pending in any court of record in this state a judge is disqualified to sit and hear said cause under the Constitution and laws of this state, he should certify his disqualification, and when he refuses to do so when requested in the manner provided by law, mandamus is the proper remedy. State ex rel. Mayo v. Pitchford, 43 Okl. 105, 141 Pac. 433.

The Criminal Court of Appeals of this state will issue the writ upon petition therefor to compel a judge who is disqualified to sit in the trial of a criminal case to certify to his disqualification. State v. Brown, 8 Okl. Cr. 40, 126 Pac. 245, Ann. Cas. 1914C, 394; Ex parte Hudson, 3 Okl. Cr. 393, 106 Pac. 540, 107 Pac, 735; Long v. Allen, Judge, 10 Okl. Cr. 182, 135 Pac. 443. And the writ will be awarded directing an inferior court to dismiss a criminal case for failure to bring the defendant to trial within the time fixed by law. McLeod v. Graham, 6 Okl. Cr. 197, 118 Pac. 160.

The writ will lie to compel a federal Circuit Court to remand a case to the state court whence it was removed where it is apparent as a matter of law from the record itself that the federal court was without jurisdiction. Re Winn, 213 U.S. 458, 29 Sup. Ct. 515, 53 L. Ed. 873.

In a number of cases in other states it has been held that, where the right to a change of venue was absolute, mandamus would issue to compel the court in which the cause was pending to change the venue according to the motion of the defendant. Herbert v. Beathard, 26 Kan. 746; Ex parte Chase, 43 Ala. 303; Ex parte Reeves, 51 Ala. 55; State v. Williams, 127 Wis. 236, 106 N. W. 286, 7 Ann. Cas. 303; State v. Dick, 103 Wis. 407, 79 N. W. 421; Krumdick v. Crump, 98 Cal. 117, 32 Pac. 800; State v. Shaw, 43 Ohio St. 324, 1 N. E. 753.

The question then remains: Did the plaintiff have an adequate remedy at law? What is, or is not, an adequate remedy is one that must be determined upon the facts of each

by which this test may be applied. Manda. mus will not issue because of inconvenience, mere expense, or delay in the pursuit of other remedies, but will usually be granted where the remedy available is insufficient to prevent immediate injury or hardship to the party complaining. 26 Cyc. 171. And this is particularly so in criminal cases. McKee et al. v. De Graffenreid et al., supra.

In criminal cases neither an appeal, habeas corpus, nor certiorari would be a plain. speedy or adequate remedy so as to defeat the right to mandamus. Evans v. Willis, Judge, 22 Okl. 310, 97 Pac. 1047, 19 L. R. A. (N. S.) 1050, 18 Ann. Cas. 258; McKee et al. v. De Graffenreid et al., supra; Herndon v. Hammond, Judge, 28 Okl. 616, 115 Pac. 775. Should the change be refused, the party making the application would be subject to an order holding him to appear and answer any charge lodged against him, and in default of bail would be imprisoned until action in the district or superior court, and upon information being filed would be placed upon trial, and if convicted be liable to imprisonment, and in capital cases would not be entitled bail pending the prosecution of an appeal.

The circumstances make it clear that plaintiff was without an adequate remedy, and his right to the change being clear, and the duty of defendant to grant the change being ministerial and involving the exercise of no judicial discretion, the writ was properly granted. City of Shawnee v. Tecumseh, 150 Pac. 890.

The defendant filed no answer to the application for the writ, but filed a motion which was in effect a demurrer objecting to the sufficiency of the petition. Where this is done the pleading filed will be treated as an answer admitting all the facts stated in the petition with the challenge of their sufficiency to authorize the issuance of the writ. Thompson v. State, 154 Pac. 508. The affidavits for the change fully satisfy the requirements of the statute.

There was no error in granting a peremptory writ without having first issued the alternative writ. State v. Cummings, 47 Okl. 44, 147 Pac. 161.

Section 4910, Rev. Laws 1910, provides:

"When the right to require the performance of the act is clear, and it is apparent that no valid excuse can be given for not performing it, a peremptory mandamus may be allowed in the first instance."

Section 4914 also provides that, if no answer be made to the application, a peremptory writ must be allowed against defendant. In this case no answer was filed. The defendant, however, appeared and participated in the trial of the case on the merits, and was in court when the peremptory writ was granted.

Affirmed. All the Justices concur.

ROSS v. WERTZ et al. (No. 7473.)

(Supreme Court of Oklahoma, Jan. 29, 1918. Rehearing Denied May 21, 1918.)

### (Syllabus by the Court.)

1. INDIANS -18-ALLOTMENT-INHEBITANCE STATUTE

The inheritance of lands allotted to a Creek Freedman, who died after the taking effect of the Creek Supplemental Agreement of June 30, 1902, c. 1323, 32 Stat. 500, and before statehood, is cast according to chapter 49, Mansfield's Digest of the Statutes of Arkansas, as modified by section 6 of such agreement.

2. Indians \$\inls\table 18\table Allotment\table

Subject to dower or to title by curtesy consummate, the inheritance of the allotted lands of a Creek Freedman, none of whose ancestors were of Creek blood or of Creek citizenship, who died intestate without issue, in the year 1903, is died intestate without issue, in the year 1903, is cast upon the nearest kin of the decedent of the nearest common ancestral lineage who are Creek citizens or Creek descendants of Creek citizens. In case of failure of such kinsmen, so qualified, the surviving spouse, if a Creek citizen or Creek descendant of a Creek citizen, may take. In case of entire failure of such kinsmen or surviving spouse, meeting the requirements imposed, the inheritance shall go to noncitizen heirs in the order named in Mansfield's Digest of the Statutes of Arkansas. the Statutes of Arkansas.

3. Indians == 18 - Allotment - Inherit-ANCE.

If a Creek Freedman, none of whose ances-If a Creek Breedman, none of whose ancestors were of Creek blood or of Creek citizenship, died in 1903 intestate and without issue, the fact that kinsmen, who are, themselves, Creek citizens, must trace their kinship to the decedent only through noncitizen blood, is not of itself a bar to inheriting allotted lands of the decedent.

4. Indians === 18-Allotment-Inheritance

—STATUTE.

Two brothers, Cherokee Freedman, one of whom is dead and the other living, would inherit, whom is dead and the other living, because of if both were living and not barred because of their noncitizenship in the Creek Nation, the allotment of a deceased Creek Freedman. The deceased brother left one child now living; the living brother has eight living children and one living brother has eight living children and one living grandchild, the offspring of his deceased child. The children of both brothers, including the grandchild, are Creek citizens through maternal blood. The deceased child likewise was a Creek citizen. The intestate died in the year, 1903. Held, that under chapter 49, Mansfield's Digest of the Statutes of Arkansas, construed in connection with section 6 of the Creek Supplemental Agreement of June 30, 1902, such living children, belonging to the same class of kin, take equally in their own right, and the grandchild takes its parent's interest, by representation, each of the children and the grandchild named each of the children and the grandchild named taking one-tenth interest in the inheritance.

Commissioners' Opinion, Division No. 1. Error from District Court, Wagoner County; J. H. Sutherlin, Special Judge.

Action against B. F. Wertz and others. Judgment for the named defendant, and David Ross brings error. Reversed and re-

error B. F. Wertz. Grant Foreman and J. D. Simms, both of Muskogee, amici curse.

STEWART, C. Betsy Primous a Creek Freedman, died intestate without issue in July, 1903, leaving as her surviving husband. Joe Primous, a Creek Freedman who remarried, after which he and his second wife conveyed the allotment of Betsy Primous to J. H. White under whom the defendant in error B. F. Wertz claims title by deed of conveyance. Joe Primous died in 1905. An action was begun in the district court by one of the alleged heirs of Betsy Primous to remove cloud from title and cancel the deeds under which B. F. Wertz claimed the land. Numerous defendants were made, and several pleas of intervention were filed in which different persons claimed to be heirs of Betsy Primous. Trial was had, and the court found that the land descended to Joe Primous as the sole heir of his deceased wife, and that B. F. Wertz, under the deeds of conveyance, was the owner of the same, all other claimants being barred. From such judgment the plaintiff in error, David Ross, duly appeals to this court.

[1, 2] This case involves a construction of section 6 of the Supplemental Creek Treaty, approved June 30, 1902, in connection with chapter 49, Mansfield's Digest of the Laws

of Arkansas. Section 6 reads:

"The provisions of the act of Congress approved March 1, 1901 (31 Stat. L. 861), in so far as ed March 1, 1901 (31 Stat. L. 861), in so far as they provide for descent and distribution according to the laws of the Creek Nation, are hereby repealed and the descent and distribution of land and money provided for by said act shall be in accordance with chapter 49 of Mansfield's Digest of the Statutes of Arkansas now in force in Indian Territory: Provided, that only citizens of the Creek Nation, male and female, and their Creek Cated and shall inherit lands of the Creek Nation: And provided further, that if there be no person of Creek citizenship to take the descent and distribution of said estate, then the inheritance shall go to non-citizen heirs in the inheritance shall go to non-citizen heirs in the order named in said chapter 49."

It has been held by this court that, by virtue of the terms of the Enabling Act, and because of the adoption of the Constitution, Creek lands and money, since the advent of statehood, descend under the laws of this state, modified by the provisos in the latter part of the section quoted. Thompson v. Cornelius, 155 Pac. 602; Jefferson v. Cook, 155 Pac. 852; Hughes et al. v. Bell et al., 155 Pac. 804. However, in this case, the intestate having died in 1903, the inheritance is cast under chapter 49, Mansfield's Digest of the Laws of Arkansas, as limited by the provisos of section 6, supra. Section 2522, chapter 49, Mansfield's Digest, reads in part:

David Ross brings error. Reversed and remainded for a new trial.

Dan M. Meredith, of Muskogee, W. P. Z. German, of Wichita, Kan., and Aldrich Blake, of Muskogee, for plaintiff in error. Jess W. Watts, E. A. Summers, and E. M. Gallaher, all of Wagoner, for defendant in

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And section 2528 reads:

"If there be no children, or their descendants, father, mother, nor their descendants, or any paternal or maternal kindred capable of inheriting, the whole shall go to the wife or husband of the intestate. If there be no such wife or husband, then the estate shall go to the state."

Section 2531 in part reads:

"In cases where the intestate shall die without descendants, if the estate come by the father, then it shall ascend to the father and his heirs; if by the mother, the estate, or so much thereof as came by the mother, shall ascend to the mother and her heirs."

Keeping in mind section 6, supra, and the foregoing quotations from Mansfield's Digest, it becomes our duty to discover those upon whom the inheritance of the allotment is cast. We find that Betsy Primous, an adopted Creek, was born ten years before our Civil War, and was the illegitimate child of Chloe Webber, deceased, a Cherokee slave. In the trial had, the names of four men were entered for the honor of being the father of the intestate. The trial court properly found that it was impossible to tell who was her father: that no man had ever recognized her as his child. The evidence shows that none of her ancestors were either of Creek blood or Creek citizenship, and that her nearest living blood relatives of Creek citizenship consist of plaintiff in error, David Ross, also Patsy Harrison, Lizzie Johnson, Lagonia Harlen, Bessie Cordrey, Annie Williams, Henry Ross, Jr., John Ross, Jessie Ross, and Waitie Ross. David Ross is the son of Henry Ross. Sr., deceased. Eight of the others named are the children of Joe Ross, brother to Henry Ross, Sr., deceased. Waitie Ross is a Creek citizen, and the only issue of a deceased child of Joe Ross. Henry Ross, Sr., and Joe Ross were Cherokee Freedmen, but the children of each are Creek citizens through the blood of their respective mothers. The two brothers were the sons of Louisa Webber, a sister of Chloe Webber, mother of the deceased. They were therefore first cousins of the decedent, their children of course being her cousins once removed. Counsel denominated them as her second cousins, but, accurately speaking, second cousins belong to the same class in the descending scale from a common ancestry, the next class below first Children of brothers and sisters consing are first cousins. Children of first cousins, are second cousins, and so on down the scale. Brothers and sisters have the same blood: cousins, if of the whole blood, have each a half, and second cousins each a fourth of a common strain.

The evidence also shows that Jack Smith, deceased, was an enrolled Creek Freedman, and a half brother of Sam Webber, who was the father of Chloe Webber. Smith has living children, who would of course be half first cousins of Chloe Webber, the allottee's mother; the deceased was therefore a half cousin once removed, to the children of Jack Smith. These children were not negities to

the suit, but the defendant in error has deeds from some of them, and suggests that, as under Mansfield's Digest, relatives of the talf blood inherit equally with those of the whole blood, the children of Jack Smith, bearing in the ascending scale the same relation to the deceased allottee that is borne by the Ross claimants in the descending scale. would have equal or better right to inherit. It is clear from the language of section 2522, supra, that, in the absence of issue of the decedent, inheritance is cast upon the nearest lineal ancestors, if any are living, otherwise upon the nearest living lineal descendants. if any, of the nearest common lineal ancestor. In the event of failure of blood kinsmen, the surviving spouse takes, and if there be no surviving spouse, the property escheats. Construed in connection with section 6, supra. the heirs, in the order named, take the inheritance, provided those taking are Creek citizens or Creek descendants of Creek citi-. zens, otherwise the property goes to noncitizen heirs in the order named. In case of the Ross claimants, the nearest lineal ancestors, common to them and the decedent, are the grandparents of Betsy Primous. The nearest lineal ancestors common to the children of Jack Smith and Betsy Primous are the great-grandparents of Betsy Primous, being grandparents of the children of Jack Smith. Hence the children of Jack Smith, whether citizen or noncitizen, must be eliminated from our further consideration.

This case has been ably briefed by the par-We have also had the benefit of the suggestions of amici curiæ. The plaintiff in error claims that he is entitled to the entire estate as the only next of kin capable of inheriting; that his rights are not only superior to the surviving husband, under whom the defendant claims, but to any claim of his cousins, the children of Joe Ross. He contends that, it being necessary for his cousins to trace their relationship to the intestate through a living ancestor, they cannot inherit. He concedes that, if Joe Ross were dead. his children could take, but asserts that the circumstance of his father's death gives him the inheritance. The defendant in error urges that the Ross claimants, including the plaintiff in error, are barred for the reason that it is necessary for them to trace their relationship to the intestate through alien or noncitizen blood; that Joe Primous, being of Creek citizenship, is not under such disability, and takes the allotment in fee simple. The suggestions of the amici curiæ are largely in line with those of the plaintiff in error. except that it is contended that the children of Joe Ross living have the same right to inherit as the plaintiff in error who is the child of Henry Ross, Sr., deceased.

mother; the deceased was therefore a half coursin once removed, to the children of Jack an ancestral estate. Under the Arkansus Smith. These children were not parties to law of descent and distribution, adopted by

section 6, supra, but modified by the provisos no propositus, as the term is generally under-therein the statutes provide (section 2531, stood, from whom succession can be traced or therein, the statutes provide (section 2531, supra) for an estate in the nature of the feudum antiquum of the common law. Under the authority of the much-quoted case of Shulthis v. McDougal, 170 Fed. 529, 95 C. O. A. 615, this court has accepted the doctrine that allotted lands in the Creek Nation are in the nature of what is termed ancestral estates, which, on the death of the intestate, pass in the ancestral line through whose tribal blood the allottee received the property. The result is that, in case one parent was a Creek citizen and the other a noncitizen, only the kin in the Creek line can inherit in the order named in Mansfield's Digest; but, if both father and mother were Creek citizens. the estate passes equally to the father and the mother, or to next of kin in such respective lines. Rentie et al. v. McCoy, 35 Okl. 77, 128 Pac. 244; Brady v. Sizemore, 33 Okl. 169, 124 Pac. 615; Sizemore v. Brady, 235 U. S. 441, 35 Sup. Ct. 135, 59 L. Ed. 308; Pigeon et al. v. Buck, 38 Okl. 101, 131 Pac. 1084; Roberts v. Underwood, 38 Okl. 376, 132 Pac. 673; Thraves et al. v. Greenless, 42 Okl. 764, 142 Pac. 1021; McDougal v. McKay et al., 43 Okl. 251, 142 Pac. 987; Lovett v. Jeter et al., 44 Okl. 511, 145 Pac. 334; Thorn v. Cone et al., 47 Okl. 781, 150 Pac. 701; Finley v. American Trust Co. et al., 151 Pac. 865.

In the Shulthis-McDougal Case, the court construed that part of section 2531 of Mansfield's Digest quoted supra, but did not hold that these estates are purely ancestral. We quote the following from the language of

"The lands of that tribe fit into neither of the classes mentioned in the statute. They do not come to a member of the tribe by inheritance from any ancestor, nor could they be spoken of with propriety as a purchase. In applying the statute in this case, therefore, we shall have to proceed by analogy only."

Further the court said:

"It was his birthright. It came to him by blood of his tribal parent, and not by purchase.

The controlling idea in the opinion is that it was the purpose of Congress and of the Indians to preserve such property only to the members of the tribe. The holding in that case has become a rule of property in this state, and has been accepted, if not indorsed, by the Supreme Court of the United States. McDougal v. McKay, 237 U. S. 372, 35 Sup. Ct. 605, 59 L. Ed. 1001; Pigeon et al. v. Buck, 237 U. S. 386, 35 Sup. Ct. 608, 59 L. Ed. 1007. This court, by veiled suggestion, has at various times indicated doubt as to the soundness of the rule, but has uniformly followed the same on the theory of being bound by the decisions of the federal courts where Indian matters are involved. Thorn v. Cone, 47 Okl. 781, 150 Pac. 701, Mr. Justice Kane observes:

"In the very nature of things, in the cases where the devolution of the immediate allotment from the government is involved, there can be the exclusion of the mother, who was a non-

degrees of consanguinity reckoned. The best that can be done is to fit as nearly as may be section 2531 of chapter 49, supra, based upon the central idea of the common law of preserving ancestral estates in the line of the blood from whence they came, to conditions in the several Indian Nations wherein the principle of descent of landed estates through the blood of an ancestor was entirely foreign.

The Supreme Court of the United States in McDougal v. McKay, supra, says:

"And not only would it be improper for us to disregard the effect of the decisions already announced by the Circuit Court of Appeals and the Supreme Court of Oklahoma, which are supported by cogent reasoning, but considering the peculiar and rapidly changing conditions within the state, especial consideration must be accorded to them. We accordingly accept the doctrine announced therein. trine announced therein.

In applying the rule, we do not find that the courts have yet faced a case like the one at bar. It can hardly be said in this particular case that the right to the allotment was received as a birthright from ancestors; Betsy Primous died without issue; the property came from the Creeks, but not from her ancestors, for she had no Creek ancestors. It may be truly observed that, as a Creek, she is the beginning and end of her line. It would appear that the title to the land in the present case was acquired much after the nature of a gift, or, perhaps, more correctly speaking, as a consideration for services rendered or for future usefulness. However, as we do not think it necessary to determine whether this is ancestral property or a new acquisition, we withhold any opinion in that respect.

We have been asked to impute to the intestate a Creek ancestry and an imaginary line of descent. The fiction indulged in the Shulthis-McDougal Case, like Achilles' wrath to Greece, is the "direful spring" of many of the woes of the bench and bar of this state. We will try in this case to confine ourselves as nearly as possible to facts and to a construction of the statutes involved.

If this property is purely ancestral, the husband cannot inherit, not being in an ancestral line with the intestate. Ancestral nature imputed to the property would not help any of the other parties to this controversy, for none of them descend from any ancestral source from which the property, either by imputation or in fact, was derived. The Creek blood of the Ross claimants comes from the maternal side with which the intestate was in no way connected. Giving a reasonable construction to the first proviso of section 0, supra, it is evident that the intention of the Indian tribe and of Congress was that lands and money of the tribe should be preserved, if possible, to citizens of the Creek Nation and their descendants, and, by so holding, the court in the Shulthis-McDougal Case could have given the property as was done, to the father, who was a Creek, to

citizen. But assuming that, for future exigencies, it was proper, by analogy, to attribute ancestral character to such property, it does not follow that the analogy is complete, nor did the court so hold. If the property under consideration is purely ancestral, it must escheat for want of heirs in the Creek ancestral line who may take. Lord Coke says:

"Whenever lands do descend from the part of the mother, the heirs on the part of the father shall never inherit and likewise, when lands de-scend from the part of the father, the heirs on the part of the mother will never inherit."

The courts do not favor escheats, nor do we think it possible that such was the intention either of Congress or of the Creek Indians.

The fact that section 6 authorizes inheritance by noncitizen heirs in certain events shows that it was the intention of Congress and of the Indian tribe, from which the property came, to prevent escheats. The first as well as the second proviso of section 6 shows an intention to prefer citizen heirs over noncitizens. The second proviso is to the effect that, if there be no person of Creek citizenship to take, the inheritance shall go to noncitizen heirs in the order named in chapter 49 of Mansfield's Digest. Neither of the provisos declares that the heirs shall be in the particular ancestral line from which the property came; the letter of the section only requiring that those taking be of Creek citizenship, or of such extraction, if possible. In determining how the descent in this case should be cast, we can act in harmony, if need be, with such ancestral character as, according to the decisions, attaches to Creek We are justified in saying that, though this property may be primarily ancestral, yet, as the property originally belonged to the Creek Nation, subject to supervision by the federal government, the Creek Nation and Congress had full power, preparatory to the allotting of the same, to establish rules for its descent, and to provide for any contingency that might arise.

Since the partially ancestral character of such property was established by a construction of that part of the treaty, providing for descent in accordance with chapter 49, Mansfield's Digest, subject to the modifications in section 6, it would be reasonable to hold that, in the event of failure of heirs along that ancestral line from which the property may have been derived, the inheritance should be cast in any other manner that might reasonably appear to be authorized by the agreement between Congress and the Creek Nation. It would follow, therefore, that, if Betsy Primous left no blood kinsmen who were Creek citizens or Creek descendants of such citizens, her husband, Joe Primous, would take the inheritance, he being a Creek citizen. However, the evidence

citizenship. The defendant in error urges that such kinsmen cannot take, for the reason that they can only trace their relationship to the intestate through noncitizen blood. Upon a reading of the section, it will be discovered that no such requirement was contemplated. It would be impossible, in this case, to find any one related to the defendant through ancestral Creek blood, for no such blood coursed her veins. The defendant in error is wrong for a further reason. Section 2527 of chapter 49, Mansfield's Digest, reads:

"In making title by descent, it shall be no bar to a demandant that any ancestor through whom he derives his descent from the intestate is, or has been, an alien."

Missouri has an identical statute as to alienage of ancestors, and in Sullivan v. Burnett, 105 U. S. 334, 26 L. Ed. 1121, the Supreme Court of the United States, construing the section, says:

"In making title by descent it may be that his ancestor is or was an alien, without inheritable blood, either at common law or by statute. That fact would ordinarily constitute an insuperable difficulty in the way of his taking or holding the estate. But the statute elsewhere interposes in estate. But the statute elsewhere interposes in his behalf, and says that he shall not be barred in tracing his descent from the intestate, by reason of the fact that any ancestor is or has been an alien—language broad enough to include a living as well as a dead progenitor."

It is also held in Campbell v. Campbell, 58 N. C. (5 Jones' Eq.) 246, that children of a living alien sister of the decedent may take the inheritance, notwithstanding they trace their relationship to the decedent through their mother who is an alien. These citations meet the contention of defendant in error, and also answer the suggestion of the plaintiff in error that the children of Joe Ross cannot inherit because their father is living.

The fact being that Joe Primous is now dead, no question of curtesy consummate is involved, and we hold that the entire estate in fee simple in and to the allotment of Betsy Primous, deceased, is vested in her nearest kin of Oreek citizenship; that is to say, in the living children of Henry Ross, Sr., and Joe Ross, and in the grandchild of Joe Ross. who takes by representation, its father being a deceased Creek citizen.

[3, 4] The next question to be determined is what interest each of the heirs named has in the land. We are not left in the dark, since not only the statutes come to our relief, but we are assisted by a construction thereof by the Supreme Court of Arkansas. 2530, c. 49, Mansfield's Digest, reads:

"The rule of descent prescribed in the last preceding section shall apply in every case where descendants of the intestate, entitled to share in the inheritance, shall be in equal degree of con-sanguinity to the intestate, so that those who are in the nearest degree of consanguinity shall take the shares which would have descended to them, had all the descendants in the same degree who shall have died leaving issue been living, so that the issue of the descendants who shall shows that there are other claimants not only which their parents, if living, would have related by blood, but qualified by Creek ceived." Garrett v. Bean, 51 Ark. 52, 9 S. W. 435, says:

"If the persons composing the nearest class of kin die before the intestate, the next class in order inherits in its own right, and as next of kin. Death in that event operates to advance the next class nearest to the intestate, and substitutes the persons in it in the place thus vacated. In that case those in the next class so advanced inherit in their own right, and as so advanced inherit in their own right, and as next of kin; and, in the absence of statutory regulations, if equal degree, \* \* \* \* take per stirpes; "those equal in degree and nearest degree to the intestate take equal shares in their own right, while those of unequal degree, and one step further removed from the intestate, take only the shares their ancestors would have taken, if alive."

This cause is therefore reversed as to all the parties, and remanded for a new trial in accordance with the views herein expressed.

PER CURIAM. Adopted in whole.

LETCHER v. MALONEY et al. (No. 8825.) (Supreme Court of Oklahoma, April 16, 1918. Rehearing Denied May 21, 1918.)

(Syllabus by the Court.)

1. EVIDENCE \$\infty 208(6) - Pleading \$\infty 36(7) - Trial \$\infty 143 - Admissions - Question for JURY.

The allegations in a petition which has been superseded by amended petition complete within itself, and which does not make the original petition a part thereof by reference or otherwise, are not conclusive upon the plaintiff, but may be introduced in evidence as admissions against interest, subject to be denied or explained by the plaintiff, and the question raised between the allegations in the original petition and the tes-timony denying or explaining such allegations is a question of fact for the jury.

2. Principal and Agent €== 146(2)-Nondis-CLOSUBE OF AGENCY—LIABILITY OF AGENT.

One who, without disclosing his agency, enters into a contract in his own name with one who has no knowledge of his agency, binds himself.

3. MINES AND MINERALS \$\infty 109 - CONTRACT TO DRILL WELL - Breach - Measure of DAMAGES.

Where plaintiff enters into a contract with defendant to drill an oil well to a stipulated depth at a stipulated price per foot, and plaintiff commences drilling and drills to a depth of ten feet, when a dispute arises over the lease and the defendant delays drilling and requests and the defendant delays drilling and requests plaintiff to remain on the lease until an adjustplaintiff to remain on the lease until an adjustment of the dispute can be made, then finally stops the drilling altogether and prevents the completion of the well, an instruction which in effect defines the measure of damages which plaintiff is entitled to recover as expenses necessarily incurred in moving the rig and drilling machinery to location, necessary expenses in rigging up and drilling to the point when interrupted, and reasonable compensation for the plaintiff's loss of time in remaining on the premises at the special instance and request of the defendant, under the pleading and evidence, properly states the measure of damages to which the plaintiff is entitled to recover.

Commissioners' Opinion, Division No. 3. Error from Superior Court, Tulsa County; M. A. Breckinridge, Judge.

Construing which section the court, in Letcher and the Canadian Oil & Gas Com-Judgment for plaintiff, motion of pany. defendant Letcher for new trial overruled, and he brings error. Affirmed.

> H. B. Martin and R. A. Reynolds, both of Tulsa, for plaintiff in error. G. C. Spillers, of Tulsa, for defendant in error James T. Maloney.

> PRYOR, C. This action was commenced on the 22d day of October, 1912, in the superior court of Tulsa county, by James T. Maloney against the plaintiff in error. F. R. Letcher, and the defendant in error Canadian Valley Oil & Gas Company, to recover damages for breach of an oil and gas drilling contract. The parties will be referred to as they appeared in the trial court.

> The plaintiff alleges, in substance, in his amended petition, that on the 7th day of September, 1912, he entered into an oral contract with the defendant F. R. Letcher to drill for the said F. R. Letcher an oil well on a quarter-section of land lying in Tulsa county to the depth of 1,260 feet; that the contract price for the drilling of said well was 85 cents per foot; that in pursuance to the said contract he moved all necessary drilling machinery and equipment on said premises and commenced drilling and drilled to the depth of 10 feet, when there arose a dispute between Letcher and J. H. Winemiller as to the lease on the premises, and the defendant suspended the drilling and had the plaintiff to wait for 39 days until the adjustment of the controversy as to the lease, and at that time stopped the drilling altogether and prevented the plaintiff from completing the well under the contract; that the plaintiff has been damaged in the sum of \$1,353 by the wrongful acts of the defendant in preventing the plaintiff from completing said well under his contract, in expenses in moving the machinery and equipment on the premises, and in loss of time.

> The answer of the defendant Letcher admits the execution of the contract, but alleges that the same was executed by him as president of the Canadian Oil & Gas Company, and that the contract was made and entered into on behalf of said company, and that the defendant Letcher was in no wise liable under said contract, but that the liability, if any, was a liability of the defendant oil company, and that plaintiff knew at the time of the making of the contract that the contract was being made for and on behalf of the defendant oil and gas company.

> The cause was tried to the court and jury, and judgment was had for the plaintiff in the sum of \$1,180. The defendant filed motion for new trial, which was overruled, and he appeals to this court.

The assignments of error of the defendant, stated briefly, are: (1) That the verdict Action by James T. Maloney against F. R. of the jury was not supported by the evi-

[1] The plaintiff in his original petition alleged that the contract was entered into with the defendant Letcher and the defendant Canadian Valley Oil & Gas Company. It is the contention of the defendant Letcher that the plaintiff is bound by the allegations of his original petition, and that under his original petition he could only recover against the defendant oil and gas company, and there was no liability on behalf of the defendant Letcher: that Letcher only acted as agent for the defendant oil and gas company, his principal; and that the plaintiff could not introduce evidence to deny or contradict the allegations of defendant.

While it is a general rule that the pleader is bound by the allegations of his pleading and cannot introduce evidence contradicting the facts alleged, there is a distinction between a pleading that has been substituted by amended pleading and the one on which the issues are made. The plaintiff went to trial on the amended petition.

When an amended pleading is complete within itself and does not make the original pleading a part thereof by reference or otherwise, it becomes a substitute for and supersedes the original pleading, and the cause of action stands for trial on the amended pleading and the original pleading ceases to be a part of the record, and the allegations contained in the original pleading, substituted and superseded by the amended pleading, are not conclusive on pleader, but the original pleading may be introduced in evidence as admissions of the pleader against his interests. However, such admissions are subject to be denied, contradicted, and explained, and the issues raised by the admissions in such pleading and the evidence introduced by the pleader to contradict or explain such admissions are questions of fact to be determined by the jury. Lane v. Choctaw, Okl. & Gulf Ry. Co., 19 Okl. 324, 91 Pac. 883; Gaar, Scott & Co. v. Rogers, 46 Okl. 67, 148 Pac. 161.

The testimony of the plaintiff refutes squarely whatever admissions there may be in his original petition as to his knowledge or notice of the interest of the Canadian Valley Oil & Gas Company in the contract.

[2] The law is well established that, where an agent enters into a contract with a third person and does not disclose to the third person his principal, the agent is liable upon the contract, unless the third person has knowledge that the agent has acted for his principal.

"If he would avoid personal liability to dis-close his agency, and not upon others to discov-er it, it is not therefore enough that the other party has the means of ascertaining the name of the principal; he must have actual knowl-edge, or the agent will be bound. There is no

dence; (2) that the trial court erred in admitting any evidence on the part of the plaintiff against the defendant F. R. Letcher; (3) that the court erred in its instructions to the jury.

[1] The plaintiff in his original petition allowed to the plaintiff and the court defendant for its instruction allowed to make himself personally responsible. The subsequent disclosure of the principal by the agent is not sufficient nor is the pal by the agent is not sufficient, nor is the commencement of an action against the principal conclusive evidence of an intention to hold him alone. Nothing short of satisfaction from him alone. nim alone. Nothing short of satisfaction from the principal would in such a case be conclusive evidence of a discharge of the agent." Mechem on Agency, § 554, quoted with approval in Mc-Connell v. Holderman, 24 Okl. 129, 103 Pac. 593; Calman v. Kreipke, 40 Okl. 516, 139 Pac. 698; Clark and Skyles Law of Agency, § 556; Deming Inv. Co. v. McGrady, 157 Pac. 737.

The plaintiff testified positively that he had no knowledge of Letcher acting for the oil and gas company; that the first time he was informed that the defendant Letcher had acted for the oil and gas company in making said contract was after the contract had been breached and the plaintiff and defendant Letcher were trying to compromise the difference between them. As seen above, the disclosure of the principal of the agent must be made before or at the time of entering into the contract with a third person, and the disclosure of the agent's principal subsequently is not sufficient.

[3] The defendant Letcher contends that the court erred in its instructions as to the law governing and determining the damages plaintiff had suffered. The court instructed the jury in effect that the measure of damages which plaintiff was entitled to recover would be the expense necessarily incurred in hauling said rig and machinery from the point north of Tulsa to the said location, the expenses necessarily incurred in rigging up and drilling to the point where interrupted. if any, the reasonable compensation for the plaintiff's services in removing said rig. reasonable compensation for the enforced idleness of the rig, if any, while remaining upon said premises, and the reasonable value of the plaintiff's services lost during said time in remaining on the premises at the special instance and request of defendant.

This instruction, under the pleadings and evidence, fairly and impartially stated the law as to the measure of damages to which plaintiff was entitled, and the instruction given by the court is in conformity with the law laid down in the case of First National Bank Building Co. v. Vandenberg, 29 Okl. 583, 119 Pac. 224; also, the instruction of the court is supported by the case of United States v. Behan, 110 U. S. 339, 4 Sup. Ct. 81, 28 L. Ed. 168.

As to the contention that the evidence does not sustain the verdict of the jury, an examination of the evidence clearly shows that the verdict is amply sustained by the evidence in this case.

Therefore the judgment of the trial court should be affirmed.

PER CURIAM. Adopted in whole.

MORGAN v. STATE. (No. A-3278.)
(Criminal Court of Appeals of Oklahoma. May 18, 1918.)

## (Syllabus by the Court.)

CRIMINAL LAW \$\infty\$1131(4) - APPEAL - DEFENDANT'S ABSENCE FROM STATE - DIS-

Where a defendant has been convicted and appeals from the judgment and sentence, this court will not consider his appeal unless defendant is where he can be made to respond to any judgment or order which may be rendered or entered in the case, and, where he leaves the state and is convicted of crime in another state pending the determination of his appeal, this court will on proper motion dismiss the appeal.

Appeal from District Court, Carter County; W. F. Freeman, Judge.

Kirk Morgan was convicted of burglary, and he appeals. Appeal dismissed.

J. B. Champion and Brown & Williams, all of Ardmore, for plaintiff in error. The Attorney General, R. McMillan, Asst. Atty. Gen., and A. J. Hardy, Co. Atty., of Ardmore, for the State.

DOYLE, P. J. Plaintiff in error, Kirk Morgan, was convicted in the district court of Carter county on an information charging that on or about the 8th day of May, 1916, he committed the crime of burglary by unfeloniously, and burglariously lawfully, breaking and entering a building at number 23 North Washington street, city of Ardmore. His punishment was fixed at imprisonment in the penitentiary for the term of two years. From the judgment rendered on the verdict an appeal was perfected by filing in this court on March 4, 1918, a petition in error with case-made. On May 7, 1918, counsel for the state filed a motion to dismiss his appeal in part as follows:

"As ground for said dismissal, the Attorney General says that pending said appeal the said Kirk Morgan has left the jurisdiction of the courts of Oklahoma; that he was on the 26th of February. 1918, confined in the county jail of Los Angeles, Cal., for the theft of automobiles; this charge is made in pursuance of the affidavit of S. H. Harris, who saw him and talked to him while in said California jail, which affidavit and the affidavit of A. J. Hardy, the county attorney of Carter county. Okl., are hereto attached and made a part of this motion. Also copy of the judgment showing that said Kirk Morgan was sentenced to serve a term of from one to ten years in San Quentin Prison, in the superior court of Los Angeles, for the theft of an automobile."

In the response filed the material averments of the motion are not denied.

We are of the opinion that the motion to dismiss the appeal should be sustained as coming within the rule declared by this court in numerous decisions that this court will not consider an appeal unless the plaintiff in error is where he can be made to respond to any judgment or order which may

be rendered or entered in the case. It follows that plaintiff in error has waived the right to have his appeal in this case considered and determined.

The appeal is therefore dismissed. Mandate forthwith.

ARMSTRONG and MATSON, JJ., concur.

MORGAN v. STATE. (No. A-3295.) (Criminal Court of Appeals of Oklahoma. May 18, 1918.)

Appeal from District Court, Carter County; W. F. Freeman, Judge.

W. F. Freeman, Judge.
Kirk Morgan was convicted of burglary, and appeals. Appeal dismissed.

J. B. Champion and Brown & Williams, all of Ardmore, for plaintiff in error. The Attorney General, R. McMillan, Asst. Atty. Gen., and A. J. Hardy, Co. Atty., of Ardmore, for the State.

PER CURIAM. The plaintiff in error, Kirk Morgan, was convicted in the district court of Carter county on an information charging that on or about the 20th day of August, 1917. he committed the crime of burglary by unlawfully, feloniously, and burglariously breaking and entering in the nighttime a certain building within the curtilage of the dwelling house of G. E. Lamb, at 1616 B street, in the city of Ardmore. His punishment was fixed at imprisonment in the penitentiary for the term of two years. From the judgment rendered on the verdict an appeal was perfected by filing in this court on March 20, 1918, a petition in error with case-made.

On May 7, 1918, counsel for the state filed a motion to dismiss his appeal on the ground that since the appeal was televated by the state of the stat

On May 7, 1918, counsel for the state filed a motion to dismiss his appeal on the ground that since the appeal was taken he left the state and was convicted on the 19th of April. 1918, of grand larceny in the superior court of Los Angeles county. Cal., and was sentenced to imprisonment in the state prison of the state of California at San Quentin for the term prescribed by law. The showing made is the same as that in the case of Morgan v. State, No. 3278, 172 Pac. 974, this day decided.

In the response filed the material averments of the motion to dismiss are not denied. It follows that plaintiff in error has waived the right to have his appeal in this case considered and determined.

The appeal is therefore dismissed. Mandate forthwith.

MEIGS v. STATE. (No. A-2935.) (Criminal Court of Appeals of Oklahoma. May 18, 1918.)

### (Syllabus by the Court.)

1. Criminal Law \$\infty\$=1130(4) -- Appeal -- Briefs-Affirmance.

Where a defendant appeals from a judgment of conviction in a felony case, and no briefs are filed, or oral argument made, this court will examine the information, the instructions of the court, and the judgment; if no fundamental error is apparent, and the evidence is sufficient to support the verdict, the judgment will be affirmed.

2. Robbery \$\inspec 24(1)\$—Sufficiency of Evidence.

tiff in error is where he can be made to In a prosecution for conjoint robbery, the respond to any judgment or order which may evidence examined, and held to sustain the ver-

material error was committed on the trial.

Appeal from District Court, Cherokee County; John H. Pitchford, Judge.

Silas Meigs was convicted of robbery, and he appeals. Affirmed.

George M. Hughes, of Muskogee, for plaintiff in error. R. McMillan, Asst. Attv. Gen., for the State.

DOYLE, P. J. This appeal is from a judgment of the district court of Cherokee county, rendered on the 22d day of December, 1916, in pursuance of a verdict convicting Silas Meigs of conjoint robbery, and assessing his punishment at imprisonment in the penitentiary for the term of 14 years.

It appears from the record that the plaintiff in error Silas Meigs and George Nave were jointly charged with robbing one C. Ross Williams of some \$90, conjointly committed. When the case was called for trial a severance was demanded and granted. The state elected to try Silas Meigs. The evidence shows that on the evening of the day alleged in the information about 9 o'clock C. Ross Williams and four or five others were sitting around a lantern on the grounds of the old Seminary at Park Hill, and several were playing cards, when the defendants appeared with masks on their faces. Nave held a winchester on the party; Meigs held a pistol, and said, "Sit still, boys!" and Nave said, "Hold up your hands!" Meigs then searched each of those present, and took what money and valuables they had, taking from C. Ross Williams the money alleged in the information.

Three or four of those present testified that they recognized the defendant Meigs by his voice and by his clothes, and that they spoke to him, calling him by his name. C. Ross Williams testified that he was a druggist at Park Hill, and had known Silas, or, as he is commonly called,"Tut," Meigs for several years; that the party were all sitting around a lantern playing cards when the defendants appeared masked and with guns in their hands. He spoke to Meigs and said, "Come on up, 'Tut,' and sit down, and be peaceable;" and Meigs stepped up and punched him in the back with his pistol, and took his pocketbook from him, and then searched and robbed the other boys.

For the defense Boone Meigs testified that he lived with his father about a mile and a quarter from the old Seminary, and the evening of the robbery when he went to bed about 8 o'clock his brother Silas was sitting on the porch; that he did not know when Silas went to bed, but the next morning about 2 o'clock the sheriff appeared and woke him up, and Silas was in the bed on the porch with him. Submit Wicket testified that Silas Meigs was her half-brother; that she was at her father's

dict and judgment of conviction, and that no! Silas go to bed about two hours after her brother Boone had gone to bed. The defendant did not testify.

> The errors assigned are that the verdict and judgment were contrary to both the law and the evidence of the case: that the court erred in denying defendant's motion to withdraw his plea of not guilty, and to file in lieu thereof a demurrer to the information: that the court erred in denying the defendant's motion for a new trial.

> [1] No briefs have been filed and no appearance made for oral argument. The case was submitted on the record, under the rule applicable in felony convictions that where no briefs are filed or oral argument made the court will examine the information, the instructions given, the judgment and sentence, and if no fundamental error is apparent. will affirm the judgment.

> [2] We have carefully examined the record and find the information sufficient, and the charge of the court, to which no specific or general objection was made or exception taken, was full and adequate to the proper instruction of the jury upon the law of the case. The evidence of the defendant's guilt is conclusive. Upon a review of the entire record, we are unable to find any serious or substantial error. The judgment of the lower court is therefore affirmed.

ARMSTRONG and MATSON, JJ., concur.

VAUGHAN v. STATE. (No. A-2941.) (Criminal Court of Appeals of Oklahoma. May 25, 1918.)

(Syllabus by Editorial Staff.)

1. Intoxicating Liquors == 236(11) - Un-LAWFUL SALE-SUFFICIENCY OF EVIDENCE. In a prosecution for an unlawful sale of intoxicating liquor, evidence held to sustain a

2. CRIMINAL LAW &=1159(2)—APPEAL—CONVICTION—SUFFICIENCY OF EVIDENCE.

Evidence will not be held to be insufficient to support a judgment of conviction, where there is any reliable evidence on which jury might have reasonably concluded that defendant was guilty, as the court may not substitute its judg-ment on questions of fact for that of the jury.

Appeal from County Court, Atoka County: W. M. Rainey, Judge.

J. H. Vaughan was convicted of the crime of selling intoxicating liquor, and sentenced to pay a fine of \$50 and to serve 30 days in jail, and appeals. Judgment affirmed.

Jones & McCasland, of Atoka, for plaintiff in error. S. P. Freeling, Atty. Gen., and R. McMillan, Asst. Atty. Gen., for the State.

PER CURIAM. But one question is presented by counsel for plaintiff in error as a reason for the reversal of this judgment. to wit, that the evidence is insufficient to place on the night of the robbery, and heard sustain same. The entire evidence is from

conviction.

The defendant did not testify, nor did he offer any witnesses in his behalf.

[1] In substance, the state's witnesses testified to the effect that in the month of February, 1916, they had collected at the residence of Robert Weathers, the son-in-law of plaintiff in error, Vaughan, in Atoka county, Okl.; that Weathers was in possession of a barrel of Choctaw beer, which was intoxicating, and that several parties drank three or four gallons of this beer on that occasion. All of the parties testified that Vaughan was given a sum of money, either \$1 or \$2 for the amount of beer drank on that occasion, and that Weathers drew the same from the keg. The parties testified that they did not know who owned the beer; that nobody claimed it; but the evidence showed that both Weathers and Vaughan, who were jointly charged with making the sale, were in active control of this beer, and together were peddling same. There is no disputing the fact that there was a sale of intoxicating liquor, called Choctaw beer, on that occasion, and that the defendant, Vaughan, was actively participating in such sale together with his son-inlaw, Weathers. This evidence stands undisputed and undenied, and is amply sufficient to sustain this verdict and judgment of conviction.

[2] Under the repeated holdings of this court, the evidence will not be held to be insufficient to support a judgment of conviction, where there is any reliable evidence from which the jury might have reasonably concluded that the defendant was guilty. court is not at liberty to substitute its judgment on questions of fact for that of juries in this state.

The judgment is affirmed.

BRYCE v. STATE (No. A-2344.) (Criminal Court of Appeals of Oklahoma. May 18. 1918.)

(Syllabus by the Court.)

1. CRIMINAL LAW \$== 1084 APPEAL SUPER-SEDEAS BOND.

Where a person is convicted of crime. and perfects an appeal to the Criminal Court of Appeals, he is not entitled to give a supersedeas bond, and leave the jurisdiction without proper orders permitting him to do so.

2. CRIMINAL LAW \$\infty\$1131(5) - APPEAL - BREACH OF SUPERSEDEAS BOND - DISPOSI-TION OF CASE.

When a person who has been convicted of a crime appeals and gives bond to stay the execution of the sentence during the pendency of the appeal, and violates the conditions of his bond by leaving the state without leave of court, it is within the discretion of the court whether it will proceed to a decision of the cause, or dismiss the appeal.

Appeal from District Court, Cleveland County; R. McMillan, Judge.

E. R. Bryce (Brice) was convicted of the 5995, Revised Laws 1910, as follows:

witnesses who were produced by the state | crime of obtaining property under false pretenses, and he appeals. Appeal dismissed.

> Prulett & Sniggs, of Oklahoma City, for plaintiff in error. S. P. Freeling, Atty. Gen., for the State.

MATSON, J. Plaintiff in error was convicted in the district court of Cleveland county of the crime of obtaining property under false pretenses, and was sentenced to serve a term of three years in the state penitentiary. Appeal was taken from said judgment of conviction to this court, which was lodged in this court on the 1st day of October, 1914, and subsequently submitted for decision. After the submission of said cause, and while same was pending for decision, the Attorney General filed a motion to dismiss the appeal, which is as follows:

"Comes S. P. Freeling, Attorney General for the state of Oklahoma, and moves the court to dismiss the appeal in the above styled and mentioned case, and for reason for so doing says: Said E. R. Brice was convicted in the district court of Cleveland county, Okl., and the verdict and judgment was appealed to this court October 1, 1914. Since that time said Brice has been out of the court been out of the custody of the sheriff of that county, and on bond. Your Attorney General county, and on bond. Your Attorney General has learned that the said Brice (who sometimes spells his name Bryce and sometimes Brice), during the existence of said bond, and during November, and February of 1917, and 1918, has November, and February of 1917, and 1918, has left the jurisdiction of the state of Oklahoma, and put himself under the jurisdiction of the courts of Texas, another and a different state. More than that, on both dates he was engaged in the violation of the law of each of said states. Thus, this court lost jurisdiction over said Brice, and his hondsmen in this state last jurisdiction. and his bondsmen in this state lost jurisdiction of his person, and he himself voluntarily changon his person, and he himself voluntarily changed the whole relation of all said parties by going out of the state of Oklahoma into another state. As evidence of this change, your Attorney General files the affidavit of J. D. Key, sheriff of Wilbarger county, Texas, marked and filed as Exhibit A hereto, and the affidavit of J. M. Edwards a constable of said country in Texas. M. Edwards, a constable of said county in Texas, showing the absence of said Brice from the state of Oklahoma, and of his presence in Texas, in open violation of the laws of both states, during the pendency of said bond. Wherefore, your Attorney General prays that said cause be dismissed. The affidavit of said Edwards is marked as Exhibit B hereto, and both said exhibits are made a part of this petition. are made a part of this petition.
"S. P. Freeling, Atty. Gen."

This motion is supported by the affidavits of one J. D. Key, the sheriff of Wilbarger county, Tex., and one J. M. Edwards, constable of precinct No. 5 of Wilbarger county, Tex., which fully sustain all of the allegations contained in the motion to dismiss, and in addition show that this plaintiff in error has left the state of Oklahoma without leave of this court during the pendency of this appeal; that he has repeatedly since the pending of this appeal not only left the jurisdiction of this court in violation of his supersedeas bond, but that he has done so for the purpose of enabling him to violate the prohibitory liquor laws of this state. The conditions of his appeal bond are provided by section

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"If an appeal is taken and the appeal bond given as provided in the preceding section, said bond shall be conditioned that the defendant will appear, submit to and perform any judgment rendered by the Criminal Court of Appeals or the court in which the original judgment was rendered in the further progress of the cause, and will not depart without leave of the court. If no bond be given the appeal shall not stay execution of the judgment, except in capital cases or where otherwise specifically provided by law. If pending the appeal the bond be given a further execution of the judgment shall be stayed and the defendant released pending the determination of the appeal. In all cases where the sentence is for a crime not bailable the defendant shall be confined in the penitentiary pending the appeal."

The motion to dismiss the appeal was set for hearing on the 11th day of April, 1918, at which time counsel for plaintiff in error filed a reply to said motion, but admits therein that since the taking of the appeal he has left the jurisdiction of this court without obtaining any proper order permitting him to do so, but says that his absence was only temporary and for business reasons.

[1, 2] In the case of Lot Ravenscraft v. State, 12 Okl. Cr. 283, 155 Pac. 198, this court held:

"When a person is convicted of crime and perfects an appeal to this court, he is not entitled to give a supersedeas bond and leave the jurisdiction without proper orders permitting him to do so."

Under section 5995, supra, and as held in Ravenscraft v. State, it is a condition of plaintiff in error's right to appeal that bond must be given as provided in said section, and that the judgment of conviction shall not be superseded except upon the conditions named therein. Therefore, where a supersedeas bond is given, it is strictly upon the condition that the plaintiff in error shall fully observe the conditions named in said bond, and where it is shown, as in this case, that the plaintiff in error, after perfecting his appeal, without permission or proper order of the court first obtained, left the jurisdiction of the court, thus voluntarily violating one of the conditions of his supersedeas bond, he thereby waived the right that was given him to have the judgment of conviction superseded, and it then became discretionary with this court to proceed to a determination of the cause on its merits or to dismiss said appeal for that reason.

If persons who are convicted of crime within this state leave the jurisdiction of this court after taking an appeal without its permission or order, even for a short period of time, they may, with equal right and propriety, leave the court's jurisdiction during the entire pendency of the appeal, and the court, under such circumstances, would be practically helpless to enforce its judgment against them. Persons convicted of crime in courts of record within this state have a right to appeal to this court, but such appeals must be taken in the manner and under the conditions provided by law. The right to

"If an appeal is taken and the appeal bond even as provided in the preceding section, said and shall be conditioned that the defendant will prepared by the Criminal Court of Appeals or the court in which the original judgment was supported by the Criminal Court of Appeals or the court in which the original judgment was criminal statutes of this state.

Where, on motion to dismiss the appeal, a showing is made by the state such as in this case, this court, in the exercise of its discretion, may dismiss the same.

For the reasons above stated, the appeal is dismissed. Mandate forthwith.

DOYLE, P. J., and ARMSTRONG, J., concur.

HOLDEN v. STATE. (No. A-3266.) (Criminal Court of Appeals of Oklahoma. May 18, 1918.)

(Syllabus by the Court.)

Criminal Law (2000) 1131(4) — Supersedean Bond—Breach—Dismissal of Appeal.

When a person who has been convicted of a crime appeals and gives bond to stay the execution of the sentence during the pendency of the appeal, violates the condition of his bond by leaving the state without leave of court, it is within the discretion of the court whether it will proceed to a decision of the cause, or dismiss the appeal.

Appeal from County Court, Oklahoma County; William H. Zwick, Judge.

Charles H. Holden was convicted of a violation of the prohibitory law, and he appeals. Appeal dismissed.

Prulett, Sniggs & Patterson, of Oklahoma City, for plaintiff in error. S. P. Freeling, Atty. Gen., and R. McMillan, Asst. Atty. Gen., for the State.

DOYLE, P. J. The plaintiff in error, Charles H. Holden, and Bert Shadrick were jointly charged, tried, and convicted under an information charging that they unlawfully transported 60 half pints of whisky, and their punishment assessed at a fine of \$250, and three months in the county jail. From the judgments rendered in accordance with the verdicts, an appeal was perfected by filing in this court on February 26, 1918, a petition in error with case-made.

The Attorney General has filed a motion to dismiss the appeal of plaintiff in error, Holden, on the ground that since the appeal was taken the said Holden at various times left Oklahoma without leave of court, and went to Texas for the purpose of violating the prohibition law of both states. In reply to the motion to dismiss his counsel filed affidavit of Charles H. Holden, which omitting merely formal parts, is as follows:

e its judgment ted of crime in state have a state have a ut such appeals and under the The right to "Plaintiff in error admits that since the making of appeal bond in this cause he has been out of the state of Oklahoma and sojourned to the state of Texas on business trips of a few hours duration, but that at no time has he removed from the state of Oklahoma and violated the prohibition laws of the state of Texas.

Plaintiff in error says that he is now confined in the county jail at Mangum, Okl., upon order of the district judge of Jackson county, Okl., wherein he is charged with murder, and that he is also being held in jail because of failure to give an appeal bond, wherein he was sentenced at Norman, Okl., to four years' imprisonment in the state penitentiary. Plaintiff in error says that he has at no time been a fugitive from justice, and has at no time withdrawn himself from the and has at no time withdrawn himself from the jurisdiction of this court in order to defeat the enforcement of any judgment which might be rendered against him; that he is now within the jurisdiction of this court, and is willing to ande by the terms of his bond given in Lins cause; that J. M. Edwards and J. D. key are witnesses for the state, wherein the plaintiff in error is charged with murder in Jackson county, Okl., and that said parties who made the affidavits are prejudiced against him, and have made said affi-davits in order that if the plaintiff in error is granted bond upon said charge of murder, he would not be liberated from custody because of having to serve the original sentence imposed in this case if the appeal is dismissed, and thereby keep plaintiff in error in custody, and prevent him as far as possible from preparing his case for trial upon the charge of murder."

Under the Constitution and the Code of Criminal Procedure of our state, an appeal may be taken to this court by any person convicted of a crime to have the judgment reversed as a matter of right, and under the Constitution the Legislature may prescribe the mode in which the right may be exercised. Our Code provides that if the crime of which the defendant is convicted be a bailable one, the defendant may give bail, and the bond shall stay execution of the sentence during the pendency of the appeal. One of the conditions of the bond as prescribed by the statute is:

"That the defendant will appear, submit to and perform any judgment rendered by the Criminal Court of Appeals or the court in which the original judgment was rendered in the further progress of the cause, and will not depart without leave of court." Section 5995, Rev.

The proof on the part of the state in support of the motion to dismiss shows that plaintiff in error had violated the conditions of his bond by making frequent trips to Texas for the purpose of transporting intoxicating liquors from Texas back to this state. The plaintiff in error's affidavit also shows he had violated the conditions of his bond. And see Ex parte Holden, 172 Pac. 978, and Bryce v. State, 172 Pac. 976.

While there is no express provision of the statute authorizing the dismissal of an appeal on the grounds stated, yet, in the absence of a statute to the contrary, we think it is a matter within the discretion of the

the determination of his appeal, to violate the conditions of his bond with impunity, and where it is conclusively shown, as in this case, that the plaintiff in error has been persistent in violating the conditions of his bond, his appeal should be dismissed. The appeal herein of Charles B. Holden is therefore dismissed.

ARMSTRONG and MATSON, JJ., concur.

BRICE v. STATE. (No. A-3247.) (Criminal Court of Appeals of Oklahoma. May 18, 1918.)

Appeal from County Court, Oklahoma County; William H. Zwick, Judge.
E. R. Brice was convicted of a violation of the prohibition liquor law, and he appeals. Appeal dismissed.

Twyford, Smith & Crowe, of Oklahoma City, for plaintiff in error. R. McMillan, Asst. Atty. Gen., for the State.

PER CURIAM. Plaintiff in error, E. R. Brice, was convicted in the county court of Oklahoma county on a charge that he did have possession of eight quarts of whisky, with the unlawful intent to sell the same. In pursuance unlawful intent to sell the same. In pursuance of the verdict the court sentenced him to be confined in the county jail for 30 days, and to pay a fine of \$50. From the judgment an appeal was taken by filing in this court on January 21,

1918, a petition in error with case-made.
On March 20, 1918, a motion to dismiss the appeal was filed by the Attorney General for the reason that since the appeal was taken the said Brice at various times went to Texas for the purpose of violating the prohibition laws of both states. In support of said motion the proof is the same, as in the case of E. R. Bryce v. State (No. A-2344) 172 Pac. 976, this day decided.

For the reason stated in the opinion in the Bryce Case, supra, we are of the opinion that the plaintiff in error has waived the right to have his appeal in this case considered and determined. The appeal herein is therefore dismissed. Mandate forthwith.

HOLDEN v. STATE. (No. A-3049.)

(Criminal Court of Appeals of Oklahoma. May 18, 1918.)

Appeal from County Court, Oklahoma Coun-William H. Zwick, Judge. ty; William H. Zwick, Judge.
C. H. Holden was convicted of a violation of the prohibitory law, and he appeals. Appeal dismissed.

Twyford & Smith, of Oklahoma City, for plaintiff in error. S. P. Freeling, Atty. Gen., and R. McMillan, Asst. Atty. Gen., for the State.

court whether, under the facts and circumstances admitted, we will consider and determine the appeal. The plaintiff in error each time he left the state was in the attitude of a fugitive from justice, and thereby waived the right to have his conviction reviewed. We do not think it would subserve the ends of justice to permit a person convicted of crime, enlarged on bond pending PER CURIAM. Plaintiff in error, C. H.

this court on June 14, 1917, a petition in error

this court on June 14, 1917, a petition in error with case-made.

On March 28, 1918, a motion to dismiss the appeal was filed by the Attorney General for the reason that since the appeal was taken the said Holden has been out of the state of Oklahoma and in the state of Texas violating the prohibition laws of both states. In support of said motion the affidavits of J. D. Key, sheriff of Wilbarger county, Tex., and of J. M. Edwards, constable in said county, and made exhibits in the case of E. R. Bryce v. State (No. A-2344) 172 Pac. 976, are referred to.

Upon an examination of the motion to dismiss and the proof supporting the same, to which no response has been filed, and for the reason stated in the opinion in the Bryce Case, supra, we are of the opinion that plaintiff in error has waived the right to have his appeal in this case considered and determined. The oppeal herein is therefore dismissed. Mandate

appeal herein is therefore dismissed. Mandate

forthwith.

# In re JONES' ESTATE. (L. A. 5569.)

(Supreme Court of California. May 17, 1918.)

In Bank. Appeal from Superior Court, San Diego County; S. M. Marsh, Judge. Proceeding in the matter of the estate of William H. Jones Deceased. From an order adverse to it, the Chicago Boys' Club, Incorporated, appeals. Reversed.

James S. Bennett, of Los Angeles, for Chicago Boys' Club. Robert A. Waring, of Sacramento, and J. W. Carrigan and Edwin H. Pennock, both of Los Angeles, for state controller.

PER CURIAM. In accord with the stipulation of the parties to this appeal, on the authority of the Estate of Fiske, Deceased (I. A. No. 5433) 172 Pac. 390, decided April 12, 1918, the order appealed from, in so far as it in any way affects or relates to the Chicago Boys' Club (a corporation), the sole appellant, is reversed.

## PATTEN & DAVIES LUMBER CO. v. DUR-FLINGER et al. (Civ. 2551.)

(District Court of Appeal, Second District, California. April 1, 1918.)

Appeal from Superior Court, Los. Angeles County; Leslie R. Hewitt, Judge.
Action by the Patten & Davies Lumber Company, a corporation, against William Durflinger, Charles T. Inman, and another. From the judgment rendered, Inman appeals, and plaintiff moves to dismiss the appeal. Motion denied.

H. C. Millsap, of Los Angeles, for appellant. Behymer & Craig, of Los Angeles, for respond-

PER CURIAM. Motion to dismiss the appeal of Charles T. Inman, on the ground of

failure to file transcript in this court within the time required by the rules, having been pre-sented and submitted heretofore, together with the application of said Inman to be relieved from his default in that particular because of

excusable neglect:

It is ordered that the transcript on appeal be filed. The motion to dismiss the appeal of said Inman is denied.

## Ex parte CARRERA. (Cr. 739.)

(District Court of Appeal, First District, California. March 25, 1918.)

Petition by James Carrera for writ of habeas corpus. Petition denied.

Edwin V. McKenzie and Hyman Levin, both of San Francisco, for petitioner. U. S. Webb, Atty. Gen., and Frank L. Guerena, Deputy Atty. Gen., for respondent.

PER CURIAM. Pursuant to the case of Exparte Lee, on habeas corpus, 171 Pac. 958, it is ordered that the warden of the prison at San Quentin deliver the petitioner to the sheriff of Los Angeles county, to whose custody he is remanded, and that the superior court of that county take such steps as may be necessary to bring the petitioner, James Carrera, before it, and pronounce judgment upon his conviction heretofore had.

## BECKER v. EMERSON-BRANTINGHAM-IMPLEMENT CO. (No. 9399.)

(Supreme Court of Colorado. June 3, 1918.)

Error to District Court, Logan County; H. P. Burke, Judge.
Action by J. C. Becker against the Emerson-Brantingham Implement Company, a corporation. Judgment for defendant, and plaintiff Supersedeas denied, and judgbrings error. ment affirmed.

McConley & McConley, of Sterling, for plaintiff in error. Frank L. Grant, of Denver, for defendant in error.

PER CURIAM. This action was brought by the plaintiff in error in the district court of Logan county to have set aside and held for naught a judgment rendered against him in the district court of the city and county of Denver, upon a promissory note and to recover \$3,000, alleged damages growing out of the transaction in which the note was given. Upon trial to the court, the action was dismissed at the cost of the defendant

the defendant.

Perceiving no prejudicial error, the application for supersedeas will be denied, and the judgment affirmed.

Supersedeas denied. Judgment affirmed.

Ex parte FOSTER. (No. A-3291.) (Criminal Court of Appeals of Oklahoma. April 11, 1918.)

Application of Fred Foster for writ of habeas corpus to be let to bail. Bail denied, and petition dismissed.

Park Wyatt, of Tecumseh, for petitioner. R. McMillan, Asst. Atty. Gen., and C. G. Pitman, Co. Atty., of Tecumseh, for respondent.

CURIAM. The petitioner, Fred Foster, filed his application in this court for a writ of habeas corpus to be let to bail, and discloses the fact that he is imprisoned in the county jail of Pottawatomie county charged with the murder of John Villines on the 9th day of February, 1918.

Stipulations were filed which show that the state was ready to try the cause on the 4th day of March, 1918, but that it was continued at the instance of the defendant on the ground that he was not ready. In support of the application for bail here, a record of the proceedings had before the trial court on a similar application is offered, supplemented by the stipulations referred to, which stipulations do not contain any new statement of facts.

After a careful examination of the record we

conclude that the petitioner has not met the burden placed on him by law, and therefore is not entitled to be let to bail as prayed. This cause is yet to be tried on its merits. An opinion, therefore, discussing at length the issues raised and the facts disclosed, will not be

Bail is denied, and the petition is dismissed.

## DE FOE v. DE FOE.

May 21, 1918.) (Supreme Court of Oregon.

In Banc. Appeal from Circuit Court, Mal-heur County; Dalton Biggs, Judge. Suit for divorce by Ina L. De Foe against Virn J. De Foe. Decree for plaintiff, and de-fendant appeals. Affirmed.

fendant appeals. Affirmed See, also, 169 Pac. 128.

Wells W. Wood, of Ontario (McCulloch & Wood, of Ontario, on the brief), for appellant. P. J. Gallagher, of Ontario (W. H. Brooke, of Ontario, on the brief), for respondent.

PER CURIAM. The record contains a recital of the gross misconduct of the defendant, which it would serve no good purpose to spread upon the pages of the Reports. The delinquency of the defendant is admitted, and the de-fense is that it has been expressly forgiven and condoned. We are satisfied that there has been no such forgiveness or condonation as is contemplated by our statute.

The decree was correct, and should be af-

ALLEN v. NARVER et al. (L. A. 4246.) (Supreme Court of California. April 25, 1918.)

1. MINES AND MINERALS \$= 78(1)-OIL LEAS-FAILURE TO DRILL—REMEDY OF LESSOR. Under a lease for extracting oil on royalty,

Under a lease for extracting oil on royalty, binding the lessees to commence operations by a certain day, and providing that if they fail to do so they will pay lessor \$100 per month during continuance of default, the further provision that failure of the lessees to comply with conditions of the lesse or to diligently prosecute the west of defling and producing oil will see the work of drilling and producing oil will ren-der the lease null and void and of no effect, does not render the lease a mere option on the part and producing oil, would render the lease

of the lessees, and reduce the lessor's remedy, for lessees' failure to commence operations, to entering and terminating the lease, but gives him an option to do so, and does not prevent him allowing the lease to continue and recovering on the covenant to pay rental during default.

2. Damages \$\infty 79(5)\to Liquidated Damages of Penalty\to Oil Lease.

Provision of an oil lease for extracting oil on royalty that if the lessees fail to commence operations by a certain day they will pay the lessor \$100 per month during continuance of the default, is for liquidated damages, and not

Department 2. Appeal from Superior Court, Los Angeles County: Willis I. Morrison. Judge.

Action by F. H. Allen against D. C. Narver and others. From an adverse judgment and order, defendants appeal. Affirmed.

A. A. Kidder, Jr., and Schweitzer & Hutton, all of Los Angeles, for appellants. Kimball Fletcher, of Los Angeles, for respondent.

VICTOR E. SHAW, Judge pro tem. question presented on this appeal from a judgment in favor of plaintiff and an order of court denying defendants' motion for a new trial involves the interpretation of a lease made by plaintiff to defendants of certain lands for use in extracting oil and other mineral substances therefrom, the express consideration therefor being a royalty of one-eighth of the mineral so extracted.

[1] The provision of the lease upon which the action is based is as follows:

"It is further expressly agreed and understood "It is further expressly agreed and understood that in the event that the second parties [defendants] shall fail to commence operations by the 4th day of July, 1911, under the terms of this lease, then and in that event the parties of the second part [defendants] will pay the party of the first part [plaintiff] one hundred (\$100) dollars per month for each and every month in which they shall make such default in the commencement of operations hereunder." mencement of operations hereunder.

The complaint alleged and the court found that defendants and each of them wholly failed and refused to commence operations on or before July 4, 1911, and from thence to March 4, 1913, continuously failed and refused so to commence operations in accordance with their covenant so to do, and likewise refused to pay the \$100 per month or any part thereof during said period of default. No attack is made upon this finding: indeed, it is conceded that defendants never at any time complied or attempted to comply with their agreement in this respect. Their contention is that, notwithstanding their express covenant, the lease constitutes merely an option on their part, and that plaintiff's sole remedy for breach of the agreement was to enter upon the property and terminate the lease. It is quite true that by another provision of the lease it was provided that a failure on the part of the lessees to comply with the conditions thereof, or their failure to diligently prosecute the work of drilling

null and void and of no effect. This provision constitutes an option given to the lessor, which, in lieu of insisting upon the payment of the \$100 per month as provided in that portion of the lease hereinbefore quoted, he might or might not exercise at his elec-Defendants, having agreed to commence operations before July 4, 1911, could not insist that their failure to perform their covenants should be equivalent to performance. As said by the court in discussing a like contention in Woodland Oil Co. v. Crawford, 55 Ohio St. 161, 44 N. E. 1093, 34 L. R. A. 62, where a great number of cases in support of the proposition are cited:

"A promise to drill a well cannot be satisfied by a failure to drill such well. The proper construction to be placed upon such an agreement is, that upon failure of the lease to drill a well, or pay the rental, \* \* the lessor may elect to put an end to the lease, \* \* \* or he may elect to have the lease continue in force to the end of the term, and enforce \* \* the payend of the term, and enforce \* \* \* th. ment of rentals. as provided in the lease."

So here, under the terms of defendants' express covenant to pay \$100 per month for each and every month in which they shall make default in the commencement of operations, the lessor may, instead of exercising the right which he has to terminate the lease, insist upon the payment of the sum stipulated to be paid for failure to comply with the covenant to commence operations and drill one well each year during the term of the lease. In support of their contention appellants have cited a number of cases, chief among which are those of Risch v. Burch, 175 Ind. 621, 95 N. E. 123, and Glasgow v. Chartiers Oil Co., 152 Pa. 48, 25 Atl. 232, an examination of which shows there was a lack of any covenant on the part of the lessees in the leases considered to do the work specified or pay anything as rental or damage for failure to do it. They involve contracts containing provisions to the effect that in the event of failure on the part of the lessees to develop the land or pay rental, the lessor might terminate the lease. There being no covenant on the part of the lessee, this was the lessor's only remedy. In the instant case, however, the lease contains an express covenant on the part of the lessees to the effect that in case they fail to commence operations by July 4, 1911, they will pay the \$100 per month for each month during which they shall make default therein.

[2] It is next insisted that the covenant to pay the \$100 per month must be regarded as a penalty, and not as liquidated damages. and since there was no evidence introduced showing the amount of damages which plaintiff had sustained, no recovery can be had. This contention is fully answered by the opinion in the case of Escondido Oil & Development Co. v. Glaser, 144 Cal. 494, 77 Pac. 1040, where the court, in discussing a like claim made therein, said:

"Fixing the amount for damages sustained in "Fixing the amount for damages sustained in contracts for digging oil wells very similar to the one here involved was upheld in Gibson v. Oliver, 158 Pa. St. 277 [27 Atl. 961], and the cases there cited. And it would seem that damages for breaches of contracts touching future interests in oil wells of unknown value are of such remote and speculative character as to bring them peculiarly within the rule that the parties should have the right to fix them by mutual agreement."

From the nature of the case it would be impossible to calculate with any degree of certainty the amount of damage sustained by plaintiff by reason of the breach of the covenant made by defendants. In the case of McComber v. Kellerman, 162 Cal. 749, 124 Pac. 431, the court, considering a like contention, said:

"It was clearly in the nature of rental for the premises or compensation for the right, and not an attempt to fix a penalty or liquidated dam-ages. But if it were considered as liquidated damages, the complaint and proof are sufficient to support the judgment. The nature of the case and the extreme difficulty of fixing damages arising from the breach of such a contract are fully shown by the lease itself."

There is no merit in the contention that the evidence is insufficient to sustain the finding as to the assignment made by the original lessor in said lease to the plaintiff bringing this action.

The judgment and order are affirmed.

We concur: MELVIN, J.; WILBUR, J.

CLARKIN v. MORRIS. (L. A. 4126.) (Supreme Court of California. April 11, 1918. On Hearing in Bank, May 10, 1918.)

1. JUDGMENT 4-419-EQUITABLE RELIEF-AFFIDAVIT FOR SERVICE BY PUBLICATION — SUFFICIENCY.

An affidavit for publication under Code Civ. Proc. \$ 412, on the ground that defendant could not after due diligence be found within the not arrer due dingence be found within the state, held sufficient to sustain order for publication of summons when attacked by action to set aside judgment; it presenting facts tending to show the exercise of diligence and that defendant could not be found.

2. Process \$\infty\$ 96(4)—Affidavit for Service by Publication—Sufficiency.

Such affidavit was sufficient, although it did not declare expressly that affiant did not himself know the whereabouts of defendant, where such fact is implied from the language of the affida-vit and could reasonably be inferred from state-ment therein that affiant was ignorant of the whereabouts of defendant.

On Hearing in Bank.

3. TRIAL €==396(4) — EVIDENCE TO SUPPORT FINDINGS.

Although the court found the existence of a state of facts warranting setting aside judgment for fraud, where plaintiff failed to offer any evidence in support of certain material allegations for relief on ground of fraud, decree for plaintiff court is a support of certain material allegations. tiff cannot be sustained.

Department 1. Appeal from Superior Court, Los Angeles County; Chas. Wellborn, Judge.

Action by Gladys M. Clarkin against J. E.

Morris. Judgment for plaintiff, and defendant appeals. Reversed.

Hancock & Lawrence and S. M. Johnstone. all of Los Angeles, for appellant. Waldo M. York, of Los Angeles, for respondent.

SHAW, J. In this action plaintiff sued to set aside a judgment against her in favor of J. E. Morals made on October 5, 1911. The grounds assigned in her complaint for setting aside said judgment were that the same was rendered upon service by publication only and that the order for the publication of summons was procured without filing any affidavit showing that the said Gladys M. Clarkin, defendant in said action, resided out of the state of California, or had departed from the state of California, or could not, after due diligence, be found within the state of California, or that she had concealed herself to avoid the service of summons, and that said Morris, plaintiff in said action, falsely represented to the court that such affidavit had been made and thereby obtained said judgment. The defendant alleged that he had obtained the order for publication by means of an affidavit presented to the court at the time the same was obtained, and that the publication was made in pursuance of the order made upon such affidavit, and he denied that he had fraudulently represented to the court at the time the judgment was given that the order for the publication of summons had been procured otherwise than upon said affidavit. The affidavit itself is referred to and made a part of the answer, and it was also introduced in evidence. The only question presented in the case is the sufficiency of the affidavit to sustain the order for the publication of summons.

[1] The affidavit purported to state a case for the publication of summons on the ground that defendant could not after due diligence be found within the state, as provided in section 412 of the Code of Civil Procedure. The facts relating to this subject as set forth in the affidavit are as follows: That defendant, Gladys M. Clarkin, is a necessary party and cannot be found within the state of California; that she had not filed or recorded any certificate of residence as provided in section 1163 of the Civil Code; that on October 22, 1889, she resided in the city of Los Angeles, state of California: that since the suit was filed, which was four days prior to the making of the affidavit, the affiant had made diligent search and inquiry for said defendant; that the summons had been given to the sheriff with instructions to serve the same on said defendant, and that his return thereon had stated that he could not find the said defendant in the county of Los Angeles; that on October 25, 1889, one Owen E. Clarkin was appointed guardian of said Gladys M. Clarkin, who was then a mi-

county: that in that proceeding the guardian had filed a bond with H. H. Yonkin and E. L. McWilliams as sureties, and had caused J. C. Wilmon, William Mead, and A. T. Trimble to be appointed appraisers of said minor's property; that on December 4, 1889, said Wilmon and Trimble returned and filed an inventory and appraisement thereof and that W. A. Ryan was attorney for the said guardian: that affiant had made inquiries of Yonkin, Wilmon, Trimble, and Mead as to the whereabouts of said Gladys M. Clarkin; that W. A. Ryan, the attorney aforesaid, was then deceased, and E. L. McWilliams, the other surety upon the bond, could not be found within the city of Los Angeles; that said persons are persons who would be most likely to know the whereabouts of said Gladys M. Clarkin; that affiant had also made inquiries of many other persons from whom he could expect to obtain information as to the whereabouts of said defendant and had examined the city directories and that from said search and said inquiries and the exercise of said diligence he had been unable to find said defendant in the state of California; and therefore he declared that by the exercise of diligent search the defendant could not be found within the state of California. The court in its findings in the present case states that the affidavit does not disclose what answers were returned to his inquiries by the parties of whom the inquiries were made, nor that any inquiry had been made of Owen E. Clarkin, the former guardian of Gladys M. Clarkin. Its conclusion was that the affidavit did not show sufficient diligence, and thereupon judgment was given in favor of the defendant canceling the previous judgment.

The rule regarding the sufficiency of affidavits for publication when attacked collaterally is clearly set forth in the language of Mr. Justice Harrison in Rue v. Quinn, 137 Cal. 651, 66 Pac. 216, 70 Pac. 732, as follows:

"If the facts set forth in the affidavit have a legal tendency to show the exercise of diligence on behalf of the plaintiff in seeking to find the defendant within the state, and that after the exercise of such diligence he cannot be found, the decision of the judge that the affidavit shows the same to his satisfaction is to be regarded with the same effect as is his decision upon any other matter of fact submitted to his judicial determination.

We are of the opinion that the affidavit in the case of Morris v. Clarkin under consideration here presented facts which did have a legal tendency to show the exercise of diligence on behalf of the plaintiff in seeking to find the defendant, and also to show that the defendant could not be found after such diligence. In the case of Rue v. Quinn, aforesaid, the affidavit in controversy stated the . return of the sheriff similar to that in the present case; that the affiant himself did not know the residence of the defendant; nor, by the superior court of Los Angeles that after the summons was issued he had

made due and diligent search and inquiry for the findings in this regard, and the appellant the defendant by inquiring of each of several prominent county officers named, and had also made inquiry of all other persons from whom he could expect to obtain information as to the whereabouts of said defendants. The affidavit in the present case certainly shows as much diligence and as strenuous an attempt to discover the whereabouts of defendant as did that involved in Rue v.

[2] The only point stated in that case which is not stated in the present case is that the present affidavit does not declare expressly, as that one did, that the affiant himself did not know the residence of said defendant. This fact, however, is implied by the language of the affidavit in almost every sentence, and it would be a reasonable inference from the statements therein that the affiant himself was ignorant of the whereabouts of Gladys M. Clarkin. It is obvious that the persons of whom the defendant in the present case inquired would be those who would be considered most likely to know the facts sought to be discovered, much more so than those of whom inquiry was made in Rue v. Quinn. Unless we can say that an affidavit is insufficient in every case where it does not expressly state that the affiant himself does not know the whereabouts of defendant, we must consider the present affidavit sufficient. We are not willing to go to that extent in indulging collateral attacks upon judgments regularly rendered in pursuance of law. With respect to the guardian of whom inquiry was not made there is no claim that he was living or could have been found at the time. This being the only question presented, and the one which is decisive of the case, it follows that the court erred in rendering the judgment for the plaintiff.

The judgment is reversed.

SLOSS, J.; RICHARDS, We concur: Judge pro tem.

# On Hearing in Bank.

PER CURIAM. [3] The respondent urges. in her petition for a hearing in bank, that the department failed to pass upon her contention that the former judgment against her had been obtained by fraud. It is true that the complaint alleged, and the court found, the existence of a state of facts which, under the rule declared in Dunlap v. Steere, 92 Cal. 344, 28 Pac. 563, 16 L. R. A. 361, 27 Am. St. Rep. 143, and similar cases, would have warranted equitable relief against such judgment. But the appellant failed at the trial to offer any evidence in support of certain allegations material to her claim for relief on the ground of fraud. The bill of exceptions embodies proper specifications of

made the point in his brief. The judgment in favor of the respondent could not, therefore, have been sustained on any ground.

The petition for hearing in bank is denied.

UNION HOLLYWOOD WATER CO. v. CITY OF LOS ANGELES et al. (L. A. 4061.)

(Supreme Court of California. April 29. 1918. Rehearing Denied May 27, 1918.)

WATERS AND WATER COURSES &= 203(12)—WATER SUPPLY—RATES—VALUATION.
Where meters installed by water company

in new houses and the like which were not revenue producing, and there was nothing to show that they would be in use within the year, they were properly not considered in arriving at valuation for purpose of rate making for the year.

2. WATERS AND WATER COURSES \$\infty 203(12)\$
-WATER SUPPLY-RATES-VALUATION.

In an action involving reasonableness of water rates, where court gave a greater valua-tion to meters for which it gave a water com-pany credit than the water company gave for all the meters in its verified statement, or in its evidence, it cannot complain that the court refused to consider some meters contained in such statement.

8. WATERS AND WATER COURSES \$\iiii 203(12)\$
—WATER RATES—VALUATION.

In action involving reasonableness of water rates, held, under the evidence, that there was no abuse of discretion in not considering an unused emergency plant such an essential part of the system as to justify an increased

4. Appeal and Error \$\oplus\$ 1011(1)—Findings of Fact—Conflicting Evidence.

In an action to restrain enforcement of a city ordinance regulating water rates, valuation of property of water company arrived at on conflicting evidence will not be disturbed on appeal.

5. WATERS AND WATER COURSES \$203(12) WATER SUPPLY-RATES-VALUATION.

In ascertaining the value of property of a water company for the purpose of fixing rates, the court could fix the valuation of the water-bearing land from which percolating water was obtained without considering the val-ue of the water separate from the land, by comparing it with similar water-bearing land in the same locality.

In Bank. Appeal from Superior Court, Los Angeles County; Robert M. Clark, Judge.

Action by the Union Hollywood Water Company to restrain the City of Los Angeles and others from enforcing an ordinance regulating water rates. Judgment for defendants. From an order denying a motion for a new trial, plaintiff appeals. Affirmed.

Haas & Dunnigan and Sheldon Borden, all of Los Angeles, for appellant. Albert Lee Stephens, Charles S. Burnell, E. R. Young, and Wm. P. Mealey, all of Los Angeles, for respondents.

RICHARDS, Judge pro tem. This is an appeal from an order denying the plaintiff's motion for a new trial. The action was one the insufficiency of the evidence to sustain brought to obtain an injunction to restrain

the defendant city of Los Angeles from enforcing a certain ordinance regulating the water rates to be charged by persons, firms, or corporations supplying or distributing water in or to the city of Los Angeles or the inhabitants thereof or to or for the use of vessels in Los Angeles harbor for the year commencing July 1, 1910, and ending June 30, 1911. Plaintiff was one of the corporations coming within the terms and provisions of the ordinance in question. The issue presented before the trial court was whether the provisions of the ordinance, if enforced, would afford the plaintiff a reasonable return upon its investment in the various kinds of properties owned or used by it on July 1, 1910, and which were essential and necessary in its business of distributing water to the inhabitants of Los Angeles during the year in which said regulative ordinance was in force. It is conceded that upon the hearing of the cause the trial court conducted a minute and exhaustive investigation as to the value of the plaintiff's various properties and as to the extent of their necessary use as parts of its operating and distributing system, and that upon these matters in controversy the testimony was much at variance. The appellant insists, however, that as to certain specified matters the findings of the court have no support in the evidence, and that the ordinance generally is unreasonable and confiscatory, and hence void. The first finding which the appellant thus assails is the finding of the trial court to the effect that only 3,172 of the service connections and meters owned by the plaintiff were used or necessary to be used for the distribution and sale of plaintiff's water within the city of Los Angeles. The evidence in this respect showed that the plaintiff was engaged in the distribution of water not only within a certain area within the city of Los Angeles, but also in and to districts without the limits of said city, and that for the purpose of operating its entire system within and without said city it owned and had in use 4,039 service connections and meters, and that of this number there were actually in use within the city of Los Angeles 3,172 of such service connections and meters. The evidence also showed that in addition to this latter number in actual use within said city the plaintiff owned and held 589 meters which were not in actual use at the time the court's valuations were made. These were called dormant meters, and, according to the testimony of the secretary of the plaintiff, most of these dormant meters had been installed in new properties, such as houses which had been built, but not as yet rented or used. The value of these unused meters, according to the valuation placed by the trial court upon those in use, would have amounted at best to a very small proportion of the total valuation of the plaintiff's

valuation, could have effected at most a very small increase in plaintiff's water rates.

[1] It is clear, moreover, that the trial court was not wrong in the exclusion of these 589 meters from its calculation in respect to the value of the plaintiff's working properties. These meters and other connections were idle at the time the valuations were made. They had never as yet come into use as a revenue producing part of the plaintiff's water system within said city. They were installed in advance of the actual necessity for their use, and there was no sufficient showing that they would be used during the year for which the rates were fixed, and the other water users and rate payers of the city should not be charged an additional amount, however small, in the way of a water rate in order to yield a return to plaintiff upon a species of property which was not in actual use as a part of its system, and which was yielding no return to plaintiff prior to the passage or taking effect of said ordinance.

[2] In addition to this, our attention is called to the fact that the trial court, in its fixation of a value upon the 3,172 meters and service connections of the plaintiff in actual use at the time of such valuation, placed a value thereon which is much more than double the valuation which the plaintiff itself placed thereon in the verified statement of its properties attached to its complaint; and our attention has not been called to any evidence in the record increasing this latter valuation. If this be so, then it follows that the court has already allowed the plaintiff a valuation upon this item of its properties far greater than it was entitled to have placed upon it for the purpose of the fixation of a water rate, and it cannot therefore be said that the plaintiff was in any wise prejudiced by any error of the court in failing to include the 589 meters in question in arriving at such valuation.

For these reasons we are unable to say that the trial court abused its discretion in the omission of this item from its valuation of the plaintiff's essential properties for the purpose of determining their total value and of regulating its water rates.

[3] The appellant's next contention is that the court erred in its finding that a portion of the plaintiff's properties, known as the Jefferson street plant, including its lots, wells, and water rights in adjacent acres, were unnecessary and not essential to its distributing system within said city. Prior to the organization of the Union Hollywood Water Company, in the year 1906, the Jefferson street pumping plant had been owned and operated by a corporation known as West Los Angeles Water Company, and was being used to supply water to the western portion of that city lying in its vicinity. Upon the organization of the Union Hollywood Water Company, however, it took over other properties, and, even if added to said the properties of the West Los Angeles Wa-

ter Company, a part of which was this particular plant, and also took over the properties of another corporation known as West Side Water Company, which was at the time engaged in serving water to another section of the western part of said city. After this consolidation of these two corporations had been effected in the name of and under the ownership of the plaintiff herein the latter developed an additional water supply from certain water-bearing lands at Sherman, which rendered unnecessary the further operation of the Jefferson street pumping plant, and in the beginning of the year 1908 the latter was shut down, and so continued to be up to and after the commencement of this action. It is conceded that this was the condition of things at the time of the trial, but the appellant insists that, notwithstanding this fact, its Jefferson street pumping plant was being maintained by it as an emergency plant to be put into use in the event of any interference with its water service from its other sources of supply. There was evidence, however, tending to show that this plant was not at the time connected with the rest of the plaintiff's water system, and that the installation of some two miles of pipe would be required to make such connection. Taking these facts into consideration, the trial court concluded, and we think properly, that the Jefferson street plant, in its state of nonuse and disconnectedness, was not such an essential part of the plaintiff's distributing system as to justify the imposition of an added water rate upon its customers. With the discretion of the trial court to make this finding from the state of the evidence before it, this court will not interfere upon appeal.

[4] The appellant's next contention, to which considerable space is devoted in its opening brief, is that the trial court did not place an adequate valuation upon certain easements and rights of way over private property which were a part of its system for supplying water to the inhabitants of Los Angeles, and that the court, in reaching a basis for the valuation of this class of property, included as unnecessary and nonessential a considerable part of the plaintiff's acquired easements and rights of way. to this latter contention we do not think it is sustained by a fair construction of the finding of the trial court, but that, with certain designated exceptions, such as the socalled Soldiers' Home reservoir, the Jefferson street pumping plant and its adjacent waterbearing acres, the Day tract, etc., the trial court was undertaking to place a valuation upon all of the plaintiff's properties in the nature of easements and rights of way over the lands of private parties. Whether or not that valuation was sufficient depends upon the evidence upon that subject, which eviing, and, this being so, the finding of the court upon that subject will not be disturbed.

We might go on dealing in detail with the other alleged errors of the trial court in arriving at its conclusions as to the proper amount and value of the plaintiff's various properties for the purpose of arriving at a basis of total valuation upon which to predicate a reasonable water rate to be charged by the plaintiff and collected from its customers for the year covered by the terms of the ordinance in question, but the discussion would be unprofitable, since the conclusion in each of these matters must, in the state of the evidence, have rested in the sound discretion of the trial court.

[5] There is, however, one remaining question which deserves separate consideration. This is the contention of the appellant that the trial court adopted a wrong principle of valuation in its finding relative to the value to be placed upon the water-bearing lands of the appellant. The finding which the plaintiff thus assails reads as follows:

"That plaintiff was also on said date the owner of water-bearing real estate constituting a part of said plant and system, but said waterbearing real estate was not of the value of \$225,000, but was of the value of \$92,500. And in making this finding the court does not consider the value of the water in said land separate and apart from said land, but fixed the value of said water-bearing land by comparing its value with similar water-bearing land in the same locality, capable of producing a like amount of water."

In respect to this finding the appellant contends that it was entitled, in excess of the valuation which the trial court placed upon its water-bearing lands as real estate, to have its rights in and to the water collected or contained therein admeasured and ascertained as separate from and in addition to the value of the land as land. The discussion of this phase of the appellant's case has reference particularly to the lands of the plaintiff at Sherman, the waters in which are percolating waters which are collected and extracted from the subsurface of said land by means of powerful pumps, and when so extracted are transferred to plaintiff's reservoirs and mains, and thence conveyed to its There was evidence before the court that there were other lands in the vicinity of the so-called Sherman lands of plaintiff which also contained these or other percolating waters derived from the same higher sources as those supplying plaintiff's said lands. It was these facts in relation to the original state of these waters prior to the plaintiff's extraction of them which controlled the conclusion of the court that they were a part and parcel of the soil itself, having an appraisable valuation as a part of the land through which they percolated. It was these facts also which differentiated the cases cited by appellant from the case at bar; for in each of them the water rights which dence was detailed, extensive, and conflict- the courts recognized as having an appraisable value apart from the land were those appertaining to reservoirs or to surface lakes or streams. It is not necessary to consider the question as to whether, in the case at bar, the trial court might have adopted a method of valuation in which the percolating waters in the tract would be considered as appraisable apart from the value of the land as land, for the reason that both methods of valuation were open to its adoption under the authority of Marin Water, etc., Co. v. Railroad Commission, 171 Cal. 706, 715, 154 Pac. 864, Ann. Cas. 1917C, 114.

The trial court adopted and applied the rule approved in this case as the basis for its valuation of the plaintiff's water-bearing lands, and having a separate valuation to the pumping works, which in effect separated the percolating waters from these lands, and we are of the opinion that it was not in error in so doing; nor do we think that it abused its discretion in the value which it affixed upon this portion of the plaintiff's properties, in view of the evidence before it.

The contention of the appellant that the ordinance under review is unreasonable, confiscatory, and hence unconstitutional, depends for its force upon the appellant's foregoing contentions as to the undervaluations of its properties or portions thereof, and, since these have not been sustained, this final contention must of necessity also fall.

No other points appear in the record requiring separate consideration.

The order is affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOSS, J.; WILBUR, J.; MELVIN, J.; VICTOR E. SHAW, Judge pro tem.

# Ex parte MANA. (Cr. 2145.)

(Supreme Court of California. May 1, 1918.)

1. JURY ⊕==10—RIGHT TO TRIAL BY JURY—
COMMON LAW.

Constitutional provisions guaranteeing the right to a trial by jury establish the right to a trial as known at common law.

2. Jury \$\infty 39\text{-Qualifications of Jury-Legislative Power.}

The qualifications of the jury is a matter subject to legislative control, and, even though prescribed qualifications may differ from those at common law, the legislation is valid.

3. Jury 39—Right to Trial—Qualifica-

 JURY 6-39-RIGHT TO TRIAL-QUALIFICA-TIONS-JURY CONSISTING IN PART OF WO-MEN.

Const. U. S. Amend. 14, forbids any state to make or enforce any law abridging the privileges or immunities of citizens of the United States, and the subsequent California Constitution by article 1, § 7, provides that the right of trial by jury shall be secured to all and remain inviolate, and by article 20, § 18, provides that no person shall on account of sex be disqualified from entering upon or pursuing any lawful business or profession, and amendment of October 10, 1911, article 2, § 1, gave women the right to vote and hold office, and the Legislature provided that a woman might act as a juror. Held, that the legislation pointed

merely to the matter of sex as a qualification, and that the Legislature was justified in dealing with the matter as such, so that it was no ground for a release from custody that one was convicted of felony by a jury consisting in part of women.

In Bank. Application for writ of habeas corpus by Eban Mana. Writ discharged, and petitioner remanded.

Feliz & White, of Salinas, for petitioner. U. S. Webb, of San Francisco, for respondent. Gail Laughlin, of San Francisco, for various organizations of women.

WILBUR, J. Petitioner, convicted of a felony by a jury consisting in part of women, seeks release from custody on the ground that the act of the Legislature authorizing women to sit as jurors is unconstitutional. The right to a trial by a jury is provided for in article 1, § 7, of the Constitution, adopted by the people of the state of California in May, 1879, as follows:

"Section 7. The right of trial by jury shall be secured to all, and remain inviolate; but in civil actions three-foorths of the jury may render a verdict. A trial by jury may be waived in all criminal cases not amounting to felony, by the consent of both parties in open court, and in civil actions by the consent of the parties, signified in such manner as may be prescribed by law. In civil actions and cases of misdemeanor, the jury may consist of twelve, or of any number less than twelve upon which the parties may agree in open court."

[1, 2] The petitioner claims that the word "men" should be inserted by proper construction in the Constitution, so that the Constitution would in effect read: "The right of trial by a jury of twelve men shall be secured to all," etc. This contention is based upon the proposition that when the Constitution provides for a trial by a jury it, by necessary inference, provides for the jury as known at the common law (People v. Powell. 87 Cal. 348, 25 Pac. 481, 11 L. R. A. 75), and that, as juries of men were provided for by the common law, the Constitution must be thus construed. Two questions seem to be thoroughly settled by the unbroken line of decisions in all the states: First, that constitutional provisions guaranteeing the right to a trial by jury established the right to a trial by a jury as known at common law; second, that the qualifications of the jury is a matter subject to legislative control, and that, even though such qualifications may differ from those at common law, such legislation is nevertheless a valid exercise of legislative power. 24 Cyc. 187; People v. Powell, supra; People v. Chin Mook, 51 Cal. 597.

[3] At the time of the adoption of our Constitution (1879) the Fourteenth Amendment of the Constitution of the United States provided that:

o vote and hold office, and the Legovided that a woman might act as Held, that the legislation pointed ties of citizens of the United States;

By this amendment state laws and state Constitutions were modified or abridged so far as necessary to conform to the rights and privileges thus created. In interpreting the right to a trial by jury as guaranteed by our Constitution, we must therefore look, not alone to the common law, but also to this amendment so far as it affects the right to a trial by jury. The Supreme Court of the United States, in construing the effect of this constitutional amendment upon the right of a colored man to a trial by jury in West Virginia (100 U. S. 303, 308, 25 L. Ed. 664),

"The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds." (Italics ours.)

It was therefore held that to try a negro before a jury from which his race was excluded by law was a denial of his right to a trial by jury as guaranteed by the Constitution of West Virginia, for the reason that it deprived him of a trial by a jury composed of his "neighbors, fellows, associates, persons having the same legal status in society as that which he holds." In deciding that question the court added:

"We do not say that, within the limits within which it is not excluded by the amendment a state may not prescribe the qualifications of its juros (italics ours) and in so doing make discriminations. It may confine the selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications. We do not believe the Fourteenth Amendment was ever intended to prohibit this."

It will be observed, then, that the Supreme Court of the United States, in determining the rights of citizens of the United States to a jury trial under the Fourteenth Amendment, bases its conclusion as to the right of a state to discriminate against female citizens of the United States upon the ground of the disqualification of females as jurors.

Our Constitution also expressly provides (article 20, \$ 18):

"No person shall, on account of sex, be dis-qualified from entering upon or pursuing any lawful business, vocation or profession."

And while jury service is neither a "business, vocation or profession," the Constitution recognizes the capacity of women to enter upon any "lawful business, vocation or profession." By an amendment to our Constitution, October 10, 1911 (art. 2, § 1), women were given the right to vote and hold office. If the contention of the petitioner is well grounded, we would then have a situation where a woman on trial for a crime might be brought to trial before a woman

nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

torney, defended by a woman lawyer, brought in court by a woman bailiff, and yet forced to a trial before a jury of men, because won any many considered are electric. cause men only were considered as eligible for jury duty at common law. It would seem that the inferences to be derived from so radical an amendment of the Constitution are quite as strong as those to be derived from the use of the term "trial by jury."

> The Legislature of the state in providing that a woman might act as a juror evidently believed that there was no longer any necessity of discriminating against her as a citizen of the United States because she was disqualified. The Constitution having recognized her as in all respects the equal of man, the Legislature was justified in doing away with the discrimination which had theretofore existed against her in the matter of jury service. We do not hold that the Fourteenth Amendment to the federal Constitution, or the Woman Suffrage Amendment to the Constitution of this state, were of themselves sufficient to entitle women to act as jurors, although this question has been seriously raised and discussed, but not decided, by the Supreme Court of Wyoming in Mc-Kinney v. State, 3 Wyo. 719, 30 Pac. 293, 16 L. R. A. 710. We do hold, however, that this amendment points so clearly to the matter of sex as a question of qualification that the Legislature was amply justified in dealing with the matter as such.

Writ discharged. Petitioner remanded.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; MELVIN, J.; RICHARDS, Judge pro tem.; VICTOR E. SHAW, Judge pro tem.

BLANTON v. KANSAS CITY COTTON MILLS CO. (KANSAS CITY CASUALTY CO., Garnishee). LUBEK v. SAME. MY-ERS v. GARDNER (KANSAS CITY CASU-ALTY CO., Garnishee). (Nos. 21537-21539.)

(Supreme Court of Kansas. May 11, 1918.)

(Syllabus by the Court.)

1. INSURANCE €=512—CONSTRUCTION OF CONTRACT—EMPLOYER'S LIABILITY.

Where a casualty company in an employers' where a casuatty company in an employers insurance contract agrees to indemnify the insured against loss, including expenses arising or resulting from claims upon the insured for damages on account of bodily injuries to employes, and wherein it is provided that the company shall have notice of accidents and shall not be responsible for settlements made by the employer unless suthority in writing is by the employer unless authority in writing is given to the insured, excepting expenses of emergency relief, and wherein it is stipulated that the company shall investigate all accidents and defend all suits for damages unless it elects to settle the claims or suits, and the company, acting under the policy, investigates accidents and adjusts and pays claims for losses and assumes exclusive control of the defense of suits upon the claims of employes of the insured, the judge, prosecuted by a woman district at contract should be regarded as one to indemnify

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the insured against liability, and the casualty company is therefore subject to garnishment at the suit of the employes when the insured is insolvent.

2. CASE DISTINGUISHED.

Carter v. Insurance Co., 76 Kan. 275, 91 Pac. 178, 11 L. R. A. (N. S.) 1155, distinguished.

3. Insurance \$\iff 144(1), 665(2)\$—Employer's Liability—Indemnity Policy—Modifica-TION-EVIDENCE.

The insured employers were not operating under the workmen's compensation law when the policies were issued, and attached to them were riders excepting the insurer from claims for compensation under that law. Before the end of the insurance period the insured came under the compensation law. Held, that it was competent for the parties to detach the rider and modify the contract by an agreement that the unearned premium should stand as insurance for compensation for injuries for the remainder of the insurance year, and also held, that the evidence in the case supports the theory that such an agreement was made.

Appeal from District Court, Wyandotte County.

Action by Charles E; Blanton, a minor, by William H. Blanton, his next friend, against the Kansas City Cotton Mills Company and the Kansas City Casualty Company, garnishee, and action by William Lubek against the same defendant and garnishee, and action by Ernest Myers, a minor, by Lydia Myers, his next friend, against Simon A. Gardner, Kansas City Casualty Company, garnishee. Judgments for plaintiffs in each case against the garnishee, and it appeals. Affirmed.

D. A. Murphy, of Kansas City, Mo., Mc-Anany & Alden, Thos. M. Van Cleave, and Samuel Maher, all of Kansas City, Kan., for appellant. T. A. Pollock, T. F. Railsback, Emerson & Smith, and K. P. Snyder, all of Kansas City, Kan., for appellees.

JOHNSTON, C. J. These are appeals by the Kansas City Casualty Company from judgments rendered against it in garnishment proceedings.

Three actions are involved, each brought by an employé against his employer to recover damages for personal injuries, in which judgments against their employers were obtained. The defendants in those actions held policies of insurance issued by the casualty company, and in the actions mentioned it took complete charge of the litigation for the defendants. The plaintiffs were unable to enforce payment of the judgments, and they garnished the casualty company, which answered in each case, denying liability to the defendant. Plaintiffs contested the answers, and the evidence upon the issues thus raised was submitted at one hearing to the court without a jury. No findings of fact were made, and the court rendered judgments against the casualty company for the amounts of the claims established.

three actions, except that in those against the Cotton Mills Company there is an added feature by reason of the fact that at the time of the injuries it was operating under the provisions of the workmen's compensation law, and it is claimed by the casualty company that under the policy it is not liable on account of injuries within the scope of that act. It also claims that the policies issued are contracts of indemnity against loss sustained, and that the obtaining of judgments against the employers, which had not been paid, was not sufficient to render it liable as garnishee. The policies in question were designated as "employers' liability policies" and in them the casualty company agreed "to indemnify the assured, described in the warranties hereof, within the amounts as expressed herein, against loss including expense arising or resulting from claims upon the assured for damages on account of bodily injuries," etc., to an employé. It was stipulated that the assured should give the casualty company immediate notice of any accident to an employé and of any suit resulting therefrom, and it was further stipulated that:

"The company is not responsible for any settlement made or any expense incurred by the assured, unless such settlements or expenditures are first specifically authorized in writing by the company; except that the assured may provide at the time of the accident, at the expense of the company, such immediate surgical relief as is imperative."

There was also a provision limiting the amounts for which the casualty company would be liable, and also stating:

"In addition to these limits, the company will, at its own cost (court costs and all in-terest accruing after entry of judgment on such part thereof as shall not be in excess of the limits of the company's liability as hereinbe-fore expressed, being considered part thereofi investigate all accidents and defend all suits even if groundless, of which notices are given to it as hereinbefore required, unless the com-pany shall elect to settle the claim or suit."

The provision usually contained in policies of this character that no action could be maintained by reason of a judgment against the assured unless the latter had sustained a loss by satisfying the judgment is not found in any of the policies involved here. It appeared from the evidence that the casualty company had in other instances adjusted claims and paid judgments that had not been already satisfied by the assured, and that it had advertised its business as including in its scope the adjustment of all claims, payment of all attorney's fees, defense of all suits, the payment of all judgments up to \$5,000, and the payment of court costs.

The main question raised on these appeals is whether or not there can be a liability against the casualty company for accidental injuries to the employes of the insured until [1, 2] The issues were the same in the the latter pays the claims for the injuries

and losses sustained. The casualty company contends that under the rule of Carter v. Insurance Co., 76 Kan. 275, 91 Pac. 178, 11 L. R. A. (N. S.) 1155, its contract was indemnity against loss, and that no loss was sustained by the insured until payment had been made. The contract in the Carter Case differs materially from those involved herein. Aside from one stipulation there was the same ambiguity in that contract as in these in regard to whether liability was included in the term "loss," and whether it was the intention of the parties that the insurance company should be substituted for the insured so far as liability for accidental injuries and death was concerned. several of the provisions of that contract indicated a substitution of the insurer for the insured, and that it was insurance against liability, it contained the following positive stipulation:

"No action shall lie against the company as "No action shall he against the company as respects any loss under this policy unless it shall be brought by the assured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment within sixty days from the date of such judgment, and after trial of the issue." 76 Kan. page 276, 277, 91 Pac. page 178 [11 L. R. A. (N. S.) 277, 9 11551.

As we have seen, this clause was wholly omitted from the contracts in question. In the decision of that case it was said that:

"This provision leaves no doubt of the inten-tion of the parties, which was that the insur-ance company was not required to pay any-thing because of the policy until losses had been paid by the assured in satisfaction of a judg-ment." 76 Kan. page 278, 91 Pac. page 178 [11 L. R. A. (N. S.) 1155].

It was there held that the obligation of the contract did not extend beyond the insurer and the insured, that it did not inure to the benefit of the injured employes, and that the insurer was only bound to reimburse the insured for the losses he was compelled to pay. The "no action" provision was deemed to be so specific and controlling as to overcome other stipulations in the contract pointing to insurance against liability, and also to prevent an estoppel against the insurer by reason of having taken control of the litigation and made the defense for the insured. The provisions of the contracts without this clause and the action of the defendant in giving a practical interpretation of the provisions of the contract strongly tend to show the purpose of the parties to have been that the insurer should be substituted for the insured, and also that it was intended as an insurance against liability. Attention is called to the use of the word "indemnify" in the contract, which it is contended carries the idea of a reimbursement for losses; but the term has other meanings, and is no more controlling than the statement at the head of the policies that it is a "liability policy."

As against the theory that the insurer is

arising from them, there is the stipulation that the insurer shall be given immediate notice of an accident and of any suit resulting from it. The obvious purpose of such a notice is that the insurer may protect itself against liability, and that this was the intention is made manifest by the action of the insurer in settling claims for such liabilities without waiting for the insured to settle or pay them. In order that the insured may intelligently carry out this plan it is provided that the insurer may inspect the plant, works, machinery, and appliances used by the insured, and shall also have access to its books and records, and in that way determine the nature of the injury and the extent of the liability. While the insured is not denied the right to make settlements with its injured employes it is expressly stipulated that, except for emergency surgical relief at the time of the accident, the insurer will not be responsible for any settlement made, unless written authority therefor is given by the insurer. In view of the fact that plaintiffs were paying for insurance protection and would lose that protection if they settled a claim without the consent of the insurer. the clause was almost equivalent to a stipulation forbidding them to negotiate a settlement with an injured employé. Under the contract the insured was permitted to cooperate with the insurer in negotiating a settlement, but it was practically excluded from the control of settlements.

To make the control of the insurer more effective, it was stipulated that it should investigate all accidents of which it had notice, and its course of action was not only to investigate such accidents, but it went farther and made settlements for liability arising from the accidents. This control was after the investigation and continued throughout any litigation that might arise upon the claims based on accidents, because in the contract it was stipulated that the insurer should take charge of any litigation that arose, and should at its own cost defend all suits brought whether they were groundless or real, unless it should elect to settle the claims or suits without contest. These provisions show that the obligations of the contract rested upon the insurer from the time the accident occurred down until the liability resulting from them was settled and discharged.

Instead of being exempt from liability until prepayment of claims by the insured, the insurer practically puts itself into the place of the insured so far as settlements with employes and payment of their claims were concerned, and if it had been the intention of the parties that no liability should attach to the insurer until payment had been made by the insured, it would have been very easy to have made that statement in some such way, as was done in the Carter Case. There being not concerned as to accidents or liabilities ambiguity in the contract respecting the kind of insurance intended, extrinsic circumstances showing the practical interpretation placed upon the contract by the parties may be and was received. The casualty company not only designated its contracts as "liability policies," but in an advertisement published in a newspaper in March, 1914, as to the character of the policies it stated:

"Every man in business, every employer of labor, needs liability insurance. It safeguards you against possible damages arising from injury or death to those who work in your shop, factory, or store. The liability insurance issued by the Kansas City Casualty Company fully protects you. Note the wide scope: We adjust all claims. We pay all attorney's fees. We defend all suits. We pay all judgments up to \$5,000. We pay all court costs."

In addition to this a former manager of the casualty company testified in its behalf, and stated that:

"Our policy, as I have stated, was an employer's liability policy, and our policy indemnified the assured against his legal liability for personal injuries."

These things in connection with the action of the casualty company in making settlements without waiting for prepayment by the insured show that the casualty company understood its contracts to bind it for Hability and not for mere indemnity.

There is a conflict in the authorities on this branch of the law. Some of them interpret contracts containing stipulations similar to those included in the policies in question as indemnity only, and hold that prepayment of losses is essential to recovery. Others treat them as indemnity contracts because of the inclusion of the "no action" provision. Very many treat them as liability contracts, where the "no action" provision is omitted. In a few cases courts have gone to the extent of holding policies containing the "no action" provision as contracts to pay liabilities. The authorities supporting the different theories and illustrative of the conflict are grouped in a note in 48 L. R. A. (N. S.) 184. Some of the cases tending to support the interpretation which we have placed on the contracts involved here are American Employers', etc., Ins. Co. v. Fordyce, 62 Ark. 562, 36 S. W. 1051, 54 Am. St. Rep. 305; Stephens v. Pennsylvania Casualty Co., 135 Mich, 189, 97 N. W. 686, 3 Ann. Cas. 478; Standard Printing Co. v. Fidelity & Deposit Co. (Minn.) 164 N. W. 1022; Patterson v. Adan, 119 Minn. 308, 138 N. W. 281, 48 L. R. A. (N. S.) 184; Allen v. Ætna Life Ins. Co., 145 Fed. 881, 76 C. C. A. 265, 7 L. R. A. (N. S.) 958; Sanders v. Frankfort Marine Acc. & Plate Glass Ins. Co., 72 N. H. 485, 57 Atl. 655, 101 Am. St. Rep. 688; Lewinthan v. Travelers' Ins. Co., 61 Misc. Rep. 621, 113 N. Y. Supp. 1031; Clark v. Bonsal, 157 N. C. 270, 72 S. E. 954, 48 L. R. A. (N. S.) 191; Maryland Casualty Co. v. Peppard (Okl.) 157 Pac. 106, L. R. A. 1916E, 597; Fenton v.

1096, 48 L. R. A. 770; Pickett v. Fidelity Company, 60 S. C. 477, 38 S. E. 160, 629; Davies v. Maryland Casualty Co., 89 Wash. 571, 154 Pac. 1116, 155 Pac. 1035, L. R. A 1916D, 395, 398; Hoven v. Employers' Linbility Assurance Corporation, 93 Wis. 201, 67 N. W. 46, 32 L. R. A. 388.

[3] The next contention is that in no event can there be a liability for the injuries to Lubek and Blanton as their employer, the Cotton Mills Company, was operating under the workmen's compensation law, and compensation injuries were expressly excepted from the obligations of the contract. No such exception was contained in the policy when it was produced at the trial, but there is testimony that a rider was attached to the policy when it was written which was later detached. The Cotton Mills Company had not elected to come under the compensation law when the policy was issued, but did so in March, 1913. The evidence tended to show that the casualty company through its officer then agreed to cover compensation cases under the policy without an additional premium in view of the short time in which the policy would remain in force, and that the rider clause mentioned was torn off the policy. Some testimony was offered to the effect that an additional premium was demanded, but the Cotton Mills Company declined to pay more insurance, and then, instead of returning the unearned premium. the agreement to cover compensation cases the remainder of the year for the premium paid was made. The retention of the unearned premium, instead of its return to the insured, would be sufficient consideration for the change made in the contract through the detaching of the rider and making the insurance cover compensation injuries. There is a sharp dispute in the testimony as to when this agreement was made, or when the rider was torn off the policy, but there is evidence to support the conclusion that both occurred before the injuries to Lubek and Blanton were sustained. As there were no special findings and the general finding was in favor of the plaintiffs, it must be deemed that the court accepted the testimony favorable to plaintiffs as true, and discredited the conflicting evidence given in behalf of the casualty company.

The judgment is affirmed. All the Justices concurring.

THOMPSON et al. v. UNION TRACTION CO. (No. 21522.)

(Supreme Court of Kansas. May 11, 1918.)

## (Byllabus by the Court.)

270, 72 S. E. 954, 48 L. R. A. (N. S.) 191;
Maryland Casualty Co. v. Peppard (Okl.) 157
Pac. 106, L. R. A. 1916E, 597; Fenton v.
Fidelity & Casualty Co., 36 Or. 283, 56 Pac.

the pipe by driving a threshing outfit over it, and sustains injury and loss from the escaping oil.

Highways 153—Injury — Contributory Negligence.

In taking their threshing outfit into a field adjoining the highway in order to thresh a crop, the plaintiffs were entitled to use not only the worn part of the highway but also the whole width of the same so far as it was necessary.

3. Highways & 213(2, 4)—Injury — Question for Jury—Negligence — Contributory Negligence.

In an action to recover damages resulting from the breaking of an exposed oil pipe, a demurrer to plaintiff's evidence was sustained, and upon an examination of the evidence it is held to have been sufficient to take the case to the jury as to the negligence of the defendant and also as to the plaintiffs' contributory negligence.

Appeal from District Court, Montgomery County.

Action by J. A. Thompson and F. D. Thompson, partners, etc., against the Union Traction Company. Judgment for defendant, and plaintiffs appeal. Reversed and cause remanded for a new trial.

Sullivan Lomax, of Cherryvale, for appellants. J. J. Jones, of Chanute, and Chester Stevens, of Independence, for appellee.

JOHNSTON, C. J. This was an action to recover damages for the alleged negligent burning of plaintiffs' threshing outfit. There have been two trials of the case, at the first of which a demurrer to the evidence was sustained and the plaintiffs were given leave to amend their petition. At the second trial the court again sustained a demurrer to plaintiffs' evidence and from that decision they appeal.

[1, 2] It was alleged in the amended petition that the defendant owns and maintains a 2-inch pipe line upon the surface of and along the south side of a public road for the purpose of conveying fuel oil; that plaintiffs came along the highway with their threshing outfit with the intention of entering a field on the south side of the road to do some threshing; that the only entrance to the field was a passageway through a gap in the fence on the south side of the highway; that the pipe line was entirely concealed from view by a rank growth of weeds, and that plaintiffs did not know of its presence or the character of its contents; and that when their engine crossed the pipe the oil gushed out, caught fire, and destroyed the engine and threshing machine.

From the testimony introduced it appears that the pipe line is at the extreme south edge of the highway, near to the fence and about 25 feet from the center of the road; that there is a ditch between it and the roadway; and that at the place where the pipe crossed the passageway into the field one of the plaintiffs went ahead and inspect-

ed the ditch to ascertain whether the machine could be taken across it. He then started his engine across the ditch and over the pipe without putting anything down to protect it, and the wheel of the engine punched a hole in the pipe, and the oil gushing out was ignited from the fire box. Although one witness said that plaintiff's attention was called to the pipe, the latter testified that he did not see or know that the pipe was there and that no one told him about it.

Plaintiffs insist that there was sufficient evidence presented to take the case to the jury, and that is the only question presented on this appeal. As against this contention it is argued that the evidence failed to show that the defendant owned or was in control of the pipe line. The line was used to convey oil from the defendant's station to the Coffeyville brick plant. In his testimony the foreman of that plant stated that the pipe line "belonged to the Union Traction Company, and it was the same line that was broken when the threshing outfit was burned." Another witness in effect stated that the oil was pumped to the Coffeyville brick plant; that the pump was located on the switch of the Union Traction Company; and that the oil was taken to the defendant's pump station in tank cars which were operated by the defendant. Still another witness testified that after the fire the company put in a joint of pipe where it was broken and buried it. The evidence warrants the inference that the defendant owned or at least controlled the pipe line.

[3] There is a contention that the evidence failed to show negligence on the part of the defendant. It is true, as defendant contends, that a pipe line for the transportation and distribution of oil for fuel and other purposes may láwfully be laid along a public highway. However, it must be so laid that it will not obstruct or endanger the use of the highway for public travel. State v. Natural Gas Co., 71 Kan. 508, 80 Pac. 962, 114 Am. St. Rep. 507. Plaintiffs were likewise entitled to take their threshing outfit over the highway, and in order to enter the gap or gateway into the field where the threshing was to be done had the right to use not only the worn part of the highway but the whole width of it. As oil is of an inflammable nature, great care should be exercised in transporting it along a highway. should be such care as is commensurate with the dangerous nature of the material and the consequences that should have been apprehended from the means employed in carrying it over the highway. Hashman v. Gas Co., 83 Kan. 328, 111 Pac. 468; Luengene v. Power Co., 86 Kan. 866, 122 Pac. 1032. Pipes carrying such material are usually and easily buried in the ground, and the right to lay

if pipes are laid on the surface the party who maintains them becomes liable for all Justices concurring. damages occasioned by placing them there, although such damages would not have been occasioned by the pipes if they had been buried in the ground. Lebanon Light, Heat & Power Co. et al. v. Leap, 139 Ind. 443, 39 N. E. 57, 29 L. R. A. 342; Thornton on Oil & Gas (2d Ed.) § 510. In Indiana, etc., Gas Co. v. McMath, 26 Ind. App. 154, 57 N. E. 593, 59 N. E. 287, it was held that the maintenance of a gas pipe through which gas is flowing on the surface of the ground within the limits of a public highway renders the owner liable for damages to one who without his fault breaks the pipe by driving a traction engine over it and is injured by an explosion of the escaping gas.

It is further contended that the plaintiffs were guilty of contributory negligence in driving over the pipe line when it was in plain view. One witness stated that it was actually brought to the attention of one of the plaintiffs. It appears that the pipe line was lying on the surface of the road and was partially visible through the dirt and was about the color of dirt. While a witness stated that when one of the plaintiffs got down and examined the ditch to determine whether he could take the engine across his attention was called to the pipe line, the latter testified that he heard no such remark and did not have any knowledge that the pipe was there until it was broken and the oil was thrown upon the machine. In the first petition which plaintiffs filed their attorney, it appears, inserted in it an allegation to the effect that a portion of the pipe was visible; that plaintiffs did not know it contained oil of an inflammable nature, but supposed it was an old discarded gas pipe. The plaintiff testified that he did not know that the allegation was included in the petition, and did not in fact see the pipe or know of its existence, and that when his testimony was given on that trial his attorney asked and obtained leave to amend the petition by striking out this allegation. If this averment should be treated as a conflict in the testimony of plaintiff, it must nevertheless be held that it was within the province of the jury to decide that conflict. On the demurrer to the evidence that part of his testimony which was favorable to plaintiffs must be taken as true, and, although other testimony given by him or in his behalf may contradict that which is favorable to plaintiffs, it is the function of the jury, and not of the court, to determine which is credible and controlling. Acker v. Norman, 72 Kan. 586, 84 Pac. 531.

Measuring the testimony as we are required to do on a demurrer to the evidence. it must be held that the issues in the case should have been submitted to the jury, and

questioned. It has been held, however, that therefore the judgment is reversed and the cause remanded for another trial.

> HUSTON et al. v. COX et al. (No. 21467.) (Supreme Court of Kansas. May 11, 1918.)

> > (Syllabus by the Court.)

1. Receivers == 29(2)-Appointment - Ju-BISDICTION.

A receiver may be appointed by the district court for an oil and gas lease of land beyond the jurisdiction when the instrument merely creates an incorporeal hereditament, and in any event when the court has jurisdiction of the persons of the interested parties.

2. MINES AND MINERALS \$= 97-EXISTENCE OF PARTNERSHIP-COTENANTS OF OIL AND GAS LEASE.

Unless an ordinary partnership has been created, a mining partnership between cotenants of an oil and gas lease may exist only while they actually engage in working the property.

8. Receivers === 18-Oil and Gas Lease-EVIDENCE

The evidence considered, and held, a receiver was properly appointed for an oil and gas lease, although the interested parties were merely cotenants.

(Additional Syllabus by Editorial Staff.)

4. Mines and Minebals \$\sim 56\to 01L and Gas Lease-Estate Created - "Incorporeal Hereditament."

A lease granting the right to enter on land and to explore for oil and gas, and if it be found in paying quantities to operate and produce, is not a lease in the strict sense, and creates no estate in the lands, but merely an "incorporeal hereditament," which is a right growing out of, or concerning, or annexed to, a corporeal thing, but not the substance of the thing itself. thing itself.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Incorporeal Hereditament.]

Appeal from District Court, Sedgwick County.

Action by Edward J. Huston and others against George W. Cox and others. From an order appointing a receiver, defendants appeal. Affirmed.

David Smyth and J. W. Smyth, both of Wichita, for appellants. Wilson, Madalene & Hudson, of Wichita, for appellees.

BURCH, J. The appeal is taken from an order of the district court appointing a receiver.

[1, 4] The petition prayed for dissolution of a partnership, for an accounting, and for disposition of the partnership property. The appointment of a receiver was asked by way of provisional and auxiliary relief. The chief ground of opposition to the appointment of a receiver was that the subject of the action was real estate situated in Butler county. and consequently that the court had no iurisdiction to appoint a receiver for it.

The property involved is an oil and gas

The lease is of the familiar kind granting the right to enter on described land, explore for oil and gas, and if oil and gas be found in paying quantities to operate and produce. The decisions of this court are too numerous to require citation, that instruments of that character are not leases in the strict sense. The term "lease" is applied to them merely through habit and for conveni-They create no estate in land, but merely a kind of license. In the case of Oil Co. v. McEvoy, 75 Kan. 515, 89 Pac. 1048. it was said they create an incorporeal hereditament; that is, a right growing out of, or concerning, or annexed to, a corporeal thing, but not the substance of the thing itself. In the case of Robinson v. Smalley, 102 Kan-842, 171 Pac. 1155 (opinion filed April 6, 1918), this nomenclature was approved and applied.

In this instance the right granted was exclusive to the grantees, and it is said this fact changed the nature of the grant. The circumstance that the grantors precluded themselves from making other leases does not change the thing the grantees acquired from one of an incorporeal to one of a corporeal nature.

Besides what has been said, it is unnecessary that property constituting the subjectmatter of a receivership be within the jurisdiction of the court, provided the parties in interest be subject to the control of the court. In this instance the court acquired jurisdiction of the persons of the defendants by personal service and by an answer to the merits, and it would have made no difference if the property had been land. High on Receivers (4th Ed.) § 44.

Cox and Brush negotiated for the lease, which provided the lessors should receive one-eighth of the mineral produced. Cox and Brush took the lease in their own names. Huston and his associates contributed \$3,200 to the enterprise. Huston and his associates signed a contract relating to the matter, and there was evidence that Cox and Brush were to sign, but refused to do so after the lease was procured. Material portions of the contract follow:

"This agreement is further made with the understanding that the money hereto subscribed is, to be used in conjunction with procuring one certain lease which George W. Cox and William H. Brush are obtaining on the northeast quarter (1/4) of section twenty-six (26), township twentyfive (25), range four (4), containing one hundred sixty (160) acres more or less. The parties subscribing hereto are to receive one-eighth of subscribing hereto are to receive one-eighth of all oil, gas, or minerals produced on said quarter section, for furnishing said thirty-two hundred (\$3,200) dollars as a bonus in securing said lease. The owners of said land are to receive one-eighth of all oil, gas, and mineral produced on said quarter section; said George W. Cox and William H. Brush are to receive one-eighth of all oil gas or mineral produced on said subscribed on said sections. of all oil, gas, or mineral produced on said quarter section; and said George W. Cox and William H. Brush and parties subscribed hereto or which may subscribe hereto are to hire parties to develop said quarter section for oil, gas,

and mineral, by giving the other five-eighths por-tion of all production of oil, gas, and minerals to such drillers as may be so hired, unless responsible drillers may be secured to develop said quarter section for less than a five-eighths porquarter section for less than a nve-eighths portion of the production, in which case the extra profit at all times shall be divided equally into two equal portions, and said George W. Cox and William H. Brush are to receive one half, and the subscribers hereto are to receive the other half. No contract for developing shall be let except that a well be drilled at least to a depth of twenty-seven hundred fifty (2,750) feet, unless oil or gas is found in paying quantities at a less depth.
"The subscribers hereto are at all times to

share in the profits in the proportion that the amounts set opposite their names and paid in bears to the total sum of thirty-two hundred

(\$3,200) dollars subscribed.
"At all times the total number of subscribers hereto shall have equal powers and interest with said George W. Cox and William H. Brush in managing and transacting business with reference to said lease."

[2] The court found that the relationship between the parties constituted a mining partnership. The court was in error. Mining partnerships are indulged between coowners only when they actually engage in . working the property. Before actual operations begin, and after actual operations cease, they are simply cotenants, unless, of course, an ordinary partnership has been formed. 3 Lindley on Mines (3d Ed.) § 796, and following sections.

[3] It is said the order appointing the receiver was erroneous because based on the finding of a mining partnership. The conclusion does not follow from the premise. While the parties are merely cotenants of an incorporeal hereditament, the evidence was that they have reached an impasse. They cannot agree with respect to their rights, or the management of the property, or a disposition of it. There is no reason why a court of equity should not solve the situation, and meanwhile a receiver to hold the lease, protect the property, and perform other functions, is a proper and justifiable auxiliary.

The judgment of the district court is affirmed. All the Justices concurring.

NELSON et al. v. HOSKINSON et al. (No. 21271.)

(Supreme Court of Kansas. May 11, 1918.)

(Syllabus by the Court.)

Action \$\infty 45(1)\text{-Mortgages} \$\infty 504\text{-Parties} \$\infty 25\text{-Foreclosure} - Injunction -PETITION.

The petition examined, and held to state a cause of action to enjoin the foreclosure sale therein mentioned; no misjoinder of causes or parties appearing.

Appeal from District Court, Wyandotte County.

Action by Ida N. Nelson and husband against Jennie Hoskinson, Benham C. Nelson, L. J. Mason and R. L. Hinch, Sheriff of Wyandotte County, Kan. Demurrer to

amended petition sustained, and plaintiffs appeal. Modified and remanded.

J. M. Mason, of Kansas City, for appellants. O. H. Barker and H. H. McCluer, both of Kansas City, Mo., for appellees.

WEST, J. To the amended petition attempting to set up five causes of action for damages, for injunction, and to quiet title, a demurrer was sustained, and the plaintiffs appeal. The story in substance is that the plaintiff Ida M. Nelson was the owner of certain lots on which she gave a mortgage for \$4,666 to J. M. Hoskinson, at whose direction it was executed to his wife, the defendant Jennie Hoskinson; there was a provision that the lots covered could be sold by the payment on the mortgage of a certain price for each front foot; that six months before the note fell due Hoskinson made a provision on another basis, and a new mortgage for \$6,345 was executed, and a new arrangement made about the price to be paid and credited for each front foot sold; that certain releases were to be executed and placed in escrow, but were not so deposited: that Hoskinson died leaving everything to the defendant Jennie Hoskinson, as his assignee, she having full knowledge of all the equities of the plaintiffs; that Hoskinson had refused to release the lots which the plaintiff had sold and failed to give credit therefor; that the defendant Jennie Hoskinson, when about to foreclose, induced the plaintiffs to believe that, if they would not defend, she would continue the arrangement substantially as it had been, but proceeded to take judgment, although one of the plaintiffs had at that time been declared a bankrupt and discharged from any liability on the note; that Jennie Hoskinson flatly refused to perform her contract. It was alleged that one Benham C. Nelson had bought certain lots which were not included in the second mortgage and "had been released from all prior mortgages," but were attached and sold under a deficiency judgment against the Nelsons on another note from which W. S. Nelson had been discharged in bankruptcy; that certain other lots bought by Benham C. Nelson subject to the terms of the second mortgage which were to be released upon payment of a certain price for each front foot were included in the foreclosure, and Benham C. Nelson was given no opportunity to redeem without paying the entire judgment; that unless this relief be afforded Benham C. Nelson the plaintiffs might be called upon to respond under the covenants of their deeds to him. It was prayed that he be protected and allowed to redeem, and that the sale under foreclosure be enjoined, and the title of the plaintiffs to the land be quieted.

If, as alleged, the failure to defend was caused by the promise to continue the for-

mer arrangement, the defendant is taking advantage of the breach of her own agreement. In Hentig v. Sweet, 27 Kan. 172, an accommodation indorser who was liable upon a promissory note then in litigation made a payment after its maturity to the holder, and at the request of the plaintiff paid him several hundred dollars in addition upon his promise to credit the amounts with the claim and take judgment for only the balance. The indorser, relying upon such promise, made no defense, but the plaintiff took judgment for the full amount. It was held that as an unfair and unconscionable advantage was taken in depriving the indorser of his just credits he had a right to stay by injunction, the collection of the remainder of the judgment after paying all except that for which he was entitled to credit. On the strength of this decision and the authorities therein cited the plaintiffs have a right to enjoin the sale under the judgment of foreclosure until the alleged wrongs shall have been righted by the defendant Jennie Hoskinson.

It was proper to make the sheriff a party defendant, as he was the one ordered to make the sale. No rule of code pleading was violated by naming Benham C. Nelson as a party defendant and suggesting that he bear his portion of the cost of the litigation. Should he not see fit to defend or assert his own rights, the plaintiffs should be permitted to protect themselves from the effect of the alleged improper inclusion of his lots.

Various allegations of damages and numerous complaints of John M. Hoskinson's conduct in many respects not already noticed have been considered, but the only result we are able to reach is that the pleading states a cause of action which if proved will authorize the trial court merely to enjoin the sale until such conditions are brought about as may render it equitable and proper to carry it out.

To this extent only the judgment is modified, and the cause remanded for further proceedings in accordance herewith. All the Justices concurring.

SEVERY STATE BANK V. HOYT. (No. 21266.)

(Supreme Court of Kansas. May 11, 1918.)

(Syllabus by the Court.)

1. PRINCIPAL AND SURETY 4 109-RENEWAL

NOTE—SURETY—LIABILITY.

A surety for a comaker signed a note as maker. The principal obtained a renewal by presenting to the holder a note signed by himself and purporting to be signed by the surety. The surety's signature was forged. The holder sued the principal and the surety in separate actions on the renewal note. The actions were consolidated and tried together. The only issue presented to the jury for its determination was whether or not the signatures to the renewal note were forged. The jury found a

general verdict against the principal and in favor of the surety. The holder then sued the surety on the original note, which had been can-celed and delivered to the principal when the renewal note was given. *Held*, judgment was properly rendered against the surety.

(Additional Sullabus by Editorial Staff.)

2. Principal and Surety ← 145(2)—Judg-ment—Res Judicata — Action Against Surety.

A judgment in a holder's action against principal and surety on the issue as to forging of the surety's name in a renewal note rendered in favor of the surety was not res judicata in the holder's action against the surety on the original canceled note.

Appeal from District Court, Elk County. Action by the Severy State Bank against G. N. Hoyt. Judgment for plaintiff, and defendant appeals. Affirmed.

Sheedy & Stryker, of Fredonia, for appellant. A. F. Sims, of Howard, and F. S. Jackson, of Topeka, for appellee.

BURCH, J. The action was one to recover on a promissory note. The plaintiff prevailed, and the defendant appeals.

In 1912 F. M. Seimers and L. C. Seimers, as principals, and the defendant, as surety, executed and delivered to the plaintiff their promissory note, for a consideration not now in dispute. The note was not paid at maturity, and in 1913 the plaintiff accepted a renewal note for the sum due, signed by the principals and purporting to be signed by the defendant. The old note was stamped paid and delivered to the principals. The renewal note was not paid at maturity, and the plaintiff brought two actions for the amount due, one against the principals and one against the defendant. Apparently, the defendant was sued separately because he was a nonresident, and it was necessary to proceed against him by attachment. The defendant appeared, and the actions were consolidated and tried together. The defense in each case was that the signatures appearing on the note were not genuine. Judgment was rendered against the principals and in favor of the present defendant. The plaintiff then sued the defendant on the original note, with the result stated.

[2] The main defense was that of res judicata. While the verdict in the former suit was a general verdict in favor of the defendant, the pleadings and the instructions, introduced in evidence in the present action, show that the sole issue determined was the genuineness of the signature to the renewal note. The present action is on a different note, which the defendant admitted he signed, and consequently the defense of res judicata was not sustained. Stroup v. Pepper, 69 Kan. 241, 76 Pac. 825.

surrendered to the principal debtors, and that the new note of the principal debtors had been accepted, on which judgment had been rendered. The note disclosed that the defendant was a maker, and his liability to the plaintiff was that of maker, although his relation to his comakers was that of surety. Bank v. Jeltz. 101 Kan. 537, 167 Pac. 1067. Stamping the note paid and surrendering it did not discharge it, and no agreement that the new note should be taken in payment of the old one was pleaded or proved. Bank v. Cooper. 99 Kan. 731, 162 Pac. 1169.

The new note when taken supposedly bore the defendant's signature. The judgment which the defendant pleaded established the fact that his signature had been forged to the new note. Under these circumstances, the fact that the new note was accepted by the plaintiff did not discharge the old one. This proposition was conceded by the party whose signature had been forged in the case of Bank v. Jeltz, supra, and is sustained by cases found in case notes, 13 L. R. A. (N. S.) 205, and 16 L. R. A. (N. S.) 343.

The fact that judgment against the principal debtors was rendered on the renewal note does not concern the plaintiff. Both notes were for the same indebtedness, and the plaintiff is entitled to establish its claim against all persons obligated to pay.

The defendant argues that the plaintiff split his cause of action. This is not true. The rule against splitting causes of action applies to separate actions against the same person to enforce fractions of the same obligation. It does not apply to separate actions on different causes of action.

The judgment of the district court is affirmed. All the Justices concurring.

AVERY et al. v. HOWELL. (No. 21058.) (Supreme Court of Kansas, May 11, 1918.)

(Syllabus by the Court.)

COMPROMISE AND SETTLEMENT @== 15(2)-EF-

FECT-LIABILITY TO THIRD PARTY.

A defendant in an action without merit may compromise the litigation without making himself liable in any way to any third party.

Appeal from District Court, Gray County. On rehearing. Petition for rehearing denied.

For former opinion, see 102 Kan. 527, 171 Pac. 628.

MARSHALL, J. In a petition for a rehearing, the plaintiffs earnestly contend that the principal proposition argued by them was overlooked by the court in Avery et al. v. Howell, 102 Kan. 527, 171 Pac. 628. In their brief, the plaintiffs urged that:

241, 76 Pac. 825.

[1] Another defense was that the defendant was an "accommodation indorser," that the note sued on had been marked paid and fendants, and in not holding that the settlement

of such suit was a waiver of all defenses to ceded, a judgment may properly be entered plaintiffs' claim for a commission."

This court refused to reverse the judgment on account of the withdrawal of the evidence of the settlement, but did not say anything about the trial court's not holding that the settlement of the suit was a waiver of all defenses to the plaintiffs' commission. By compromising the action commenced by D. H. Hanna, the defendants did not render themselves liable to the plaintiffs for the payment of any commission. By compromising the litigation, the defendants did not admit either the justice of Hanna's claim, or that they were liable thereon. They may have paid \$150 to get rid of a vexatious lawsuit when they knew that they could prevail by fighting. To hold the defendants liable for the commission which the plaintiffs seek to recover would be to discour-The policy of age settling litigation, the law should be, and is, to encourage compromises. When they are made the rights of third parties are not in any way affected thereby. The plaintiffs' right to recover commission from the defendants cannot be based on the settlement of the action commenced by Hanna. The plaintiffs cite Davis v. Roseberry, 95 Kan. 411, 148 Pac. 629; Parker v. Estabrook, 68 N. H. 349, 44 Atl. 484; Willson v. Crawford, 61 Tex. Civ. App. 580, 130 S. W. 227; Foster v. Holbrook-Armstrong Iron Co., 158 Wis. 447, 149 N. W. 148; Kirkland v. Berry, 136 S. W. 832. None of the cases cited is controlling in the present action. In Davis v. Roseberry, supra, the landowner voluntarily accepted \$500 in lieu of other performance of a binding contract. In the present action the contract was not binding, and the \$150 was not paid in lieu of performance.

The judgment of affirmance is adhered to, and the petition for a rehearing is denied.

All the Justices concurring.

RICH et al. v. ROBERTS et al. (No. 21534.) (Supreme Court of Kansas. May 11, 1918.)

#### (Syllabus by the Court.)

1. GARNISHMENT 551—ASSIGNED PROPERTY.
Rule followed that a garnishment only reaches the property which actually belongs to the debtor, and does not lawfully reach that which the debtor has already assigned in good faith to other creditors.

2. Trusts €==104 — Proceeds of Insurance POLICY - ASSIGNMENT - RIGHTS OF CREDI-TORS.

Where a creditor in a garnishment proceeding gets possession of the proceeds of an insurance policy which had already been lawfully assigned to other creditors, he holds such proceeds as trustee for the benefit of such other creditors; and, in an action where all parties concerned are brought into court and all the pertinent facts are pleaded and proved or contors for the sums due them from the debtor in conformity with the terms of the assignment.

Appeal from District Court, Kiowa County. Action by Tim Rich and others against M. C. Snyder and others. Judgment against defendant named, and he appeals. Affirmed.

John D. Beck, of Greensburg, for appellant. C. H. Bissitt and O. G. Underwood. both of Greensburg, for appellees.

DAWSON, J. The plaintiffs were the assignees of an insurance policy for \$200. The insured, R. W. Farris, who had suffered a fire loss, assigned the policy to them to satisfy debts due for work and labor. The insurance company sent the money to pay the fire loss to its local agent, F. W. Roberts, and the defendant, M. C. Snyder, sued Farris and garnished the money in the hands of Roberts. Snyder knew that the policy had theretofore been assigned to plaintiffs; and plaintiffs knew of the garnishment proceedings, but were not made parties thereto. Snyder obtained judgment, and the money was paid over to him. Thereupon plaintiffs brought this action against Snyder and the other parties concerned, and obtained judgment against Snyder for the exact amounts due them from Farris, and for the satisfaction of which sums Farris had assigned the policy to them.

[1, 2] Just what error in this judgment is urged by defendant is not easily discernible. It is said that the action brought was equitable in its nature, and that an adequate remedy at law would have answered the purpose. Notwithstanding our Code has abolished the ancient distinctions and forms of actions at law and of suits in equity, and has provided one form of action—a civil action-in lieu thereof, fundamental differences in actions sometimes do exist, but we do not discern how any such differences affect the case at bar. The facts were all pleaded. The parties were all before the court, and their true relationship was a proper subject of judicial inquiry. The garnishment did not lawfully operate on so much of the proceeds of the policy as had already been assigned to plaintiffs. Hall v. Terra Cotta Co., 97 Kan. 103, 154 Pac. 210, L. R. A. 1916D, 361. Having gotten possession of the proceeds of the insurance policy when he knew it had been assigned to plaintiffs, Snyder became, in law, a trustee thereof for plaintiffs' benefit. He must therefore hand over to plaintiffs their due. There is no semblance of error in this judgment. It is not conceivable that some different form of action or different procedure properly invoked could have brought about a different result.

Affirmed. All the Justices concurring.

For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

WASHBURN et al. v. BOARD OF COM'RS OF SHAWNEE COUNTY. (No. 21948.)

(Supreme Court of Kansas, May 18, 1918.)

(Syllabus by the Court.)

1. HIGHWAYS = 122 - IMPROVEMENT - AP-

PORTIONMENT OF COSTS—STATUTE.
Where proceedings for the improvement of a highway are begun under a statute providing that one-fourth of the cost shall be paid by the township and the remainder charged against the land in a benefit district, it is competent for the Legislature thereafter to change the distribution so that the cost shall fall one-fourth on the township, one-half on the county, and the remainder upon the land in the county, and the remainder upon the land in the benefit district. The owner of the specially benefited land is not prejudiced, for his burden is lightened, and the general taxpayers of the county, have no legal ground of complaint, because it is within the discretion of the Legislature to impose any part of the cost of a highway upon the county. the county.

2. HIGHWAYS \$\infty 122\text{--Improvement--Apportionment of Costs--Statute--Notice.}

In such a statute no provision is necessary for notice to the owners of property other than land in the benefit district, for as to them the tax is general, or, if it is regarded as special, they are conceived as having notice through their representatives in the Legislature; that body having itself determined the apportionment of the burden.

8. HIGHWAYS \$\infty\$109\to Public Improvement \to Petition for Roadway\to Call for Bids\to \text{ VARIANCE.

A call for bids for the construction of "a hard surface road of "bituminous macadam" shows no departure from the requirements of a petition for a roadway of "crushed stone or macadam with a top surface of Bermudez asphalt, or other asphalt equally as good, employing what is known as the 'penetration' method."

Appeal from District Court, Shawnee County.

Action by F. M. Washburn and others against the Board of County Commissioners of Shawnee County. Judgment for defendant, and plaintiffs appeal. Affirmed.

James A. Troutman, of Topeka, for appellants. Hugh T. Fisher, of Topeka, for appellee.

MASON, J. Prior to 1917, proceedings were begun for the improvement of a highway under a statute providing that onefourth of the cost should be paid by the township, and that the remainder should be charged against the land in a benefit district. Gen. Stat. 1915, §§ 8815-8826. By reason of litigation which resulted in confirming the validity of the steps already taken (Stevenson v. Shawnee County, 98 Kan. 671, 704, 159 Pac. 5), the work was delayed, and in the meantime the statute was amended (Laws of 1917, c. 265); the amendment being specifically made applicable to roads theretofore petitioned for (section 14). In the new statute the distribution of the cost was changed so that the township should bear one-fourth, the county one-half, and the land in the ben-

county commissioners had advertised for bids for doing the work, when a new action was brought to enjoin it by an owner of land in the benefit district and a resident of the township who is liable for taxes on property elsewhere in the county. The plaintiffs were denied relief and appeal.

[1] 1. They contend that it was beyond the power of the Legislature to change the distribution of the cost of the improvement after the petition therefor had been signed and acted upon. We regard the contention as not well founded. The owners of the land within the benefit district were not prejudiced by the alteration, because their burden was diminished. The taxpayers of the township were not affected as such. The taxpayers of the county have no legal basis for complaint, for it was competent for the Legislature to impose upon the county any part of the cost of the highway. 2 Cooley on See, also, State v. Taxation, 1203-1205. County of Shawnee, 28 Kan. 431. It is true, some of the petitioners might possibly have been opposed to the road if they had known that half of the expense was to be borne by the county. But as the Legislature could have dispensed with the petition altogether in the first place, it could do so at a later date as well. 12 C. J. 1091.

[2] 2. The plaintiffs argue that the statute is invalid under the rule that "before special taxes can be made a fixed and permanent charge upon the property of such individuals, they must have notice, with an opportunity \* \* \* to contest the validity and fairness of such taxes." Gilmore, County Clerk, v. Hentig, 33 Kan. 156, 5 Pac. 781. Provision is made for notice to the owners of land in the benefit district. Section 6. As to other taxpayers, the tax is a general one. But if it be regarded as special, the property owner is regarded as having notice and hearing through his representatives in the Legislature, inasmuch as that body has itself directly determined the apportionment of the burden, without committing any essential feature thereof to an inferior tribunal. Railroad Co. v. Abilene, 78 Kan. 820, 826, 98 Pac. 224; 1 Taxation by Assessment, Page & Jones, § 123; Judson on Taxation (2d Ed.) § 418. So far as relates to the valuation of his property, the taxpayer has the benefit of the notice and hearing provided by the statute relating to general taxation.

[3] 3. The petition asked for the improvement of the highway "by constructing a roadway \* \* \* using stone or macadam with a top surface of Bermudez asphalt, or other asphalt equally as good, employing what is known as the 'penetration method.' " The notice to contractors asks for bids "for the constructing of a hard surface road of 'bltuminous macadam' \* \* \* as called for in the plans and specifications \* \* \* now efit district the remainder. Section 6. The on file in the office of the county clerk." The plaintiffs suggest that the character of the road described in the bid is not the same as that petitioned for. We perceive no inconsistency. According to Webster's New International Dictionary, bitumen originally meant mineral pitch or asphalt, and by extension includes that substance with others; "bituminous macadam" means "bitulithic pavement," and "bitulithic" is an adjective "designating a kind of paving the main body of which consists of broken stone cemented together with bitumen or asphalt." The specifications referred to are, of course, controlling, and presumably conform to the petition.

The judgment is affirmed. All the Justices concurring.

ABRAHAM et al. v. WEISTER, School Director, et al. (No. 21792.)

(Supreme Court of Kansas. May 11, 1918.)

(Syllabus by the Court.)

Schools and School Districts &= 111 — Lease of School Site-Tax Burden-In-Junction.

Under section 265, Code Civ. Proc. (Gen. St. 1915, § 7163), before taxpayers of a school district can maintain a suit to set aside an oil and gas lease of the school site executed by the school board, and enjoin the lessee from entering upon the school premises and exploiting for oil and gas, it must appear that the contract and the acts complained of may result in imposing some burdens of taxation upon the plaintiffs.

Appeal from District Court, Butler County.
Action for injunction by J. H. Abraham
and others against E. P. Weister, Director of
School District No. 37 in Butler County, and
others. Temporary injunction refused, and
plaintiffs appeal. Affirmed.

R. C. Davis, of Hutchinson, John H. Brennan and R. H. Hudson, both of Bartlesville, Okl., and A. C. Malloy, of Hutchinson, for appellants. Chester I. Long, A. M. Cowan, John Madden, C. E. Cooper, B. F. Hegler, Fred Stanley, C. C. Stanley, and James G. Martin, all of Wichita, for appellees.

PORTER, J. The plaintiffs, who are patrons and taxpayers of school district No. 37 in Butler county, brought suit to enjoin the school board from executing an oil and gas lease covering the school grounds, and to restrain the defendants from going upon the premises and exploiting for oil and gas. A temporary restraining order was granted, but the court on a hearing refused a temporary injunction, and taxed the costs of the proceedings to the plaintiffs, who bring the case here for review.

The quarter section in which the school is located belonged in 1885 to Andrew J. Owen. He and his wife executed a warranty deed to the district conveying a tract out of the brought by southwest corner of the quarter with the

provision that the land was conveyed for the express purpose of schools, and when not used for that purpose, or when it should become necessary to change the site, the land should revert to the original owner. Within the past two years it has been discovered that the entire school district lies near the center of the Butler county oil field, and the land on all sides of the school site is being exploited for oil.

Andrew J. Owen died in 1888, and by will devised all his property to his wife. Afterwards she sold the farm, subject to the rights of the school district. There have been a number of conveyances to other parties since. In the fall of 1917 John Madden, Jr., procured quitclaim deeds from Sarah Ann Owen, conveying whatever rights she had in the school premises, and also procured from the present owners of the quarter section quitclaims of any interest held by them. Madden subsequently transferred his interests to the Revert Oil Company, which was organized for the purpose of taking over the school site and exploiting it for oil and gas. after the Revert Oil Company made an offer to the school district for a lease, and agreed to deposit in escrow the sum of \$3,500, which was to be paid to the district in case an election carried and the lease was executed, and also agreed to pay the district \$3,500 more out of the proceeds of the first oil produced, and one-eighth royalty on all oil or gas thereafter produced. This proposition was submitted at a special election on the 20th of December, 1917. There was no reservation in the lease permitting the school district to make use of any portion of the site for school purposes. It was the usual oil and gas lease providing for damage to growing crops. The vice president and the secretary of the Revert Oil Company appeared at the meeting at the time of the election and talked to the voters, and left with the school board a writing purporting to be executed on behalf of the company, agreeing that if its proposition for a lease was accepted it would. after consulting with the board, move the present schoolhouse forward on the school lot, and if necessary fence off its drilling operations, so that the schoolhouse might be continued to be used for school purposes, "with entire safety to the pupils," until such time as a new schoolhouse is erected "and properly safeguarded," and stating the understanding of the company to be that there should be no interruption in the use of the schoolhouse for school purposes by reason of drilling operations. The election resulted in 52 votes for and 32 votes against the prop-The lease was executed, the first payment of \$3,500 was made to the school board, the schoolhouse was moved to another part of the premises, when the suit was brought by the plaintiffs to enjoin further

There was testimony showing that the intention is to drill an oil well on the schoolhouse site in close proximity to the schoolhouse; that for each oil well a pit 50 to 60 feet in diameter and from 4 to 6 feet deep is necessary; that the operations would occasion noise from the exhaust of an engine, the turning of bull wheels and sand wheels. the heating of bits with blowers, and the pounding of bits with sledge hammers; that the oil and gas create an unpleasant odor; and that there is some danger of fire from the wells. The testimony also shows that from 3 to 5 offset wells, and possibly more, would be drilled next to the boundary line of the school premises. There are approximately 150 pupils of school age in the district, the school population having materially increased by reason of the large number of laboring men employed in the oil business, who have brought their families into the district.

By the terms of the contract the board agrees to turn over the school site to the oil company, permit it to move the school building to one side, in order that it may use the premises to exploit for oil beneath the surface, permit the erection upon the school lot of derricks, engines, tanks, or oil pits, and other appliances and machinery with the attendant noise, confusion, unpleasant odors, and possible danger to the school children. It appears, too, from the evidence, that the drilling on the school site will necessarily result in the school premises being surrounded on three sides by the drilling and operation of offset wells by other oil companies and owners of the oil rights under the adjoining lands. The plaintiffs' contention is that these facts, which are not disputed, establish a probability that the conditions will result in the entire loss of the property to the district, and that in the future it will become necessary to procure another school site. On the other hand, the defendants contend that since the district has already been paid \$3,500 bonus, and is to receive another payment of an equal amount, besides a royalty of one-eighth of all oil that may be produced, it is conclusively established that the plaintiffs will be relieved from the burdens of taxation, instead of having such burdens imposed upon them. Section 265 of the Code (Gen. St. 1915, § 7163) does not authorize the plaintiffs to maintain a suit of this character merely because of the contention that the contract is one which the school board is unauthorized to make.' While there are authorities which seem to go to this extent, they do not appear to depend upon a statute worded like ours. In Herald et al. v. Board of Education, 65 W. Va. 765, 65 S. E. 102, 31 L. R. A. (N. S.) 588, it was held that residents and taxpayers in a school district may sustain a suit to enjoin a lease of a school lot for oil and gas as unauthorized and void, and enjoin the use of the lot for such purpose. Our statute would authorize the plaintiffs to maintain this suit if it appeared that the contract or the acts complained of "may result in the creation of any public burden or the levy of any illegal tax, charge or assessment, and any number of persons whose property is or may be affected by a tax or assessment so levied, or whose burdens as taxpayers may be increased by the threatened unauthorized contract or act, may unite in the petition filed to obtain such injunction." Section 265, Civ. Code; Bunker v. City of Hutchinson, 74 Kan. 651, 87 Pac. 884; Water, Light & Gas Co. v. Railway Co., 74 Kan. 661, 87 Pac. 883.

We are unable to discover from the record in what manner the carrying out of the contract may impose burdens upon the plaintiffs; and it cannot be assumed merely because the contract is illegal, or because it is alleged to be so, that it will result in imposing upon the plaintiffs such burdens.

Whether the trial court denied the application for a temporary injunction upon the ground of the plaintiffs' incapacity to sue, or because it was held that the contract is one which the board had authority to make, does not appear. Since plaintiffs have not been able to bring themselves within the provisions of the statute, and cannot maintain the suit, it is unnecessary to pass upon the other questions.

The judgment is affirmed. All the Justices concurring.

CAPITAL IRON WORKS CO. v. FINNEY. (No. 21546.)

(Supreme Court of Kansas. May 11, 1918.)

(Syllabus by the Court.)

SALES \$= 90-BREACH OF CONTRACT-SATIS-

FACTION—New CONTRACT—EVIDENCE.

The evidence held to support a finding that the entering into a new contract had been accepted as a satisfaction of any claims on account of the breach of the original agreement.

Appeal from District Court, Lyon County. Action by the Capital Iron Works Company against W. W. Finney. Judgment for plaintiff for \$5.10, and it appeals. Affirmed.

Garver & Garver, of Topeka, for appellant. Hamer & Ganse, of Emporia, for appellee.

MASON, J. On January 13, 1916, the Capital Iron Works Company entered into a written contract with W. W. Finney by which it agreed to furnish: for \$1,700 the iron and steel work for a garage. Later Finney informed the company that by reason of a change in his plans he could not use the material contracted for, with certain exceptions, and directed the discontinuance of the work. Five cast-iron lintels which were furnished were paid for. The company sued Finney for damages for breach of the contract. The defendant filed an answer stating in effect | ment to pay for the material actually furnishthat the contract had been modified by mutual consent, a new agreement being made providing that the material furnished should be paid for upon an agreed basis, and as to the rest the contract should be canceled. In a reply the plaintiff denied this allegation and asserted that no consideration existed for any modification or cancellation of the contract. A trial resulted in findings and a judgment in favor of the defendant, the plaintiff being allowed a recovery of only \$5.10. The plaintiff appeals.

There was a direct conflict in the evidence. The defendant gave testimony to this effect: On January 14, 1916, the day after the signing of the contract, he wrote a letter to the plaintiff which he deposited in the mail, properly addressed and stamped (the receipt of which was afterwards referred to by representatives of the company in conversation with him), stating that he had changed his plans and directing that no work be done except upon the lintels and columns. About February 24, 1916, he called at the company's office in pursuance of an appointment made by telephone and told the manager (who had signed the contract for the company) that he had come to see about the shipment of the lintels and columns and to make full settlement with him. He proposed to the manager that they be shipped and billed at the regular price (irrespective of that fixed by the original contract), saying that he would pay that amount and would also pay for his share of some expenses incident to the letting of the contract. The manager said that this was satisfactory.

The plaintiff introduced evidence denying this conversation and denying the receipt of the letter referred to, but the decision of the court must be regarded as resolving all controversies concerning the facts in favor of the defendant. The plaintiff contends that, even assuming the truth of the defendant's evidence, it was entitled to recover damages resulting from the breach of the contract; one item being the loss of the anticipated profits. We regard the evidence already set out as sufficient to support a finding that the contract was modified by agreement, and that the defendant had carried out the terms of the modified agreement on his part; or, stated in another way, that the plaintiff had agreed to accept, in satisfaction of any claim for the breach of the original contract, the payment by the defendant of a share of the expenses referred to, and the acceptance of the lintels and columns at a price then agreed upon. This seems a legitimate interpretation of the defendant's testimony that (after telling the plaintiff's representative that he had come to make a full settlement) he proposed to make these payments, and in reply was

ed at a different price, presumably higher than that at which it was figured in the original contract, formed a sufficient consideration for the modification. 13 C. J. 592.

The judgment is affirmed. All the Justices concurring.

CARSON et al. v. ATCHISON, T. & S. F. RY. CO. (No. 21551.)

(Supreme Court of Kansas. May 11, 1918.)

(Syllabus by the Court.)

1. Railboads &= 279 — Personal Injury — Negligence — Breach of Speed Ordi-NANCE.

Rule followed that in an action for damages against a railway company the breach of a city speed ordinance cannot be considered as an element in establishing the railway company's negligence unless the damages are traceable to or aggravated by the violation of the ordinance. RAILBOADS @== 276(3)—INJUBY ON TRACK-TRESPASSERS.

A railway company ordinarily owes no duty to be on the outlook for juvenile trespassers who may be inclined to climb upon the freight cars of its moving trains, and it is not liable for injuries sustained by such juveniles in so doing.

3. Railboads &= 273½—Injury on Track— Duty to Trespassess.

Rule followed that a railway company's duty to a trespasser is merely to avoid injuring him willfully.

4. Railboads &= 282(5)—Personal Injury— Evidence — Negligence — Contributory NEGLIGENCE.

The facts and relevant circumstances adduced in evidence to sustain an action for damages against a railway company for the death of a bright 12-year old boy tended to show that the boy climbed upon the fore truck of a braicht can in a train moving from 5 to 15 that the boy climbed upon the fore truck of a freight car in a train moving from 5 to 15 miles per hour through a city having an ordinance limiting train speed to 7 miles per hour; that the boy's foot became fast in the truck and that he fell off and was run over by the car wheels, and that he was dragged by the foot some 1,200 feet before the train was stopped; that the trainmen did not see the accident; that the enginemen did not see or did not respond promptly to the signals of a bystander to stop the train after the accident had occurspond promptly to the signals of a bystander to stop the train after the accident had occurred. The boy died of his injuries. *Held*, that this evidence did not establish negligence on the part of the railway company; that it did establish negligence on the part of the boy; and that a demurrer to the evidence was properly sustained.

Appeal from District Court, Finney County. Action by Anna V. Carson and another against the Atchison, Topeka & Santa Fé Railway Company. Judgment for defendant, and plaintiffs appeal. Affirmed.

H. O. Trinkle, of Garden City, for appellants. W. R. Smith, O. J. Wood, and A. A. Scott, all of Topeka, William Osmond, of Great Bend, and Wm. E. Hutchison, of Garden City, for appellee.

DAWSON, J. The plaintiffs sued the defendant for the death of their 12-year old told that this was satisfactory. The agree- | son, who was killed at Garden City.

though no witness saw the main incidents of ! this accident, it seems that the boy must have climbed upon the side of a freight car and that his foot had been caught and that he had fallen off or had attempted to jump off. The car was part of a long freight train moving westward. When first seen the boy's foot was caught in the angle of the iron frame which connects the set of wheels or truck at the front end of the freight car, and he was being dragged along the ground by the train. One of his legs had already been run over before the lad was discovered. The car to which the boy was caught was at some distance from the caboose and at a still greater distance from the engine. When the train stopped, the boy was released from the car at about 1,200 feet west of a bloody place on the track which indicated that a car wheel had there run over him. He died shortly afterwards. The engineer and conductor testified that the train was moving about 5 miles per hour. Another witness who saw the boy dragging from the car truck, and who ran alongside and attempted to release the boy, said that he had to run at "about 15 miles per hour" to keep up with the moving train. The boy was shown to. have been a bright, healthy lad who helped his mother in her bakery business and delivered goods about town. Defendant's demurrer to the plaintiff's evidence was sustained, and this is assigned as error.

Counsel for plaintiff say:

"On the demurrer to the evidence it must stand admitted that the instant that Kermit Sherman was caught by the train he was help-less and no longer charged with negligence; that the train was running 15 miles per hour when the ordinance of said city limited its speed to not more than 7; that the head and rear brakemen were not in their proper positions on the train and if they didn't see Kermit Sherman when he was first caught by the train it was due to this fact; that the boy was dragand the solution and the boy was dragged for 1,200 feet or four blocks in the principal part of the city; that the place where the accident occurred was frequented by trespassers and licensees; that the train could have been stopped in from 50 to 75 feet; that the train might have been stopped in time to have prevented his injuries had the brakemen been in their proper positions.'

[1-3] It is the law of this state that a railway company's only duty to a trespasser is to refrain from willfully injuring him. A., T. & S. F. R. Co. v. Todd, 54 Kan. 551, 558, 38 Pac. 804; Railway Co. v. Prewitt, 59 Kan. 734, 54 Pac. 1067; Burgess v. Railway Co., 83 Kan. 497, 112 Pac. 103. In some jurisdictions a duty is imposed upon railway companies to keep a lookout for trespassers where their presence is to be expected (see note in 8 L. R. A. [N. S.] 1069 et seq.), but that rule may be founded on local statutes. and the decisions so holding go no further than to impose such duty to look out for trains, either while such trains are standing or in motion. Even in congested switchyards, in this state, the railway's duty is merely to avoid willful injury to a trespasser. Malott v. Railroad Co., 99 Kan. 115, 160 Pac.

When discovered, the boy had already been run over by the trucks of the freight car and his maimed body was being dragged by the train. The fact, if it be a fact, that the train was going 15 miles an hour had nothing to do with the accident. Williams v. Electric Railway Co., 102 Kan. 268, 170 Pac. 397. Where the brakemen were stationed on the train is of no consequence. for no duty was imposed on them to keep an outlook that this boy did not attempt to climb on the freight car. The law does not require a railroad company to be on the alert against the invasion of a freight train by trespas-

In Handley v. Railway Co., 61 Kan. 237, 59 Pac. 271, it was decided:

"Where a trespasser goes under a train and upon a brake of a car in an attempt to steal a ride, no duty of the railroad company arises in his favor until he is discovered by some one in charge of the train, nor can a recovery be had for injuries caused by falling from his perilous position unless the company was guilty of willful and wanton neglect of duty in not stopping the train and removing him after his peril was discovered." Syl. § 2.

In Wilson v. Railway Co., 66 Kan. 183, 71 Pac. 282, it was held:

"(1) As a general rule, a railroad company owes no duty to trespassers who jump on and off its moving trains for the purpose of stealing rides, except not recklessly or wantonly to injure them after their peril is discovered.

"(2) An intelligent boy, 12 years of age, who

was familiar with the running of railroad trains, and who knew and appreciated the danger of getting on and off a moving train, climbed upon a slow-moving train and was injured while getting down from one car and attempting to climb upon another. Held, that he was a conscious trespasser and responsible for his own negligence and injury.

"(3) The fact that the plaintiff and other boys had previously jumped on and off the cars of the company, without remonstrance from the employes of the company, did not amount to an invitation from the company to plaintiff to hop on and off its moving trains thereafter, nor make the company liable for an injury result-ing from such reckless conduct." Syl.

In A., T. & S. F. R. Co. v. Plaskett, 47 Kan. 112, 114, 115, 26 Pac. 403; A., T. & S. F. R. Co. v. Schroeder, 47 Kan. 315, 27 Pac. 965, it was said:

"If it were the duty of the trainmen to keep a lookout to prevent thoughtless children from climbing on or under their train when cross-ing the public street at a slow rate, or when momentarily stopping in a public street before crossing another railroad, then the brakemen or trainmen, instead of being at their usual or proper places upon the cars to handle the brakes, give signals, etc., should be upon the ground, near by the several cars of the train, than to impose such duty to look out for trespassers on the tracks; none of them suggests a duty on the railway company to watch out for such trespassers as may be inclined to climb upon the freight cars of its | their proper places. Nothing else was found. If they had been at their usual or proper places on the cars for the operation of the train, they would not, in the performance of their usual or general duties, have been watching or looking out to prevent children or others from climbing on or under the cars, when the train was in motion, or when it momentarily stopped."

See, also, Tennis v. Rapid Transit Ry. Co., 45 Kan. 503, 508, 25 Pac. 876; Mendenhail v. Railway Co., 66 Kan. 438, 71 Pac. 846, 61 L. R. A. 120. 97 Am. St. Rep. 380; Gamble v. Oil Co., 100 Kan. 74, 163 Pac. 627, L. R. A. 1917D, 875.

[4] There was no evidence that the train was not promptly stopped when once the boy's situation was discovered. The enginemen were under no duty to watch for and respond to signals given by a bystander or stranger running alongside the train, and there is no evidence that they saw or understood those signals.

There was no evidence of negligence on the part of the railway company; the negligence of the unfortunate boy was fully established by circumstances; and the judgment of the trial court cannot be disturbed.

Affirmed. All the Justices concurring.

# DAVIN v. KANSAS MEDICAL, MISSION-ARY & BENEVOLENT ASS'N. (No. 21282.)

(Supreme Court of Kansas. May 11, 1918.)

(Syllabus by the Court.)

CHARITIES 4-45(1)—MEDICAL SUPERINTEND-ENT'S BREACH OF CONTRACT—LIABILITY. A charitable hospital corporation is not lia-

A charitable hospital corporation is not liable in damages for the failure of its medical superintendent to comply with a contract made by him for the care of a patient being treated in the hospital.

Appeal from District Court, Sedgwick County.

Action by Fannie Davin against the Kansas Medical, Missionary & Benevolent Association. Judgment for defendant notwithstanding the verdict, and plaintiff appeals. Affirmed.

Brubacher & Conly and W. P. Campbell, all of Wichita, for appellant. Smyth & Smyth, of Wichita, for appellee.

MARSHALL, J. The plaintiff commenced this action to recover judgment for personal injuries. Judgment was rendered in favor of the defendant, and the plaintiff appeals.

The defendant is a charitable corporation organized under the laws of this state solely for purely philanthropic and charitable purposes. It conducts a hospital, or sanitarium, at Wichita. The plaintiff was afflicted with melancholia and was, by her husband, taken to the defendant's hospital. He stayed with her for a couple of days, when he was advised by Dr. Sutter, the defendant's medi-

cal superintendent, to go home and stay away from the plaintiff. The husband agreed so to do on condition that a nurse be placed in charge of the plaintiff at all times. and that she be not left alone. To this Dr. Sutter assented. A special nurse was placed in charge of the plaintiff, but the nurse did not remain in the room with the plaintiff at all times. The nurse slept in the hall near the door to the plaintiff's room. While the nurse was so sleeping, the plaintiff got on: of her bed, passed through an open window. and fell to the roof of a porch below, and injured herself. She brought this action to recover damages for the injuries sustained by her. There was no allegation in the petition, and there was no evidence to prove that the defendant did not exercise reasonable care in the employment of its physicians and attendants.

The jury returned a verdict in favor of the plaintiff and answered special questions as follows:

"(2) Does any person, corporation, or association receive profits or dividends from its earnings? Answer: No.

"(3) If the jury answer the foregoing interrogatory in the affirmative, then state what person, corporation, or association receives profits or dividends. Answer: Not any.

or dividends. Answer: Not any.

"(4) What, if any, negligence do you find the defendant guilty of? State fully. Answer: In not complying with special contract entered into with Mr. Davin in supplying a special nurse in constant attendance upon Fannie Davin at all times.

at all times.

"(5) What servant or agent of the defendant was guilty of the negligence found, if any? Answer: Miss Cox, the special nurse.

"(6) What could the defendant have done that

"(0) What could the defendant have done that it did not do to avoid the injury to plaintiff? Answer: Should have had special nurse in room in constant attendance on Fannie Davin.

"(7) Did any servant or agent of the defendant have reason to believe that the plaintiff would be likely to injure herself? Answer:

Yes.

"(8) If you answer the last question in the affirmative, then state what servant or agent had such reason so to believe. Answer: Dr. Sutter, the hospital doctor, and the special nurse.

"(9) Did the husband or physician of the plaintiff inform any agent or servant of the defendant that she was likely to injure herself if not guarded, and, if so, to whom was such information given? Answer: Yes; inasmuch as Dr. Edgerton informed Dr. Sutter of the nature of the case."

The court set aside the verdict, and rendered judgment in favor of the defendant on the facts found by the jury.

The plaintiff says:

"The only specification of error is the order sustaining the motion of the defendant for judgment on the special findings."

Can the plaintiff recover under the facts found by the jury? In Nicholson v. Hospital Ass'n, 97 Kan. 480, 155 Pac. 920, L. R. A. 1916D, 1029, this court said:

"Charitable associations conducting hospitals are not liable for the negligence of their physicians and attendants resulting in injury to patients unless it is shown that the association

maintaining the hospital has not exercised reasonable care in the employment of its physicians and attendants. \* \* \* In such an action a peand attendants. \* \* \* In such an action a petition which fails to allege that the defendant did not exercise reasonable care in the selection of its physicians and attendants is subject to demurrer. Paragraphs 1, 3, Syl.

There are cases holding that even if a contract is made by which those in charge of a hospital agree to furnish a nurse to be in constant attendance, yet the hospital is not liable for damages on account of injuries sustained by a failure to comply with the Duncan v. Nebraska Sanitarium contract & Benevolent Ass'n, 92 Neb. 162, 137 N. W. 1120, 41 L. R. A. (N. S.) 973, Ann. Cas. 1913E, 1127; Downes v. Harper Hospital, 101 Mich. 555, 60 N. W. 42, 25 L. R. A. 602, 45 Am. St. Rep. 427; Duncan v. St. Luke's Hospital, 113 App. Div. 68, 98 N. Y. Supp. 867.

One reason for this rule is "that trust funds created for benevolent purposes should not be diverted therefrom to pay damages arising from the torts of servants." Another reason is "that public policy encourages the support and maintenance of charitable institutions and protects their funds from the law of litigation." Duncan v. Nebraska Sanitarium & Benevolent Ass'n, supra, and note to this case found in Ann. Cas. 1913E, 1129. Both reasons are good.

Dr. Sutter made the agreement, and he may be liable personally; but the plaintiff argues that because Dr. Sutter failed to comply with his agreement the defendant is liable. There is no reason why the defendant should be liable for Dr. Sutter's negligence, any more than it should be liable for the negligence of the nurse who was looking after the plaintiff. Under Nicholson v. Hospital Ass'n, supra, the defendant is not liable for the negligence of Dr. Sutter.

The plaintiff cannot recover under the facts found by the jury, and the judgment is attirmed. All the Justices concurring.

STATE v. WILL. (No. 21390.)

(Supreme Court of Kansas. May 11, 1918.)

(Syllabus by the Court.)

1. INDICTMENT AND INFORMATION \$== 176 ALLEGATION IN INFORMATION-PROOF

ALLEGATION IN INFORMATION—I'ROOF.

In a prosecution for persistent violation of the prohibitory liquor law, an allegation in an information as to a former conviction on a particular day does not preclude proof showing that the verdict finding the defendant guilty was returned on the date alleged, although the judgment imposing sentence was entered a few days after that time.

2. CRIMINAL LAW \$\infty\$ 543(2)—EVIDENCE—TESTIMONY OF ABSENT WITNESS—TRANSCRIPT— OBJECTION.

It is not a good objection to the admission of a transcript of the testimony of an absent witness previously given at the preliminary examination that the docket of the justice of the

while the stenographer who took the testimony testified that it was taken on the following day. since it sufficiently appears that there was no doubt as to the identity of the hearing nor any doubt that both referred to the same testimony.

(Additional Syllabus by Editorial Staff.)

3. WORDS AND PHRASES—"CONVICTION."
In legal parlance the term "conviction" is sometimes applied to finding a person guilty, and is sometimes used to indicate a final judgment (citing Words and Phrases, Conviction).

Appeal from District Court, Saline County. Pete Will was convicted of being a persistent violator of the prohibitory liquor law, and he appeals. Affirmed.

R. A. Lovitt and Frank T. Knittle, both of Salina, for appellant. S. M. Brewster, Atty. Gen., and L. W. Hamner and W. B. Crowther, both of Salina, for the State.

JOHNSTON, C. J. Pete Will was convicted upon a charge of being a persistent violator of the prohibitory liquor law. Gen. Stat. 1915, § 5541. In this appeal he assigns two grounds of error based on the admission of testimony.

[1, 3] The first is the admission of the record of a previous conviction. In the information it was alleged that he was formerly convicted on December 2, 1915, while the record introduced in evidence showed that the defendant was tried and found guilty of the offense on December 2, 1915, but the judgment was not entered until December 15. 1915. It was necessary to allege and prove a former conviction, but, if an error was made in stating the time of the conviction, it would not preclude proof of the true time. Here the date of the verdict finding the defendant guilty was named as the time of conviction. and in common parlance a finding of guilty is frequently spoken of as a conviction. In legal parlance the term is sometimes applied to finding a person guilty and sometimes used to indicate a final judgment. Commonwealth v. Lockwood, 109 Mass. 323, 12 Am. Rep. 699; People v. Adams, 95 Mich. 541, 55 N. W. 461; 2 Words and Phrases, 1584. However, if the date of the sentence and judgment is deemed to be the time of conviction, it would not aid the contention of the defendant. It was enough to show that the defendant had been convicted of a violation of the probibitory law prior to the commission of the offense charged in the present prosecution. If the conviction is fully identified, an error in the information as to the time it happened cannot be material, as only one former conviction is needed to make a subsequent violation a felony. It cannot be inferred that the defendant was embarrassed as to the identity of the conviction because of the number of previous convictions.

[2] The other ground of error is the admission of a transcript of the testimony of one Temple purporting to have been given at peace showed that it was given on one day, the preliminary examination of the defend-

ant. This is based on another dispute as to dead bodies are placed, has been placed on dates. The record sent up by the justice of the peace showed that the evidence of Temple was given on August 29, 1916, while the stenographer who took the testimony testified that it was given on the 28th of August. It is manifest that both referred to the same testimony, and it is not important nor necessary to determine who was mistaken in respect to the date. The hearing before the magistrate was begun on one day and ended at a later time, and the stenographer testified that the testimony was taken on the 28th of August, and that the case was continued until the 29th for argument. There can be no question as to the identity of the case and no possibility of prejudice to the defendant. Aside from this matter of identity, it appears that the defendant was not convicted of the charge as to which Temple gave his testimony. The sales referred to by him were set out in other counts in the information upon which there was an acquittal.

Judgment affirmed. All the Justices concurring.

GRAY et al. v. CRAIG, County Clerk, et al. (No. 21515.)

(Supreme Court of Kansas. May 11, 1918.)

(Syllabus by the Court.)

MOITAXAT \$245—EXEMPTION—MAUSOLEUM -"GBAVEYARD."

A mausoleum, erected and used exclusively as a place for the permanent interment of the dead, is exempt from taxation under the second subdivision of section 11151 of the General Statutes of 1915, which exempts from taxation all lands used exclusively as "graveyards."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Graveyard.]

Appeal from District Court, Neosho County. Action for injunction by W. M. Gray and others against W. E. Craig, County Clerk, and others. Demurrer to petition sustained. and plaintiffs appeal. Reversed, and cause remanded, with directions to overrule the demurrer, and for further proceedings.

H. P. Farrelly and T. R. Evans, both of Chanute, for appellants. R. B. Smith, of Chanute, for appellees.

MARSHALL, J. The plaintiffs commenced this action to enjoin the collection of taxes levied on certain real property. A demurrer was sustained to their petition, and they appeal.

The petition, in substance, alleges that the plaintiffs are partners in the construction and maintenance of a mausoleum, on a tract of land 179x239 feet, adjoining Elmwood cemetery in the city of Chanute: that the land and the mausoleum building constructed thereon are used exclusively for the burial of the dead; that "a plat of the crypts in said building, wherein the

record in the office of the register of deeds of Neosho county, Kan., each crypt being numbered, and by such numbers are sold and conveyed by the complainants by warranty deed, the same as any other conveyance or right in real property"; that "the mausoleum building contains 216 crypts, including two private rooms therein of eight crypts each, and on March 1, 1916, 89 of said crypts had been sold to 36 different people. and deeds thereto had been delivered to the purchasers for all but three of said crypts. At the time of filing this petition 104 of said crypts, including one of the private rooms, have been sold to 40 different people and deeds thereto delivered accordingly and 14 bodies buried therein, and are now resting in said mausoleum"; that the property is exempt from taxation; and that the defendants have assessed the property at \$23,000, and will place the same on the tax rolls of Neosho county, and will levy a tax thereon in violation of law.

There is but one proposition argued, and that proposition is that the property is exempt from taxation. Section 11151 of the General Statutes of 1915, in part, reads:

"That the property described in this section, to the extent herein limited, shall be exempt from taxation: \* \*

"Second. All lands used exclusively as grave-yards."

If a mausoleum is a graveyard, within the meaning of this statute, the property is exempt from taxation, and the plaintiffs must prevail. What is a graveyard? It is a place for the burial of the dead. Usually the dead are buried in the ground, but that is not necessary, and is not always done. Sometimes. they are placed in vaults, or mausoleums, built on top of the ground. Each of these vaults, or mausoleums, may contain more than one body, but these facts do not deprive the property of its character as a graveyard.

When the statute was enacted, mausoleums, other than those found in graveyards, were little known in this country. Within a comparatively few years, mausoleums, such as the one built by the plaintiffs, have come into use as places for the interment of the The manner in which the plaintiffs dead. have disposed of crypts in which to deposit dead bodies is very similar to the manner in which lots are ordinarily disposed of in graveyards in this state. Every other reason that can be urged in favor of exempting graveyards from taxation can likewise be urged in favor of exempting mausoleums.

The defendants invoke the rule that statutes exempting property from taxation must be strictly construed. The rule is correct. and must be followed; but the statute must be construed so as to give it effect, and so as to include all property that comes within caskets containing the meaning of the term "graveyard."

###For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes



mausoleum is taxable, the defendants cite Mausoleum Bldrs. of N. J. v. State Taxes, 88 N. J. Law. 593, 96 Atl. 494. The reasoning in that case is not convincing when applied to a mausoleum as a burial place for the dead. In addition to this, the decision was based on a statute exempting buildings for cemetery use. This exemption was held to include buildings essential and necessarily incidental for the use of a cemetery, but not to include mausoleums. We have no such provision in our statute. Our statute exempts graveyards. A mausoleum comes within the terms of our statute.

The judgment is reversed, and the cause is remanded, with directions to overrule the demurrer and to proceed in accordance with this opinion. All the Justices concurring.

(No. 21356.) BROWN v. BROWN. (Supreme Court of Kansas. May 11, 1918.)

(Syllabus by the Court.)

1. JUDGES \$\infty\$46 — DISQUALIFICATION — CHANGE OF VENUE—STATUTE—"PARTIES."

Where the judge of the district court is rewhere the judge of the district court is related to an attorney in the cause, whose fee is to be fixed and determined by the court, the attorney is one of the "parties" in interest within the meaning of section 57 of the Code (Gen. St. 1915, § 6947), which provides that when the judge is related to either of the parties the place of trial shall be changed or an

ties the place of trial shall be changed, or another district judge called in to try the cause. [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Party.] 2. JUDGES \$\infty 46 - Disqualification Change of Venue.

CHANGE OF VENUE.

In a suit for divorce, where the wife's attorney is the son of the judge of the court, and asks for an allowance of counsel fees, and the defendant applies for a change of venue on the ground of the relationship between the judge and the plaintiff's attorney, it is error to refuse to grant the application.

Appeal from District Court, Barton County. Suit for divorce and alimony by Louise Brown against James E. Brown (Cox). Judgment for plaintiff, and defendant appeals. Reversed, and cause remanded for further proceedings.

Carr W. Taylor, of Hutchinson, and Charles L. Carroll, of Great Bend, for appellant. A. C. Banta, of Great Bend, for appellee.

PORTER, J. This was a suit for divorce and alimony. The plaintiff recovered and the defendant appeals.

The plaintiff, who is a negro woman, alleges that the defendant, a white man, is her husband by a marriage which she claims took place in Louislana about 1904. The defendant's true name is James E. Cox. On May 10, 1890, he was married in Indiana to Nellie A. Logan; they afterwards moved to Illinois and five children were born of sider is the contention that it was error to that marriage. In March, 1902, the defend-refuse to grant a change of venue.

In support of their contention that the ant abandoned his wife and family, assumed the name of James E. Brown, and lived at various places in the South until he came to Kansas. He denies that he and plaintiff were ever married, and alleges that in Louisiana it was unlawful for whites and blacks to mar-The plaintiff and the defendant lived together in Louisiana as husband and wife. and the defendant subsequently came to Great Bend, where he engaged in his trade of blacksmithing. Shortly thereafter the plaintiff followed him, and they lived there together until a short time before this suit In February, 1917, plaintiff was begun. wrote and mailed the following letter to the former wife of defendant.

"Great Bend, Feb. 5, 1917.

"Mrs. Anne Cox—Dear Madam: I write to let you know that I am a negro and that your former husband, J. E. Cox, and I have been living together for 13 years. I am his common-law wife. I think it justice to you that you should know this. He has lived with me under an assumed name, J. E. Brown, and have denied you and your children and I just recently knew he was a married man, and after was wears senarated about three weeks age. Was "Mrs. Anne Cox-Dear Madam: I write to we were separated about three weeks ago was when I first learned of you, and since he has been in this country he has been passing as a negro. Included you will find postage. Please answer on return mail.

"Mrs. J. E. Brown or Lula Brown, "1102 Kansas Ave."

Nellie A. Cox, the first wife of the defendant, secured a divorce from him in Indiana on January 29, 1912, but the fact that she had procured a divorce was not known to either the plaintiff or defendant until after this suit was instituted.

On the same day the petition was filed and before service was had upon the defendant. the court made an ex parte order requiring the defendant within 5 days to pay to the clerk of the court \$50 for the use and benefit of plaintiff's attorney, and to deposit \$25 security for costs, and to pay to the clerk for the support and maintenance of plaintiff and her daughter the sum of \$25; and to pay each 30 days thereafter a sum of \$25 until the further order of the court. The case afterwards proceeded to trial on the merits and the court refused to find that any marriage ceremony ever took place between the parties, holding that if there was one it was illegal and void under the laws of Louisiana, but that the plaintiff was the common-law wife of the defendant, and the court granted her a divorce on the ground of extreme cruelty, setting apart to her two of the four lots owned by the defendant, including the lots upon which the residence is situated, and giving the defendant two vacant lots which defendant claims are worth about \$150. In the decree the court allowed to plaintiff's counsel \$150 attorney fees.

There are a number of claims of error, but the only one which we find necessary to con-

suit was commenced January 11, 1917; four days later defendant filed a motion to vacate the order for the payment of attorney's fees, suit money and money for the support and maintenance of plaintiff and her daughter, setting up as one of the grounds that he was never at any time married to the plaintiff, that she is not his wife, and that he is not the father of her child. While this motion was pending the defendant filed an application for a change of venue on the ground of the relationship existing between the judge of the district court and plaintiff's attorney, who is a son of the judge. Motions were also filed asking the court to reserve the questions of alimony, suit money, and attorney's fees until the case could be finally heard before a qualified judge. The motions were overruled, and the defendant filed his verified answer to the petition setting up the defense already referred to. A second motion for a change of venue was filed on March 13th, alleging as one of the grounds that the attorney for the plaintiff was the son of the judge of the district court, and that by reason of their relationship the judge was disqualified under the statute to try the case.

[1, 2] Section 57 of the Code (Gen. St. 1915, \$ 6947) reads in part as follows:

"In all cases in any of the district courts of this state in which it shall be made to appear that a fair and impartial trial cannot be had in the county where the suit is pending, or when the judge is interested or has been of counsel in the case or subject-matter thereof, or is related to either of the parties, or otherwise disqualified to sit, the court may, upon application of either party, change the place of trial to some county where the objection does not exist."

Provision is made in the same section for calling in some other district judge to attend and sit as judge of the court where the case is pending.

It is defendant's contention that the son of the district judge is a "party," within the meaning of the statute. There are two lines of authorities respecting the construction which should be given to the term "parties" as used in constitutional or statutory provisions intended to disqualify a judge from sitting in a cause in which he is related to one of the litigants. In some jurisdictions the word is given a narrow and technical meaning, and the judge will not be held disqualified unless the person to whom he is related is in strictness one of the parties to the cause. In other jurisdictions the rule adopted is that if the judge is related to an attorney in the cause whose fee is contingent upon success, or the amount of the fee is to be fixed and determined by the court, he is a party within the meaning of the provision requiring a change of venue where the judge is related to one of the parties. In our opinion the spirit and purpose of the statutory provision is best subserved by the latter con-

"The great weight of authority is that a judge whose relation within the specified degree is attorney in an action with fees contingent on recovery is disqualified to sit therein under a constitutional provision that no judge shall preside in the trial of a case where either of the parties shall be connected with him by consanguinity within a certain degree, although the authorities are not all agreed on this point."

In 23 Cyc. 585, it is said:

"But where the attorney's compensation depends on the contingency of recovery, he is, in some jurisdictions, regarded as an interested party, so that relationship to him will disqualify, although the client may have agreed to pay fees commensurate with the services rendered, independently of success."

A leading case is Roberts v. Roberts, 115 Ga. 259, 41 S. E. 616, 90 Am. St. Rep. 108. There the judge was related to the counsel of an applicant for alimony and counsel fees in a divorce proceeding, and it was held that he was disqualified from presiding in the case and passing upon the application, although such counsel may have had a contract with the applicant binding her to pay them for their services, independently of the success of the application for alimony and counsel fees. In the opinion it is said:

"It is the pecuniary interest of the attorney in the result of the case which disqualifies the judge. If the applicant did not ask any allowance of counsel fees, of course the fact that her counsel was related to the judge, no matter how closely, would not have the effect to disqualify the judge from presiding. The moment the applicant asks for counsel fees her counsel becomes pecuniarily interested in the result of the suit, and, so far as these fees are concerned, the counsel are as much parties to the case as if they were parties to the record. \* \* In an application for alimony and counsel fees the counsel for the applicant are thus not only pecuniarily interested in the result of the suit, but if counsel fees are allowed a judgment is obtained which is absolutely under their control, independently of anything which might be done by their client in reference to the main case, and which can be enforced for their benefit, certainly in the name of their client, even if the cases above referred to are not authority for the proposition that it can be enforced in their own names. In such a case we do not think that a judge who is related within the fourth degree of consanguinity or affinity to any counsel for the applicant should preside. The reason and spirit of the Code section above referred to, as well as a proper construction of the word 'party' therein contained, would disqualify a judge so situated from presiding in the case. In such a case the judge determines not only the question as to whether under the circumstances of the case counsel fees should be allowed, but he also determines the amount; the allowance of fees and the amount thereof being left under our law to his discretion."

adopted is that if the judge is related to an attorney in the cause whose fee is contingent upon success, or the amount of the fee is to be fixed and determined by the court, he is a party within the meaning of the provision requiring a change of venue where the judge is related to one of the parties. In our opinion the spirit and purpose of the statutory provision is best subserved by the latter construction. In 15 R. C. L. 534, it is sald:

The question is also the subject of a note in 15 Ann. Cas. 533, where it is stated that the courts adopting the contrary view are those inclined to construe the term "parties" in its limited or strict sense. A recent case envolving the very question now under consideration is Yazoo, etc., 'R. Co. v. Kirk, 102 Miss. 41, 58 South. 710, 834, 42 L. R. A. (N. S.) 1172, reported with notes in Ann. Cas. 533, where it is stated that the courts adopting the contrary view are those inclined to construe the term "parties" in its limited or strict sense. A recent case envolving the very question now under consideration is Yazoo, etc., 'R. Co. v. Kirk, 102 Miss. 41, 58 South. 710, 834, 42 L. R. A. (N. S.) 1172, reported with notes in Ann. Cas.

of Mississippi adopted the broad and liberal rule of construction and held a judge disqualified to sit in a divorce and alimony case because he was related to an attorney for one of the parties, expressly declaring in the opinion that if the numerical weight of authority rested with the narrow view, or if there were no precedent to follow, the court would unhesitatingly adopt the broad and liberal construction of the statute because of the general policy of the law. In the opinion it was said:

"We are convinced that the broad and liberal rule of construction is the soundest and wisest rule, and, adopting this rule as our guide, we conclude that the circuit judge was disqualified to preside at the trial of this case. If the numerical weight of authority rested with the narrow view, we would unhesitatingly follow the lead of those courts adopting the broad and liberal construction of statutes and constitutions similar in language to our own Constitu-tion. In the absence of precedent, we would feel constrained to create a precedent in har-mony with our views. Every litigant is en-titled to nothing less than the cold neutrality of an impartial judge, who must possess the disinterestedness of a total stranger to the indisinterestedness of a total stranger to the interests of the parties involved in the litigation, whether that interest is revealed by an inspection of the record or developed by evidence aliunde the record. The real parties in interest furnished the reason for the judge to recuse himself when it becomes known that they are related to the judge, although they may not be parties so nomine." may not be parties eo nomine.

An examination of the cases cited on both sides of this question convinces us that the weight of authority, giving due consideration to the more recent expressions of the courts and law-writers, favors the adoption of a broad and liberal, rather than a narrow, construction of the term "parties" as it is used in statutory or constitutional provisions simiiar to the provision in our Code. In some of the cases which adopt the other view, the fact that at the common law relationship of the judge to one of the litigants did not disqualify him from sitting in the cause is given more consideration and force than it is entitled to in our opinion. In Roberts v. Roberts, supra, the Supreme Court of Georgia lays stress upon the statutory disqualification of a juror who is related to one of the parties, or has an interest in the result of the suit. and the court in the opinion say:

"The reasons at the foundation of the rule which forbid a juror from sitting in a case where he is related to some one pecuniarily interested in the result of the suit would also apply in the case of a judge who was in a similar situation. If one not a party to the record, but directly and pecuniarily interested in the result of the cause, would be such a party thereto as to disqualify one of his kinsmen from being a juror, he would also be such a party as to disqualify his kinsman from presiding as judge. Especially would the judge be disqualithe loan.

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in the powers of a judge be disqualified in a proceeding where he presides, not only with the powers of a judge to determine the questions of law arising in the case, but with the powers of a jury to absolutely settle all disputed questions of fact, as is the case in overruled, verdict and judgment for defendance.

viewing the leading cases the Supreme Court | an application for the allowance of temporary alimony and counsel fees, when one or more counsel for the applicant in whose behalf the fees are asked are related to the judge within the degree referred to in the statute declaring when a judge should be disqualified."

> Among the grounds under our Code for the peremptory challenge of a juror are "that he has an interest in the action \* \* \* or is of kin to either party." Civ. Code, § 282 (Gen. St. 1915, § 7182).

> Our conclusion is that under the facts in this case the judge of the district court was disqualified, and it was error to refuse to change the venue.

> The judgment is reversed, and the cause remanded for further proceedings. All the Justices concurring.

FONTRON v. KRUSE. (No. 21137.) (Supreme Court of Kansas. May 11, 1918.)

(Syllabus by the Court.)

1. BILLS AND NOTES \$==518(1)-FAILURE OF CONSIDERATION.

In an action on a promissory note the answer alleged that the consideration for the note wholly failed; that it was given in part payment of a commission on a farm loan under a verbal contract, by which plaintiff agreed to procure for defendant a \$20,000 loan at 6 per cent. interest; that the loan obtained bore 6½ per cent. interest; that defendant was unable to read and signed the loan papers, believing they provided for 6 per cent. interest, and did not discover the truth until he had made two payments of interest; and he prayed that the note be canceled, and that he have judgment against the plaintiff for the balance of the commission paid in cash at the time the note was executed. No fraud or Held, that the mutual mistake was alleged. facts do not show a total failure of considera-

2. EVIDENCE 6 441(1) - PAROL EVIDENCE -

APPLICATION FOR LOAN—PRESUMPTION.
Under such an answer, when the defendant's evidence shows that he signed written applications for the loan, appointing the plaintiff his attorney in fact to procure the loan at 6½ per cent. interest, it is error to permit defendant to offer oral evidence of representations and statements made previous to the execution of the written applications and loan papers, the presumption of law being that the instruments contained the whole contract and should govern, in the absence of any allegation or claim of fraud or mutual mistake. Willard v. Ostrander, 46 Kan. 591, 26 Pac. 1017.

(Additional Syllabus by Editorial Staff.)

3. ESTOPPEL \$\sim 90(2)\to Acquiescence.

In action on a note given August 29, 1913, for obtaining a farm loan on defendant's application signed November, 1912, under which he received proceeds in February, 1913, and on which he had made interest payments, of the rate of which he did not complain until his answer in May, 1915, not averring fraud or mistake, he was estopped to raise defense that interest was greater than he agreed to pay on the loan.

ant, and plaintiff appeals. Reversed and remanded, with directions to sustain the demurrer to the evidence and to render judgment for plaintiff.

W. G. Fairchild and H. S. Lewis, both of Hutchinson, and J. D. Beck, of Greensburg, for appellant. J. W. Davis, of Greensburg, for appellee.

I'ORTER, J. The action was on a promissery note for \$300 given by the defendant to the plaintiff in part payment of a commission for procuring a real estate loan. The answer admitted the execution of the note, but alleged that the consideration for which it was given had wholly failed; that plaintiff had orally agreed with defendant to procure him a loan of \$20,000 on his farm in Kiowa county, which was to draw interest at the rate of 6 per cent., and that defendant agreed to pay him a commission of \$600 for his services; that he had paid \$300 in cash, and given the note for the balance. It alleged that, when the first installment of interest on the loan became due, defendant for the first time discovered that the rate of interest was 61/2 per cent. instead of 6 per cent., and that therefore plaintiff had not fulfilled his contract; that defendant was unable to read, and for that reason did not discover when he signed the loan papers that the rate of interest was greater than 6 per cent. He prayed that the note be canceled, and for judgment against plaintiff for the \$300 cash payment, with interest from the time it was paid, and for costs. The reply was a general denial. The jury returned a verdict in favor of defendant. The court gave judgment against the plaintiff for \$357.-72, the amount of the cash payment, with interest, and for costs. The plaintiff appeals. The defendant had the burden of proof.

He testified he had lived in Kiowa county 32 years; that in company with one Eastman he went to Hutchinson to the office of plaintiff, where they informed plaintiff that he desired a loan of \$20,000 upon his land, and did not want to pay over 6 per cent.; that Mr. Fontron said that he did not know whether he could do that or not; would have to find out from the company if he could make that rate; that the regular rate was 614 per cent.; that possibly the company might make it at 6 per cent., and he would call up by long distance phone and inform defendant later. He further testified that he had never talked with plaintiff about paying him any commission; that he did not make any contract with him at the time he made the loan, but paid the \$300 and executed the note after the \$20,000 loan had been paid to him; that after he had received the last of the proceeds of the loan plaintiff told him that Eastman had said defendant would give plaintiff a small commission, and that plaintiff "struck him for \$600." He thought at the time that it was a big commission in gave the note for the balance, thinking he had a 6 per cent. loan. He admitted that Mr. Fontron advanced him \$12,000 before the loan was completed; that after talking with Eastman he came to the conclusion that owing to the trouble Fontron had with the loan he ought to pay him a commission. On his direct examination the defendant's attention was called to one of the applications made to the insurance company for the loan, in which the interest was stated to be at the rate of 61/2 per cent. He admitted signing the applications the day following the conversation in the office, after he had been notifled by telephone that the company would make the loan. His testimony is that he cannot read, and that the written applications for the loan were signed by him without having them read; that he did not have the note and mortgage read over to him, and signed them without knowing what was in them; that his wife signed them without having them read to her, although she can read and write; that he discovered the 61/2 per cent, rate when he paid the first year's interest, and did not discover it when he paid the first interest installment of about \$754, which was for part of a year. He admitted that he had never made any complaint to Mr. Fontron after discovering the rate of interest he was paying.

testified that he introduced Eastman Kruse to Fontron, explained the condition of the land, the amount of money wanted. and the rate of interest defendant was willing to pay if he could get it at that rate; that plaintiff said he could not make it at 6 per cent.; that they never had made any as low as that so far West. "I told Mr. Fontron it was a big loan, and that he ought to give him a pretty good rate on it-something to that effect." The witness was not positive whether or not he told Fontron the defendant would not make a loan unless he could get it at 6 per cent. He testified that plaintiff called him by telephone that evening and said, "I can make that loan for you;" and he replied, "All right, we will be down in the morning." The next morning he went with Kruse to Fontron's office, but did not stay over five minutes, and left Fontron and Kruse talking the matter over. As he started out he heard Fontron ask defendant if he would be willing to pay a small commission to get the loan through, stating as a reason that there was no commission in it for him to amount to anything, and that he was having trouble to get it through. The court overruled a demurrer to the defendant's evidence.

note after the \$20,000 loan had been paid to him; that after he had received the last of the proceeds of the loan plaintiff told him that Eastman had said defendant would give plaintiff a small commission, and that plaintiff a small commission, and that plaintiff as mall commission. The mortgages, notes, and coupons tiff "struck him for \$600." He thought at the time that it was a big commission in place of a little one, but paid \$300 cash and his office he told them it was a heavy loan

est was out of the question; that he could not do any better than that at home on the best land; that the rate in Kiowa county was higher than it was in Reno, where the prevailing rate was 7 per cent, and that a good many loans were being made at 71/2 per cent.; but he would try to get them a loan at 61/2 per cent. His testimony is that after they had studied the matter over they asked if that would include a commission, and he told them it would if he could get the rate from the party he had in mind. He testified that the next morning Kruse signed and acknowledged the application, and that nothing was changed in the papers after he signed them; that the application was made in November, 1912, and Kruse got all his money some time in February, 1913; that, while the abstracts were being brought to date, plaintiff advanced \$12,000 to defendant to pay for a quarter section of land, and at that time told him the insurance company paid a very slight commission—less than \$100-and that after some talk defendant finally agreed to pay \$600 provided plaintiff would not say anything to defendant's wife about it, and if plaintiff would take his note for the amount due after harvest. He testifled that defendant gave him his note for \$600, payable September 1, 1913, and came to his office about the date it was due, paid \$300 and the interest, and asked a year's time on the balance, which he granted, and defendant gave a new note for the \$300 balance. He testified that he had never been informed that Kruse was dissatisfied with the loan or the rate until the second note for the commission fell due and after he had sent it to the bank for collection.

J. A. Fontron, father of plaintiff, testified that when he arrived at the office that morning his son said to him, in the presence of defendant, that he had been unable to procure a loan for less than 61/2 per cent., and that Kruse had agreed to pay that rate, and asked the witness to draw the application; that Kruse made no remark. The witness drew up the application, which took two hours to complete, and that defendant was present all that time.

The answer pleads, in effect, a total failure of consideration, but the facts alleged show that the consideration had not entirely failed. They show that the note sued upon was given in part payment of plaintiff's services in procuring defendant a loan on his farm for a certain amount, to run a certain number of years, and to draw interest at 6 per cent.; that a loan was procured for the agreed amount, and in all respects satisfactory to the defendant, except that it provided for interest at the rate of 61/2 per cent., and that plaintiff accepted and still retains the loan. Having accepted and retained the benefits of plaintiff's services, he is in no position to claim a total failure of consideration. If the agreement had been to procure him a the whole contract is presumed to be ex-

to one individual, and that C per cent. inter- | loan of \$15,000 to run for five years at 6 per cent, interest, and plaintiff had procured a loan of \$10,000 running three years at 6 per cent. interest, the defendant, after accepting the loan upon these terms, could not claim that the consideration for his agreement to pay plaintiff for the services rendered had failed. If he had employed plaintiff to procure for him a thousand bushels of white corn, and plaintiff had procured for him that amount of yellow corn, which he received, giving his note in payment of the services rendered, he would not be heard to say that the consideration for the note had failed. The undisputed facts show that there was no agreement to pay any commission until after the services had been performed and defendant had received the full proceeds of his loan; and part of the consideration for the payment of the commission is conceded to have been additional services of plaintiff in advancing defendant \$12,000 before the loan was completed, and other services found to be necessary because of the condition of plaintiff's record title to the land.

The court gave the following instruction:

"If you find from the evidence that the plaintiff agreed to procure said loan for defendant at the rate of 6 per cent, interest per annum; and if you further find that defendant executed the notes and mortgages for said loan without knowledge that they bore six and one-half per cent, interest; and if you further find that the defendant, without knowledge that the said loan bore six and one-half per cent. interest, delivered to plaintiff the \$300 note sued on as payment or part payment for plaintiff's service in procuring said loan—then you are instructed that the consideration for said note failed and plaintiff cannot recover thereon."

[2] For the reasons already stated, it is manifest this instruction should not have been given.

Other instructions, based upon the alleged failure of consideration, were also erroneous. The only part of the answer which suggested a defense was that portion which set up a counterclaim for damages resulting from the alleged breach of the contract by the plaintiff, and the question is whether the defendant, who had the burden of proof, offered any competent evidence to sustain that defense. On the trial it developed that defendant had signed a written application for the loan, in which he appointed the plaintiff his agent to procure it at 61/2 per cent. interest—the exact terms upon which the loan was procured. He attempts to avoid this written agreement by alleging an oral agreement made before the contract was signed. by which the rate was to be different from that stated in the written application. The answer contains no allegation of fraud or mutual mistake, and no evidence was offered to show either fraud or mutual mistake. The admission of the testimony was in violation of the parol evidence rule, that all prior negotiations and agreements are regarded as merged in the writing, and that

pressed therein. "The only safe criterion of | have sustained the objection to the parol evithe completeness of a written contract as a full expression of the terms of the parties' agreement is the contract itself; \* \* \* and, consequently, all parol testimony of conversations held between the parties, or of declarations made by either of them, whether before or after, or at the time of the completion of the contract, will be rejected." Naumberg v. Young, 44 N. J. Law, 331, 339, 43 Am. Rep. 380, followed and approved in Railway Co. v. Truskett, 67 Kan. 26, 35, 72 Pac. 562. "Parol evidence of what was said or done before and at the time of making a written contract is not admissible to alter, vary, or contradict the express terms of the written contract." Smith v. Deere et al., 48 Kan. 416, 29 Pac. 603; Miller v. Edgerton, 38 Kan. 36, 15 Pac. 894: Rich v. Cattle Co., 48 Kan. 197, 29 Pac. 466; McMullen v. Carson, 48 Kan. 263, 29 Pac. 317; Trice v. Yoeman, 60 Kan. 742, 57 Pac. 955; Railroad Co. v. Price, 62 Kan. 327, 62 Pac. 1001; Railway Co. v. Vanordstrand, 67 Kan. 386, 73 Pac. 113. The rule is not altered by the fact that defendant was unable to read. See authorities cited in Railway Co. v. Vanordstrand, supra, 67 Kan. page 392, 73 Pac. 113. This is the invariable rule, in the absence of any claim of fraud or mutual mistake. Griesa v. Thomas, 99 Kan. 335, 340, 161 Pac. 670. The present case illustrates the necessity for the rule. The witnesses for the plaintiff testified that the rate was stated to be 61/2 per cent, before the application for the loan was signed. The defendant testified to the contrary. The application for the loan having been made in writing it is the best evidence, and the defendant ought not to be permitted to vary the terms of the writing by parol evidence of conversations leading up to the making of the written agreement. The fact that the written instrument is not the one upon which the suit is brought does not prevent the application of the rule to the testimony offered. Willard v. Ostrander, 46 Kan. 591, 26 Pac. 1017. There the action was on a note which the answer alleged was given as a part of the purchase price of a flock of sheep under an express warranty of the soundness of the sheep, and the answer set up a counterclaim for damages on account of a breach of the warranty. It was shown that the bill of sale for the sheep contained no warranty, and it was held error to permit the defendant to show by oral evidence representations and statements made previous to the execution of the bill of sale, because of the presumption of law that the instrument contained the whole contract and should govern unless fraud had been alleged and proved. The application for the loan authorizing the plaintiff to procure it being in writing was the best evidence of what the

dence offered by the defendant. Where a mistake is relied upon in the execution of a written agreement, it must be a mutual mistake, and, moreover, must, as in the case of fraud, be pleaded.

The only reason stated in the answer for his not knowing the contents of the written application and the other loan papers is that he is unable to read. But that was all the more reason for his not signing them until examined "by some one for him in whom he had a right to place confidence." Hawkins v. Hawkins, 50 Cal. 558, quoted with approval in the Vanordstrand Case, supra.

[3] Besides, the defendant should be held estopped to raise this defense at such a late day. The written applications for the loan were signed in November, 1912; he received the \$20,000 proceeds in February, 1913; the note was not executed until August 29, 1913. and in the meantime he had made a payment of \$754 interest on the loan, and claims not to have discovered what rate of interest the loan drew until he made the second payment of interest at the end of the first year from the time the loan was made; and he made no complaint of any misunderstanding of the facts until he filed his answer in May, 1915. The answer contains no averment of fraud or mutual mistake, and there was no proof of either.

The judgment is reversed and the cause remanded, with directions to sustain the demurrer to the evidence and render judgment in plaintiff's favor for the amount due on the note. All the Justices concurring.

MILLER v. MILLER. (No. 21521.)

(Supreme Court of Kansas. May 11, 1918.)

(Syllabus by the Court.)

APPEAL AND EBROR 4 82(2)—APPEALABLE OBDER—"FINAL ORDER."

An order refusing to consider a motion to correct a judgment nunc pro tune, and striking such motion from the files, is a final order from which an appeal is allowed by the Civil Code.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Final Order.]

CAL ERBORS.

The provisions of the Code and the rules of court concerning the presentation of appeals must be read and arblied in the light of section 581 of the Code (Gen. St. 1915. \$ 7485), which commands that mere technical errors and irregularities not affecting substantial rights nor causing any uncertainty in the matter under review are to be disregarded.

JUDGMENT \$325-MOTION TO CORRECT -REFUSAL TO CONSIDER.

Matters of evidence and estoppel which may be sufficient to defeat a motion to correct a judgment considered, and held insufficient to rate agreed upon was, and under the rule in williard v. Ostrander, supra, the court should strike the motion from the files.

Action for divorce by Rose C. Miller against Melvin D. Miller. There was judgment for plaintiff, and from an order refusing to consider a motion to correct the judgment nunc pro tunc and striking such motion from the files defendant appeals. Reversed.

Archie D. Neale, of Chetope, and J. J. Campbell, of Pittsburg, for appellant. Denison & Kirkpatrick, of Pittsburg, for appellee.

DAWSON, J. [1] This is the aftermath of a divorce case (Miller v. Miller, 97 Kan. 704, 156 Pac. 695), and is brought here to review an order of the trial court in which a motion to correct the original judgment nunc pro tunc was stricken from the files and a consideration thereof upon its merits denied. The motion was to correct the judgment so as to show that the \$10,000 worth of property awarded to the appellee in the divorce case for permanent alimony was for the support of her child as well as for her own support. The original judgment did not in specific words make provision for the child. It is urged by appellee that this is not an appealable order. This court decides otherwise. It is a final order, and therefore reviewable. Civil Code, \$\$ 565, 566 (Gen. St. 1915, \$\$ 7469, 7470).

[2] It is also urged that certain Code provisions and rules of court relating to procedure and practice in appeals have been somewhat disregarded by appellant. These rules and provisions are wisely designed to guide attorneys in the logical presentation of their cases to the Supreme Court, but this appeal presents so simple a point that disregard of these rules in this instance does not confuse or perplex the court and will not necessitate a dismissal. Civil Code, § 581 (Gen. St. 1915, § 7485).

[3] It is also urged that the briefs and arguments of counsel in the principal case (Miller v. Miller, supra) disclose that there was no mistake in the original judgment; that the minutes in the judge's trial docket show that the judgment was accurately entered in conformity with the trial court's determination thereof; and appellee "emphatically" denies "that the journal entry of judgment did not speak the truth as to the judgment actually rendered," etc. element of estoppel is also brought forward. But all of these matters have relation to the issue presented by the motion to correct the They are matters of defense to the motion. They may convince the trial court that the allegations of the motion and the evidence in support of it are untrue and that the motion should be denied. They are, however, no answer to appellant's grievance, which is that the trial court would

Appeal from District Court, Crawford tion nor hear his evidence, and struck his motion from the files.

> [4] It is also contended that an appellate court will not review a decision of a trial court denying a motion nunc pro tunc to correct a judgment. That, again, goes to the merits or demerits of the motion. That rule does not apply to the question of the appellant's right to a hearing on his motion. However little merit such a motion may contain, if it be intelligibly and respectfully presented, it should be heard, and should be sustained or denied according to its deserts. Reversed. All the Justices concurring.

> > GAULT v. HURD. (No. 21325.)

(Supreme Court of Kansas. May 11, 1918.)

(Syllabus by the Court.)

VENDOR AND PURCHASER \$== 198-TAXATION. Where a contract for the sale of a farm was made on September 23, 1913, whereby the purchaser paid \$1,000 thereon and was immediately let into possession for the purpose of sowing wheat and the vendor at the same time executed a deed to the farm in favor of the purchaser, which deed was by agreement deposited with a bank for delivery to the purchaser on the pay-ment of the balance of the purchase price, which sum was to be paid on the first day of the following March, and where the contract was complied with in every respect by both vendor and purchaser but no express agreement had been made between them as to which should pay the taxes due in November, 1913, the purchaser is liable for such taxes under section 11349 of the General Statutes of 1915.

Appeal from District Court, Jackson County.

Action by Ernest Gault against Bide Hurd. Judgment for plaintiff, and defendant appeals. Reversed.

John D. Myers, of Kansas City, Mo., for appellant. Hursh & Sloan, of Holton, for appellee.

DAWSON, J. This case presents the question whether the grantor or grantee of a tract of land should pay the taxes thereon. On September 23, 1913, the plaintiff made a contract with the defendants for the purchase of a farm. By its terms the plaintiff was to pay \$1,000 in cash and was to be let into possession for the purpose of sowing fall wheat, and was to pay the balance of the purchase price, \$11,000, at the State Bank of Holton, on March 1, 1914. The defendant was to execute a warranty deed with the usual covenants conveying the property to plaintiff, which deed at the time of making the contract was to be deposited with the Holton bank until March 1, 1914, when, upon final payment, the deed was to be surrendered to the purchaser. Both parties fully and promptly complied with all the provisions not hear him, would not consider his mo- of their contract, but no express agreement or mention was made of the taxes which matured against the land on November 1, 1913. The plaintiff grantee had to pay the taxes; and, having paid them, he brought this action to recover the amount so paid. He prevailed, and the defendant says that this judgment was wrong.

The pertinent statute reads:

"As between grantor and grantee of any land, where there is no express agreement as to which shall pay the taxes that may be assessed thereon, if such land is conveyed between the first day of March and the first day of November, then the grantee shall pay the same, but if conveyed between the first day of November and the first day of March, then the grantor shall pay them." Gen. Stat. 1915, § 11349.

When the plaintiff closed the bargain in September for the purchase of the farm, and paid the agreed sum then due, and took possession for the purpose of sowing wheat pursuant to his bargain, he became the grantee and equitable owner of the property. The fact that the deed was deposited with the bank to await the final payment for the land before it should be delivered to him is not a controlling circumstance, nor does it alter plaintiff's status as grantee under the provisions of the statute imposing liability on him for the payment of the taxes maturing after he purchased the property. The situation presented is precisely of the sort which the statute was designed to cover. The bank was the agent of both parties. Davis v. Clark, 58 Kan. 100, 48 Pac. 563, Syl. 2. When the deed was delivered to the bank on September 23, 1913, there was in legal effect a delivery of it to the grantee subject only to the subsequent condition of final payment on the first day of the following March. In Davis v. Clark, supra, it was said:

"We do not understand that a manual delivery of an escrow is necessary to invest the obligee with title to it, or to pass to him the subject of the grant. Our own decisions are to the contrary, and likewise, we think, are those of all

the courts. "The delivery therefore is constructively made the moment the conditions are performed. The second delivery, whether actual or constructive, operates retroactively, and, by relation back to the first delivery, is substituted to it in time and effect"—citing authorities, 58 Kan. 106, 48 Pac. 565.

See, also, discussion in Scott v. Stone, 72 Kan. 545, 548, 84 Pac. 117, and in Nolan v. Otney, 75 Kan. 311, at pages 317, 318, 89 Pac. 690, 9 L. R. A. (N. S.) 317.

It seems clear that the purchase of this farm was effected on September 23, 1913, and, since, there was no express agreement between the grantor and grantee as to which should pay the taxes falling due the following November, the plaintiff was liable therefor.

This necessitates a reversal of the judgment, and it is so ordered. All the Justices concurring.

ARNOLD v. GARNETT LIGHT & FUEL CO. et al. (No. 21842.)

(Supreme Court of Kansas. May 11, 1918.)

(Syllabus by the Court.)

1. APPEAL AND ERROR \$\ightharpoonup 900(1) - Grant of Temporary Injunction - Reversal.

An order granting a temporary injunction will not be reversed, where the order, to be correct, must be supported by evidence tending to prove certain facts, and there is nothing in the abstracts to show that such evidence was not introduced, or that such facts did not exist.

2. MINES AND MINEBALS \$\infty\$73\frac{1}{2}\cdot\$OIL AND

2. MINES AND MINEBALS \$\instructure{100}\$ To that such facts du not exist.

GAS LEASE—TERM.

Under the provisions of the gas and oil lease in controversy, which provisions are set out in the opinion, the lease runs for 50 years, if gas or oil is found in paying quantities, or if the stipulated annual rental of \$1 an acre is paid.

Appeal from District Court, Anderson County.

Action for injunction by E. M. Arnold against the Garnett Light & Fuel Company and others. Judgment for plaintiff, and the Company appeals. Affirmed.

M. Schoonover, J. G. Johnson, and Bowman & Bowman, all of Garnett, for appellant. W. S. Jenks and F. M. Harris, both of Ottawa, for appellee.

MARSHALL, J. The plaintiff obtained a temporary injunction enjoining defendant the Garnett Light & Fuel Company and its officers, agents, and employes from interfering with the plaintiff's drilling for oil on an 80-acre tract of land in Anderson county. The Garnett Light & Fuel Company appeals from the order granting the injunction.

[1] 1. The principal error assigned is that the court erred in granting the temporary injunction. On December 22, 1903, W. C. Tippen and wife executed and delivered to Fred Ball an oil and gas lease on the land. Ball afterward conveyed a one-half interest in the lease to Frank McCuddy. On August 18, 1904, Ball and McCuddy, as parties of the first part, entered into a contract with J. B. Levy, as party of the second part, to form a corporation to be known as the Garnett Gas Company, and designated in the contract as party of the third part. By the contract the gas rights under the lease were separated from the oil rights. The gas rights were transferred to the Garnett Gas Company. while the oil rights were retained by Ball and McCuddy. The plaintiff holds under Ball and McCuddy, and the Garnett Light & Fuel Company has succeeded to the rights of the Garnett Gas Company. The contract contained the following provisions:

"(13) It is agreed that second party shall pay (until third party shall ratify this contract when it shall pay and be responsible for) one-half of the cash rentals on not to exceed 1.000 acres of the short term leases, for two annual payments, after which first party is to pay the same: Provided, however, that when any cash

rental falls due upon any of the leases herein mentioned as provided in said original lease (except as herein before specified and agreed), if said first party elect not to pay said cash rentals, the said third party, after ratifying this contract (and the said second party until said ratification), may pay the same, and thereupon it shall be the duty of said first party to assign such lease or leases to the said second or third. such lease or leases to the said second or third party as the case may be, upon tendering said first party the legal notary fees for so doing, first party giving thirty days' notice to third party of their intention to abandon said lease or leases.
"(14) It is agreed that the party owning the

oil right and the party owning the gas right shall operate their separate properties so as to interfere as little as practical with the inter-

est of each other.

"(15) In case a gas well ceases producing and produces oil, it is to become the property of first parties on payment of the actual value of

the casing and equipment.

"(16) It is agreed that if the party owning the casing and equipment.

"(16) It is agreed that if the party owning the gas right shall encounter oil in paying quantities in any of its wells to be drilled or that may be hereafter drilled on the above leases, the party owning the oil rights agrees to take such well and pay the actual cost of the same within thirty days from completion, and if the parties owning the oil right while drilling on any of the above leases shall encounter gas in paying quantities in any of its said wells to be drilled, or that may be hereafter drilled on said leases, the party owning the gas rights agrees to take such well and pay the actual cost of the same within thirty days from completion, and if the parties cannot agree as to the actual cost of such well, or as to whether such wells are producing gas or oil in paying quantities, then it is to be left to three disinterested persons, each choosing one, and these two so chosen choosing the third, whose determination as to the actual cost of the well and as to whether it is producing gas or oil in paying quantities is to be final.

"(17) In case a well produces both oil and gas in paying quantities, the party drilling the well is to have his choice of surrendering or retaining the same."

ing the same.'

The Garnett Light & Fuel Company, or its predecessor, paid the rentals under the lease. There was no direct evidence that the plaintiff abandoned or released his rights under the lease and contract, although there is set out in the abstracts correspondence which tends to show that each of the parties to this action desired to place on the other the obligations arising out of the oil rights. The abstracts also indicate that there was some oral evidence introduced on the hearing of the application for a temporary injunction, and that there were statements and admissions made by counsel, none of which has been abstracted. Special findings of fact were not made by the court; but in order to justify a temporary injunction, the court must have found and held that the plaintiff's oil rights under the lease and the contract were in full force and effect. This conclusion is sustained by a statement of the court subsequently made in another proceeding in this action. That statement was as follows:

"Upon further consideration of the original lease, I am still of the opinion that it is in promises; each promise furnishes a sufficient full force and effect, and that the rights of the consideration for the other.

For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

that such a finding was not correct.

[2] The Garnett Light & Fuel Company contends that the lease from Tippen and wife expired on December 22, 1905. This contention is based on the following provisions contained in the lease:

"To have and to hold the same unto the lessee, his heirs and assigns, for the term and period of two years from the date hereof, and as much longer (not exceeding fifty [50] years) as coal, oil, water, mineral water, gas, or other mineral are found in paying quantities thereon.

"In case no well shall be found on the above-described premises within two years."

"In case no well shall be found on the above-described premises within two years from the date hereof, this lease shall become null and void and without any effect whatever, unless the lessees shall pay for further delay at the rate of one (\$1.00) dollar an acre per year at or before the end of each year thereafter, until a well shall be found on said premises."

By these provisions, the lease was to extend 50 years, if gas or oil was found in paying quantities, or if the annual rental of \$1 an acre was paid before the end of each year until a well should be found on the premises. The rentals have been paid, and the lease has not expired. On October 11, 1917, the Garnett Light & Fuel Company obtained another lease on the same property from the then owners, which lease contained the same provisions as the first one. The second lease did not have any effect on, nor change, any right of the plaintiff under the first lease and under the contract.

The judgment is affirmed. All the Justices concurring.

KRAMER v. WALTERS. (No. 21550.) (Supreme Court of Kansas. May 11, 1918.)

(Syllabus by the Court.)

1. PRINCIPAL AND AGENT == 123(1) -- COM-MISSION CONTRACT—AUTHORITY OF AGENT— EVIDENCE.

There was evidence sufficient to show that the plaintiff's agent had authority to bind the plaintiff by contracting with the defendant for the sale of silos by the defendant on commission.

2. PRINCIPAL AND AGENT \$\insigma 193\to Contract with Agent\to Commission\to Counterclaim.

It was not error to submit to the jury the defendant's counterclaim based on those commissions.

3. PRINCIPAL AND AGENT  $\rightleftharpoons$  101(1) — Contract of AGENT—MEETING OF MINDS.

A binding contract is made by the meeting of the minds of an authorized agent and of another person with whom the contract is being made for the agent's principal.

4. Contracts \$==56-Consideration-Mutu-AL PROMISES.

Appeal from District Court, Butler County. Action by A. A. Kramer against B. Walters, with counterclaim by defendant. Judgment for defendant on the counterclaim, and plaintiff appeals. Affirmed.

E. D. Stratford, of El Dorado, and Hutton, Davis, Nourse & Bell, of Kansas City, Mo., for appellant. H. W. Schumacher and George J. Benson, both of El Dorado, for appellee.

MARSHALL, J. The plaintiff commenced this action to recover on a promissory note. The defendant set up a counterclaim and recovered judgment for \$76. The plaintiff appeals.

In 1913, the defendant purchased a silo from the plaintiff, and, in part payment thereof, gave the note sued on in this action. On January 31, 1914, the defendant wrote the plaintiff that there were men looking at the silo sold to the defendant, and said:

"I am writing you to know what terms you could make and what commission you could pay, if I could draw up the contracts and sell 8 or 10 of these silos. I would try to get these contracts as early as possible, so please give me the best terms you can make and state whether or not you would let me give them the price, and terms of payment. I would want all this understood; also state whether or not you will send me catalogues and literature to distribute among prospective buyers.

On February 6, 1914, the plaintiff replied to this letter as follows:

"Replying to your letter, will say that we have requested our Mr. J. P. Viers, who has charge of the sale of Columbian silos in the southern and central portions of Kansas, and is at present at Rosalia, Kansas, to call on you at his earliest convenience with a view of quoting you commissions for selling Columbian silos in your immediate neighborhood.
"If you do not hear from Mr. Viers within

"If you do not hear from Mr. Viers within a few days, please communicate with us again. We are sending you our new catalogue under senarete cover."

separate cover.

Viers visited the defendant in February and contracted with him for the sale of silos in Butler county. By that contract the defendant was to receive, as commission, 20 per cent. on all sales of silos made by him without assistance, and 15 per cent. on all sales made by him in which he received assistance from the plaintiff or his agents. The plaintiff sent the defendant a catalogue and other printed advertising matter, and also sent forms of contracts to be signed by the purchasers of silos. Those contracts contained limitations on the authority of the agent making the sale. The plaintiff also wrote the defendant to visit some parties who had ordered silos and were about to cancel their orders, and to "get them lined Under the agreement made with Viers. the defendant sold and assisted in selling a number of silos in Butler county. The commissions for those sales were not paid, and were set up as a counterclaim against the

not sufficient evidence of the employment of Pac. 276; Hawkins v. Windhorst, 82 Kan.

the defendant by the plaintiff to warrant the submission of that issue to the jury. This contention is not good. There was evidence which tended to show that the plaintiff. through Viers, the plaintiff's agent, employed the defendant to sell silos for the plaintiff in Butler county. That evidence was the defendant's letter of inquiry, the plaintiff's reply thereto, the visit of J. P. Viers in accordance with that reply, the contract made by Viers with the defendant concerning commissions, and the letters written by the plaintiff to the defendant requesting him to see certain purchasers of silos and get those purchasers."lined up."

[2] 2. Another matter argued by the plaintiff is that it was error to submit the defendant's counterclaim to the jury, for the reason that the defendant knew that Viers had no authority to employ him as agent for the plaintiff. The answer to this matter is that there was no evidence which tended to show that the defendant had any knowledge of any limitation on the authority of Viers at the time the contract was made.

In May or June, 1915, after the defendant had performed the labor for which he claimed compensation, the plaintiff informed the defendant that Viers had no authority to make the contract; but, until the letters were received in which this information was given, the defendant did not have any knowledge that any limitation had been placed on the authority of Viers as agent for the plaintiff.

The plaintiff also insists that the limitations contained in the contracts to be taken by the defendant and to be signed by the purchasers of silos constituted notice of the limitation on the authority of Viers. This conclusion cannot be properly drawn from anything contained in those contracts. limitations therein contained were to be observed by the defendant in selling silos. Those limitations did not concern the authority of Viers in making the contract with the defendant.

[3] 3. The plaintiff argues that there was no contract between him and the defendant, because their minds never met on the terms of the contract. This argument is not good. The minds of the defendant and of Viers, the plaintiff's agent, did meet. According to the defendant's evidence, there was no misunderstanding between him and Viers concerning the contract. Viers represented the plaintiff when the contract was made, and the plaintiff was bound thereby.

[4] 4. The plaintiff's final complaint is that there was no consideration for the contract. The plaintiff agreed to pay certain commissions for the sale of silos. The defendant agreed to sell silos for those commissions. These agreements constituted a contract. The promise of each was a sufficient consideration for the promise of the [1] 1. The plaintiff contends that there was other. Spencer v. Taylor, 69 Kan. 493, 77

522, 108 Pac. 805. The defendant performed or does not accrue, and therefore the statute his part of the contract, and was thereafter entitled to the agreed compensation for the services rendered by him.

The judgment is affirmed. All the Justices concurring.

LESLIE v. COMPTON. (No. 21492.) (Supreme Court of Kansas. May 11, 1918.)

## (Syllabus by the Court.)

1. GUARANTY 4=4. 100 - REIMBURSEMENT FROM MAKER.

One who guarantees the payment of a note by a contract made with the payee, without the request or knowledge of the maker, and by reason of such guaranty is required to make payment, may thereby acquire a valid claim against the maker for reimbursement. But in such a case his attitude is that of a virtual purchaser of the note rather than of a surety in the ordinary sense, and if five years elapse after the maturity of the note without the maker recognizing the guaranty, or even being informed of it, the statute of limitations may bar the guaranter's alaim notwithstanding that action is antor's claim, notwithstanding that action is brought upon it shortly after his payment was

(Additional Syllabus by Editorial Staff.)

2. PRINCIPAL AND SURETY 6-182-RIGHTS OF SUBETY-REIMBURSEMENT.

A surety may acquire a claim for reimbursements by paying a debt which is alive as to him, but outlawed as to the principal.

3. LIMITATION OF ACTIONS \$= 56(2)-INDEM-NITY.

A guarantor who has become such at the request of the principal has the benefit of an implied promise of indemnity, and a new and independent cause of action arises thereon whenever he is compelled to make a payment, irrespective of the time of maturity of the original deht.

Appeal from District Court, Pawnee County.

Action by J. F. Leslie against J. S. Compton. Judgment for defendant, and plaintiff appeals. Affirmed.

C. M. Williams, W. G. Fairchild, and H. S. Lewis, all of Hutchinson, and W. H. Vernon, Jr., of Larned, for appellant. G. P. Cline and Nellie Cline, both of Larned, for appellee.

MASON, J. On October 24, 1899, J. S. Compton executed a note to the Zeb Crider Commission Company, due April 24, 1900. About 30 days later J. F. Leslie signed a writing guaranteeing the payment of the note. In June, 1901, the holder of the note sued Leslie, and in time obtained a judgment against him, which he paid on April 16, 1916. On May 29, 1916, Leslie brought the present action against Compton for indemnity. He was denied relief on the ground that he had been guilty of laches; that the claim was stale and was barred by the statute of limitations. He appeals.

[1] The rule is that a cause of action in

of limitations does not begin to run thereon, until payment has been made. Mentzer v. Burlingame, 78 Kan. 219, 97 Pac. 371, 18 L. R. A. (N. S.) 585; 25 Cyc. 1113, 1114. And ordinarily this rule is applicable to a guarantor. Here, however, the rights of the parties are affected by the fact that Leslie became a guarantor not only without any request on the part of Compton (as the court specifically found), but also without any knowledge of the fact on his part until this action was brought (as he testified and the court must be deemed to have found). It is true that by a contract with a creditor, made without the request or knowledge of the debtor, a person may bind himself as a guarantor of the payment of the debt. 20 Cyc. But he does not thereby become a surety in the ordinary sense; his rights are not the same in all respects as those of a guarantor who has become such at the express or implied request of the principal. If he is compelled to pay the debt, he may have a remedy over against the original debtor. but it is not based upon the principles of ordinary suretyship.

"It seems to be necessary as between the surety and his principal, but not as between the surety and the creditor, that the principal should have notice of and accept the surety's offer to assume the relation." 32 Cyc. 30.

"A surety cannot ordinarily recover indemnity from the principal unless he become surety at

from the principal, unless he became surety at the request of the principal, either express or implied." 1 Brandt's Suretyship and Guaran-ty, § 231.

The following text from a recent work is borne out by the cases there cited:

"But, in order to claim reimbursement of his principal, it is generally held that the surety must become such at the express or implied request of the former; otherwise he will be deemed a mere volunteer under the rule that one who, without authority, intermeddles with the affairs of another even by paying his debts, cannot thus make himself the creditor of him whose debts he pays." Spencer on Suretyship, § 118.

Reference is made in the note thereto, and in a subsequent section (section 139) to a conflict of authority on the subject, but whatever want of harmony there may be in the results reached is largely due to the fact that different grounds of liability were invoked and considered. Where it has been held that a guarantor who has become such without the request of the debtor has no claim to be reimbursed if he is compelled to pay, the reason given has been that the case is not one of ordinary suretyship. Where the right of reimbursement has been sustained, it has not been because the guarantor was a surety in the usual sense, but because he was found to be entitled to be regarded as a virtual purchaser of the debt. It has been said that:

"The fact that the guaranty was made at the request of the creditor and without the knowlfavor of a surety against the principal debt- edge of the principal does not affect the liability of the principal. The guarantor in such a case is not an officious intermeddler having no remedy." 12 R. C. L. 1099.

The meaning clearly is, in view of the decision cited in support of the statement, that ignorance of the guaranty on the part of the debtor does not prevent his becoming liable to reimburse the guarantor. The statement that his liability is not affected thereby, if regarded as meaning more than that his liability is not prevented, goes beyond what is decided in the case referred to. There Jones had executed a bond (note) to Smith, with Black as surety. Smith sold it to Boyd; Carter guaranteeing it without the knowledge of the makers. Carter was required to pay it, and sued Jones and Black. In the opinion it was said:

"The plaintiff Carter is clearly entitled to a decree against the defendants, unless their objections that Carter was an officious intermeddler, and for that reason not entitled to relief, and to the bill on account of Boyd's being a party plaintiff, can avail them. \* \* \* But it is said that Carter was an officious intermeddler, and on that account can have no claim to the interference of a court of equity. It is true that he paid the amount of the bond to Boyd without any request, express or implied, from the defendants Jones and Black, or either of them. He could not then have recovered at law, as was decided in a suit at law brought by him against them (Carter v. Black, 20 N. C. 561). But in this court the plaintiff Carter stands in a very different situation. He is not suing here for money paid for the use of the defendants at their request. He became bound on the bond at the instance of the plaintiff Boyd and the defendant Smith, and, having paid the amount of it to Boyd, he claims as an equitable purchaser of it, and seeks here to recover on it \* \* \* in the same manner as Boyd might do. \* \* From what has been before said in considering the objection that Carter was an officious intermeddler it is to be deduced that Boyd must be regarded here as bound to assign the bond to Carter." Carter v. Jones, 40 N. C. 196, 198, 199, 200, 49 Am. Dec. 425.

In a similar case B. & H. Boynton, as principals, and Jedediah Boynton, as surety, made a note to John A. Place. At the request of Place, without the knowledge of the Boyntons, Dorwin also signed it. The court said:

"The act of Dorwin in signing that note at the request of Place did not create the relation of principal and surety between him and the Boyntons; but, as the money was raised for their benefit, very slight acts, recognizing that relation on their part, would place him in the light of surety for them. Without some evidence, however, of that character, the relation does not exist, and Dorwin, on payment of the note, could not have sustained an action against them for money paid; for no one can make another his debtor, by paying his debt, without a request, either express or implied. \* \* \*

If Dorwin, before the contract for delay was made, had been called upon by the plaintiff [the purchaser of the note], and had paid the note, he would have been entitled, by subrogation, to all the rights and remedies of the creditor against the other parties thereon, and would stand as a purchaser of the note. This right of subrogation exists in equity, not only where the strict relation of principal and surety is formed, 'but where one is compelled to pay the

debt in order to protect his own interests."
Peake v. Estate of Dorwin, 25 Vt. 28.

These cases are regarded as establishing the doctrine that a guarantor who becomes such without the knowledge of the debtor, and is required to make payment, has a valid claim for reimbursement. But they go no further than to hold that such a voluntary guarantor is not deprived of recourse against the principal debtor upon the ground that he is a mere intermeddler. They proceed upon the theory that it is competent for the guarantor to become such by contract with the creditor alone; that when, by virtue of the liability so assumed, he is required to make payment, he becomes virtually the purchaser of the claim against the debtor, or entitled to the rights of a purchaser. In that view it is proper that he should have all the remedies of the original creditor, but no reason is apparent why he should have any added right, or why he should be privileged to keep alive in this manner a claim which, so far as the debtor could know, had long since ceased to have any validity. In Teberg v. Swenson, 32 Kan-224, 4 Pac. 83, this aspect of the matter is emphasized by the fact that the guarantor was given a formal assignment of the debt. The opinion concludes with the words:

"In the present case, however, the plaintiffs did not volunteer to discharge the obligation of the defendant. They were bound by their written guaranty to pay the debt of the defendant; and when they paid the same they took a written assignment of such debt from the creditor. This gave them the same right to recover the debt from the defendant which the creditor previously had." 32 Kan. 229, 4 Pac. 86.

In the present case Leslie was not a surety for Compton in any sense that implied a contractual relation between them. He had made an agreement with the owner of the note to see that it was paid. On being compelled to make payment in fulfillment of that obligation he had a remedy against Compton. but it was by virtue of his being subrogated to the rights of the payee, or of his having become the virtual purchaser of the note. If Compton had requested the execution of the guaranty, or if he had known of it and recognized it in any way-if Leslie had been his surety in the ordinary sense-he would have been chargeable with notice that, although no action had been brought against him within five years of the maturity of the note. proceedings might have been taken against Leslie, resulting in a payment which he might be called upon later to make good. But, as Leslie merely acquired the rights of a holder of the note, the statute of limitations protected Compton against him to the same extent as against any other purchaser. If it be objected that as a result of this view the statute of limitations had prevented a recovery by Leslie against Compton before his right of action against him accrued. a sufficient answer is that no cause of action ever accrued in favor of Leslie; he is in the

attitude of one who has bought an outlawed claim. Compton was not at fault in the matter.

[2, 3] A surety may acquire a claim for reimbursement by paying a debt which is alive as to him, but outlawed as to the principal. Reed v. Humphrey, 69 Kan. 155, 76 Pac. 390. A guarantor who has become such at the request of the principal has the benefit of an implied promise of indemnity, and a new and independent cause of action arises thereon whenever he is compelled to make a payment. irrespective of the time of maturity of the original debt. But a guarantor who becomes such by an agreement with the creditor, to which the debtor is not a party, and is compelled to make payment, has no claim based upon an implied promise of reimbursement; his rights are equivalent to those of a purchaser of the debt, and his remedy is lost whenever an action on that is barred. No inequity results from this view in the present case. Compton was justified in believing that the note had been fully paid from the proceeds of mortgaged cattle, or that all claims upon it had been abandoned. Leslie could probably have protected himself by giving Compton notice of his relation to the matter, and causing him to be made a party to the action on the note. At all events the running of the statute in favor of Compton was not prevented by dealings between Leslie and the holder of the note of which he had no knowledge, actual or constructive.

While not material to the decision, it may be pertinent to add that the defendant claimed a meritorious defense apart from that here considered.

The judgment is affirmed. All the Justices concurring.

PHILLIPS v. SPRINGER, County Treasurer, et al. (No. 21528.)

(Supreme Court of Kansas. May 11, 1918.)

(Syllabus by the Court.)

JUDGMENT \$\infty 949(2) - RES ADJUDICATA - PLEADING.

A deed contained a condition that the grantor should, during his life, receive an annual payment from the grantee. In an action to enjoin the taxation, as personal property, of the grantor's right thereunder, it is held that a prior adjudication against its taxability is sufficiently pleaded by averments that in a former action between the same parties, brought to restrain the collection of the tax assessed against the same right the year before, the same issue had been raised, and that the court adjudged "that the real estate \* \* was conveyed, \* \* \* upon conditions subsequent, and that the assessment of plaintiff on account of said pretended property was illegal, \* \* \* and \* \* that said decision then had upon the merits of this matter in said case rendered the matter of assessing said property res adjudicata."

Appeal from District Court, Franklin County.

Action by George K. Phillips against J. H. Springer, as county treasurer of Franklin County and others. Demurrer to petition overruled, and defendants appeal. Affirmed.

S. M. Brewster, Atty. Gen., R. R. Redmond, of Ottawa, and S. N. Hawkes and Jno. L. Hunt, both of Topeka, for appellants. W. B. Pleasant, of Ottawa, for appellee.

MASON, J. In 1915, George K. Phillips and his wife executed deeds to their several children by which they conveyed to each a tract of land, upon the condition that the grantee should annually pay to them, or to the survivor of them, so long as either should live, the sum of \$1 per acre. In 1916, the county commissioners undertook to tax the right of George K. Phillips to receive such annual payment, and entered it upon the rolls as personal property belonging to him. He brought an action against the commissioners and treasurer seeking to enjoin the collection of the tax. A demurrer to his petition was overruled. The defendants elected to stand upon their demurrer, and now ap-

The plaintiff contends that the execution and acceptance of the deeds referred to created no right or property in him which is subject to taxation, but that, whether or not he is correct in that contention, the defendants are precluded from disputing it because of allegations in the petition which he asserts constitute a good plea of res judicata as to that matter. Such allegations are to the effect that in 1915, under similar circumstances, a warrant based upon the same character of proceedings was about to be issued against the plaintiff, and he had then sought and obtained a permanent injunction against the defendants, forbidding the collection of the tax. The defendants assert that the matters alleged do not amount to a prior adjudication of the issue here presentedthat the facts pleaded merely show that for some undisclosed reason the tax warrant that was to have been issued in 1915 was not valid. The rule is invoked that where, as in this instance, the second cause of action is upon a different demand, a former judgment operates as an estoppel only as to matters that were actually litigated. Stroup v. Pepper, 69 Kan. 241, 76 Pac. 825. The question presented for determination is whether the allegations of the petition, when given the construction favorable to the pleader to which they are entitled upon an attack by demurrer, are sufficient to show expressly or by fair implication that in the earlier case the court decided that the deeds created no right in the plaintiff which was subject to taxation as personal property. The part of the petition referring to this phase of the controversy reads as follows:

"That in March, 1915, the deputy assessor of said Franklin township and the county clerk

of Franklin county assessed this plaintiff upon said property, that is, the alleged property, which they claimed plaintiff owned by virtue of said deeds, and extended the same upon the tax rolls of Franklin county, Kan., and the county treasurer was about to and intended to issue a warrant to the sheriff of Franklin county to collect said tax levied upon said property the amount height \$200 and to precounty to collect said tax levied upon said property, the amount being \$93.20, and to prevent the issuance of said warrant this plaintiff, on February 7, 1916, duly filed in this court his action against all defendants in this case nis action against all defendants in this case to enjoin the issuance and service of such tax warrant. That the defendants in this case answered plaintiff's petition in that case by setting up that it was a taxable property owned by plaintiff by virtue of the provisions in said deeds, and claimed the right to assess the property of the provisions in the content of the property of deeds, and claimed the right to assess the property and tax the plaintiff thereon; and, the issues being duly joined in said case, the same was tried to this court, and, the court having heard the evidence fully of both parties and the argument, it was duly considered and adjudged in said cause by this court that the real estate described in said deeds was conveyed by this plaintiff to his said several children upon conditions subsequent and that the deen upon conditions subsequent, and that the assessment of plaintiff on account of said pretended property was illegal, and that the defendants should be enjoined from collecting taxes ants should be enjoined from collecting taxes thereon, whereupon it was adjudged and decreed by the court in that cause that the defendants herein, who were defendants in that cause, be and they were perpetually enjoined from issuing, or causing to be issued, any warrant for the collection of said taxes, and this plaintiff now says that said decision then had upon the merits of this matter in said case rendered the matter of assessing said property rendered the matter of assessing said property res adjudicata, and the defendants are estop-ped thereby and prohibited thereby from assess-ing said pretended property and from issuing any warrants against this plaintiff to collect said illegal taxes thereon."

It is quite apparent that the pleader had in mind and intended to give expression to the idea that the question of the taxability of the plaintiff's rights under the contracts evidenced by the deeds was passed upon in the former action. That allegation is not made, however, as distinctly and explicitly as might be desired. Doubtless a motion for a more definite statement of the plaintiff's claims in this regard would have elicited a fuller exposition of them. Possibly everything said in the petition might have been literally true, although the decision was based on some defect peculiar to the tax proceedings of 1915. No hint is given, however, of any challenge of the validity of the tax excepting that based upon the character of the plaintiff's rights with respect to the real estate, and the repeated references to that feature of the matter would seem entirely purposeless, unless that were the controlling issue. The petition alleged that in the prior action the plaintiff asked an injunction against the defendants, restraining the collection of a tax on "the alleged property, which they claimed plaintiff owned by virtue of said deeds"; that the defendants answered "by setting up that it was a taxable property owned by plaintiff by virtue of the provisions in said deeds, and claimed the right to assess the property and tax the plaintiff of Kan. 252.

Notice of an acceptance of a guaranty is not necessary. Compliance or performance by the party for whose protection the guaranty is given is sufficient, following Platter v. Green.

thereon"; that, "the issues being duly joined in said case, the same was tried to this court"; that it was adjudged "that the real estate described in said deeds was conveyed by this plaintiff to his several children upon conditions subsequent, and that the assessment of plaintiff on account of said pretended property was illegal": and that "said decision then had upon the merits of this matter in said case rendered the matter of assessing said property res adjudicata." The final allegation as to the effect of the judgment partakes of the nature of a legal conclusion, but it serves to interpret the other allegations and to give character to them by showing the purpose for which they were inserted in the pleading. We think the petition must be deemed to show, at least by fair inference, that in the former action an issue as to the taxability of the rights held by the plaintiff under the deeds was raised, heard, and determined against the defendants. The demurrer was therefore properly overruled on the ground that estoppel by former adjudication was sufficiently pleaded.

The judgment is affirmed. All the Justices concurring.

GREAT WESTERN MFG. CO. v. PORTER et al. (No. 21488.)

(Supreme Court of Kansas. May 11, 1918.)

(Syllabus by the Court.)

1. Corporations \$\iff 428(8)\$ — Evidence \$\iff 383(6)\$ — Parol Evidence — Record — Guaranty—Ratification—Minutes of As-SOCIATION.

The plaintiff furnished to a building contractor certain machinery supplies for an ele-vator upon receipt of a letter from the secretary of the elevator association that the latter would guarantee the payment of the supplies. The of the elevator association that the latter would guarantee the payment of the supplies. The minutes of the corporation recited: "Directors' Meeting, Oct. 2, 1915. The secretary is hereby instructed to write the Great Western Manu-facturing Company \* \* that the associa-tion will guarantee the payment of machinery going into the elevator now under construction by G. A. Porter, under contract." The by-laws of the association provided for monthly meetings at which all officers should submit statements showing all transactions since the last meeting. The corporate minutes and the secretary are the last meeting. tary's action stood unchallenged for several

tary's action stood unchallenged for several months and until the association was called upon to pay under its guaranty.

"Held, that the minutes of the corporate record could not be impeached by the parol evidence of the directors, who did not remember the directors' meeting or what transpired thereat; that the association is estopped to dispute the accuracy of its corporate minutes; that by inaction of the heard of directors at their subinaction of the board of directors at their sub-sequent monthly meetings the association acquiesced in and ratified the conduct of the secre-

tary.

2. GUARANTY -7(1) - NOTICE OF ACCEPT-ANCE.

APPEAL AND ERROR 5 1176(3)—REVIEW—TECHNICAL ERRORS—FINAL JUDGMENT.
Where all the controlling facts to determine

a liability are established, and the defense to the liability wholly fails, a new trial is unnecessary, and final judgment on the liability should be or-

Appeal from District Court, Sheridan County.

Action by the Great Western Manufacturing Company against G. A. Porter and another. Judgment for defendants, and plaintiff appeals. Reversed, with instructions to enter judgment for plaintiff.

F. A. Sloan, of Hoxie, and W. W. Hooper, of Leavenworth, for appellant. W. H. Clark and C. L. Thompson, both of Hoxie, for appellees.

DAWSON, J. The plaintiff manufacturing company brought this action to recover the purchase price of certain machinery installed by the defendant G. A. Porter in an elevator constructed by him at Hoxie for the defendant the Farmers' Union Co-operative Association.

The liability of Porter for the price of the goods is not denied, but this appeal is based upon the disputed question of the association's liability as Porter's guarantor. principal facts upon which plaintiff seeks to fasten liability upon the defendant Farmers' Association are these:

In September, 1915, Porter, who had a contract with his codefendant to erect an elevator for the latter, ordered the machinery from plaintiff. Plaintiff declined to ship the machinery without some assurance from the association that payment would be forthcoming. The minutes of the association's corporate record read:

"Directors' Meeting, Oct. 2, 1915.
"The secretary is hereby instructed to write the Great Western Manufacturing Company, Kansas City, Mo., that the company or association will guarantee the payment of machinery going into the elevator now under construction by G. A. Porter, under contract."

The plaintiff received a letter from the secretary of the association which reads:

"Hoxie, Kan., Oct. 11, 1915.
"Great Western Mfg. Co., K. C., Mo.—Gentlemen: I have been directed by the Hoxie Farmers' Union Co-operative Association board of directors to guarantee the payment of the \$256 supplies for the elevator now under construction by G. A. Porter, contractor. The Hoxie Farmers' Union Co-operative Association, by John W. Schlicher, Secretary."

About two weeks thereafter the defendant drew and delivered to Porter the following check:

"The First National Bank: \$260.00.

"Pay to G. A. Porter E. C. contract or order two hundred sixty 00/100 dollars for Great Western Elevator supplies.

"J. R. Cooper,

"F. U. Treasurer." "Hoxie, Kan., Oct. 27, 1915.

Indorsed on back: "G. A. Porter."

Thereafter the goods were shipped and delivered on November 6, 1915. The defendant answered:

"That this defendant never at any time authorized any one to guarantee the payment of any sum to plaintiff herein; that this defendant never received any notice or claim from said plaintiff that plaintiff claimed to have any guarantee from this defendant, or that plaintiff had not been paid in full for all material that it had shinned to the said G. A. Porter, or claimed to shipped to the said G. A. Porter, or claimed to have shipped, until long after this defendant had made settlement in full with the said G. A. Porter for all work and material furnished by the said G. A. Porter in the construction of the elevator for this defendant; that this defendant derived no benefit of any kind from any claim or arrangement of plaintiff."

The plaintiff replied:

The plaintiff replied:

"In case said guaranty set out in plaintiff's petition filed herein was executed by J. W. Schlicher, secretary of the Farmers' Union Co-operative Association, without authority of the said Farmers' Union Co-operative Association, said Farmers' Union Co-operative Association has ratified said guaranty by failing to disaffirm same within a reasonable time after acquiring knowledge of said unauthorized act and by accepting the benefits thereunder, and that said Farmers' Union Co-operative Association is therefore estopped from denying said guaranty." anty."

On these issues the cause was tried to a jury. The plaintiff's evidence tended to support the matters pleaded by it, the minutes of the directors' meeting, the letter written to plaintiff by the secretary of the association, and the company's check, payable to Porter, for plaintiff's supplies were likewise introduced. So, too, the by-laws of the association were in evidence. Two of these, in part, read:

66 ± . "\* \* Regular monthly meetings shall be held on the third Tuesday of each month. At the regular meeting of the board a thorough examination of the affairs of the company shall be made, and all officers shall submit full and complete statements at such meetings, showing all transactions since the previous meet-

ing. \* \* \*
"Sec. 8. Quorum at Directors' Meeting.
Three members of the board of directors shall constitute a quorum to do business at any meeting of the board. A less number may adjourn from day to day till a quorum can be secured."

On behalf of the defendant elevator association the oral evidence tended to show that there was no formal meeting of the directors on October 2, 1915. The president of the association, who was also one of the five directors, testified:

"That he was the president of the Hoxie Farmers' Union Co-operative Association on October 2, 1915, and a director of said union, and that he didn't attend any directors meeting on October 2, 1915, that he was aware of; that he had no recollection and that no knowless that the had no recollection and that no knowless that he had no recollection and that he had no recollection and that no knowless that he had no recollection a that he had no recollection and that no knowledge came to him that a meeting was held on that day; that there were five directors of the company at that time, himself, Mr. Burr, Mr. Schlicher, Mr. Cooper, and Mr. Wright; that at no time prior to October 2, 1915, or subsequent to that date or at any other time did he have knowledge of the board of directors making or instruction any one to guarantee. ing or instructing any one to guarantee the payment of any account of G. A. Porter; that the matter might have been talked of on the streets,

but there was never any action taken by the board of directors, and the board of directors did not authorize any one to write the Great Western Manufacturing Company the letter dated October 11, 1915, guaranteeing the pay-ment of \$256 for supplies for the elevator under construction.

A second director, F. M. Burr, testified that he thought the directors had a meeting about October 2d, but did not remember that the guaranty proposition had been mentioned. This witness admitted that the secretary of the company had told him about the guaranty "in the fall of 1915." The third director, L. J. Wright, did not remember consenting to the guaranty, but did recall that something was said about it. The fourth director, John Cooper, did not attend a directors' meeting on October 2d, but testified:

"Q. Did you have any conversation with Mr. Schlicher relative to this matter? A. Well, we probably talked it over some time when we might have met."

The attorney for the defendant association testified that on February 14, 1916, pursuant to authority of the association he had written to the plaintiff:

"The union will pay your claim, if it has not been paid, but will expect you to help them prosecute Porter if necessary."

The verdict and judgment were for the defendant, and the principal error urged is that these are contrary to the evidence.

[1, 2] It seems clear that the judgment cannot stand. The forgetfulness of the directors touching the meeting of October 2d does not prove the defense which the association set up-that it had "never at any time authorized any one to guarantee the payment of any sum to plaintiff herein." The minutes of the corporation clearly show that the guaranty was authorized on October 2d. The by-laws show that after that date regular meetings of the directors were held, or should have been held, on the third Tuesday of each month. Several months elapsed before the liability of the association on its guaranty became a disputed question. At these subsequent monthly meetings there was ample opportunity to correct the minutes if they did not speak the truth. The elements of both estoppel and acquiescence intrude to bar the defense pleaded. Furthermore, in communicating with the plaintiff the secretary was acting within both the apparent and specific scope of his authority, and his letter bound the defendant association when the plaintiff, by shipping the goods pursuant to the secretary's assurance, accepted and acted on the guaranty. Written notice of acceptance was not necessary. Platter v. Green, 26 Kan. 252; and citations in note in 16 L. R. A. (N. S.) 355 et seq.

[3] Does this conclusion leave anything on which to base a new trial, or should judgment be ordered? The defense of want of authority on the part of the secretary to apprise the plaintiff that the association would Products Company, which resulted in perma-

guarantee the payment failed. The minutes of the corporation, standing unchallenged and uncorrected for several months, estop the defendant to deny the guaranty. check to Porter was intended to pay for plaintiff's supplies. The check says so. That Porter converted the proceeds of the check does not relieve the association nor satisfy plaintiff's claim. The attorney's letter, written with admitted authority, recognizes and concedes the liability; the record shows that in no way can the defendant rightfully prevail: and since all the material facts are incontrovertibly established, a new trial would confer no favor on the defendant, but only prolong litigation over a liability which defendant cannot escape; and judgment for plaintiff should be directed. Civ. Code, § 581 (Gen. St. 1915, § 7485).

Reversed, with instructions to enter judgment for plaintiff. All the Justices concurring.

BUNDY v. PETROLEUM PRODUCTS CO. (No. 21205.)

(Supreme Court of Kansas. May 11, 1918.)

(Syllabus by the Court.)

1. Master and Servant \$\iff 385(1)—Work-men's Compensation Act—Grade of Work -AMOUNT

Under the Kansas statute a workman who has been engaged for a specific employment at a fixed amount may recover from his employer compensation, based upon the earnings of persons in that grade of service, for an injury re-ceived while working for less wages in a different grade, to which he had been assigned for a short time by reason of a temporary cessation of the work for which he was employed.

2. Master and Servant \$\iiis 385(17)\$MEN'S COMPENSATION ACT — H
CHARGES—STATUTE—"OR BENEFIT." -Work-HOSPITAL

The provision of the Workmen's Compensation Act (Gen. St. 1915, § 5906) that, "in fixing the amount of the payment, allowance nxing the amount of the payment, allowance shall be made for any payment or benefit which the workman may receive from the employer during his period of incapacity" authorizes an allowance for hospital charges of a reasonable amount actually and necessarily incurred for the benefit of the workman and paid by the employer.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Benefit.]

Appeal from District Court, Montgomery County.

Action by Ralph G. Bundy against the Petroleum Products Company, to recover damages under the Workmen's Compensation Act. Judgment for plaintiff, and defendant appeals. Modified.

Thomas E. Wagstaff, of Independence, for appellant. O. C. Mosman, of Kansas City, Mo., and W. E. Ziegler, of Coffeyville, for appellee.

MASON, J. Ralph G. Bundy received an injury while in the employ of the Petroleum

He was employed to operate an acetylene welder. As the defendant had not yet bought its machine, he was directed to work as a helper building tanks, and did so for 15 days. An agent then arrived with the machine, and the plaintiff worked with him for 5 days. He then went back to work upon a tank, helping until the defendant decided whether it would buy the machine. His injury was received that evening. As a tank builder he was paid at one time 20 cents an hour, and at the next payment 2216 cents. As soon as the acetylene welder machine arrived he was to work on that and receive 40 cents an hour. A regular tank builder received 45 and 471/2 cents an hour, depending on whether he was a riveter, heater, or corker. The plaintiff was a "heater." He was allowed compensation on the basis of 40 cents an hour. The defendant maintains that the award should have been computed upon the basis of the wages he was receiving for the work he was doing when hurt, 221/2 cents an hour. The statute as it existed at the time of the accident provided for an allowance to an injured workman "equal to fifty per cent. of his average weekly earnings," computed according to the following rule:

"'Average earnings' shall be computed in such manner as is best calculated to give the average rate per week at which the workman was being remunerated for the fifty-two weeks prior to the accident: Provided, that where by reason of the shortness of time during which the workman has been in the employment of his employer, or the casual nature of the terms of the employment, it is impracticable to com-pute the rate of remuneration, regard shall be had to the average weekly amount which, dur-ing the twelve months previous to the accident, ing the twelve months previous to the accident, was being earned by a person in the same grade employed at the same work by the same employer, or, if there is no person employed, by a person in the same grade employed in the same class of employment and in the same district." Gen. Stat. 1915, § 5906.

The trial court must be deemed to have found, and the evidence warranted the finding, that the plaintiff's regular work under his employment by the defendant was the operation of the acetylene welder, and that the work he was doing at the time of his injury was temporary, his assignment thereto for a short time being brought about by exceptional circumstances. In that situation we think the trial court was justified in holding that the plaintiff's grade was that of a heater or operator of a welding machine, and not that of a mere assistant, and that his compensation was to be computed on that basis. The language quoted from our statute is substantially the same as that of the English act, the effect of which under circumstances similar to those here presented is thus stated:

"In fixing the compensation of an injured

nent total disability. He recovered a judgment under the Workmen's Compensation be based on the wages the workman was earning in the grade of employment in which he met with the accident. But if the workman is regularly employed in one grade, and is temporary and accident of the content of rarily transferred to another grade, and is temporarily transferred to another grade in an emergency, the wages of the latter grade do not determine his compensation." Note, L. R. A. 1916A, 151, 152.

The Industrial Accident Board of Massachusetts acted upon this theory in a case where a workman whose regular employment was that of a "brewery worker," receiving \$18 a week, was allowed compensation on that basis, although the task at which he was engaged at the time of his injury was helping in the digging of a well-work for which a day-laborer received but \$13.50 a week. Coyle v. Massachusetts Employés' Ins. Ass'n. 2 Mass. Workm. Comp. Cas. 704, quoted from in 11 N. C. C. A. 380, 381. The defendant cites as sustaining its view a recent Wisconsin case. There a bystander lost his life while responding to a call made upon him by a city marshal for aid in making an arrest. His widow was allowed to recover compensation from the city, based upon the earnings of one doing policeman's service in that locality, notwithstanding that in his own occupation-that of a plumber, not in the city's employ-he had received a different and presumably a larger income. Village of West Salem v. Industrial Commission, 162 Wis. 57, 155 N. W. 929. The rule we declare here is that under our statute a workman who has been engaged for a specific employment at a fixed amount may recover from his employer compensation, based upon the earnings of persons in that grade of service, for an injury received while working for less wages in a different grade to which he had been temporarily assigned. This principle obviously does not apply to the case of one who is injured in the course of casual employment by a person other than his regular employer.

Complaint is made of the admission of certain evidence, but the competence of a part of it is established by what has already been said, and no prejudice appears from the admission of the remainder.

[2] 2. The trial court allowed the defendant a credit on account of payments made for medical attendance, nursing, and similar services. It refused, however, to allow a credit of \$114.75, claimed on account of a hospital bill incurred. The defendant complains of the latter ruling. The ground of the disallowance is not definitely shown. It may have been because the payment had not been made at the time judgment was render ed. The plaintiff objects to the allowance because the statute does not contemplate such a credit, because it was not shown that the amount claimed was reasonable and was necessarily incurred, and because the claim, if valid, is one that can be enforced against him directly by the original claimant. It was intimated in Cain v. Zinc Co., 94 Kan. 679, 682, workman who had served the same employer 146 Pac. 1165, 148 Pac. 251, that such allowstatute that "allowance shall be made for any payment or benefit which the workman may receive \* \* \* during his period of incapacity." Gen. Stat. 1915, § 5906, subd. "e." We think the words "or benefit" in the clause quoted are intended to cover payments made for reasonable charges for necessary medical attendance and services of like na-Boyd's Workmen's Compensation, \$ ture. 535. The defendant's showing was technically defective, in that it was not made to appear affirmatively that the charges were reasonable or the services necessary. There is nothing in the record, however, to suggest the contrary, and the hearing was conducted rather informally. It has not been proved that the payment has actually been made, but we do not understand that an issue is made on that point. We think the ends of justice will be best served by reducing the judgment by the amount of this claim. Such a reduction is ordered, unless the plaintiff shall, within 20 days, file in this court a verifled denial of the reasonableness and necessity of the charge, or of the payment of the amount, in which case further consideration will be given the matter.

The judgment is modified accordingly, but as no actual error is shown in the rulings of the trial court the costs of the appeal will not be divided, but will be taxed to the defendant. All the Justices concurring.

MISSOURI, K. & T. RY. CO. v. PUBLIC UTILITIES COMMISSION. (No. 21531.)

(Supreme Court of Kansas. May 11, 1918.)

(Syllabus by the Court.)

1. CARRIERS \$==12(7), 18(6)—FREIGHT RATES -Unreasonableness - Injunction-Evi-DENCE.

The record and the evidence examined, and held sufficient to support a finding and judg-ment of the trial court that a schedule of freight rates on chats, gravel, and rough stone, from Galena, Kan., to points in Kansas on the Mis-souri, Kansas & Texas Railway, which was or-dered to be established by the Public Utilities Commission, was unreasonably low and discriminatory, and unjust to the railway company, and that such schedule of rates was properly enjoined.

2. CARRIERS \$\infty\$=12(7) — FREIGHT RATES — UNREASONABLENESS—BURDEN OF PROOF.

A carrier may sufficiently maintain the burden of showing that a schedule of freight rates is unreasonable or noncompensatory by whatever evidence may be available, and with-out undertaking the almost impossible task of proving the ultimate and controlling fact with the precision of a mathematical theorem.

Appeal from District Court, Shawnee County.

Suit for injunction by the Missouri, Kansas & Texas Railway Company against the Public Utilities Commission for the State of Kansas. | perused the abstract, but the transcripts of

ances are authorized by the provision of the Judgment for plaintiff, and defendant appeals. Affirmed.

> F. S. Jackson and H. O. Caster, both of Topeka, for appellant. W. W. Brown and James W. Reid, both of Parsons, and J. G. Slonecker, of Topeka, for appellee.

> DAWSON, J. The Public Utilities Commission appeals from a judgment of the district court of Shawnee county, enjoining an order of the commission issued in April, 1915, directing the plaintiff to publish and observe a new and reduced schedule of freight rates on mine chats, gravel, and rough stone. from Galena to the several stations on its railway in Kansas within 150 miles of that city. The order was made pursuant to a hearing before the commission upon the complaint of the Galena Commercial Club. days thereafter, the railway company brought this suit, charging that the freight rates sought to be established by the commission were unlawful, unreasonable, and discriminatory: "that the said order and schedule of rates is unjust and that its enforcement by the defendant would deprive this plaintiff of its property without due process of law, and deny to it the equal protection of the law. Issues were joined, and certain statistical and opinion evidence was introduced, and certain incidents touching the commercial aspects of the trade in chats in and near Galena were established; and by agreement of parties the evidence presented to the commission at its hearing was also introduced. The finding of the district court reads:

> "The court finds the issues in favor of the plaintiff and against the defendant, and that the schedule of rates promulgated by the defend-ant on the 5th day of April, 1915, over the lines of the plaintiff railroad, from its station at Galena to other stations on its line, within the state of Kansas, on mine chats, gravel, and rough stone is unreasonably low and discriminatory, and would be unjust to the plaintiff company.

> On this finding the rates were enjoined, and the errors assigned challenge the sufficiency of the evidence upon which the judgment is based.

> [1] In this behalf the defendant's argument begins with a reminder that the rates fixed by the commission are presumed to be reasonable, and that the burden is on the plaintiff railway to show the contrary. We do not understand that the plaintiff disputes this as an abstract principle. The railway company assumed the burden in the district court of overturning that presumption. Whether the evidence adduced in its behalf did overcome that presumption, or, to put it more precisely whether the evidence was of sufficient probative force to justify the trial court in finding that the presumption was overthrown and the contrary established is the only question which this court can consider. To determine this we have not only

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the evidence presented to the commission and to the trial court. This evidence tends to show that for certain rate-making purposes Galena is grouped with certain neighboring Missouri towns, including Joplin, which is less than 8 miles away, and that this group of towns enjoys the same freight rates on chat, etc., except that at the time this rate was being considered by the commission, and for about a year prior thereto, there was in effect in Missouri a statutory rate on chats, etc., less than the then prevailing Kansas and interstate rates. The evidence tends to show that for several years prior to the filing of the complaint before the defendant commission by the Galena Commercial Club, the shipment of chat had practically ceased except for use as railway ballast. This was partly caused by the fact that Galena chat was not of so good a quality as the chat obtainable in Joplin and the other towns grouped with Galena. Another reason was that these other towns grouped with Galena had better facilities for loading the chat: and the cost of loading and transportation is practically all that the chat is worth. the points of production it has no substantial value. The Missouri statutory rate which appears to have been accorded considerable weight by the commission in fixing the rate complained of had not been long in effect, and it was not voluntarily acquiesced in by the railway company, and that rate has since been substantially increased by the Missouri state commission. Freight rates, voluntarily established by carriers, and rates established by authority of law, whether by Legislature or by commissions, and rates judicially determined to be reasonable and just, are practical and valuable aids in rate making and in determining the fairness of a disputed rate, provided, of course, that the similarity of the traffic conditions is established or a proper allowance is made to overcome existing differences in traffic conditions. Railroad Co. v. Utilities Commission, 95 Kan. 604, 616, 148 Pac. 667. But a freight rate imposed upon a carrier by whatsoever authority. which the carrier has not assented to, and which it has not had a reasonable time and opportunity to contest, is of very little probative value, either for rate making or for determining the reasonableness of a questioned rate, even if the density of traffic and other pertinent conditions attending it are similar, or their proper relationship be conceded or established. It would seem that the abrogation of the Missouri rate from the Joplin group points used by the defendant commission as an aid in determining the rate from Galena here complained of, and the granting of a substantially higher rate in Missouri, were evidential circumstances of considerable force which the trial court could properly consider in determining the reasonableness and justice of the commission's order establishing rates out of Galena.

The evidence also showed that the use of chat, etc., from the Galena-Joplin group of shipping points comes in competition with the use of gravel from Emporia, Council Grove, and Chanute, and with the use of crushed stone from Iola and Junction City; and the trial court might properly give some consideration to those facts. We would not intimate that a rate from Galena could not be reduced because it would unsettle competitive conditions elsewhere, but it is proper to consider all these facts in determining whether a rate reduction is fairly designed to measure the respective rights of shipper and carrier, or to discriminate in favor of a shipper or shipper's club against rivals in business, while largely losing sight of the just rights of the carrier. If the commission's rates from Galena are established, it would be possible for Galena chat to invade and pre-empt a wide marketing territory in which the producers of gravel and crushed stone now meet and compete under lawful and long-established Kansas freight tariffs. Furthermore, if the rates out of Galena are to stand, Joplin and the other nearby points in the same group would be entitled to a reduction in their interstate rates, so that they might continue to enjoy their trade in Kansas territory. This is the doctrine of the Shreveport case. Railroad Commission of La. v. St. L. S. W. Ry. Co., 23 Interst. Com. Com'n, 81; Houston & Texas Ry. v. United States, 234 U. S. 342, 34 Sup. Ct. 833, 58 L. Ed. 1341; Railroad Co. v. Utilities Commission, 95 Kan. 604, 626, 148 Pac. 667, supra. Under the doctrine of these cases the plaintiff railway is forced to the alternative of contesting the Galena rates, on which little or no traffic moves, and which could in no event become other than a negligible factor in its business, or subject itself to the likelihood of seeing its revenues depleted by a corresponding reduction in the interstate rates from the other Joplin group points. Furthermore, if the Joplin interstate rates were reduced. the superior quality of Joplin chat would again drive the inferior Galena chat out of the market.

Whether this was the course of reasoning by which the trial court arrived at its finding and judgment we cannot say; but these considerations were well within the purview of the evidence. There was considerable opinion evidence of experts, both for the plaintiff and the defendant. Some of these were traffic men of large experience; and, while their eagerness to serve their employers was a thing to be considered in weighing their testimony, they were subjected to skillful cross-examination, and the experienced trial judge who heard them testify must be deemed to have given proper weight to their testimony. Since expert and opinion evidence is competent, its value must largely be left to the trial judge who sees and hears the witness, his manner of testifying, his apparent

candor and familiarity with the subject, and any interest he may appear to have in the controversy. In our opinion the great preponderance of this class of testimony, whatever its worth might be, was that the rates complained of were unreasonably low.

Besides, the reductions required by the order of the commission are themselves of some evidential potency. These reductions run from 8 per cent to 75 per cent and average 34 per cent below the former, long-established rates on which this commodity has freely moved from points grouped with Galena in Southeastern Kansas and South-western Missouri for many years.

[2] It is finally urged that the railway company did not produce any figures showing the cost of moving chat from Galena, and therefore it was not clearly proved that the rate complained of is noncompensatory. But the courts have recognized that this sort of evidence is seldom, if ever, available; and, until railroads and shippers, or Legislatures and commissions and courts, or all of them together, can settle and agree upon some arbitrary factor to be included as the proper proportionate burden of investment, maintenance, administration, taxation, wages, service, etc., which every commodity hauled by a railroad should bear, the evidence which appellant says was wanting in this case will be wanting in every case; and, if the failure to produce that particular line of evidence is fatal to the carrier's cause, it would always be useless to seek judicial redress. A freight rate lawsuit is in most respects like any other lawsuit. It has to be decided on the evidence which the parties can and do present, and justice cannot be withheld because a rate complained of cannot be shown with the precision of a mathematical theorem to be noncompensatory.

After a painstaking study of this record the court can discern no ground for a reversal, and therefore the judgment is affirmed. All the Justices concurring.

In re BURKHART'S ESTATE. SKINNER v. WEAVER. (No. 21494.) (Supreme Court of Kansas. May 11, 1918.)

(Syllabus by the Court.)

EXECUTORS AND ADMINISTRATORS 4=451(2)—CLAIM AGAINST ESTATE—DEMURRER TO EVIDENCE.

The guardian of the plaintiff's brother made a contract with plaintiff by which the latter was to board and care for his brother for \$2.75 per week. He presented each month for several years his bill for compensation at this rate, which the guardian paid him during the time the brother remained with him. His brother died and an administrator was appointed for the estate, when plaintiff filed a demand against the administrator for additional compensation, elaiming that the services rendered were worth more than he had been paid. Held, on the

candor and familiarity with the subject, and facts stated in the opinion, that the court should any interest he may appear to have in the have sustained a demurrer to the evidence.

Appeal from District Court, Cowley County.

In the matter of the estate of Samuel Burkhart, deceased, with claim by John T. Weaver against John W. Skinner, administrator. Judgment for claimant, and defendant appeals. Reversed and cause remanded, with directions to sustain the demurrer to the evidence.

Hackney & Moore, of Winfield, for appellant. S. A. Smith, of Winfield, for appellee.

PORTER, J. Samuel Burkhart and John T. Weaver were half-brothers. Burkhart, who was unmarried, was advanced in years and was weak-minded. He owned 160 acres of land in Cowley county near Winfield. Some time in 1912 he was adjudged incapable of transacting business and John W. Skinner was appointed his guardian. He went to live with Weaver at the latter's home under an arrangement between the guardian and Weaver by which the guardian purchased enough land from Weaver upon which to build a room for Samuel to live in, and Weaver agreed that if this was done he would board and care for Samuel, for which he was to receive \$2.75 per week. The sum of \$392.86 was expended by the guardian in building an addition to Weaver's house and in repairing and enlarging the part owned by Weaver. Samuel Burkhart continued to board with Weaver until December 20, 1916, when he was removed to a hospital, where he died January 2, 1917. During the time he remained with Weaver the latter presented to the guardian each month his account for the compensation agreed upon, and was paid the amount due according to the terms of the agreement. Shortly after Samuel Burkhart's death Weaver presented to the guardian and was paid his claim of \$8, being the amount due for the portion of the month of December prior to the time his brother was taken to the hospital. Thereafter the guardian filed his final report, and the probate court discharged him as guardian. After the guardianship matter had been closed, John W. Skinner was appointed administrator of the estate of Samuel Burkhart, deceased. Weaver then filed a demand against the estate in which he claimed to be entitled to compensation for the board and care of Samuel Burkhart from January 1, 1914, to May 7, 1916, at the rate of \$15 a month, and at the rate of \$1 a day, for 221 days' board and care from May 7, 1916, to December 20, 1916, aggregating \$647. The matter was appealed to the district court, where a trial resulted in a judgment in plaintiff's favor against the estate for the sum of \$400. The

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administrator brings the case here for review.

The theory upon which Weaver seeks to recover against the estate is best explained by his own testimony. He testified that he had an understanding with the guardian that he was to be paid \$2.75 a week "to take care of Samuel and look after him, board him, and do his washing." He was then asked, "Was that a reasonable and fair price for the board at the time when it was made?" Over the objections of counsel for the administrator, he testified that it was not a fair contract the last year or two of Samuel Burkhart's life; and, again, over objections, was permitted to testify that he did not think it was a fair contract at the time it was made. He admitted that he felt some moral obligation to take care of his half-brother, who had no other place to go and who wanted to live with him. The court overruled objections to his testimony that reasonable compensation for his brother's board, in view of the cost of living, was \$3.50 a week; that the cost increased about half a dollar a week each year until the last year or two; and that a reasonable compensation for the board alone would be from \$4.50 to \$5 a week, and, further, that after his brother suffered a paralytic stroke in May, 1916, it was worth, in his opinion, \$15 a week to board and care for him. Mrs. Weaver testified that at two or three times she complained to the guardian that they were not getting enough compen-Her testimony, which was quite sation. vague and uncertain, was:

"Well, so far as I remember, Mr. Skinner said he would pay us more in the future; something similar to that; I don't just remember. Q. Said he didn't have the money now, but intimated that he might have later? A. Something similar to that."

The plaintiff himself did not testify to any agreement with the guardian for additional compensation. We think the court should have sustained the administrator's demurrer to the evidence. The plaintiff admitted making a contract with the guardian to board and take care of his brother for \$2.75 a week, and the uncontradicted evidence shows he presented each month a bill to the guardian for compensation at the agreed rate, which the guardian duly paid. He relies on the testimony of Mrs. Weaver to the effect that she had some kind of an understanding with the guardian that at some indefinite time in the future he would pay more, and upon the claim that the services rendered were worth more than the compensation agreed upon. The plaintiff had no claim against his brother in the latter's lifetime because Samuel Burkhart was under the care of a guardian. After Samuel's death and before the appointment of an administrator, the guardian paid the balance claimed to be due according to the terms of

been inadequate, but it was the amount agreed upon in the contract, and, besides, the evidence shows that part of the consideration agreed upon consisted of the money expended by the guardian in repairing and fixing up that part of the property belonging to Weaver. By presenting his claim each month for the compensation fixed by the contract and accepting payment therefor, the plaintiff is estopped from claiming that an increased rate had been agreed upon, or that he is entitled to recover more because the services rendered were worth more than the contract price.

The judgment is reversed and the cause remanded, with directions to sustain the demurrer to the evidence. All the Justices concurring.

STEVENS v. KEEGAN. SAME v. MULRY-AN. SAME v. BLOCKER. (Nos. 21487, 21516, 21517.)

(Supreme Court of Kansas. May 11, 1918.)

(Syllabus by the Court.)

BILLS AND NOTES \$\infty\$=365(1)—Bona Fide
Purchaser—Defense of Counterclaim.
No defense, counterclaim, or set-off can

No defense, counterclaim, or set-off can reduce the amount of the judgment that should be rendered on a negotiable promissory note in the hands of one who took it from one who claimed to hold it in due course, where the defense of want of good faith in acquiring the note by such holder is set up against the note, and the special findings of the jury show that the defense has not been established by the evidence.

2. Bills and Notes €==315—Assignment — Equities.

One who acquires a negotiable promissory note, by an assignment written on a separate piece of paper, from one who is not a holder in due course, takes the note subject to all equities and defenses in favor of the maker.

Appeal from District Court, Marshall County.

Actions by F. L. Stevens against T. M. Keegan, J. C. Mulryan, and Charles Blocker. Judgment for defendants in each case, and plaintiff appeals. Judgments reversed, and a new trial ordered.

Guy S. Calkins, of Iowa City, Iowa, Ira K. Wells, of Seneca, Walter T. Griffin, of Marysville, and Godard & Myers, of Topeka, for appellant. W. J. Gregg, of Frankfort, W. W. Redmond, of Marysville, and C. L. Thompson, of Hoxie, for appellees.

definite time in the future he would pay more, and upon the claim that the services rendered were worth more than the compensation agreed upon. The plaintiff had no claim against his brother in the latter's lifetime because Samuel Burkhart was under the care of a guardian. After Samuel's death and before the appointment of an administrator, the guardian paid the balance claimed to be due according to the terms of the agreement. The compensation may have

of Iowa City, under the trade-names of the Lyon-Taylor Company, the Puritan Manufacturing Company, and the Franklin Price Company, conducted three separate kinds of business. The one under the name of the Lyon-Taylor Company was that of increasing sales by country merchants through contests, a scheme of advertising planned and sold by the company. The one under the name of the Puritan Manufacturing Company was that of selling jewelry; while the one under the name of the Franklin Price Company was that of selling perfumery. The defendant signed an order for a piano, a watch, and some silverware, and for the advertising matter and instructions that went therewith, and put on contests for the piano, the watch, and the silverware. These were to be distributed as premiums to candidates receiving the highest number of votes. The contract contained the following provisions:

"Increased Sales Guaranteed .- Sales preced-"Increased Sales Guaranteed.—Sales preceding twelve months were \$—. Next twelve months are hereby guaranteed to be \$31,200, and if .092 per cent. of said sales does not amount to \$289.00 we hereby agree to pay to purchaser the deficiency in cash. We also agree to send our bond in the sum of \$1,000.00 to cover this agreement."

The contract had printed thereon the fol-

"The attached note is tendered in settle-ment of this order and the company is au-thorised to detach same when the order is ac-

Under the contract, the goods described were to be shipped by the Lyon-Taylor Company to the defendant f. o. b. transportation company. The Lyon-Taylor Company did not ship some of the goods promptly, and those goods were not in the hands of the defendant when they were to be delivered to the contestants as prizes.

The note sued on was attached to the contract at the time it was signed, but was detached before it was transferred. A copy of the note attached to the petition was indorsed, "Lyon-Taylor Company, by M. H. Taylor." The answer contained a general denial, an allegation that the plaintiff was not the owner of the note in good faith, and that if he ever did purchase the note, it was after the maturity thereof, with notice of the defenses and equities of the defendant. The answer further alleged the failure of the Lyon-Taylor Company to perform their part of the contract, set up a counterclaim of \$175.55, alleged damages in the sum of \$100. prayed judgment for \$271.55, and tendered into court \$117.45. The amount tendered into court was 92 hundredths of 1 per cent. of the gross sales made by the defendant for the period agreed to under the contract. The answer was verified. The jury returned a verdict for \$13.92 in favor of the plaintiff, and answered certain special questions as follows:

"(4) Did the First National Bank of Iowa

eral security on or about the 9th day of August, 1913? Answer. Yes.

"(5) Was the First National Bank of Iowa City, Iowa, at the time it took the note in suit, guilty of bad faith in so doing? Answer. Yes.

"(6) If you answer the above question in the affirmative, then state the particular facts constituting such bad faith. Answer. On account of suits pending on similar notes.

constituting such bad faith. Answer. On account of suits pending on similar notes.

"(7) Did the First National Bank of Iowa City, Iowa, have notice of any defect in the note in suit at the time it acquired the same?

Answer. Yes.

"(8) If you answer the above question in the affirmative, then state the particular facts of which it had notice. Answer. By past experience on similar notes."

There was evidence which tended to show that the Puritan Manufacturing Company transferred the note to the First National Bank of Iowa City, as collateral, to secure the payment of the notes of that company aggregating \$8,000; that about a month before these notes became due, the bank notified the company that payment of the notes would be expected at maturity; that M. F. Price, or Mr. Taylor, a representative of Price, went to the plaintiff and induced him to go to the bank and purchase the notes of the Puritan Manufacturing Company and take the collateral then held by the bank to secure the payment of the notes as security in the hands of the plaintiff: that an arrangement was then made between Price or Taylor and the plaintiff by which, if any of the notes taken as collateral were unpaid at maturity, such notes should be turned over for collection to an attorney to be named by Price, and the plaintiff should not be at any loss or expense on account of such collection. The note sued on was among those held by the bank as collateral, and was, by the bank, turned over to the plaintiff.

[1] 1. The plaintiff requested a peremptory instruction for judgment in his favor, moved for judgment on the special findings of the jury, and filed a motion for a new trial, in which he alleged "that the general verdict and the answer to the special questions are contrary to the evidence." The request for instructions and the motions were denied, and error is assigned thereon. The note was past due when the plaintiff became the owner of it, and he was not the holder thereof in due course; but he claims to have derived his title from a holder in due course, and that, therefore, he held the note free from any defenses in favor of the defendant. Section 6585 of the General Statutes of 1915 provides that:

"A holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter."

Section 6579 of the General Statutes of 1915 reads:

"A holder in due course is a holder who has taken the instrument under the following conditions: (1) That it is complete and regular City, Iowa, acquire the note in suit as collat- upon its face; (2) that he became the holder of it before it was overdue, and without notice; some evidence to show that the bank obtainwas the fact; (3) that he took it in good faith and for value; (4) that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

What was there to show that the First National Bank of Iowa City was not a holder in due course? This question is answered by the special findings of the jury. Those findings were not sufficient to establish that fact. Neither the fact that suits on other notes of like character given by other parties, nor the fact that the bank had previously had like experience on similar notes, was sufficient to establish that the bank was guilty of bad faith in taking the note sued on, or that it was not the holder thereof in due course. When the note was delivered to the bank, it was indorsed in blank by the payee thereof. The note was then payable to bearer, and was negotiable by delivery. Gen. Stat. 1915, § 6561. The burden was on the defendant to prove that the bank was not the holder of the note in good faith. Mann v. National Bank, 34 Kan. 746, 10 Pac. 150; Savings Association v. Barber, 35 Kan. 488, 11 Pac. 330; Gafford v. Hall, 39 Kan. 166, 17 Pac. 851; National Bank v. Elliott, 46 Kan. 32, 34, 26 Pac. 487; Brook v. Teague, 52 Kan. 119, 125, 34 Pac. 347; Clark v. Skeen, 61 Kan. 526, 532, 60 Pac. 327, 49 L. R. A. 190, 78 Am. St. Rep. 337; Gen. Stat. 1915, § 6586. Under the findings of the jury, the judgment on the note could not be reduced by any matter set up in defense.

[2] 2. To sustain the judgment, the defendant argues that the evidence did not prove the indorsement of the note by the Lyon-Taylor Company, but did prove that the First National Bank of Iowa City acquired the note from the Puritan Manufacturing Company by assignment on a separate sheet of paper. The indorsement of the note by the Lyon-Taylor Company was established by abundant evidence. The defendant's contention concerning the transfer of the note by the Puritan Manufacturing Company by assignment is based on the following testimonv:

"Q. Now, how did you know whether you were getting any title to that Lyon-Taylor paper at that time if you did not know who composed the firm? A. Because it was indorsed by the Lyon-Taylor Company, and subsequentby the Lyon-Taylor Company, and subsequently indorsed by the Puritan Manufacturing Company, and the Puritan Manufacturing Company guaranteed to us the genuineness of the previous indorsement. Q. Do you want to be understood as testifying that the notes in suit in these cases are indorsed by the Puritan Manufacturing Company? A. They should be indorsed by the Puritan Manufacturing Company; if not, the assignment was made in separate assignments; in any event the genuine-ness of the paper would be guaranteed to us by the Puritan Manufacturing Company."

The note was not indorsed by the Puritan Manufacturing Company.

ed the note by assignment from that company. The Puritan Manufacturing Company was not the holder of the note in due course. The name was one of the trade-names under which M. F. Price did business, and he had notice of all defenses and equities in favor of the defendant. If the bank obtained the note by assignment, without reference to the indorsement of the Lyon-Taylor Company, it took the note subject to the equities and defenses of the defendant. McCrum v. Corby, 11 Kan. 464; Hadden v. Rodkey, 17 Kan. 429; Hatch v. Barrett, 34 Kan. 223, 8 Pac. 129; Briggs v. Latham, 36 Kan. 205, 13 Pac. 129; Offenstein v. Weygandt, 89 Kan. 739, 132 Pac. 991.

In Farnsworth v. Burdick, 94 Kan. 749, 147 Pac. 863, it was held that the holder of a note by assignment written on the back thereof is a holder in due course. But that case does not overrule previous decisions of this court, where the assignment is made in writing and is not attached to the note. The plaintiff took the note from the bank subject to the equities and defenses of the defendant.

Other matters are urged by the plaintiff, but there is no substantial merit in any of them, and none of them is of sufficient importance to justify discussion.

The judgment is reversed, and a new trial is ordered.

The same order is made in Nos. 21516 and 21517. All the Justices concurring.

SMITH et al. v. CITY OF COURTLAND et al. (two cases). (Nos. 21725, 21788.) (Supreme Court of Kansas. May 11, 1918.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS €==301--CHANGE

of Grade Ordinance—Statute.

The statute providing that the grade of a street may be established by ordinance, and when so established shall not be changed without a three-fourths vote of the city council, does not prevent the establishment of a grade by any other method than the adoption of an ordinance.

2. MUNICIPAL CORPORATIONS \$\infty\$ 278(3) STREET PAVING-ASSESSMENTS-STATUTE.

The statute providing that for the purpose of paying for certain improvements, after the streets "have first been brought to grade," assessments shall be made upon the abutting property, does not fix the order in point of time in which the grade shall be established with respect to the contracting for the improvements or the levying of the assessments, but is intended to insure that the abutting property shall not be required to carry the expense of bringing the street to grade, by providing that it is only the expense that accrues after that work has been done which shall be charged to the adjoining lots.

3. MUNICIPAL CORPORATIONS 4=323(1, 3) STREET IMPROVEMENT-GRADING-EVIDENCE INJUNCTION.

The evidence held to warrant a finding that the price fixed in a contract for curbing and gut-There was then tering certain streets included a charge for the streets which was to support the curb and gutter, and therefore to justify an injunction against its enforcement.

MUNICIPAL CORPORATIONS 4=311, 325 STREET IMPROVEMENT — PROCEEDINGS OF COUNCIL—AMENDMENT—TRUTH OF RECORD-PRESUMPTION.

Other defects in proceedings for the improvement of streets considered, but not definitely

Appeal from District Court, Republic County.

Action for injunction by Paul Smith and others against the City of Courtland and others. Permanent injunction granted, and defendants appeal. Affirmed.

Vance & McTaggart, of Belleville, and W. R. Mitchell, of Mankato, for appellants. N. J. Ward, of Belleville, and R. W. Turner, of Mankato, for appellees.

MASON, J. The city of Courtland, a city of the third class, let a contract for curbing and guttering certain streets. An action was brought by several owners of abutting property, seeking to enjoin the carrying out of the contract and the levying of assessments to pay for the work. On final hearing a permanent injunction was granted, but further proceedings under the resolutions declaring the improvement necessary were expressly The defendants appeal.

The principal objection made to the power of the city to make the improvements referred to by the means employed is that no ordinance has ever been passed establishing the grade of the streets affected. The plaintiffs contend that the grade can be established only by ordinance, and that it must be established before any contract for curbing, guttering, or paving is let. Cases are cited tending to support this contention. N. P. R. R. Co. v. City of Chicago, 174 Ill. 439, 51 N. E. 596; State v. District Court of Ramsey County, 44 Minn. 244, 46 N. W. 349. It has been held sufficient, however, if the grade is fixed before the improvement is made. Allen v. City of Davenport, 107 Iowa, 92, 99, 77 N. W. 532. The matter is so largely controlled by statute that little aid is to be derived from decisions in another juris-

[1] 1. It is true that the passage of an ordinance is the natural method of establishing a permanent as distinguished from a temporary rule or condition. Remington v. Walthall, 82 Kan. 234, 108 Pac. 112, 31 L. R. A. (N. S.) 957. Yet where the method of the exercise of a power which a city possesses is not prescribed, it may ordinarily use its own discretion in the matter, to the extent at least of employing any usual and appropriate means for the purpose. Cyc. 275. It is contended that the establish-

bringing to the established grade the part of jed through an ordinance by virtue of a statute enacted in 1909, reading as follows:

> "The mayor and council of the cities of the second and third class may by ordinance estab-lish the grade of any street or alley in said city, and when the grade of any street or alley shall have been so established said grade shall not be changed until a resolution shall have been passed by a three-fourths vote of all the councilmen elected declaring it necessary to change said grade." Gen. Stat. 1915, § 887.

> The power of a city to establish a grade cannot be thought to be derived from this statute, for it existed prior to the year named. Nor do we regard the statute as making an ordinance necessary to the establishment of a grade in all cases arising after its adoption. Its effect is to provide that a grade which is once established by ordinance shall be changed only by a three-fourths vote. We think the mayor and council still have authority, outside of this statute, to fix the grade of a street, and this result may be brought about by any action, as for instance by a resolution, giving expression to a present intention to accomplish that purpose. See Wood v. Village of Pleasant Ridge, 12 Ohio Cir. Ct. R. 177, 181.

> [2] 2. The contention that a grade must be established before a street is curbed or guttered is based upon the statute which

> "Cities of the third class in their corporate ca-pacities, are authorized and empowered to enact ordinances for the following purposes, in addition to other powers granted by law: To pave, curb and gutter any street, avenue or alley in said city and to tax the costs and expenses thereof to the abutting property and to issue improvement bonds for the payment of the costs and expenses of such improvements as herein provided. First, for all the paving, curbing, guttering and improvements of the squares and areas formed by the crossing of streets. Syvenues areas formed by the crossing of streets, avenues and alleys, the assessment shall be made upon all the taxable property of the city. Second, for paving, curbing and guttering all streets, avenues and alleys and for doing all excavating and grading necessary for the same, except the squares and areas formed by the crosssquares and areas normed by the crossing of streets, avenues and alleys, after said streets, avenues and alleys have first been brought to grade, as now provided by law to be done, the assessments shall be made for each block separately, on all lots and pieces of ground to the center of the block on either side of such attract or evenue the distance improved as the street, or avenue, the distance improved or to be improved, or on the lots or pieces of ground abutting on such alley, according to the assessed value of the lots or pieces of ground without regard to the buildings or improvements thereon. regard to the buildings of improvement three dis-which value shall be ascertained by three dis-intercated appraisers appointed by the mayor interested appraisers appointed by the and council." Gen. Stat. 1915, § 1974.

We do not regard this as intended to fix the order in point of time in which the grade shall be established with respect to the contracting for the improvements or levying the assessments. Its purpose as we interpret it is to insure that the abutting property shall not be required to carry the expense of bringing the street to grade, by providing that it is only the cost that accrues after ment of a grade is required to be accomplish; that has been done which shall be charged

dem For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

to the adjoining lots. In Keys v. Neodesha, 64 Kan. 681, 685, 68 Pac. 625, 626, it was said:

"Before a city can legally levy a special assessment for building sidewalks, it must establish a grade and bring that part of the street on which the walk is to be built to the grade so established."

But the reason is that until the grade is established it cannot be determined what part of the whole cost of the improvement is incurred in bringing the street to grade, that portion of the expense being chargeable to the city generally, and not to the abutting property.

[3] 3. An engineer employed by the city prepared the specifications on which the contract was let. He testified that he made a survey, and ran levels the full distance covered by the improvements, taking into consideration the outlying portion of the town; the curb and gutter were to be built according to these levels—on the grade determined by them, as marked by grade stakes; and that he made or was to make a survey of the town sufficiently to see that it was the correct grade for the draining of any other portion of the town that might be later improved. We think that by entering into a contract (authorized by ordinance) for the making of the improvements in accordance with these specifications, and levying the assessments to pay therefor, the city authorities adopted the grade so indi-The method pursued was very informal, but doubtless was sufficient to prevent the city from thereafter disputing the establishment of the grade. See O'Leary v. Street Railway Co., 87 Kan. 22, 123 Pac. 746.

The interest of the adjoining owner in having the grade established is to be assured that under color of paying for the curbing and guttering he is not required to pay for any part of the grading. The engineer testifled that "the plans, specifications and profile did not call for any street grading or filling": that "the excavations referred to in the specifications was simply what was necessary to install the curbing and guttering"; but that "there was some filling necessary to install the curb and gutter"; that "the deepest excavation would not exceed 14 inches, and that would be at the street intersections"; that "the excavation generally required for the work was from 8 to 10 inches"; that "in making the estimate of cost for this work he did not consider any excavation or filling other than that actually connected with the curb and gutter itself." The representative of the company which took the contract testified "that there would be some slight difference in the cost of the work for the different blocks; that he simply took the entire street into consideration in figuring on the job; that as to excavations necessary for the work. he estimated that as a whole it would be the thickness of the pavement (6 inches)"-re-

ferring to the guttering; that "from a practical standpoint there is no difference in the elevation of the different blocks"; that "he figured nothing for extra excavation in any one block." Other witnesses said that some of the grade stakes were level with the ground, some above the ground, and some below the surface, a variation of 12 inches being indicated.

A decision in favor of the validity of the proceedings would have implied a finding that the variation between the natural grade and that established by the city was not substantial. But there clearly was some difference, and the court must be deemed to have found upon sufficient evidence that, although small, it was too large to be rejected as inconsiderable, thereby establishing that fact for the purposes of this case. Some slight amount of filling and excavating had to be done on account of this situation, and presumably the contract price was influenced by this fact. Therefore an expense of an unascertained and unascertainable amount, which should have been borne by the city generally, was charged against the abutting property. This justified an injunction against the carrying out of the contract. The objection was timely, and as the improvements have not been made, no inequity results. In Clarke v. Lawrence, 75 Kan. 26, 88 Pac. 735, it was said:

"That some grading is necessary to level or fill the inequalities in the surface of a dirt road to prepare it for receiving the pavement seems evident; also that such leveling would be a necessary incident to the paving of a street, even after it had been brought to grade."

The "grading" there referred to was obviously the leveling or smoothing over of slight and inconsiderable inequalities in the surface of the road existing after it had once been completely "graded" in the sense of being brought to the established grade. Here the process was that of bringing the natural grade to that fixed by the engineer.

[4] 4. The conclusion reached requires the affirmance of the judgment, and makes it unnecessary to pass upon the effect of various other irregularities in the proceedings, which are made the grounds of objections by the plaintiff. The statute already cited seems to contemplate that the guttering at street intersections is an improvement that requires an ordinance for its authorization. The ordinance in this instance appears to relate only to curbing and guttering the parts of the streets in front of the various blocks designated. It is suggested that if this were the only defect the special assessments might be upheld by treating the contract as severable. While the agreed price of the various parts of the work is shown, it may not be entirely clear that the inclusion of the intersection work was not an inducement to the other. Sedgwick County v. State, 66 Kan. 634, 72 Pac. 634. Objection is made because where adjoining lots belonged to the same owner they were not separately assessed. If the proceedings were otherwise regular this

this regard gives opportunity for a question which might better be avoided.

The records of the proceedings of the city council with reference to the proposed improvement, as originally made, failed to show a due compliance with the law in several particulars. After this suit was begun the record was amended by the action of the council: the apparent defects being thus cured. The plaintiffs contend that the amendment could not properly be accomplished in this manner, and at all events that it could not affect their rights in the action already begun. The council had the power to cause the record to be changed so as to show the actual facts. In the absence of a showing to the contrary, the presumption must be that as finally adopted the record spoke the truth, and no prejudice appears to have resulted to the plaintiffs from the original defect in the entry. We understand this to have been the view of the trial court.

The judgment is affirmed. All the Justices concurring.

STATE ex rel. INTERSTATE LUMBER CO. v. DISTRICT COURT OF FIRST JUDI-CIAL DIST. IN AND FOR LEWIS AND CLARK COUNTY et al. (No. 4212.)

(Supreme Court of Montana. May 1, 1918.)

1. VENUE "MAY." 4-7 -- ACTION ON CONTRACTS

Under Revised Codes, \$\$ 6501-6503, designating in what county an action for any of the causes therein enumerated must be tried subcauses therein enumerated must be tried sub-ject to the power of the court to change the place of trial as elsewhere provided in the Code, section 6504, providing that in all other cases the action shall be tried in the county in which the defendants or any of them may reside at the commencement of the action, etc., and that ac-tions upon contracts "may" be tried in the tions upon contracts "may" be tried in the county in which the contract was to be performed, section 6505, providing that an action may lawfully be tried in any county unless defendant asks for a change to the proper county as therein provided, and section 6506, providing that place of trial must be changed on motion (1) when county designated in complaint is not the proper county, (2) where there is reason to believe that an impartial trial cannot be had, (3) when conveyance of witness would be probelieve that an impartial trial cannot be had, (3) when conveyance of witness would be promoted by change, and (4) when judge is disqualified, plaintiff had the right to have an action on a contract tried in the county where the contract was made and was to be performed, although defendant resided in another county; the word "may," as used in that part of section 6504 referring to actions on contracts, having the force of "must."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, May.]

2. STATUTES \$==206-Construction-Inten-TION.

The form of expression used in a statute is not important when the purpose intended and sought to be accomplished by the Legislature is ascertainable and made reasonably certain by applying the rule that every word and clause must be given effect if possible.

might not be fatal, but the plan followed in | 3. VENUE -7 - ACTION ON "CONTRACT" -STATUTE.

The term "contract," as used in Rev. Codes, § 6504, providing that action may be tried in the county where contract was to be performed, includes contracts of all kinds whether express or implied.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Contract.

4. VENUE 4 68 MOTION FOR CHANGE-AF-FIDAVITS.

Since by Rev. Codes, \$ 6504, plaintiff is entitled to bring an action in the county where the contract was to be performed, he is also entitled where place of performance does not appear from his complaint filed in such county to defeat defendant's motion to transfer to the county of defendant's residence by showing place of performance of contract by affidavits. Courts 204 — Supervisory Control. Change of Venue.

There being no remedy by appeal from order granting defendant's motion for change of venue or by mandamus, application to Supreme Court for an order under its supervisory power annulling order and requiring court to retain case for trial is the appropriate remedy, since the court had jurisdiction to entertain and determine the motion rendering certiorari and

prohibition unavailing.

Application by the State, on the relation of the Interstate Lumber Company, against the District Court of the First Judicial District in and for Lewis and Clark County and Lee Word, a judge thereof, for an order of the Supreme Court under its supervisory power annulling an order of said District Court granting defendant's motion for change of venue in an action wherein relator was plaintiff and Jake Tyanich defendant. Granted, and order

Henry C. Smith, of Helena, for relator. W. D. Rankin and R. L. Dick, both of Helena. for respondents.

BRANTLY, C. J. [1] On February 11th of this year the Interstate Lumber Company, a Montana corporation, brought an action in the district court of Lewis and Clark county against Jake Tyanich to recover the sum of \$130.08, the agreed price of lumber sold and delivered to him between March 29 and April 18, 1916, with interest thereon from the latter date. The defendant appeared in the action by a general demurrer. At the same time he filed a motion asking that the cause be transferred to Silver Bow county for trial, on the ground that at the time the action was commenced and he was served with summons he was a resident of that county. The motion was supported by his own affidavit disclosing the fact of his residence in Silver Bow county and the service of summons there. The plaintiff, not controverting these facts, resisted the motion on the ground that the contract was made in Lewis and Clark county and was to be performed there, and hence that it had the right to bring the action and have it tried in that county. To support this contention it presented an affidavit by Albert Neider, its general manager, which dis-

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closed these facts: That at the time the sale. was made, the defendant was engaged in mining near Helena, in Lewis and Clark county; that the lumber was sold to him by the plaintiff at its place of business in Helena and was delivered to him at his mine; and that he used the same in the erection of a building on his mining ground, where the said building now is. The statements contained in this affidavit are not controverted. The court overruled plaintiff's contention and ordered the cause transferred to Silver Bow county. Thereupon the plaintiff made application to this court for an order under its supervisory power, annulling the order transferring the cause and requiring the court to retain it for trial in Lewis and Clark county. In response to an order to show cause issued by this court, the district court appeared by counsel and moved to quash it and dismiss the application upon several grounds, all of which present the same question, viz. whether, upon the facts stated in the petition heretofore recited, the relator is entitled to the relief demanded. The proceeding was thereupon submitted for decision.

Sections 6501-6503, inclusive, of the Revised Codes, designate in what county an action for any of the causes therein enumerated must be tried, subject to the power of the court to change the place of trial as elsewhere in the Codes provided. Section 6504 provides:

"In all other cases, the action shall be tried in the county in which the defendants, or any in the county in which the detendants, or any of them, may reside at the commencement of the action, or where the plaintiff resides, and the defendants, or any of them, may be found; or if none of the defendants reside in the state, or, if residing in the state, the county in which they so reside be unknown to the plaintiff, the same may be tried in any county which the same may be tried in any county which the plaintiff may designate in his complaint; and if any defendant or defendants may be about to depart from the state, such action may be tried in any county where either of the parties may reside, or service be had. Actions upon contracts may be tried in the county in which the contract was to be performed; and actions for torts in the county where the tort was commit-ted; subject, however, to the power of the court to change the place of trial, as provided in this Code.

[2] The first sentence of this section is general in its terms, and but for the last sentence in it would apply to any action whatsoever for a cause other than one of those enumerated in some one of the preceding sections. The place of trial is therein made to depend upon the residence or whereabouts of the defendant at the time the action is commenced. :The last sentence, however, excepts out of the application of this general provision actions upon contract and actions for torts, and requires the place of trial in these cases to be determined by considerations wholly apart from the residence or whereabouts of the defendant. In the one case, the place of trial is determined by an answer to the inquiry, Where was the con-

Where was the tort committed? The use of the permissive auxiliary "may" instead of "must," expressive of obligation or necessity. used in the first sentence, becomes of no significance when we note that under section 6505 an action for any cause may lawfully be tried in any county unless the defendant asks for a change to the proper county as therein provided. If it should be assigned a permissive force only, it would render the sentence meaningless. would be in violation of the general rule of construction applicable, viz. that in construing a statute every word, clause, and sentence must be given effect, if it is possible to do so, to the end that its different provisions may be made consistent and harmonious and each be assigned an intelligent meaning. State ex rel. Anaconda C. M. Co. v. District Court, 26 Mont. 396, 68 Pac. 570, 69 Pac. 103; Stadler v. City of Helena, 46 Mont. 128, 127 Pac. 454; 36 Cyc. 1128. On the other hand, if it be given the same force as that of the auxiliary "must" the sentence becomes harmonious and consistent with the rest of the section and thus expressive of a definite intention of the Legislature in enacting it, to except out of the scope of the general statement in the first sentence the two classes of cases mentioned. We therefore hold that it should be given the force of "must." True, the sentence is not expressed technically in the form of an exception, but mere form of expression not important when the purpose intended and sought to be accomplished by the Legislature is ascertainable and made roasonably certain by applying the rule of construction referred to. 36 Cyc, 1106, 1107.

To determine, then, whether an action in either of these two classes has been commenced in the proper county, the only question the court may consider and determine is where, in the one case, the contract was to be performed, or, in the other, where the tort was committed. As will appear below, our own decisions are not in harmony, but in two of them at least this court impliedly adopted the construction we have given the last sentence of the section, by refusing to recognize the residence of the defendant as a material consideration. Oels v. Helena & Livingston S. & R. Co., 10 Mont. 524, 26 Pac. 1000; State ex rel. Coburn v. District Court, 41 Mont. 84, 108 Pac. 144. The first of these cases was an action for damages for an injury sustained by an employe of a corporation doing business in Jefferson county. The defendant moved to have the action transferred for trial to Lewis and Clark county, on the ground that at the time it was commenced defendant was a resident of Lewis and Clark county and had been served with summons there. The district court overruled the motion. This court, after expressing a doubt whether the cause of action arose out of contract or tort, held tract to be performed? and in the other, that this inquiry was wholly immaterial, because it appeared that if it arose out of con- it was upon an open account or upon an extract the contract was to be performed in Jefferson county, and if out of tort that the tort had been committed there, and that the motion was properly denied. The second case was an application to this court for a writ of prohibition to restrain the district court of Broadwater county from proceeding further in an action brought by plaintiff to recover wages for work and labor done for the defendant in that county, after it had denied the motion of defendant asking that the cause be transferred to Lewis and Clark county, the place of his residence. court held that the place of performance of the contract determined the place of trial, and, since it appeared that it was to be performed-that is, payment was to be madein Broadwater county, the proper place of trial was in that county. The writ was ac-It is not controverted cordingly denied. that the contract in question here was made in Lewis and Clark county, and that it was to be performed—that is, payment was to be made-by defendant at the plaintiff's place of business there. Hence these cases directly sustain the relator's right to have the action tried in Lewis and Clark county, subject, however, to the power of the court to order it transferred to some other county for one of the reasons enumerated in one of the last three subdivisions of section 6506.

Counsel for defendant cites and relies upon three other decisions of this court, assuming that they fully sustained the order of transfer made in this case. We concede that they do, but hold that they are based upon a misconception of the intention of the Legislature in formulating the statute. are: Wallace v. Owsley, 11 Mont. 219, 27 Pac. 790; McDonnell v. Collins, 19 Mont. 372, 48 Pac. 549; and Bond v. Hurd, 31 Mont. 314, 78 Pac. 579, 3 Ann. Cas. 566. The first was an action on an account for goods, wares, and merchandise sold and delivered to defendant in Lewis and Clark county. The court held that, since it did not appear from the complaint where the contract was to be performed and the affidavits of the respective parties were in conflict, the district court erred in refusing to order a transfer of the action for trial to Silver Bow county. the place of defendant's residence, thus bringing the case within the general provision of the statute, instead of within the scope of the exception. The second was also an action on an account. No inquiry was made as to where the contract was to be per-The court held that the action should be transferred from Fergus county, where it had been commenced, to Cascade county, on the sole ground that the defendants resided and had been served with summons in that county. In the third case, the complaint contained three causes of action on contract, the first and second of which were on open accounts, the allegations in

press contract. The action had been begun in Beaverhead county, where the plaintiff resided. The defendant resided and had been served with summons in Valley county. The district court of Beaverhead county denied defendant's demand for a change of place of trial to Valley county. On appeal to this court the final judgment was reversed on the ground, among others, that the court erred in refusing to transfer the action. Incidentally it expressed the opinion that the last sentence of section 6504 applies to actions on express contracts only and does not include actions on implied contracts. was clearly erroneous.

[3] The term "contract," as used in the statute, not being limited in meaning either by the context or by any qualifying word, must be accepted in its broadest signification and as including every kind of contract, whether express or implied. The error in these decisions was doubtless due to a lack of careful attention by court and counsel to the statute. They were all based upon decisions by the Supreme Court of California construing the statute of that state; our court evidently having overlooked the purport of the last sentence of the section of our own statute, which is not found in the corresponding section of the California statute. Code Civ. Proc. Cal. § 395. We improve this opportunity to call attention to them so that the confusion resulting from them may be cleared away.

We think we have noticed all the decisions which are not in harmony with the conclusion herein expressed. So far as they are not. they are specifically overruled.

[4] The contention is made by counsel for the defendant court that a defendant in the particular action has the right to have his motion for a change of place of trial determined upon the condition in which the action is at the time he first appears therein. It is true that the motion, to be available on the ground that the action has not been commenced in the proper county, must be made by defendant upon his first appearance. Section 6505, Rev. Codes. It is true, also, that he may not be defeated in his motion by a countermotion by plaintiff upon a ground that would entitle him to a change from the county to which defendant has demanded that a change be made, as, for illustration, on the . ground of convenience of witnesses, or because of prejudice existing in the people, by reason of which he cannot have a fair and impartial trial. Wallace v. Owsley, supra; State ex rel. Stephens v. District Court, 43 Mont. 571, 118 Pac. 268, Ann. Cas. 1912C, 343. There is no basis, however, for the contention in this case. It may be conceded that an action on a contract which was to be performed outside of the state should be commenced in the county of defendant's residence, and if not commenced there may be rethe third count leaving it doubtful whether moved there upon his application; yet since

ed to the last sentence of section 6504, supra, the plaintiff is entitled to bring his action in the county where the contract was to be performed, if the place of performance does not appear from the complaint, there is no valid reason why he may not defeat defendant's motion for a transfer of the action to the county of his residence by showing by affidavit that the contract was to be performed where the action was commenced.

[5] Lastly, contention is made that the supervisory power of this court should not be exercised in this case, for the reason that it does not appear that the plaintiff has suffered or will suffer any prejudice because of the order complained of. This contention must be overruled. There is no direct appeal from the order. Rev. Codes, § 7098. Neither is there remedy by mandamus (State ex rel. Independent Pub. Co. v. District Court, 23 Mont. 329, 58 Pac. 867; State ex rel. Woodward v. District Court, 53 Mont. 358, 163 Pac. 1149); and since the court below had jurisdiction to entertain and determine the motion, error in its conclusion was not such an excess of jurisdiction as to render either certiorari or prohibition available. In the ordinary course of law the plaintiff would be compelled to go to Silver Bow county and submit to a trial there, suffering the additional expense and inconvenience thus made necessary-an injustice for which, though he should recover judgment in the action, he could recover no compensation.

The order is annulled.

STRONG v. BUTTE CENTRAL & BOSTON COPPER CORP. et al. (No. 3853.)

(Supreme Court of Montana. April 22, 1918.)

1. BANKBUPTCY == 214 - PARTIES ENTITLED APPEAL-INTEREST IN SUIT.

Where a trustee in bankruptcy has sold certain property belonging to the bankrupt subject to an attachment lien, a judgment in the attachment suit against such property cannot be complained of by the bankrupt; his interest not being affected.

2. PLEADING & 129(2) — FAILURE TO DENY ALLEGATIONS—EFFECT.

In an action to subject certain property to an attachment lien, failure of the purchaser of the property to deny the allegations of plaintiff's control of the property of the pro cause of action constituted a confession on de-fendant's part that plaintiff's claims were just, and could not be successfully controverted.

3. Pleading \$\infty 349 - Judgment on Plead-

In an action to subject certain property to an attachment lien, where the former owner admitted a decree in bankruptcy against him and the sale of the property by the trustee, and the purchaser of the property admitted the existence of the lien, there was no issue for trial, and judgment on the pleadings was proper.

Appeal from District Court, Silver Bow County; Albert P. Stark, Judge.

Butte Central & Boston Copper Corporation the amended answer that plaintiff's right to

under the only meaning which can be assign- and others. Judgment for plaintiff, and defendants Butte Central & Boston Copper Corporation and Austin M. Pinkham appeal. Affirmed.

> Kremer, Sanders & Kremer, of Butte, John G. Brown, Wm. Wallace, Jr., and T. B. Weir, all of Helena, and Austin M. Pinkham, of Boston, Mass., for appellants. Gunn, Rasch & Hall, of Helena, for respondent.

HOLLOWAY, J. This action was brought to recover on money demands aggregating \$24,485.44, with interest. The Butte Central & Boston Copper Corporation (hereinafter called the Butte Central), the Freeman I. Davison Company, Limited, the Trinational Corporation, Limited, Samuel A. Hall, Freeman I. Davison, and Robert G. McMeekin were made defendants. Certain property (hereinafter referred to as the Ophir claim) belonging to the Butte Central, was attached at the instance of the plaintiff. There was answer by the Butte Central and reply by plaintiff. Thereafter the Butte Central was adjudged a bankrupt, and the trustee in bankruptcy was substituted as defendant in The trustee's answer was substanits place. tially the same as that of the Butte Central, and to this answer reply was made. On December 10, 1910, upon a showing that the trustee had completed the execution of his trust, he was dismissed from the action and the Butte Central again made a party defendant. Thereupon the plaintiff filed an amended complaint, in all essential respects the same as the original, and to this the Butte Central interposed a demurrer. On October 11, 1913, plaintiff filed a supplemental complaint in which the bankruptcy proceedings are set forth at length. The only matters of consequence here are that acting under an order of court the trustee sold the property belonging to the bankrupt estate, including the Ophir claim, and that the sale was confirmed. Walter S. Tallant purchased the Ophir claim subject to certain liens and incumbrances not affected by the bankruptcy proceedings, including the attachment in this case, and thereafter Austin M. Pinkham succeeded to Tallant's interest, was made a party defendant in this action, and filed a general demurrer to the amended complaint and a motion to strike the supplemental complaint from the files. The demurrer and motion were overruled, and Pinkham and the Butte Central then filed an answer and afterwards an amended answer to the supplemental complaint in which they admit every fact pleaded, except the allegation that the Ophir claim was conveyed to the purchaser subject to the attachment lien in this action. With respect to that allegation it is alleged that the property so sold was conveyed "in accordance with the contract made Action by L. Wilton Strong against the for such purpose." It is further alleged in

enforce the attachment lien is barred by the provisions of sections 5728 and 6446. Revised · Codes; that the facts pleaded in the supplemental complaint constitute a departure from the cause of action stated in the amended complaint, and that to grant the prayer of the supplemental complaint would amount to a denial of due process of law. There was a reply which amounts to a general denial, and upon the record as thus made up plaintiff moved for a judgment authorizing the sale of the attached property to satisfy his claims. By an order general in terms the court sustained the motion, and judgment was entered accordingly. The concluding paragraph of the judgment recites:

"It is further ordered, adjudged, and decreed that the plaintiff do not have or recover any other or further judgment in this action, and that said cause be dismissed as to all of the defendants, except the said Butte Central & Boston Copper Corporation and Austin M. Pinkham."

From that judgment the Butte Central and Pinkham appealed.

It is to be borne in mind that plaintiff does not seek a personal judgment against any one, but only a judgment subjecting the attached property to the satisfaction of his claims. If the proceeds from the sale of this property fail to equal in amount the aggregate of his claims, he loses the balance, for he has waived all right to any further relief. When the motion for judgment on the pleadings was submitted, the trial court had before it but a single inquiry, Are there any material issues for trial? and in reviewing the judgment we must determine the same question.

[1] (a) Do the pleadings present a material issue as between plaintiff and the Butte Central? The judgment runs only against the Ophir claim, and all the right, title, and interest of the Butte Central in that property had been sold by the trustee in bankruptcy. The judgment therefore cannot affect any interest of that defendant, and it cannot complain.

(h) Is there any issue raised as between plaintiff and defendant Pinkham? Plaintiff's several causes of action are stated in his amended complaint. The supplemental complaint alleges only facts material to the causes of action stated, and which occurred after the commencement of the action, viz. the proceedings in bankruptcy by which the Butte Central was divested of all interest in the attached property and Pinkham succeeded to an interest in that property subject to plaintiff's attachment lien. When Pinkham's demurrer to the amended complaint and his motion to strike the supplemental complaint were overruled, he was given 20 days within which to answer, and he answered the supplemental complaint, but failed to plead further to the amended complaint. The trial

tion that he had raised or attempted to raise every question which he desired to have passed upon.

[2] His failure to deny any of the allegations which state plaintiff's cause of action must be taken as a confession on his part that the claims asserted by plaintiff are just, and cannot be successfully controverted. The fact that Pinkham's default for failure to answer the amended complaint was never formally entered is of no consequence. Herman v. Santee, 103 Cal. 519, 37 Pac. 509, 42 Am. St. Rep. 145. Strictly speaking, he was not in default, for he had responded to the trial court's order and had presented such an answer as he saw fit to make.

[3] The allegations of the supplemental complaint which disclose the proceedings in bankruptcy are admitted specifically, and from those proceedings it appears that the Ophir claim was offered for sale subject to plaintiff's attachment lien; that Tallant bid for the property subject to that lien: that his bid was accepted and the sale to him confirmed by the court; so that the answer amounts to nothing more than an admission that Pinkham's interest in the property is subject to the satisfaction of that lien, whatever the amount of it may be, and since he admits the amount as claimed in the amended complaint he cannot be injured by a sale of the property to satisfy the judgment for that amount

There is not any merit in any of the socalled affirmative defenses. There was not any issue for trial, and the order for judgment on the pleadings followed as of course. If the motion had been heard and determined upon the theory that the allegations of the amended complaint were in issue, the judgment could not be justified and respondent could not urge a different theory in this court (Dempster v. Oregon S. L. R. Co., 37 Mont. 335, 96 Pac. 717), but there is not a suggestion in the record that any such theory was urged upon or adopted by the court.

The motion for judgment searched the entire record as made, and the order sustaining it has but one meaning, namely, that in the judgment of the trial court there was not presented for trial any material issue. From the correctness of that conclusion there is no escape.

The judgment is affirmed.

BRANTLY, C. J., and SANNER, J., concur.

WHITE et al. v. HAGBERY. (No. 3852.) (Supreme Court of Montana. April 22, 1918.) PLEADING €→21 — INCONSISTENT ALLEGATIONS.

plemental complaint, but failed to plead further to the amended complaint. The trial court had the right to indulge the presumphad been made by deceased, and in another ment has refused to make said indorsement, paragraph that payment for the services had It is further alleged that the plaintiffs have been made by deceased and applied by plaintiffs upon the purchase price of property bought by them from deceased, was demurrable, since the two allegations are inconsistent and cannot stand together.

Appeal from District Court, Missoula County: Theo Lentz, Judge.

Action by Earl D. White and another against Daniel Hagbery, as administrator of the estate of John F. Hagbery, deceased. From a judgment of dismissal, plaintiffs appeal. Affirmed.

Gilbert J. Heyfron and E. C. Mulroney, both of Missoula, for appellants. Wayne, of Missoula, for respondent.

STARK, District Judge. According to the allegations of the amended complaint filed in this action, it appears that John F. Hagbery died in Missoula county on November 6, 1914, and that the defendant is the administrator of his estate; that between the year 1908 and the summer of the year 1912, the plaintiffs performed certain services for the deceased, who owned and operated a ranch in Missoula county, but (paragraph 4) "no payment of any kind or character, either in money or property, was paid by the said John F. Hagbery, deceased, to the plaintiffs herein for the said services of both of the plaintiffs"; that in the summer of 1912 the deceased desired to sell his said ranch, and, "recognizing his indebtedness to the plaintiffs for such services so rendered, he thereupon told them \* \* \* that if he succeeded in making a sale of said ranch for the sum of \$5,000, he would pay to the plaintiffs the sum of \$2,000 for their said services," but that the deceased was unsuccessful in his efforts to dispose of his ranch to others, and on December 16, 1913, sold the same to the plaintiffs for the sum of \$5,000; that plaintiffs, as payment of the purchase price, gave to the deceased their promissory note for \$5,000, due in ten years, with interest at the rate of 6 per cent, per annum, payable annually, which note was secured by a mortgage upon the purchased property.

It is next alleged (paragraph 7), that immediately after the execution and delivery of the note and mortgage to the deceased by the plaintiffs, and on the 16th day of December, 1913, the plaintiffs paid to the deceased as a payment upon, and part payment of, said note, the sum of \$2,000 as represented by the indebtedness of the deceased to the plaintiffs for the services rendered to him by the plaintiffs. That deceased then and there accepted said payment of \$2,000 as a payment upon, and a part payment of, said note and mortgage, but that during his lifetime he failed and neglected to credit the plaintiffs upon said note and mortgage with the said sum of \$2,000, and that the defendant as administrator has also failed and neg-

It is further alleged that the plaintiffs have tendered to the defendant, as administrator, the sum of \$180 as full payment of the interest due on said note and mortgage for the first year, which offer and tender the defendant refused, and that he threatens to foreclose said mortgage unless the plaintiffs pay to him the full sum of \$300 as interest on said note for said first year.

The prayer is that the defendant be required to indorse a credit of \$2,000 on said note and mortgage, and that he be compelled to accept \$180 as full payment of the first year's interest on said note, and that he be enjoined from foreclosing said mortgage.

To this amended complaint the defendant demurred on the ground that it does not state facts sufficient to constitute a cause of action. This demurrer was sustained, and the plaintiffs granted 20 days in which to file a second amended complaint, and, they having failed to do so, thereafter the default of the plaintiffs for such failure was duly entered, and a judgment of dismissal was entered against them, from which order and judgment they now prosecute this appeal.

The sole point presented on this appeal is whether the court erred in sustaining the demurrer to the plaintiffs' amended complaint.

In paragraph 4 of the amended complaint there is the direct allegation that no payment of any kind or character, either in money or property, was paid by the said John F. Hagbery, deceased, to the plaintiffs for the said services of both of the plaintiffs. In paragraph 7 of the amended complaint, however, the allegations of paragraph 4, in so far as they relate to the subject of payment, are entirely contradicted, as the essence of the allegation in the latter paragraph is that Hagbery did pay to the plaintiffs the full sum of \$2,000, which they thereupon turned back to him as a payment upon the note and mortgage. These allegations are directly contrary to each other. One necessarily infers the negation of the other. Both cannot be true; proof of one would disprove the other. They are so completely repugnant as to be self-destructive.

The only object of a lawsuit is the elicitation of the truth, and the only object of pleading is to aid in determining the truth of the controversy. Seattle Nat. Bank v. Carter, 13 Wash. 281, 43 Pac. 332, 48 L. R. A. 177. The rule is well settled that inconsistency between two or more allegations contained in a single cause of action is fatal if both cannot possibly be true as a matter of fact, and either is essential to make out a suffi-1 Abbott's Trial Briefs, 656; cient case. Reed et al. v. Poindexter, 16 Mont. 294, 40 Pac. 596. Clearly no greater latitude in pleading should be allowed to a plaintiff in framing the statement of a single cause of action in a complaint than is permitted to a lected, and at all times since his appoint- defendant in setting forth separate defenses

in his answer, and this court has held that, although a defendant may interpose inconsistent defenses, they must not be so far inconsistent that if the allegations of one are true the allegations of the other must of necessity be false. Johnson v. Butte & Superior Copper Co., 41 Mont. 158, 108 Pac. 1067, 48 L. R. A. (N. S.) 938; O'Donnell et al. v. City of Butte, 44 Mont. 97, 119 Pac. 281.

If a complaint containing allegations such as these, which are so inconsistent and repugnant that if one is true the other is false should be held to be a good pleading, it would necessarily follow that it would be competent to introduce evidence to sustain the inconsistent averments, and the plaintiffs would be allowed to assume the absurd position of testifying that they had performed the services for the deceased set forth in their amended complaint, and in one breath to say that he had not paid them therefor in any way or manner, either in money or property, and in the next breath to solemnly aver that he had paid them in full by giving them credit for the amount upon the note representing the purchase price of the ranch in question. It cannot be contended that such a proceeding would elicit the truth, or that such a pleading would aid in determining it.

As the allegation of nonpayment in paragraph 4, and the allegation of payment in paragraph 7 in effect nullify and destroy each other, the court could not act upon either, but was obliged to disregard both and to construe the pleading as though neither were contained therein. State v. Foulkes, 94 Ind. 493.

Omitting both the above-mentioned paragraphs from consideration, the amended complaint does not state a cause of action, and it follows that the order sustaining the demurrer thereto was correct, and the judgment of the lower court should be, and the same is, affirmed.

Affirmed.

SANNER and HOLLOWAY, JJ., concur. Hon. ALBERT P. STARK, Judge of the Sixth Judicial District, sitting in place of the Chief Justice.

## In re WADDELL. (No. 4171.)

(Supreme Court of Montana. April 26, 1918.)

1. Attorney and Client \$\infty\$ 33(2)—Disbarment—Misconduct—Evidence;

Evidence held to show that an attorney was employed by a client, and after discharge from the case for inexcusable delay appeared for the adverse party without returning expense months to the first client, requiring that he be disbarred.

2. ATTORNEY AND CLIENT 44(1) — DISBARMENT—MISCONDUCT.

Where an attorney settled a claim in full, but gave part of the money back, netting less than he was authorized to settle for, hiding the these cases."

true settlement from his client, he will be disbarred.

3. Attorney and Client \$\; 44(2)\to Disbar-MENT\to Misappropriation.

Where an attorney fails without reason to turn over to his client money collected for months after collection, he will be disbarred.

Proceedings to disbar John L. Waddell, an attorney. Disbarred.

McIntire & Murphy, of Helena, for accused. S. C. Ford, Atty. Gen., and A. A. Grorud, Asst. Atty. Gen., for respondent.

HOLLOWAY, J. John L. Waddell, an attorney admitted to practice law in this state, was accused by the Attorney General of unprofessional conduct in a complaint which contains four charges. After issues were joined, a hearing was had before A. C. Schneder, referee, and a report of the proceedings has been filed in this court. We deem it unnecessary to consider but two of the charges.

[1] 1. In May, 1915, Travers Daniel, Jr., wrote to the accused complaining of certain acts of one W. P. Moncure, and soliciting advice and information concerning the terms upon which the accused would undertake to prosecute certain actions for Daniel and his wife against Moncure. Later Daniel and wife conferred personally with the accused, gave to him a statement of the facts concerning their grievances, and paid him \$50 to cover court costs and expenses. The suggestion was made that F. V. H. Collins, of Forsyth, should be secured to assist the accused in handling the business for Daniel and wife. Beginning with June 8th, and continuing until November 15, 1915, the accused wrote to Daniel some 12 letters, each referring to the Moncure matters and the actions to be brought for Daniel, his wife, or both of them. A brief reference to some of these letters will serve to illustrate the character of all of them. On June 8th he wrote that he would see Collins, and "go into every phase of the case," and would have Daniel and wife come to Hardin, "and we will prepare the papers for filing." On June 21st he wrote that he had completed a thorough investigation of the facts, "and in a few days I will try to arrange matters here so that I can see one or both of you relative to the signing of necessary papers and other preliminary arrangements before actual filing of the suit." Later in June he wrote that he would see Collins on July 5th or 6th, and said further, "I am working on the law as applied to what facts you have given me." On July 30th he wrote, "I am now preparing all three actions for immediate filing." On August 12th he wrote, "The papers in the three cases are now beginning to look like lawsuits, and will soon be in the hands of the sheriff." On September 26th he wrote that he had made arrangements with Collins "to get in On November 15th he wrote

that he had prepared tentative drafts of two complaints, and was working on a third. About December 8th Daniel and wife withdrew their business from the accused, and thereafter employed other counsel, who commenced the actions in the spring of 1916. After Moncure had been served with process he retained the accused as his attorney in the actions, paid him a retainer fee of \$200, and afterwards additional compensation. Wall-dell appeared as attorney of record for Moncure, assisted in the trial of one of the cases and in the settlement of the others, and never returned to Daniel the \$50 he had received in July, 1915, until more than two years later and after Daniel had complained to the judge of the district court.

Notwithstanding this evidence, the accused now denies that he was ever employed or retained by Daniel or his wife, but his denial only adds to his disgrace. The evidence of his employment is conclusive, and his present contention that his employment was contingent upon his receiving a retainer fee is obviously an afterthought. His attempt to shift the responsibility for his employment by Moncure upon other attorneys is unworthy of any serious consideration. An attorney who is so insensible to the obligations which his profession imposes cannot expect to be permitted to continue to practice in this state.

[2, 3] 2. In 1916 the accused received for collection for the Oliver Chilled Plow Works a note executed by C. A. Quarnberg, and an account against Ed. Jenkins. Acting as the attorney for the Plow Works, the accused commenced an action upon each of these claims, and about March 1, 1917, wrote his client that he had an offer of compromise of the Quarnberg matter. In a letter dated March 5th he was authorized to waive any claim for interest and settle upon the basis that Quarnberg pay the principal, costs, and attorney fee. On April 19th the accused secured a judgment against Quarnberg for \$172.09 principal, \$95.87 accrued interest; \$7.40 costs, and \$50 attorney fee, and on May 12th he received \$325.36 in full satisfaction of the judgment, and on the same day repaid to Quarnberg \$167 of the amount; in other words, instead of remitting \$95.87, the amount of accrued interest, as he had been authorized to do, he remitted \$167. May 21st, July 20th, and August 3d, the Plow Works wrote the accused inquiring concerning the progress made in the Quarnberg matter, but received no reply until August 29th, when Waddell wrote:

## "In re Quarnberg Matter.

"Beg to advise that we expect to be able to close this matter in full just as soon as the grain on the land of defendant is in the bin or threshed. This might mean four or six weeks."

This letter refers then to the Jenkins claim, and concludes:

"We will keep in close touch with both of land office, was not material in trial of an acthese cases, and just as soon as we can do so tion to have determined the rights of the respec-

that he had prepared tentative drafts of two under the present arrangements we will make complaints and was working on a third, remittance."

On August 24th the accused had collected \$210.60 on the Jenkins account, but inade no report, until October 4th, when he wrote:

"I beg to say that in the Jenkins judgment we are proceeding as rapidly in our opinion as possible, and hope that within a reasonable time we will be able to secure full satisfaction of same."

On October 10th the Plow Works made a demand upon the accused for settlement, and on October 16th he remitted \$200, explaining the settlement made in the Quarnberg matter, and advising the Plow Works that the balance collected in the two suits had been retained by him as attorney fees and costs. When called to account for the manner in which he had settled the Quarnberg claim, the accused wrote on November 8th, "We settled it exactly upon the letter from you under date of March 5, 1917." Soon afterwards the accused was dismissed from the employment of the Plow Works.

The record discloses beyond controversy that the accused violated his instructions in making settlement of the Quarnberg claim: that the matter was finally settled by him on May 12th; that he did not report the settlement or remit the amount due his client; that 8% months thereafter he wrote his client that he expected to get the claim settled in from 4 to 6 weeks. This breach of faith and deceit alone would command his disbarment. but his failure to pay over to his client promptly the money he had collected was equally reprehensible. Such conduct cannot fail to bring reproach upon the legal profession and alienate the favorable opinion which the public should entertain for it.

It is ordered that the name of John L. Waddell be stricken from the roll, and that he be disbarred from practicing as an attorney or counselor at law in the courts of this state.

BRANTLY, C. J., and SANNER, J., concur.

## ROBERTS et al. v. OECHSLI et al. (No. 3897.)

(Supreme Court of Montana. April 22, 1918.)

1. APPEAL AND ERROR \$\ightharpoonup 1058(2)\$—CURE OF ERROR—EVIDENCE.

Error in sustaining objection to a question to a witness was cured when the question was thereafter repeated and the witness answered.

 TRIAL 67—EVIDENCE IN CHIEF—TIME OF OFFER.

Evidence, a part of defendants' case in chief, attempted to be introduced after they had rested and plaintiffs had introduced their evidence in rebuttal, was properly excluded.

8. MINES AND MINERALS \$\infty\$ 38(20)—QUIETING TITLE—EVIDENCE—REPRESENTATION WORK—MATERIALITY.

Whether defendants did representation work of the value of \$500 on a mining claim, though it might have been a proper inquiry before the land office, was not material in trial of an action to have determined the rights of the respec-

by each.

4. MINES AND MINERALS @=38(27)-ADVERSE BUBDEN TO SHOW EBROB - EVI-CLAIMS

DENCE AGAINST FINDINGS.

Upon appeal in an action to determine the rights of the parties to conflicting portions of two mining claims, defendant appellants had the burden to show the evidence preponderated against the findings of the trial court for plain-

5. NEW TRIAL \$\infty 104(1)\$—CUMULATIVE TESTI-MONY.

Order denying new trial on account of newly discovered testimony which is merely cumulative is proper.

6. New Trial &==102(1)—Newly Discovered Evidence—Knowledge of Testimony.

New trial was properly denied where the motion was based on the ground of newly discovered evidence of a witness known by a defendant to be in possession of the facts seven years before trial.

7. New Trial \$= 99 - Newly Discovered

EVIDENCE—STATUTE.

By Rev. Codes, § 6794, newly discovered evidence, as a ground for new trial, must be evidence discovered after the trial which is material, and which the moving party could not with reasonable diligence have discovered and produced at the trial.

8. New Trial \$\infty\$150(4)-Newly Discovered EVIDENCE-AFFIDAVIT.

The party moving for new trial on the ground of newly discovered evidence must disclose by his own affidavit that the new evidence was not known to him at the time of the trial.

Appeal from District Court, Silver Bow County; J. J. Lynch, Judge.

Action by E. A. Roberts and D. M. Morgan against George Oechsli, P. A. Comer, and E. F. Mayer. From judgment for plaintiffs and order denying new trial, defendants appeal. Judgment and order affirmed.

Wm. Meyer, of Butte, for appellants. James E. Healy, of Butte, for respondents.

HOLLOWAY, J. Defendants made application for patent for the Hugo quartz lode mining claim, and plaintiffs adversed and brought this action to have determined the relutive rights of the parties to portions of the ground claimed by each. From a judgment in favor of plaintiffs and from an order denying a new trial defendants appealed.

 Complaint is made that the court unduly restricted the cross-examination of one of the plaintiffs, but the record discloses that the widest latitude was allowed in the crossexamination of all the witnesses.

[1] 2. Plaintiff Morgan was asked to state his reason for joining Roberts as a co-owner in the Fawn claim, and, though an objection to the question was sustained, the question was thereafter repeated and the witness answered that his only reason for doing so was that Roberts had theretofore shown him a like favor with reference to a claim in the Cable district. The error, if any, was cured. Titus v. Anaconda C. M. Co., 47 Mont. 583, 183 Pac. 677.

tive parties to a portion of the ground claimed | plaintiffs had introduced their evidence in rebuttal, defendants called a witness and sought to show that the Hugo location covered the same ground as the May claim which had been abandoned. If the evidence was admissible for any purpose, it was a part of defendants' case in chief, and for this reason the ruling excluding it was not erroneous. There must be an end to the trial of a lawsuit some time, and a party cannot be permitted to introduce new subjects of inquiry at any stage of the proceedings.

> [3] 4. Defendants complain that they were not permitted to prove that they did certain annual representation work upon the Hugo claim and also the required amount of work to entitle them to patent. There was no question of forfeiture or abandonment involved. and whether they did work of the value of \$500 might have been a proper inquiry before the land office, but could not become material in the trial of an action of this character. Wilson v. Freeman, 29 Mont. 470, 75 Pac. 84. 68 L. R. A. 838.

> [4] 5. The principal contention is that the findings are not supported by the evidence. Plaintiffs assert ownership, as against every one but the United States, of the Fawn claim, located by them on January 1, 1912. Defendants assert like ownership to the Hugo claim. located in 1906. On the conflicting portions of the two claims is the discovery shaft of the Fawn and the discovery cut of the Hugo. It is the contention of plaintiffs that between January 1 and 15, 1912, they sank their discovery shaft 5 feet by 5 feet and 10 feet deep in virgin ground within the limits of their claim, and that there were not then any indications of work done at the same place by any one else. Defendants contend that in 1906 they excavated an open cut 4 feet by 4 feet and 10 feet deep within the limits of the Hugo claim as their discovery cut, which cut was at the same place as the discovery shaft afterwards sunk by the plaintiffs. A number of witnesses testified in support of each of these contentions. The evidence is irreconcilable. The question before the trial court was one of veracity, and having the superior advantage of seeing the witnesses and observing their demeanor, we cannot say from the printed record that a different conclusion was commanded.

Plaintiffs further offered evidence to the effect that the Hugo claim as located did not conflict with the Fawn, but that after the Fawn location was completed defendants moved the corner posts of the Hugo claim so as to include the Fawn discovery shaft within the limits of the Hugo. The presiding judge viewed the premises and found generally for plaintiffs and that defendants' claim to the ground in dispute is without right. The evidence was reviewed on motion for new trial and the motion was denied. Defendants have the burden of showing that the evidence [2] 3. After defendants had rested and preponderates against the findings (Gibson v.

[5-8] 6. In support of their motion for a new trial defendants tendered the affidavit of John W. Wade, to the effect that he had visited the ground in dispute between 1906 and 1912, and had observed the open cut within the boundaries of the Hugo claim and at the point where plaintiffs' discovery shaft is sunk. Defendants cannot complain of the order denying them a new trial upon the ground of newly discovered evidence, for two reasons: (1) The testimony of Wade was merely cumulative. Garfield M. &. M. Co. v. Hammer, 6 Mont. 53, 8 Pac. 153; State v. Jones, 32 Mont. 442, 80 Pac. 1095. (2) Wade's affidavit discloses that when he went upon the ground in 1907 it was defendant Comer who pointed out to him the Hugo claim and the discovery cut, so that one of these defendants knew that Wade was in possession of the facts seven years before this case was tried, and these considerations alone fully justified the court's order; but, furthermore, the affidavit of defendants Oechsli and Mayer recites that at the request of defendants wade came to Butte on July 14, 1914, and went over the ground to refresh his recollection and verify the impressions gained by his prior visits. The record discloses that the trial of this case commenced on July 15, 1914, so that, if the statement is accurate, the other defendants knew of Wade's information the day before the trial. There are conflicting statements in this affidavit, and it may be that the date "July 14, 1914," is erroneous, but even so, there is not anything in the record which even tends to excuse the negligence of defendant Comer in failing to have Wade present at the trial. Newly discovered evidence as a ground for a motion for new trial must be evidence discovered after the trial which is material. and which the moving party "could not with reasonable diligence have discovered and produced at the trial" (section 6794, Rev. Codes), and the moving party must disclose by his own affidavit that the new evidence was not known to him at the time of the trial. Smith v. Shook, 30 Mont. 30, 75 Pac. 513.

The judgment and order are affirmed. Affirmed.

BRANTLY, C. J., and SANNER, J., concur.

OSBORNE v. OSBORNE et al. (No. 2052.) (Supreme Court of New Mexico. April 24, 1918.)

(Syllabus by the Court.)

1. Appeal and Error \$==265(1)—Exceptions IN TRIAL COURT-FINDINGS.

It is well settled that when there is a trial by the court, without a jury, the findings of fact are conclusive, and are not subject to review as erroneous or defective in the absence of proper exceptions thereto, which need not be Under our statute the com-

Morris State Bank, 49 Mont. 60, 140 Pac. 76), plaining party is required in some manner to and in this respect they have failed. ed error, and give that court an opportunity either to avoid or correct the same.

2. Frauds, Statute of \$==129(8) - "Part PERFORMANCE" - SALE OF LAND - POSSES-SION.

Possession in pursuance of a parol contract for the sale of lands, together with payment, in full or in part, of the purchase price, is recognized as sufficient part performance to take the case out of the statute of frauds.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Part Performance.]

Appeal from District Court, Curry County; Richardson, Judge.

Action by Henry W. Osborne against William Barto Osborne and others. Judgment for plaintiff, and defendants appeal. Affirmed.

By the complaint it is alleged that on the 1st day of January, 1909, the plaintiff furnished to the defendant William Barto Osborne, his nephew, at his request, the sum of \$600 cash and \$1,500 in stock of a mercantile company at Farwell, Tex., for the purpose of purchasing a relinquishment of and the improvements upon a certain quarter section of land located in Curry county, N. M. Other sums of money in connection with the same transaction are also referred to in the pleadings and proof. The complaint further alleges that on or about the 15th day of March, 1911, after the defendant William Barto Osborne had made his final proof, a parol agreement was entered into between the parties whereby the appellant contracted to execute and deliver to the appellee a deed to the land in question in payment of the indebtedness referred to, to be made upon receipt by appellant of his patent from the government. Appellee further alleged by his complaint that relying upon the parol agreement in question, he entered into possession of the land, paid taxes thereon, made valuable improvements, and exercised every ownership over the same, but that the appellant failed and refused to execute a conveyance in accordance with the parol agreement, and subsequently conveyed the property to his wife, Leona Osborne, some time in August. 1915, without consideration and with the intent to defraud the appellee. Cancellation of the last-mentioned instrument was prayed for, and specific performance of the parol contract referred to. Appellants denied generally all the allegations of the complaint, pleaded the statute of limitations against a part of the money alleged to have been advanced by appellee; alleged that the stock in the mercantile corporation at Farwell, Tex., was valueless at the time of its delivery to appellant; that the appellee had received as rentals from the land in question the sum of \$600, leaving a balance of only \$200 owing by appellants to the appellee, for which amount the appellants confessed judgment. It is further alleged that the land in- of the land in question, made valuable imvoved in the suit was acquired by virtue of the homestead laws, and that any agreement between the parties in regard to conveyance thereof prior to patent was void. Appellee in reply urged that the appellant was without the jurisdiction of the state for a period sufficient to toll the running of the statute of limitations against the claim for \$600 received by appellant William Barto Osborne from appellee in January, 1909; denied that the contract between the parties was fraudulent and void; deried, further, that the corporate stock was valueless. The trial court found the issues generally in favor of the appellee and against the appellants.

Patton & Bratton, of Clovis, and H. S. Bowman, of Santa Fé, for appellants. Francis C. Wilson and D. K. Sadler, both of Santa Fé, for appellee.

HANNA, C. J. (after stating the facts as above). [1] Appellee contends that no exception was made in the court below to the findings or the judgment; that therefore there is nothing to review in this court. This case was tried to the court without a jury, and, as contended by appellee, it is well settled that when there is a trial by the court, without a jury, the findings of fact are conclusive, and are not subject to review as erroneous or defective in the absence of proper exceptions thereto, which need not be formal, however. Under our statute, the complaining party is required in some manner to call the attention of the trial court to the claimed error, and give that court an opportunity either to avoid or correct the same. Wallis v. Mulligan, 20 N. M. 328, 148 Pac. 500. See, also, 3 Corpus Juris, 933 et seq., where the general rule and exceptions thereto are re-

We will consider such assignments of error as were properly called to the attention of the trial court.

[2] Upon the opening of plaintiff's case, the defendants (appellants here) moved that all evidence as to the alleged parol contract be excluded. This contention was based upon the fact that the amended complaint disclosed that the contract in question was in fact a parol one; it being urged that under the statute of frauds no evidence thereof was admissible. The overruling of the defendants' motion in this respect and the subsequent admission of evidence is made the basis of the first assignment of error. It is contended by appellee that the statute of frauds was not available to the appellants as a defense because it had not been specially pleaded. It is not necessary for us to determine this question, however, as it is not one concerning the sufficiency of the pleadings.

By the complaint it is set up that there was a part performance of the contract; that the plaintiff had entered into possession

provements, paid taxes, and in every way exercised ownership over the land. By the English rule, generally adopted by the textbooks, possession of the land delivered by the vendor in pursuance of a parol contract is in itself sufficiently an act of part performance to take the case out of the statute. This rule has not been universally adopted in this country, but the American rule, as laid down in 36 Cyc. 654, is that possession in pursuance of a parol contract for the sale of lands, together with payment, in full or in part, of the purchase price, is recognized in nearly all jurisdictions as sufficient part performance to take the case out of the statute of frauds. In the instant case we have as well the payment of taxes and the making of valuable improvements upon the land in question, which are further elements frequently given consideration by the authorities as influential in determining whether or not the case is within the statute. We therefore conclude that the facts set up by the complaint in this case do not disclose that the contract in question was within the statute of frauds. Our conclusion in this respect makes it unnecessary to give further consideration to the other assignments of error having to do with the admission of testimony concerning the contract, the objection to the admission of which evidence is all predicated upon the ground that the contract in question was within the statute of frauds. Other questions are raised as to the sufficiency of the evidence, the question of laches, and upon the ground that the contract in question was in conflict with the federal homestead laws. We have considered these questions, but do not desire to lengthen this opinion by a full discussion thereof, and we deem it sufficient to say that we find no merit in them.

The judgment of the lower court is therefore affirmed, and it is so ordered.

PARKER and ROBERTS, JJ., concur.

BOARD OF EDUCATION OF CITY OF ROSWELL et al. v. SEAY et al. (No. 2071.)

(Supreme Court of New Mexico. April 24, 1918.)

(Syllabus by the Court.)

Action \$\infty\$50(2)\to\$Joinder of Causes\to\$Statute.

A taxpayer cannot, in the same complaint, set up a cause of action against the individual members of a school board for the recovery, on behalf of the school district, of money alleged to have been unlawfully paid out by such members, and in the same complaint join such parties in their official capacities as members of such board, and seek to enjoin them as such officials from making further unlawful payments of the school funds, as the two causes of ac-

tion stated do not affect all the parties and do not charge them in the same character.

Appeal from District Court, Chaves County; McClure, Judge.

Suit by Ed. S. Seay and others against the Board of Education of the City of Roswell and others. Demurrer to complaint overruled, and judgment for plaintiffs, and defendants bring error. Reversed and remanded, with instructions to sustain the demurrer.

E. D. Bowers, of Roswell, and E. R. Wright, of Santa Fé, for plaintiffs in error. O. O. Askren and Tomlinson Fort, both of Roswell, for defendants in error.

ROBERTS, J. Defendants in error filed in the district court of Chaves county a complaint against the board of education of the city of Roswell, J. W. Rhea, Elza White, and Mrs. O. R. Haymaker. The three individuals were sued personally and also as members of the board of education, and as president, vice president, and clerk of said board. E. J. Minton, treasurer of the board, was joined as a defendant in his official capacity. The purpose of the action was threefold: (1) Defendants in error sought to recover from the individuals sued money which it was claimed had been unlawfully paid to Mrs. Haymaker as clerk of such board of education. This, of course, stated a cause of action against the parties named as individuals. (2) The complaint alleged that the three parties named as directors of the school board proposed to continue making such unlawful payments and drawing warrants therefor, and as officers of the board executing and delivering the same, and that Minton, as treasurer, proposed to pay such warrants when presented; and the relief sought against them officially was an injunction restraining them from drawing further warrants or making further payments to Mrs. Haymaker in excess of a stated amount. (3) It was alleged that the officers named would, unless restrained, pay the attorney's fee necessary to defend the suit filed out of the funds of the school district, and an injunction against so doing was sought. demurrer was interposed to the complaint on the ground, among others, that several causes of action were improperly united: one being against Rhea, White, and Mrs. Haymaker individually, and another against them as officers and members of said board of education, and that said causes could not be joined under section 4105 of the Code, in that they did not affect all the parties to the action. Other grounds were stated in the demurrer which need not be considered. The demurrer was overruled and, plaintiffs in error refusing to plead further, judgment was entered as prayed for in the complaint.

To review this judgment this appeal is prosecuted.

Section 4105, Code 1915, which provides the causes of action that may be joined in the same complaint, requires that the causes of action so united "must all belong to one of these classes and must affect all the parties to the action," etc. It will be observed that the individuals against whom a money judgment is sought for the benefit of the board of education have no interest in whether the injunction against further payments is granted or the injunction sought to prevent the payment by the officials of the attorney's fees, and likewise the parties in their official capacity have no interest in the question as to whether the individuals are personally liable, or the amount of the judgment that may be rendered against them individually.

"It is not permissible to join a cause of action against a person in an individual capacity with one against him in a fiduciary or representative capacity." 1 C. J. 1104.

In Bliss on Code Pleading (3d Ed.) § 123, the author says:

"The several defendants must be charged in the same character. Officers of municipal corporations cannot, in the same action, be charged officially and personally."

In Pomeroy's Code Remedies (4th Ed.) § 396, it is said:

"Another particular rule, which is but an application of the same doctrine, requires that the several causes of action against or for a given person should all affect him in the same capacity. In other words, a demand for or against a party in his personal character cannot be united with another demand for or against him in a representative character as trustee, executor, administrator, receiver, and the like."

The author, while stating the rule and the fact that it is universally followed by the courts, does not give it his approval. It is possible to conceive of a cause which might affect a person in both a personal and official capacity, but such a case is not presented by the pleadings here. The judgments sought in this case upon the several causes of action would have no relation one to the other.

The court permitted the plaintiffs below to amend their complaint by striking out the word "personally" in alleging the liability of the individuals, but the striking out of this word does not affect the status of the pleadings, for clearly it stated a cause of action against the parties as individuals in seeking to recover judgment against them for the money alleged to have been unlawfully paid Mrs. Haymaker.

The court should have sustained the demurrer on this ground, and for this reason the cause must be reversed and remanded to the district court, with instructions to sustain the demurrer; and it is so ordered.

HANNA, C. J., and PARKER, J., concur.

TIETJEN v. McCOY. (No. 2112.) (Supreme Court of New Mexico. April 24, 1918.)

(Syllabus by the Court.)

APPEAL AND ERBOR €==231(1)—REVIEW—NECESSITY OF OBJECTIONS.

As a general rule, objections, whether made by motion or otherwise, whether to the pleadings, to the evidence, to the instructions, or failure to instruct, to the argument of counsel, to the verdict, findings, or judgment, or to other matters, must, in order to preserve questions for review, be specific and point out the ground or grounds relied upon, and a mere general objection is not sufficient.

Appeal from District Court, McKinley County; Raynolds, Judge.

Action of forcible entry and detainer by J. E. Tietjen against L. McCoy. From a judgment of the district court, on appeal from a judgment of justice court in favor of the plaintiff, awarding plaintiff damages only, he appeals. Affirmed.

The appellant, plaintiff in the district court. first instituted his action before the justice of the peace in precinct No. 3 of McKinley county, setting up that he was lawfully possessed of a certain tract of land situate in said county, and that the defendant had unlawfully and with force entered upon the same, and had obtained and held possession thereof as against the plaintiff; the action being, therefore, one in forcible entry and detainer. The judgment of the justice of the peace court was that the defendant be removed from the premises and the plaintiff put in possession thereof, from which judgment an appeal was taken to the district court of McKinley county. Upon a trial in that court, a judgment was given for appellant for damages in the sum of \$1, but without a warrant of removal or restitution, from which judgment an appeal was prayed and allowed.

A. T. Hannett, of Gallup, for appellant. H. B. Jamison, of Albuquerque, for appellee.

HANNA, C. J. The only error assigned by the appellant is that the court should have given judgment in favor of the plaintiff, restoring to him possession of the premises in controversy, from which he had been unlawfully dispossessed. We cannot consider this alleged error of the trial court, however, because it nowhere appears in the record that this objection was called to the attention of the trial court. The judgment of the district court was excepted to without specifically stating any ground of objection thereto. The rule in this connection is thus stated in 3 C. J. 746:

"As a general rule, objections, whether made by motion or otherwise, whether to the plead-ings, to the evidence, to the instructions, or failure to instruct, to the argument of counsel, to the verdict, findings, or judgment, or to other matters, must, in order to preserve questions for review, be specific and point out the ground

or grounds relied upon, and a mere general objection is not sufficient."

This rule finds support in numerous authorities collected in the note to the foregoing text, and is so generally adopted that it may well be said to be a rule without an exception; at least our attention has not been directed to any exception. The rule was adhered to by our territorial Supreme Court in the case of Wells v. Walker, 9 N. M. 456, 54 Pac. 875, and by this court in the case of Stalick v Wilson, 21 N. M. 320-326, 154 Pac. 708. While we are reluctant to follow a purely technical rule of this character, it is a salutary one, and fairness to the trial court and opposing counsel, who are entitled to know the ground upon which the objection is based, so that the court may make its ruling understandingly and the objection be obviated if possible, calls for its enforcement. Many unnecessary appeals can be obviated by observance of this rule.

For the reasons stated, the judgment of the trial court is affirmed; and it is so order-

PARKER and ROBERTS, JJ., concur.

H. A. SEINSHEIMER & CO. v. JACOBSON. (No. 2103.)

(Supreme Court of New Mexico. April 24, 1918.)

(Syllabus by the Court.)

1. Pleading 4=166-Answer-"New Mat-TER"-REPLY

Affirmative allegations in an answer, which are in effect only denials, are not new matter. That is not new matter in an answer which might have been shown under a general denial. Pleadings examined, and held that answer did

not state new matter, and consequently a reply was not necessary to form the issue.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, New Matter.]

2. APPEAL AND ERBOR 493 - RECORD-RE-

VIEW.

The record on appeal must show such portions of the record of the trial court as are necessary for a consideration of the questions pre-sented. This duty devolved upon the appellee with reference to proposition stated in the opin-

Appeal from District Court, McKinley County; Raynolds, Judge.

Action by H. A. Seinsheimer & Co. against J. M. Jacobson. Judgment on the pleadings in favor of defendant, and plaintiff appeals. Judgment reversed, and cause remanded, with instructions to vacate the judgment, and for further proceedings.

A. B. Stroup, of Albuquerque, for appellant. E. A. Martin, of Gallup, for appellee.

PARKER, J. H. A. Seinsheimer & Co. brought this action against J. M. Jacobson, in the district court for the county of McKinley, for goods, wares, and merchandise sold and delivered to appellee, Jacobson, of the agreed value of \$487.50. Judgment on the pleadings was rendered in favor of the appellee, and appellant has appealed.

delivered" merchandise to the appellee, of the value of \$487.50, for which appellant had not been paid. The denials in the answer pellee, and appellant has appealed.

The complaint simply alleged that on or about the 1st day of September, 1914, appellant "sold and delivered" to appellee, at his special instance and request, goods, wares, and merchandise of the value of \$487.50, and that that amount is due and unpaid. The answer specifically denied all the allegations of the complaint, and by way of further defense alleged the following: That on or about May 7, 1914, appellee "bought" certain goods, wares, and merchandise of the appellant of the agreed value of \$487.50, to be delivered to appellee at Gallup, N. M., appellee to pay the freight charges thereon; that appellee received from appellant merchandise purporting to be the merchandise bought by him, but that a shortage of merchandise amounting in value to \$368.09 occurred in said shipment; that the appellee so advised the appellant and under instructions from the latter settled for such shortage with the railroad company for the sum of \$305.25; that appellee incurred costs in and about said settlement amounting to \$5: that appellee acted as the agent of the appellant in said transaction; and that appellee was ready and willing to pay over to the appellant the sum of \$121.50, the value of the merchandise delivered to him by appellant, plus \$300.25, the amount received from the railroad company, less the expenses incurred by him, and tendered such amount in court. To this answer the appellant filed a reply some six months after the answer had been filed. Because the reply was not filed within the time specified therefor by statute, the same was stricken from the files, upon the motion of the appellee and the motion of appellee for judgment on the pleadings granted by the court.

[1] 1. The appellant contends that the answer was argumentative, and contained no new matter, as the same is understood in code pleading, and consequently the reply was unnecessary; issue having been joined on the complaint and answer. Upon that premise it is contended that the trial court was in error in rendering judgment against the appellant on the pleadings, and with this contention we agree. In the case of Walters v. Battenfield, 21 N. M. 413, 415, 155 Pac. 721, we discussed the proposition as to what constitutes new matter, and cited numerous authorities thereon. We held that:

"A narration of facts, in an answer, in the form of new matter, which could all be properly proved under the general or specific denials made by the defendant, constitutes an argumentative answer," and that if the facts averred merely show that some essential allegation of the complaint is untrue, they do not constitute new matter, but only a traverse, citing as authority for the last statement 1 Sutherland on Code Pleading, § 457.

In the case at bar the issue tendered by erroneous because an issue of fact was bethe complaint was that appellant "sold and fore the court, which could be determined

had not been paid. The denials in the answer made an issue on those facts. The so-called new matter in the answer admitted the purchase of merchandise from appellant of the agreed value of \$487.50, but denied the delivery of merchandise of that value, alleging in that behalf that merchandise of the value of only \$121.50 had been delivered. Unquestionably these facts were provable under the general or special denial, for they were strictly relevant to the issue as to the quantity of goods alleged to have been delivered to appellee by the appellant. The answer confessed the purchase of merchandise of the value of \$487.50, but denied delivery of merchandise of that value. The burden of proof as to the fact of the delivery of merchandise of said value rested upon the appellant at the time issue was joined, and that constituted one of the material allegations necessary to prove before appellant was entitled to a recovery. In the Walters-Battenfield Case, we said, citing authority, that new matter is "truly a confession and avoidance," and that "the true test as to whether matter pleaded by the defendant in his answer is new matter is whether the burden of proof is thrown upon the defendant." Quoting 1 Sutherland on Code Pleading, \$ 457, we held:

"Affirmative allegations in the answer which are in effect only denials are not new matter, for, as we have just noted, new matter confesses and avoids either expressly or impliedly the cause of action set up in the complaint. So any matter which does not discharge or avoid a cause of action theretofore existing, but the purpose of which is to show that the alleged cause of action never did exist, and that material allegations of the complaint are not true, is not new matter such as is required to be specially pleaded. That is not new matter in an answer which might have been shown under a general denial."

The answer confessed but part of the allegations of the complaint, viz. that appellee "bought" merchandise of appellant of the value of \$487.50, and stated facts tending to show that the other material allegations of the complaint were untrue. Clearly that does not constitute new matter, within the meaning of the law. It is true that the auswer also alleged that appellee had in his hands the sum of \$300.05, which he held in his hands as ballee or agent of the appellant. That allegation, however, was only in explanation of the amount or value of merchandise delivered to appellee, and might well have been proved under the general denial. We are therefore satisfied that the answer contained no "new matter." That being so, then an issue was formed upon the complaint and answer, and there was no necessity for the filing of a reply. Whether the court errea in striking out the reply therefore becomes immaterial, but its action in granting the motion for judgment on the pleadings was erroneous. Its action in this respect was erroneous because an issue of fact was beonly in the ordinary course of the law, and that is true, even assuming that the court was correct in striking from the files the reply, because the issue was made upon the complaint and answer, as we have heretofore said. It follows that the judgment must be reversed

[2] 2. One other proposition, however, should be discussed. The appellee contends that the trial court was without jurisdiction to render the judgment it did render in this case, because the cause had been ordered abated on December 6, 1915, and the court did not order a reinstatement of the case until January 15, 1916. The objection is founded upon section 4291, Code 1915, a section of the law having to do with cost bonds and the time and manner in which an abated cause may be reinstated upon application. In the latter event it provides that:

"Should said parties at any time during said term file with the clerk of the district court a good and sufficient bond, such cause may upon application of said party be reinstated on the docket of the court. \* \* "

It is contended that the lapsing of the term of court had the effect of legally preventing a reinstatement of the cause, the statute limiting the time in which reinstatement could have been made to the November, 1915, term. One of the several reasons why there is no merit in the contention is that the record before us is not sufficient to review the question. The order of reinstatement was made on January 15, 1916. record of this case does not show whether the November, 1915, term of said court was in session at that time or had adjourned. Appellee's counsel states that the court took an indefinite recess on December 7, 1915, but there is nothing in the record to show whether the court convened or not in the interim between December 7, 1915, and January 15, 1916. If appellee would have such question reviewed here, it was his duty to file a transcript here showing such portions of the record of the trial court as were necessary for a consideration of the question presented. Baca et al. v. Unknown Heirs of Jacinto Palaez et al., 20 N. M. 1, 5, 146 Pac. 945. Appellee also contends that the bond for costs. given on appeal by the appellant, is insufficient as to form, but in view of the fact that the case will be reversed, and consequently the costs will be taxed against the appellee, it is not necessary to discuss or consider the proposition.

For the reasons stated, the judgment of the trial court will be reversed, and the cause remanded, with instructions to vacate the judgment rendered on the pleadings, and to proceed in a manner not inconsistent with this opinion; and it is so ordered.

STATE v. PRUETT. (No. 2137.) (Supreme Court of New Mexico. April 24. 1918.)

(Syllabus by the Court.)

1. Homicide 4=300(14)-Threats-Instruc-

Where there is evidence tending to show that deceased made threats against the defendant which were communicated to him, and that the deceased brought about the difficulty and was in fault at the time of the killing, the court must, upon request, instruct the jury upon the subject of such threats.

2. CRIMINAL LAW \$=829(3) — VOLUNTABY MANSLAUGHTER—INSTRUCTION—OMISSIONS— OURE.

An instruction defining the essential elements of an indictment as to manslaughter, and which omits to state that the killing must have been unlawful and not justifiable, and which is followed by another instruction telling the jury that if they believe from the evidence "that that if they believe from the evidence "that each and all of the above material allegations of the indictment have been established beyond a reasonable doubt" they should then find defendant guilty of voluntary manslaughter, is erroneous.

3. Homioide 🗫 244(3)—Self-Defense—Bub-DEN OF PROOF.

A defendant on trial for homicide who re-lies upon self-defense for acquittal is not re-quired to produce evidence which will satisfy the jury that he acted in self-defense, but only such evidence as will raise in the minds of the urors a reasonable doubt as to whether he acted in necessary self-defense.

4. Homicide 300(2)—Self-Defense—In-STRUCTION.

Instruction relative to limitations upon the right of self-defense.

Appeal from District Court, Union County; Lieb, Judge.

James C. Pruett was convicted of voluntary manslaughter, and he appeals. Reversed and remanded, with instructions to grant a new trial.

See, also, 22 N. M. 223, 160 Pac, 362,

O. P. Easterwood, of Clayton, for appellant. Harry L. Patton, Atty. Gen., for the State.

ROBERTS, J. Appellant was tried and convicted in the district court of Union county of voluntary manslaughter, and appeals.

In October, 1914, the appellant accompanied Mrs. Ethel Landreth to the Cross L ranch in Union county. There they met the deceased, who was practically a stranger to The appellant and Mrs. Landappellant. reth went into the apartments of Mr. and Mrs. Crook, the father and mother of Mrs. Landreth, when Cleasy Cheek, the deceased. and various others came in. Cheek had a pistol in his hand and ordered the appellant out of the house with the following remark, "You see that door; hit it." Cheek was disarmed, and as he went out of the room he said to the appellant, "I will kill you or get HANNA, C. J., and ROBERTS, J., concur. | you in less than a week." No explanation is

Cheek. Appellant was engaged in teaching school, and on Saturday after the occurrence just detailed visited the home of Ed Logue, where the appellant had his bedding and various other things. In the afternoon, appellant, as disclosed by the evidence offered on his behalf, took his rifle and went rabbit hunting, and while returning home on the public road met the deceased, and the shooting took place. Appellant was the only eyewitness to the encounter, and testified that he saw the deceased approaching him from the top of the hill. About the time he saw the deceased, the deceased reached for his gun and told appellant he was going to kill him. Appellant told deceased to put up his gun, and after deceased repeated his threat and was trying to get his gun out of the scabbard appellant threw up his gun and shot quickly, causing the horse of the deceased to jump. However, Cheek turned his horse around, got his gun out and up to his shoulder, and was trying to work the lever, still telling appellant he would kill him, when appellant shot him. On the part of the state it was contended that appellant had waylaid deceased and shot him from behind a clump of bushes. The evidence to this effect was all circumstantial.

Seven alleged errors are discussed by appellant upon which he relies for a reversal. Some of the errors have to do with the weight of the evidence and the refusal of the court to grant a new trial on the ground of newly discovered evidence. As the case must be reversed on other grounds, the points just stated need not be discussed. Upon a new trial appellant will have an opportunity to present the evidence in question.

[1] Appellant requested the court to give three instructions upon the subject of threats. He does not here contend that all three of these instructions should have been given, but insists that some one of the three should have been given to the jury. seventh instruction requested by appellant reads as follows: .

"The court instructs the jury that though mere threats are insufficient to justify a kill-ing as in self-defense, if the jury believes that prior to the homicide deceased made threats of a violent nature against the defendant, and the evidence leaves the jury in doubt as to what the acts of the deceased were at the time of the homicide or as to what defendant might prop-erly have apprehended in respect to the intention of deceased, the jury are entitled to con-sider the threats in connection with the other evidence in determining who was probably the aggressor, and in determining what apprehension might reasonably arise in the mind of defendant from the conduct of the deceased."

This instruction was even more favorable to the state than the law requires, and we fail to understand upon what theory the court refused to give it, or to give some appropriate instruction upon the subject. In the instructions given by the court of its own motion, this phase of the case was not referred to.

afforded by the evidence for the action of The law is well settled that where there is evidence tending to show that deceased made threats against the defendant which were communicated to him, and that deceased brought about the difficulty and was in fault at the time of the killing, the court must, upon request, instruct the jury as to the law governing threats. 11 Standard Ency. of Procedure, 676. In the case of Potter v. State, 85 Tenn. 88, 1 S. W. 614, where the deceased had made threats against the defendant and the defendant justified on the ground of self-defense, the failure of the court to instruct that the threats of deceased communicated and uncommunicated might be looked to by them, the former as tending to show the state of mind of the defendant. the conditions under which he was acting, and to illustrate his conduct and motive, in connection with other facts and circumstances in the case, and the latter as tending to show the animus of the deceased, and to illustrate his conduct and motives, was held error. In that case the defendant did not request an instruction on the subject of threats, but the court held it was the duty of the judge to charge the law applicable to the evidence and give the defendant the benefit of it, and it was held that the defendant was entitled to this charge without demand. In the present case the court was specifically requested to charge on the subject of threats. Other cases holding that it was the duty of the court to have charged on this subject are: White v. Territory, 3 Wash-Ter. 397, 19 Pac. 37; People v. Zigouras, 163 N. Y. 250, 57 N. E. 465; State v. Darling, 199 Mo. 168, 97 S. W. 592; State v. Helm, 92 Iowa, 540, 61 N. W. 246; State v. Parker. 60 Or. 219, 118 Pac. 1011; Williams v. State, 67 Tex. Cr. R. 287, 148 S. W. 763; Price v. State, 1 Okl. Cr. 358, 98 Pac. 447. The only authorities relied upon by the state as justifying the refusal are Futch v. State, 137 Ga. 75. 72 S. E. 911, and Ellison v. State, 137 Ga. 193, 73 S. E. 256; but in these cases there was no request for a charge on this subject. For the failure of the court to give an appropriate instruction upon this subject, or one of the tendered instructions, the case must be reversed.

> [2] We deem it advisable to discuss such of the other questions raised on this appeal as might probably arise upon a subsequent retrial. The seventh and eighth instructions, given by the court of its own motion, were as follows:

"(7) As to voluntary manslaughter, the material allegations of the indictment as to that are as follows: (a) That Cleasy Cheek was killed; (b) that Cleasy Cheek was killed by the defendant, James C. Pruett; (c) that the killing was effected by means of a certain rifle, commonly called a Winchester, charged and load-with cumpowder and divers leader bullets. ed with gunpowder and divers leaden bullets, which the said defendant held in his kand and did discharge and shoot off at and against the said Cleasy Cheek, and did thereby strike and wound the said Cleasy Cheek in such manner that a mortal injury was inflicted upon him

which was the proximate cause of his death; (d) that such killing was done by the defendant upon a sudden quarrel or in the heat of passion; (e) that such killing occurred in the county of Union and state of New Mexico; (f) that the deceased, Cleasy Cheek, was shot and injured as aforesaid, and died from the effects thereof on the 17th day of October, 1914.

"(8) If you believe from the evidence that each and all of the above material allegations of the

"(8) If you believe from the evidence that each and all of the above material allegations of the indictment have been established beyond a reasonable doubt, you should then find the defendant guilty of voluntary manslaughter."

These two instructions, as given, were incorrect, in that they authorized the conviction of the appellant even though he was justified in killing the deceased. It is contended on behalf of the state that the vice in these instructions was cured by other instructions given by the court on the subject of self-defense. This point need not be determined. The court should not have given the instructions. The vice was clearly pointed out by exceptions stated by counsel for appellant, which should have been sustained by the trial court.

[3] It is also insisted that instruction numbered 15 given by the court was erroneous, in that it required the defendant to affirmatively establish his plea of self-defense; in other words, that he was required to satisfy the jury that he was justified in taking the life of the deceased; whereas, the law is that he is required only to produce such evidence as will raise in their minds a reasonable doubt upon the proposition. The instruction in question is inaptly worded. It begins with the words, "If you believe from the evidence," etc. On behalf of the state it is insisted that the vice in this instruction is cured by other instructions given by the When the objection to this instruction was called to the attention of the trial court, it should have been corrected. not necessary for us to determine whether the objectionable language was cured by other instructions, because upon a second trial the court will doubtless see to it that unobjectionable language is employed. The objection could have been cured by the insertion of the words, "If you entertain a reasonable doubt."

[4] It is contended that the court erred in giving instruction numbered 17, which reads as follows:

"The law of self-defense, however, does not imply the right to attack, nor will it permit acts done in retaliation or for revenge, and if you believe from the evidence, beyond a reasonable doubt, that the defendant sought, brought on, or voluntarily entered into a difficulty with the deceased for the purpose of engaging him in a conflict with deadly weapons, then the defendant cannot avail himself of the law of self-defense and you should not acquit him on that ground, and it is for you to determine from all the evidence whether the claim of the defendant that he killed deceased in self-defense is made in good faith or is a mere pretense"

-on the ground that there was no evidence in the case warranting the giving of this instruction, in that such instruction was as to mutual combat. In this appellant is mistak-The above instruction is a familiar and oft-approved statement that the law of selfdefense does not imply the right to attack, nor will it permit acts done in retaliation for revenge, and that one who brings on or voluntarily enters into a difficulty for the purpose of engaging in conflict with deadly weapons cannot avail himself of the law of self-defense. Such an instruction is habitually given in all the courts of this state in connection with all instructions of self-defense, and it would be hard to conceive of any case where self-defense was relied upon wherein such an instruction would not be

Because of the refusal of the court to charge upon the subject of threats, the case will be reversed and remanded to the district court, with instructions to grant the appellant a new trial; and it is so ordered.

HANNA, C. J., and PARKER, J., concur.

SKALA v. NEW YORK LIFE INS. CO. (No. 2044.)

(Supreme Court of New Mexico. April 24, 1918.)

(Syllabus by the Court.)

1. INSUBANCE - 055(6) - LIFE INSURANCE - DEFENSE OF SUICIDE-EVIDENCE. Evidence examined, and held, that trial

Evidence examined, and held, that trial court should have directed a verdict for appellant, and that the evidence is insufficient to sustain the verdict and judgment.

2. APPEAL AND EBROR € 1059 EXCLUSION OF EVIDENCE—HARMLESS ERROR.

Where the court, in its instructions, assumes the existence of proof of facts sought to be extablished by evidence excluded by the court, the party thus obtains all the benefit which he could have derived from the admission of such evidence, and the error in excluding such evidence, if error it be, is rendered harmless.

3. INSURANCE ← 662(1) — LIFE INSURANCE —PROOFS OF DEATH—EVIDENCE.

Evidence examined, and held, that proof of fact that blank forms of proof of death were delivered to a physician by the local agent of the insurance company was improper, in that such evidence was irrelevant.

4. EVIDENCE 473—OPINION EVIDENCE.
Where mere descriptive language is inadequate to convey to the jury the precise facts, witness may state his opinion thereon.

6. Insurance &==659(2) — Life Insurance — Defense of Suicide—Evidence.

Evidence tending to show suicide or the motive of the insured in killing himself is admissible.

Appeal from District Court, Curry County; Richardson, Judge.

Action by Alice B. Skala against the New York Life Insurance Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with instructions to grant defendant a new trial. Francis C. Wilson and D. K. Sadler, both of Santa Fé, and James H. McIntosh, of New York City, for appellant. Patton & Bratton and C. A. Hatch, all of Clovis, for appellee.

HANNA, C. J. The appellee, Alice B. Skala, recovered a judgment against the appellant, New York Life Insurance Company, in the sum of \$1,000 upon a contract of insurance written upon the life of Phillip A. Skala. From that judgment, the appellant has appealed.

[1] The case, on appeal, turns upon the sufficiency of the evidence to sustain the verdict of the jury; appellant contending that Phillip A. Skala committed suicide within a year after the execution of the policy. The question was raised in the trial court by requesting that a verdict be directed for appellant, and is raised here also by an attack on the sufficiency of the evidence to support the verdict.

The contract of insurance contained the following provision:

"Self-Destruction.—In event of self-destruction during the first insurance year, whether the insured be sane or insane, the insurance under this policy shall be equal to the premiums thereon which have been paid to and received by the company, and no more."

The question for solution is whether the insured committed suicide or died from a cause other than self-destruction; death having occurred during the first insurance year of the policy. Ordinarily the determination of the jury on such questions is conclusive here, where the verdict is supported by substantial evidence, and it is only in those cases wherein there is no substantial evidence to support the verdict that the verdict is set aside on appeal. The rule has so often been announced in this court that citation of authority is unnecessary. A careful examination of all of the evidence contained in the record makes irresistible the conclusion that the insured committed suicide. About 4:30 in the afternoon on the 16th day of February, 1916, a noise was heard in the bedroom of the insured and shortly thereafter he was found dead lying upon his bed. In the forehead was a bullet wound and upon the face appeared powder marks. His right hand lay upon his breast, loosely clasping a revolver from which one shot had been fired. In his pocket was found a notebook in which was written, in substance, either one or the other of the following statements:

"Hazel Thompson was the nicest and sweetest girl in the U. S. A. and that is a fact. These are the last lines written by P. A. Skala." "Hazel Thompson is the best and prettiest girl in the world. Mrs. Skala is the best woman in the world, and that's a fact. These are the last lines written by P. A. Skala. Good bye to you all. P. A. Skala. Dated February 16th (or 14th) 1916."

The sheet in the notebook upon which the structed the jury. Com substance of the foregoing statements was written had been torn from the book in the interim between the time the book was tak-

en from the person of the insured and the date of the trial. Hazel Thompson was the stepdaughter of the insured. Throughout the trial the appellee objected to the method adopted by appellant in proving the said statements, but the fact remains that such evidence was admitted by the trial court and is a part of the evidence to be considered here. In addition to the foregoing proof of death by suicide, conflicting evidence appears in the record as to the domestic and financial status of the insured shortly prior to his death. We may completely disregard this evidence, however, because, in our opinion, the evidence of the physical facts surrounding the death of the insured, considered in conjunction with the written statements of the insured, that the lines then written by him were the last lines to be written by him, indubitably established beyond all doubt that the insured committed suicide. The appellee states in her brief that it is his theory that the deceased came to his death by accident, or by some means other than suicide. Counsel for appellee also say that the evidence is just as susceptible of a construction to the effect that the deceased did come to his death by accident as that he committed suicide. We cannot agree with counsel in this contention. Every fact of importance discloses that the insured committed suicide. The physical facts and the statement contained in the notebook of the insured leave no doubt as to this matter. Different opinions as to the conclusion to be drawn therefrom could not reasonably be formed, and the trial court should have directed a verdict for the appellant upon the motion made therefor. We cannot account for the conclusion of the jury, but are satisfied that no substantial evidence supports that conclusion, and consequently the same will be set aside. As this conclusion depends upon the facts alone of this case, we see no necessity for referring to the numerous cases cited by the parties to this appeal.

[2] 2. A deposition of an officer of the appellant company was read in evidence on the part of the appellant. It tended to prove that appellee had transmitted to appellant the proof of death of the insured. This proof was made up of three separate papers; viz. statement of the appellee, statement of physician, and statement of a friend. The physician's statement was made upon a company form. The fourteenth question and the answer thereto were as follows:

"Was there any special cause, direct or indirect. for the death, in the use of alcoholic beverages, drugs, occupation, or residence of the deceased? Suicide."

The court admitted the statement in evidence, but restricted its effect to proof of death only, and in the first instance so instructed the jury. Complaint is made of this by appellant, but it is rendered immaterial by the fact that the court subsequently instructed the jury that:

"Plaintiff having in her proof of death stated the jury in a position to make the final decision to the company that the death was by suicide, it is incumbent on her to satisfy the jury that in this statement she was mistaken, and that the death was the result of accident."

The same conclusion applies to the action of the trial court in striking out the answer of the physician to the fourteenth question contained in the physician's statement. The doctrine applicable to these two propositions is that, where the court in its instructions assumes the existence or proof of facts sought to be established by evidence excluded by the court, the party thus obtains all the benefit which he could have derived from the admission of such evidence, and the error, if error it be, is rendered harmless. 38 Cyc. 1468. The court, in the case at bar, having assumed that appellee stated in her proof of death that the insured committed suicide, gave to the appellant the full benefit of such evidence, and consequently the error in excluding such evidence, if error it was, is rendered harmless.

[3] 3. Over the objection of the appellant. the appellee was permitted to prove that the blank form upon which the physician's statement was written was delivered to the physician by the local agent of the insurance company, who received the same from the appellant. The evidence constituting the proof of death of the insured, introduced by appellant, was attacked by appellee on the ground that she was not responsible for statements appearing in the physician's statement, because she had no knowledge thereof and did not read the same. In the light of the facts we do not believe such testimony was relevant. Fraud on the part of the agents of the insurance company was hardly intimated, must less proved. We do not anticipate that this proposition will arise upon the retrial of this case. If it does, its admissibility will depend upon its relevancy.

[4] 4. Evidence on behalf of the appellant was admitted showing that the witness Marsh and the insured had a conversation on February 16, 1916, in which, among other things, the insured stated that he did not know what he was going to do with himself. but that it would not be long until he would know. He also stated facts tending to disclose that he was having domestic troubles. The witness Marsh was then asked to state whether or not the insured was in a despondent mood, and the court struck out the answer that he was very despondent. The rule by which the trial court will be guided in, the event this proposition arises on the retrial of this case is stated in State v. Cooley, 19 N. M. 91, 109, 140 Pac. 1111, 1117 (52 L. R. A. [N. S.] 230), and is as follows:

"Where mere descriptive language is inade-

In that case we held that it was error not to permit a witness to state that the relations between the appellant and the deceased, shortly prior to the homicide, appeared to be friendly.

[5] 5. The foregoing item of evidence, and other evidence appearing in the record, was stricken out by the trial court on the theory that the same did not indicate or prove a suicidal purpose. All evidence tending to show suicide or the motive of the insured in killing himself is admissible. See Goldschmidt v. Mutual Life Ins. Co. of N. Y., 134 App. Div. 475, 119 N. Y. Supp. 283; Furbush v. Md. Cas. Co., 131 Mich. 234, 91 N. W. 135, 100 Am. St. Rep. 605. The fact that the insured may have been deeply depressed or despondent shortly before his death was material and relevant to the issue as to whether in fact he committed suicide or not. and its weight was a matter for the consideration of the jury.

For the reasons stated the judgment of the trial court will be reversed and the cause remanded, with instructions to grant to the appellant a new trial: and it is so ordered.

PARKER and ROBERTS, JJ., concur.

WORTHINGTON v. TIPTON et al. (No. 2113.)

(Supreme Court of New Mexico. April 24, 1918.)

(Syllabus by the Court.)

1. Public Land \$==136-Claimants-Incho-ATE INTEREST-MORTGAGE-"ALIENATION.

A person having an inchoate interest in public lands may mortgage the same, even though the statute under which he claims prohibits an "alienation" of his rights, for such a prohibition refers only to attempted conveyances of title and not to mortgages.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Alienation.1

(Additional Sullabus by Editorial Staff.)

2. Pleading \$\infty 205(2) - Demurrer - Objec-TIONS REACHED.

In a suit to foreclose a mortgage, wherein the answers raised only the question that it was executed and delivered prior to final proof by the mortgagor and to the delivery of a patent to her, demurrers on the ground that the answer did not state facts sufficient to constitute any defense were sufficient as against the objection that they did not sufficiently specify the objection to the answers.

Appeal from District Court, Roosevelt County; Richardson, Judge.

Action by H. G. Worthington against Sarah guate to convey to the jury the precise facts. or their bearing on the issue, the description of the witness must of necessity be allowed to be supplemented by his opinion, in order to put fendants upon the pleadings, and plaintiff appeals. Reversed, and cause remanded, with instructions.

This action was brought to foreclose a mortgage on certain land situate in the county of Roosevelt. The complaint was in the usual form, and a copy of the mortgage sought to be foreclosed was attached and made a part thereof. The defendants filed separate answers to the complaint, in which they admit the execution and delivery of the mortgage, but seek to avoid its legal effect on the ground that the mortgage was executed on the land described therein by Sarah Ann Tipton before the receiver's final receipt had issued to her, and before she had offered her final proof for patent. Demurrers were filed by the appellant, attacking the defenses set forth in each of said answers on the ground that they did not state facts sufficient to constitute any defense to the suit. The court overruled such demurrers, and appellant, electing to stand thereon and refusing to plead further, a motion for judgment on the pleadings was sustained, and judgment rendered against the appellant, from which this appeal was taken.

M. C. Spicer, of Socorro, for appellant. W. A. Gillenwater and Fred E. Dennis, both of Clovis, for appellees.

HANNA, C. J. (after stating the facts as above). It appears from the pleadings that the mortgage which appellant sought to foreclose in the district court was given upon a homestead entry. The mortgage was executed prior to the date of the final receiver's receipt and before final proof for patent to said land. As pointed out by the trial court in a memorandum opinion, the question raised, in a general way, is whether or not a mortgage, given to secure moneys loaned for general purposes on a homestead entry prior to final proof or final entry of the same, is good and valid as against the land described in said homestead entry. The trial court was of the opinion that a mortgage may be given prior to entry, and after the filing upon a homestead to secure money to acquire the title in event of commutation or to make permanent improvements in compliance with the law or acquiring a water right for its cultivation and development, but that there is nothing in the record to indicate that the money borrowed and secured on this homestead entry prior to the issuance of final receipt was for such purposes, but was a general loan having no particular purpose connected with the acquisition or improvement of the homestead, and that it would be against public policy and contrary to the federal statute to permit a mortgage generally on a homestead entry which might ultimately affect the title. The court said, referring to the federal statute, that the language "after entry" meant, in his opinion, after final proof.

The four assignments of error urged by appellant raise but one question, i. e., the right of a homesteader, after entry on government land, to subject his interests therein to a mortgage executed by him after entry and before final proof is made.

[2] Before discussing this question it is necessary to refer to a point made by appellees, which is that the demurrers filed by the appellant in the trial court were insufficient in law to raise the question of the sufficiency of the answers of the appellees. This contention is based upon the proposition that the demurrer must distinctly specify the ground of objection to the pleading, and when it does not it may be disregarded or overruled: and that the demurrers in question, which it must be remembered attacked the several answers upon the ground that they did not state facts sufficient to constitute any defense to the cause of action, did not sufficiently specify the objection raised, and did not constitute any ground of demurrer. Appellee cites section 4111, Code 1915, and Evants v. Taylor, 18 N. M. 371, 137 Pac. 583, 50 L. R. A. (N. S.) 1113, in support of this contention. There can be no question but that the demurrer must distinctly specify the ground of objection to the pleadings as is provided by the statute, but that it did so in this case is apparent. The several parties, and the court as well, evidently considered this one question raised, as is shown clearly by the memorandum opinion of the trial court and the judgment of that court. The answers of the several defendants raise but one question so far as the mortgage of plaintiff is concerned; i. e., that the mortgage was executed and delivered to the plaintiff prior to final proof by Sarah Ann Tipton, mortgagor, and prior to the issuance of final register's receipt, and prior to the execution and delivery of patent to said land, for which reason it did not establish or create any interest, lien, or incumbrances upon said land, as the title to said land was, at the time of the execution of said mortgage, in the United States. A demurrer was filed to said answers on the ground that they did not state a sufficient defense to the cause of action, and under the circumstances in this case the demurrers were clearly sufficient.

[1] We turn, therefore, to the question raised by the several demurrers. Not desiring to unduly lengthen this opinion, we shall not discuss the authorities pro and con upon the question, as they are very numerous. An examination of the earlier authorities upon this question discloses, in our opinion, that they were made upon the theory that a mortgage transferred the legal title to the land. These decisions would not be applicable to conditions in New Mexico by reason of the fact that we have held that the legal title remains in the mortgagor, unless there is a stipulation in the mortgage to the con-

trary. See Cleveland v. Bateman, 21 N. M. 687, 158 Pac. 648. The department of the interior has adopted the view that the giving of a mortgage on a homestead prior to the issuance of the final receiver's receipt is not an alienation of the land within the meaning of section 2262, Rev. Stat. (U. S.). Larson v. Weisbecker, 1 Land Dec. 409. It is to be noted in the Larson-Weisbecker Case that the mortgage given was to secure money loaned with which to pay the government price for the land, Secretary Teller's opinion in that case pointing out that it was apparent that the entryman did not intend that the title should inure to some one other than himself, but that he made a conditional alienation of the land only, when, had his purpose been different, he might have made an absolute conveyance. It has been held that the purpose for which the money is borrowed is material as tending to show the bona fides of the mortgagor. Norris v. Heald, 12 Mont. 282, 29 Pac. 1121, 33 Am. St. Rep. 581. But in this case it must be borne in mind that the answers of the defendants did not attack the good faith of the mortgagor, but squarely raised the question that the title was in the United States, and she was without power to mortgage. The great weight of authority is against this contention. The rule is thus stated in 32 Cyc. 1075:

"A person having an inchoate interest in public lands may mortgage the same, even though the statute under which he claims prohibits an allenation of his rights, for such a prohibition refers only to attempted conveyances of title and not to mortgages."

This is the general rule, in our opinion, and is the rule followed in the case of Hafemann v. Gross, 199 U. S. 342, 26 Sup. Ct. 80, 50 L. Ed. 220, in an opinion written by Mr. Justice Brewer, from which we take the liberty of quoting as follows:

"Obviously, the trend of the authorities is strongly in favor of the proposition that a mort-gage or deed of trust by one seeking an entry under the pre-emption or homestead laws of the United States, made prior to the perfection of, his equitable right, is valid."

It certainly would not lie in the mouth of the mortgagor to raise the question of good faith or to challenge her intention in making this particular moftgage. Under the rule adopted in this jurisdiction, as announced in the Bateman Case, no intention to convey the land can be implied, and, there being in this case but the one question concerning the right of the entryman to mortgage the entry before final patent, we must necessarily hold that the trial court was in error.

The judgment is reversed, and the cause remanded, with instructions to proceed in accordance with this opinion; and it is so or-

PARKER and ROBERTS, JJ., concur.

STATE v. CERTAIN INTOXICATING LIQ-UORS. (No. 3176.)

(Supreme Court of Utah. March 28, 1918.)

1. Intoxicating Liquors == 139 - Posses-SION—STATUTES—CONSTRUCTION.
Act Feb. 1, 1917 (Laws 1917, c. 2), entitled

"An act to define, prohibit and regulate sale, manufacture, use and possession of intoxicating liquor," and sections 2. 8, 26, thereof, aboling induor, and sections 2. 8, 20, thereof, anotishing property rights in liquors, and prohibiting possession thereof, except as provided in sections 6, 7, 8, and 9, permitting use for scientific, manufacturing, and sacramental purposes, forbids possession of liquors, regardless of when or how acquired, for what use, or where least reside fractions. where kept, aside from the enumerated exceptions.

2. CONSTITUTIONAL LAW \$\infty\$82, 240(3), 296
(1) — INTOXICATING LIQUORS \$\infty\$15 — Possession — Due Process of Law — Equal Protection of Laws.

Such act does not violate Const. art. 1, § 1, as to right to life and property, section 7, as to due process of law, nor Const. U. S. Amend. 14. as to due process of law and equal protection of the laws, since it is a valid exercise of police powers.

3. Intoxicating Liquors == 245-Posses-

Though claimant acquired intoxicating liquors prior to effective date of Act Feb. 1, 1917, prohibiting possession of intoxicating liquors and abolishing property rights therein, they were confiscable after such effective date.

Appeal from District Court, Weber County; A. E. Pratt, Judge.

Proceeding by the State against certain intoxicating liquors, wherein Otto Meek claimed the liquors. From a judgment of the district court, on appeal from municipal court dismissing the action, the State ap-Reversed and remanded. peals.

Dan B. Shields, Atty. Gen., and Jas. H. Wolfe and O. C. Dalby, Asst. Attys. Gen., for the State. George Halverson, of Ogden, for respondent.

CORFMAN, J. This was a proceeding begun on the complaint of the state, filed in the municipal court of Ogden City, against certain intoxicating liquors, seized by peace officers on the 18th day of August, 1917, under the provisions of chapter 2 of the Laws of Utah 1917, "prohibiting the manufacture and use of intoxicating liquors and regulating the sale and traffic therein," entitled, "An act to define, prohibit and regulate the sale, manufacture, use, advertising of, possession of, or traffic in intoxicating liquor, malt or brewed drinks; providing for its enforcement, and providing penalties and remedies for its violation. The municipal court, under the provisions of the said act, commanded and directed the liquors to be kept and held by the officers until otherwise disposed of according to law. An appeal was taken to the district court for Weber county. The defendant Otto Meek appeared, made claim to the liquors as the owner thereof, was made a party



to the action, and moved to quash the order made by the municipal court and to dismiss the action upon the grounds, to wit: (1) That the court has no jurisdiction to hear, try, or determine the title to said intoxicating liquors; (2) upon the ground that said liquors were wrongfully and unlawfully seized and held. By stipulation of the parties the motion was treated as a submission of the case upon the merits.

As to the facts, so far as material here, it was further stipulated by the parties that the liquors, consisting of 134 pints of wine, 28 quarts of Sunny Brook whisky, and 12 one-fifth gallons of Old Hermitage whisky, were purchased by the defendant Otto Meek. and delivered to him at the premises of the Ogden Sales Company, Ogden City, Weber county, state of Utah, prior to the 1st day of August, 1917; that the liquors were stored there for a time in a shed, and afterwards the defendant Meek caused them to be removed from the shed and placed in the attic of the building occupied as offices by the Ogden Sales Company, adjoining the private office of Meek, where they were kept under lock and key by Meek until seized by the officers on the 18th day of August, 1917. It was also stipulated that the liquors were purchased by the defendant Meek prior to August 1, 1917, the date when the prohibition law became in force and effective; that the liquors had been purchased, kept, and held in good faith without any intent to dispose of them by sale or otherwise in violation of law, and solely for the personal use of the defendant Meek when seized by the officers. Upon the facts, as stipulated, the district court rendered judgment dismissing the action and ordered that the officers having the liquors in custody restore them to the defendant Meek. From this judgment and order the state appeals.

The appeal presents primarily but two questions, to wit: (1) Do the provisions of the 1917 prohibition law forbid the possession of intoxicating liquor, within prescribed limits, regardless of when acquired or the purposes for which they are intended to be used? (2) If so forbidden, is the act of the Legislature constitutional? We will discuss the questions in the order named.

(a) The legislative act in question was passed February 1, 1917, and became effective August 1st, of the same year, and is entitled "An act to define, prohibit and regulate the sale, manufacture, use, advertising of, possession of \* \* \* intoxicating liquor," etc. At the very outset, it is made manifest by the title of the act that there is intendment that the subject-matter to be treated is not only the traffic in intoxicating liquors but the "use" and "possession of" as well. The object of the title is to state the subject of the act. That must be conceded. Section 2 of the act defines liquors as follows:

"The word liquors as used in this act shall be construed to embrace all fermented, malt, vinous or spirituous liquors, alcohol, wine, porter, ale, beer, absinthe, or any other intoxicating drink, mixture or preparation of like nature, and all malt or brewed drinks; and all iliquids, mixtures or preparations, whether patented or not, which will produce intoxication; fruits preserved in alcoholic liquors of any kind; and all beverages containing in excess of one-half of one per centum of alcohol by volume, shall be deemed spirituous liquors, and shall be snail be deemed spirituous induors, and snail be embraced in the word liquors as hereinafter used in this act; and all mixtures, compounds or preparations, whether liquid or not, which are intended when mixed with water, or otherwise, to produce, by fermentation or otherwise, an intoxicating liquor, shall also be deemed to be embraced within such term."

Section 3 of the act prohibits:

"Except as hereinafter provided, the manufacture, sale, keeping or storing for sale in this state, or offering or exposing for sale, or importing carrying, transporting, advertising, distributing, giving away, exchanging, dispensing, or serving of liquors, are forever prohibited in this state. It shall be unlawful for any parent within this state knowingly to have ed in this state. It shall be unlawful for any person, within this state knowingly to have in his or its possession any intoxicating liquors, except as in this act provided."

Section 26 reads as follows:

"There shall be no property rights whatso-ever in liquors, vessels, appliances, fixtures, bars, furniture and implements kept or used for the purpose of violating or used in viola-tion of any provision of this act."

It is expressly provided in section 9 of the act that grain alcohol may be manufactured and sold under certain restrictions, and that wine may be acquired and used for sacramental purposes of religious bodies. Provisions are also made in sections 6, 7, and 8 of the act for the sale of alcohol for scientific and manufacturing purposes under prescribed rules and regulations.

[1] No exceptions being made in the act other than the foregoing, we think it is made clear by the sections quoted that it was the legislative intent to not only forbid the possession but to abolish property rights in alcoholic liquors within the confines of the state after August 1, 1917, aside from the exceptions expressly provided for in the act, no matter when or how acquired, for what use intended, or in what place kept or pos-

[2] (b) Such being the purpose and intent. of the plain provisions of the legislative enactment, we are next confronted with the question, Does the act under consideration invade or abridge the privileges or immunities of the citizen guaranteed by the federal or state Constitutions? The question involves the scope of the police powers of the state. Section 1 of the act provides:

"Objects. This entire act shall be deemed an exercise of the police powers of the state for the protection of the public health, peace and morals, and all of its provisions shall be liberally construed for the attainment of that purpose." pose.

Section 1, art. 1, of the state Constitution. reads:

"All men have the inherent and inalienable right to enjoy and defend their lives and liberties; to acquire, possess and protect property," etc.

Section 7 of the same article provides:
"No person shall be deprived of life, liberty or property, without due process of law."

The Fourteenth Amendment to the Constitution of the United States provides:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Counsel for respondents contends for, and has incorporated in his brief and argument before this court, the findings and decision of the district court, wherein that court concludes and decides, after a very exhaustive review of the leading cases bearing upon the construction and validity of liquor laws in general, that the Utah law undoubtedly applies, and its validity is to be upheld in so far as the right to traffic in, acquire, and possess liquors prohibited since the law became effective, but concludes otherwise as to possession when liquors have been acquired and kept for personal use prior to August 1, 1917, as in the case at bar. If we correctly interpret the meaning of the opinion of the very able and learned trial judge, he holds that the act does not undertake to prohibit the use or drinking of intoxicating liquors within the state except as in the act expressly mentioned, and that the state may not, in the lawful exercise of its police powers, confiscate and destroy intoxicating liquors within the state, when acquired for personal use and recognized as property before the act became effective. In support of this doctrine the following cases are cited: Wynehamer v. People, 13 N. Y. 378; State v. Eden, 92 Wash. 1, 158 Pac. 967; same case on rehearing, 159 Pac. 700. We have heretofore pointed out that in our judgment it was the intent of the Legislature, and that the plain provisions of the act abolishes, aside from the exceptions expressly made, all property rights in alcoholic liquors on and after August 1, 1917, no matter where or how acquired, for what use intended, or how possessed. It necessarily follows that the very purpose and intent of the act was to preclude the right to use intoxicating liquor within the state except for the specific purposes in the act expressly mentioned and reserved. If liquor cannot be legally acquired or procured, it may not be legally

While the law is somewhat drastic in some of its provisions—doubtless it was so intended to be—yet in view of the tendency of present day legislative enactments designed to protect the health, safety, morals and promote the general welfare of organized society it is not the province of the courts to disregard the purpose and intent of the Legislature so long as the constitutional rights

of the individual have not been invaded. In Commonwealth v. Campbell, 133 Ky. 50, 117 S. W. 383, 24 L. R. A. (N. S.) 172, 19 Ann. Cas. 159, where it was contended the police power does not extend to the right of deprivation of a citizen to possess intoxicating liquor in his possession for his own use, the Kentucky court took occasion to say:

"It is not within the competency of government to invade the privacy of a citizen's life and to regulate his conduct in matters in which he alone is concerned, or to prohibit him any liberty which will not directly injure society."

As opposed to the view taken by the Kentucky court the Supreme Court of the United States, in the case of Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205, a case involving the constitutionality of the Kansas law, Mr. Justice Harlan said:

"The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the Legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge and thereby give effect to the Constitution. \* \* There is no justification for holding that the state, under the guise merely of police regulations, is here aiming to deprive the citizen of his constitutional rights; for we cannot shut out the view of the fact, within the knowledge of all, that the public health, the public morals, and the public safety may be endangered by the general use of intoxicating drinks; nor the fact, established by statistics accessible to every one, that the idleness, disorder, pauperism, and crime existing in the country are, in some degree at least, traceable to this evil. If, therefore, a state deems the absolute prohibition of the manufacture and sale within her limits of intoxicating liquors for other than medical, scientific, and manufacturing purposes, to be necessary to the peace and security of society, the courts cannot, without usurping legislative functions, override the will of the people as thus expressed by their chosen representatives. They have nothing to do with the mere policy of legislation."

The same court, in the case of Clark Distilling Co. v. Western Maryland R. Co., 242 U. S. 311, 37 Sup. Ct. 180, 61 L. Ed. 326, L. R. A. 1917B, 1218, Ann. Cas. 1917B, 845, involving the constitutionality of both the Webb-Kenyon Act and the prohibition law of the state of West Virginia, in effect held a prohibition of possession for personal use a valid exercise of police powers. In that case the Clark Company brought suit to compel a common carrier to receive a shipment of liquor from one state claimed to be for personal use in another state. Section 34 of the West Virginia statute (Code Supp. 1918, ch. 32A, § 34 [sec. 1305h]) provides:

and promote the general welfare of organized society it is not the province of the courts to disregard the purpose and intent of the Legislature so long as the constitutional rights in this state to possess intoxicating liquors, re-



ceived directly or indirectly from a common, or other carrier in this state. This section shall apply to such liquors intended for personal use, as well as otherwise, and to interstate, as well as intrastate shipments or carriage."

The Webb-Kenyon Act (U. S. Comp. St.

1916, § 8739) provides:

1916, § 8739) provides:

"\* \* \* That the shipment or transportation, in any manner or by any means whatsoever, of any spirituous, \* \* \* or other intoxicating liquor of any kind, from one state, territory, or district of the United States, \* \* intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such state, territory, or district of the United States \* \* in hereby prohibited."

Clearly the Supreme Court of the United States, in upholding the constitutionality of both the West Virginia statute and the Webb-Kenyon Act, gave recognition that a statute forbidding the right to possession of liquor for personal use is constitutional, and not an invasion of the individual rights of the citizen. However, the same court, in the late case of Crane v. Cambell, Sheriff, 245 U. S. 304, 38 Sup. Ct. 98, 62 L. Ed. --. decided December 10, 1917, has put the questions here involved forever at rest. The case involved the validity of the Idaho statute, in many particulars similar to our own. Sections 15 and 22 of the Idaho statute (Laws 1915, c. 11) provide:

"It shall be unlawful for any person, to import, ship, sell, transport, deliver, receive or have in his possession any intoxicating liquors

except as in this act provided."
"It shall be unlawful for any person, firm, company, corporation or agent to have in his or its possession any intoxicating liquors of any kind for any use or purpose except the same shall have been obtained and is so possessed under a permit authorized by this act."

The agreed facts in that case were that one Crane was arrested for having in his possession on the 16th day of May, 1915, after the Idaho statute became effective, a quantity of whisky for his own use and not for the purpose of selling it or giving it away. On habeas corpus proceedings (In re Crane, 27 Idaho, 671, 151 Pac. 1006, L. R. A. 1918A, 942), the Idaho Supreme Court held the statute valid. The constitutionality of the statute was assailed under both the state and federal Constitutions. The Idaho court. after upholding the validity of the law, took occasion, in commenting on the right to possession, to say:

"Still it must be admitted that, if the possession of such liquor 'can by no possibility injure or affect the health, morals, or safety of the public,' the sale is equally harmless; for it only transfers the possession from one person to another. The fact is that the harm consists neither in the possession nor sale, but in the consumption of it."

The Supreme Court of the United States, in passing on the question involved, took occasion to say:

"It must now be regarded as settled that, on account of their well-known noxious qualities and extraordinary evils shown by experience commonly to be consequent upon their use, a

state has power absolutely to prohibit manufacture, gift, purchase, sale, or transportation of the purchase, sale, or transportation of the state has the power above indicated to prohibit, it may adopt such measures as are reasonably appropriate or needful to render exercise of that power effective. Booth v. Illinois, 184 U. S. 425, 22 Sup. Ct. 425, 46 L. Ed. 623, Silz v. Hesterberg, 211 U. S. 31, 29 Sup. Ct. 10, 53 L. Ed. 75, Murphy v. California, 225 U. S. 623, 32 Sup. Ct. 697, 56 L. Ed. 1229, 41 L. R. A. (N. S.) 153, and Rast v. Van Deman & Lewis, 240 U. S. 342, 364, 36 Sup. Ct. 370, 60 L. Ed. 679, L. R. A. 1917A, 421, Ann. Cas. 1917B, 455. And, considering the notorious difficulties always attendant upon efforts to suppress traffic in liquors, we are unable to say that the challenged inhibition of their possession was arbitrary and unreasonable or without proper relation to the legitimate legislative purpose. lation to the legitimate legislative purpose.
We further think it clearly follows from our numerous decisions upholding prohibition legis-lation that the right to hold intoxicating liquors for personal use is not one of those fundamen-tal privileges of a citizen of the United States tal privileges of a citizen of the United States which no state may abridge. A contrary view would be incompatible with the undoubted power to prevent manufacture, gift, sale, purchase or transportation of such articles—the only feasible ways of getting them. An assured right of possession would necessarily imply some adequate method to obtain not subject to destruction at the will of the state."

The tendency of the more recent legislation of the several states with respect to alcoholic liquors is directly against the consumption. It is in the consumption always that the evil lies. A reading of the Utah statute convinces that primarily it was the purpose and intent of the Legislature to prevent the use of liquors within the confines of the state as a beverage, whether in private or moderation. The act itself provides that it shall be deemed an exercise of the police powers for the protection of society, and that all of its provisions shall be liberally construed for the attainment of that purpose. The law in itself does not distinguish as to persons, time. place, or purpose for which liquors may be held or possessed except as in the act expressly mentioned and reserved. Officers and the courts are made chargeable with its observance and enforcement. Upon these its efficacy depends.

[3] We are of the opinion, under the stipulated facts of the parties, that the trial court erred in holding that the liquors involved in this action, having been acquired by respondent Meek prior to August 1, 1917, and kept and held for his personal use, was not confiscable after August 1, 1917. It is therefore ordered that the judgment of the district court dismissing this action and ordering the officers of the law having the custody of the liquors described in the complaint to deliver them to respondent Otto Meek be reversed, and the case be remanded to the district court of Weber county. It is further ordered that the said liquors be, and the same are hereby, forfeited, and that the said district court enter judgment accordingly, and such proceedings be had as shall be in

compliance with the provisions of chapter for 100 cubic feet of water per minute of 2, Laws Utah 1917, § 18.

FRICK, C. J., and McCARTY, THURMAN, and GIDEON, JJ., concur.

SCHWARTZ v. KING et al. (No. 9017.) (Supreme Court of Colorado. May 6, 1918.) 1. Waters and Water Courses = 151-IR-BIGATION-WATER ADJUDICATION DECREE-

ABANDONMENT.

Ten years' failure to use the allotments of water conditional, under a water adjudication decree, upon the irrigation of certain land with reasonable diligence, is not an abandonment of the rights under such decree as to permeable does not start appropriating such water son who does not start appropriating such water until persons entitled thereto start irrigating the land.

APPEAL AND ERROR \$\infty\$1010(1)\to Review-FINDINGS SUPPORTED BY EVIDENCE.

A finding of the trial court will not be disturbed, on appeal, where it is supported by ample evidence.

3. WATERS AND WATER COURSES \$== 135-IR-WATER ALLOT-RIGATION - CONDITIONAL

Whether land was brought under irrigation with reasonable diligence under a conditional water adjudication decree must be determined by the particular circumstances and facts in the particular case, and not by other adjudications tions.

Error to District Court, Garfield County; John T. Shumate, Judge.

Petition of C. A. King and others to have made absolute the conditional parts of the water adjudication decree to which Sheridan N. Schwartz protested. Judgment for petitioners, and protestant brings error.

C. W. Darrow, of Glenwood Springs, for plaintiff in error. A. L. Beardsley, of Glenwood Springs, for defendants in error.

BAILEY, J. This is a review of a judgment on petition of C. A. King and others to have made absolute the conditional parts of a decree rendered in a water adjudication on May 5, 1888. The decree is a part of a general one adjudicating water rights in Water District No. 45. Protest was filed by Sheridan N. Schwartz in the court below, and upon trial the issues were found for the petitioners, with decree and judgment accordingly. The protestant brings the cause here for review on error. In this opinion he will be designated as defendant, and petitioners as plaintiffs.

Plaintiffs are the owners of the Talmadge and Gibson Ditch, taking water from East Divide Creek, in Water District No. 45. Their priorities are numbered 36, dating from August 14, 1885, and calling for 372 cubic feet of water per minute of time; No. 49, on account of the first enlargement of said ditch, dating from April 10, 1886, calling for 315 cubic feet of water per minute of time;

time, being water for approximately 656 acres of land, under the general decree of May 5, 1888.

This general decree was absolute as to only 118 acres, and the balance contingent upon the bringing of the remainder of the land under irrigation with reasonable diligence. Plaintiffs set up that they had, with reasonable diligence, increased the irrigable lands under their ditch to 450 acres, and prayed that this additional amount of water be made absolute, with 300 cubic feet of water per minute of time to priority No. 36, from August 14, 1885, and 240 cubic feet per minute of time to priority No. 49, as of date April 10, 1886.

Defendant is the owner of the Johnson Ditch No. 70A, and of priority No. 114A, calling for 72 cubic feet of water per minute absolutely, and 6 cubic feet conditionally, dated April 14, 1893, the decree for which was entered December 3, 1907, without notice to plaintiffs or others interested. He claims in substance that neither the plaintiffs nor their grantors have brought additional lands under cultivation with reasonable diligence, so far as his priority, No. 114A, is concerned; that by reason of the long delay any relief granted them should be subject to his priority; since he has been making beneficial use of all the water adjudicated to him long prior to the use by plaintiffs of any water for additional land. Upon hearing of testimony the conditional parts of the decree of May 5, 1888, were made absolute, according to the prayer of the petition. subject to prior appropriations, but not subject to that of defendant.

The only question to be determined is whether plaintiffs were reasonably diligent in making beneficial use of their conditional allotments of water. It appears that in 1888 and 1889 the lands for which the water was decreed were incumbered by trust deeds by their owners, for the benefit of an investment company, which later failed and made an assignment; and that the land passed to various trustees, assignees and successors in trust, who were non-residents, and who never were on the land. For the period of approximately ten years no new lands were brought under irrigation by any one. It then passed to others, who made beneficial use of the water upon increased acreage, until, at the time of the filing of the petition, water had been put to beneficial use upon approximately 450 acres.

[1] Whether the lapse of practically ten years, during which time no use was made of the conditional allotments of water, may be considered as such an abandonment as to permit defendant to acquire the water for his use, need not be here considered, for the reason that his use of the water did not beand No. 82, dating from July 9, 1887, calling gin until after plaintiffs or their grantors

properties of the cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

had begun to bring additional lands under cultivation. So far as defendant be concerned, there was no abandonment of any of the rights secured under the decree of May 5, 1888. The doctrine announced in Beaver Brook Co. v. St. Vrain Co., 6 Colo. App. 130, at page 135, 40 Pac. 1066, at page 1068, is applicable to the facts of this case, which is there thus stated:

"That the interval from 1882 until 1893 was presumptively too long must be conceded, were the reasons and circumstances unexplained \* \* \* but how can that inure to the benefit of appellants? If, by neglect to apply the water within a proper time, the right to apply was forfeited, the water reverted, and any one could proceed to appropriate and apply it; but such right could only attach while the right of the former claimant was in abeyance by reason of his negligence, and the second party must have availed himself of the right before the re-entry and prosecution of the enterprise by the first party. Unless, during the interim, when by failure to prosecute the enterprise the water right may be regarded as having reverted, some party intervenes and makes a valid and legal appropriation of the water, the first party may resume, and if such resumption occurs before intervening rights attach, the right to appropriate is lost."

[2] It is claimed on the part of defendant that plaintiffs did not begin to apply the water until after he had commenced to use it. This question being disputed, the conclusion reached by the trial court against the defendant will not be disturbed, there being ample evidence to support it.

[3] As to whether, after the land was again put into cultivation, plaintiffs or their grantors used reasonable diligence in applying the conditional allotments of water, it may be said that what constitutes reasonable diligence varies in each particular case, with the attendant facts and circumstances. Here, because the land was practically deserted while in the hands of the assignees and trustees, the doctrine announced in Weldon Co. v. Farmers' Co., 51 Colo. 545, 119 Pac. 1056, should be applied. In that opinion it is said (51 Colo. at page 549, 119 Pac. at page 1057):

"It is impracticable, if not impossible, for a settler to seed and irrigate 160 acres of sod breaking a year. Settlers on the public domain are usually poor men, and cannot do all this at once, even if it were possible. It is a continuing process, requiring a number of years.

\* \* The test is not necessarily the number of acres irrigated each year. If these tracts were farmed, and all the water necessary

\* \* was beneficially used with reasonable diligence in the improvement of the land, it is sufficient."

And also to the same effect from Conley v. Dyer, 43 Colo. 22, at page 29, 95 Pac. at page 307:

"What shall constitute due diligence and what is a reasonable time depend, of course, upon many circumstances; and one adjudication cannot be taken as a test by which to determine these matters in another trial, for the reason that the circumstances are never precisely the same in both." The question of due diligence, as well as questions upon other material and essential facts, were sharply in dispute. All were resolved in favor of the petitioners. We find nothing in the record which warrants a reversal of the findings of the court upon the facts involved. The judgment should therefore be affirmed, and it is so ordered.

Judgment affirmed.

HILL, C. J., and ALLEN, J., concur.

AMERICAN SMELTING & REFINING CO. v. HICKS et al. (No. 8838.)

(Supreme Court of Colorado. May 6, 1918.)

1. TROVER AND CONVERSION € 30 — STOLEN
PROPERTY—JOINT TORT FEASORS—PARTIES.

Where a smelting company is sued for value of stolen ore converted by the company to its own use, it is unnecessary to make the persons who stole the ore and sold and delivered it to the company joint defendants.

2. Trover and Conversion \$\sim 23\to Defenses \\
-Stolen Property.

Where stolen ore is delivered to a smelting company and converted by company to its own use, the fact that the persons who stole and sold and delivered the ore to the company may sue it for the proceeds is no defense in an action against the company for conversion.

8. APPEAL AND ERROR \$\infty\$=1037 — HARMLESS ERROR — DEFECTIVE SERVICE AS TO JOINT TOBT-FEASORS.

Where an action in conversion is brought against persons stealing ore, and against smelting company using it, the liability of the defendants is joint and several, and a judgment against one without prejudicial error, under Code Civ. Proc. § 84, providing errors not affecting substantial rights shall be disregarded, is not affected by defective service upon other.

4. TROVER AND CONVERSION \$\infty\$30 - STOLEN GOODS-NECESSARY PARTIES.

Where a person in possession of ore through contractual relations with the owner wrongfully sells such ore, the owner cannot sue buyer for conversion of the ore without making seller a joint defendant.

Error to District Court, Summit County; Charles Cavender, Judge.

Action by Frederick C. Hicks and another against the American Smelting & Refining Company and others. Judgment for plaintiffs, and defendant named brings error. Affirmed.

Henry A. Dubbs and Henry C. Vidal, both of Denver, for plaintiff in error. Hogan & Bonner, of Leadville, for defendants in error.

HILL, C. J. This action was instituted by the defendants in error, hereafter called the plaintiffs, against S. B. and M. A. Wright and the American Smelting & Refining Company. The complaint alleges that the defendants Wrights by means of underground workings, etc., entered upon plaintiffs' property, and mined and carried away certain ore; that it was shipped to the defendant the American Smelting & Refining Company, and that the proceeds of such ore were then

tiffs had served the company with notice that the ore was the property of plaintiffs; that defendants Wrights are claiming the proceeds of said ore; and that the defendant Refining Company threatens to make settlement with the Wrights for it, etc., unless restrained, etc. The prayer is for judgment against Wrights for \$100,000 damages, and that they be restrained from further trespass on plaintiffs' property; that the defendant the American Smelting & Refining Company be restrained from making settlement with Wrights for the ore taken; that it be declared to hold the proceeds of said ore as trustee for the use of plaintiffs, and to pay such proceeds to them, etc. That portion of the findings and judgment necessary to review is against the American Smelting & Refining Company, wherein it is held that ore of the value of \$449.45 was, by the defendants Wrights, unlawfully taken from the property of plaintiffs and shipped to the Refining Company, and at the time of the commencement of this action was in its possession, had been converted to its use, and that the plaintiffs are entitled to the proceeds in the sum of \$449.45.

The Refining Company brings the case here for review, and contends that the court erred in its findings: (a) That service of summons was legally made upon the Wrights by publication; (b) that the proceeding was in rem; (c) that it had jurisdiction over the Refining Company as to the \$449.45 in its hands, and in entering the default of the Wrights, and in finding that these ores shipped to the Refining Company amounting to \$449.45 were the property of the plaintiffs, and that they are entitled to said moneys; and (d) in finding that plaintiffs were entitled to judgment against the Wrights for this property in the hands of the Refining Company; and (e) in not holding that there was no service of summons upon the Wrights; and (f) that they were indispensable parties, and that the court was without jurisdiction to enter judgment against the Refining Company for the reason that no legal service was made upon the Wrights, etc.

The plaintiffs maintain that the Wrights entered a general appearance which gave the court jurisdiction over them; that if this position is not sound, that they were regularly served by publication; that the action is in rem, and for this reason that the court had jurisdiction to proceed in so far as the ore and the proceeds derived therefrom by the Refining Company are concerned; and that the Wrights were not indispensable parties as between the plaintiffs and the Refining Company to this action for possession of the ores belonging to the plaintiffs, or their value, when it is alleged and was established by proof that they were wrongfully and unlawfully taken from plaintiffs' mine by the Wrights, and wrongfully and unlawfully delivered to the Refining Company. If the lat- plaintiffs, in order to have their claim ad-

in the hands of said company; that plainter of these contentions is sound, the others tiffs had served the company with notice need not be considered.

[1, 2] As between the plaintiffs and the defendant Refining Company, the pleadings allege and the proofs establish that certain persons (in this case the Wrights) wrongfully and unlawfully took from plaintiffs' mine certain ores, and delivered them to the defendant Refining Company, who converted them to its own use; that it has paid no one for them: and that their value is \$449.-45. In such circumstances we cannot agree that the Wrights are indispensable parties to the action between plaintiffs and the defendant Refining Company in order for plaintiffs to recover the value of their ores. Tabor v. Bank of Leadville, 35 Colo. 1, 83 Pac. 1060, involved the validity of a garnishee summons issued by purported authority of a void judgment; it has no application to a case of this kind. The judgment here for review is the one against the Refining Company for its conversion of the plaintiffs' property. The fact that others assisted in the commission of the tort is no defense to its liability. The fact that the Wrights lay claim to the proceeds is no defense to the Refining Company for the conversion of plaintiffs' property. The contention that without the presence of the Wrights as parties, there can be no inquiry concerning plaintiffs' rights against the defendant Refining Company for the conversion of their property, is not well taken. We might as well say that A., the owner of a cow which had been stolen by B., who sells it to C., who converts it into beef, can have no adjudication of his claim against C. for its conversion without finding and making B., the thief, a party to the action. To bring it nearer to this case, suppose B. sells a stolen horse to C. to be paid for later, and A., the owner, brings suit against C. for possession or its value. C. admits having received the horse from B., and that he agreed to pay B., the thief, for it, but says to A. that notwithstanding you allege and have proven that the horse was stolen, that it is yours, and that you are entitled to it or its value, nevertheless the thief, B., from somewhere out of this state, claims this money; hence I cannot be made to pay you until you get the thief into court and have his rights determined against me pertaining to my liability to him for selling the horse to me. This, in substance, is the position of the defendant Refining Company. It admits the receipt of the ore, its conversion by it, but says that the Wrights are in California, and make claim there against it for these proceeds, that as it does business in California, they may sue it there, and unless the Wrights' claim against them is determined in this litigation, it may be compelled to pay them for this ore, although it is now compelled to pay plaintiffs for it; for this reason, as the Wrights cannot be reached here, that the

judicated against the Refining Company, must go where the Wrights are and make them parties to the action. If such were the rule, it would, in many cases, work a denial of justice. All persons, in some degree, must be held responsible for the result of their actions in dealing with others. Think of the result that might follow should the rule contended for be applied to transactions in the buying and selling of live stock at the large centers of trade.

The act complained of against the defendant Refining Company is ex delicto. In such case, the liability for conversion is joint and several. Carper v. Risdon, 19 Colo. App. 530, 76 Pac. 744; D. O. & C. Co. v. Gast, 54 Colo. 17, 129 Pac. 233. In the former of these cases, 19 Colo. App. at page 536, 129 Pac. at page 746. it is said:

"The point is made that, after the court had ordered the dismissal as to Lindemann, it could not lawfully render judgment against Carper, because the complaint charged a joint conversion. For a joint trespass, the liability of the trespassers is joint and several. This action might have been brought in the first instance against Carper alone; or, having been brought against both, there might, at any time before judgment, have been a dismissal by the plaintiff as to Lindemann, leaving the action to proceed against the other defendant; and, on principle, we confess ourselves unable to see why the court might not do what could have been done by the plaintiff, or why it is not competent to either court or jury, in an action for a trespass, to find one defendant guilty and another not guilty."

We think this declaration somewhat applicable to the facts here.

[3] Section 84, Revised Code 1908, provides that:

"The court shall in every stage of an action disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect."

As heretofore stated, the complaint states a cause of action in favor of the plaintiffs against the Refining Company; there is no contention that it was not tried, or that the testimony did not sustain it. A judgment was rendered thereon. In such circumstances, under the provision of the Code last cited, it should not be reversed, unless it works prejudicial error against the substantial rights of the Refining Company; and inasmuch as the Wrights were not indispensable parties to this contention, all portions of the case concerning them can be eliminated without doing an injustice to the Refining Company pertaining to the issue presented against them and tried. Hence it is unnecessary to determine whether there was service of summons upon the Wrights, whether the court had jurisdiction over them, or whether any judgment rendered against them is valid or otherwise. The fact that they threaten the Refining Company with suit in another jurisdiction to recover the value of this ore is no de-

fense to its paying the plaintiffs for it if the allegations of plaintiffs' complaint are true; if they are, that fact would be a defense in favor of the Refining Company against the Wrights in any jurisdiction. The contention of the Refining Company that this will not relieve it from being harassed with litigation concerning it may be true. One answer to this is that the Refining Company, and not the plaintiffs, brought about the condition whereby it may be liable to such an attack, by purchasing something from the Wrights which they did not own, and which in fact belonged to the plaintiffs, and which they did not give the Wrights or the Refining Company permission to take.

[4] Had the pleadings disclosed that the action involved contractual relation between the plaintiffs and the Wrights concerning this property, it might present a different question, in which case Rumsey v. New York Life Insurance Co., 59 Colo. 71, 147 Pac. 337, might be applicable. In that case the record discloses that Rumsey, then of Honolulu, secured from the insurance company a \$5,000 policy upon his life, wherein Benson, Smith & Co., also of Honolulu, were designated as the beneficiary; that after Rumsey's death, his wife brought suit in Colorado to be substituted as the beneficiary and to recover the value of the policy seeking to invoke the equitable rule of substitution. She admitted that she had never been designated in the manner provided in the policy as the beneficiary, and that such an indorsement had never been made on the policy, or on the books of the company, and also that at the time of her husband's death Benson, Smith' & Co. were in possession of the policy, were the designated beneficiaries in it, and that the records of the company thus showed. She contended that upon account of certain acts of the insurance company, and also certain alleged wrongful acts of Benson, Smith & Co. in refusing to surrender the policy, etc., that under the equitable rule of substitution she should be treated as having been substituted during the life of her husband as the beneficiary instead of Benson, Smith & Co., and was entitled to recover the amount called for in the policy as such substituted beneficiary without making Benson, Smith & Co. a party to the suit, or securing from them the surrender of the policy. We held, under such circumstances, that their equities and rights as a beneficiary could not be determined under the equitable rule of substitution in an action to which they were not a party. Such an issue is foreign to the case under consideration.

The judgment is affirmed.
Affirmed.

GARRIGUES and SCOTT, JJ., concur.

172 P.--67

CARLSON v. AKEYSON. (No. 9373.) (Supreme Court of Colorado. May 6, 1918.)

1. APPEAL AND ERBOR \$==1008(3)-REVIEW-FINDINGS.

Where the evidence in which findings are based consists of a transcript of the evidence taken in a former trial of the same action, the court on appeal, in determining if judgment is sustained by the evidence, will review and weigh such evidence, uninfluenced by such findings.

2. MOBTGAGES \$\sim 86(3) \to Misrepresentation SUFFICIENCY OF EVIDENCE.

In an action to cancel a note and deed of trust, evidence held sufficient to show that plaintiff was induced to execute note and deed of trust by reason of fraudulent misrepresentation, and in fact received no consideration therefor.

3. Cancellation of Instruments \$=37(6) PLEADING—COMPLAINT.

In an action to cancel a note and deed of trust on the ground of misrepresentation, a complaint is not defective for failure to allege reliance on the false statement, where it alleges that plaintiff relied on the representa-tions, and thereupon and at defendant's request executed the note and deed of trust.

4. CANCELLATION OF INSTRUMENTS \$\sime 37(6)

PLEADING—COMPLAINT.

A complaint for cancellation alleging misrepresentation is not defective for failure to allege that the representations were material, where it sufficiently appears from the com-plaint as a whole that the representation re-lated to a material fact.

5. CANCELLATION OF INSTRUMENTS \$== 24(2)-

RESTORATION OF CONSIDERATION.

Plaintiff, suing for cancellation of note, has not lost her right to such relief by failure to tender defendants, before commencement of action, the shares of stock she received in consideration for her note when undisputed evi-dence shows stock to be worthless, and where defendants retused to accept such stock when tendered during the trial.

6. MORTGAGES \$= 78-RELIANCE ON REPRE-

SENTATION—DUTY TO INVESTIGATE.
Where a woman inexperienced in business is induced to give her note and execute a deed of trust on her land in consideration of shares of stock in a land development company upon the representation that the company owned certain land, she was justified in believing such statement, and was not bound to investigate

Error to District Court, Alamosa County; A. Watson McHendrie, Judge.

Action by Mary E. Akeyson against C. H. Price, A. W. Carlson, and others. Judgment for plaintiff, and defendant Carlson brings error, and applies for supersedeas. sedeas denied, and judgment affirmed.

Fred D. Stanley and W. W. Platt, both of Alamosa, for plaintiff in error. James D. Pilcher and Albert L. Moses, both of Alamosa, for defendant in error.

ALLEN, J. This is a suit which was brought by Mary E. Akeyson against C. H. Price, A. W. Carlson, and the public trustees of Alamosa and Costilla counties, for the purpose of securing the cancellation of a promissory note and deed of trust given by the plaintiff to the defendant Carlson. The money whatever to the plaintiff, in any man-

trial court rendered a judgment in favor of plaintiff. The defendant Carlson brings the case here for review, and asks that the writ of error herein be made to operate as a supersedeas.

[1] Practically all of the evidence received at the trial consisted of a typewritten transcript of the testimony which had been given by the witnesses at a former trial of this case. Under this situation, we are not bound by the findings of the trial court in considering the main contention of the plaintiff in error, which is, that the judgment is contrary to the law and the evidence. Hagerman v. Bates, 30 Colo. 89, 94, 69 Pac. 526.

[2] Upon a review of the evidence, and endeavoring to remain uninfluenced by the findings of the trial court, we are of the opinion that a preponderance of the evidence is in favor of the plaintiff, and that the judgment of the trial court is right.

The testimony discloses that some time prior to October, 1912, both the defendant Carlson and the plaintiff became interested in the Rio Grande Development Company, as a result of the efforts and representations of the defendant Price. In a pamphlet which Price gave to the plaintiff it was represented that:

"The total number of acres owned by the Rio Grande Development Company is 80,000, and 20,000 acres of this is irrigable land that can be watered at a very small cost. \* \* \* There is also mineral lands of great value included in the holdings of this company. We have some valuable coal deposits in the mountains at the east of this land. The veins of coal are anywhere from 14 inches up to 6 feet in width."

The testimony warrants the inference that Carlson and Price, shortly prior to the date above mentioned, desired to obtain certain stock in the company which was held by one Gordon, at Spokane, Wash. Price was without means, and Carlson was not willing to risk his money in the enterprise. The defendant Price induced the plaintiff, a woman without much business experience, to contemplate aiding him in securing the Gordon stock by giving a trust deed upon her land. This fact evidently became known to Carlson, through Price. Thereafter, and on or about October 31, 1912, Carlson came to the home of the plaintiff, and, according to the testimony of the plaintiff, assured her that the company had good title to the real estate which it assumed to own. Relying upon that assurance, as well as upon the representations theretofore made by Price, the plaintiff delivered to the defendant Carlson the note and trust deed involved in this suit. It is claimed by the plaintiff in error, the defendant Carlson, that in consideration of the note and trust deed, Carlson advanced \$3,000 to the plaintiff. The circumstances disclosed by the evidence, however, lead us to the conclusion that Carlson advanced no

€==For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

ant Price, in the manner hereinafter mentioned. The money was deposited by Carlson himself, in a local bank. The plaintiff had nothing whatever to do with the disposition or control of this money, and never received any of it. The bank itself regarded the deposit as a part of a transaction called by its cashier, "the Price-Gordon and Carlson deal." Only \$1.000 of this deposit was used in procuring the Gordon stock. The remaining \$2,000 was credited to the wife of the defendant Price, Mary E. Price, who does not appear to have been in any manner concerned with the transaction. Mrs. Akeyson, the plaintiff, received 10,000 shares of stock in the company, and the defendant Carlson received 15,000 shares, as a result of the "Price-Gordon and Carlson The stock was worthless, and the plaintiff never received anything of value whatever for her note and deed of trust. The evidence warrants the conclusion that the company never owned the land which it claimed to possess nor any part of it. If the defendant Carlson did not actually know this fact at the time he obtained the note and trust deed, he nevertheless made his representations to the plaintiff in reckless disregard of their truth or falsity.

Notwithstanding the testimony given by Carlson in his own behalf, we are of the opinion that the evidence lends support to the theory of counsel for plaintiff, to the effect that Carlson advanced \$3,000 for the benefit of the enterprise or the company, hoping to profit greatly if the venture proved successful, and if a failure, intending to be fully protected and reimbursed by reason of the note and trust deed obtained from the

plaintiff.

[3] It is also contended by the plaintiff in error that the complaint fails to state a cause of action. The first ground for this contention is that:

"It is nowhere stated in the complaint that when she [the plaintiff] signed the trust deed and note sought to be canceled, the plaintiff acted in reliance upon any representations made to her by Price or Carlson."

Such allegations, however, need not always be made in express terms, and it is not necessary to allege expressly that plaintiff would not have taken the action which he or she did but for the false representations. 20 Cyc. 102. The complaint alleges that the plaintiff relied on the representations of the defendants, and that thereupon and at the request of the defendants the plaintiff made, executed, and delivered the note and trust deed in question, and by other allegations in the complaint it is clearly evident that the complaint alleges facts showing that plaintiff acted upon the alleged false representations to her damage. The complaint is good

ner, but advanced the \$3,000 to the defend-, when tested by the objection above menbaroit

> [4] The second ground taken for insisting that the complaint fails to state a cause of action is that:

> "It is not stated anywhere in the complaint that the representations set forth therein were material representations."

It is not necessary that there be an express averment to this effect. It is sufficient if it appear from the complaint, taken as a whole, that the representations related to a material fact, and not to some mere col-lateral matter. We find the complaint not objectionable on the ground last referred to. In other respects we find the complaint good under the rules stated in Kilpatrick v. Miller, 55 Colo. 419, 135 Pac, 780, to which case the plaintiff in error calls our attention.

[5] It is also urged that the complaint is defective because it-

"shows that Akeyson [the plaintiff] has received a valuable consideration from Price [one of the defendants] for her money, and no tender thereof prior to the commencement of this action is alleged, and no tender thereof is made in the complaint."

The "valuable consideration" referred to consists of certain shares of stock in the Rio Grande Development Company. It appears from the complaint, and also from the evidence, that all the parties regard this stock as worthless. The record shows, furthermore, that at the trial the plaintiff tendered the stock in court, and thereupon the defendant Carlson declined the tender on the ground that he never owned and never had any interest in the stock, and the defendant Price refused the tender "for the reason that he did not get the mortgage or note mentioned in the complaint, the return of which is demanded." The decree provides that the stock be returned to the defendants. circumstances above mentioned sufficiently show that a tender by plaintiff at any time would have been futile, and the stock declined by both above-named defendants. The plaintiff in error was not, in the least degree, prejudiced by the failure of the plaintiff to make proper allegations with reference to tender, and is not entitled to a reversal of the judgment on any such ground.

[6] Counsel for plaintiff in error also assert that:

"The complaint fails to state a cause of action in that it fails to show that plaintiff was in any manner prevented from investigating the truth of the representations made to her.

Under the facts existing in this case, we do not think that there is merit in this contention. See Zang v. Adams, 23 Colo. 408, 411, 48 Pac. 509, 58 Am. St. Rep. 249.

The application for a supersedeas is denied, and the judgment affirmed.

Affirmed.

HILL, C. J., and BAILEY, J., concur.

DENVER & R. G. R. CO. v. TEUFEL (No. 8928.)

May 6, 1918.) (Supreme Court of Colorado. 1. CARRIERS \$\infty 158(1)\to Loss of Baggage-LIABILITY.

In view of Sess. Laws 1910, p. 49, § 8, limiting carriers' liability to value stated in the contract, shipper of trunk, under bill of lading with released valuation, could not recover actual value of the contents of the trunk, but only the stipulated liability.

2. Carriers 5-150-Negligence-Contract -VALIDITY.

A common carrier cannot exempt itself from liability for negligence of itself or its servants. 3. WAREHOUSEMEN €==8 - AUTHORITY AGENT.

A warehouseman, authorized to ship goods in the owner's name, has the authority to make a statement as to the value of the goods.

4. Carriers == 158(1)—Loss of Goods-Lia-

2. CARRIERS \$\infty\$=158(1)—Loss of Goods—Liability—Statute—Construction.

Sess. Laws 1910, p. 49, \(\frac{5}{6}\), providing that nothing in this section shall deprive any holder of a bill of lading of any remedy or right of action under existing law, did not preserve common-law right of recovery of actual value of goods lost, where bill of lading contained clause limiting liability.

Error to Delta County Court; William W. Dingman, Judge.

Action by F. W. Teufel against the Denver & Rio Grande Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

E. N. Clark and G. A. Luxford, both of John R. Denver, for plaintiff in error. Charlesworth and Mortimer Stone, both of Delta, for defendant in error.

SCOTT, J. This action is by the defendant in error to recover from plaintiff in error the sum of \$203 for goods delivered to the carrier at Ft. Collins, Colo., for shipment to Delta, Colo., and lost through the negligence of the carrier. The case was tried to the court without a jury upon the following agreed statement of fact:

"(1) The defendant admits that a trunk belonging to plaintiff and described in bill of lading as set forth in defendant's answer herein was delivered to defendant company to be carried to Delta, Colo.; that at the time defendant received said trunk it did not know its constant as the said trunk it did not know its con-

tents or the value thereof.
"(2) The defendant admits that when the said trunk arrived at Delta, Colo., the point of its destination, the trunk was empty and the defendant was therefore unable to deliver to the consignee, certain goods, personal effects and chattels, which the plaintiff claimed to have placed in said trunk before delivering it for cerviage to the defendant; the defendant admits carriage to the defendant; the defendant admits that it has not paid anything to the plaintiff

that it has not paid anything to the plaintiff by way of settlement.

"(3) The defendant admits that plaintiff was and is the owner of the goods, personal effects, and chattels described in plaintiff's complaint.

"(4) The plaintiff admits said trunk containing the goods, personal effects, and chattels claimed by plaintiff was left by him, the plaintiff, in storage at Ft. Collins, in the state of Colorado, and that he, the plaintiff, instructed one McMillin, proprietor of the storage house where said trunk was kept, to consign the same of lading, where such valuation is stated.

to the plaintiff, at Delta, Colo., and that said trunk and contents weighed less than 250 pounds,

pounds.

"(5) The plaintiff admits that the aforesaid McMillin did consign said trunk containing said goods to Delta, Colo., via the Colorado & Southern Railway Company, a common carrier, and to Denver, Colo., and thence to Delta, Colo., via the defendant's railroad.

"(6) The plaintiff admits that the aforesaid McMillin did sign and execute a released valuation clause contained in the bill of lading, marked 'Exhibit A,' and described in the further and separate answer of the defendant filed herein, and accepted the same before shipment.

mer and separate answer of the defendant filed herein, and accepted the same before shipment. "(7) The plaintiff admits that a higher rate of transportation, as provided by the published tariff then on file would have been required to have been paid by him for the transportation of said trunk and contents, if the defendant had, or its agents had, known the alleged value of the contents, or if the aforesaid McMillin had not signed and executed the said released value not signed and executed the said released valuation clause at \$10 per hundredweight, as is alleged in the further and separate answer of defendant filed herein.

"(8) The defendant admits that the defendant

'(8) The defendant admits that the defendant company has made an offer to confess judgment for the sum of \$25 and costs to date.

"It is further stipulated that plaintiff may

"It is further stipulated that plaintiff may introduce testimony regarding the value of said property claimed to have been lost, and to whether or not it was placed in said trunk before shipment. It is further agreed between the parties that the bill of lading filed by the defendant herein may be introduced as evidence, and it is agreed that the court may take judical notice that the defendant has filed its tariff rates with the proper authorities, and that the rates with the proper authorities, and that the same constitutes notice to all parties shipping.

The court rendered judgment against the carrier for the full amount of the claim, \$203.

[1] It is clear that under the common law and under the decisions of this court a contract such as the one in question was not valid either as against the negligence of the company or the value of the shipment, and that the actual value must control, and but for the act of 1910 (section 8, c. 5, Session Laws 1910), the judgment should be affirmed. Union Pacific Co. v. Stupeck, 50 Colo. 151, 114 Pac, 646,

But since that cause of action arose, the Legislature enacted the statute in question which is quite identical in substance with the Carmack Amendment (Act June 29, 1906, c. 3591, § 7, pars. 11, 12, 34 Stat. 595 [U. S. Comp. St. 1916, §§ 8604a, 8604aa]) to the Interstate Commerce Law (Act Feb. 4, 1887, c. 104, § 20, 24 Stat. 386) upon that subject. The provision of the Colorado statute is as follows:

"Every common carrier receiving property for transportation between points within this state shall issue a receipt, or a bill of lading therefor, and shall be liable to the lawful holder thereof for all loss, damage, or injury to such property caused by it or by any common carrier to which such property may be delivered, or

holder of such receipt, or bill of lading, of any remedy or right of action which he has under

remedy or right of action which he has under existing law.

"The common carrier issuing such receipt, or bill of lading shall be entitled to recover from the common carrier on whose line the loss, damage or injury shall have been sustained, the amount of such loss, damage, or injury, as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment or transcript thereof."

The Supreme Court of the United States has uniformly held this limitation in the federal statute to be valid, and has limited the amount of recovery in such cases to the value stated in the bill of lading. Adams Express Co. v. Croninger, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257; C., B. & Q. R. R. Co. v. Miller, 226 U. S. 513, 33 Sup. Ct. 155, 57 L. Ed. 323; Missouri, K. & T. Ry. Co. v. Harriman, 227 U. S. 657, 33 Sup. Ct. 397, 57 L. Ed. 690; Boston & Maine Ry. Co. v. Hooker, 233 U. S. 97, 34 Sup. Ct. 526, 58 L. Ed. 868, L. R. A. 1915B, 450, Ann. Cas. 1915D, 593; Pierce Co. v. Wells Fargo & Co., 236 U. S. 278, 35 Sup. Ct. 351, 59 L. Ed. 576.

[2] That a common carrier cannot exempt itself from liability for its own negligence or that of its servants is so generally held as to become elementary. Neither does the Carmack Amendment nor the Colorado statute attempt to disturb this principle. The Colorado statute, if anything, is more explicit in its terms, confining recovery to the value fixed in the bill of lading than is the federal law, and provides:

"No contract, receipt, rule or regulation shall exempt such common carrier from liability in this section imposed, but the carrier shall not be responsible for any greater sum than the value as fixed in the contract, receipt or bill of lading, where such valuation is stated."

The language of this provision is clear and unambiguous, and is plainly within the rule of the cases cited.

It is said in this case that there was no knowledge, either upon the part of the plaintiff's agent, or the agent of the company as to actual value, and therefore the agreement was arbitrary and for such reason may be avoided. But in the Express Company Case, supra, it was held:

"That no inquiry was made as to the actual value is not vital to the fairness of the agreement in this case. The receipt which was accepted showed that the charge made was based upon a valuation of \$50 unless a greater value should be stated therein. The knowledge of the shipper that the rate was based upon the value is to be presumed from the terms of the bill of lading and of the published schedules filed with the commission."

In the case of an interstate shipment, arising in this state, it was held by this court that the contract was controlled by the act of Congress, and the construction of that act by the federal Supreme Court was approved. Appel Co. v. Platt, 55 Colo. 45, 132 Pac. 71. In that case the recovery was lim-

"But nothing in this section shall deprive any itted to the value of the shipment as stated in the receipt, or bill of lading. We must construe a like statute of the state to be valid and binding on the parties, and hold in this case that the amount of recovery is fixed by the agreement in the bill of lading.

> [3] It is contended that the warehouseman who delivered the goods to the carrier was without authority to bind the plaintiff as to value by the acceptance of the receipt. But the authority of this agent to make the shipment is conceded. Indeed it is alleged in the complaint that the plaintiff delivered the goods to the carrier, and in the agreed statement of fact it is admitted that McMillin. the agent, delivered the goods under authority of plaintiff. If the agent had authority to make the shipment, it follows that he had authority to make the statement as to value.

> [4] The Colorado act contains the follow-

ing provision:

"But nothing in this section shall deprive any holder of such receipt, or bill of lading, of any remedy or right of action which he has under existing law.

It is contended by counsel that this discloses that it was thus not the intention of the Legislature to deprive the shipper of his then existing common-law remedy against the carrier. But the provision is in the precise wording of a like provision of the federal statute, and has been construed by the Supreme Court of the United States, contrary to the contention of defendant in error.

It was said of this clause in Adams Express Co. v. Croninger, supra, that:

"What this court said of the twenty-second "What this court said of the twenty-second section of this act of 1906 in the case of Texas & P. R. Co. v. Abilene Cotton Mills, 204 U. S. 426 [51 L. Ed. 553, 27 Sup. Ct. 350, 9 Ann. Cas. 1075] is applicable to this contention. It was claimed that that section continued in force all rights and remedies under the common law or other statutes. But this the common law or other statutes. But this court said of that contention what must be said court said of that contention what must be said of the proviso in the twentieth section, that it was evidently only intended to continue in existence such other rights or remedies for the redress of some specific wrong or injury, whether given by the Interstate Commerce Act, or by state statute, or common law, not inconsistent with the rules and regulations prescribed by the provisions of this act. Again, it was said of the same clause, in the same case, that it could 'Not in reason be construed as continuing in a shipper a common-law right the existence of which would be inconsistent with the existence of which would be inconsistent with the provisions of the act. In other words, the act cannot be said to destroy itself."

The judgment is reversed.

HILL, C. J., and GARRIGUES, J., concur.

LYNCH v. UNION PAC. R. CO. (No. 8909.) (Supreme Court of Colorado. May 6, 1918.) .

1. CARBIERS = 134—INJURY TO GOODS—DE-LIVERY BY CARRIER—EVIDENCE.

In an action against a railroad for damages for the freezing of a part of a carload of vegetables, evidence held sufficient to show that vege-

2. CARRIERS \$\infty 114\to Loss of Goods\to Delivery by Carrier\to Liability after Delivery by C ERY

Where railway delivers a carload of vege-tables to consignee, who accepts same and starts removing vegetables from the car, the railway's responsibility for the safety of the vegetables ceases; and, where vegetables remaining in car freeze, the railway is not liable for damages sustained.

3. CARRIERS 6=140 - LIABILITY AS WARE-HOUSEMAN.

Where a railway has completed transporta-tion of a carload of vegetables and is awaiting delivery thereof, its liability as carrier terminates, and it becomes and will remain until de-livery a bailee liable only for want of ordinary care.

4. Carriers &== 146 - Liability as Ware-HOUSEMAN-PRESUMPTION.

Where a railway is in possession of a carload of vegetables as bailee, the freezing of such vegetables is prima facie, but not conclusive. evidence of its negligence, and can be rebutted by evidence that consignee had access to car and was removing vegetables at time of freezing.

Error to District Court, City and County of Denver: George W. Allen, Judge.

Action by T. F. Lynch, doing business under the firm name of T. F. Lynch & Co., against the Union Pacific Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Edwin H. Park, of Denver, for plaintiff in error. Hughes & Dorsey, John Q. Dier, and Robert L. Stearns, all of Denver, for defendant in error.

HILL, C. J. The plaintiff in error seeks to recover damages for the destruction of a part of a carload of vegetables alleged to have been frozen while in a car on the tracks of the defendant in error in Denver. It claims, while the contents of this car were still in the possession of the defendant, that it so negligently cared for the same by removing without notice to the plaintiff the heating apparatus which the defendant had placed in said car upon its arrival in Denver to prevent the freezing of said vegetables, etc., and that upon account of such negligence they were frozen, etc. The defendant denied any negligence, and, among other defenses, pleaded delivery to plaintiff of the car and its contents prior to the time of the freezing complained of, also that it had exercised ordinary care in its custody of the contents of the car up to the time the plaintiff concedes it received it. Trial was to the court, which, upon conflicting testimony, found the issues in favor of the defendant.

[1, 2] The plaintiff admits that the defendant's liability in the way of an insurer as a common carrier had ceased, but contends that at the time the damage occurred it was a bailee for hire, and cites numerous authorities concerning the duties and liability

tables had been delivered to plaintiff before time; of a common carrier as a warehouseman, as a bailee for hire and as a gratuitous bailee. The issues were found generally in favor of the defendant. There is testimony to sustain its contention that this car, or its contents rather, was delivered to the plaintiff before the damage occurred to the vegetables; that it had accepted the delivery, had assumed the responsibility for its care, and also that before this freeze it had removed a large amount of the vegetables from the car to its place of business, etc. It admits that it had paid the freight and unloaded a part of the car before the remainder was frozen. If the court's finding in defendant's favor was based on the strength of its testimony that delivery had been made, which is sufficient to sustain this conclusion, then the responsibility of the defendant for the safety of the goods had ceased prior to the time the damage occurred, and the conclusion reached was correct.

> [3, 4] In 2 Hutchison on Carriers (3d Ed.) \$ 714, the rule is laid down that, after the carrier's liability as a carrier has ceased, which is conceded here, and it becomes a hired bailee, it is bound to take ordinary care of the goods, and, if it suffers them to be damaged or lost for want of such ordinary care, it shall be liable; that when it has once become the bailee of the goods, its liability in that character will continue as long as the goods remain in its custody. If the court was of opinion that there had been no delivery of the vegetables which were in the car at the time frozen, and that at that time the defendant was keeping them in its car as a bailee for hire, upon account of its charge for demurrage, then the foregoing rule is applicable; but, when thus considered, we find sufficient testimony to sustain a finding that the defendant, under the circumstances disclosed, exercised ordinary care in its custody of that portion of the vegetables frozen until delivery. This was made an issue. The fact that they had frozen while in the car is not conclusive evidence of negligence upon the part of the defendant, especially when it was shown that the plaintiff had access to the car and was daily removing from it a portion of the shipment, and thus continued for a period of seven days. As bailee, the defendant was not an insurer of the This showing, goods against freezing. though prima facie evidence of negligence (Nutt v. Davison, 54 Colo. 586, 131 Pac. 390. 44 L. R. A. [N. S.] 1170), created as against defendant's evidence a conflict in the testimony which, if the case was disposed of on this issue, the court decided in favor of the defendant. There being testimony upon which such a finding can be sustained, the judgment will be affirmed.

Affirmed.

WHITE and TELLER, JJ., concur.



DENVER TRAMWAY CO. v. ORBACH. (No. 8914.)

(Supreme Court of Colorado. May 6, 1918.)

APPEAL AND ERROR \$\infty\$1053(4)\to Curing Error\text{-Instructions.}

If there was any error in admitting an ordinance requiring sounding of gongs on street cars over an objection that there was no evi-dence from which it could be inferred that the sounding of the gong might have prevented the collision, it was cured by an instruction given at defendant's request covering such matter.

TRIAL \$\infty 260(1)\to Requests Covered by Given Instructions.

Where an instruction given added to a requested instruction what in effect would have been added by giving other requested instructions, there is nothing to complain of.

3. Negligence \$\sim 93(1) - Imputed Negli-

GENCE

Negligence of a city chauffeur cannot be imputed to a policeman, who had no control over nor right of selection of a driver, and who was ordered out with such driver to answer a riot call; there being no question of joint enterprise involved.

Error to District Court, City and County of Denver; John A. Perry, Judge.

Action by Alexander Orbach against the Denver Tramway Company. Judgment for plaintiff, and defendant brings error. firmed.

Gerald Hughes and Howard S. Robertson, both of Denver (W. G. Temple, of Denver, of counsel), for plaintiff in error. William W. Garwood, Omar E. Garwood, and George O. Marrs, all of Denver, for defendant in error.

TELLER, J. The defendant in error obtained a judgment in an action for damages for personal injuries caused by a collision between an automobile, in which he was riding, and one of the street cars of plaintiff in error.

The parties will be designated as they were in the trial court.

The plaintiff was one of a party of policemen who were riding in a city automobile, driven by one Pickens, who was employed by the city of Denver as a chauffeur. The policemen had been ordered by their superior officer to respond to a "riot call," and, upon said order, entered the automobile in question, and were responding to said call when the accident happened.

Of the large number of errors assigned only two or three are asserted to be sufficient in themselves to justify a reversal of the judgment.

[1] Error is assigned on the admission of an ordinance requiring the sounding of gongs on street cars when approaching a crossing, but, as the ground upon which the objection is based, i. e., that there was no evidence from which it could be inferred that the sounding of the gong might have prevented

No. 16, given at defendant's request, the error, if any, was cured.

[2] The principal errors argued are in the court's refusal to give defendant's requested instruction No. 11, and in giving instruction No. 17. These instructions differ only in that the latter submits to the jury the question whether or not the plaintiff was guilty of negligence in not protesting to the driver against the rate of speed at which he was driving, if such rate were found to be reckless; while the instruction requested told the jury that, if they found that the automobile was driven recklessly and negligently. which fact was known or should have been known to the plaintiff, if he were in the exercise of due care, and that he made no protest, but acquiesced in said action of the driver, then plaintiff could not recover, if the driver's said negligence contributed to cause the collision. In other words, counsel contend that plaintiff should be held to have been negligent as a matter of law, while the court left it to the jury to determine from the facts in evidence whether or not be was negligent.

By requested instructions 15 and 20, the defendant asked the court to submit to the jury the question of plaintiff's contributory negligence in not protesting against the driving of the automobile at a dangerous rate of speed, and the modification of requested instruction 11 in instruction 17, as given, does no more than to add to No. 11 what was asked in 15 and 20 to be submitted to the jury. Plaintiff in error is therefore hardly in a position to complain of instruction 17, or to urge that instruction 11 was not given, since the latter was in direct conflict with two other requested instructions.

[3] Moreover, instruction 17 is proper under the circumstances of this case. were several matters to be considered from which different inferences might reasonably be drawn by different persons, and that fact made it a question for the jury.

The cases cited to support the proposition that the negligence of the chauffeur is to be imputed to the plaintiff are not in point. They are based upon an entirely different state of facts, and involve questions of injury to persons riding in private vehicles.

In C. & S. Ry. Co. v. Thomas, 33 Colo. 517, 81 Pac. 801, 70 L. R. A. 681, 3 Ann. Cas. 700, on which counsel rely, this court, in terms, confined the discussion to passengers in private vehicles, and pointed out that negligence was to be imputed to a passenger only in those exceptional cases in which "the injured person is in a position to exercise authority or control over the driver."

The imputation of negligence in cases of a "joint enterprise" has the same basis, it being properly assumed that the several parties to the enterprise will each have a voice the collision, is fully covered by instruction in its management, and hence have the right to exercise control over a driver when the parties are traveling in furtherance of the enterprise. Each is in effect the agent of the others in the line of their undertaking.

Here there was no such community of interest as to make any member of the party the agent of another, nor did the policeman have any control over the chauffeur. They were acting in the line of their official duty, and the enterprise was one in which the whole public was interested as much as they were. They had no voice in the selection of the chauffeur, but were obliged to go with him when so directed by their superior officer. A passenger on a street car becomes so voluntarily, and there is therefore more reason for imputing to him the negligence of the street car company in case of his injury than there is for making the negligence of the chauffeur the negligence also of plaintiff; and yet the rule of imputed negligence is not applied to passengers on street cars. O'Rourke v. Lindell R. Co., 142 Mo. 352, 44 S. W. 254.

Clearly, the policemen were not riding in the automobile in the prosecution of a common enterprise, in the sense in which that term is used in the decisions on which counsel rely.

It has been directly held in several cases that firemen, and the driver of a hose cart or a fire engine on which the firemen are riding, are not engaged in a common enterprise, and that the negligence of the driver is not to be imputed to them. Elyton Land Co. v. Mingea, 89 Ala. 521, 7 South. 666; Mc-Bride v. Des Moines City R. Co., 134 Iowa, 308; 109 N. W. 618; McKernan v. Detroit Citizens' St. R. Co., 138 Mich. 519, 101 N. W. 812, 68 L. R. A. 347. The same principle applies in this case as in those, and the court did not err in withdrawing from the jury the question of imputed negligence.

As the other errors argued are admitted not to be sufficient to reverse the judgment, they need not be considered.

The judgment is affirmed. Judgment affirmed.

HILL, O. J., and WHITE, J., concur.

DENVER TRAMWAY CO. v. LEWIS. (No. 8913.)

(Supreme Court of Colorado. May 6, 1918.) Department 1. Error to District Court, City and County of Denver; John A. Perry, Judge. Action by George W. Lewis against the Den-ver Tramway Company. Judgment for plain-

Denver Tramway Company v. Orbach, 172 Pac. 1063, and was argued with the latter case. For the reasons given in the opinion in that case, the judgment in this case is affirmed.

Judgment affirmed.

HILL, C. J., and WHITE, J., concur.

CONSUMERS' LEAGUE OF COLORADO V. COLORADO & S. RY. CO. et al. (two cases). (No. 8544.)

(Supreme Court of Colorado. May 6, 1918.) abriers &== 13(2) — Rates — Switching Charges—Discrimination. CARRIERS

Switching being a terminal service that is rendered only in connection with certain parts of the traffic, and that may not be required, and being a service that is separate and distinct from transportation service, a carrier has no right, in view of Laws 1910 (Ex. Sess.) pp. 46, 48, §§ 3, 5, to fix a rate that includes switching charges, regardless of whether switching services are rendered.

Bailey, J., dissenting.

En banc. Review from the Public Utilities Commission.

Petitions filed with the Public Utilities Commission by the Consumers' League of Colorado, a corporation, against the Colorado & Southern Railway Company and others. From findings in favor of respondents, petitioner brings writ of review. Reversed.

Carle Whitehead and Albert L. Vogi, both of Denver, for petitioner. C. C. Dorsey, E. E. Whitted, and E. N. Clark, all of Denver, for respondents.

SCOTT, J. There were two petitions filed by the complainant with the Public Utilities Commission of the state against the respondents, railroads. Both were heard together and are here presented on the same record for review.

It was alleged in the first petition:

"That defendants are and each of them is a common carrier; that defendants, the Colorado & Southern Railway Company, Chicago, Burlington & Quincy Railroad Company, and Union Pacific Railroad Company, are common carriers engaged in the transportation of lignite coal from the coal field located in Boulder and Weld counties, Colorado, being the coal fields generally known as and hereinafter referred to as the "Northern fields," to Denver; that each of the defendants operate railway terminals in the city and county of Denver, and each of said defendants transports and delivers lignite coal from said Northern field over and upon the said terminals operated respectively by it; that as such common carriers and in respect to such traffic defendants are and each of them is subject to the provisions of chapter 5 of the Ses-"That defendants are and each of them is a

pepartment 1. Error to District Court, City and County of Denver; John A. Perry, Judge. Action by George W. Lewis against the Denver Tramway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Gerald Hughes and Howard S. Robertson, both of Denver (W. G. Temple, of Denver, of Counsel), for plaintiff in error. William W. Garwood, Omar E. Garwood, and George O. Marrs, all of Denver, for defendant in error.

Marrs, all of Denver, for defendant in error.

TEILER, J. This cause involves the same facts and questions of law as cause No. 8914,

of 75, 70 and 60 cents per ton for the transportation of lump, mine run and slack lignite coal respectively in carload lots from said Northern fields to Denver, including delivery upon the Denver terminals of any of the defendants other than the defendant, upon whose line the traffic originated."

It was then alleged that the said rates of 75, 70, and 60 cents for such transportation are unjust, unreasonable, and excessive, and subject the citizens and consumers of the city of Denver, and the traffic of said Northern field, to undue and unreasonable prejudice and disadvantage, and is in violation of sections 3 and 5 of chapter 5 of the Session Laws of 1910, and that a just and reasonable rate including a delivery to one or the other of the respondents upon the interchange track with such respondents would be 40 cents per ton in carload lots; that the respondent the Colorado & Southern Railway Company is and for several years last past has been transporting all grades of lignite coal in carload lots from the mines in said Northern fields, located upon its line and delivering the same to the interchange track between it and the Rock Island road for 40 cents per ton. It is further alleged that a maximum rate of \$3 per car is a reasonable, just, and compensatory rate for respondents and each of them to charge for switching service involved in delivering a carload of said lignite coal to any public track, spur, private siding, or industry track upon its terminal after such car has been delivered to it by one of the other respondents.

The second petition alleged:

"Third. That all of the defendants herein were parties to two certain proceedings before this commission, being cases numbered 22 and 34 by this commission, and generally known as the Consumers' League and the Garwood cases, respectively; that in each of said cases this commission was petitioned to determine what would constitute reasonable rates for the transportation described in paragraph 'second' here portation described in paragraph 'second' here-of, and in each of said cases determined that of, and in each of said cases determined that 55, 50 and 45 cents per ton upon lump, mine run and slack coal respectively would constitute reasonable rates for transportation of lignite coal from the Northern Colorado coal fields aforesaid to Denver; that the decision of this commission in the Consumers' League case has been expressly approved and affirmed by the district court of the city and county of Denver, and no ruling has ever been made by any court adverse to the decision of this commission in the Garwood case. Garwood case.

Garwood case.

"Fourth. Inat in defiance of the aforesaid decisions of this commission and of the aforesaid decision of the district court of the city and county of Denver in the Consumers' League case, defendants, acting through their respective attorneys and traffic officials, have entered into a conspiracy to disregard and defy said decisions of said chapter 5 of the Session Laws of Colorado for 1910, and as a part of and in pursuance of said conspiracy defendants the Colorado for 1910, and as a part of and in pursuance of said conspiracy defendants the Colorado & Southern Railway Company published and issued its Tariff Supplement No. 11 to C. R. C. No. 261, and defendant the Chicago, Burlington & Quincy Railroad Company issued its Tariff C. R. C. No. 51, all of said tariffs being made effective July 1, 1914;

that each defendant in its aforesaid tariff published rates of 55, 50 and 45 cents per ton for the transportation of lump, mine run, and slack lignite coal respectively in carload lots from the mines in said 'Northern Colorado coal fields' to Denver when billed direct from said mines for delivery at the public team tracks in Denver of the defendant upon whose lines the coal originated and when so delivered and in and by said tariffs defendants, and each of them, have published rates of 75, 70 and 60 cents per ton on lump, mine run and slack coal respectively in carload lots when transported from said mines in said 'Northern Colorado coal fields' mines in said 'Northern Colorado coal fields' and delivered in Denver upon the spurs, private sidings and industry tracks of the carrier upon whose line the coal originated; that defendant the Union Pacific Railroad Company in its tariff aforesaid, in order to deceive and mislead the public and to conceal its part in the conspiracy aforesaid and in an attempt to discredit this commission, has caused to be prominently printed upon its said tariff the statement, 'Rates named herein to Denver and Greeley are established in compliance with orders of the State Railroad Commission of Colorado; that in so far as said statement refers to the 75, 70 and 60 cent rates aforesaid, complainant alleges such statement is wantonly and maliciously misleading, as this commission has never ordered or approved said rates in any proceeding what-

or approved sale and a solution of approved sale and a solution of the fifth. Petitioner alleges that the aforesaid rates of 75, 70 and 60 cents per ton respectively on lump, mine run, and slack lignite coal in carload lots for the transportation thereof from said 'Northern Colorado coal fields' to Denver, and the sale of the colorado coal fields' to Denver, and the sale of t including delivery upon a spur, private siding or industry track of the carrier upon whose line the traffic originated are and each of them is unjust, unreasonable and excessive and in viola-tion of the provisions of section 3 of the afore-said chapter 5 of the Session Laws of Colorado

for 1910.

There are other allegations, but the foregoing involves all that is necessary to consider.

The Public Utility Commission in its findings recites that in a former proceeding between the same parties and involving the same questions under the Railroad Commission Act of 1910, the district court of the city and county of Denver, upon an appeal from the order and findings of the Railroad Commission, and on the 2d day of May, 1914, sustained the commission in fixing the rates from the Northern coal field to any point on the line of the carrier on which the shipment originated, at 55, 50, and 45 cents, respectively, for lump coal, mine run, and slack, and held such rates to be reasonable, but held that switching charges were a sepa-

line of the carrier, and switching charges, and making a uniform rate in all cases, regardless of whether or not a switching service was rendered, was based upon the notion of the commission as to commercial considerations, and not upon transportation considerations, with which alone the commission has the power to deal. This holding is without legal precedent and has been uniformly held to be invalid. Judge Perry in a very carefully considered opinion in the case when before him has clearly and aptly stated the law on the subject as follows:

"Every charge for transportation compre-hends compensation for initial terminal services for haulage services and for final terminal services. In fixing a rate, all incidental terminal services. In fixing a rate, all incidental terminal services, that is to say, all terminal services which appertain to the traffic as a whole, must be considered and the rate must include, and must be understood to include these incidental terminal services. terminal services. In fixing a rate, neither the carrier nor the commission has the right to consider any extra terminal services, that is to terminal services which do not appertain to the traffic as a whole, but which are to be rendered in connection with certain parts of the traffic only and as occasion may from time to time require. Neither the carrier nor the commission may fix a rate which will include these extra terminal services. A rate fixed, either by the carrier or commission, is understood to mean simply for the haulage services, including the incidental and excluding the extra terminal services. The carriers were under no obligation to deliver this coal except on their own tracks respectively. If the coal, after reaching Denver, had to be transferred to the track of a second carrier, the shipper or consignee could be obcarrier, the snipper or consignee could be obliged to pay for this transfer either directly to the second carrier or to reimburse the first carrier for making or pay for the transfer; or, in railroad parlance, 'for absorbing the switching.' In fixing the rates in this case, the commission simply determined what would be a reasonable observe for the line heal irrelutions of sonable charge for the line haul, including of course charges for incidental terminal services, and there is nothing in the order set out in paragraph 3, supra, nor in the law which prevented the carriers from making special charges for storage, reconsignments, absorbing switching and other extra terminal services, and that the carriers understood that this is the meaning of the statute, and that there was nothing in the order of the commission to the contrary, is provorder of the commission to the subsequently made special schedules covering some of the extra terminal services above mentioned. It was pracminal services above mentioned. It was practically conceded at the trial that the rates fixed by the commission would be reasonable if they did not preclude the carriers from collecting for these extra terminal services.

An examination of the following cases by the Interstate Commission, and court decisions, discloses well reasoned and uniform support of the conclusions reached by Judge Perry. Associated Jobbers v. A., T. & S. F. Ry. Co., 18 Interst. Com. Com'n R. 310, affirmed by the Supreme Court of the United States in 234 U. S. 294, 34 Sup. Ct. 814, 58 L. Ed 1319; Lanning-Harris Coal & Grain Co. v. A., T. & S. F. Ry. Co., 12 Interst. Com. Com'n R. 479; A., T. & S. F. Ry. Co. v. I. C. C. (C. C.) 190 Fed. 591; Southern Pacific Ry. Co. v. I. C. C., 219 U. S. 433, 31 Sup. Ct. 288, 55

Waverly Oil Works v. Penn Ry., 28 Interst. Com. Com'n R. 621; Dixie Cotton Oil Co. v. St. L., I. M. & S. R. Co., 27 Interst. Com. Com'n R. 295; Swift & Co. v. C. & A. Ry. Co., 16 Interst. Com. Com'n R. 426; Grand Junetion N. & F. Co. v. D. & R. G. Ry. Co., 2 Colo. P. U. C. 181. No case has been cited to the contrary, and we know of none. The Public Utility Commission has the power to fix rates for service, performed, or to be performed, but it has no power to fix a charge for a service not to be rendered. In the respect we are considering, it may deal with transportation service only, and its view of commercial policies and problems can have no greater legal force than the view of any other like number of persons. injustice and unreasonableness of the rate complained of is well illustrated by the facts

The Colorado & Southern Railway Company, the Chicago, Burlington & Quincy Railroad Company, and the Union Pacific Railroad Company are the only carriers transporting coal from the Northern field to Denver. We assume that each has tracks and spurs with industries located within the city on its own line. Necessarily but little of the coal carried by any one of the three lines may be expected to be transferred to the line of another of the three, and therefore to that extent no switching service is rendered. The effect of this is to increase the transportation rate for a line haul from 15 to 20 cents per ton, over that found by the commission and the court in the former proceeding to be just and reasonable, upon every car of coal not legitimately subject to a switching charge.

The recognized rule as to the rights and obligations of American railroads applied to line hauls and to the furnishing terminal facilities is clearly stated in Associated Jobbers v. A., T. & S. F. Ry. Co., supra, as follows:

"The American railroad rate has always been recognized as covering the full service which the carrier gives in furnishing the car, a prop-er place at which to load it, the conveyance of that loaded car, and its terminal delivery. that loaded car, and its terminal delivery.

The rate, which it is required shall be published, is a complete rate, which includes not only the charge for hauling, but the charge for the use of the terminals at both ends of the line. \* \* \* The terminal charges referred to in section 6, and which must be expressly set forth in the carrier's tariff, are those for other services at the terminal which the carrier may furnish, such as storage, elevation, switching and cartage. This construction of the act is borne out fully by its history and has been formally accepted by railroad counsel in advising the carriers. The railroads recognize their duty to make delivery under the flat rate stated in their tariffs, and such delivery is made upon in-dustry tracks, which are part of the carrier's terminals, without additional charge. They treat a dependent spur as a part of their own depot to which the published rate carries all freight. They have recognized the value of hav-I. C. C., 219 C. S. 433, 31 Sup. Ct. 288, 00 ing industries located on their tracks, and have L. Ed. 283; Utica Traffic Bureau v. N. Y. O. & W. Ry. Co., 18 Interst. Com. Com'n R. 168; cure them as dependencies. They have, accord-



ingly, given to such industries the same service, ice for which a charge may properly be made that they give at their team tracks, treating the one as the substitute or equivalent of the other. If delivery is made at the team track the carrier must haul the ear from the main line and place it on the team track. place it on the team track. And so, if delivery is to be made at an industry, it must be conveyed from the main line to the industry. In the former, as in the latter case, there is an inter-terminal switching and a placement of the CAT

## It was further said in that case:

"An additional charge may be made when an additional service is given. But the service here given is not additional to that for which the rate given is not additional to that for which the rate pays. If the shipper pays for team track delivery and does not receive it, but asks instead and is given a side track delivery which costs the carrier no more, he may not be compelled to pay an additional charge upon the assumption that he has received a terminal team track service which has not been given. A carrier may not so construct its rates as to compel an extra charge for like service, and this, in our judgment, the defendants at Los Angeles have

It is plain from the language of the order of the commission in this case that its decision was influenced by considerations of commercial necessity rather than a determination of what are reasonable rates. It was held in the case of A., T. & S. F. Ry. Co. v. Interstate Commerce Commission (C. C.) 190 Fed. 591:

"The authority granted it under section 15 of the act to regulate commerce [U. S. Comp. St. 1916, § 8583] to prescribe reasonable rates when it shall be of the opinion that the rates fixed by the carrier are unreasonable does not fixed by the carrier are unreasonable does not confer absolute or arbitrary power to act on any considerations which the commission may deem best for the public, the shipper, and the carrier. Its order must be based on transportation considerations. While it may give weight to all factors bearing either on the cost or the value of the transportation services, it must disregard as well the demand of the shipper for protection from legitimate competition, domestic or foreign, for unlimited markets, or for the enforcement of equitable estoppels arising from a justifiable expectation that past rates will be maintained, as the demand of the carrier for the maximum rate under which the traffic will move maximum rate under which the traffic will move

A switching charge upon and over lines other than the line of the initiating carrier is a separate and distinct service, and may be charged only when such service is rendered. Counsel for respondents assert with abundant authority to support the assertion that it was undoubtedly within the power of the commission to group the rates on coal from the Northern field and to make the same rate over the several roads from the several mines in that field to Denver, and then argue that if it is right to group the rates from the mines in that field to Denver, it is also proper to blanket the rates in Denver. The distinction is, that a rate from the mine to Denver is one fixed for a single service, though distances may vary somewhat as between the several mines of a group to a common destination; while the switching as between the different lines in the city is an additional and distinct serv-

only in case such service is actually rendered.

There is no dispute as to the facts in this case, and the consideration here of the order of the commission involves a conclusion of law to be drawn from the conceded facts. The order of the commission complained of is vacated and set aside, with direction to the Utilities Commission to ascertain and fix reasonable rates for each such separate service to be rendered.

The judgment is reversed.

BAILEY, J., dissents. WHITE, J., not participating.

MIDLAND CASUALTY CO. v. ANDERSON. (No. 9385.)

(Supreme Court of Colorado. May 6, 1918.)

1. Insurance ← 665(3) — Accident Insur-ance—Sufficiency of Evidence.

ANCE—SUFFICIENCY OF EVIDENCE,
In an action on an accident insurance policy where company seeks to avoid payment of full amount of policy because of change of occupation by beneficiary or by insured, evidence held sufficient to sustain finding that the usual occupation of insured was mining superintendent, that given upon issuance of policy, that although temporarily employed as timberman for several weeks prior to accident he had ceased working as such before accident, and intended resuming his work as mining superintendent. ed resuming his work as mining superintendent. 2. Insurance \$\sim 339\text{-Accident Insurance}\tag{-Temporary Change of Occupation.}

Where usual occupation of insured is mining superintendent, he is not deemed to have changed his occupation to that of timberman at time of accident, where, although he had been temporarily employed as timberman for several weeks prior thereto, he had ceased such work when accident occurred and was planning to resume his work as mining superintendent.

En Banc. Error to District Court, Ouray County; Thomas J. Black, Judge.

Action by Stella C. Anderson against the Midland Casualty Company. Judgment for plaintiff, and defendant brings error and applies for supersedeas. Supersedeas denied. and judgment affirmed.

Joseph D. Pender, of Denver, for plaintiff in error. Millard Fairlamb, of Delta, for defendant in error.

HILL, C. J. Upon trial to the court, the defendant in error had judgment for \$2,000 and interest, being the amount named in an accident insurance policy issued by plaintiff in error to Elmer G. Anderson, deceased, in which his wife, Stella C., was designated as the beneficiary. At the time of the issuance of this policy, Anderson gave his occupation as "ore mine superintendent, supervising only, inside and outside duties." The policy contains the following provisions:

"If the insured suffers such injury while engaged in any occupation classified by the com-pany as more hazardous than that herein given, the amount payable shall be for such proportion of the indemnity herein provided as the premium paid would purchase at the rate and within the limits fixed by the company for such more hazardous occupation. The insured shall notify the company immediately in writing of any change in his occupation.

[1] Anderson was killed on December 23, 1916, when, with a party of others, he was going from Ouray county to Delta, Colo., to spend Christmas with his family. His death was caused by a snowslide and at which time he was not in the employ of any one. The plaintiff in error contends that, upon account of the nonforfeitable provisions above set forth, the judgment should have been for \$500 only, for the reason that prior to his death the deceased had changed his occupation from that of mine superintendent to a timberman, which it is agreed is a more hazardous risk. The court found that the usual occupation, the life work, or business of the deceased, was that of mine superintendent: that temporarily and for a few weeks preceding the accident he had worked as a timberman; that on December 22, 1916, the day before the accident, he quit such temporary employment without intention of resuming the same, but with the intention of engaging in his usual occupation, that of mine superintendent, when he returned to work: that at the time of the accident he had no occupation or employment in which he was actually engaged. There is abundant testimony to sustain this conclusion. The testimony of the manager of the company, for whom the deceased had been temporarily working up to December 22d, discloses that on December 23d, the day on which deceased met his death, he was not in the employ of the company; that for a few weeks prior to December 23d he had been working as a timberman; that it was thoroughly understood that such employment was temporary; and that he was given that employment in order that he might be held by the company so that he could, in a short time, resume the position of a mine superintendent, which was his usual occupation. There is other testimony to justify the finding that the defendant's real business was that of a mine Had the accident, which superintendent. was the cause of his death, happened when he was employed as a timberman, it would present a different question and might come within the language in the policy relied upon, which reads:

"If the insured suffers such injury while engaged in any occupation classified by the company as more hazardous than that herein giv-

[2] When this accident happened, the deceased was not engaged as a timberman, the more hazardous risk; that was not his business, and he had no intention of becoming thus engaged in the future, for which reason we cannot agree that the plaintiff in error should only be holden for the smaller amount place" to warrant this application. We are

porarily been engaged in the more hazardous risk, when, as heretofore stated, it had nothing to do with the cause of his death, and when he had ceased to be thus engaged and had no intention of again performing such The reasoning in Pacific Life Co. v. Van Fleet, 47 Colo. 401, 107 Pac. 1087, in a way supports this conclusion. Perceiving no prejudicial error, the application for supersedeas will be denied, and the judgment affirmed.

Supersedeas denied; judgment affirmed.

GARRIGUES, J., not participating.

Ex parte RAINBOLT. (No. 9380.) (Supreme Court of Colorado. May 6, 1918.) 1. HABEAS CORPUS \$== 44 ORIGINAL JURIS-DICTION.

The Supreme Court should not, on original application for habeas corpus, exercise jurisdiction, if the plaintiff's rights can be fully protected and enforced in the county court. . Habeas Corpus 🖘 3 — Modification of COMMITMENT.

Since all proceedings, judgments, and orders under Laws 1915, p. 836, as to commitment and discharge of lunatics, are of a continuing character and open to modification on petition of any party in interest, one committed as insane, if in fact cured, could apply for modification of the order, and was therefore not entitled to writ of habeas corpus to secure release.

8. Insane Persons €===23 — Modification of Commitment.

Proceedings under Laws 1915, p. 336, relating to the commitment and discharge of lunatics, may be reopened upon petition of the next friend of the party in interest or by the conservator or guardian, and if his interests are antagonistic, or he refuses to act, the party committed may institute such proceedings.

En Banc. Original application by Lucy Rainbolt for a writ of habeas corpus. Writ denied.

A. R. Morrison, of Denver, for plaintiff. Robert Collier and George Q. Richmond, both of Denver, for defendant.

BAILEY, J. This is an original application for a writ of habeas corpus by Lucy Rainbolt, who claims to be unlawfully restrained of her liberty by defendant herein. It appears that Mrs. Rainbolt was adjudged insane by the County Court of the City and County of Denver, in July, 1916, and committed to the care and custody of her husband until further order of the court. The writ is sought under Section 2919. R. S. 1908, which is as follows:

"Second, where, though the original imprison-ment was lawful, yet, by some act, omission or event, which has subsequently taken place, the party has become entitled to his discharge."

[1] Plaintiff claims to have recovered her reason, and relies upon a return to sanity as the "event which has subsequently taken because the deceased had theretofore tem- asked to assume original jurisdiction, take testimony and determine whether plaintiff is now sane. Such jurisdiction should not be exercised if the question may properly be determined, and the rights of plaintiff fully protected and enforced, in the county court.

The hearing was had under Chapter 118, Session Laws 1915, relating to the commitment and discharge of lunatics. The chapter sets out the procedure to be followed in the commitment of distracted persons and for an accounting by the conservator when the incompetent shall be discharged as by law provided. Plaintiff contends that the provisions for the discharge of a person adjudged incompetent, contained in Section 4130, R. S. 1908, are unconstitutional, and that therefore there is no way provided by which she can get relief except through this application.

[2] It is unnecessary to pass upon the constitutionality of Section 4130, as all proceedings, judgments and orders under Chapter 118. Session Laws 1915, are of a continuing character, and open to change and modification on application of any party in interest in the court having original jurisdiction. Such proceedings are analogous to those appointing guardians, decrees awarding the custody of minors or payment of alimony in divorce cases, and like matters which are not within such judicial control as to make adjudications therein absolutely final. While such judgments and decrees are final in the sense that they determine matters then in controversy, and are subject to review on error, they cannot, in the very nature of things, be irrevocably conclusive. In the case of plaintiff the order of commitment was "until the further order of the court." Plainly the court had in mind the fact that other orders might become necessary and accordingly left the proceedings open; and whether the court did so or not the case at all times would have been open for further action by the court to meet any exigency.

[3] Such proceedings may be reopened upon petition of the next friend of the party in interest. Wood v. Throckmorton, 26 Colo. 248, 57 Pac. 699. Or such petition may be presented by the conservator or guardian. If the interests of the latter are antagonistic, or should they fail or refuse to act, plaintiff herself may institute such proceedings. In Wiesmann v. Donald, 125 Wis. 600, 104 N. W. 916, reported in 2 L. R. A. (N. S.) 961, the common law right of a lunatic to be heard in his own behalf is discussed as follows: "Again, in Rankin v. Warner, 2 Lea [Tenn.] 302, it is said: "The law mainly designs to protect the weak and dependent, and if the courts, seeing a suitor has rights or property entitled to their consideration and judgment, entitled to their consideration and judgment, turn him out because no one will or does assume the role of guardian or next friend for him, they will certainly be guilty of a strange perversion of the object of their creation.' The common law right of a lunatic to maintain a suit was declared as long ago as Lord Coke's

time, in Beverley's Case, 2 Coke's Rep. pt. 4, 568."

This rule was announced in a case involving property rights only. Manifestly it applies with even greater force where the liberty of the plaintiff is involved, and under it the petitioner may have the issue of her present sanity adjudicated by the County Court in the same manner that like disputed questions may be therein heard and determined.

The application for the writ is therefore denied, and plaintiff is remanded to her remedy in the County Court, which has full jurisdiction to hear and adjudge all questions involved. That court not only has jurisdiction to hear and determine, but it is its duty to do so.

Writ denied.

SNYDER v. HAMILTON NAT. BANK. (No. 8980.)

(Supreme Court of Colorado. May 6, 1918.)

APPEAL AND ERBOR 6=1011(1)-REVIEW-FINDINGS-CONFLICTING EVIDENCE.

The evidence being conflicting, the finding of the trial court will not be disturbed on appeal. 2. Banks and Banking €== 127 - Title to DEPOSITS.

Where a bank credits a check drawn on it-self to person presenting it on the strength of a check payable to drawer of former check and deposited simultaneously therewith, it does so upon the assumption that latter check will be paid, and where payment was stopped on it the bank has the right to recharge former check to person to whom it had been credited,

3. BANKS AND BANKING \$==127-Deposits-

3. BANKS AND BANKING \$\insigma \operatorname{\text{Construction of Contract.}}\$

Where a person whose check has been accepted by a bank upon simultaneous deposit of a check payable to drawer goes to bank, upon stoppage of payment of latter check, and gives his note for amount of loss by bank due to accepting such check the check will be construed. to have been accepted upon understanding that latter check would be paid.

4. BANKS AND BANKING \$\infty\$ 154(8) - SUFFI-CIENCY OF EVIDENCE.

In an action against a bank to recover amount on deposit, evidence held sufficient to sustain finding that a check was credited to plaintiff upon the assumption that a check deposited at same time would be paid.

Error to District Court, City and County of Denver; George W. Allen, Judge.

Action by Ira C. Snyder against the Hamilton National Bank. Judgment for defendant, and plaintiff brings error. Affirmed.

Charles K. Phillipps, of Denver (William A. Reef, of Denver, on the brief), for plaintiff in error. Bardwell, Hecox, McComb & Means, of Denver, for defendant in error.

HILL, C. J. The plaintiff in error seeks to recover from the defendant in error bank \$1,750, which he alleges was the amount he had on deposit in the bank subject to check on November 26, 1915. Trial was to the court, which found the issues in favor of the defendant bank and gave it judgment for costs.

The record discloses that on September | he would do so, he would make it good, etc.; 17, 1915, the plaintiff opened an account with defendant by depositing \$100; that prior to September 29th, following, he had given checks upon this deposit in the sum of \$99.-30, leaving a balance due him of 70 cents; that previous to said September 29th Timothy Ross and Alfred Dunham were engaged in a real estate transaction, or negotiations pertaining to a partial exchange and sale of properties, whereby the plaintiff was to receive a commission; that under the assumption that the deal had been consummated Dunham gave to Ross, in Denver, two checks on a Telluride bank, payable to Ross, for \$4,000 and \$6,000, respectively, dated September 29, 1915; that on the same day Ross gave to plaintiff checks on defendant bank for \$1,000 and \$1,500, respectively, in part payment for plaintiff's services in the real estate deal; that at the time of giving these checks Ross had but a small amount on deposit in defendant bank, but upon the same day and at or about the same time he deposited in the defendant bank to his credit the \$4,000 Dunham check; that upon the same day and at or about the same time the plaintiff deposited to his credit in the defendant bank the two Ross checks hereinbefore referred to; that on the same day the plaintiff drew a check on his account in defendant bank to the Colorado State & Savings Bank for \$800; that before accepting it the cashier of this bank phoned the defendant bank asking if it was good and received an answer from some one that it was: that this \$800 check was paid by defendant bank upon the same day.

Thus far there is no conflict in the testimony. From this point on that of the plaintiff and the agents of the defendant differ materially. Mr. Weckbach, the defendant's assistant cashier, testified, in substance, that early on the morning of September 30, 1915, Mr. Dunham, or his attorney, called at the defendant bank and notified the witness that Dunham had stopped payment on the \$4,000 check to Ross; that the witness immediately notified Mr. Burger, the defendant's cashier. of this fact. Mr. Burger testified, in substance, that after receiving this information he, upon the morning of September the 30th, notified the plaintiff that the checks which Ross had given him were not good because they had been notified by the maker that payment had been stopped on the Dunham check, and that they would want him to make good the amount already honored on his check, viz. \$800; that the Dunham check was recharged to the Ross account and the Ross checks recharged to the plaintiff's account; that the Dunham check was in due time returned indorsed "payment stopped," but that he acted in the matter immediately upon being notified that Dunham had stopped payment on it, and before its return; that in response to his demand upon plaintiff that he

that he had redeemed a debt he had at the Colorado State & Savings Bank, had redeemed some diamonds, and he would make the account good by getting the diamonds and putting them in defendant bank; that he came back and brought the collateral; that he gave his note to the defendant bank for \$795.30 to square up the account, thus closing it; that he put up with the note as collateral certain diamonds; that thereafter he borrowed from defendant bank \$100 or \$150 more, which he repaid, and paid somelittle interest on the other; that thereafter, when it became due, he renewed the note or gave two new notes rather in lieu thereof. and that the defendant held these notes at the time plaintiff brought this suit; that all of these notes were payable to the defendant bank. The witness also testified that he secured a note from Mr. Ross payable to the bank for \$1,500 as collateral upon the noteof Mr. Snyder given for the purpose of paying up Snyder's deficiency; that this Ross note was obtained at Snyder's request; that on the morning of September 30th, when he notified Snyder of his deficiency and the reason for it, Snyder asked the witness to get Ross to pay it, and that he (Burger) told him he would try to get the money from Ross; that in pursuance of his efforts under such promise Ross told the witness that he would get the money in ten days and that he gave to the witness the \$1,500 note payable to the bank: that he took this note for the protection of the plaintiff and at his request.

The plaintiff testified that when he deposited the Ross checks he said, "Mr. Burger, I have some debts that are past due, can I check on this to do it?" that he (Burger) said, "Sure, this is as good as wheat." He admits that he was notified by Burger of the stoppage of payment on the Dunham check, etc.; he also admits the giving of the original note and the putting up of the collateral as security for it, which note would represent the amount of his overdraft in defendant bank, were the two Ross checks properly recharged to him. He also admits the giving thereafter of the renewal or new notes representing the purported obligation. His explanation for giving the first note is: That on the morning of September 30th Mr. Burger told him that Dunham had stopped payment upon a check that had got him intodifficulty, etc. That the transaction had got him into trouble with his directors and he said: "I wish you would help me out, in some way. I will get the money out of Ross. I am going to get the money out of Ross and Dunham. Dunham is the man. I want you to help me out some way, as a personal accommodation, so I can get the money out of Ross. \* \* \*" That Burger wanted to know if he would not go and get some collateral and put up there with him personally so he make the \$800 overdraft good plaintiff said could not get in trouble with his directors.



talked it over with my friend. I went back by the plaintiff. Pertaining to his giving the the next morning and he still insisted I could get some collateral and I went and got collateral and went on my note and when I got him that collateral I said: 'Mr. Burger, hold this collateral in your hands and don't mix it with the bank's interest. I am doing this as a personal accommodation to you and you get the money out of Ross." That Burger called him the next day and said: "I think I have saved myself and you too, I have taken Ross' note for the amount for ten days. We have known Ross; he always pays his bills; he is sometimes slow, but never refuses to pay his bills. I have his note, as soon as that is paid you can have your money." witness admits that he renewed his note to the bank on November 24th by giving two notes and paid some interest on them, but "I do not know of making the notes to the Hamilton National Bank; I was endeavoring to aid Mr. Burger in view of his own suggestion to keep him out of difficulty with his directors and to give him time; Mr. Burger was a stranger to me. Ross was absolutely a stranger to me." Referring to Exhibits 1 and 2, which were the renewal notes executed by the plaintiff to the bank, and not to Burger, on November 24, 1915, the witness says, "I had made, executed, and delivered Exhibits 1 and 2 formally." He denies that the Dunham checks were ever mentioned between them until he was informed the next day of the difficulties which had arisen concerning the \$4,000 one, but on cross-examination said, "In fact I supposed until recently that the full \$10,000 had been deposited there (meaning the two Dunham checks); I learned only \$4,000." This statement concerning his supposition of the disposition of the Dunham checks is hardly consistent with his statement that he knew nothing about their disposition or with his counsel's contention that he was relying solely upon his (Ross') checks regardless of where Mr. Ross was to get the money to pay him, or on the assumption that he then had it or that the bank would otherwise extend credit to him or Ross, for it, and especially so when according to his testimony he was the negotiator or agent between Ross and Dunham, knew all about the transaction, and was to get \$7,500 from Ross' side of it if it went through.

The witness Burger denied the truth of plaintiff's testimony pertaining to his statements to him or any communication other than as heretofore and hereafter set forth in Burger's testimony, or that there were any personal transactions between them or any reference to any such. He says that plaintiff's first note was made payable to the bank, which the plaintiff does not deny, as well as the second two (which so show). He also says that Ross was practically a stranger to him; that he opened his first account with National Bank v. Burkhardt, 100 U. S. 686, the bank at the same time the plaintiff did; 25 L. Ed. 766; Oddie et al. v. National City

That he then said, "In the meantime, I had, and that he was introduced to the witness plaintiff permission to check, as he dru, on the strength of the Ross checks, Mr. Burger admits that at the time plaintiff deposited the Ross checks he might have thus asked him

> [1] The plaintiff contends that the record discloses that the bank in no manner predicated the crediting of the \$2,500 Ross checks to plaintiff upon anything but its own reliance on the account Ross maintained with it. and that it positively assured the plaintiff. through its cashier, that the Ross checks drawn on it were good. The difficulty with this position is that it ignores the testimony on behalf of the defendant. As heretofore stated, the testimony was conflicting on this question. It cannot be harmonized. It was the province of the trial court to determine who was telling the truth, and it is not the privilege of this court to disturb that finding. In commenting on this phase of it, the court

> "From the evidence in this case the court is of "From the evidence in this case the court is of the opinion that the plaintiff obtained the credit of \$2,500 upon the 29th day of September by reason of the deposit of the \$4,000 check called the Dunham check, which was afterwards repudiated; and when the bank discovered that the check by Dunham, upon which it had a right to rely and as the court finds from the evidence the check by Dunnam, upon which it had a right to rely, and as the court finds from the evidence did rely, was repudiated in payment by the drawer of the check, that good conscience and the law ought to protect the bank against the payment of the \$2,500 of the fund which must result, if paid, in an absolute loss to the bank.

There being evidence to support this finding, we are not at liberty to disturb it.

[2] If we understand it correctly, the next contention of plaintiff is that, when the bank received the Ross checks for deposit by plaintiff, credited them to his account, and charged them to Ross' account, because these checks were drawn upon Ross' account at defendant bank, it constituted a payment of them to the plaintiff by the bank, and not an extension of credit to the plaintiff; that if the Ross account proved insufficient to satisfy them, or uncertain upon account of checks deposited by him which might be returned. in accepting the Ross checks the credit was executed to Ross and not to the plaintiff; and for that reason that, regardless of what might thereafter happen concerning the Ross account, the bank was not at liberty to recharge the Ross checks to the plaintiff, and hence was owing him the amount sued for. This, upon the theory that when a bank accepts a check drawn on itself, either by payment or by depositing to the credit in the bank of the person presenting it, it is presumed to know whether the check at that time is good or not, and, if it accepts it, it cannot thereafter repudiate its act in this respect. The following cases are cited as sustaining this contention: City National Bank v. Burns, 68 Ala. 267, 44 Am. Rep. 138; Bank, 45 N. Y. 735, 6 Am. Rep. 160; S. & E. from which it can properly be inferred, that Trust Co. v. Huff, 63 Wash. 225, 115 Pac. 80, 33 L. R. A. (N. S.) 1023, Ann. Cas. 1912D, 491; National Bank v. Berrall, 70 N. J. Law, 757, 58 Atl. 189, 66 L. R. A. 599, 103 Am. St. Rep. 821, 1 Ann. Cas. 630; Levy v. Bank, 4. Dall. 234, 1 L. Ed. 814; Michie on Banks and Banking, vol. 2, § 124.

Without an agreement expressed or implied, or understanding directly or indirectly to the contrary, we may concede that the general rule as contended for and supported by these authorities is correct, but as said in the first of them, viz. City National Bank v. Burns, 68 Ala. at page 275, 44 Am. Rep. 138:

"Contracts, agreements, transactions between parties should have operation and effect according to their intention."

And again at page 276 (44 Am. Rep. 138): "It is the intention of the parties which must govern."

In Lumsdon v. Gilman et al., 81 Hun, 526, 30 N. Y Supp. 1124, it appears that the depositor and defendant agents both knew, when the draft which was drawn on the defendant bank was offered for deposit, that the drawer was insolvent. He then had an apparent credit with the bank exceeding the amount of the draft, but afterwards an error was discovered which entirely absorbed the apparent credit. The bank's clerk testified that he accepted the draft under an agreement with plaintiff that if there was any trouble about it it should be charged back to plaintiff's account. It was held proper to ascertain the intention of the parties, and that a verdict for the defendant bank on that issue would not be disturbed.

In Arkansas Trust & Banking Co. v. Bishop, 119 Ark. 373, at page 375, 178 S. W. 422, at page 423, the court said:

"The only question in this case for the decision of the jury was whether the bank accepted the check and became liable to the payment of the amount for which it issued its deposit slip to the drawee thereof. The intention of the parties to the transaction could properly have been shown for the determination of this question."

In Pollack v. Bank of Commerce, 168 Mo. App. 368, 151 S. W. 774, it is held that a depositor may make a valid agreement with the bank that payment shall be deferred for a reasonable time until the bank can ascertain whether or not there are sufficient funds of the drawer in its hands to pay it, and that such an agreement may be established from a custom to that effect, etc. These cases, while not exactly like the one under consideration, involve somewhat similar propositions.

The court found, and there is evidence

the plaintiff obtained the credit of the \$2,500 evidenced by the Ross checks to him by reason of the deposit of the \$4,000 Dunham check by Ross. This, of course, had to be under the assumption that the Dunham check would be paid, and, in case it was not, that the bank necessarily had the right to recharge the Ross checks to the plaintiff the same as it would have, had the Dunham check been deposited by him. When the shortage created by the Dunham check was disclosed, it immediately did so; he was advised to that effect the next morning after he had deposited the Ross checks, and was requested to make good the amount of his overdraft given on the strength of this credit. In response to this demand, he voluntarily, when in possession of all the facts, acquiesced in this arrangement and gave his note and security for the overdraft which terminated in the closing of his account. His actions at that time were in harmony with the court's finding, as is his testimony in part to the effect that Mr. Burger told him he could draw checks on the strength of his deposit of the Ross checks to pay other indebtedness; otherwise, if the checks were accepted as that much cash when deposited, why the necessity of getting permission at all to check on this account?

[3, 4] In Lovell v. Goss, 45 Colo. 304, 101 Pac. 72, 22 L. R. A. (N. S.) 1110, 132 Am. St. Rep. 184, this court quotes with approval from Manhattan Life Insurance Co. v. Wright, 126 Fed. 82, 61 C. C. A. 138:

"The practical interpretation given to their contracts by the parties to them while they are engaged in their performance, and before any controversy has arisen concerning them, is one of the best indications of their true intent, and courts that adopt and enforce such a construction are not likely to commit serious error."

This declaration is applicable here, and is just what the trial court did. The plaintiff admits that after he was advised of both his and Ross' shortage occasioned by the stopping of payment on the Dunham check, and after he had talked it over with a friend, he went back to the bank the next day and gave his note (and secured it with diamonds) to represent the amount of this shortage, which did not exist had he the right to rely upon his deposit of the Ross checks. In such circumstances, when the testimony is considered as a whole, we cannot agree that there is no competent testimony to sustain the finding of the trial court.

The judgment is affirmed.

Affirmed.

GARRIGUES and SCOTT, JJ., concur.

STATE NAT. BANK OF ARDMORE v. STATE. (No. 8938.)

(Supreme Court of Oklahoma. May 14, 1918.)

(Syllabus by the Court.)

Intoxicating Liquoes 4 246 Transportation—Seizube of Automobile.

Prior to the enactment of chapter 188 of the 1917 Session Laws of the state of Oklahoma, there was no legal authority for the seizure and confiscation of an automobile used for the unlawful transportation of intoxicating liquors.

Commissioners' Opinion, Division No. 1. Error from County Court, Love County; J. H. Hays, Judge.

Action by the State of Oklahoma to confiscate an automobile claimed by the State National Bank of Ardmore. From an order of confiscation, and the overruling of its motion for a new trial, the Bank brings error. Reversed and remanded, with instructions to return automobile to party entitled thereto.

J. C. Graham, of Marietta, for plaintiff in error. S. P. Freeling, Atty. Gen., and Hunter L. Johnson, of Oklahoma City, for the State.

COLLIER, C. This is an action brought to confiscate an automobile used for the unlawful transportation of intoxicating liquors, and was seized on the 26th day of August, 1916. On the trial of the cause the automobile was ordered confiscated, to which the defendant duly excepted. Motion for a new trial was overruled, excepted to, and error brought to this court.

The defendant in error, the state of Oklahoma, has filed in this cause a confession of error, admitting that there was no law prior to the approval of chapter 188 of the 1917 Session Laws of the state that authorized the seizure and confiscation of an automobile used for the unlawful transportation of intoxicating liquors.

This cause is reversed and remanded, with instructions that the automobile seized be returned to the possession of the party entitled thereto.

PER CURIAM. Adopted in whole.

OLIPHANT et al. v. CRANE. (No. 8571.) (Supreme Court of Oklahoma. May 14, 1918.)

(Syllahus by the Court.)

1. PLEADING =343 — JUDGMENT ON PLEAD-ING-EFFECT.

A motion for judgment on the pleadings is in the nature of a demurrer, and has the effect of testing the sufficiency of the pleadings, and presenting to the court as a question of law whether the facts alleged constitute a defense to the plaintiff's cause of action.

2. Pleading \$349-Judgment on Pleadings-Admissions.

Although the answer of defendants contained a general denial, this was qualified by other allegations therein contained which admit-

ted all the essential facts necessary to authorize a judgment in plaintiff's favor, and it was not error to sustain a motion for judgment on the pleadings.

Commissioners' Opinion, Division No. 2. Error from District Court, Tulsa County; Conn Lynn, Judge.

Action by J. E. Crane, as administrator of the estate of Laura Crane, against John A. Oliphant and C. B. Lynch. Judgment for plaintiff, and defendants bring error. Affirmed.

Robinson & Mieher, of Tulsa, for plaintiffs in error. S. E. Gidney, of Muskogee, for defendant in error.

GALBRAITH, C. This was an action against the sureties on a supersedeas bond executed upon an appeal to the Supreme Court of the state from a judgment of the trial court.

The substantial facts alleged in the petition were that Laura Crane on the 17th day of January, 1910, recovered a judgment against the Merchants' & Planters' Insurance Company, in the sum of \$700, interest and costs, in the county court of Muskogee county; that the insurance company appealed from that judgment to the Supreme Court of Oklahoma, and in order to stay execution thereon pending the appeal executed a supersedeas bond in the sum of \$1,400, conditioned as provided by statute, with the company as principal and the plaintiffs in error, Oliphant and Lynch, as sureties thereon; that the bond was approved by the judge of the trial court on the 18th day of February, 1910; that by virtue of the filing and approval of said bond the judgment was superseded; that on the 19th day of November, 1912, the Supreme Court affirmed the judgment appealed from; that demand had been made on the principal and each of the sureties for payment of the judgment, and that each had failed and refused to pay the same: that the Merchants' & Planters' Insurance Company was adjudged insolvent by the district court of Tulsa county April 21, 1910, and a receiver appointed therefor; that the receivership was still pending; that Laura Crane died intestate in December, 1912, in Muskogee county, Okl., and on January 30, 1913, J. E. Crane was appointed administrator of her estate, and had qualifled as such, and was authorized to maintain the action. The prayer was for judgment against Oliphant and Lynch on the bond for the amount of the judgment recovered by Laura Crane against the Merchants' & Planters' Insurance Company, interest and costs.

The answer was: First. A general denial. Second. An admission of the execution of the bond sued on, and that at the time alleged in the petition, the Merchants' & Planters' Insurance Company was a corporation engaged in the fire insurance busi-

ness in the state of Oklahoma, and that ments and urged in the brief is that the judgment was recovered by Laura Crane against the insurance company, as stated in the petition, and that said judgment had been affirmed on appeal to the Supreme Court. Third. It was denied that the sureties on the bond in suit agreed and thereby bound themselves to pay the condemnation money and costs adjudged against the Merchants' & Planters' Insurance Company, in case said judgment should be affirmed in whole or in part by the Supreme Court, but alleged the facts to be that by the provisions of said bond the sureties were bound to pay the amount of the judgment upon affirmance of same by the Supreme Court only in case the Merchants' & Planters' Insurance Company failed to pay the same; that while the Merchants' & Planters' Insurance Company had been placed in the hands of a receiver, it was not insolvent, and had assets far in excess of its liabilities, and that the said corporation was wrongfully placed in the hands of a receiver, and denied that the conditions of the bond in suit had been breached, and as reasons for such denial alleged that the insurance company is and has been solvent, and still had ample assets out of which to satisfy the judgment obtained by Laura Crane, and that the plaintiff had failed and neglected to cause such judgment to be satisfied out of such assets, and that such judgment was a preferred claim against the insurance company by reason of the fact that the plaintiff had caused a certified copy of the judgment against the insurance company to be filed in the office of the clerk of the district court of Cherokee county, Okl., thereby making such judgment a valid lien upon all the real estate owned by the insurance company in said county, consisting of 410 acres of land, and that such real estate was worth more than the amount of the judgment, including interest and costs, and that said land would sell for an amount in excess of the judgment, at a forced sale; that there had been no reason or excuse for the plaintiff's failure to satisfy said judgment from the assets above mentioned, and that its failure to do so constituted laches upon the part of the plaintiff; and that it would be unjust, inequitable, and contrary to the law to permit the plaintiff to enforce payment of said indebtedness by the defendants herein as sureties upon such bond.

The prayer was for judgment; that the action be dismissed at the plaintiff's costs.

Thereupon plaintiff, in the court below, filed a motion for judgment upon the pleadings on the ground that it appeared from the answer that the plaintiff was entitled to the judgment prayed for. This motion was, by the court, sustained, and judgment entered as prayed in the petition. To review that judgment this appeal was prosecuted.

[2] The only error presented by the assign-

court erred in rendering judgment on the pleadings. An examination of the pleadings shows that this assignment is not well taken; that although the answer contained a general denial, this was qualified by other allegations of the answer which virtually admitted all the essential facts necessary to entitle the plaintiff to judgment as rendered by the trial court.

It was admitted in the answer that the judgment against the insurance company, in favor of Laura Crane, had been entered in the county court of Muskogee county; that an appeal had been taken by the insurance company to the Supreme Court of the state; that these sureties joined the insurance company in executing the supersedeas bond sued on; that the judgment appealed from had been affirmed by the Supreme Court, and that the same had not been paid.

[1] Upon the authority of the case of Schuber et al. v. McDuffee, not yet officially reported, 169 Pac. 642, the judgment appealed from should be affirmed.

PER CURIAM. Adopted in whole.

OLIPHANT et al. v. CRANE et al. (No. 8572.)

(Supreme Court of Oklahoma. May 14, 1918.)

(Syllabus by the Court.)

PLEADING \$=343, 349-JUDGMENT ON PLEAD-

The syllabus in No. 8571, John A. Oliphant et al. v. J. E. Crane, Administrator, 172 Pac. 1073, is adopted herein.

Commissioners' Opinion, Division No. 2. Error from District Court, Tulsa County; Conn Lynn, Judge.

Action by J. E. Crane, as administrator of Laura Crane, deceased, and A. H. Harrison, as administrator of J. H. Harrison, deceased, against John A. Oliphant and C. B. Lynch. There was judgment for plaintiffs, and defendants bring error. Affirmed.

Robinson & Mieher, of Tulsa, for plaintiffs in error. S. E. Gidney, of Muskogee, for defendants in error.

GALBRAITH, C. This was an action against the sureties on a supersedeas bond given to stay execution pending appeal from the judgment of the trial court to the Supreme Court of the state. It differs. only from case No. 8571, 172 Pac. 1073, just handed down, in that the judgment recovered against the Merchants' & Planters' Insurance Company was recovered by Laura Crane and J. H. Harrison. The judgment was for the same amount and rendered in the same court and on the same day as in case No. 8571, and the supersedeas bond was in a same amount, and was executed by the same principal and sureties. The judgment on appeal was affirmed on the second day of April, 1912. Both the parties plaintiff in the trial court, Laura Crane and J. H. Harrison, having died, this action was prosecuted by their respective administrators.

The petition in this action alleged the same facts as ground for recovery and the answer sets up the same ground for defense as in case No. 8571. Upon authority of that case the judgment appealed from in this case should be affirmed.

PER CURIAM. Adopted in whole.

PACE v. PACE et al. (No. 8900.) (Supreme Court of Oklahoma. May 14, 1918.)

(Syllabus by the Court.)

1. Appeal and Error \$\sim 254\text{-Ruling on Demurrer-Exception-Necessity.}

A demurrer to the petition and the order of the court sustaining the same are a part of the judgment roll or record proper, and error of the trial court in passing upon said demurrer will be reviewed in this court, though no exceptions have been taken to the ruling of the trial court.

Trusts \$\iff 346\$ — Resulting — Land Purchased for Ward—Enforcement by Truster.

A guardian, appointed to have charge of the persons and estates of four minors, by mistake petitioned the county court having jurisdiction to order the investment of funds alleged to belong to the estate of one of said wards, which order was duly made pursuant to said petition. Lands were purchased, the title to which was taken in the name of said ward, when in fact said guardian had in his possession no funds of said ward, the funds expended for such lands belonging to the estates of the other three wards. Such guardian, having resigned his guardianship, and a successor having been duly appointed and qualified, cannot maintain an action to declare a trust in said lands in favor of the other wards, and to have the title divested from the ward in whose name it was taken and vested in the other wards whose money was expended therefor.

3. GUARDIAN AND WARD \$= 53-INVESTMENT -ORDER-MISTAKE.

A guardian, appointed in one proceeding for four wards, is not protected in the investment in lands of funds belonging to the estates of three of said wards by an order of the county court, upon the petition of said guardian, which by mistake alleged that such funds belonged to the estate of the other of said wards, directing the said guardian to invest funds of such other ward in said lands, which investment was accordingly made and title taken in the name of said other ward.

Commissioners' Opinion, Division No. 1. Error from District Court, Mayes County; W. H. Brown, Judge.

Action by James Pace against Thomas Jefferson Pace and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Kent V. Gay, of McAlester, for plaintiff in naked, legal title to said real estate, and error. A. Lee Battenfield and Graves & holds the same as trustee for James W. Pace, Seaton, all of Pryor, for defendants in error. Carrie May Pace, and Rosa L. Pace, minors,

RUMMONS, C. This action was instituted in the district court of Mayes county by the plaintiff against the defendants to declare a trust in certain real estate situate in Mayes county, the legal title to which was in the defendant Thomas Jefferson Pace, in favor of the defendants Rosa L. Pace, James W. Pace, and Carrie May Pace, minors, and to vest the legal title to said real estate in said Rosa L. Pace, James W. Pace, and Carrie May Pace. The defendants Rosa L. Pace. James W. Pace, and Carrie May Pace by their guardian demurred to the petition of plaintiff for the reason that the same did not state facts sufficient to constitute a cause of action. The trial court sustained this demurrer, and, the plaintiff electing to stand upon his petition, judgment was rendered for the defendants to reverse which the plaintiff prosecutes this proceeding in error.

The petition alleges that the plaintiff was the duly appointed, qualified, and acting guardian of the persons and estates of Thomas Jefferson Pace, Rosa L. Pace, James W. Pace, and Carrie May Pace until January 13, 1915, at which time plaintiff resigned his guardianship, and the defendant R. D. Morgan was duly appointed as guardian of the persons and estates of said minors to succeed him; that said R. D. Morgan qualified as such guardian, and is now acting as the guardian of said minors; that, on November 12, 1912, the county court of Mayes county, having jurisdiction of the guardianship of said minors, upon the petition of plaintiff, made and entered an order directing the plaintiff, as guardian, to invest the sum of \$1,250 of the funds belonging to Thomas Jefferson Pace, minor, in the real estate here in controversy; that pursuant to said order the plaintiff paid the sum of \$1,250 as the purchase price of said real estate, and received a warranty deed conveying title to the said Thomas Jefferson Pace; that plaintiff had made a mistake of fact in advising the said county court, in his petition to invest said funds, that said funds were the property of Thomas Jefferson Pace, a minor; that in truth and in fact plaintiff had in his possession, as guardian, no funds of Thomas Jefferson Pace, but said sum of \$1,250 belonged, one-fourth, or the sum of \$312.50, to Rosa L. Pace, a minor, and one-half, the sum of \$625, to James W. Pace, a minor, and onefourth, the sum of \$312.50, to Carrie May Pace, a minor; that the sum of \$1,250 so invested by the plaintiff, as guardian, in said real estate, the title to which was taken in the name of Thomas Jefferson Pace, belonged to the estates of Rosa L. Pace, James W. Pace, and Carrie May Pace, minors; that said Thomas Jefferson Pace holds only the naked, legal title to said real estate, and holds the same as trustee for James W. Pace, said last-named minors are the equitable owners of said real estate. The petition further alleges that the plaintiff has been ordered by the county court of Mayes county to file his final report as guardian of said minors and account for all funds and property which has come into his hands as such guardian; that by reason of his mistake of fact in taking title to said real estate in the name of Thomas Jefferson Pace, a minor, when as a matter of fact the funds invested in said real estate belonged to James W. Pace, Rosa L. Pace, and Carrie May Pace, minors, it is impossible for him to file his final account and make report of the funds and assets that have come into his hands as such guardian until a resulting trust is declared and the legal and equitable title to said real estate transferred to the owners thereof; that said county court of Mayes county is requiring that he deliver to his successor as guardian all funds in his hands not accounted for, and that, if such settlement be required of plaintiff, he would be compelled to pay out of his own funds the sum of \$1,250. The petition then prays that a resulting trust be declared in favor of Rosa L. Pace, James W. Pace, and Carrie May Pace, that Thomas Jefferson Pace be decreed to hold title to said real estate in trust for them, and that he (Thomas Jefferson Pace) be divested of the legal title, and that the legal title be vested in said minors above mentioned.

[1] We are first met by a motion of the defendants to dismiss this appeal for the reason that the plaintiff failed to except to the order of the trial court sustaining the demurrer to his petition. This motion is not well taken. The demurrer and the order of the court sustaining the same are a part of the judgment roll or the record proper, and it has been well settled by this court that it will review error appearing upon the judgment roll or record proper, though no exceptions have been taken in the trial court. International Harvester Co. of America v. Cameron, 25 Okl. 256, 105 Pac. 189; Baker v. Hammett, 23 Okl. 480, 100 Pac. 1114; Tribal Development Co. v. White, 28 Okl. 525, 114 Pac. 736; Gourley v. Williams, 46 Okl. 629. 149 Pac. 229.

[2] Counsel for plaintiff contends that his petition states a cause of action, and that under the facts alleged he, being, by reason of his appointment and acting as guardian. liable to account to the minors Rosa L. Pace. James W. Pace, and Carrie May Pace for the sum of \$1,250 of their funds which was by mistake invested in property, the title to which was taken in the name of Thomas Jefferson Pace, has such an interest in the execution of the trust arising therefrom that he can maintain this action. It may be conceded that the facts stated in the petition are sufficient to raise a resulting trust, and to

in the proportions as above set out, and that I holder of only the naked legal title to said real estate, and that the equitable title is vested elsewhere. The difficulty arises in determining whether or not the plaintiff is entitled to have a trust declared in favor of the minor defendants Rosa L. Pace, James W. Pace, and Carrie May Pace, over their objection in order to relieve himself of his mistake.

> It will be borne in mind that in this action the plaintiff is not seeking to have a trust declared in his own favor, but is seeking to enforce a trust in favor of the minor defendants in order to relieve himself from accounting for funds of said minor defendants, which, by mistake and carelessness, he has invested in property, taking title thereto in the name of another. The petition addressed to the county court of Mayes county and the order of the county court made and entered therein, directing the investment of these funds in the real estate in question, calls for the investment of funds belonging to the estate of Thomas Jefferson Pace. It is contended by counsel for plaintiff that the proceedings in the county court which resulted in the order directing the investment of these funds is in rem, and not in personam, and that therefore the funds in the hands of the guardian were controlled by said order without regard to which of the minors said funds properly belonged, and the taking of title in the name of Thomas Jefferson Pace was a mere error which could be corrected in a court of equity by declaring a trust in favor of the minors to whom the funds belonged.

> [3] For the purposes of this opinion it may be conceded that the proceeding to procure an order to invest these funds in the county court was a proceeding in rem, and not in personam. We do not, however, undertake to determine in this case whether or not it was a proceeding in rem or in personam, since, as we view this case, such determination is unnecessary. It seems that the guardianship of the four minor defendants was pending in the county court of Mayes county as one case, although the guardian of said minors had in his possession funds belonging to them in differ-It is therefore contended ent amounts. by counsel for plaintiff that, since these funds were in his possession as guardian by appointment made for the four minors in one case; the order to invest the sum of \$1,250 in question was in rem, and it could reach that particular sum of money belonging to one of the minors under the jurisdiction of the county court.

The petition of plaintiff for the investment of this sum advised the county court that he had the sum of \$1,250 belonging to Thomas Jefferson Pace for investment; thereupon the court ordered that he invest said sum belonging to Thomas Jefferson Pace in such real estate. This order could only affect funds show that Thomas Jefferson Pace is the belonging to Thomas Jefferson Pace, even

the order of the court operated was the estate of Thomas Jefferson Pace. His estate was the res affected by the proceeding, and not the estate of the other three minors. Counsel for plaintiff has cited no authority, nor have we been able to find any, holding that, in a case like this, where estates of several minors were under guardianship, an order made in a proceeding to invest funds, which by mistake were alleged to belong to one of the wards, and which directed the investment of funds belonging to said minor. would hind the estates of the other wards. It is apparent that many reasons might exist in such a case where the investment would be advisable and proper for one of the wards when it might be wholly inadvisable or improper for others of such wards.

It seems clear to us that an order of the court directing a guardian to invest funds belonging to one ward under his guardianship can afford no protection to the guardian if the funds he actually invests belong to other wards under his guardianship, and this without regard to whether or not his appointment was made in one or several proceedings. It seems to us that the plaintiff, if he had by mistake invested the funds of a stranger to the guardianship which happened to be in his hands and taken title to the real estate purchased in the name of one of his wards, could as well invoke the aid of a court of equity to declare a trust in favor of the stranger as he can in the instant case invoke its aid to declare a trust in favor of his other wards.

The petition of plaintiff does not allege facts sufficient to authorize a court of equity to declare a trust in favor of the minor defendants Rosa L. Pace, James W. Pace, and Carrie May Pace, nor, since it fails to allege that plaintiff has accounted for the funds of said last-named minors mistakenly invested in this real estate, does it state facts sufficient to authorize a trust to be declared in favor of the plaintiff.

The judgment of the trial court should be

PER CURIAM. Adopted in whole.

FUSS v. COCANNOUER. (No. 8725.)

(Supreme Court of Oklahoma. May 14, 1918.)

(Syllabus by the Court.)

1. APPEAL AND ERROR \$\infty\$837(11)\to Trial \$\infty\$ 156(2) — DEMUBERT TO EVIDENCE — DISREGABING INCOMPETENT EVIDENCE.

In considering a demurrer to the evidence, the trial court may disregard incompetent testimony, admitted over proper objections, and on appeal to this court from a ruling sustaining

though it be in rem; the estate upon which 2. WITNESSES \$\iii \)159(8) - COMPETENCY - IMthe order of the court operated was the estate upon which 2. WITNESSES \$\iiii \)159(8) - COMPETENCY - IM-

Under the provisions of section 5049, R. L. 1910, a party to a civil action against the administrator of the estate of a decedent is incompetent to testify, in his own behalf, to facts which will raise an implied contract between such party and the decedent.

3. APPEAL AND ERROR @==997(2)-REVIEW-

DEMURBER TO EVIDENCE.

When there is no competent evidence reasonably tending to support the plaintiff's case, the judgment of the trial court, sustaining a demurrer to plaintiff's evidence, will not be reversed.

Commissioners' Opinion, Division No. 1. Error from District Court, Pawnee County; Conn Linn, Judge.

Action by G. B. Fuss against C. H. Cocannouer, as administrator of the estate of Margaret Cocannouer, deceased. Judgment for defendant, and plaintiff brings error. Affirmed.

Edwin R. McNeill, of Pawnee, for plaintiff in error. Claude C. McCollum, of Pawnee, for defendant in error.

RUMMONS, C. This action was commenced by the plaintiff in error, plaintiff below, against the administrator of the estate of Margaret Cocannouer, deceased, to recover the sum of \$350 lent by the plaintiff to decedent to purchase the improvements upon a homestead situated in Pawnee county. Plaintiff had theretofore presented his claim for said sum to the administrator, which claim was disallowed. At the trial the court sustained a demurrer to the evidence of the plaintiff and rendered judgment for the defendant, to reverse which the plaintiff prosecutes this proceeding in error.

The substance of the material testimony for plaintiff, as set forth in his brief, is that of one George W. Hall, witness for defendant, who testified as follows:

"Mrs. Cocannouer seemed to be very desirous of getting this land in some way as a home, but said she did not have any money, and she was getting pretty old, and did not see how she could make this expense. Mr. Fuss said she could make this expense. Mr. Fuss said in substance that if she wanted the land, and wanted to go ahead with the contest, that they would get through with it some way, meaning as I understood it that he would furnish the money necessary and that she could settle with him later. After some further conversation Mrs. Cocannouer said in substance that it Mrs. Cocannouer said in substance that it seemed like going to a whole lot of trouble and expense, but that he (meaning Mr. Fuss) would get it all back some day, or words to that effect. \* \* It was my understanding at the time that Mr. G. B. Fuss, was advancing the money to make the payment. Q. Did you have any conversation with Mrs. Cocannouer about this transaction at any time after said contest was finally settled? A. About the year 1902 or 1903 I called on Mrs. Cocannouer at her home on the land in question to arrange for a settlement for money still due me as attorney in looking after this contest case. This was at her home on the land in question or above deon appeal to this court from a ruling sustaining her home on the land in question or above dead demurrer to the evidence, incompetent evidence, admitted over objection, will not be considered for the purpose of reversing such ruling. which had been advanced by him in payment

for these improvements and the contest expenses. I do not now remember definitely just what proposition I submitted to her, but I do remember that she told me she did not want to do any thing at that time, because one of the boys objected, and she had to rely on him to some extent for a living, but she intended to such deceased person."

The state of the cause of action immediately from such deceased person." do any thing at that time, because one of the boys objected, and she had to rely on him to some extent for a living, but she intended to fix it so that George (meaning G. B. Fuss) would get all that was coming to him some

The plaintiff, over the objection of the defendant, testified as follows:

"Q. Did you have any—pay any money to Mr. Muenzenmeier of Junction City, Kan. A. Q. State the amount that you paid to Mr. Muenzenmeier. A. I paid him about \$250. Mr. Muenzenmeier. A. I paid him about \$250. Q. I will hand you—at that time did you execute a mortgage? A. I did. Q. I will hand you that exhibit, and ask you if that is the mortgage you gave for the security of that money. A. That is. Q. Was that money paid by you afterwards? A. Yes, sir. Q. What was the consideration for the giving of that mortgage—what was the money for? A. It was the heir of the relinquishment for the improvements."

[1] In Nance v. Oklahoma Fire Insurance Co., 31 Okl. 208, 120 Pac. 948, 38 L. R. A. (N. S.) 426, this court says:

"In considering a demurrer to the evidence, trial court may disregard incompetent testimony admitted over proper objections; and, on appeal to this court from a ruling sustaining a demurrer to the evidence, incompetent evidence admitted over objection will not be considered for the purpose of reversing such rul-

See Bank of Commerce of Ralston v. Gaskill, 44 Okl. 728, 145 Pac. 1131; Clinton National Bank v. McKennon, 26 Okl. 835, 110

2] Applying this rule to the instant case, was there any competent evidence to sustain a verdict for the plaintiff? Section 5049, R. L. 1910, provides as follows:

"No party to a civil action shall be allowed to testify in his own behalf, in respect to any transaction or communication had personally by such party with a deceased person, when the adverse party is the executor, administrator, heir at law, next of kin, surviving partner, or assignee of such deceased person, where such party had acquired title to the cause of action immediately from such deceased person.

In Conklin v. Yates, 16 Okl. 266, 83 Pac. 910, the territorial Supreme Court says:

"Counsel for plaintiff in error argues that "Counsel for plaintiff in error argues that the statute forbids only communications had 'personally' with the deceased; that is, that the statute only contemplates preventing one party from testifying as to conversations had with the deceased. We do not agree with this contention. The evident purpose of the statute is to prohibit a party testifying in his own behalf in respect to any transaction or communication had with a deceased person individually. nai in respect to any transaction or communication had with a deceased person individually. To hold otherwise would open the door for the greatest fraud, and this because the lips of his adversary are closed by death, and he cannot be heard to give his version of the conversation.

The case last cited was quoted with approval in MacDonald v. McLaughlin et ux.,

[3] There was no competent evidence in the record of any express contract between plaintiff and the decedent, and under the foregoing rule the evidence of the plaintiff that he had expended the sum of about \$250 for the use and benefit of the defendant was also incompetent, for the reason that, in an action upon an implied contract with the decedent, the plaintiff is not competent to testify in his own behalf to facts which would raise such an implied contract. The facts from which an implied contract might be inferred constitute a part of the transaction with the decedent, and therefore evidence as to such facts comes within the inhibition of such statute. 40 Cyc. 2318; 12 Enc. Ev. 886.

The evidence of the witness Hall was clearly incompetent to establish an express contract between plaintiff and decedent, for the reason that he does not testify to any conversation between plaintiff and decedent which would show an express contract between them for the plaintiff to furnish money to the decedent, but only testifies to his understanding. His testimony as to the conversation with the decedent after she had acquired and made settlement upon the homestead is probably sufficient to establish an admission of liability, but the amount thereof is nowhere fixed by any competent evidence. When there is no competent evidence reasonably tending to support the plaintiff's case, the judgment of the trial court sustaining a demurrer to the plaintiff's evidence will not be reversed.

The judgment of the trial court should be affirmed.

PER CURIAM. Adopted in whole.

AMERICAN NAT. BANK OF STIGLER v. FUNK. (No. 8116.)

(Supreme Court of Oklahoma. May 14, 1918.)

(Syllabus by the Court.)

1. Banks and Banking \$\infty 154(8) - Evidence \$\infty 408(4) - Deposit Slip - Effect -EXPLANATION.

A deposit slip issued by a bank is but prima facie evidence that the bank received prima facie evidence that the bank received the amount of the deposit on the date shown by the deposit slip. It has the same force and effect as that of any other form of receipt, and is open to explanation as to the conditions surrounding the deposit, and the circumstances under which it was given may be inquired into.

ATTORNEY AND CLIENT 6=182(1)-LIEN-

22 Okl. 584, 123 Pac. 158, where this court says:

"No party shall be allowed to testify in his own behalf, in respect to any transaction or general balance due him from his client, and

such a lien is not lost while the money is still | judgment, and Mrs. Funk's claim was paid under the control of the attorney's agent.

3. Banks and Banking ♣⇒154(8) — Conditional Deposit — Knowledge of Conditions—Liability—Evidence.

Evidence in this case examined, and held (1) that the deposit made by a third person to the credit of the plaintiff was a conditional deposit; (2) that she and the bank had knowledge of the conditions under which the deposit was made; and (3) that the bank was not liable to the plaintiff for charging to her account the sum of \$398.50 paid by it to the person lawfully entitled to the possession of such sum of money.

4. Appeal and Error = 1010(1, 2)—Review
—Findings—Sufficiency of Evidence.

Where there is any evidence reasonably tending to support the findings of the trial court, they should not be disturbed by the Supreme Court; but where, after a careful examination of all the evidence in the case, it is found that there is not any competent evidence to sustain the findings, the cause will be reversed

Error from County Court, Haskell County; Wm. L. Crittendon, Judge.

Action by Mrs. Margaret B. Funk, as administratrix of the estate of H. H. Funk, deceased against the American National Bank of Stigler, Okl. Judgment for plaintiff, and defendant brings error. Reversed and remanded, with instructions to grant a new trial.

J. B. Furry and E. C. Motter, both of Muskogee, for plaintiff in error. T. T. Varuer, of Poteau, for defendant in error.

RAINEY, J. Mrs. Margaret B. Funk, as administratrix of the estate of H. H. Funk, deceased, instituted this action in the county court of Haskell county, Okl., against the American National Bank of Stigler, Okl., for the recovery of the sum of \$398.50. claimed by her as a balance due from a sum of money deposited in said bank to her credit, as administratrix. The defendant pleaded that it had made payment in full to the plaintiff of all sums due her by virtue of said deposit. A jury was waived, and the cause was tried to the court, which resulted in a verdict for the plaintiff, to reverse which judgment the defendant has brought the case to this court. The parties will hereinafter be referred to as they appeared in the county court.

[3] The circumstances out of which the controversy arose are substantially as follows: During the year 1912, H. H. Funk, deceased, employed J. B. Furry and Robert A. Zebold, as his attorneys, to institute suit to foreclose a mortgage on the property of the Stigler Light & Power Company, which resulted in a judgment for the plaintiff and a decree of foreclosure of the mortgage. The property was sold under the mortgage, and after a stubborn contest the same was confirmed by the district court, and sheriff's deed issued on March 1, 1913. The property

in full, together with the sum of \$250 attorney's fees, the amount provided for in the mortgage. Upon confirmation of the sale the sheriff of Haskell county, James Keese, gave his check for the full amount of the judgment, payable to J. B. Furry and R. A. Zebold, in the sum of \$14,959.93. Before the sale was confirmed Mr. Funk died, and his wife, Margaret B. Funk, was appointed administratrix of his estate. Mr. R. A. Zebold. one of the attorneys originally employed, resided in Muskogee, Okl., at the time of his employment, but in June, 1912, moved to Stigler, where he became connected with the American National Bank in the capacity of cashier. While his name appears of record as one of counsel until the case was concluded he testified that he was not connected with the case after June, 1912. Mr. Furry charged an additional attorney's fee of \$250 to that named in the mortgage, and expenses incurred on various trips to Stigler, in the sum of \$23.50, and so notified Mr. Roy Funk, a son of the plaintiff. The sale was confirmed after banking hours on March 1, 1913, and Mr. Furry, being anxious to catch a train back to Muskogee, Okl., gave positive instructions to Mr. Zebold to collect the money on the sheriff's sale, to remit him \$398.50, the balance due on his fee in the case. \$125 having been paid during the lifetime of Mr. Funk. It seems, however, that Mr. Zebold, being anxious to secure the deposit for the American National Bank of the full amount of the sum collected on the judgment, which deposit had been promised to him by the representatives of the Funk estate, on the suggestion of Roy Funk deposited the entire sum to the credit of Mrs. Funk, as administratrix of the estate, and delivered the deposit slip to Roy Funk. However, he explained to Roy Funk at the time the deposit was made that it was subject to Furry's claim in the sum of \$398.50; that said amount would have to be paid Mr. Furry by Mrs. Funk by check, or that he would pay the same and charge it to her account.

With reference to the instructions given Mr. Zebold. Mr. Furry's testimony is as

"I instructed him to get the check from the sheriff, James Keese, for the amount of the judgment and costs the plaintiff was entitled to in that action. The amount was \$14,959.93. I believe that amount included \$250 for attorney's fee collected from the defendants in that case as a part of the costs. I told Mr. Zebold to collect the money on the sheriff's check and remit to me \$398.50, which was the balance of the attorney's fee which I charged in the case. There had previously been paid \$125 by Mr. Funk to apply on attorney's fee and my fee in the case would be \$500, and that my expenses from the number of trips that I had made to Stigler and back in attending court in that case. I never at any time authorized the bank to deposit that money to Mrs. deed issued on March 1, 1913. The property ized the bank to deposit that money to Mrs. was sold for more than enough to satisfy the Funk's credit or any part of it to her credit.

I didn't at any time know that Mrs. Funk in- | explaining the arduous and valuable services tended to carry any deposit in the American National Bank. My instructions were to col-lect the money on the check and remit to Mrs. Funk the amount of the judgment after deducting the amount of the fee I charged in the case and my expenses. I told Roy Funk the day, on March 1st, that the fee, right here in the court room, in the presence of Mr. Curry, that the fee would be \$500."

Mr. Zebold, one of the witnesses placed on the stand by plaintiff as her witness, with reference to how the deposit was made, testified as follows:

"Upon the evening of March 1, 1913, after banking hours, approximately 6 o'clock, you (Judge Furry) delivered a check by James Keese for \$14,959.93 and this check was payable to yourself and myself. Your instructions to me were to take the check, collect and remit you \$398.50, and to pay the balance to Margaret B. Funk, administratrix of the estate of H. H. Funk, deceased. I took the check, went over to the bank, went in some time between 6 o'clock and 7 o'clock, made a deposit ticket in the name of Margaret B. Funk, administratrix of the estate of H. H. Funk, deceased, and entered the check for \$14,959.93, made a duplicate of that deposit ticket, and delivered the duplicate to Roy B. Funk, and told him that his mother was to send Judge Furry a check for \$398.50, and, in the event that she did not do so, that the sum would be charged against this account and remitted to Judge Furry, because I had received those instructions from him when he delivered to me the check for deposit. \* \* \* Q. Didn't you deposit the check in the name of this plaintiff in the way you did at the suggestion of Mr. Funk, after some protesting on your part? A. I did. Q. Just state to the court what was said. A. I told Roy what my instructions were to de-"Upon the evening of March 1, 1913, after after some protesting on your part? A. I did. Q. Just state to the court what was said. A. I told Roy what my instructions were to deduct the \$398.50 from it, and from him I received authority to give his mother a deposit for this judgment, or rather it had been the understanding between us that I was to have the benefit of the deposit or until they sought new fields of investment. Roy said his mother would feel better about it if she could issue check for that amount, \$398.50, to you. Under those conditions I issued this deposit ticket, of which this copy introduced here is a duplicate, and delivered this duplicate to Roy Funk with and delivered this duplicate to Roy Funk with that understanding, and told him that his mother was to send me a check, and if she did not I would charge it to her account; that I had received the check from you with those instructions. Q. Did you notify Mrs. Funk of the conditions or instructions under which the deposit was made? A. I did. Q. When? A. I dictated a letter on March 3d. This deposit was made after banking hours on Saturday—showed on Monday's business. I dictated a letter to Mrs. Funk, which was written on March 4th, the next day or the day after, and explained to her just how the case had been terminated, and gave her all the details relative minated, and gave her all the details relative to your charge for attorney's fee and the conditions surrounding this deposit. I was to write a letter to his mother explaining this deposit, and he was to do the same verbally. Q. At the time you had this conversation with Roy B. Funk at the bank about depositing this sum in his mother's name, I will ask you whether he didn't state at that time he would see that his mother sent a check for the amount due me for the sum of \$398.50? A. That is my recollection of the conversation."

There was introduced in evidence the letter written by Mr. Zebold to Mrs. Funk. In this letter, which is quite long, Mr. Zebold gave the history of the case in some detail,

rendered by Mr. Furry in the case; stated that the writer was not entitled to and did not claim any part of the fee, but that the fee charge by Mr. Furry was very reasonable. Relative to the condition of the deposit the letter reads as follows:

"Knowing you quite well, I deviated from the line of instructions received from the judge, and gave you credit in the bank for the \$14,-959.93, subject, of course, to the conditions surrounding the deposit, and I am awaiting a check from you for the attorney fees and expenses in the matter."

Mrs. Funk did not send the check as requested by Mr. Zebold, but instead sent only \$135, which was refused. Mr. Furry then drew on Mr. Zebold, personally, for \$398.50, which draft was paid by Mr. Zebold and charged to the account of Mrs. Funk. The record further shows that Roy Funk made no objection at any time to the fee charged, but suggested to Mr. Zebold that he was without authority to allow it. He further testified that he had no authority in the premises other than to receive the deposit slip.

Under the above state of facts, the trial court found for the plaintiff, doubtless on the theory that the bank was bound by and could not dispute the deposit slip.

Counsel for defendant contend that on the undisputed testimony in this case and the conceded facts that the judgment of the court is wrong as a matter of law, and counsel for plaintiff say that the sole question is whether the defendant was legally justified in paying the draft drawn on Mr. Zebold by Mr. Furry and charging the amount thereof to the account of the plaintiff.

[1] A deposit slip is but prima facie evidence that the bank received the amount of the deposit on the date therein stated. has the same force and effect as that of any other form of receipt, and is open to explanation as to the gonditions surrounding the deposit, and the circumstances under which it was given may be inquired into. Hough v. First Nat. Bank of Oelwein, 173 Iowa, 48, 155 N. W. 163; Keen v. Beckman et al., 66 Iowa, 672, 24 N. W. 270; First Nat. Bank of Union Mills v. Clark, 134 N. Y. 368, 32 N. E. 38, 17 L. R. A. 580; Davis v. Lenawee County Savings Bank, 53 Mich. 163, 18 N. W. 629; Stair v. York Nat. Bank, 55 Pa. 364, 93 Am. Dec.

This is especially so where the deposit is made by the depositor in the name of a third person. The applicable principle is well stated by Tiffany in his work on Banks and Banking, par. 15, p. 42, as follows:

"Where a deposit is made in the name of a "Where a depost is made in the name of a third person, the bank must make payment to such person, in the absence of any adverse claim by the actual depositor or another. The actual depositor has a right to demand payment from the bank if the money deposited was his own, and he did not intend to transfer the beneficial ownership of the deposit to the person in whose name it was made."

[4] We understand from the brief of counsel for plaintiff that he concedes that the bank may show that the deposit was a conditional deposit, but counsel contend that the question as to whether the deposit in this case was a conditional deposit was a question of fact, that the trial court determined against the defendant, and for that reason the judgment should not be disturbed. This position is obviously correct if the evidence in the record reasonably tends to support the judgment. We have carefully read and considered all of the evidence in the record, and have concluded that the judgment is not reasonably supported by the evidence.

[2] It is a well-settled proposition of law that an attorney has a general possessory or retaining lien on property or money of his client in his hands for the fees or for any general balance due him from his client. 6 Corpus Juris, 770; 2 Ruling Case Law, §§ 150-152, inc., pp. 1063, 1064. While such a lien depends upon the attorney's possession, and is lost if possession is voluntarily relinquished to the client, we do not think, under the facts of this case, that such possession was voluntarily relinquished, but, on the contrary, was retained. As we have read the record, the uncontradicted and undisputed evidence in the case shows that Mr. Zebold was not acting in the capacity of an attorney for Mrs. Funk when he received the check from the sheriff in payment of the judgment, but was acting as the agent of Mr. Furry, who had the retaining lien on the funds represented by the sheriff's check. The possession of Mr. Zebold was that of Mr. Furry, and control over that part of the proceeds of the judgment claimed as a fee, to wit, \$398.50, and the possession of the same, was never voluntarily surrendered by Mr. Zebold to Mrs. Funk. So far as the bank was concerned, Mr. Furry, through his agent, still retained control and constructive possession of this part of the fund. This control and possession did not in any wise preclude Mrs. Funk from litigating with Mr. Furry the reasonableness of the fee charged by him. The record discloses that the fee charged was very reasonable for the services performed, and no other claim is made. It seems that Mrs. Funk has brought suit against the bank on what she assumes to be her technical legal rights. But since the bank, through Mr. Zebold, its cashier, had recognized the claim of Mr. Furry to the amount of the fund claimed by him, and issued the deposit slip on this understanding, and with notice to Mrs. Funk as to the conditions surrounding the deposit, the bank not only had the right, but it was its duty, to pay the amount due Mr. Furry upon his demand, and to charge the same to the account of Mrs. Funk, to whose account it had been erroneously deposited, in violation of the specific instructions given by Mr. Furry. The deposit was not, in fact, made by Mrs. Funk, and she was only entitled to have deposited to her credit as much of the proceeds of the judgment as were released to her by Mr. Furry through Mr. Zebold.

The cause is therefore reversed and remanded, with instructions to grant a new trial. All the Justices concur-

HARN et ux. v. INTERSTATE BUILDING & LOAN CO. et al. (No. 9281.) (Supreme Court of Oklahoma. April 9, 1918. Rehearing Denied June 11, 1918.)

## (Syllabus by the Court.)

1. APPEAL AND ERROR & 170(6)—REVERSAL
—SUBSTANTIAL ERROR—PREMATURE TRIAL.
To compel parties, over their objection, to proceed to the trial of a case at a date earlier than ten days after the issues are made up, as provided by section 5043, Rev. Laws 1910, is a denial of a substantial right of such parties, and is prejudical error. and is prejudicial error.

2. TRIAL 5-COMPELLING PARTIES TO GO TO TRIAL—REVERSIBLE ERROR.

Where the issues were joined with the plain-tiffs by one of two defendants in the action, and this by one of two defendants in the action, and the other defendant, during a term of court, voluntarily made his appearance and adopted the answer of his codefendant on condition that the case proceed to trial immediately, it was reversible error for the trial court to overrule the motion of the plaintiffs to strike the case from the trial docket and comper them to go to trial over their objection. over their objection.

Sharp, C. J., and Miley, J., dissenting.

Error from District Court, Oklahoma County; Geo. W. Clark, Judge.

Suit by W. F. Harn and wife against the Interstate Building & Loan Company and another. From a judgment sustaining a demurrer to plaintiffs' evidence on their first cause of action, and awarding nominal damages only on their second cause of action, they bring error. Reversed and remanded, with directions to grant a new trial.

W. F. Harn, of Oklahoma City, for plaintiffs in error. Wilson, Tomerlin & Buckholts, of Oklahoma City, for defendants in error.

RAINEY, J. This is an appeal from a judgment sustaining a demurrer to the evidence of the plaintiffs on their first cause of action, and in awarding judgment for nominal damages only on their second cause of action, in a suit instituted by Mr. and Mrs. W. F. Harn, as plaintiffs, against the Interstate Building & Loan Company and I. C. Enochs, as defendants. The parties will be designated as they appeared in the trial court.

Mr. I. C. Enochs, one of the defendants, at the time of the institution of the suit was a nonresident of the state of Oklahoma, and the plaintiffs attempted to obtain service on him by publication. Mr. Enochs, by his attorneys, Wilson, Tomerlin & Buckholts, filed a separate special appearance and motion to

quash the summons attempted to be served on him by publication, on the ground that the action was not one wherein service by publication was authorized to be made. The motion to quash was properly sustained by the trial court, for the reason that the plaintiffs, in their action, sought to recover a money judgment only against Mr. Enochs, and neither the affidavit nor the notice by publication brought the case within the class of cases provided for in section 4723, Rev. Laws Okl. 1910, authorizing such service. Thereafter plaintiffs, by leave of court, filed a supplemental affidavit and motion to vacate the order sustaining the motion of the defendant Enochs to quash the service by publication. This motion was overruled, and exceptions allowed plaintiffs. The record then discloses the following proceedings:

"By Mr. Harn: Now, if your honor pleases, I have a motion here that I will read. It is a motion to strike the case from the docket (reads

"By Mr. Wilson: Your honor, at this time the defendant I. C. Enochs agrees to enter his appearance in this case, with the understanding that he adopts the answer of the Interstate Building & Loan Company as his answer in this case, and with the further understanding that

case, and with the turguer understanding that this case goes to trial immediately.
"By the Court: Is that satisfactory?
"By Mr. Harn: No.
"By the Court: Why?
"By Mr. Harn: Since I. C. Enochs is now in the case we are not ready for trial.'

Thereupon Mr. Harn filed the motion to strike the case from the docket and for a continuance, in which it was alleged that the plaintiffs had been informed and believed that Mr. Enochs was at that time in Oklahoma City, and that personal summons could be served on him by the sheriff of Oklahoma county. This motion was overruled by the court in the following language:

"The motion for continuance will be over-ruled, the defendant I. C. Enochs entering his appearance in this action, and adopting as his answer all the allegations of the answer of the Interstate Building & Loan Company.

"By Mr. Harn: The plaintiffs except."

[1,2] One of the errors assigned for reversal of the judgment is that the court erred in overruling the motion of the plaintiffs for a continuance, and to strike the case from the docket, and in support thereof counsel for plaintiffs say that it was reversible error for the court to force the plaintiffs to trial at a time when the issues had not been made up for ten days, and that said action of the court was in violation of their statutory rights. Section 5043, Rev. Laws Okl. 1910, in part, reads as follows:

"Actions shall be triable at the first term of court, after or during which the issues therein, by the time fixed for pleading are, or shall have been made up. When the issues are made up, or when the defendant has failed to plead within the time fixed, the cause shall be placed on the trial docket, and if it be a trial case shall stand for trial at such term ten days after the issues are made up, and shall, in case of default, stand for trial forthwith. \* \* \* \*"

Mr. Enochs certainly had the right to waive the issuance of summons, to enter his of the issues. It may sometimes happen, as

appearance, and to adopt the answer of his codefendant, but we do not think the trial court was authorized to impose upon the plaintiffs the condition that the case was to proceed to trial immediately, as proposed by counsel for Mr. Enochs. Plaintiffs had the right to plead to Mr. Enochs' answer, who was not in court until he voluntarily made his appearance and adopted the answer of his codefendant. Under the provisions of section 5043, supra, where the issues in a case are settled during a term of court, the case is triable at that term only after the expiration of ten days from the date the issues are made up. Conwill v. Eldridge, 35 Okl. 537, 130 Pac. 912; City of Ardmore v. Orr, 35 Okl. 305, 129 Pac. 867; Title Guaranty & Trust Co. v. Turnbull, 40 Okl. 294, 137 Pac. 1178; Chicago, R. I. & P. Ry. Co. v. Pitchford, 44 Okl. 197, 143 Pac. 1146.

All of the above cases arose before section 6005, Rev. Laws Okl. 1910, went into effect on May 16, 1913. Said section is as fol-

'No judgment shall be set aside or new trial granted by any appellate court of this state in any case, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence, or as to error in any matter of pleading or procedure, unless, in the opinion of the court to which application is made, after an examination of the entire record, it appears that the error complained of has probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right."

We cannot hold the error harmless under this statute, for the reason that the time for trial, as provided by section 5043, supra, is a statutory right, in fact a valuable one. As was observed in the case of Conwill v. Eldridge, supra, the purpose of the statute is to secure to the parties to the action a reasonable time after the issues are joined in the case, in which to secure witnesses and to prepare for trial, and it is reversible error for the court to compel a party, over his objection on this ground to proceed to the trial of a case on a date earlier than ten days after the issues are made up. While the time for trial may be waived, the record in this case shows that it was not.

It is urged, however, that the plaintiffs, by insisting that the service by publication as to Mr. Enochs was good, and by moving for a default judgment against him, are not in a position, after an adverse ruling, to say that they were entitled to have the case stricken from the trial docket and the cause continued. We cannot concur in this view. An attorney, who believes that his client is entitled to a default judgment, does not usually take his witnesses with him when he goes into court insisting upon such default judgment. In such cases where the court, to which such application is made, holds the service insufficient, the attorney knows that he cannot proceed to trial without service. and is seldom prepared to enter into a trial

in this case, that the defendant, notwithstanding the invalidity of the service, enters his appearance, but this procedure is the exception, and the rule must be such as to protect the rights of parties litigant in all cases.

If section 5043, supra, could be construed as directory only, we would then, after an examination of the entire record, determine whether the error complained of had probably resulted in a miscarriage of justice: but. as we construe said section, it is the mandatory duty of the court to allow the parties to the action at least ten days to prepare for trial after the issues are made up, where the right is not waived, and we must hold in this case that the denial of the motion to strike the case from the trial docket was a substantial violation of plaintiffs' statutory

The cause is therefore reversed and remanded, with directions to grant a new trial. All the Justices concur, except SHARP, C. J., and MILEY, J., who dissent.

RENTIE et al. v. RENTIE et al. (No. 8723.) (Supreme Court of Oklahoma. April 2, 1918. Rehearing Denied May 28, 1918.)

(Syllabus by the Court.)

1. Bastabds &== 12 - Legitimation - Ac-KNOWLEDGMENT-STATUTE.

Under the laws of Arkansas, which were extended over the Indian Territory, the only mode by which an illegitimate child could be made legitimate was by the marriage of the father and mother of such illegitimate child, and an acknowledgment by the said father that he was the father of such illegitimate child.

2. Bastards @== 101-Inheritance - Decla-

BATION-STATUTE.

BATION—STATUTE.

Where the father of an illegitimate child dies intestate, the only mode by which such illegitimate child can be made an heir of the estate of such father, under the laws of Arkansas, which were extended over the Indian Territory, is for the father to have made a declaration in writing as provided for in section 2544, Mansfield's Digest, and the said declaration must have been recorded as required by section 2545 Mansfield's Digest by section 2545, Mansfield's Digest.

by section 2545, Mansfield's Digest.

3. INDIANS —18—ALLOTMENT—DESCENT.

A duly enrolled Seminole freedman, after receiving his allotment, died in 1901 or 1902, leaving surviving him a widow and a daughter, who had been enrolled as Chickasaws. Held, that the descent was cast under chapter 49, Mansfield's Digest of Arkansas, and the question of whether or not the said widow and daughter are Seminole citizens is not involved in determining the descent of said land in determining the descent of said land.

(Additional Syllabus by Editorial Staff.)

4. INFANTS = 115-CASE-MADE-SERVICE.

Where member of bar, appointed guardian for minor, appeared and acted in trial court as attorney, and accepted service of case-made, and was present at settling of case, the contention that case-made was not properly served, that notice of time of settling thereof was not properly given, or that summons in error was not properly served, was without merit.

could not be known by affiant, that he had used due diligence, and had made trips to find them, was insufficient, where the facts as to due diligence as to service in the state were not set up.

6. JUDGMENT = 17(9)—PROCESS — VALIDITY.

Where an affidavit for publication was not sufficient, the trial court never acquired jurisdiction of defendants so served, and judgment against them was void, and it was not necessary that they be served with case-made, notice of its settling, or service of summons in error.

Commissioners' Opinion, Division No. 1. Error from District Court, Seminole County; Geo. C. Crump, Judge.

Action by Isadore Elnora Rentie, by her guardian, and others, against Ollie Rentie and others, with cross-action by Ollie Rentie. Demurrer to evidence sustained, and judgment for defendant Ollie Rentie on her crossaction. Motion for new trial overruled, and plaintiffs bring error. Reversed and remanded, with instructions to render judgment for plaintiffs.

H. C. Thompson and Thomas P. Holt, both of Ada, for plaintiffs in error. John W. Willmott, of Wewoka, for defendant in error Ollie Rentie.

COLLIER, C. This is an action brought by the plaintiffs in error against the defendants in error to quiet title in them to lands described in the petition, and for rent; the respective interest claimed by said plaintiffs in said lands being, on the part of Rachel Clark, née Rachel Rentie, that she was the wife of Robert Rentie at the time of his death, he dying intestate in the now present limits of Seminole county in 1902, owning the lands in controversy, and that she was entitled to a dower in the said lands of the said decedent; and the respective interest claimed by Isadore Elnora Rentie in said lands being that she was the only child and heir of Robert Rentie, deceased, and inherited said lands subject to said dower. The case was tried to the court, and upon conclusion of the evidence the defendant demurred to the evidence, which demurrer was sustained, and judgment rendered for the defendant in error Ollie Rentie, on her cross-action for the lands in controversy, to which the plaintiffs in error duly excepted. Timely motion was made for a new trial, which was overruled and excepted to, and error brought to this court.

Hereinafter the parties will be designated as they appeared in the trial court. After the case was submitted upon plaintiffs' brief, the defendant, not having filed a brief, nor offered any excuse for such failure, filed a motion to dismiss this appeal upon the following grounds:

"First. Because the case-made herein was never served upon said minor defendant in er-

ror, Ollie Rentie. "Second. Because 5. PROCESS & 96(4)—PUBLICATION—AFFIDAvit.

An affidavit for summons by publication,
averring that the whereabouts of defendants | fected by the judgment, and who will be affected by the judgment in this court, have not been made parties to this appeal; the case-made not having been properly or legally served upon them, no notice having been given them of the time or place of presentation of the case made for settlement, and no summons in error hav-

ing been served upon them.

Third. Because the case-made shows no proper or legal service upon the minor defendant in error, Ollie Rentie, of notice of the time and place of presenting the case made for set-

tlement.

"Fourth. Because summons in error was never legally or properly served upon said minor defendant in error, Ollie Rentie."

[4] For the reasons hereinafter stated, we are of the opinion that the motion to dismiss is without merit. The record discloses that John W. Willmott, a member of the bar at Wewoka, Okl., was appointed guardian ad litem for the said minor, Ollie Rentie, and the record discloses that John W. Willmott, not only acted as guardian ad litem, but appeared and acted in the trial court as the attorney of Ollie Rentie. There being no question that he accepted service of the casemade, signing the same as "attorney ad litem," that he was present at the settling of the same, and that service of the summons in error was properly made upon him, there is no merit in the contention that the case-made was not properly served, that notice of the time of settling of the same was not properly given, or that summons in error was not properly served, so far as Ollie Rentie is concerned.

[5] Jerome Carter and the unknown heirs of John Silas were attempted to be made parties by publication, but the affidavit for the publication is defective. It is averred in the affidavit for the summons by publication:

That the whereabouts of the defendant Jerome Carter, and the unknown heirs of John Silas, cannot be obtained by affiant; that due diligence has been used by affiant to ascertain the same; "that affiant made several trips to various parts of Seminole county, inquiring of various people of the whereabouts of said heirs, but that no one could tell him anything about them; that both Jerome Carter and John Silas them; that both Jerome Carter and John Silas were formerly residents of Seminole county, Okl., their last known place of residence; that the said Jerome Carter and unknown heirs of John Silas, deceased, cannot be served with summons in the state of Oklahoma with due diligence."

These averments are not sufficient, for the reason that the facts of the due diligence used as to service in this state are not set up. It is true that the facts as to diligence in attempting to serve these parties in Seminole county are set up, but there are no facts set up to show that the summons could not be served in the state of Oklahoma, nor is it alleged that Jerome Carter is a nonresident of this state, nor that John Silas had died leaving heirs surviving him, whose names and places of residence are unknown, while it is averred in the affidavit for publication that it is unknown whether or not there are unknown heirs of John Silas. In Nicoll v. Midland Savings & Loan Co. of Denver, Colo., 21 Okl. 591, 96 Pac. 744, it is held: in January or February, 1901; that she was

"Where publication service is relied on solely, and it is alleged in the affidavit therefor that, with the exercise of due diligence, the plaintiff is unable to procure service of summons on the defendant within the territory, \* \* the facts necessary to show that due diligence was used to obtain personal service should be stated, and, where judgment is rendered against a for-eign corporation without such requirements be-ing complied with, it is void."

In J. W. Cordray v. Salia M. Cordray, 19 Okl. 36, 91 Pac. 781, it is held:

"Where publication is relied on, and 'urisdiction is sought to be obtained of the defendant in an action by publication service alone, the affidavit for publication, as well as the publication notice, are matters jurisdictional, and, in order to obtain jurisdiction of the defendant in such case, both the affidavit for publication and the publication notice must comply with the provisions of the statute."

[6] The affidavit for the publication not being sufficient, the trial court never acquired jurisdiction of the person of Jerome Carter and the unknown heirs of John Silas, deceased, and the judgment rendered against them was void, and therefore it was not necessary that Jerome Carter and the unknown heirs of John Silas be served with the casemade, notice of its settling, or to have served upon them a summons in error. In Rogers, County Treasurer, v. Bass & Harbour Co., 47 Okl. 786, 150 Pac. 706, it is held:

"Where a judgment as to a certain defend-ant therein is void, service of the case-made up-on him is not required."

The motion to dismiss the appeal is denied. [1, 2] The undisputed evidence is that the deceased, Robert Rentie, was a Seminole freedman, and died seised and possessed as his allotment of the lands involved in this controversy; that Julia Jefferson was the mother of the defendant Ollie Rentie, that she is a Seminole freedwoman, that she knew Robert Rentle during his lifetime, and that Robert Rentie was dead, but she did not know when he died; that up to the time Robert Rentie married Rachel Clark (plaintiff) he lived with his father, John Rentie; that Robert Rentie never lived with witness at any time; that he never carried her around as his wife; that he never called her his wife to any one; that they were not married, and had no intentions of being married, to each other: that Robert Rentle was the father of Ollie Rentie, but that he never admitted it to any one but this witness, and another witness at a different time; that Robert Rentie never contributed anything towards the support of Ollie Rentie, and never claimed her as his child; that this witness was never married to any one but to Thomas Jefferson; that this witness and Robert Rentie did not even keep company together as "sweethearts" before he married Rachel Clark, or any other time; that Rachel Clark was the mother of Isadore Elnora Rentie; that she was the wife of Robert Rentie at the time of his death, which is fixed as March 28, 1902; that she was legally married to deceased near Lima, in the Seminole Nation,



death, and had lived with him continuously ever since she married him: that Isadore was born about two weeks before Robert died; that she was married to Robert by a preacher named Ellis Stevenson; that the plaintiffs were enrolled in the Dawes Commission Rolls as Chickasaw freedmen.

The court made the following findings of fact:

"That Robert Rentie was a irretunal of the Seminole Nation, and received as allot-ment the lands described in the petition, which ment the lands described in Seminole county. That "That Robert Rentie was a freedman citizen ment the lands described in the petition, which lands were situated in Seminole county. That said Robert Rentie, being seised and possessed of said tract of land, died intestate in Seminole county in the year 1902, leaving surviving him the following as next of kin: His daughter, a minor defendant, Ollie Rentie, a duly enrolled Seminole citizen, who was his legitimate child by Julia Williams, a Seminole freedwoman. That said Robert Rentie also left surviving him his lawful wife, Rachel Clark, a Chickasaw freedwoman, duly enrolled as such, and the minor plaintiff, Isadore Elnora Rentie, also enrolled as a Chickasaw freedwoman.

enrolled as a Chickassw freedwoman.

"The court further finds that upon the death of the said Robert Rentie the said land descended to his heirs, who were Seminole citizens, according to the laws of descent of the state of Arkansas as contained in chapter 49 of Mansfield's Digest, and that said Robert Rentie left only one heir, who was a Seminole citizen, to wit, the minor defendant, Ollie Rentie, his to wit, the minor defendant, Olhe Rentie, his daughter, and that said land, upon the death of said Robert Rentie, passed to and was inherited by the said Ollie Rentie in fee simple, and that she is now the owner of said land in fee simple, and entitled to the possession therefof; that neither of the plaintiffs, being citizens and members of the Chickasaw Tribe or Nation of Indians, inherited any right, title or interest in or to said land

terest in or to said land.
"The court further finds that the minor defendant, Ollie Rentie, is entitled to the immediate possession of all of said land, and to have the title to the same quieted in her as against the plaintiffs and all of her codefendants named in the petition, and to have canceled and removed as clouds from her title each and every conveyance mentioned and set out in the plaintiff's petition, and is entitled to judgment for her costs."

Sections 2525, 2544 and 2545 of said laws (Mansfield's Digest of Arkansas) provide:

Section 2525: "If a man have by a woman a child or children, and afterward shall intermarry with her, and shall recognize such children to be his, they shall be deemed and consid-

ered as legitimate."

Section 2544: "When any person may desire
to make a person his heir at law, it shall be favor of such person, to be acknowledged before any judge, justice of the peace, clerk of any court, or before any court of record in this state." lawful to do so by a declaration in writing in

Section 2545: "Before said declaration shall be of any force or effect, it shall be recorded in the county where the said declarant may reside, or in the county where the person in whose favor such declaration is made may re-

We have been unable to find any provision of the laws of Arkansas which were extended over the Indian Territory providing for legitimating an illegitimate child, other than said section 2525, supra. The uncontradicted evidence is that Ollie Rentie was an ille-

living with Robert Rentie at the time of his | married her mother, or publicly acknowledged Ollie as his child, and consequently the finding of the court that Ollie Rentie was the legitimate child of Robert Rentie is unsupported by the evidence, and the trial court committed reversible error in so finding.

Not being the legitimate child of Robert Rentie, the only other way-Robert Rentie having died intestate-by which Ollie Rentie could have been an heir to the land in controversy was by Robert Rentie complying with sections 2544 and 2545, supra. It is not attempted to be shown that Robert Rentie made the declaration provided for by said section 2544, supra, and consequently the court committed reversible error in holding that Ollie Rentie is an heir of Robert Rentie, deceased.

There is but one controlling question involved in this litigation. Does the fact that Robert Rentie was an enrolled Seminole freedman, and the plaintiffs were enrolled as Chickasaws, exclude the right of dower on the part of the wife, and inheritance on the part of the child as to the lands in controversy? The finding of the trial court that the plaintiffs being enrolled as Chickasaws excluded them from any interest in the said lands was prejudicial error, and in direct conflict with the holding of this court in the case of Wadsworth et al. v. Crump et al., 157 Pac. 713, decided by this court on March 21, 1916, in which it is held:

"The word 'citizen' as used in section 2 of "The word 'citizen' as used in section 2 of said Agreement, is not limited to persons whose names are found on the rolls prepared under section 1. Citizenship in the Seminole Tribe did not necessarily extend to or invest in the citizen a personal or individual interest in the common or undivided property of the tribe, but might exist independent of any right to participate in the distribution of tribal property."

## It is further held:

duly enrolled Seminole Indian died July 1901, before receiving his allotment, leaving him surviving a widow and two daughters, who had been enrolled as Creeks. Held, that the daughters were heirs of their deceased father under section 2 of the Seminole Agreement approved by Act Cong. June 2, 1900, and inherited the lands to which their father was entitled to the exclusion of more distant relations, though enrolled as Seminoles."

[3] At the time of the death of Robert Rentie, the allottee in this case, there were two laws of descent and distribution in force and effect in the Seminole Nation. The laws of Arkansas applied in cases where the allottee died before receiving his allotment, and in such case the descent was limited. by section 2 of the Second Seminole Agreement (Act Cong. June 2, 1900, c. 610, 31 Stat. 250), to Seminole citizens. See Bruner et al. v. Sanders et al., 26 Okl. 673, 110 Pac. 730. Where the allottee died after receiving his allotment, and after 1900, and prior to statehood, the descent was cast under chapter 49, Mansfield's Digest of Statutes of Arkansas, and did not limit the descent to Semgitimate child; that Robert Rentie never inole citizens. See Heliker-Jarvis Seminole

having received his allotment, and since 1900, and prior to statehood, and therefore the descent was not limited to Seminole citi-The trial court so limited it, and held that the plaintiffs, since they were not enrolled as Seminole citizens, were not entitled to inherit. It follows that the trial court committed reversible error in finding that the wife was excluded as to the right of dower, and the daughter as an heir of the lands described in the petition. The court not only wrongfully applied the law of descent, if the descent had been cast under the Seminole Agreement, as the allottee had received his allotment prior to his death, but in addition wrongfully determined the law of descent governing the instant case. The question as to whether or not the plaintiffs are included within the term of "Seminole citizens" is not involved in this case.

This cause is reversed and remanded, with instructions to the trial court to render judgment for the plaintiffs in accord with the views herein expressed.

PER CURIAM. Adopted in whole.

DANIELS v. BUNCH et al. (No. 7963.) (Supreme Court of Oklahoma. Jan. 29, 1918.)

(Syllabus by the Court.)

1. Usury \$\insigm 143 - Penalty - Set-Off Against Debt.

AGAINST DEBT.

In enforcing the penalty for taking, receiving, reserving, and charging usurious interest prescribed by section 3, art. 14, Oklahoma Constitution, and section 1005, Rev. Laws 1910, a distinction is made depending upon whether or not the usurious interest has been paid. If or not the usurious interest has been paid. In usury has been contracted for and not paid, the penalty may be pleaded by the defendant as a set-off in an action to recover the debt; but if such usurious interest has been paid, it cannot be set up as a defense in an action to re-cover the debt, but can only be recovered in a separate action brought for that purpose within two years, according to the provisions of section 1005, Rev. Laws 1910.

2. USURY \$== 101-USURIOUS INTEREST-SET-OFF.

In an action to recover the amount of a promissory note, and to foreclose a real estate mortgage given to secure the same, where the defense is the payment of usurious interest, and defense is the payment of usuarous interest, and a forfeiture of all interest is claimed, and the court finds that usurious interest has been paid, and that all interest should be forfeited, and allows all interest payments to be offset against the date held arrow gines usurious interest paid. the debt, held error, since usurious interest paid cannot be allowed as an offset in an action on the debt, and must be recovered in a separate action.

3. BILLS AND NOTES \$\sim 497(2) - HOLDER IN DUE COURSE-BURDEN OF PROOF-STATUTE. When it is shown that the title of any person who has negotiated a negotiable instrument is defective, the burden is on the holder to prove that he or some one under whom he claims acquired title to the instrument as a

Co. v. Lincoln et al., 83 Okl. 425, 126 Pac. firmaties save under the exception provided in section 4109, Rev. Laws 1910; and unless he proves this to the satisfaction of the court or jury, he is not entitled to recover against the maker.

> 4. BILLS AND NOTES \$=376 - USURY - "DE-FECTIVE TITLE"-STATUTE.

> The exaction of usury on loans for which a negotiable promissory note is executed renders the consideration for said note illegal, and the title of the person taking such note is defective within the meaning of section 4105, Rev. Lews 1910, to the extent of such usury.

> [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Defective.]

> Commissioners' Opinion, Division No. 1. Error from District Court, Stephens County: Chan Jones, Judge.

> Action by Mary A. Daniels against Abel N. Bunch and others. Judgment for plaintiff for a sum less than her demand, and she brings error. Reversed and remanded.

> Charles B. Mitchell, of Miami, and H. A. Kroeger, of Oklahoma City, for plaintiff in error. H. B. Lockett, of Comanche, for defendant in error Bunch.

RUMMONS, C. The parties appear here as they appeared below, and will be so designated. The plaintiff commenced this action against the defendant A. N. Bunch and others to recover judgment upon promissory note for the sum of \$350, and for the sum of \$10.50 interest represented by coupons attached to the principal note, and to foreclose a mortgage upon real estate in Stephens county given to secure said note. The defendant answered admitting the execution of the note and mortgage sued upon, and alleging that at the time he executed said note and mortgage he executed various other notes and mortgages in connection therewith; that he made application to the Deming Investment Company for a loan of \$550; that the Deming Investment Company lent him said sum, requiring him as a condition to procuring such loan that he obligate himself to pay in addition to the sum of \$550 the sum of more than \$239, and as evidence thereof required him to sign obligations to various persons, all of which obligations have been paid by the defendant, except the note sued on herein; that the sums charged for the use of said money are in excess of 10 per cent. interest, and usurious; that by reason of such usury, under the provisions of section 3, art. 14, Constitution of Oklahoma, and section 1005, R. L. 1910, double the sum charged, to wit, \$478 had been forfeited, and prayed judgment forfeiting the note and interest coupons sued on, canceling the mortgage, and for attorney's fees and costs. The plaintiff replied denying the plea of usury, and alleging that if usury was in fact exacted by the Deming Investment Company it was done without her knowledge, and holder in due course without notice of any in- that plaintiff was an innocent purchaser of

and without notice of said usury.

The record discloses that at the time the sum of \$550 was lent the defendant by the Deming Investment Company, in consideration thereof on May 20, 1908, he gave the note for \$350 sued on, maturing May 1, 1913, and bearing interest at 6 per cent. per annum from date, payable semiannually, such interest being represented by coupon notes attached to the principal note; one note for \$50, maturing November 1, 1909, bearing interest at 6 per cent. per annum, payable semiannually, according to the coupons attached; one note for \$50, maturing May 1, 1910, bearing interest at 6 per cent, per annum from date according to coupons attached. These three notes were payable to the Deming Investment Company, and secured by a first mortgage on the real estate of defendant. The evidence further discloses that these three notes were indorsed and transferred by the Deming Investment Company to the plaintiff for their face value before maturity, and the mortgage securing them duly assigned by the Deming Investment Company to plaintiff. The defendant at the same time also executed a note for \$75, payable November 1, 1908, to J. T. Miller, with interest at the rate of 10 per cent. from maturity, a note for \$73.50, payable to J. T. Miller on May 1, 1909, with interest at 10 per cent. per annum from maturity; a note for \$22, payable November 1, 1909, to J. T. Miller, with interest at 10 per cent. per annum from maturity; a note for \$22, payable November 1, 1910, to J. T. Miller, with interest at 10 per cent. per annum from maturity. All of these notes have been paid, except the note for \$350, and the interest coupon for \$10.50, maturing May 1, 1913.

The court found the contract usurious, and that the plaintiff had not shown herself to be an innocent purchaser of said note without notice of said usurious transaction; the court found that the interest in the transaction should be forfeited, and further found that the amount of the loan made to defendant, after deducting the amount theretofore paid by defendant, and without interest, was \$131.96, and rendered judgment for plaintiff in said sum, together with costs of the ac-

[1, 2] The plaintiff complains of several errors committed by the trial court, but as this case must be reversed, it will only be necessary for us to consider two of the errors assigned. The first is, that inasmuch as the evidence showed that all of the alleged usurious interest had been paid except the last interest coupon amounting to \$10.50, the court was only authorized to deduct and forfeit the sum of \$21. This assignment of error seems to be well taken. Upon a computation of the various notes executed by the defendant for the loan of \$550, it seems that the finding of

the note sued on for value before maturity | ed with usury is supported by the evidence. The evidence, however, discloses that in this transaction the three notes, one for \$350, and two for \$50, each constituted the principal debt, and were secured by the first mortgage upon the real estate of the defendant. The remaining \$100 of the loan and the interest charged were absorbed in the five notes executed to J. T. Miller; one for \$75, one for \$73.50, and three for \$22 each. We are therefore unable to agree with counsel for the defendant that the trial court was unable to say which of the notes represented the principal, and which of said notes represented interest. So far as \$100 of the loan remaining after the notes for \$450 were executed is concerned, there is some difficulty, but inasmuch as the five notes which included this \$100 and interest in excess of 6 per cent, on the \$450 have been paid, it is not material which of these notes represented the \$100 principal, and which represented the excess interest.

> It is now well settled by this court that in enforcing the penalty for "taking, receiving, reserving and charging' usurious interest prescribed by section 3, art. 14, Oklahoma Constitution, and section 1005, R. L. 1910, a distinction is made depending upon whether or not the usurious interest has been paid. If usury has been contracted for, but not paid, the penalty may be set up by the defendant by way of set-off in an action to recover the debt. If the usurious interest has been paid, however, the amount thereof or the penalty prescribed therefor cannot be set up by way of set-off by the defendant in an action to recover the debt, but can only be recovered in a separate action brought for that purpose within two years in accordance with the provisions of section 1005, R. L. 1910. First National Bank of Hobart v. Hutton. 166 Pac. 726; Gunness v. Stever, 158 Pac. 568; Anderson v. Tatro, 44 Okl. 219, 144 Pac. 360. It is therefore clear that all the interest contracted for having been paid except the sum of \$10.50, the trial court erred in deducting more than the sum of \$21 from the debt.

> [3] One other contention of the plaintiff remains to be disposed of. It is urged that when it was shown that the plaintiff had paid value for the note indorsed to her and sued on herein before maturity, that the burden of proof to show that she had notice of the usury if usury be found to exist was upon the defendants. Unfortunately for the plaintiff this court has held adversely to her contention. Section 4102, R. L. 1910, provides:

"A holder in due course is a holder who has taken the instrument under the following conditions: First. That it is complete and regular upon its face. Second. That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact. Third. That he took it in good faith and for value. Fourth. That at the time it was negotiated to him he had no the loan of \$550, it seems that the finding of notice of any infirmity in the instrument or dethe trial court that the transaction was taintfect in the title of the person negotiating it."

"The title of a person who negotiates an instrument is defective within the meaning of this chapter when he obtained the instrument, or any signature thereof, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to fraud.

Section 4106, R. L. 1910, provides:

"To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith."

Section 4109 provides:

"Every holder is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course. But the last-mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title."

Construing these sections of our statute, this court has held in Gourley v. Pioneer Loan Co., 51 Okl. 434, 151 Pac. 1072, as fol-

"Where the maker of a note establishes that the note has been diverted or negotiated in violation of an agreement under which it was given, the burden is on the holder to prove that he, or some one under whom he claims, acquired title to the note as a holder in due course, and without notice of any infirmity; and, unless he proves this to the satisfaction of the court or jury he is not entitled to recover essing the jury, he is not entitled to recover against the

[4] In the case of Lambert v. Smith, 157 Pac. 909, in the syllabus it is said:

Pac. 909, in the syllabus it is said:

"The purchaser of a negotiable instrument, in order to be a holder in due course, must come within the requirements of section 4102, Rev. Laws 1910, defining such holder. When it is shown that the title of any person who has negotiated a negotiable instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course, except as otherwise provided in section 4109, Rev. Laws 1910. Instructions placing the burden of proving knowledge of infirmity in a negotiable instrument upon the defendant, except in the class of cases provided for in the latter part of section 4109, Rev. Laws 1910, constitutes reversible error. Such instructions relieve the plaintiff holder of making proof of latter part of section 4109, Rev. Laws 1910, constitutes reversible error. Such instructions relieve the plaintiff holder of making proof of a fact necessary to a recovery, and impose upon the defendant maker the additional duty of establishing to the jury's satisfaction a fact not necessary to his defense."

The exaction of usury on loans for which a negotiable promissory note is executed is an illegal consideration within the terms of section 4105, supra; 8 C. J. 987. This being the case under the authority of Gourley v. Pioneer Loan Co. and Lambert v. Smith, supra, we are constrained to hold that the findings of the trial court that the plaintiff had not established the fact that she was an innocent purchaser of the note sued on without potice of the usurious transaction is not sale certificate.

By section 4105, R. L. 1910, it is provided: ! against the weight of the evidence, and we are therefore unwilling to disturb the same. The plaintiff did not testify in the case, and while there is no evidence tending to prove notice upon her part of the usurious transaction it is equally true that there is not sufficient evidence of want of notice on her part to maintain the burden of proof which the law places upon her.

The judgment of the trial court should be reversed, and this cause remanded, with instructions to the trial court to proceed in accordance with this opinion.

PER CURIAM. Adopted in whole.

STATE ex rel. GAULT et al. v. BAKER, County Treasurer.

STATE ex rel. GAULT v. SAME. (No. 8017.) (Supreme Court of Oklahoma. May 14, 1918.)

(Syllabus by the Court.)

1. Taxation 6=840 - Delinquency - No-TICE-PENALTIES-STATUTE.

If notice was not given by mail, postage prepaid, by the county treasurer to a taxpayer, whose name appeared on his record of the amount of his taxes, and when the same beamount of his taxes, and when the same became due and delinquent, as required by chapter 120, Session Laws 1910-11, p. 263, the penalty prescribed by that act for delinquency did not attach upon the failure of the taxpayer to pay his taxes within the time provided therein.

2. Taxation 4-836 — Amended of Super-seded Statute — Enactment after Ex-

TRAOBDINARY SESSION—CODE.

Chapter 120, Session Laws 1910-11, p.
263, having been enacted subsequent to the adjournment of the extraordinary session of the Legislature convened in January, 1910, was not repealed or superseded by any provision of the Revised Laws 1910, known as the Harris-Day Code.

3. TAXATION @==840-Delinquent Taxes-

NOTICE-STATUTE.

The provise of chapter 120, Session Laws 1910-11, p. 263, requiring the county treasurer to give notice to the taxpayer of the amount of his taxes, etc., qualifies only the matter preceding relating to the penalty on delinquent taxes. Unpaid taxes became delinquent at the time prescribed by the act, although the notice required by the proviso was not given.

4. TAXATION \$==693, 845-SALE-VALIDITY-

PENALTY.

Where the parties agree that real property has been sold for the tax of a given year and tax sale certificate issued by the county treastax sale certificate issued by the county treasurer, it will be assumed that the sale was valid and the certificate regular, and that the sale was for the amount lawfully due, and no more. And where by reason of the failure to give notice no penalty for delinquency attached, it will not be presumed that such penalty was included in the amount recited in the sale care. cluded in the amount recited in the sale cortificate.

5. TAX SALE-REDEMPTION-STATUTE.

To redeem real property from a valid tax sale, the owner must pay the treasurer interest at the rate of 18 per cent. per annum from date of purchase on the sum mentioned in the 6. REFUSAL OF MANDAMUS—CERTIFICATE OF of 18 per cent. per annum on the amount REDEMPTION.

Where the amount tendered and which the owner offers to pay to redeem land from a tax sale is insufficient, mandamus will not lie to compel the treasurer to issue a certificate of redemption.

Error from District Court, Oklahoma County; Geo. W. Clark, Judge.

Mandamus by the State of Oklahoma, on the relation of W. D. Gault and another, against George Baker, County Treasurer of Oklahoma County, State of Oklahoma, consolidated with mandamus by the State of Oklahoma, on the relation of Sarah E. Gault, against the same defendant. From a judgment refusing to make the alternative writ peremptory, relators bring error. Affirmed.

Warren K. Snyder, of Oklahoma City, for plaintiffs in error. Chas. B. Selby, Co. Atty., and H. M. Gray, Asst. Co. Atty., both of Oklahoma City, for defendants in error.

MILEY, J. Upon motion and affidavit of plaintiffs in error, as plaintiffs below, an alternative writ of mandamus was issued to defendant in error as county treasurer of Oklahoma county to accept of plaintiffs a certain sum of money tendered by them, and issue receipt in full for taxes for year 1912 and certificate of redemption from tax sale of certain real property of plaintiffs, or show cause for his refusal so to do. Upon return of the writ the parties stipulated as to the facts, upon consideration of which the trial court held that the amount tendered by plaintiffs was insufficient to entitle them to redeem, and refused to make the writ peremptory.

[1] It appears from the stipulated facts that for the year 1912 taxes were levied on an ad valorem basis on certain real property of the plaintiffs. Although the name of the plaintiffs as the taxpayers appeared upon his record, the county treasurer did not give them notice of the amount of the taxes, and when same would become due and delin-The taxes were not paid, and on the first Monday in November, 1913, the county treasurer sold the property for the taxes of said year to certain individuals, and tax sale certificates were issued by the treasurer to the purchasers. On October 30, 1915, the plaintiffs tendered to the county treasurer the amount of the taxes, together with interest thereon from February 3, 1915, to the 1st day of June, 1915, at the rate of 6 per cent. per annum, and interest from June 1, 1915, to the date of the tender, at the rate of 18 per cent. per annum, and in addition thereto the fees prescribed by statute, and demanded of the said treasurer a receipt therefor and certificate of redemption.

The only question briefed and argued by either party is whether the plaintiffs were liable to interest, as a penalty, at the rate

of 18 per cent. per annum on the amount of the taxes from the date of the delinquency to February 3, 1915, as provided by chapter 120, Session Laws 1910-11, p. 263. That act provided:

"One-half of all taxes levied upon an ad valorem basis, for the fiscal year ending June 30, 1912, and for each fiscal year thereafter, shall become due on the first day of November; and unless said one-half of the taxes so levied shall be paid on or before the first day of January, the entire tax levied for such fiscal year shall become delinquent on said date. If the first half of the taxes levied upon an ad valorem basis for such fiscal year, shall have been paid on or before the first day of December, the second half shall become delinquent on the fifteenth day of June thereafter. All delinquent taxes shall, as a penalty, bear interest at the rate of eighteen per centum per annum: Provided, that the county treasurer shall stamp the date of receipt on each letter containing funds in payment of taxes; and no penalty shall attach after the receipt of the full amount due, at said date, by reason of the inability of the county treasurer to enter the same of record on the date received; and, provided further, that it shall be the duty treasurer, on or before November first, to notify by mail, postage prepaid, each taxpayer whose name appears on his record, of the amount of his taxes and when the same will become due and delinquent."

In Trimmer v. State ex rel. Rennie, 43 Okl. 152, 141 Pac. 784, this court held that if the notice was not given, then the penalty prescribed for delinquency did not attach upon failure to pay within the time prescribed by the act. Counsel for defendant in error contend that section 7389, R. L. 1910 (Harris-Day Code), and not the act of 1911, controls, and seek to distinguish this case from Trimmer v. State ex rel. Rennie on that ground. But this cannot be done.

[2-4] As in the case cited, the taxes here under consideration became due, and it was the duty of the treasurer to give notice prior to the date the Harris-Day Code took We may say, however, that the intimation in the decision of Trimmer v. State ex rel. Rennie, that the act of 1911 was amended or superseded when the Code went into effect, was an inadvertence. It is expressly provided in section 2 of chapter 39, Session Laws 1910-11, p. 70, adopting the Code, that no act of the Legislature enacted subsequent to the adjournment of the extraordinary session of the Legislature, which convened in January, 1910, was repealed thereby. Chapter 120, Session Laws 1910-11, supra, was enacted at a subsequent session, and remained in force until amended by chapter 31, Session Laws 1915, p. 44. Delinquent taxes for the fiscal years ending in June 30, 1912, to June 30, 1915, inclusive, were not liable to penalty for delinquency, unless the notice prescribed by the act of 1911 was given, until February 3, 1915, upon the approval of chapter 8, Session Laws 1915, p. 7, which act provided that such taxes should bear interest from that date until

June 1, 1915, at the rate of 6 per cent. per annum, and thereafter at the rate of 18 per cent. per annum, until paid. The remaining contention of counsel for defendant in error is also untenable. It sufficiently appears from the record that the taxes were those "levied upon an ad valorem basis," and not a paving assessment or other special assessment, such as the court had under consideration in Whitehead v. Mackey, 163 Pac. 124, and hence that decision has no application.

If the trial court had held the plaintiffs were liable to the penalty prescribed by the act of 1911 from the date of the delinquency, the finding would have been erroneous, and it would be necessary to reverse the judgment, if the amount tendered proved to be otherwise sufficient. But it appears on examination of the judgment that the court held that the penalty prescribed by that act did not attach by reason of the failure of the treasurer to give the requisite notice. However, the trial court was of the opinion that the property having been sold for the delinquent taxes on the first Monday in November, 1913, and certificate issued to the purchaser, the owners were not entitled to redeem, unless they paid interest on the amount of the taxes at the rate of 18 per cent. per annum from the date of purchase, and that the sum offered being less than the amount required to pay such interest, in addition to the other amounts due, the tender for that reason was insufficient.

The parties have not briefed or argued that question. It was not involved or decided in Trimmer v. State ex rel. Rennie. That case only decided that the second proviso with reference to giving notice conditionally defeated the antecedent clause, to wit:

"All delinquent taxes shall, as a penalty, bear interest at the rate of eighteen per centum per annum."

It is clear to us that the two provisos operated on that clause, which immediately preceded it only, and should be confined thereto, and were not intended to apply to the part of the statute fixing the time when the taxes became due and when delinquent. Searcy v. State ex rel. Carl, 167 Pac. 476. It follows that although the notice required by the second proviso was not given, onehalf the taxes became due November 1st, and not having been paid on or before the 1st day of January, the entire tax levied became due and delinquent on said date. The taxes were a lien upon the real property. Section 1a, c. 38, Session Laws 1909, p. 603; section 7391, R. L. 1910. Being delinquent, it was the duty of the county treasurer to advertise and sell such property for the delinquent taxes and costs. Sections 7396, 7397, 7398, R. L. 1910. By section 7403, R. L. 1910, it is provided that the purchaser is entitled to a certificate describing the land purchased, and was prescribed by section 7413, R. L. 1913.

the sum paid, and the time when he will be entitled to a deed. Section 7413. R. L. 1910. provides that the owner of any land sold for taxes may redeem the same at any time within two years after the day of such sale, or at any time before the execution of a deed of conveyance therefor by the county treasurer, by paying the treasurer for the use of the purchaser, his heirs or assigns, the sum mentioned in this certificate, and interest thereon at the rate of 18 per cent. per annum from the date of purchase. The sum for which the land was sold and the sum mentioned in the certificate are not stated in the stipulation. If a penalty of 18 per cent, per annum from the date of delinquency to date of sale was included in the amount, the sale and certificate would perhaps be void. 37 Cyc. 1290. The stipulation recites that the property was sold "for the tax of 1912, and tax sale certificate issued by the county treasurer." We cannot assume that any item not warranted by law was included. No attack is made on the regularity of the sale or the sufficiency of the certificate, and the presumption is that the same was regular and valid. For the purpose of this case, we assume that the amount for which the land was sold and the amount mentioned in the certificate is no more than was lawfully due, which was the amount of the tax without penalty.

[5, 6] According to the terms of the statute on redemption (section 7413), it was necessary for plaintiffs in error to pay the treasurer for the use of the purchaser the sum mentioned in the certificate, and interest thereon at the rate of 18 per cent. per annum from date of purchase, which was the first Monday in November, 1913. The plaintiffs in error only tendered and offered to pay interest at 6 per cent. per annum from February 3, 1915. to June 1, 1915, and from the latter date at the rate of 18 per cent. per annum, which is less than the amount required.

If there had been no valid sale of the land, the amount tendered would have been sufficient to pay the taxes and interest and penalties thereon as provided by chapter 8, Session Laws 1915, p. 9, extending the time for the payment of taxes, and it would have been the duty of the treasurer to accept the amount and issue plaintiffs in error a receipt in full. But inasmuch as we must assume from the record for the purpose of this case that the sale was regular, and the amount named in the certificate is the amount that was lawfully due at the time of the sale, and no more, it is not a question of the amount of taxes and interest and penalty thereon due the state and the several municipalities, but it is a question of the amount required to redeem from the sale which had been made previous to the passage of the act That act has no bearing on this of 1915. question. The amount required to redeem

The amount tendered being less than that required, the trial court did not err in refusing the writ.

The judgment is affirmed. All the Justices concur.

KIBBY v. BINION, Sheriff, et al. (No. 8533.) (Supreme Court of Oklahoma. April 30, 1918. Rehearing Denied May 28, 1918.)

# (Syllabus by the Court.)

 JUDGMENT ← 39—Injunction—Enforcing Counterclaim.

An action was brought by K. H. & Co. against C. F. K. under a written contract entered into by and between K. H. & Co. and C. F. K., to which C. F. K. answered and set up a counterclaim for damages for alleged fraud practiced upon him by K. H. & Co. in causing him to enter into said contract. In the trial of the case the counterclaim was withdrawn without prejudice, and the trial resulted in a judgment in favor of K. H. & Co., which judgment was affirmed by this court. After said judgment was affirmed C. F. K. brought an action against K. H. & Co. and the sheriff, based upon substantially the same averments contained in the counterclaim which was withdrawn, to enjoin the collection of said judgment, and to have ascertained the amount of said damages, and when ascertained to have the same set off against the judgment. No excuse was pleaded or proven for the withdrawal of said counterclaim. Held, that K. having purposely abstained from using in the trial in which the judgment was rendered his claim of set-off voluntarily waived such defense, and he cannot make such set-off a basis of equitable relief. Held, further, that under such facts an injunction to restrain the collection of such judgments will not lie.

2. APPEAL AND ERBOB €==854(2)—REVIEW— JUDGMENT—ERBONEOUS REASONS.

Where in a trial to the court the court renders a proper final judgment in the case, it is entirely immaterial that such judgment is predicated by the court upon an erroneous finding of facts or a misinterpretation of the law, as the ground upon which the court proceeded is not a subject of review by an appellate court.

### (Additional Syllabus by Editorial Staff.)

3. Appeal and Ebrob \$\iff 878(1)-Review-Right of Defendant in Ebrob.

Where a defendant in error fails to file a cross-petition in error, only those questions presented for assignments in the petition in error are properly reviewable by the Supreme Court on appeal.

Commissioners' Opinion, Division, No. 1. Error from District Court, Oklahoma County; John W. Hayson, Judge.

Action by C. F. Kibby against Kubie, Helmann & Co. and M. C. Binion, Sheriff of Oklahoma County, Okl., to enjoin the collection of a judgment and to set off damages against the judgment. Judgment for defendants, motion for new trial overruled, and plaintiff brings error. Affirmed.

Everest & Campbell, of Oklahoma City, for plaintiff in error. H. N. Boardman, E. R. Hastings, and Embry, Crockett & Johnson, all of Oklahoma City, for defendants in error.

COLLIER, C. The actual controversy in this case is between C. F. Kibby, the plaintiff in error, and the defendant in error Kubie, Heimann & Co., to which action the sheriff of Oklahoma county is a party, but not interested in the result. Suit was instituted by the plaintiff for the purpose of enjoining the sheriff of Oklahoma county from levying an execution upon the property of the plaintiff under a judgment entered by the district court of Oklahoma county in favor of the defendant Kubie, Heimann & Co., and to have ascertained the amount of an unliquidated claim for damages, and when ascertained to have the same set off against said judgment; the said judgment being in excess of the sum of \$3,000.

The petition in this case is very voluminous. The salient averments thereof are as follows: That the defendant brought an action against the plaintiff on the 13th day of September, 1910, and on the 4th day of November, 1910, the plaintiff filed an answer and counterclaim, to which a reply was afterward duly filed by defendants; that after said case was called for trial the plaintiff dismissed his said cross-action and counterclaim and the jury, at the direction of the court, returned a verdict in favor of the plaintiff for \$3,064.28 and costs; that the plaintiff appealed said cause to this court, where the cause was duly heard and determined, and judgment of the trial court affirmed; that the plaintiff was by occupation a traveling salesman, and was induced by fraudulent representations on the part of Kubie, Heimann & Co. to enter their employ, and that he devoted his entire time to the services of said defendant from the 1st day of July, 1909, to the 1st day of July, 1910, in the furtherance of the business of said defendant; that by reason of the said fraudulent misrepresentations, which are specifically and extensively set forth in the petition, the plaintiff had sustained damages in the sum of \$3,900; that Kubie, Heimann & Co. are nonresidents of the state: and that the only property they have in this state is the said judgment against the plaintiff. The prayer of the petition is:

"Wherefore, premises considered, plaintiff prays the court to make an order temporarily restraining the sheriff and said defendant Kubie, Heimann & Co., and each of them, and their agents, deputies, and employés, from levying said execution upon the property of this plaintiff and enforcing the collection of the same, and temporarily restraining said sheriff from making a sale of the property of plaintiff under said execution, until this petition can be heard, and that upon a hearing of this petition said plaintiff be granted a temporary injunction restraining and enjoining the levy and service of said execution and the sale of said property, and upon a final hearing and trial said temporary injunction be made permanent in the event the court should find that said defendant Kubie, Heimann & Co., is indebted to the plaintiff under the allegations hereinbefore made, in a sum equal to or exceeding the amount of the judgment held by said defend

ant against the plaintiff, and that if it be found defendant, and dissolved the temporary in-upon a hearing hereof that said defendant is indebted to the plaintiff in a less sum than the amount of its said judgment and costs, then amount of its said judgment and costs, then that said defendants be permanently enjoined and restrained from the levy of said execution and the sale of said lands, except for the amount representing the excess of the judgment in favor of said defendant and against this plaintiff, over the amount of the indebtedness from said defendant to this plaintiff. Plaintiff further prays that he recover his costs berein, and have all such other and further reherein, and have all such other and further relief as he may be entitled to in the premises.

There was attached to said petition as an exhibit the contract of employment referred to in said petition. A temporary restraining order was issued. A temporary injunction was granted on the 19th day of March, 1914, which became effective on the giving of a bond. A little later the plaintiff filed an affidavit for service by publication. The defendant filed a special appearance and motion to quash the service by publication upon the ground, among other grounds, "that the affidavit for publication shows the action is not against a foreign corporation having in this state property or debts owing it which are sought to be taken by any of the provisional remedies, or to be appropriated in any way, and that such judgment is not sought to be taken by any of the provisional remedies."

The court overruled the motion to quash the service of summons by publication, to which the defendant excepted, and the defendant thereupon demurred to the petition, which was overruled, and excepted to. Thereupon the defendant answered, denying generally and specifically each and every and all of the statements and allegations in said petition contained, excepting only such statements as are therein expressly set up in defense of the action, which, under the view we take of the case we deem unnecessary to recite, further than to say that the contract attached as an exhibit to the petition in the case is the identical contract which was attached to the petition upon which the judgment which is sought to be enjoined was rendered, and that the facts relied upon by plaintiff are the identical facts pleaded in the counterclaim which was filed by plaintiff to the action in which the judgment was rendered, which counterclaim was withdrawn without prejudice. There was voluminous evidence offered by the plaintiff tending to support the allegations of his petition, which evidence we deem unnecessary to recite.

The case was tried to the court on May 13, 1916, and taken under advisement. July 14, 1916, the case came on for further hearing, and the court found that the pleas of res adjudicata interposed by the defendant had been sustained, declined to find upon any question of fraud or damages, or any other question raised by the issues in said cause, for the reason that such finding prior to its adoption was construed in the is unnecessary to the proper judgment in case of Ollie F. Bowen v. Flora Pickett, 26

in the case are as follows:

"The court having heard and considered the evidence in said cause finds therefrom that the plea of res judicata of the defendants is sustained by said evidence, and that the plaintiff is estopped by his conduct to urge the fraudulent representations as pleaded by him as a ground for the relief sought in his petition, and for enjoining the execution of the judg-ment therein sought to be enjoined, and is not entitled to the equitable relief prayed for, and the court further is of the opinion that it is unnecessary to pass upon any question of fraud or damages or any other question raised by the issues in said cause, and declines to pass upon the same and declines to make a finding as to whether or not faise and fraudulent representations and inducements were made to plaintiff to induce him to enter into the employ of defendant Kubie, Heimann & Co., or as to the amount of his damages thereby incurred, if any for the reason that such finding is unnecessary to the proper judgment in said cause. It is therefore ordered, adjudged, and decreed by the court that plaintiff take nothing by this ac-tion and that said defendants recover their tion and that said defendants recover their costs herein, and that said temporary injunction heretofore granted in said cause be, and is hereby dissolved. To all of which judgments, orders, and decrees of the court the plaintiff excepted and still excepts. And thereupon, said plaintiff on said 14th day of July, 1916, having filed in said cause his motion for new trial, and the court having heard and considered said court having heard and considered said metion, the parties appearing as before, and consenting that the same be taken up at this time. It is ordered, adjudged and decreed by the court that said motion for new trial be and is hereby overruled. To which order, judgment and decree the plaintiff in open court excepted and still execute." cepted and still excepts.'

To the action of the court in rendering judgment for the defendant and dissolving the temporary injunction the plaintiff excepted, and brings error to this court.

[1, 2] There are several assignments of error, but the only ones necessary to review are the third and fourth, which are as follows:

"(3) The trial court erred in finding and adjudging that the plea of former adjudication entered in said cause by the defendant was sus-

"(4) The trial court erred in finding and adjudging that the plaintiff was estopped to have and recover the relief demanded in the petition filed in said cause, and that the plaintiff was not entitled to the equitable relief prayed for and court in said nettrin." for and sought in said petition.

Section 4771. Revised Laws 1910. provides: "The court at any time before the final submission of the cause, on motion of the defendant, may allow a counterclaim or set-off, set up in the answer, to be withdrawn, and the same may become the subject of another action; on motion of either party, to be made at the time such counterclaim or set-off is withdrawn, an action on the same shall be docketed and proceeded in as in like cases after process served; and the court shall direct the time and manner of pleading therein. If an action be not so docketed, it may afterwards be commenced in the ordinary way."

This law was adopted from Kansas, and said cause, and rendered judgment for the Kan. 219, the syllabus of which reads:

"Under the provisions of section 120 of the Code, the defendant has the privilege, as a matter of right, any time before the final submission of the cause on trial, to withdraw a counterclaim or set-off, and the same may become the subject of another action."

We therefore think that the court committed error in finding that the plea of res adjudicata of the defendant was sustained by the evidence, and upon such finding predicating judgment for the defendant. But such error we think was error without injury. Where, as in the instant case, the court disposes of the case tried to it by a proper final judgment, it is entirely immaterial that the court based such judgment upon an erroneous conclusion of facts, or a wrong interpretation of law.

"The ground on which the court below proceeded is not a subject of inquiry in the appellate court." 3 Cyc. 221(b); Hodgins v. Hodgins, 23 Okl. 625, 103 Pac. 711.

The evidence and pleading does not disclose any reason, certainly not a good and sufficient excuse, for plaintiff's withdrawal of the counterclaim filed and withdrawn in the action in which the judgment sought to be enjoined was rendered. We are therefore of the opinion that by reason of failure, without excuse, to plead the counterclaim which was withdrawn, the plaintiff is not entitled to the equitable relief prayed in the instant case, and that the court did not err in rendering judgment for the defendant, and dissolving the temporary injunction.

In Pearce v. Winter Iron Works, 32 Ala. 68. it is held:

"A defendant, having a cross-demand, which is available as a set-off either at law or in equity, and having failed to bring it forward in the action at law, cannot make it the basis of equitable relief against the judgment at law, without showing some sufficient excuse for his failure to avail himself of it at law; and the fact that he was advised that the law court had no jurisdiction to allow the set-off is not a sufficient excuse for his failure."

In John C. Wolcott v. Sidney Jones, 86 Mass. (4 Allen) 367, it is held:

"A bill in equity cannot be maintained to restrain the collection of an execution against the plaintiff in favor of the assignee of an insolvent debtor, on the mere ground that the plaintiff has claims against the debtor which might be the subject of set-off; there being no averment to show that the plaintiff, for any reason, could not have availed himself of his set-off in the action in which the judgment against him was recovered."

In the body of the opinion it is said:

"There is no averment in the bill from which it appears that this remedy, if the plaintiff had exercised due diligence, could not have been used by him to obtain a proper adjustment and set-off of the debt due to him against the claim on which the assignee has obtained judgment. This certainly afforded him, so far as we can infer from the statements in the bill, a clear, plain, and adequate remedy. Having omitted to avail himself of it, the plaintiff cannot now seek to enforce his set-off by enjoining the assignee against the collection of the amount due on the judgment which has been recovered in due course of law against the plaintiff."

See, also, Hill v. McNeill, 8 Port. (Ala.) 432; Cummins v. Bentley, 5 Ark. 9; Hughes v. McCoun's Adm'r, 6 Ky. (3 Bibb) 254; Cook v. Murphy, 7 Gill & J. (Md.) 282.

In Hendrickson v. Hinckley, 58 U. S. (17 How.) 443, 15 L. Ed. 123, it is held:

"An injunction will not be granted against a judgment upon the ground that defendant has a set-off against the debt, where he has purposely abstained from using such set-off in defense of the action at law."

In the body of the opinion it is said:

"Similar considerations are fatal to the plaintiff's claim for relief, on the ground that the defendant resides out of the state, and that therefore he should have the aid of a court of equity to subject the judgment at law to the payment of the complainant's claim. When the complainant elected not to file these claims in set-off in the action at law, he knew that defendant, who was the plaintiff in that action, resided out of the state. If that fact was deemed by the complainant insufficient to induce him to avail himself of his complete legal remedy, it can hardly be supposed that it can induce a court of equity to interpose to create one for him. The question is not merely whether he now has a legal remedy but whether he has had one and waived it. And as this clearly appears, equity will not interfere."

In Hall v. Clark, 21 Mo. 415, it is held:

"Where a vendee fails, in an action against him for the purchase price, to recoup for damages sustained by fraudulent representations made by the vendor to procure the sale, and the vendor recovers judgment, the vendee, pending a subsequent action against the vendor for the deceit, is not, on the ground of insolvency of the vendor, entitled to an injunction enjoining the collection by the vendor of his judgment."

In Perkins v. Clements, 1 Pat. & H. (Va.) 141, it is held:

"A. borrowed money from B., arising from the sale of his wife's real estate, and, gave a bond therefor payable to the wife. On the husband's death the wife brought suit on the bond therefor payable to the wife. On the husband's death the wife brought suit on the bond against A., who filed an account of set-offs consisting of the dealings of B. with A.'s firm, and alleged an agreement that the said dealings should be set off against the bond. This plea was waived, and judgment had for the plaintiff. The defendant then filed a bill praying an injunction against the judgment. Held, that, if the defendant had any defense, it was a legal one, on which, having failed to make it with no excuse, he could have no relief in equity."

[3] In the trial of the case several exceptions were saved by the defendants to rulings of the court, which exceptions are extensively argued in defendant's brief, and supported by citations of authorities, but in view of the fact that no cross-appeal has been filed by the defendant, and as the judgment rendered for the defendant must be affirmed, such exceptions will not be considered.

"Where a defendant in error fails to file a cross-petition in error, only those questions presented for assignments in the petition in error are properly reviewable by the Supreme Court on appeal." Higgins-Jones Realty Co. v. Davis, 158 Pac. 1160.

The motion for a new trial was properly overruled.

The judgment is affirmed.

PER CURIAM. Adopted in whole.

BECKNELL et al. v. STATE ex rel. Mc-RILEY. (No. 8526.)\*

(Supreme Court of Oklahoma. April 9, 1918.)

(Syllabus by the Court.)

1. MANDAMUS 23(2) — ELECTIONS VOTING PRECINCTS—FORMATION.

It is the duty of the county election board to create, alter, or discontinue voting precincts so that no precinct shall contain more than 200 voters, unless in extreme cases of necessity; and, in case of failure to perform this duty, any qualified elector of the county may require a performance thereof by writ of mandamus.

2. Mandamus €==74(1) — ELECTIONS

VOTING PRECINCTS—FORMATION.
Where between 450 and 500 qualified electors reside within a precinct, which precinct is eight miles long and from six to nine miles wide, and the polling place therein is located on the west line thereof, and there is situated the west line thereof, and there is situated near the east side of said precinct an incorporated town in which reside 208 qualified electors, and with 90 per cent. of the electors residing within said precinct residing nearer said incorporated town than near the polling place, and where the county election board have failed, neglected, and refused to divide said precinct as required by law, mandamus will issue to compel performance of this duty.

2. MANNAMUS 62-178 FIGURE FOR

3. Mandamus = 176 - Elections - Mation of Districts-Discretion.

The county election board is vested by statute with discretion as to the boundaries of the precincts created by them, and the judgment of the trial court, ordering that certain bound-aries be established, is modified so as to leave the boundaries of the proposed district to the discretion of the county election board.

Error from District Court, Okfuskee County; Geo. C. Crump, Judge.

Mandamus by the State, on the relation of J. H. McRiley, against C. H. Becknell and others, to create election precincts. A peremptory writ was awarded relator, and defendants bring error. Modified and affirmed.

T. S. Hurst, Co. Atty., of Okemah (W. A. Huser and Tom Hazelwood, both of Okemah. of counsel), for plaintiffs in error. Wm. S. Peters, of Boley, for defendant in error.

HARDY, J. The state, upon the relation of J. H. McRiley instituted an action in the district court of Okfuskee county against C. H. Becknell, C. F. Jordan, and M. H. Castleberry as members of the county election board of Okfuskee county, wherein they prayed a writ of mandamus, requiring defendants to create one or more election precincts within the boundaries of the incorporated town of Boley, and to locate in such precincts when created suitable polling places, and to appoint from the qualified electors residing therein the requisite precinct election officials. An alternative writ was issued and served upon defendants, who filed answer. After both sides announced ready for trial, defendants objected to the introduction of any evidence, for the reason that any one precinct in any election and that plaintiff's motion for the writ and the al- fact is reported to the county election board

ternative writ failed to state facts sufficient to constitute a cause of action in favor of plaintiff and against the defendants. At the close of plaintiff's evidence a demurrer was interposed thereto, which was by the court overruled. The court found the issues in favor of relator, and awarded a peremptory writ as prayed, directing defendants to establish a voting precinct, and prescribing the boundaries thereof.

[1] The contention of plaintiffs in error is that upon the pleadings and the evidence plaintiff was not entitled to the relief sought. Section 3067, Rev. Laws 1910, governing the establishment of voting precincts, makes it the duty of the county election board to create, alter, or discontinue voting precincts, and requires the secretary of said board to keep in a bound book a complete record of each precinct and any change made in the boundary thereof, with the name of the voting places and the number of votes cast therein, and it is provided:

"But one voting place shall be allowed in a precinct, and no precinct shall contain more than two hundred voters, unless in extreme cases of necessity.

And it is made the duty of the election inspector, in case 250 votes or more shall be cast at any election in any one precinct, to report the same to the county election board. who shall forthwith divide such precincts as equally as possible, so that the new precincts formed shall each contain no more than 200 electors, and the county election board is given the authority to change the boundaries of any precinct within the county or divide any precinct into two or more precincts, or consolidate two or more precincts into one or change any place of holding elections when public convenience or public good may require it; and, in the event of the failure of such board to perform any of the duties enjoined upon it by said section, the right is conferred upon any qualified elector of the county to compel a performance of such duty by writ of mandamus. Section 24, c. 157, Session Laws 1913, provides:

"\* \* It shall be the duty of the various county election boards to create, alter, divide or discontinue voting precincts, as in their judgment is best and proper under the limitations of the number of voters now provided by law for each precinct.

Plaintiffs in error contend that under these provisions of the statute the creation, alteration, division, or discontinuance of voting precincts is discretionary with the county election board, subject to two limitations: First, that voting precincts must not cross the boundary line of congressional, commissioners, or legislative districts as prohibited by said section 24, c. 157, Laws 1913; and second, when 250 or more votes are cast in by the inspector of the election, it is the duty a precinct is established in Boley the election of the board to forthwith divide such precinct so that the new precincts formed shall not contain more than 200 electors each; and. taking this as a premise, they argue that the discretion of the county election board is not subject to control by the writ of mandamus. because it is not alleged, nor made to appear, that more than 250 electors have voted in said precinct at any election.

The motion and alternative writ alleged that said precinct contains 450 or 500 qualified electors, approximately 90 per cent. of whom are negroes, and that only about 1 per cent. of the negro electors residing in said precinct voted in the general election held in November, 1914, the remainder having been denied the right to vote on account of the enforcement of section 4A, art. 13, of the Constitution of this state, commonly called the "Grandfather Clause," and that if said section had not been enforced in said election there would have been as many as 500 votes cast therein.

[2] The evidence introduced on behalf of plaintiff is, in substance, that the town of Boley contains an exclusive negro population, with a heavy negro population surrounding the town; that the town is located in Paden precinct No. 1, the voting place of which is in the town of Paden, about six miles distant from Boley; that about 80 or 90 per cent. of the electors in said precinct are negroes, and that only about 10 per cent. of said electors live nearer Paden than the town of Boley; that the town of Boley is incorporated, and the electors residing therein have been voting in municipal elections since 1910. Said precinct is about eight miles long east and west, and about six to nine miles across, north and south; and there are about 450 or 500 legal voters residing therein: that at the primary election in the town of Boley in 1915 there were 208 votes cast; about 40 electors live upon additions to the town which were not included in the poll; that the taxable value of the property within said town is \$600,000, and said town has a bonded indebtedness of \$48,000 incurred for schools and a water system; there are two schools each containing several hundred pupils; a third class post office, six lawyers, several doctors, preachers, and professional men; that Boley is much larger than Paden, and is about as large as any other town in the county; that it is very inconvenient for the electors in and around Boley to go to Paden to vote; that the polling place for them is within the town of Paden, and is within 300 yards of the polling place of Paden's regular precinct, and that not more than three or four persons residing in Paden live in the precinct in question: that five persons is the greatest number which has been permitted to vote in said precinct at any one election; and that if

laws will be enforced.

If the contention of plaintiffs in error be true that the election officials are vested with discretion as to whether they shall establish voting precincts except in the contingency that more than 250 electors have voted in any one election, and the only proof of this fact must be the certificate of the election inspector, then the trial court was wrong in awarding the peremptory writ. We do not entertain this view. Section 3067, Rev. Laws 1910, makes it the duty of the county election board to create, alter, or discontinue voting precincts, and contains a positive provision that no precinct shall contain more than 200 voters unless in extreme cases of necessity, and gives any elector the right to compel performance of any duty imposed upon the board by writ of mandamus. Under this section the only excuse for not creating one or more election precincts within the town of Boley would be extreme necessity that such be not done, and this necessity is not made to appear. While it is made the duty of the inspector to certify to the election board the fact that 250 votes or more have been cast in any election, and it is then made the duty of the election board to divide such precinct as equally as possible. this is not the sole evidence of the necessity for dividing the existing precincts, for, if it were, by refusing to let qualified electors cast their ballots election officials could forever prevent the establishment of necessary precincts, and while they are vested with some measure of discretion in determining when this condition arises, yet in the same section the duty to divide the precinct is conclusively made to exist when 200 voters reside therein, unless in cases of extreme ne-

From the record before us it appears that between 450 and 500 qualified electors reside within the precinct, and as many as 208 have cast their ballot in municipal elections held in the town of Boley, and as many as 40 more legal voters reside upon additions to the town. Outside of and adjacent to the town is a heavy negro population. A map of Okfuskee county is in the record, and it appears that at all the other incorporated towns in the county, except Clearview, which is another exclusive negro town, precincts have been established and polling places located within said towns. Some of these towns where the population is exclusively white are less than half the size of Boley. The extreme west line of the precinct embracing the town of Boley runs through the town of Paden, and it appears that as much as 90 per cent. of the population within the precinct reside within and nearer the town of Boley than to the town of Paden, and not more than three or four persons entitled to vote in said precinct reside within the limits of Paden.

These facts show a clear case where the

public convenience and necessity requires that the precinct should be divided and one or more precincts established subject to the limitation that not more than 200 legal voters should be contained therein.

There is no extreme necessity which requires the maintenance of the precinct lines as now established, and we are satisfied, as contended by defendant in error, that the precinct was established on the theory that by reason of section 4A, art. 3, of the Constitution the persons residing within said district were not qualified voters. Since this section of the state Constitution has been stricken down by the Supreme Court of the United States (Guinn et al. v. United States, 238 U. S. 347, 35 Sup. Ct. 926, 59 L. Ed. 1340, L. R. A. 1916A, 1124), there should be a readjustment of the precinct lines to conform to the changed conditions and so as to conduce as far as possible to the public convenience and necessity.

[3] The county election board is vested by statute with discretion as to the boundaries of the precincts to be created by them, and the judgment of the trial court is modified in so far as same prescribes the limits of the precincts ordered to be created, leaving the boundaries thereof to be determined by the county election board, and, as so modified, is affirmed. All the Justices concur. except TURNER, J., absent.

STATE v. PAYNE. (No. A-2380.) (Criminal Court of Appeals of Oklahoma. May 25, 1918.)

## (Syllabus by the Court.)

OBSCENITY & 4-STATUTES—INFORMATION.

Under section 2403, Rev. Laws 1910, making it a misdemeanor to "utter or speak any obscene \* \* \* or lascivious language or word in any public place, or in the presence of females, or in the presence of females, or in the presence of females. word in any public place, or in the presence of females, or in the presence of children under ten years of age," the language used need not necessarily consist of words obscene or las-civious per se, but where the information sets out the language, although it may be composed of words which are not in themselves either obscene or lascivious, yet if the sense and meaning of the words employed is either obscene or lascivious, the information is suffi-cient to state the offense, where all other alle-gations necessary to complete said offense are contained therein.

Appeal from County Court, Kingfisher County; R. F. Shutler, Judge.

Robert Lee Payne was informed against for the use of obscene or lascivious language. Demurrer to information sustained, and the State brings error. Reversed and remanded, with instructions.

error and defendant below. Robert Le? Payne, charging the said defendant with the use of certain obscene and lascivious language. A warrant was issued on the information and defendant brought into court. The defendant demurred to the information and the demurrer was by the court sustain. ed. The court also made an order quashing the information, discharging the defendant and discharging the sureties on his appearance bond. The information filed in said cause was as follows:

"In the County Court within and for Kingfisher County, State of Oklahoma.

"State of Oklahoma, Plaintiff, v. Robert Lee Payne, Defendant. Information.

"Comes now W. B. Blair, county attorney within and for Kingfisher county, and in the name and by the authority of the state of Oklahoma, makes information that the said defendant, Robert Lee Payne, in the county of Kingfisher and state of Oklahoma, on or about the 13th day of September, 1914, did then and there willfully and unlawfully utter and speak there willfully and unlawfully utter and speak certain obscene and lascivious language, to wit, 'Will Jim Murphy make an affidavit that he didn't go out and catch a sexual disease and give it to his wife,' in a public place, to wit, at the open air meeting ground of the Baptist Church in the town of Hennessey, Kingfisher County, State of Oklahoma, and in the presence of a number of women, among whom being one Flora Cullum, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the State. and against the peace and dignity of the State.
"W. B. Blair, County Attorney.

"County of Kingfisher, State of Oklahoma-ss.: "Comes now R. Reynolds, who upon oath deposes and says that he has read the above and foregoing information and knows the contents thereof and that the matters and things

therein contained are true. R. Reynolds. "Subscribed and sworn to before me this 18th day of September, 1914.

"[Seal.] W. R. Blackburn, Notary Public.

"My commission expires Sept. 29, 1914."

The demurrer filed by the defendant below (omitting the caption) was as follows:

"Comes now the above-named defendant by his attorneys, P. S. Nagle and Lee M. Gray, and demurs to the information filed herein and assigns the following as grounds of demurrer, to wit: (1) That the allegations contained in the information do not charge a public offense under the laws of the state of Oklahoma.

"P. S. Nagle,
"Lee M. Gray,
"Attorneys for Defendant."

The journal entry showing the judgment of the court on the hearing of the demurrer is as follows:

"In the County Court within and for Kingfisher County, State of Oklahoma.

"The State of Oklahoma, Plaintiff, v. Robert Lee Payne, Defendant.

And now on this 16th day of November, A. with instructions.

Chas. West, Atty. Gen., C. J. Davenport,
Asst. Atty. Gen., and W. B. Blair, Co. Atty.,
of Kingfisher, for the State.

MATSON, J. This is a case in which the
county attorney of Kingfisher county filed
an information against the defendant in

For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

and was granted leave to withdraw his pleat of not guilty and file a demurrer to the information on file herein. Thereupon the said defendant, Robert Lee Payne, files a demurrer to the information on file herein. Thereupon argument is had on the said demurrer by the defendant Robert Lee Payne, and on helpf of argument is had on the said demurrer by the defendant, Robert Lee Payne, and on behalf of the state of Oklahoma, and thereafter, the court being fully advised in the premises sustains the said demurrer and quashes and sets aside the information on file herein, and it is so ordered, to which ruling and order of the court the plaintiff, the state of Oklahoma, duly excepted at the time and exception allowed. Thereupon the said plaintiff the state of Oklahoma, Thereupon the said plaintiff, the state of Oklahoma, elects to stand on the information on file. Thereupon the court discharges the defendant and releases his bondsmen, to all of which the state of Oklahoma objects and excepts and the exception allowed. Thereupon the state of Oklahoma asks and for good cause shown is granted twenty days within which to make and serve a case-made herein; the de-fendant, Robert Lee Payne, is given five days thereafter within which to suggest amendments thereto and said case-made to be settled, cer-tified, and signed upon five days notice by el-ther party. R. F. Shutler, Judge of the County Court within and for Kingfisher County, State of Oklahoma."

There are but two assignments of error relied upon by plaintiff in error, namely: "First. That the trial court erred in sustaining the demurrer of the defendant below to

the information of the state.
"Second. That the trial court erred in quashing the information of the state and discharging the defendant and in releasing his bondsmen on his appearance bond.

This prosecution is carried on under section 2403, Revised Laws 1910, which is as follows:

"If any person shall utter or speak any obscene, profane or lascivious language or word in any public place, or in the presence of fe-males, or in the presence of children under ten years of age, he shall be liable to a fine of not more than one hundred dollars, or imprison-ment for not more than thirty days, or both."

Section 5746, Revised Laws, provides:

"The indictment or information is sufficient

"Sixth. That the act or omission charged in the offense is clearly and distinctly set forth in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended.

"Seventh. That the act or omission charged as the offense, is stated with such a degree of certainty, as to enable the court to pronounce judgment upon a conviction according to the right of the case."

And section 5747:

"No indictment or information is insufficient, nor can the trial, judgment or other proceedings thereon be affected, by reason of a defect or imperfection in the matter of form which does not tend to the prejudice of the substantial rights of the defendant upon the merits."

From the two above set forth sections of our statutes it will be seen that the Legislature intended a liberal construction should be placed upon indictments and informations. That the county courts, concurrent with justices of the peace, have original jurisdiction cur.

in this class of misdemeanors is decided by this court in Ex parte McClure, 6 Okl. Cr. 244, 245, 118 Pac. 591,

No brief has been filed in behalf of the defendant in error, and the court is not advised as to the reasons urged in the trial court why the demurrer to the information should have been sustained. From the brief filed on behalf of the state, we presume that the lower court sustained the demurrer for the reason that the language and words used are not obscene or lascivious per se, as the question presented by the state's brief is whether or not under the foregoing statute the test is whether the sense of the language used is obscene or lascivious, or whether in order to constitute the crime the language or words must of themselves be obscene or lascivious.

The trend of modern authority is to the effect that it is not necessary in order to render the matter obscene or lascivious that words or expressions which are in themselves obscene or lascivious should be employed, but it is sufficient if the idea conveyed be obscene or lascivious. This is the rule laid down in American and English Encyclopedia of Law (2d Ed.) vol. 21, p. 761. It is sustained by a long list of authorities both from the courts of the United States and of several states construing similar statutes, among which are the following: United States v. Hanover (C. C.) 17 Fed. 444; United States v. Smith (D. C.) 45 Fed. 477: United States v. Martin (D. C.) 50 Fed. 918; United States v. Males (D. C.) 51 Fed. 41; United States v. Moore (D. C.) 129 Fed. 159; Morris v. State, 6 Ga. App. 395, 65 S. E. 58; United States v. Davidson (D. C.) 244 Fed. 523, 531, 532.

Clearly the idea conveyed by the language, "Will Jim Murphy make an affidavit that he didn't go out and catch a sexual disease and give it to his wife?" is obscene and lascivious; and under the rule laid down by the above cited authorities, which we think is correct and should be followed in this state in order to obtain the object for which such statute was enacted, the court erred in sustaining the demurrer to the information. The information appears to be sufficient in other respects to charge a completed crime under section 2403, supra.

The cause, therefore, is reversed and remanded to the county court of Kingfisher county, with instructions to set aside the order sustaining the demurrer to the information, and to overrule same, and to set aside the order discharging defendant; and it is also directed that an alias warrant be issued for the arrest of the defendant, and the cause be further proceeded with in accordance with

DOYLE, P. J., and ARMSTRONG, J., con-

STATE v. PAYNE. (No. A-2379.) (Criminal Court of Appeals of Oklahoma. May 25, 1918.)

Appeal from County Court, Kingfisher Coun-

ty; R. F. Shutler, Judge.

Robert Lee Payne was informed against for the use of obscene and lascivious language. From an order of the county court sustaining

a demurrer, the State brings error. Reversed and remanded, with instructions.

Chas. West, Atty. Gen., C. J. Davenport, Asst. Atty. Gen., and W. B. Blair, Co. Atty., of Kingfisher, for the State.

PER CURIAM. The identical questions are PER CURIAM. The identical questions are raised in this appeal as in the case of State v. Robert Lee Payne (No. A-2380) 172 Pac. 1096, this day decided, and on authority of the decision in that case this cause is reversed and remanded, with instructions to the trial court to set as information and the outer are constant to the information and the outer are constant. murrer to the information, and to enter an order overruling same, and to set aside its judgment discharging the defendant; and it is also directed that an alias warrant be issued for the arrest of the defendant, and that the cause be proceeded with in accordance with law.

BROWN v. STATE. (No. A-2928.) (Criminal Court of Appeals of Oklahoma. May 29, 1918.)

(Syllabus by Editorial Staff.)

Intoxicating Liquoes \$= 236(7) - Unlaw-SUFFICIENCY OF EVIDENCE.

Evidence held insufficient to sustain a con-

viction for the unlawful possession of intoxicating liquors with intent to sell them.

Appeal from County Court, Tulsa County; H. L. Standeven, Judge.

Roy Brown was convicted of the crime of unlawful possession of intoxicating liquor, with intent to sell it, and he appeals. Judgment reversed.

Brown & Shackleford, of Tulsa, for plaintiff in error. S. P. Freeling, Atty. Gen., and R. McMillan, Asst. Atty. Gen., for the State.

PER CURIAM. Plaintiff in error was convicted in the county court of Tulsa county of the unlawful possession of intoxicating liquors, with intent to sell same, and his punishment was fixed at confinement in the county jail for a period of 90 days and a fine of \$150.

After a careful consideration of the record in this case, the court has reached the conclusion that the judgment should be reversed. There is evidence in the record that the defendant had in his possession a half pint of whisky, but there is an entire lack of evidence to establish on his part any intent to sell same. The defendant took the witness stand in his own behalf, and testified that this was the first time that he had ever been arrested or tried for violation of the prohibitory liquor laws of this state. There was no material conflict between the evidence of the geles, for appellant. Edwin A. Meserve and

state and that of the defendant, except that the evidence on the part of the defendant explained the possession of the whisky, and the explanation made by the defendant and the owner of the building in which his place of business was located was not contradicted.

Considering the evidence as a whole, while same might tend strongly to establish a suspicion that the defendant was guilty, we are clearly convinced that the proof in this case on the question of intent is wholly lacking, and that it would be a miscarriage of justice to permit the conviction to stand.

For this reason the judgment of conviction is reversed

KINSEY v. PACIFIC MUT. LIFE INS. CO. OF CALIFORNIA. (L. A. 4155.)

(Supreme Court of California. April 15, 1918. Modification of Judgment May 7, 1918.)

1. Insurance 4 466 — Accident Insur-ANCE.

If an accident was the proximate cause of drowning of insured, the nature of accident was immaterial on the question of liability on an accident policy.

2. Insurance \$==645(3) - Breach of War-

RANTIES—PLEADING.

Where insurer alleges a certain specific breach of warranty, in that insured in accident policy falsely stated he did not have heart trouble, it cannot introduce evidence of breach of warranty as to apoplexy or other warranties, which may have caused death.

3. EVIDENCE €=546-EXPERT TESTIMONY-COMPETENCY.

It was within the discretion of the trial court to refuse to allow life guards to give their opinion whether an insured found in the water died from drowning, where it did not appear that their knowledge made them competent as a matter of law, and where medical experts differed on the question. fered on the question.

A. INSUBANCE 4-665(5)—ACCIDENT INSUB-ANCE—CAUSE OF DEATH—EVIDENCE.

Evidence held sufficient to sustain finding that insured in accident policy was drowned, and did not die from heart trouble.

5. New Trial #== 103-Newly Discovered Evidence-Materiality.

In action on accident policy for accidental drowning, where the only breach of warranty alleged in the answer was that deceased had heart trouble, an affidavit of a physician that in his opinion the physical condition of deceased prior to the time of securing the policy, as shown by the deposition of one named, indicat-ed that he had suffered from an apoplectic stroke did not support a motion for new trial on ground of discovered evidence.

Department 2. Appeal from Superior Court, Los Angeles County; Louis W. Meyers, Judge.

Action by Esther A. Kinsey against the Pacific Mutual Life Insurance Company of California, a corporation. From a judgment for plaintiff, and an order denying a motion for a new trial, defendant appeals. Modified and affirmed.

Williams, Goudge & Chandler, of Los An-

Shirley E. Meserve, both of Los Angeles, for drowned as the result of accident. The narespondent.

VICTOR E. SHAW, Judge pro tem. On May 12, 1911, defendant issued to Edward W. Kinsey, who was the husband of plaintiff, a policy of insurance by which defendant agreed to and did insure said Kinsey against "bodily injury sustained during the term of the policy through accidental means (excluding suicide, sane or insane, or any attempt thereat, sane or insane) and resulting directly, independently, and exclusively of all other causes in \* \* \* death." Plaintiff. beneficiary named in said policy, alleging the insured, while bathing in the surf was accidentally drowned, on September 18, 1913, brought this action to recover the amount of the indemnity specified in the policy. A trial was had before a jury, which rendered a verdict in favor of plaintiff for the sum prayed for in the complaint. Judgment followed, from which, and an order denying defendant's motion for a new trial, it appeals.

In its answer defendant denied that the death of deceased was the result of accidental drowning, denied that any sum was due plaintiff under the terms of the policy, and affirmatively alleged that deceased in procuring the policy made certain warranties, among which was that he was in sound physical condition, whereas at the time of making such warranty he was afflicted with heart disease, which fact was at the time of the issuance of said policy unknown to defendant, who at all times believed and relied upon the representations so made by the insured, and that subsequent to the death of the insured, upon learning of the falsity thereof, tendered the plaintiff the premiums theretofore received by it from deceased, which, being refused, were deposited in court.

Upon the issues joined, the questions involved were: First, did the death of the insured result from accidental drowning? second, did deceased, as alleged, misrepresent his physical condition? and, third, assuming these facts to be determined in favor of plaintiff, what amount is she entitled to recover under the terms of the policy?

[1] In its brief appellant assigns as error the giving of certain instructions to the jury. Upon the hearing it was conceded by counsel for appellant that its contention as to instruction No. 12 was without merit; and an examination of other instructions complained of, when taken in connection with and as a part of the entire charge given to the jury, shows that they are likewise without merit. By instruction No. 23 the court told the jury that, if they found that Edward W. Kinsey was drowned as the resu't of an accident, it was immaterial for the purpose of the case how he came to drown, provided it found that such drowning was the proximate result of ture of the accident which caused him to drown was immaterial, provided it constituted the proximate cause of the drowning.

[2] By instruction No. 22 the jury was instructed that defendant by its answer had limited its defense based upon alleged breach of plaintiff's warranty that he was in sound physical condition to the claim that he was afflicted with heart trouble, and told the jury that evidence of any breach other than that so alleged was not evidence for its consideration in determining the question as to breach of warranty made. The giving of this instruction finds full support in the case of Taylor v. Modern Woodmen of America, 42 Wash. 304, 84 Pac. 867, 7 Ann. Cas. 607, and a number of authorities there cited, and is likewise approved in Weber v. Ancient Order of Pyramids, 104 Mo. App. 729, 78 S. W. 650, in both of which it is, in effect, held that where a certain specific breach of warranty is alleged, the defendant should be restricted to the specific charge of fault or wrong contained in the pleading. Otherwise, as stated in Taylor v. Modern Woodmen of America, supra, "no matter how many conditions precedent the contract contained, the plaintiff would be obliged to go to the expense of preparing to prove performance or waiver of every one of them." The only breach of warranty alleged in the answer was that plaintiff at the time of procuring the policy was afflicted with heart trouble; and under the pleading the court correctly instructed the jury that, in considering the question as to whether or not there was a breach of warranty, they should consider only evidence touching the allegation that deceased was afflicted with heart disease.

[3] Defendant called as witnesses the life guards who assisted in rescuing the body of deceased from the surf, and who aided in efforts to resuscitate him. They were asked questions, the purpose of which was to elicit their opinion based upon their observation of deceased as to whether the death of deceased was due to drowning. Objection was sustained to these questions and the ruling is assigned as error. The contention of appellant is that these life guards were, by reason of their calling and experience which they were shown to possess in rescuing and treating persons apparently drowned, qualified like a physician or surgeon to express their opinion as to whether the appearance of deceased was indicative of death by drowning. As to whether or not they were thus qualified was a question for the determination of the trial judge, and in the absence of an abuse of discretion disclosed by the record, his ruling should not be disturbed. The evidence, while perhaps showing that these witnesses were skilled in the methods of rescuing drowning persons from the water, fails to show that accident. The ultimate fact was that he was they had any knowledge, gained by experience or otherwise, upon which, from their observation of the appearance of the body of deceased, they were as a matter of law entitled to testify to their opinions as to the cause of the death of deceased. Indeed, as shown by this record, the question was one upon which men of long professional standing and experience differed.

[4] It is next claimed that the evidence was insufficient to sustain the verdict. There is no merit whatsoever in this contention. While there was expert testimony to the effect that the appearance of the body of deceased was consistent with the fact that his death might have been due to other causes such as apoplexy or heart failure, it also clearly tended to establish facts which indicated that his death was due to drowning, and the jury, whose province it was to determine the question upon such conflict of evidence, so found.

[5] It is likewise claimed that a new trial should have been granted on the ground of newly discovered evidence. This is based upon an affidavit made by a physician to the effect that in his opinion the physical condition of deceased prior to the time of securing the policy, as shown by the deposition of Emma Belle Badger, indicated that he had suffered from an apoplectic stroke. A mere statement of the fact upon which the contention is based shows that there was no abuse of discretion on the part of the trial court in refusing a new trial upon such ground. Moreover, the only breach of warranty alleged in the answer was that deceased had heart trouble.

The policy of insurance provided that, if the premiums thereon were "payable quarter-annually or semiannually in advance, then each year's premium paid after payment of the first year's premium, will increase said benefits 5 per cent. until such increase is 50 per cent." It appears that the insured paid the second year's premium semiannually in advance, by reason of which fact the benefit was increased 5 per cent. during the second year. The amount specified in the policy was \$5,000, which, increased by \$250, made the sum which plaintiff was entitled to recover under the terms of the policy, \$5,250. By reason of an erroneous instruction, however, the jury fixed the amount due upon the policy at \$6,500. At the hearing of the case it was conceded by counsel for respondent that the judgment, based upon said verdict, was \$1,250 in excess of the amount to which plaintiff was justly entitled.

It is therefore ordered that the judgment be and the same is modified, by deducting therefrom, as of the date rendered, the sum of \$1,250, and, as thus modified, the judgment is affirmed.

We concur: MELVIN, J.; WILBUR, J.

#### Modification of Judgment.

VICTOR E. SHAW, Judge pro tem. The judgment heretofore given by this court is amended to read as follows, viz.:

"The judgment appealed from is modified by deducting therefrom \$1.250 and interest thereof from November 1. 1913, to date of judgment, amounting to \$63.75, making a total of \$1,313.75, and, as thus modified, said judgment is affirmed. The order denying a new trial is affirmed. Appellant shall recover its cost on the appeal to the extent only of \$50 for and on account of the printed transcript used in presenting the record, and \$20 only for and on account of cost of printing briefs, making a total of \$70, and \$10 for filing transcript. Respondent shall recover as costs of printing briefs the sum of \$50, and no other costs on these appeals."

We concur: WILBUR, J.; MELVIN, J.

## RAMISH v. MARSH. (L. A. 4239.)

(Supreme Court of California. May 3, 1918.)

ABBITRATION AND AWARD 6-68-IRREGULAR-ITIES-WAIVER.

Where arbitration for adjustment of partnership accounts was for the benefit of both parties, their acceptance of the award and a part payment thereunder to one of them constituted waiver of any irregularities in the award.

Department 2. Appeal from Superior Court, Los Angeles County; G. W. Nicol, Judge.

Action by Adolph Ramish against Martin C. Marsh. Judgment for plaintiff, and defendant appeals. Affirmed.

Hannon & Rickard and J. Vincent Hannon, all of Los Angeles, for appellant. Olin Wellborn, Jr., and Alfred H. McAdoo, both of Los Angeles, for respondent.

WILBUR, J. Defendant appeals from a judgment in favor of plaintiff, based in part upon a common-law award of three arbitrators, selected to adjust the partnership accounts of plaintiff and defendant, in accordance with a written agreement of arbitration. Defendant resists said award on the ground of many alleged informalities in the proceedings of said arbitrators. findings are in favor of said award. It is also found that after the award, the defendant "told plaintiff to draw money from the Metropolitan Contracting Company (a corporation owned by plaintiff and defendant) and to credit the amount so drawn as payments upon the sum due from defendant to plaintiff under and by virtue of the award of said arbitrators," and this was done, and as a conclusion of law holds that the defendant had waived any irregularities in the arbitration. As the arbitration was for the benefit of both parties, their acceptance of the award, and the payment thereunder by defendant to plaintiff would constitute a waiver of any irregularities in the award. See, on this point, Matter of Silliman, 159 Cal. 155, 113 Pac. 135; Dore v. So. Pac. Co., 163 Cal. 182, 124 Pac. 817; 5 Corpus Juris, 170, sec. 426.

Judgment affirmed.

We concur: MELVIN, J.; VICTOR E. SHAW, Judge pro tem.

EDMONDS v. WILCOX. (L. A. 4210.)
(Supreme Court of California. May 3, 1918.)

1. APPEAL AND ERBOR \$\infty\$928(3)\$—Presump-

TIONS.

In the absence of record showing to the contrary, it is presumed that the court's statement in instruction that certain facts were conceded was true.

2. PLEADING & 8(15)—CONCLUSIONS—FRAUD-ULENT STATEMENTS.

In action on notes given in renewal of corporation stock subscription notes, allegation in the answer that at time of renewal of the notes the holders thereof "ratified and confirmed the statements and representations" made to induce the execution of the original notes, which were set out, was not the allegation of a conclusion, but an allegation that the holders repeated the false statements of the agent who sold the stock.

3. Fraud \$\infty\$ 11(2) — STATEMENT OF FACT - OPINION.

Where banks, holding stock subscription notes, to induce renewal thereof, confirmed statement of original seller thereof that "they wouldn't take \$5 a share for their shares if they couldn't get more," and that the bank regarded the stock as ample security for a loan of its face value, this was not a mere expression of opinion, but a statement of value, which, considered with the fact the stock was actually worthless, and in connection with other assertions of the banks, justified a finding of fraud.

4. Fraud \$\infty\$ 58(1)—Proof Required.

Notwithstanding judicial expressions concerning the necessity of clear and satisfactory proof of fraud, the rule of Code Civ. Proc. \( \)

2061, subd. 5, that a preponderance of the evidence controls in a civil case applies in a civil case where fraud is claimed.

. Department 2. Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by B. J. Edmonds against H. W. Wilcox. From the judgment, plaintiff appeals. Affirmed.

Sam Ferry Smith and Ward, Ward & Ward, all of San Diego, for appellant. Shreve, Reed, Sample & Shreve and Theodore Stensland, all of San Diego, for respondent.

wilbur, J. This is an action brought by the plaintiff to recover judgment upon two promissory notes assigned to him for collection. These notes were given in renewal of notes given in payment of a subscription for stock in the Western Underwriting & Mortgage Company was "one of the Mortgage Company, one to each of two banks. Subsequently, on April 4th, 1913, the defendant executed renewal notes. It is claimed by

defendant that the original notes were procured by fraudulent representations. But the appellant claims that at the time of the giving of the renewal notes, April 4, 1913, plaintiff had become aware of the fraud, and that therefore he waived the fraud by giving the renewal notes.

[1] After the opening statement by defendant, which was construed by the plaintiff as an admission of knowledge and therefore a waiver by defendant of the original fraud at the time of the giving of the renewal notes, the court on motion of the plaintiff made on that ground excluded evidence of the original fraud, and by ruling on the evidence and by instruction to the jury confined the defendant to evidence of fraud at the time of said renewal. The court, in instructing the jury as to the measure of damages, stated that it was assumed by the parties on the trial that the stock was of the value of \$2 per share, the amount paid therefor, if the original representations were true, and that for that reason no proof had been given as to the value thereof in that event, and that the jury should so assume. While this was no doubt an instruction on the facts, it is stated to be on conceded facts, and we cannot say from the record printed in the briefs and before us that this was not correct, as it is presumed to be.

[2, 3] The only fraud alleged in the answer to have occurred at the time of the renewal of the notes is that the agents of the banks holding the notes "then and there ratified and confirmed the statements and representations so made by said agents, A. O. Garrett. and L. U. McKee, and the said L. A. Blocman as aforesaid." It is claimed that this is but an allegation of a conclusion, but it is an allegation that the agent of the bank in effect repeated the previous false statements of the agents who sold the stock, which were set out in great detail in the answer, containing 42 pages. The jury found on the issue thus presented in favor of the defendant. One of these representations that was thus confirmed by the agent of the banks was that "they wouldn't take \$5 a share for their shares if they couldn't get more," and that the bank regarded the stock as ample security for a loan of its face value. As the stock was actually worthless and so found to be by the jury, this could hardly be classed as a mere expression of opinion. It was a statement of value which, taken alone, might be so regarded, but reinforced by the assertion that the banks regarded the stock as ample security for a loan of the face value thereof. without regard to the financial standing of the purchaser; that the Western Underwriting & Mortgage Company was "one of the solid financial institutions of the coast"; that the dividends arising from the company were so large that they would pay off the notes;

gladly renew the notes; coupled with the actual loan by the banks of the face value of the stock, and the immediate renewal thereof, amply justified the jury in its finding of fraud. See Barron Est. Co. v. Woodruff Co., 163 Cal. 561, 126 Pac. 351, 42 L. R. A. (N.

[4] The court instructed the jury that the case must be decided according to the preponderance of the evidence. This is correct. De Kahn v. Chase, 170 Pac. 608. This is the statutory rule in civil cases, and all judicial expressions concerning the necessity of clear and satisfactory proof of fraud must be construed in the light of the fundamental rule that a preponderance of the evidence controls in a civil case. Section 2061, subd. 5, Code Civ. Proc.

Judgment affirmed.

We concur: MELVIN, J.; VICTOR E. SHAW, Judge pro tem.

FRENCH v. FARMER et al. (L. A. 4224.) (Supreme Court of California. May 3, 1918.) 1. PRINCIPAL AND SUBETY \$\infty\$ 66(1)—LIABIL-ITY TO THIRD PERSONS—BONDS—CONSTRUC-TION.

Surety bond of contractor, conditioned that he should "pay all laborers, mechanics and ma-terialmen and persons who shall supply him with provisions or goods, all just debts due to such person or to any others to whom any part of the work is given incurred in carrying on such work," did not entitle one who leased mules to the contractor to recover on the bond. 2. PRINCIPAL AND SURETY \$\infty\$ 66(1)—LIABILITY TO THIRD PERSONS—BONDS—CONSTRUC-TION.

Such bond did not warrant recovery by the lessor of the mules for services and expenses of a corral man, whom he furnished, and who was to be paid by the contractor, the right of action, if any, being in favor of the employé and not the lessor.

3. Principal and Surety \$== 136-Liability TO THIRD PERSONS-BONDS-CONSTRUCTION. Recovery for provisions furnished railroad contractor could be had on the contractor's bond to the railroad, conditioned to pay for provisions used, by a third person furnishing the provisions, in whose favor the bond did not nominally run, on the theory that the bond was

one made for his benefit.

Department 2. Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by M. H. French against O. O. Farmer and the National Surety Company. Judgment for plaintiff, and defendant Surety Company appeals. Affirmed.

Carroll Allen, Bertin A. Weyl, and Allen & Weyl, all of Los Angeles, for appellant. Robt. T. Linney, Gordon L. Finley, and Ralph W. Schoonover, all of Los Angeles, for respondent.

WILBUR, J. The defendant National

curity (the stock) to any other, and would favor of plaintiff upon a common-law bond executed by the defendant to the Grand Canyon Railway Company, conditioned upon the faithful performance of "all the stipulations and agreements contained in" a contract entered into between defendant Farmer and said railway company, on the part of said Farmer to be performed and observed, and further conditioned that said Farmer "shall well and faithfully pay all laborers, mechanics and materialmen, and persons who shall supply such contractor with provisions or goods of any kind, all just debts due to such persons, or to any others to whom any part of such work is given, incurred in carrying on such work." The contract between Farmer and the railway company was for the construction of a wagon road in the Grand Canyon, Ariz., upon the property of the United States government. This contract provided, among other things, that:

> "The contractor shall promptly pay all sub-"The contractor shall promptly pay all succentractors, materialmen, laborers and other employes as often as payments are made to him by the company, and shall deliver said work free from any claim or lien on account of such laborered materials and subcontractors. \* \* \* \* labor and materials and subcontractors.

> The form of the bond was identical with that set out in the opinion in the case of the National Bank of Cleburne v. Railway Co. et al., 95 Tex. 176, 66 S. W. 203.

[1] The plaintiff, French, by contract in writing, leased to the defendant Farmer the contractor, to be used in the performance of the latter's contract with the railway company, 32 head of mules, 1 saddle horse and 16 sets of harness. He also agreed to furnish a "corral boss." to be paid by Farmer. Farmer having failed to pay therefor, this action was brought by French against Farmer and the surety company to recover \$4,-200 rental for the use of the teams and saddle horse, \$10 for services of corral man, and \$5 for expenses of corral man, and \$75 for hay and barley sold. Judgment was rendered against defendant Farmer and the defendant surety company. The appeal is by the surety company only. It is claimed that there is not sufficient privity between the defendant surety company, as obligee of the bond, and the plaintiff to authorize suit by him upon the bond. That point, however, has been determined adversely to appellant's contention by this court in Union Sheet Metal Works v. Dodge, 129 Cal. 390, 62 Pac. 41. and later by the court in bank in People's Lumber Co. v. Gillard, 136 Cal. 55, 68 Pac. 576. The question then is, Does the contract or bond, or both, contain a sufficient promise to pay the obligation of the plaintiff to authorize him to sue to enforce this as a promise made for his benefit? With reference to the item of rental for the mules, a similar question was involved in Wood, Curtis & Co. v. El Dorado, etc., Co., 153 Cal. 231, 94 Pac. 877, 16 L. R. A. (N. S.) 585, 126 Am. Surety Company appeals from a judgment in St. Rep. 80, 15 Ann. Cas. 382, wherein the

following question was answered in the negative by this court:

"Did plaintiff by this letting of his horses at a stipulated price per month 'bestow labor' upon the work so as to entitle it to a lien under section 1183 of the Code of Civil Procedure?

Upon the same reasoning, which need not be here repeated, it must be held that plaintiff was not a person "to whom any part of such work is given," and that therefore the contract and bond make no express provision for the payment to the plaintiff of that indebtedness here sued upon. This view is strengthened by the fact that both the contract and bond make it the duty of the contractor to furnish teams, without fixing any obligation to pay therefor.

[2] As to the items of \$10, services of corral man, and \$5, traveling expenses of corral man, under the contract between French and Farmer the corral man was to have been paid by Farmer. Even if we assume that the corral man was a laborer upon the work within the meaning ot the contract and bond, it does not follow that the plaintiff, upon paying such laborer, was entitled to sue therefor upon the bond. The right of action, if any, was in the corral man and not in his employer, who was not a subcontractor.

[3] As to the judgment for \$75 for hay and barley sold, there was no express agreement contained in the contract for the payment for either "provisions or goods," although the bond is expressly conditioned upon the payment of all just debts incurred therefor in carrying on such work. The question is, then, squarely presented whether or not there can be a recovery upon the bond based upon the condition thereof by a third person not a party thereto, where the bond does not by its terms expressly inure to the benefit of such third person and the right to sue thereon is based entirely upon the theory that the third person is entitled to sue upon a promise made for his benefit. The Supreme Court of Texas, upon a bond identical in form, held that the surety could not be sued thereon by a third party. National Bank, etc., v. Railway Co., supra. This was upon the theory that the bond was one of indemnity to the railway company, containing no express agreement to pay such third person, and therefore he could not sue thereon. If we adopt this view we violate the fundamental principle that every part of a contract should be given some effect, for the railway company could not, in any event, be liable for "goods" and "provisions" furnished the contractor in carrying out its contract, nor in this case could there be any lien therefor, as the property upon which the work was done was government property. If, under the circumstances, any effect whatever is to be given to this clause in the condition of the

tion of the parties to benefit such third persons rather than the railway company, to whom the bond ran. The case of Parker v. Jeffery, 26 Or. 186, 37 Pac. 712, is in harmony with the Supreme Court of Texas. The courts of Nebraska, Missouri, Iowa, Indiana, and Michigan, however, seem to hold to the view that if it can be fairly said from either the contract or the bond, which are to be construed together, that the parties intended to and did agree to pay such third person, a suit could be brought on such bond by such third person to recover upon the promise so made for his benefit. Lyman v. City of Lincoln, 38 Neb. 794, 57 N. W. 531; Kaufmann v. Cooper, 46 Neb. 644, 65 N. W. 796; School District v. Livers, 147 Mo. 580, 49 S. W. 507; Jordan v. Kavanaugh, 63 Iowa, 152, 18 N. W. 851; National Surety Co. v. Foster Lumber Co., 42 Ind. App. 671, 85 N. E. 489. While the question has not been directly decided by this court, the cases of Union Sheet Metal Works v. Dodge. supra, and People's Lumber Co. v. Gillard. supra, were based in part upon the authority of the Indiana, Iowa, Michigan, and Nebraska cases, as was also the case of W. P. Fuller & Co. v. Alturas School District, 28 Cal. App. 609, 153 Pac. 743. We therefore hold that the plaintiff was entitled to recover the item for goods and provisions.

The lower court is directed to modify the judgment by striking out all items therefrom save and except the item of \$75 for goods and provisions, and, as so modified, the judgment is affirmed.

We concur: MELVIN, J.: VICTOR E. SHAW, Judge pro tem.

CHUNG SING v. SOUTHERN PAC. CO. et al. (L. A. 5293.)

(Supreme Court of California. May 9, 1918.) 1. APPEAL AND ERBOB \$\infty 422-Notice of APPEAL-MISNOMER OF Parties.

That a notice of appeal by three defendants misnamed one of them does not necessitate the dismissal of the appeal as to the others.

2. APPEAL AND ERROR \$\infty\$=\frac{422}{NOTICE} OF APPEAL—MISNOMER OF PARTIES.

Where notice of appeal by three defendants

misnamed one of them by substituting a name of a person not a party to the record, such notice was nevertheless sufficient as to the defendant omitted, where it was obvious from the remainder of the record that the omission was a clerical mistake.

1915 made no change in the law in that respect.

In Bank. Appeal from Superior Court. Los Angeles County; Curtis D. Wilbur, Judge.

Action by Chung Sing against the Southbond, it must be held that it was the inten- ern Pacific Company and others.

ment for plaintiff, and defendants appeal., behalf within the time allowed by law? We On motion to dismiss appeal. Denied.

Henry T. Gage and W. I. Gilbert, both of Los Angeles, for appellants. Waldo M. York and Harry M. Irwin, both of Los Angeles. and William D. O'Hara, for respondent.

ANGELLOTTI, C. J. This is a motion to dismiss an appeal from a judgment entered February 16, 1917, as well as from certain orders. The principal grounds of the motion to dismiss the appeal are, first, that no notice of appeal was filed on behalf of defendant Blackburn within the time allowed by law, and, second, that the notice of appeal filed is insufficient as to any of the defendants, in that it does not sufficiently identify the judgment appealed from. Both of these alleged grounds are based on the fact that in the notice of appeal signed by the attorneys of all the defendants and filed within due time, April 10, 1917, it is stated that "the defendants Southern Pacific Company, a corporation, C. A. Burton, and H. W. Crumrine, hereby appeal" from "\* \* \* that certain judgment, in favor of the plaintiff and against said defendants and each of them, entered on or about the 16th day of February, A. D. 1917, in book 407, page 4, of Judgments," etc., and from an order entered March 30, 1917, reducing said judgment to \$13,000. The name of the defendant Geo. W. Blackburn did not appear therein; the name "C. A. Burton" appearing in lieu thereof owing to mistake and inadvertence. The superior court, after the time for appeal elapsed, made an order allowing the notice to be amended in this respect, upon a showing to its satisfaction of the mistake. It is claimed that the superior court had no power to allow such an amendment after the time for appeal had expired.

[1] In so far as defendants Southern Pacific Company and H. W. Crumrine, who were originally and specifically named in the notice of appeal, are concerned, there is no force in the claim that the appeal must be dismissed. It is perfectly plain in view of the record, despite the misnomer of the other appellant, that the judgment referred to in the notice is the judgment in favor of Chung Sing and against said defendants and George W. Blackburn for \$18,000 and costs, entered February 16, 1917, in Book 407 of Judgments, at page 4, and reduced by \$5,-000 by order entered March 30, 1917. In other words, the judgment attempted to be appealed from by these defendants was sufficiently identified by the notice.

[2] As to defendant Blackburn a different question is presented, owing to the fact that in attempting to specifically name the defendants in the notice of appeal another name was substituted for his, with the result that his name did not appear at all.

are of the opinion that this question should be answered in the affirmative. The verdict and judgment in the cause were against the Southern Pacific Company, Geo. W. Blackburn, and H. W. Crumrine only, all of whom were represented in the action by the same attorneys. There was no verdict or judgment against any one named Burton. notice of appeal also refers to an order of the superior court made and entered September 12, 1916, granting in part and denying in part "said defendants' motion for new trial." The record shows that said motion was made by the Southern Pacific Company. H. W. Crumrine, and Geo. W. Blackburn only, and that no one named Burton was involved therein. It also refers to the order of March 30, 1917, reducing the judgment from \$18,000 to \$13,000, which the record shows was an order making such reduction in favor of the company, Blackburn, and Crumrine only, and declaring that the judgment should be for \$13,000 and costs as against each of them. No one named Burton was involved therein. An undertaking on appeal filed on the day the notice of appeal was served states that the appeal is by defendants Southern Pacific Company, Geo. W. Blackburn, and H. W. Crumrine. It seems perfectly apparent from the notice, when read in connection with the record, that such notice was filed on behalf of the three defendants against whom the judgment runs, and that the use of the name "C. A. Burton" instead of "George W. Blackburn" to designate one of the appellants was solely due to inadvertence—a mere clerical misprision. One of the three defendants against whom the judgment runs and on whose behalf it was desired to appeal was designated as "C. A. Burton" instead of "George W. Blackburn." The record demonstrates this, and the adverse party could not have been misled thereby. Under these circumstances we are satisfied it should not be held that no notice of appeal was filed by Blackburn. We say this entirely regardless of the order of the superior court allowing the notice of appeal to be amended in this regard.

[3] It is urged that the undertaking on appeal is fatally defective. We are not, on this motion, concerned with any question as to the validity of this bond as a stay bond. It is therefore unnecessary to determine whether the objection to the bond is well based. The appeal may be regarded as taken under sections 941a, 941b, and 941c, of the Code of Civil Procedure, and, this being so, any defect in the undertaking must be disregarded for the reason that under those sections no undertaking is essential to the taking or maintenance of the appeal. Theisen v. Matthai, 165 Cal. 252, 131 Pac. 747. See, also, Estate of Stough, 173 Cal. 640, 161 Was there any notice of appeal filed on his Pac. 1. The amendments to our Codes in

The motion is denied.

We concur: SLOSS, J.; WILBUR, J.; MELVIN, J.; RICHARDS, Judge pro tem.; VICTOR E. SHAW, Judge pro tem.

NEALE v. ATCHISON, T. & S. F. RY. CO. et al. (L. A. 4203.)

(Supreme Court of California, May 3, 1918. Rehearing Denied May 31, 1918.)

1. APPEAL AND ERROR 4 907(1)-PRESUMP-

TIONS-EVIDENCE.

Testimony that at one place in a track locomotives wobbled about, the witness indicating the motion, cannot be disregarded, but the court on appeal must assume that it indicates undue movement resulting from a bad condition of the track, because all reasonable deductions from the evidence must be indulged in favor of the iud**z**ment.

2. MASTER AND SERVANT & 278(7)—INJUBIES TO SERVANT—DEFECTIVE RAILBOAD TRACK—

EVIDENCE.

In action for death of engineer, evidence held to support judgment for plaintiff on the-ory that the track was defective and caused the derailment.

8. MASTER AND SERVANT \$\infty 286(24) - RAIL-ROAD TRACKS-INSPECTION-QUESTIONS FOR JURY.

In action for death of engineer when locomotive derailed, though witness testified that shortly before the accident the track had been inspected, question whether the inspection was proper was for the jury.

4. Evidence €==116 - Explanatory Mat-

TERS-CUSTOM.

In action for death of engineer when locomotive was derailed, the roadmaster should have been allowed to say whether it was the usual custom to burn fies when unfit for service, after he had testified that the ties at the point where the locomotive was derailed were burned.

5. APPEAL AND EBBOB \$\infty\$1058(2)-Harmless ERROR.

Error in excluding testimony is not prejudiwhere the witness afterwards gives the excluded testimony in substance.

6. MASTER AND SERVANT \$265(6)-TO SERVANT-DEBAILMENT OF LOCOMOTIVE-

RES IPSA LOQUITUR DOCTRINE.
While the mere happening of derailment of engine is not proof of negligence of the railroad, it is competent to be considered thereon.

7. MASTER AND SERVANT \$== 101, 102(9)-IN-

JURY TO SERVANT—CARE REQUIRED.

It is the duty of a railroad company to exercise reasonable care to keep its tracks and locomotives in a reasonably safe condition for its employes.

8. TRIAL ERROR. TRIAL \$\infty 296(3)-Instructions-Cure of

Error in instructing that a master must furnish track and locomotives in reasonably safe condition was not harmful, where further instructions properly held the master to exercise ordinary care to furnish reasonably safe track and locomotives.

Department 2. Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by Jessie H. Neale, as administra-

1915 made no change in our law in this re- , trix of the estate of James B. Neale, deceased, against the Atchison, Topeka & Santa Fé Railway Company and another. From the judgment and order denying new trial, defendants appeal. Affirmed.

> E. W. Camp, U. T. Clotfelter, and M. W. Reed, all of Los Angeles, for appellants. E. B. Drake, of Los Angeles, for respondent.

> MELVIN. J. Defendants appeal from the judgment and from an order denying the motion for a new trial. The action was one to recover damages for the death of James B. Neale, respondent's intestate, an engineer in the service of the defendant corporation. The accident which caused the death of Mr. Neale was the derailment of an engine of which he had charge. Mr. Bean and Mr. Purdy, respectively mechanical superintendent and roadmaster of the railroad company, were joined as defendants, and a verdict was rendered against them as well as the corporation. On motion for a new trial the verdict against Bean was set aside. The other two defendants are appealing.

> The theory of plaintiff, as set forth in her pleading, was that the railroad company and defendant Bean negligently furnished James B. Neale a defective engine, and that the corporation and defendant Purdy negligently permitted the track, at the place where the accident occurred, to become unsound and defective. The latter ground seems to be the one on which respondent relies for affirmance of the judgment. Several attacks are made by appellants on the findings which, it is contended, are not, in many of their parts, supported by the evidence. The testimony tends to show that the train was moving at the rate of 20 to 25 miles an hour. The engine left the rails near the point of a switch. Appellants insist that the record furnishes no evidence that the track was unsound, or that they were charged with notice of its condition, if it was defective.

> [1] Upon the subject of the defective condition of the track one witness, Corwin, testified that he had noticed engines as they approached the place where the derailment afterwards occurred. He said: "I have noticed them in passing, the engine would be wobbling like this" (indicating). It is argued that such testimony is of no value because any engine going at the rate of 20 or 25 miles an hour will show some movement from side to side, such as the witness characterized as "wobbling." Of course, we cannot have reproduced for us the pantomime accompanying the testimony. Therefore we must assume that it indicated an undue movement evidencing a bad condition of the track, because all reasonable deductions from the evidence must be indulged in favor of the judgment.

[2] Another witness, Smith, stated that

where engine and track are in good condition, the engine will not be derailed from a speed of from 20 to 25 miles an hour. Other witnesses testified that some of the ties over which the wheels of the engine passed after leaving the rails were badly splintered and some were "broken in two." Counsel for appellants insist that this evidence is of no value to plaintiff's case, and lends no support to the theory that the track was in bad condition, because a heavy engine running over redwood ties would naturally splinter them. "In fact," they say, "it is only sound wood that splinters; rotten wood crumbles." But the testimony tends to show that, while some of the ties were splintered and some broken completely, many were merely marked by the wheels. The evidence also showed that some of the ties, on removal, proved to be partly rotten, and that they were so soft that the rails and tie plates cut down from half to three-fourths of an inch into the wood. We think that this and other evidence produced at the trial sufficiently supports the judgment. The testimony tends to show, for example, that of 52 ties examined in detail by the witnesses, 6 or 8 were broken through, others torn all to pieces and splintered, while many were only marked by the wheels, and that the engine ran for 250 feet along a switch over ties smaller than those over which it had passed on the main track and only marked the smaller timbers.

[3] Defendants introduced the testimony of two of the employés of the railroad to the effect that the track at the place where the accident occurred had been duly and properly inspected shortly before the accident. This testimony did tend to show that a general inspection of the track had been made, and that the switch point near the place of subsequent derailment of the engine had been very carefully examined, but it was for the jury to determine from all of the facts and circumstances, including the interests of the witnesses themselves as employés of the railroad company, whether their inspections had been properly made.

[4, 5] Mr. Purdy, one of the witnesses for the defendants, testified that certain ties broken in two by the derailment were taken away from the track and burned "because they were unfit for further service." He was asked if that was "the usual custom with ties rendered useless in that way." Objection to the question was sustained and the ruling is specified as error. The question should have been permitted, but appellants were not injured because later the witness said, speaking of the section foreman who had burned the ties:

"I have no authority to tell him to burn up ties inspected by other people. But that is the general custom. I suppose in this case he took it upon himself to burn them; he knowing that that has been the custom and practice."

[6] The court instructed the jury that the mere happening of the derailment or the death of James B. Neale raised no presumption of negligence of the defendants; that the burden was upon plaintiff to show by a preponderance of evidence that the accident was proximately caused by some one or more of the specific acts of negligence charged in the complaint; and that "the mere facts that the engine was derailed and said Neale was killed, taken alone, are not to be considered by you as proof of any negligence on the part of either or any of the defendants." Appellants complain of the use of the word "proof" instead of "evidence" in the latter part of the instruction. As originally proposed the latter word was used. There is no force in this contention. It is true, as appellants indicate, that this court in Brymer v. Southern Pacific Co., 90 Cal. 496, 27 Pac. 371, has said that the mere fact of the occurrence of an accident does not fix the liability, or even raise a presumption that the employer was at fault. But the evidence regarding such an accident is clearly admissible, so that the fact of the happening thereof, if established, may be considered in connection with other facts which might tend to make up a complete showing of negligence. This court has never said that evidence of the failure of machinery to do its allotted work may not be introduced, but the rule is that proof of the occurrence of the accident by reason of such failure, standing alone, is not proof of negligence.

[7] The jury was instructed that it was the railroad company's duty to furnish its engineer a reasonably sound and safe engine upon which to perform his duties and a reasonably safe track, failing in which judgment should go for plaintiff. The counsel for appellants say that the obligation of the corporation was not to furnish a reasonably safe track, but to exercise reasonable care te furnish a reasonably safe track. In this behalf the case of Duffy v. Hobbs, Wall & Co., 166 Cal. 210, 135 Pac. 1093, L. R. A. 1916F, 806, is cited. The opinion in that case declares that under a well-settled rule an employer is bound to use ordinary care to see that his employés have a safe place in which to labor, and that the tools and appliances with which they are to work are in good condition and reasonably safe for the purposes intended. It is there declared that:

"This rule, however, does not apply between the master and the servant who is employed to perform for the master this duty to the other servants, where the injury happens because of the failure of such servant to do that part of his duty."

It will be seen at once that the qualification of the general rule does not apply to this case. In Thompson v. California Cons. Co., 148 Cal. 35, 82 Pac. 367, also cited by appellants, the court was considering a situation in which a workman was employed in a quarry in which blasting was done and the conditions were constantly changing. It

was held that where the servant is under the to its engineer the same duty that the law same obligation as the master to look for dangers in the place of employment, and has equal facilities for ascertaining them, and under such conditions continues to work, the master is not liable for any injuries caused by the dangers then existing unless, after knowing or being presumed to know the dangers himself, the master urges or coerces the servant to continue the work. In Eastern Transportation Co. v. Johnson, 117 Va. 306, 84 S. E. 649, and Southern Ry. v. Childrey, 113 Va. 376, 74 S. E. 221, the court said in effect that it is the duty of the master to exercise ordinary care to provide, not safe and suitable appliances and instrumentalities, but reasonably safe and suitable appliances and instrumentalities for the use of his servant. But a railroad track is not a tool given to a servant and one which he is required to observe and to know when it becomes unsuitable and unsafe. The dangers arising from the rotting of ties are not obvious to the engineer who passes over the road at a high speed. Such dangers may only be learned by inspection, and it is the duty of the railroad company to inspect its tracks and to exercise reasonable care to keep them in a reasonably safe condition for the purposes for which they are used. The true rule has been stated many times. It will suffice to quote the language of Mr. Justice Kerrigan in Matchette v. California Fruit Canners' Association, 33 Cal. App. 156-159, 164 Pac. 423, 424:

"The duty of an employer to furnish an employé with a reasonably safe place to work is fulfilled when he exercises ordinary care for that purpose. \* \* It was the defendant's duty to use reasonable care in providing a reasonably safe place for decedent to work."

[8] While the instruction criticised, if taken alone, might possibly cause jurors to place a heavier burden upon the employer than the law permits, we are of the opinion that, when taken in connection with the rest of the charge (as the jury were instructed that it must be), this instruction could not have been misleading. The court carefully defined ordinary care and negligence, and the jury was told that plaintiff was bound to prove negligence in order to recover; that it was the duty of the corporation and defendant Purdy "to have used ordinary care in furnishing a safe track, trackage, and ties over which the engine" was being operated; and that a failure so to do would be negligence, "and if such negligence, if any, contributed to the happening of the accident as a proximate cause thereof, you will find against both of said defendants, or either of them, if shown by the evidence to have been negligent in that behalf." Taken together the instructions properly declared the law.

Nor do we think the jury could have been misled by the instructions, taken as a whole into a belief that the railroad company owed appearing, the widow applied for letters of

imposed upon it with reference to a passen-The jurors were carefully instructed ger. upon the rule respecting the burden of proof, and that "the mere facts that the engine was derailed and said Neale was killed" were not, when taken alone, to be considered as proof of any negligence on the part of defendants or any one of them.

The judgment and order are affirmed.

We concur: WILBUR, J.; VICTOR E. SHAW, Judge pro tem.

In re JEPSON'S ESTATE. (L. A. 5574.) (Supreme Court of California, May 8, 1918.)

WILLS \$302(2)-PROOF OF SIGNATURE. Evidence held sufficient to sustain finding of the court that an alleged will was in the handwriting of and signed by the deceased.

2. APPEAL AND ERROR \$\infty\$ 995, 1011(1) -- QUESTIONS OF FACT—WEIGHT OF EVIDENCE. Where the evidence is conflicting, the findings of fact of a trial court or jury is conclusive on appeal, the weight of the evidence being for the jury or court, unless obviously false or inharently immediately. inherently improbable.

3. APPEAL AND ERROR 4 1010(1)—REVIEW FINDINGS OF FACT.

An appellate court will not assume the role of a handwriting expert, for the purpose of setting aside a finding of fact by the trial court, based not only on its own inspection of a writing, but also upon the opinions of witnesses peculiarly qualified.
4. WILLS \$\infty\$303(4)—Olographic Wills—

PROOF.

Code Civ. Proc. § 1315, does not require that both witnesses to an olographic will be pro-

5. New Trial &=102(1)—Newly Discovered Evidence—Diligence.

To be entitled to a new trial on the ground of newly discovered evidence, it must be shown that the evidence could not, with reasonable diligence, have been produced at the trial.

6. NEW TRIAL \$==104(1)-NEWLY DISCOVER-ED CUMULATIVE EVIDENCE.

New trial will not be granted for newly discovered evidence which is merely cumulative.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge. In the matter of the estate of Frederick Emil Jepson, also known as Fred Jepson, deceased. From an order admitting will to probate, and appointing Elise Jepson executrix, and an order denying their motion for a new trial, contestants of the admission of the will to probate appeal. Affirmed.

Fred N. Arnoldy, of Los Angeles, for appellants. Frank Stewart, J. W. Howell, and Stewart & Stewart, all of Los Angeles, for respondent.

SLOSS, J. Frederick Emil Jepson died in Los Angeles county on November 5, 1915, survived by his wife, Elise Jepson, and several nephews and nieces, the children of a deceased brother and sister of Jepson. No will

administration, which were granted to her. I familiar with the decedent's handwriting. Upon her petition for the setting apart of a homestead, the nephews and nieces appeared in opposition. The superior court ruled that they were not entitled to oppose the widow's petition, for the reason, as she claimed, that the entire estate passed to her under the law of succession. The nephews and nieces appealed, and this court, on a motion to dismiss, and later, in passing on the merits of the appeals, decided that the appellants were entitled to share in the estate of the supposed intestate. Estate of Jepson, 174 Cal. 684, 164 Pac. 1; Estate of Jepson, 170 Pac. 1182. About a year and a half after Jepson's death, and shortly after our decision on the motion to dismiss, the widow filed a paper as the last will of the decedent, together with a petition for its admission to probate. The nephews and nieces filed a contest, putting in issue the genuineness of the alleged will. Upon the trial the court found that the paper was duly executed by the testator in the presence of two subscribing witnesses. further found that the will was written "entirely in the handwriting of said testator, by his own hand, and was dated and subscribed by him." Orders were made admitting the will to probate, and appointing the widow, Elise Jepson, executrix. The contestants appeal from these orders. By their appeal they seek to review, also, an order denying their motion for a new trial.

The controversy turns, principally, on the sufficiency of the evidence to support the findings just mentioned. Frederick Jepson was a native of Germany. For some years prior to 1903 he lived in Yonkers, in the state of New York. In that year he moved to California, and continued to reside in this state until his death. He was married to the respondent in 1882. The disputed paper, which was in the German language, purported to have been executed at Yonkers on the 27th day of February, 1903, a date shortly before the departure of Jepson for California. According to the testimony introduced by the respondent, it was entirely written, dated, and signed by Jepson, but it bore, after the signature of the alleged testator, an attestation clause to which the names of John Behrens and Rudolph Hettler were affixed as attesting witnesses. Hettler appeared at the trial, and testified directly and specifically to Jepson's compliance with all of the formalities required for the execution of an attested will. He also testified that the entire document, with the exception of the signatures of himself and Behrens, was in the handwriting of the decedent. His wife, who is a sister of the respondent, gave corroborating testimony concerning the execution of the paper, and also declared her opinion "hat the handwriting was that of the decedent. Additional opinion evidence that the paper was in the handwriting of Jepson was given by the respondent, by another witness thought it deserved. There is no occasion to

and by an expert on handwriting. On the other hand, the appellants testified that, in their opinion the signature was not genuine, and their testimony was supported by that of two other witnesses, one an expert.

[1-3] This mere statement should suffice to show that the case presents a question, simply, of a conflict of evidence, upon which the trial court's determination of the issue of fact must be deemed conclusive here. The appellants argue with great earnestness and apparent conviction that the evidence offered by the respondent is unworthy of belief, and should have been rejected. No rule of appellate practice is more firmly settled than that the weight of evidence is for the jury or the court passing on the facts. It is true, of course, that testimony may be so obviously false or so inherently improbable as to require its rejection. But no such situation is presented here. Viewing, for the moment, the opinion evidence alone, we could not say that the court below should have rejected the testimony of the witnesses who declared that, in their view, the signature was that of the decedent. Photographic copies of the will and of exemplars of Jepson's admitted handwriting are contained in the transcript. and differences between the subscription of the alleged will and signatures appearing on other writings of Jepson are pointed out. But these differences do not appear to us to be any greater or more significant than the variations between different handwritings of conceded authenticity. Even if they were more marked than they are, we should still be in no position to pass upon the genuineness of the handwriting with that degree of certainty which would be required to overthrow a finding of the trial court. A court of appellate jurisdiction cannot be expected to assume the rôle of a handwriting expert, for the purpose of setting aside a finding made by the trial court, and based, not only upon its own inspection and comparison of the original writings, but upon the opinions of witnesses peculiarly qualified, either by special study of the subject or by familiarity with the handwriting of the decedent. But beyond all this, we have the direct testimony of Hettler, which, as above stated, is corroborated in some degree, that he saw Jepson sign the paper. There was nothing on the face of the evidence for respondent to compel its rejection by the trial court. The appellants make much of the fact that the will was not produced until long after the decedent's death, and then only when this court had held against the widow's claim that she was entitled to take the entire estate in the absence of a testamentary disposition. But this, like other matters to which appellants point, is merely a circumstance, to which the trial judge was to give, as he doubtless did, such weight as he

recite the several particulars brought forward by the appellants to justify their belief that the signature to the disputed paper was a forgery. These may, singly or collectively, have justified a suspicion that the alleged will was not genuine, but no greater force can be attributed to them on this appeal. On the other hand, we might, if it were necessary, call attention to various presumptions and inferences which may fairly be regarded as fortifying the conclusion reached on the trial. A careful reading of the whole record satisfled us that the attack upon the court's finding is entirely without merit.

[4] The appellants make the further point that under the provisions of section 1315 of the Code of Civil Procedure the will should not have been admitted to probate without the production of Behrens, one of the subscribing witnesses. Regardless of any other consideration, the finding that the paper was duly executed as an olographic will furnishes a sufficient answer to this point.

[5,6] The motion for new trial was based, in part, upon the ground of newly discovered evidence. Affidavits of witnesses resident in Yonkers to the effect that the disputed signature was spurious were offered. The court was warranted in disregarding these affidavits upon the grounds: First, that there was no sufficient showing that the evidence could not, with reasonable diligence, have been produced at the trial; and, second, that it was merely cumulative.

No other points are made.

The orders appealed from are affirmed.

We concur: ANGELLOTTI, C. J.; WIL-BUR, J.; MELVIN, J.; RICHARDS, Judge pro tem.; VICTOR E. SHAW, Judge pro tem.

BENOIST v. BENOIST. (L. A. 4247.) (Supreme Court of California. May 8, 1918.)

1. LIMITATION OF ACTIONS \$\infty\$103(2)-TION AGAINST TRUSTEE—REPUDIATION. €===103(2)-Ac-

The rule that the statute does not run in favor of a trustee against his beneficiary till the trust is repudiated, and adverse claim of trustee is clearly and unequivocally made known, applies to express trusts only, and not to an involuntary trust raised by operation of law.

2. Limitation of Actions \$\infty\$=102(6)—Recovery of Chattels—Accrual of Cause

of Action.
Where pictures were given to defendant's father, under agreement that on his death they should go to his son, if he left any, otherwise to plaintiff, and they were then given to de-fendant by her father, and she took possession of them. plaintiff's cause of action accrued, and Code Civ. Proc. § 338, subd. 3, giving three years for action for chattels detained, began to run at least on the death of the father leaving no son.

3. NEW TRIAL \$==79-SUFFICIENCY OF EVI-DENCE-IMMATERIAL FINDINGS.

New trial will not be granted for want of

evidence to sustain immaterial findings.

Department 1. Appeal from Superior Court, Los Angeles County; George H. Cabaniss, Judge.

Action by Conde L. Benoist against Eugenie Benoist. From an order denying new trial, plaintiff appeals. Affirmed.

Fairbanks & MacFarland, of Los Angeles, for appellant. Chas. L. Benoist, of Los Angels, for respondent.

SLOSS, J. In this action, which was brought to recover the possession of seven family portraits, judgment went in favor of the defendant. The plaintiff appeals from an order denying his motion for a new trial.

The trial court made findings as follows: Mrs. Eliza B. Pallen was a sister of the plaintiff, Conde L. Benoist, and of S. H. Benoist, the father of the defendant. In 1877, Mrs. Pallen, who was then the owner of the portraits in question, made a written agreement with her said brothers, which provided, in effect, that she gave the portraits to S. H. Benoist, with the understanding that they should, at his death, "go to his oldest son, if he should have any," but, in the event of his dying without male issue, the portraits should go to Conde L. Benoist, or his oldest son. In the year 1899, S. H. Benoist made a gift of the portraits to his daughter, the defendant, who took them "with knowledge of the agreement, and denying its validity, and claimed to be the owner of the portraits." The plaintiff knew of defendant's possession and claim of ownership. The defendant has had possession of the portraits since the year 1899, and has had them in her possession in the county of Los Angeles for eleven years or more, which fact was known to the plaintiff. S. H. Benoist died without male issue on November 10, 1910.

As conclusions of law the court found that the agreement between Mrs. Pallen and her brothers was valid and binding; that S. H. Benoist violated this agreement when he made a gift of the portraits to the defendant; that a trust devolved upon the defendant when she came into possession; that the statute of limitations then began to run; that the action is governed by section 338, subdivision 3, of the Code of Civil Procedure, and that it is barred by the statute of limitations.

The motion for new trial was based upon the grounds of newly discovered evidence, and insufficiency of the evidence to justify the decision. The showing made did not require the granting of the motion on the first ground, and the appellant makes no complaint on this score. On the other ground, the attack is directed against the findings that the plaintiff knew of defendant's possession and claim of ownership. The record is, in truth, devoid of any evidence tending to show that the plaintiff had such knowledge, and if these findings were necessary to the

support of the judgment, the order appealed of the District Court of Appeal annulling, on from could not be upheld. But, in view of the other facts found, it becomes entirely immaterial whether the plaintiff did or did not have knowledge of defendant's possession and claim, and the findings questioned have no real bearing on the ultimate issue raised by the plea of the statute of limitations.

[1] The appellant takes his stand upon the rule that the statute of limitations does not begin to run in favor of a trustee as against his beneficiary until there has been a repudiation of the trust, and the adverse claim of the trustee has been "clearly and unequivocally made known to the cestui que trust." Luco v. De Toro, 91 Cal. 405, 416, 27 Pac. 1085. This rule applies, however, to express trusts only. Where an involuntary trust is raised by operation of law, no repudiation of the trust is required to set the statute in operation. The period of limitation begins with the commission of the wrongful act. Hecht v. Slaney, 72 Cal. 363, 366, 14 Pac. 88; Broder v. Conklin, 121 Cal. 282, 288, 53 Pac. 699; Barker v. Hurley, 132 Cal. 21, 26, 63 Pac. 1071, 64 Pac. 480; Earhart v. Churchill Co., 169 Cal. 728, 731, 147 Pac. 942.

[2] Here, as appears from findings which are not assailed, the defendant was not a party to the agreement upon which the plaintiff bases his claim, and she took the portraits as her own in antagonism to that claim, and denying its validity. It is not necessary to consider whether the court was correct in its conclusion of law that the statute began to run in 1899, when the defendant came into possession of the portraits. In any event, the plaintiff's right of action accrued when S. H. Benoist died without male issue, whereupon, under the agreement, the portraits were to go to the plaintiff. This event took place in November, 1910, which was more than three years before the commencement of the action. In any aspect, therefore, the action was barred by the provisions of the Code section to which the court refers in its findings.

[3] A new trial will not be granted for want of evidence to sustain immaterial findings. Haese v. Heitzeg, 159 Cal. 569, 573, 114 Pac. 816.

The order is affirmed.

We concur: SHAW, J.: RICHARDS, Judge pro tem.

ROCKRIDGE PLACE CO. v. CITY COUN-CIL OF CITY OF OAKLAND et al. (S. F. 8301.)

(Supreme Court of California. April 1, 1918. On Petition for Rehearing, May 1, 1918.)

1. Courts \$\infty 485-Transfer of Causes-As-

certiorari, resolution for a reassessment of lands for street improvements.

2. Courts 4=3487(2)—Transfer of Causes— ASSESSMENTS FOR STREET IMPROVEMENTS.

The Supreme Court may exercise jurisdiction to vacate a decision of the District Court of Appeal as to assessment for public improve-ments, and transfer such cause to itself on the petition of one not a party to the proceeding, or upon its own motion.

COURTS 438(1)-TRANSFER OF CAUSES-EFFECT.

An order by the Supreme Court granting a hearing, in such court, of certiorari proceeding pending in the District Court of Appeal as to an assessment of lands for public improvements, vacates the decision of the District Court and transfers the case to the Supreme Court as though originally instituted therein.

4. Courts €==486 — Transfer of Causes — GROUNDS.

The action of the District Court of Appeal in regard to an assessment of land for street improvements may be vacated, and cause transferred to the Supreme Court, notwithstanding no error appears on the face of the opinion when considered without regard to the record, since such action is an original proceeding.

5. MUNICIPAL CORPORATIONS \$= 514(11) PUBLIC IMPROVEMENTS-MODE OF REASSESS-MENTS.

Reassessment of a city council for a street improvement will not be set aside as not being proportionate to benefits for the mere reason that deductions and additions were made to the original assessment at a certain sum per front

MUNICIPAL CORPORATIONS **€**⇒407(1) PUBLIC IMPROVEMENTS—ASSESSMENT—CON-STITUTIONALITY OF STATUTE.

Improvement Act (St. 1911, p. 730), providing in section 4 that the city council may make the expense of a public improvement chargeable upon a district to be benefited, and by section 20 that it shall assess the cost of the by section 20 that it shall assess the cost of the work upon the several lots in the assessment district benefited thereby upon each respectively, in proportion "to the estimated benefits to be received by each of said several lots," is not unconstitutional as failing to provide for an assessment in accordance with the benefits to be actually received.

Certiorari by the Rockridge In Bank. Place Company to review a reassessment of lands for street improvement by the City Council of the City of Oakland and others. Proceeding dismissed.

C. Irving Wright and F. E. Boland, both of San Francisco, for plaintiff. Wm. H. O'Brien, of Oakland, for defendants. Johnson & Shaw, of Oakland (R. M. F. Soto, of San Francisco, of counsel), for petitioner Marsh Bros. & Gardenier, Inc.

ANGELLOTTI, C. J. This is a proceeding in certiorari to review a resolution of the city council of the city of Oakland, adopted December 28, 1915, directing a reassessment of the lands liable for a certain street improvement, and prescribing the amount of assessment as to each parcel of land within the assessment district. The proceeding was in-SESSMENTS FOR STREET IMPROVEMENTS.

The Supreme Court may transfer to itself and exercise jurisdiction to vacate the decision | Court of Appeal of the First Appellate Disstituted November 10, 1916, in the District trict. Judgment was given by that court annulling the resolution. Within 60 days thereafter this court vacated said decision and judgment and granted a hearing herein. The only petition filed herein asking for such action was one filed by Marsh Bros. & Gardenier, Inc., a corporation, which was not technically a party to the certiorari proceeding, but which was a party in interest, being the street contractor in whose favor the assessment was made.

[1-4] The claim that this court was without power to vacate the decision of the District Court of Appeal in this matter, and to transfer the same to this court for determination, is sufficiently answered by what is said in the Matter of Wells, 174 Cal. 467, 163 Pac. 657. As to proceedings in mandamus, prohibition, and certiorari originally instituted in a District Court of Appeal, this court has many times made such orders, and the uniform practice in that regard is fully sustained by the opinion in the case cited. It is immaterial that the only petition for such action by this court was by one not made a party to the proceeding. This court has the power to make such an order on its own motion. When such an order is made within the time prescribed in the Constitution, the decision of the District Court of Appeal is vacated and the matter is transferred to this court for a determination of all the material questions involved therein, to the same extent as if originally instituted in this court. It is also immaterial that the opinion of the District Court of Appeal may not show any error upon its face, when considered without regard to the record. The practice established by our decisions (People v. Davis. 147 Cal. 346, 81 Pac. 718; Burke v. Maze, 10 Cal. App. 206, 215, 101 Pac. 438, 440; Rauers, etc., v. Berthiaume, 21 Cal. App. 675, 132 Pac. 596, 833), to the effect that in considering petitions for a hearing, in this court, of appeals required by our Constitution to be taken to a District Court of Appeal, we will consider only the opinion of that court and will not look into the record. is confined to appeals, and has never been extended to original proceedings instituted in such courts. There are material differences between the two classes of matters, which, to our minds, preclude any such extension of the practice, or at least, render it inadvisable to declare any such rule as to original proceedings instituted in a District Court of Appeal. There is no question of power involved in this regard. The power exists as to all matters, and has been exercised in this particular matter, with the result that the proceeding is now here for determination on its merits.

We will concede, for the purposes of the decision, that this proceeding should not be dismissed for laches, or because of the claim that petitioner, before instituting the an amount equal to fifty cents per running

action in equity to enjoin proceedings under the assessment and prosecuted the same to judgment, with the result that judgment was given against it and its coplaintiffs on the merits. We will concede, purely for the purposes of the decision, that certiorari will lie to review an assessment levied on property for street improvements, and come at once to a discussion of the claim of petitioner that the assessment ordered herein is on its face in excess of the jurisdiction of the city council and void.

[5] The street improvement work here involved was work on portions of two intersecting streets, and was done under the provisions of the so-called Street Improvement Act of 1911 (Stats, 1911, p. 730). The work and improvement being in the opinion of the council of more than local or ordinary public benefit, the district benefited was described, and it was ordered that the cost and expense be chargeable against and assessed upon said district. Under the law it was required that the assessment on the several pieces and parcels of land within the district be in proportion to the estimated benefits to each lot. The work was done by the contractor and accepted by the superintendent of streets, who made his assessment for the cost of the work with incidental expenses. \$27,978.68, upon the various lots of land in the district, 447 in number. An appeal was made by certain property owners to the council to review the assessment. The appeal was heard and the council gave its decision by the resolution here assailed, wherein the amount to be assessed against each lot in the district was specified. The sole point made against the resolution and the assessment thereby ordered is that the council did not take into consideration the proportion of benefits to be derived by each of the several lots and make the assessment accordingly, but, by said resolution, arbitrarily apportioned a portion of the cost without regard to benefits. The particular charge in this behalf is that council deducted from the assessment theretofore made by the superintendent of streets on the several lots fronting on Chabot road the sum of 50 cents per running foot, amounting (according to petitioner's brief) to \$4,462.03, and added this to the assessment against all of the lots in the district in proportion to the area of each of said lots; the charge by reason thereof being (according to petitioner's brief) \$0.0006 per square foot, and increasing petitioner's assessment from \$652.50 to \$663.27.

It may be admitted that an analysis of the assessment made by the street superintendent and that ordered by the council on appeal shows that the effect of the action of the council was that as to each lot fronting on Chabot road the street superintendent's assessment was reduced by same, in common with others, resorted to an loot, less approximately \$0.0006 per square foot of area, and that the assessment on each of the other lots in the district was increased approximately \$0.0006 per square foot of area. Also that the deduction of 50 cents per running foot on Chabot road aggregates \$4,462.03, and that \$0.0006 per square foot aggregates in the whole district approximately the same amount. But it does not follow that alleged "mathematical demonstration," as it is called by learned counsel, of the method adopted by the council in apportioning the assessment, that the assessment was not made by the council solely with reference to the benefit to each lot, and does not represent the best judgment of that body as to the amount that should be charged against each lot under that method of apportionment. Certainly there is in this proceeding no showing to the contrary, and the situation portrayed by the record is not such that we can say that there was even any error of judgment in the apportionment. The return to the writ shows that the council gave much time to the hearing of the appeal, the same being considered at several sessions, at which the warties interested were given the opportunity to be heard and were in fact heard. The minutes disclose that the sworn testimony of witnesses was received. and the resolution here assailed so states in terms. The nature of this testimony does not appear, as no record was kept thereof; the law not requiring any such record. Certainly it will not be presumed that this testimony was not sufficient to support the conclusion of the council. The resolution in terms requires the superintendent of streets to assess the sum of \$27,978.68 upon the several lots, "upon each respectively in proportion to the estimated benefits to be received by each of said several lots," and states that "this council hereby finds and decides and determines that said several lots \* \* \* benefited by said work and improvement in the proportions and in the amounts set forth in the table of assessments hereinafter set In the face of this finding, unassailed as it is by anything in the record. it cannot be said here that the assessment was not made in accord with the rule of apportionment prescribed by the statute. The "mathematical demonstration" of learned counsel is simply a demonstration of the facts we have already admitted. Those facts are entirely consistent with a conclusion that it was correctly decided by the council that, in order to make the assessment one according to the benefit to the several lots, it was necessary to charge against each lot the exact amount specified in the resolution. That the amounts so charged are, in so far as the \$4,462.03 is concerned, the same as would have been obtained by the method which counsel contends was in fact adopted, but as to the adoption of which there is no showing in the record other than that they are the same, is entirely beside the question. It certainly cannot be held upon the record before

us that under no conceivable conditions could the several lots be benefited in the proportion stated by the assessment, or that the assessment is void on its face.

[6] A question is raised as to the constitutionality of the Improvement Act of 1911, the claim being that it does not provide for an assessment of the lands in the district in accordance with the benefits to be actually received by such lands from the work, but only provides for an assessment in proportion to the estimated benefits. The act provides (section 4) that the city council may make the expense of the work chargeable upon a district, which, in its resolution of intention, it shall declare "to be the district benefited by said work and improvement," etc., and (section 20) that it shall assess the cost of the work upon the several lots in the assessment district benefited thereby, "upon each respectively, in proportion to the estimated benefits to be received by each of said several lots," etc. Full opportunity is required to be given to the property owners to be heard with respect to the proposed work and the extent of the district, prior to any order for the doing of the work, and after the assessment is made they have the opportunity to be heard as to the amounts charged against their respective lots. It is apparent, of course, that if the district created by the city council comprises all the land to be actually benefited by the proposed work, which is the manifest design of the act. and if this "benefit" to the land embraced in the district exceeds the cost of the work, an assessment of the cost upon the several lots in the district "upon each respectively in proportion to the estimated benefits," etc., is an assessment upon each lot in accordance with the benefits received by it from the work. The point appears to be that the cost of the work which is to be assessed against the lands of the district may exceed the benefit, with the result that the assessment on those lands while in proportion to the benefits may not be in accord with the benefits accruing to each lot from the work. We do not think the act, fairly read, so contemplates or provides. When it provides for the establishment of "the district benefited by said work," it contemplates a district that will in fact be benefited by the completion of the proposed improvement under the terms of the act, including the imposition of the cost thereof upon the lands of the district. If this be the proper construction of the act in this regard, as we think it is, the objection made is without force. That the exact cost of the proposed work is not known until after the establishment of the district, is unimportant. It can be approximately determined with sufficient certainty to avoid the possible condition suggested by counsel. There is no suggestion that any such condition exists in the case at bar.

The proceeding is dismissed.

MELVIN, J.; VICTOR E. SHAW, Judge pro

#### On Petition for Rehearing.

PER CURIAM. The petition for a rehearing is denied. In denying a rehearing we deem it proper to say that we do not consider the points made by the petitioner relative to the alleged damage to its property resulting from the grading to the official grade available in this proceeding. See Duncan v. Ramish, 142 Cal. 693, 694, 76 Pac. 661; Hornung v. McCarthy, 126 Cal. 17, 58 Pac. 303; Engebretson v. Gay. 158 Cal. 27, 109 Pac. 879.

UNION MACH. CO. v. CHICAGO BONDING & SURETY CO. (Civ. 2222.)

(District Court of Appeal, First District, California. March 26, 1918.)

1. Bailment €==18(3)—Lien for Repairs-

I. BAILMENT © 18(3)—LIEN FOR REPAIRS—
POSSESSION—STATUTES.
Under Civ. Code, §§ 3049, 3051, providing
for liens on personal property, where machine
company repairs a dredger, and constructs new
parts therefor, its lien for repair charges and
price of new parts is dependent upon company retaining possession of the dredger.

2. Guaranty 4=16(1)-Consideration-Re-

LINQUISHMENT OF LIEN.

Where a machine company does repair work on, and furnishes new parts for, a dredger, and without receiving payment therefor gives up possession of dredger upon guaranty of payment by a bonding company, the relinquishment of the lien is sufficient consideration for the guaranty.

3. GUARANTY \$\infty 16(4)\$\to Consideration\$\to Extension of Time for Parment.

Extension of time of payment was a sufficient consideration for the guaranty.

4. Costs €==260(1)—Damages for Frivolous APPEAL.

Where an appeal is taken obviously for purpose of delay, the court may assess damages for the prosecution of a frivolous appeal.

Appeal from Superior Court, City and County of San Francisco: Bernard J. Flood.

Action by the Union Machine Company, a corporation, against the Chicago Bonding & Surety Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Watt, Miller, Thornton & Watt, of San Francisco, for appellant. Cushing & Cushing and Wm. S. McKnight, all of San Francisco, for respondent.

KERRIGAN, J. This is an appeal from a judgment in favor of the plaintiff apon a guaranty executed by the defendant.

The appeal is without merit. The facts are briefly these: Plaintiff entered into a contract with the Western Reclamation Company to make certain repairs to and to construct new parts for a dredger. Part of the work under the contract had been performed, and plaintiff was entitled to the contract appeals from an adverse judgment, and pre-

We concur: SLOSS, J.; WILBUR, J.; price therefor. When the balance of the work was ready for delivery the plaintiff refused to install the same until it should be paid in full for all the work. The Western Reclamation Company was unable to make payment at the time, and prevailed upon the plaintiff to perform the balance of the work upon the execution by the defendant of a written instrument by the terms of which the latter guaranteed the payment of all bills against the Western Reclamation Company for the work done on the dredger under the contract, the same to be paid at stated periods.

> [1-3] We do not doubt that the plaintiff had a perfect right to retain possession of the undelivered part of the work until the purchase price of all the work was paid. Civ. Code, §§ 3049, 3051. It follows that by the delivery of the articles in question without receiving payment, in reliance upon the security of the guaranty, plaintiff suffered a detriment which was a good consideration for the guaranty. Moreover, at the time and as a part of the transaction just noted plaintiff agreed to extend the time of payment for the articles mentioned in the contract, which we think furnished an additional and distinct consideration for the guaranty sufficient of itself to support the same.

> [4] We cannot escape the conviction that the present appeal was not taken in good faith, but for the purposes of delay, and that the court should exercise its power of imposing a penalty upon the appellant for what it deems an abuse of the right of appeal. The judgment is affirmed, and it is ordered that the appellant pay to the respondent the sum of \$50 as damages for the taking and prosecuting of a frivolous appeal.

> We concur: ZOOK, Judge pro tem.; BEAS-LY, Judge pro tem.

> BORBA et al. v. DE MELLO. (Civ. 2341.) (District Court of Appeal, Second District, California. March 26, 1918.)

APPEAL AND ERROR 6 760(1)-BRIEFS-SUF-FICIENCY.

One presenting his appeal by the alternative method must print in his brief such portion of the record as he desires reviewed, as required by Code Civ. Proc. § 953c, and references to the transcript are insufficient.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by Constantino V. Borba and others against Jose De Mello. Judgment for plaintiffs, and defendant appeals. Affirmed.

Bradley & Bradley, of Visalia, for appellant. G. W. Zartman, of Tulare, for respondents.

PER CURIAM. Defendant in this case

In the briefs filed by counsel no attempt is made to comply with the provisions of section 953c, Code of Civil Procedure, which require that the parties in presenting an appeal by the method mentioned shall print in their brief such portions of the record as they desire to call to the court's attention. Numerous references are made to the pages of the transcript filed, but it has been repeatedly held that the appellate courts will not examine the transcript documents in order to determine whether there is merit in the contentions made by the appellant. Many opinions of this court and the Supreme Court reiterate the rule. A collection of the cases so holding will be found grouped in the case of Barker Bros. v. Joos et al., 171 Pac. 1085. Not having properly before us sufficient of the record to illustrate the various contentions made on behalf of the appellant, we are compelled to hold that no error is shown as against the judgment.

The judgment appealed from is affirmed.

MOORE & SCOTT IRON WORKS et al. v. INDUSTRIAL ACCIDENT COM-MISSION et al. (Civ. 2467.)

(District Court of Appeal, First District, California. March 25, 1918. Rehearing Denied by Supreme Court, May 25, 1918.)

MASTER AND SERVANT \$\instructure 375(2) - "Arising in Course of Employment."

Where one employed as a bolter-up within the hull of a ship in course of construction left his employment to go to lunch, but instead of going the usual safe way chose another dangerous way, whereby he was killed, he was not in the course of his employment within the Workmen's Compensation Act.

Proceedings by Minerva Higgins against the Moore & Scott Iron Works and others for compensation for the death of Michael Higgins, deceased. There was an award by the Industrial Accident Commission, and defendants petition for a writ of review. Award annulled.

Rehearing denied by Supreme Court; Angellotti, C. J., and Lorigan, J., dissenting.

Redman & Alexander, of San Francisco, for petitioners. Christopher M. Bradley, of San Francisco, for respondents.

PER CURIAM. The award of the Industrial Accident Commission in this case must be annulled upon the following considerations: Michael Higgins, employed as a bolter-up within the hull of a ship in the course of construction at the Moore & Scott Iron Works, left his employment for the purpose of going to his lunch; he went by an unusual route, and undertook to go down a scaffolding and ladder on the outside of the shipa means not intended for his use in leaving the ship at any time—another and perfectly safe method of exit having been provided by determinate sentence cannot be given.

sents his appeal by the alternative method. his employers. In doing so he lost his hold and fell, and was killed. Upon these facts it must be held that the death of Higgins did not take place in the course of his employment; nor was he at the time of the accident performing any service growing out of or incidental to his employment, nor acting within the course thereof. Fitzgerald v. Clarke & Son, 1 B. W. C. C. (Eng.) 197.

> The findings of the commission to the effect that he might have been leaving his work for the purpose of getting more bolts for use therein, or for the purpose of getting fresh air, seem to us to rest upon nothing but conjecture. There is no evidence in the record to sustain them. The fresh air, if he needed it, could have been obtained in a perfectly safe place upon the deck of the vessel, and nearer to the point of his immediate employment than the scaffolding from which he fell, and there seem to have been no bolts or other material necessary to his work to be obtained at the place toward which he was going. It is certain from this record, it seems to us, that he was, as has been said, simply abandoning his work before the hour when he was permitted to leave it.

The award is annulled.

### PEOPLE v. HILL. (Cr. 707.)

(District Court of Appeal, First District, California. March 23, 1918.)

G=25(6)-SUFFICIENCY OF IN-1. PERJURY DICTMENT

Allegations that at a certain\_time in the on trial a certain action in which the people were plaintiff and B. was defendant, and that it was then material to know where B. was on a certain date, and whether he was with the defendant at a certain place, was a sufficient presentation of the matter in which it was charged defendant committed perjury.

2. PERJURY \$\sim 33(1)\$—SUFFICIENCY OF EVI-DENCE.

Evidence held sufficient to support a conviction of perjury.

3. Criminal Law \$\iiins\$553 - Findings of

FACT.
The jury in a criminal case has the right to entirely discredit the testimony of defendant and another, and to base its verdict on other evidence which it considers more trustworthy.

4. CRIMINAL LAW €=730(1)—MISCONDUCT

or Counsel—Admonishing the Jury.
Where, in perjury case, prosecuting attorney improperly referred in argument to matters in the case where the offense was alleged to have been committed, on defendant's motion to admonish the jury, a statement of the court, "I think I will take the view of the defendant, and instruct the jury to disregard that part of it," was a sufficient admonition, especially where the matter referred to was known to the jury.

5. Criminal Law 4=1207 - Indeterminate SENTENCES.

Where an offense was committed before the indeterminate sentence law took effect, an in6. CBIMINAL LAW \$\infty\$1188 — Harmless Er-BOR—SENTENCE.

A conviction will not be reversed for error in giving an indeterminate sentence for an offense committed before the indeterminate sentence law went into effect, but the case will be remanded, with instructions to give a proper sentence.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

A. J. Hill was convicted of perjury, and he appeals. Remanded, with directions to give proper sentence.

Burns & Watkins and E. A. Williams, all of Fresno, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

PER CURIAM. The defendant was convicted in the superior court of Fresno county of perjury, and an indeterminate sentence of imprisonment in a state penitentiary was imposed upon him. He appeals from the judgment and from an order denying him a new trial.

The points insisted upon for a reversal of the judgment and order are that the court erred in overruling the demurrer to the information; insufficiency of the evidence to sustain the verdict; misconduct of the district attorney by which the defendant was prevented from having a fair and impartial trial; and that the court erred in not determining the period of the defendant's confinement.

[1] Considering the first point raised, it appears that the information sets forth, among other things, that at a certain time in the superior court of the county of Fresno there was on trial a certain action in which the people of the state of California were plaintiff and Clarence C. Boling was defendant, and that it was then and there material to know in said action where the defendant Boling was on the night of December 6, 1915, and whether or not said Boling at said time time stayed all night with Hill, the defendant in this case, at a place known as Hub. It is claimed that this is not a sufficient setting forth of the controversy or matter in respect to which the offense was committed to comply with the provisions of section 966 of the Penal Code.

We think this statement of the indictment was a sufficient presentation of the matter in which it is charged that Hill committed the perjury complained of. The purpose of the requirement of setting forth the substance of the controversy or matter in which the perjury is alleged to have taken place is to inform the defendant of the offense with which he is charged, and this is as effectually done by the statement above given as if the whole proceedings of the trial had been incorporated in the information. The demurrer to the information on this ground was properly overruled.

[2, 3] The next, and main point urged by appellant for a reversal is the insufficiency of the evidence to sustain the verdict. The verdict of the jury is that Hill, in testifying in the case of People v. Boling that Boling stayed with him in his camp at Hub on the night of December 6, 1915, testified falsely. In reaching this conclusion the jury had before them evidence of the following facts among others: One Boling was informed against and tried in the superior court of Fresno county for the larceny of certain mules. Upon that trial, in attempting to establish an alibi, he produced Hill, the present defendant, as a witness in his behalf. who testified that Boling passed the night of December 6, 1915, with him in his tent at a little station called Hub, where he testified he was camping at the time. It appears that Hub is a very small community containing but a few inhabitants. At the trial of the present case the prosecution called as witnesses a number of the residents of Hub. who testified to Hill's presence there at the end of December and the beginning of January, and that they had not seen him there prior to that time. The owner of the pasture in which Hill camped during his stay at Hub testified that the only time he saw Hill there was after December 27th. To the same effect is the testimony of Joe Fernandez, near whose house the defendant was camped, and who witnessed the arrival of Hill at Hub. Another witness testified to a horse trade with Hill at Hub on January 8th, and that Hill stayed at Hub but a few days, and in any event not more than ten days. This testimony is sufficient to warrant the jury in finding that Hill himself was not. at Hub on December 6th, and that consequently Boling did not camp there with him on that night, even though there was contradictory evidence given by Boling and the defendant. The fact that the claim of defendant and Boling that the latter was at Hub on the night of December 6th was made at Boling's trial in an endeavor to relieve him of the charge of grand larceny was before the jury. It was also before them that Boling gave testimony contradictory of his claim that he visited Hub in December, and that he also stated a few days after December 6, 1915, that he passed that night in a barn. The jury had the right-which it evidently exercised—to entirely discredit the testimony of Boling and the defendant, and to base its verdict on other evidence which it considered more trustworthy.

[4] The next contention of the appellant is that the district attorney was guilty of misconduct during the trial by which the defendant was prevented from being fairly and impartially tried. Regarding this matter the record shows that the prosecuting officer, during his argument to the jury, referred to some evidence contained in a tran-

ing the finding of certain stolen mules in Boling's pasture. This transcript had been offered in evidence in the present case for the purpose of showing the materiality of Hill's testimony given in that trial, and had been so offered in the absence of the jury. It is the appellant's contention that this evidence was addressed solely to the judge of the trial court, and that the district attorney should not have referred to it in his argument to the jury. Appellant's counsel objected to the prosecuting officer's reference to this testimony, and requested that the jury be instructed to disregard it. It is apparent from the colloguy between the court and counsel at the time that the court was rather inclined to the view that the reference was proper, but the court closed the incident by saying, "I think I will take the view of the defendant, and instruct the jury to disregard that part of it." The district attorney acquiesced in this by saying, "Very well, I don't oppose the order of the court." It is urged that this was not an instruction or admonition to the jury. There can be no doubt that it was intended to be such, and the district attorney at least so understood it. as is clear from his remark; and while it might with advantage have been given much more emphatically, we cannot hold in the present case that the defendant was prejudiced by this manner of closing the incident, especially in view of the fact that it was well known to the jury that Boling was charged with the theft of the mules. Indeed, this point seems to be somewhat inconsistent with the point urged in support of the demurrer, that the indictment or information did not sufficiently set forth the substance of the controversy-a point based upon the omission to state in that pleading that Boling was charged with having stolen the very mules referred to in the district attorney's argument.

[5,6] Finally it is claimed by the appellant that the court erred in pronouncing upon him an indeterminate sentence. offense was committed before the indeterminate sentence law at present in force took effect, and this case stands upon the same footing in that respect as Ex parte Lee, a case recently decided by the Supreme Court on habeas corpus, and reported in 171 Pac. 958, in which it is held that the indeterminate sentence law is ex post facto as to crimes committed before it took effect. The case at bar comes within the authority of that case, and is one wherein the court should have pronounced judgment in conformity to the state of the law as it existed at the time of the commission of the offense. The indeterminate sentence is the only error we find in the record. We will not reverse the case therefor, but will remand it to the superior court, with instructions that such had been proved.

script of the trial of People v. Boling concerning the finding of certain stolen mules in Boling the finding of certain stolen mules in Boling's pasture. This transcript had been offered in evidence in the present case for the purpose of showing the materiality of Hill's testimony given in that trial, and had been crime was committed.

It is so ordered.

PEOPLE v. WILSON. (Cr. 560.)

(District Court of Appeal. Second District, California. March 26, 1918. Rehearing Denied April 25, 1918.)

1. Homicide \$\infty\$=105 — Justification — Arrest.

An officer is not justified in shooting a man in order to compel submission to arrest for a misdemeanor.

2. Homicide === 111- Self-Defense - Arbest.

An officer, properly engaged in attempting to make an arrest on a misdemeanor charge, has the right to resist attack made upon him, and, being rightfully there and not legally considered the aggressor, may in his own defense take life.

3. Homfcide ← 276 — Justification — Evidence.

In a prosecution for manslaughter against deputy constable who shot deceased while attempting to arrest him for disturbing the peace, evidence held not as a matter of law to make the act justifiable.

4. Homicide ←332(3) — Review — Questions of Fact.

In a prosecution for manslaughter by a deputy constable in an attempt to make an arrest for disturbing the peace, the question on conflicting evidence as to whether the shooting was a crime for which conviction should be had is for the jury, and its finding is conclusive.

CRIMINAL LAW \$\infty\$ 1174(2)—CONDUCT OF JUBOR—EVIDENCE—MISCONDUCT.
 In a prosecution for manslaughter, evidence

In a prosecution for manskughter, evidence of improper conduct of a juror in giving a witness a ride in his automobile and discussing a map of the scene of the crime, in violation of the instructions, held not to require reversal.

6. CRIMINAL LAW \$\iiis\$23(5)—INSTRUCTIONS

—INTENT.

In a prosecution against a deputy constable for killing a man he was attempting to arrest on a misdemeanor charge, an instruction that a person must be presumed to intend that which he attempts to or which he voluntarily does in fact do, and must also be presumed to intend all the natural, probable, and usual consequences of his own voluntary act, and the willful use of a deadly weapon without excuse or provocation generally indicates a felonious intent, correctly stated the law, when taken in connection with other parts of the charge, a vising the jury that it must find beyond a reasonable doubt that defendant committed the acts charged.

7. Criminal Law ⇐⇒761(11) — Instructions—Assumption of Facts.

In a prosecution against a deputy constable for killing a person he was attempting to arrest on a misdemeanor charge, an instruction, advising that when a homicide is proved the burden of proving circumstances of mitigation or justification devolves upon defendant, unless the proof on the part of the prosecution tends to show that the crime amounts only to manslaughter, or that defendant is justifiable or excusable, was not erroneous, as assuming that the commission of the homicide by defendant had been proved.

8. CRIMINAL LAW \$==1137(3)-Review-In-STRUCTIONS.

An instruction in a criminal case, given at defendant's request, cannot be questioned by defendant on appeal.

9. Homicide 6=325 - Review - Reserva-

TION OF OBJECTIONS.

In a prosecution against a deputy constable for killing a person he was attempting to arrest on a misdemeanor charge, admission of evidence as to malice would not be considered, in the absence of an objection at the time offered.

DENCE-HEARSAY.

In a prosecution against a deputy constable for killing a person whom he was attempting to arrest on a misdemeanor charge, a statement by a witness of the answer to a question that he had asked a third person as to whether he knew who owned the gun that had been found at the scene of the crime was inadmissible as hearsay.

1. Homicide &==268 — Manslaughter -Questions of Fact. 11. HOMICIDE

In a prosecution against a deputy constable for killing a person whom he was attempting to arrest on a misdemeanor charge, evidence as to whether the bullet that killed deceased came from defendant's gun or from that of another held to make a question for the jury.

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

G. A. Wilson was convicted of manslaughter, and from the judgment and a denial of new trial he appeals. Affirmed.

W. T. Helms, of Los Angeles, and J. F. Frick, of Lompoc, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Deputy Atty. Gen., for the People.

JAMES, J. Defendant was charged, by an information of the district attorney of the county of Santa Barbara, with having on the 29th day of April, 1917, murdered Pedro Lopez. The jury by its verdict found him guilty of the crime of manslaughter, and the trial judge sentenced him to serve a term of ten years in the penitentiary. Motion for a new trial was made and denied, and an appeal was then taken both from the judgment and from the order denying that motion.

The killing occurred while appellant, who was at the time a deputy constable, was assisting one Knight, the constable under whom appellant was deputized, in an attempt to arrest Lopez and a man named Flores. On the day in question Lopez, in company with Flores, one Pena, and one Cordero, was in a building which was located on the main street of the little town of Santa Ynez in the county of Santa Barbara. Lopez at least had been drinking, and by all of the testimony was shown to have been considerably intoxicated. The men emerged from the building onto a vacant lot adjoining thereto. They were quarreling and fighting among themselves, one knocking the other down repeatedly. A fifth man named Espinosa made another of the party who participated in the fight on the lot. As to how the encounter mony of Flores and Espinosa was generally

started and as to who the chief aggressor was, is, to our minds, immaterial to a consideration of the case. While the men were engaged in the mêlée, Wilson, who conducted a garage in the neighborhood, was notified of the disturbance by an employe of his, this employé being related to one of the participants in the disturbance. nouncement of this employé to Wilson at the time was for Wilson to "come; they are killing my cousin." Wilson had just previous to that time suffered an injury to one of his legs below the knee, and the injured part was incased in a cast, making it necessary for him to use crutches or a crutch. Responding to the call made, Wilson got into an automobile and rode to the scene of the disturbance. There were a number of bystanders there at the time engaged in watching the fight, and. as we may remark, seeming to enjoy the performance, as none of them offered to interfere to quell the disturbance. Wilson, upon his arrival at the scene, left his machine, called upon two bystanders to assist him, and attempted to arrest the men who were fighting. There was testimony of the prosecution introduced showing that he called upon the disturbers to cease their fighting, and notified them that they were under arrest. That these men knew Wilson well, and knew him to be an officer authorized to make arrests, the evidence admits of no doubt at all. Instead of submitting to arrest, the men turned upon Wilson; some one of them knocked his crutch or crutches away and knocked his gun from his hand. The testimony was undisputed as showing that Wilson made no attempt to use his revolver in any way other than in the attempt to intimidate the men and compel them to submit to arrest. The disturbers, however, appeared not to fear the gun, and continued their aggressive acts against Wilson, who, recovering his gun from the ground, made his way back to the automobile and went after Knight, the constable. It is worth while here to note that had Wilson the inclination or the desire to have shot any of the men during this first encounter, he had ample opportunity to do so, for he was armed with a large caliber revolver which was fully loaded. As soon as Wilson left the scene to get the assistance of Knight, two of the participants in the row made their escape or went away, and there remained Lopez, Flores, and Espinosa. It is not clear that Espinosa participated actively in interfering with Wilson's first attempt to arrest the disturbers of the peace. Flores and Lopez, as the evidence indicates, appreciated the fact that when Wilson obtained assistance their arrest might be effected. As Wilson returned with Knight, the three men last mentioned had started across the field. Knight called upon them to stop. The testi-

to the effect that they obeyed the command, while Knight and Wilson agree that the men did not. Whether they came to a stop or not upon the call by Knight, it is clear beyond doubt from the whole record that Flores and Lopez declined to submit themselves to ar-Knight stated that he fired several shots into the ground in order to intimidate the men, and there is no dispute about the fact that he did fire into the ground. The testimony shows that Knight used his gun only in the attempt to intimidate the men and compel them to submit to arrest and as a club to beat off their attack upon him. It was shown clearly that both Flores and Lopez declined to acknowledge the right of Knight to arrest them, and that they proceeded with physical force to drive Knight away, as they had previously done to Wilson. Knight grappled with the men, and the two appear to have gotten the better of him. Meanwhile Wilson stood by, several feet away, taking no active part in the tussle.

Up to this point we have recited the facts which appear to be without material dispute as the record shows them. From this point the testimony in its narrative of the occurrence which culminated in the shooting of Lopez is divergent. The testimony of several witnesses introduced on behalf of the prosecution, some of which is that given by bystanders, some by Flores and Espinosa, was to the effect that in the midst of the struggle between Knight and Flores and Lopez, Wilson approached Lopez, and, standing a distance of from six to eight feet away from him, deliberately discharged his revolver in Lopez's direction, whereupon Lopez sank to the ground, shot through the head. Lopez was in fact shot through the head, and died almost immediately. On the other hand, the testimony first of Knight was that when the two men whom he was attempting to arrest began to get the better of him, he called out that, unless some one came to his assistance, he would have to shoot one of the men; that Wilson immediately came to his assistance, a shot was fired, and Lopez sank to the ground, and that he (Knight) was then able to place handcuffs upon Flores. At about the same time, Knight testified, he (Knight) fired another shot from his revolver, aiming the shot downward between the legs of one of the men with whom he was struggling. Wilson testified that he did not intentionally fire any shot; that when he saw the men getting the better of Knight and Knight called for help, he approached and struck Flores, who appeared to be the more obstreperous of the two, over the head with his revolver, and that his revolver was discharged accidentally. As to where the shot went he testified that he did not know.

We have here given a brief synopsis of the testimony covering the case as it was presented to the jury. There was some testimo-

showing malice on the part of Wilson. This testimony consisted of statements of some of the witnesses that they had heard that Wilson had said at a prior time that there were some men whom he intended to "get," mentioning the name of Lopez as being one of them. There was testimony by another witness that after the shooting of Lopez, Wilson had stated that he had shot Lopez and made some further remark that he did not think any more of doing that than of hunting "rabbits." This testimony we must conclude was given no weight by the jury, for the verdict of manslaughter eliminated any finding of malice. No doubt that the jury considered, when it was made clear to them that Wilson upon the first encounter had every opportunity under provoking circumstances to use his weapon against Lopez, that there was small showing of any particular malice held in the mind of Wilson against any of the men concerned. From the undisputed evidence it appears very clear that Wilson as an officer was fully authorized to arrest Lopez and Flores and the other men engaged in the fight, when he first appeared upon the scene where the disturbance was in progress. These men were then engaged in a public disturbance of the peace. They added to their offense that of resisting an officer in the discharge of a public duty. Not only was Wilson authorized to arrest them, but if he had declined to interfere he would have left himself open to a charge of dereliction. The right to arrest the men did not cease when Wilson went away to get the assistance of Knight, any more than had the men fled, remained out of sight for a time, and then been overtaken by Wilson and whomsoever he might have secured to assist him in making the arrest. Knight's act in attempting to make the arrest was accompanied by all of the right which Wilson himself had.

[1-4] By reason of the particular verdict returned, we then view the case as being one which submitted to the jury the questions: (1) Whether under the circumstances of the case, the arrest being for a misdemeanor, there was no such exercise of force on behalf of the persons whose arrest was being attempted as to authorize the use of a deadly weapon to the extent of killing; (2) whether, conceding no intent to discharge the weapon and no necessity to so discharge it, the officer made use of it in such a careless and negligent manner as to make him responsible where a death resulted from his act. The first proposition, of course, involves the matter of self-defense. The law is well understood to be that an officer is not justified in shooting a man in order to compel submission to an arrest on a misdemeanor charge. While this is so, an officer properly engaged in attempting to make an arrest in such a case has the right to resist atny in the record offered for the purpose of tack made upon him, and, being rightfully

there and not legally considered the aggressor, may in his own defense take life. Under the testimony heard by the jury in the case, it does not appear as a matter of law that the act was justifiable. The facts under the conflicting testimony were for the jury to resolve. It was for the jury to say, judging from all the circumstances, as to whether the shooting of Lopez amounted to a crime for which a conviction of Wilson should be had. Upon those questions of fact, and where the verdict is against the defendant, an appellate tribunal has no right to say that the determination of the jury should have been otherwise. Our examination can only extend to a consideration of the alleged errors which it is claimed were committed in the course of the trial by which defendant was prevented from having a full and fair hearing as guaranteed by the law.

[5] Appellant contends, first, that he is entitled to a new trial because the jury received evidence out of court and the members thereof were guilty of prejudicial misconduct. In support of this ground made on his motion for a new trial defendant made affidavits, and by consent of the prosecution testimony was introduced orally on both sides. One Brant, at the trial, gave impor-One of the tant evidence for the people. jurors, Gordon, was the employer of the son-in-law of Brant at Santa Barbara. several occasions during the trial Gordon was seen in company with Brant, riding in Gordon's automobile to the courthouse. Another juror, Gates, accompanied them on at least one occasion. On another occasion Gott and Fitzgerald, witnesses for the state, were were with them. Appellant did not show that the persons mentioned had discussed at any of these times the case or any of the evidence. The attorney who represented the appellant at the trial testified that, when a map or plat used to illustrate the scene of the shooting, and which had been introduced in evidence, was handed to the jury, the jury were instructed by the court not to discuss the map, and that, notwithstanding this injunction, Jurors Gordon and Gates did point out the various places delineated on the drawing and discuss the same. It appears by the record that the jury, after having retired to the jury room to deliberate upon a verdict, and before agreeing thereto. was returned into court, where the request was made that the jury be allowed to take certain exhibits, including this map. consent of people and defendant, the exhibits were given to the jury, which again retired to the jury room. It was while the jury was in the courtroom in the presence of the judge that it is claimed Gates and Gordon discussed the map. Gordon testified there was no such discussion had in the courtroom, and that while he had invited the three witnesses mentioned to ride with him to the

them about the case or the evidence; that he had merely picked them up on the street while all were on their way to attend the trial. Not only did appellant fail to furnish the trial judge with any proof that any improper communications had passed between the jury and witnesses, but positive testimony was furnished that no such communications passed. Conceding that it is always better that jurors should so conduct themselves as to avoid even the suspicion that they may have had discussion with witnesses about the case in which they are sitting, a suspicion alone may not be taken as sufficient to establish the fact claimed. Had the showing made by the defendant, involving the association of Gordon with the witnesses Brant, Fitzgerald, and Gates, stood alone and uncontradicted, the trial judge would not have been authorized to conclude that there had been no interchange of improper communication. Referring to the question as to whether Jurors Gates and Gordon, disregarding the injunction of the court, passed remarks between themselves upon the map exhibit while in the courtroom, it will be seen that the same condition of conflicting evidence was again presented to the trial judge. But we cannot perceive how, conceding that the jurors did do what is charged against them, prejudicial error would be created. The jury came into the courtroom and asked for the exhibits, including the map. Defendant consented that they have the map, and it was taken to the jury room for examination. The map had been regularly introduced in evidence, and its contents were presumably well known to the jury.

Another ground of the motion for a new trial was that the court had misdirected the jury in matters of law, and erred in its decision in the course of the trial. The discussion of the alleged errors in the giving of instructions should be prefaced by a summary of the charge as given by the court. The trial judge in this case gave very full instructions touching the right of peace officers to use deadly weapons in making arrests. He defined what constituted a disturbance of the peace and what constituted resisting an officer. While, as counsel for appellant suggest, the trial judge evidently thought that Knight and Wilson had not the right to attempt the arrest of Flores and Lopez at the time they did, this view of his was given expression only at the time of the sentencing of this appellant. The instructions did not so declare, either directly or by reasonable inference. And we deem it proper to say, at the end of an exhaustive perusal of the record, that we find nothing to indicate on the part of the trial judge the hostile prejudiced attitude ascribed to him in the briefs of counsel. We find but one instruction offered by defendant and marked in the record as "refused." That instruccourthouse, he had had no conversation with tion defined the crime of manslaughter and

read by the court to the jury.

[6] Instruction No. 4 is attacked on the ground that the assumption was presented to the jury that there was an absence of evidence showing that appellant did not intend the death of Lopez. This instruction was in the following words:

"A person must be presumed to intend to do that which he voluntarily and willfully does in fact do, and must also be presumed to intend all the natural, probable, and usual consequencan the natural, processes, and usual consequences of his own voluntary acts. Therefore, when one person assaults another violently with a dangerous weapon, likely to kill, and which does in fact destroy the life of the party assailed, the natural presumption is that such assailant intended death, or other great bodily harm; and, in the absence of oxidence to the contrary this in the absence of evidence to the contrary, this presumption must prevail. The willful use of a deadly weapon without excuse or provocation generally indicates a felonious intent.

The instruction correctly stated the law. and is one so frequently given as to have become almost axiomatic. It must not be read alone, but must be read in connection with the entire charge, and particularly that portion of it which advised the jury that it must find beyond a reasonable doubt that defendant committed the acts charged. It was qualified, too, by instructions defining the right of peace officers to resort to the use of deadly weapons in making arrests or in defending themselves against attack while so engaged.

[7] Instruction No. 29, it is contended, was inappropriate and erroneous under the defense made to the charge. By this instruction the jury was advised that when a homicide is proved, the burden of proving circumstances of mitigation or that would justify or excuse it, devolves upon a defendant, unless the proof on the part of the prosecution tends to show that the crime amounts only to manslaughter, or that the defendant is justifiable or excusable. Of this instruction counsel say:

(1) "It is a practical assumption by the court that the commission of the homicide by the defendant has been proved"; (2) "otherwise the instruction could have no application to the case, and, by the words of the instruction it-self, it should not have been given, since the very last clause of the instruction itself provides that it is not to be applied when the proof on the part of the prosecution tends to show that the defendant was justifiable or excusable."

Read in connection with other instructions given, there was no assumption of guilt reasonably to be deduced from this instruction. In making the second point against it, counsel has tried the case for the jury and rendered his verdict. The charge made in the information was murder, and the jury had the right to determine under the evidence whether defendant was guilty at all, or, if guilty, whether his guilt was of the first or second degree, or was manslaughter.

[8] Instruction No. 31, which is criticized by appellant, appears to have been given at the request of the defendant, and therefore | sustaining objection to a question asked of

its substance was contained in the charge, appellant cannot be here heard to question its soundness.

[9] It is argued that the testimony of two witnesses to the effect that about a month before the shooting of Lopez they had heard Wilson say that he was going to "get" Lopez. Flores, and another man named, and that he had a big gun that would stop them, referred to statements and incidents too remote to be competent. This testimony was not remote in point of time, and was introduced in support of the attempt on the part of the prosecution to show malice of Wilson. As has already been noted, the jury evidently did not pay great heed to this testimony for the offense of which they convicted the appellant involved no particular malicious intent. But there is another and complete answer to any objection that might have been here made to this evidence, and that is that it appears that no objection at all was urged at the trial against its introduction. The same condition of the record is shown and the same answers may be made to the contention for error in admitting the testimony of Ed Hames. Hames testified regarding some "trouble" that appellant had had a year before with Lopez over cattle, and to having heard appellant at that time say that he would kill Lopez. It would serve only to extend this opinion to an unwarrantable length to take up with more detail the objections urged against the admissibility of other testimony, or to alleged misconduct of the prosecuting officers. The testimony of which complaint is pointedly made was received without a word of objection from the defendant at the trial. Statements of the prosecuting attorneys, which it is claimed were calculated and intended to improperly influence the jury, were not objected to at the time, and no request was made to have the court instruct the jury to disregard them. The prosecuting officers were indeed zealous in their endeavors to convict the defendant. The introduction of an American flag found about the neck of Lopez, and the narrative of how it had been the subject of a quarrel on the day of the shooting when Lopez was said to have declared his willingness to fight for the flag, were no doubt "make-weights." for we can see no reason why the flag or the incident referred to tended to establish that Wilson shot Lopez either lawfully or unlawfully. Evidently the prosecutors, from the manner of their examination of witnesses, took the view, which they sought to impress upon the jury, that Wilson and Knight had not the right to attempt the arrest of Lopez and Flores. We must assume that the instructions of the court were heeded by the jury, and, as before noted, these instructions were comprehensive in defining the rights of officers as our law declares them

[10] It is claimed that the court erred in



the witness Bailey, who was called for the doubt correctly set forth in the briefs. In defense. Flores, a fellow participant with Lopez in the disturbance occurring on the day Lopez met his death, while testifying for the people, was asked on cross-examination whether Lopez had a gun at the time he was shot. Flores replied in the negative, and was next asked whether he had not, after the shooting, told Bailey that there was a gun found at the scene of the affray, and that it was Lopez's. He replied that he had not so stated. Bailey was interrogated as to the alleged statements of Flores. The record shows the examination of Bailey on this subject to have been as follows:

"Q. Did you in the presence of Frank Flores and his mother on the Indian Reservation, near Santa Ynez, on the night of the 30th of April, 1917, have any conversation with Frank Flores about a gun? A. I asked Mr. Flores if the about a gun? A. I asked Mr. Flores it the gun that Robles picked up over there near where the fight occurred was his gun. He stated that it was not. I said, 'Do you know whose gun it is?

"Mr. Ford (the assistant prosecutor): Just a moment. We object to that as hearsay. "The Court: That objection is sustained."

The objection, we think, was properly sustained on the ground stated by the prosecuting officer.

[11] It is claimed that the evidence showed without conflict that it was a bullet from Knight's gun, and not from Wilson's gun, that killed Lopez. Knight was using a .32 caliber gun, while Wilson's gun was a heavy .45 caliber weapon. The testimony of the physician who examined the wound in Lopez's head was that the aperture at the place of exit was much larger than the aperture at the point of entrance. There was testimony that the bullets used in Knight's gun were soft, and that the bullets used in Wilson's gun were hard, "steel-jacketed." The defense produced a witness who qualified as an expert and who had had experience in army hospitals, and had also made certain tests before the trial with guns and bullets of the kinds used by Wilson and Knight. The testimony of this witness was to the effect that a .45 caliber bullet such as was used in Wilson's gun would produce approximately the same size of hole at the point of exit as at the point of entrance, and that the kind of bullet used in Knight's gun would produce a smaller hole at the point of entrance than at the point of exit, owing to the fact that the bullet was softer and would spread out as it encountered the bone on the opposite side of a head. This evidence was not conclusive of the fact that a bullet from Knight's gun, and not from Wilson's, had passed through the head of Lopex, and it was still left for the jury to determine under all of the facts laid before them as to whether the deadly wound had been inflicted by appellant.

The law as stated by appellant's counsel touching the right of peace officers to use

the opening paragraph of this opinion we have expressed a view which accords with that which is given exposition in the authorities cited by appellant. The difficulty with appellant's position is that he leaves out of account the consideration that there was some substantial evidence given which showed that Wilson acted deliberately and without such provocation as the law deems sufficient to justify an officer in killing a person whose arrest on a charge of misdemeanor he is attempting to accomplish. It may be that that testimony was untrue; it may be that the shooting was an accident which occurred while Wilson in good faith was using only such force as the circumstances reasonably justified in assisting his fellow officer in the lawful undertaking of arresting a disturber of the peace. But we are not permitted to substitute our judgment for that of the jury, or to say on the facts that the verdict should have been otherwise. It may be well said that any error of a fairly substantial nature might be sufficient to justify a reversal of the case. This because of the fact that a verdict in favor of the defendant could not have been assailed on the ground that it was not fully supported by competent evidence. In other words, any substantial error would make it appear more readily that there had been a miscarriage of iustice. However, we have searched with great diligence through the record, and have examined with much care all of the assignments of error made by counsel in their brief. We find nothing which would justify the conclusion that defendant was not given a fair trial, or that he was denied any right which the law guarantees to a person accused of crime.

The judgment and order appealed from are affirmed.

CONREY, P. J.; WORKS, We concur: Judge pro tem.

Ex parte DOWELL. (Cr. 601.)

(District Court of Appeal, Second District, California, March 26, 1918.)

CRIMINAL LAW \$\implies 241-Jubisdiction of Justice of the Peace-Commitment.

A justice of the peace of a township has no authority to commit an offender to the custody of the chief of the police of Los Angeles city, commitment by justice of the peace of townships running to the sheriff of the county and not to local police officers.

2. CBIMINAL LAW € 90(6)—JUBISDICTION OF JUSTICE OF THE PEACE—POLICE COURTS.

Where a misdemeanor is admittedly committed within the city of Los Angeles, the police courts of that city have exclusive jurisdiction under St. 1913, p. 469, giving exclusive jurisdiction to police courts of the cities of the first and one half class of all misdemeanors touching the right of peace officers to use within the city, so that a commitment issued by deadly weapons in effecting arrests is no the justice of the peace of a township on an offense committed within the city of Los Angeles As the misdemeanor with which petitioner is void.

Application by Lorton L. Dowell for a writ of habeas corpus. Petitioner discharged.

C. B. Ladd, of Los Angeles, for petitioner. Erwin W. Widney, City Pros., and W. K. Crawford, Deputy City Pros., both of Los Angeles, for respondent.

JAMES, J. It appears by the return made to the writ that petitioner is held in custody by the chief of police of the city of Los Angeles under a writ of commitment issued by the justice of the peace of Malibu township. This commitment shows that the petitioner was convicted of the crime of battery and sentenced to serve a term of 90 days in the city prison. Petitioner bases his demand to be released from custody on two contentions, namely: (1) The justice of the peace of Malibu township has no authority to commit a person to the custody of the chief of police of Los Angeles city; (2) that the justices' court of Malibu township has no jurisdiction of a misdemeanor committed within the limits of the city of Los Angeles because exclusive jurisdiction to try all such offenses is conferred by legislative enactment upon the police courts of such city.

[1, 2] We are not pointed to the authority of any provision of statute or charter showing any right in a justice of the peace of a township to commit an offender to the custody of the chief of police of Los Angeles city. Commitments issued by justices of the peace of townships run to the sheriff of the county and not to local police officers. While we think that the petitioner is improperly held by respondent because of the lack of authority in the justice to commit to that particular officer's custody, it might be questionable whether the order to be made herein, granting the first contention of petitioner to be well founded, should be that he should be discharged absolutely from custody or remanded to the court having jurisdiction of the cause for further proceedings. However, involved in the second contention is the question as to whether the justice's court of Malibu township had any jurisdiction of the charge upon which petitioner was convicted. By general statute of the Legislature (Stats. 1913, p. 469), exclusive jurisdiction is given to police courts in cities of the first and onehalf class (Los Angeles) of all misdemeanors occurring within the city. That the Legislature has the right to vest exclusive jurisdiction in police courts of misdemeanors arising within the limits of the cities is held in Union Ice Co. v. Rose, 11 Cal. App. 357, 104 Pac. 1006, and cases therein cited. Ex parte Dolan, 128 Cal. 460, 60 Pac. 1094, cited by respondent. does not deny to the Legislature the right we have ascribed to it, but holds only that

As the misdemeanor with which petitioner was charged was admittedly committed within the present limits of the city of Los Angeles, we think that the police courts of that city only had jurisdiction of the offense. It follows, therefore, that the commitment issued by the justice of the peace of Malibu township is without force and is void.

It is ordered that petitioner be, and he hereby is, discharged from the custody of the chief of police of Los Angeles city.

We concur: CONREY, P. J.; WORKS, Judge pro tem.

NEW ENGLAND EQUITABLE INS. CO. v. CHICAGO BONDING & SURETY CO. et al. (Civ. 2175.)

(District Court of Appeal, First District, California. March 26, 1918.)

1. CONTRACTS \$\infty\$306(4) — BUILDING CONTRACTS—ABANDONMENT BY SUBCONTRACTOR—NOTICE.

—Notice.

Where contract between principal contractor and subcontractor provided that if subcontractor should delay work, the contractor might proceed therewith if after three days' notice to prosecute the work subcontractor does not do so, no notice was required to authorize contractor to complete work, where subcontractor entirely abandoned contract.

 PBINCIPAL AND SURETY €= 82(2)—BUILDING CONTRACTS—NONPERFORMANCE—DAMAGES.

Where subcontractor abandons work and owner completing the job deducted the cost thereof from amount payable principal contractor under his contract, the principal contractor was damaged to the extent of such deduction, and can recover such damages from subcontractor's bondsmen.

3. Costs == 260(1)—Damages for Frivolous Appeal.

Where an appeal is obviously for purpose of delay, the court may impose additional damages for taking a frivolous appeal.

Appeal from Superior Court, City and County of San Francisco; James M. Seawell, Judge.

Action by the New England Equitable Insurance Company, a corporation, against the Chicago Bonding & Surety Company and another. Judgment for plaintiff, and defendant named appeals. Affirmed.

Watt, Miller, Thornton & Watt, of San brancisco, for appellant. Samuel Knight and F. Eldred Boland, both of San Francisco, for respondent.

half class (Los Angeles) of all misdemeanors occurring within the city. That the Legislature has the right to vest exclusive jurisdiction in police courts of misdemeanors arising within the limits of the cities is held in Union Ice Co. v. Rose, 11 Cal. App. 357, 104 Pac. 1006, and cases therein cited. Ex parte Dolan, 128 Cal. 460, 60 Pac. 1094, cited by respondent, does not deny to the Legislature the right we have ascribed to it, but holds only that the city charter may not do the same thing.

work, and the regents took it over, completed the job, and deducted the cost thereof, amounting to \$1,409, from the money payable to Carr under his contract. On this state of facts plaintiff had judgment against defendant surety company for \$750, the full amount of its bond.

[1] But two points are presented on this appeal. The contract provided that in the event that Macdonald should delay the work Carr might prosecute it "if same is not done after three days' notice." It is claimed that Carr did not give this notice before proceeding with the work after Macdonald's abandonment, and that the surety was thereby relieved from liability. As was expressly held by this court in Bacigalupi v. Phœnix Bldg., etc., Co., 14 Cal. App. 632, 639, 112 Pac. 892, notice is unnecessary where the contractor entirely abandons the contract, which the trial court expressly found to be the fact in the case at bar.

[2] Appellant's only other contention is that because Carr did not himself complete the work, he was not injured by Macdonald's failure to do the work. The owner did complete the work, at an actual and reasonable cost of \$925.50, and as this amount was deducted from the amount to be paid to Carr on his contract, it is obvious that he was damaged to the extent of this deduction.

[3] The appeal in this case, as in another case appealed by the same defendant at this term of court, is obviously without merit, and we are satisfied that the same was taken for the purpose of delay. We are of the opinion that the judgment should be affirmed, and that the plaintiff should recover from the defendant surety company the sum of \$50 as damages for a frivolous appeal. It is therefore so ordered.

We concur: KERRIGAN, J.; BEASLY, Judge pro tem.

IOBBETT & DEAN v. OAKLAND, A. & E. RY. (Civ. 2293,)

(District Court of Appeal, First District, California. March 29, 1918.)

Where motorman slowed down, thinking plaintiff's truck was going to cross the tracks, but speeded up when he saw the truck slow down, assuming that it would stop before it reached the track, the last clear chance doctrine did not apply; actual knowledge of plaintiff's danger being necessary.

2. APPEAL AND ERBOR €==1071(5)—HARMLESS ERBOR—IMMATERIAL FINDINGS.

An erroneous finding that plaintiff could have avoided collision with a street car by turning his truck to the right or left was immaterial, where plaintiff was negligent in not having control of the truck when approaching the crossing.

Appeal from Superior Court, Alameda County; Everett J. Brown, Judge.

Action by Lobbett & Dean, a corporation, against the Oakland, Antioch & Eastern Railway, a corporation. Judgment for defendant, and plaintiff appeals. Affirmed.

B. D. Marx Greene, of Berkeley, Greene & Sinclair and Barry J. Colding, of San Francisco, for appellant. Snook & Church, of Oakland, for respondent.

ZOOK, Judge pro tem. This is an action for damages arising out of a collision between plaintiff's motor truck and an interurban train of the defendant, as a result of which plaintiff's truck was badly damaged. scene of the accident was at the crossing of Shafter avenue, over which defendant has a right of way, and Cavour street, in the city of Oakland. The crossing is at grade, and both streets are practically level at that point. There was practically no conflict of evidence upon the trial, and the facts, briefly stated, are as follows: Plaintiff's driver, who admitted that he was perfectly familiar with the crossing in question and had frequently seen trains of the defendant pass by at that point, was driving a five-ton truck, loaded with rock, westerly along Cayour street, at the rate of about eight miles per hour, about the maximum speed of the machine when loaded. When about 33 feet from the crossing, he threw out his clutch, and after he had gone about 8 feet further, he saw defendant's train approaching. He immediately put on both brakes in an endeavor to stop, but was carried by the momentum of the heavy load to a point 2 feet from the nearest rail of defendant, and within the interference line of the train. He made no endeavor to turn to the right or left along Shafter avenue, although the court expressly found that by so doing he could easily have avoided the collision. Defendant's motorman testified that he first saw the truck when about 300 feet from the crossing; he immediately put on the air brake in order to stop and let the truck cross ahead of him, and could have brought the train to a standstill before it reached the crossing: but, seeing the truck slowing down, he speeded up the train upon the assumption that the truck would stop in time. When he finally saw that the truck was in danger, he was unable to stop the train in time to avoid a collision. Upon this state of facts, the court found that both plaintiff's driver and defendant's motorman were negligent, and gave judgment in favor of defendant upon the ground of plaintiff's contributory negligence.

[1] Appellant's main contention is that, conceding its own negligence, the case is one for the application of the last clear chance rule, but we are of the opinion that this claim is not well founded. The motorman's negligence, if any, lay in his speeding up the train after having slowed down, and the

reason given by him for doing so was his | sues, make a new apportionment, and set aside erroneous assumption that the truck would stop before it reached the crossing. He having shown a reasonable degree of care in slowing down but a moment before, when he thought the truck was going to cross, it is only reasonable to accept his statement that he thought any danger was passed when he speeded up again. Under these circumstances, there being no other evidence as to the state of the motorman's mind, the plaintiff has wholly failed to establish one of the principal conditions precedent to the application of the rule in question, namely, actual knowledge on the part of defendant's servant of the perilous position of the truck. Appellant's claim that the last clear chance rule applies where the defendant is in possession of facts from which a reasonable man would infer that plaintiff was in peril, although he may not have actual knowledge of such peril, is based upon a single sentence contained in the opinion of the Supreme Court in Arnold v. San Francisco-Oakland Terminal Ry., 164 Pac. 798. That the language relied on was inadvertently used in that case is apparent from the recent case of Collins v. Marsh, 169 Pac. 389, where it is said that:

"It is well settled in this state that the 'last clear chance' rule does not apply where the de-fendant was not, but should have been, aware of the plaintiff's danger.'

[2, 3] Appellant's only other contention is that the finding of the court that plaintiff's driver could have turned to either side and avoided the collision is not supported by the evidence. Inasmuch as plaintiff's driver was clearly negligent in not having his truck under control when approaching the crossing, this finding is immaterial and not necessary to support the judgment.

The judgment is affirmed.

We concur: KERRIGAN, J.: BEASLY, Judge pro tem.

## MACHADO v. MACHADO. (Civ. 2375.)

(District Court of Appeal, First District, California. March 30, 1918.)

1. Homestead \$\infty 57(1) - Establishment . BURDEN OF PROOF.

Wife in divorce suit claiming homestead has burden of showing declaration and recording of her homestead, and that she then resided on the property.

2. EVIDENCE \$\sim 589\text{-Weight-Conflicting} TESTIMONY.

Where party's testimony was conflicting and uncertain, the court was justified in reconflicting solving it against her.

3. Divorce \$\Rightarrow 287-Apportioning Property Scope of Inquiry.

Where court apportioned property in di-vorce suit, and plaintiff on retrial awarded by Appellate Court introduced testimony as to value and character of properties of the parties, latter division of the Alviso ranch, which he the court could, without going beyond the is-

previous orders.

4. New Trial \$\operate{\operat Proceedings on motion for new trial are independent of the judgment.

5. DIVORCE \$\infty 284 - APPEAL - NEW TRIAL

D. DIVORCE 42204 — AFFEAL — NEW ISLAL
—EFFECT ON JUDGMENT.
In divorce suit, plaintiff's appeal from a
judgment apportioning the property did not
deprive the court of jurisdiction to modify the
judgment on motion for new trial, which was an independent proceeding.

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Suit for divorce by Maria Machado against Frank R. Machado. From the judgment rendered, and order denying new trial on condition, plaintiff appeals. Affirmed.

See, also, 26 Cal. App. 16, 145 Pac. 738; 31 Cal. App. 378, 160 Pac. 684.

Beggs & McComish, of San Jose, and Joseph Rafael, of San Francisco, for appellant. C. L. Witten, of San Jose, R. V. Burns, of Mountain View, and F. H. Bloomingdale, of San Jose, for respondent

BEASLY, Judge pro tem. This action was begun in 1913. Plaintiff had judgment for divorce on the ground of cruelty, and included in the judgment also was a settlement of property rights, to which she objected, and she appealed from the latter part of the judgment and was granted a new trial of the issues regarding property. The superior court retried those issues, and again adjusted the property rights of the parties. In this latter judgment it determined that what is known as the Guth ranch was separate property of the defendant, and what is known as the Alviso ranch was partly separate and partly community property, and awarded to the defendant as his separate property 40/63 of the Alviso ranch, and, determining that 23/63 thereof was community property, gave the defendant an even half of that. The court also added a provision to the judgment that the defendant should pay \$50 a month to the plaintiff for the period of six months, and set aside all previous orders regarding alimony and support for plaintiff. It also decreed to be void a homestead which the plaintiff claimed on the Alviso The plaintiff appealed from this judgment on the 15th day of November, 1915. Thereafter, upon the hearing of a motion for a new trial, and on the 10th day of December, 1915, the court made an order modifying this judgment so as to award to the plaintiff 149/338 of the Alviso ranch instead of the 23/126 thereof, that is to say, one-half of 24/63 thereof, awarded her in the judgment. The condition of the refusal to grant a new trial to the plaintiff on the property issues was that the defendant should accept this latter division of the Alviso ranch, which he

latter judgment as to property rights, and of the appeal to bring up a document purfrom this order.

[1,2] Her first contention is that the order holding her homestead void and refusing to set it apart is unsupported by the evidence. The burden of showing not only the declaration of the homestead and the recording of the declaration, but also of showing that she was a resident upon the property at the time the declaration was made and recorded, rested upon the plaintiff. Apprate v. Faure, 121 Cal. 466, 53 Pac. 917. Her testimony is the only evidence upon this point, and it is conflicting and very uncertain, indeed difficult to understand: and therefore the trial court was justified in finding that that portion of her testimony which showed that she was not residing upon the property at the time of the declaration, but had abandoned it, was true. This being so, that finding is supported by the evidence.

[3] The plaintiff's next contention is that that part of the judgment at the second trial, providing that all orders theretofore made for the payment of alimony and for the support of the plaintiff should be vacated, was outside the issues of the case, in that, as it is claimed, no issue had been raised on this matter and no evidence introduced by either party relevant thereto. But evidence was introduced on the question of the value and character of the property of the parties, the very purpose of this evidence being to secure a just apportionment thereof between the parties. This justified the court in setting aside its former orders and in making a new judgment upon this subject. Indeed it is impossible for us to see what other purpose the appeal of the plaintiff upon the subject of property rights subserved except

[4, 5] The appellant's third contention is that her appeal from the judgment of November 9, 1915, deprived the trial court of jurisdiction to modify that judgment on motion for a new trial. But it has been the consistent practice of the courts of this state to insist upon the acceptance of modifications in judgments as a condition of refusing a new trial. The proceedings upon motion for a new trial are independent of the judgment. Hayne on New Trial and Appeal, § 2. None of the cases cited by the appellants seems to be a case where the court made it a condition of refusing a new trial that a modification of the judgment be assented to. Pashgian v. Stephenson, 10 Cal. App. 36, 100 Pac. 1075, was a case where a judgment was modified without a motion for a new trial, or at least no proceedings for a new trial appear in the record. In Shay v. Chicago Clock Co., 111 Cal. 549, 44 Pac. 237, a diminution of the record was suggested at the hearing pro tem.

porting to be a judgment nunc pro tunc. This nunc pro tune judgment does not appear to have been made upon motion for a new trial. The same state of the record is found in Reynolds v. Reynolds, 67 Cal. 176, 7 Pac. 480. The plaintiff's motion for a new trial was pending. It was an independent proceeding of which the trial court had jurisdiction. Havne on New Trial and Appeal, \$ 2. The appeal did not deprive the trial court of its authority. The court made an order on the hearing of this motion for a new trial that if the defendant should consent to a modification of the judgment the motion would be denied: otherwise it would be granted. The consent was given and the motion denied. The fact that this order was made after an appeal had been taken did not deprive the court of authority to make it, as it was a proper order in the proceeding for a new trial. Besides, it does not seem proper to permit the plaintiff to complain of this modification because it was altogether in her favor.

The fourth contention of the appellant is that the court erred in finding that all the personal property and the Guth ranch were the separate property of the defendant, and that the defendant had a \$4,000 separate estate in the Alviso ranch.

It would serve no useful purpose to review the figures by which the court undertook to follow the issues and profits of the large business which the defendant owned as his separate property at the time of his marriage to the plaintiff, and of the changes in personal property and the investment and reinvestment of money which took place between his marriage and the beginning of this action for divorce. It is sufficient to say that the evidence supports the court's finding upon these points.

The fifth contention of the plaintiff is that she should have been given more than one-half of the community property. Leaving out of account the \$50 a month allowed the plaintiff for six months it may be said that the trial court was exercising its discretion as to the division of this community property, and we cannot say that it abused its discretion in making the division as it did. The circumstances of the case presented many difficulties in the division and apportionment of the property of the parties; and the case itself is an illustration of the rule that the trial court must be given some latitude to use its own judgment in such matters.

The judgment is affirmed.

We concur: KERRIGAN, J.; ZOOK, Judge pro tem.

# PEOPLE v. FRAYSIER. (Cr. 675.)

(District Court of Appeal, First District, California. March 25, 1918.)

1. WITNESSES \$= 370(1)-IMPEACHMENT.

Conceding arresting officer was hostile to accused, such matters went to his credibility, but did not conclusively show that his testimony or that of witnesses secured by him was false.

2. RAPE \$\sim 51(5)\$\to\$ EVIDENCE--Weight.

Where prosecutrix testified that she told arresting officer of the rape in order to avoid being punished, but did not say that her story was false, such matter went to her credibility, but if believed by the jury her testimony was sufficient upon which to rest conviction.

3. INDICTMENT AND INFORMATION \$== 176-SUES AND PROOF—TIME OF OFFENSE.

Failure to prove the exact day and hour of the crime is not fatal, where accused is not prejudiced thereby.

\$\sim 59(12)\text{—Instructions—Failure} 4. RAPE

TO MAKE COMPLAINT.

It is not error to refuse instructions that if prosecutrix made no complaint of the alleged crime the jury should view her failure to do so as a suspicious circumstance indicating that her story was false.

5. Criminal Law \$= 785(8)-Instructions-

CAUTION.

The jury in prosecution for rape was suffi-ciently cautioned by instruction that a charge of rape is easy to make and difficult to disprove; that testimony of a child of tender years such as prosecutrix ought to be viewed with care and caution; and that evidence in such case must be weighed with utmost care and without blas or prejudice.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Louis Fraysier was convicted of statutory rape, and he appeals from the judgment and order denying motion for new trial. Affirmed.

A. C. Keane, of San Francisco, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the Peonle.

KERRIGAN, J. The defendant was convicted of the crime of statutory rape. This appeal is from that judgment and from an order denying his motion for a new trial.

The defendant was a gardener making his living by growing and selling vegetables in San Francisco. His garden lay in the center of a city block shut in by fences and dwell-Into that somewhat secluded place customers often sent their children to buy vegetables. Without elaborating the revolting details it will suffice to say that according to the testimony of the prosecutrix, a girl 12 years of age, she went to the defendant's garden one day in September, 1916, and was there ravished by the defendant. As is unfortunately often the case in prosecutions of this character, the testimony relied upon by the state is not as satisfactory as might

prosecution was unable to fix the time of the day, whether in the forenoon or afternoon, nor the day of the week nor the date on which the assault occurred nearer than that it was some time three or four weeks before Labor Day. The prosecutrix testified that immediately after the assault she went home, but said nothing to her mother about the unusual occurrence, and straightway went out to play with some chums and forgot the matter: indeed she thought no more about it until the arresting officer called on her one day at school, when, to avoid being "put away" until she was 21 years of age, during which time she would not see her father and mother, she told the officer the story subsequently related by her in court.

With respect to the arresting officer it appears that on the day before, or not more than three days before, the arrest of the defendant, he had visited the defendant's garden, and finding there a little girl, the defendant, and a woman, drove the defendant and the woman from the premises, took the girl into a shack near by, and questioned her concerning her relations with the defendant. Failing to find them incriminating he took her to her home and told her to stay away from the defendant. The same night the defendant, the woman above mentioned, and the father of the little girl called at police headquarters and complained of the treatment to which the girl had been subjected. Not more than three days thereafter the same officer questioned the prosecutrix and caused the present charge to be brought against the defendant.

[1, 2] Conceding that the officer may have been hostile to the defendant, it of course does not follow that his testimony was false, or that he attempted to induce the prosecutrix to testify falsely. As to her testimony. while she stated that she told the officer the story about the assault in order to avoid being punished, still she did not testify that she had related a false story against the defendant, nor can we conclude that she did so. The criticism of these witnesses is as to a matter going to the weight and credibility to be given their testimony, which are considerations for the jury. We cannot say from a review of the entire record that the evidence of the prosecution was inherently improbable. The most that can be said is that its truth was open to suspicion. If believed by the jury it was sufficient to support their verdict and the judgment.

[3] Passing to the next point, there are, no doubt, cases where a defendant in making his defense would be seriously embarrassed by the failure of the prosecution to definitely fix the date of the alleged crime; but it does not appear that this defendant was prejudiced by such failure in this case. The prosecutrix gave the date of the assault as be desired. This, perhaps, is inevitable. The inearly as she could; and the case falls

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within the general rule that the proof need not show that the offense was committed on the day named in the charging paper. People v. Squires, 99 Cal. 327, 33 Pac. 1092; People v. Allen, 144 Cal. 298, 77 Pac. 948.

[4] The court committed no error in refusing to give an instruction to the effect that, if the jury found from the evidence that the prosecutrix made no complaint of the alleged act of the defendant, they should view such failure as a suspicious circumstance indicating that her story was a fabrication. People v. Jacobs, 16 Cal. App. 478, 117 Pac. 615.

[5] We think, too, that the jury were sufficiently cautioned by the court in the instruction advising them in effect that a charge of rape is one easy to make and difficult to disprove; that the testimony of a child of tender years "such as the prosecuting witness here" ought to be viewed with great care and caution; and that the evidence in a case of this kind was to be weighed with the utmost care, without bias or prejudice. People v. Currie, 16 Cal. App. 731, 117 Pac. 941; People v. Liggett, 18 Cal. App. 367, 123 Pac. 225. The jury were fully and fairly instructed in every phase of the law applicable to the facts of the case.

Respecting a remark made by the trial judge of which complaint is made by the appellant, it was directed to counsel during a discussion as to the admission of certain evidence. It was quite harmless. It did not amount to misconduct. Counsel must have taken this view of it at the time it was made, for he did not assign it as misconduct or request the appropriate admonition.

The judgment and order are affirmed.

We concur: BEASLY, Judge pro tem.; ZOOK, Judge pro tem.

## VERDIER v. STOLL. (Civ. 2496.)

(District Court of Appeal, Second District, California. March 23, 1918.)

Appeal and Error \$\infty 766 - Briefs-Statement of Case-Sufficiency.

Though in default of compliance with Code Civ. Proc. § 953c, requiring printing of parts of the record for appeal, judgment appealed from must be affirmed. The mere fact that appellant's brief on appeal insufficiently printed such portions of the record as he desired to call to the attention of the court, so as not fully to comply with the statute did not require dismissal.

Appeal from Superior Court, Kern County; Milton T. Farmer, Judge.

Action by Marie Verdier against V. J. Stoll. Judgment for plaintiff, defendant appeals, and plaintiff moves to dismiss the appeal. Motion denied.

R. J. Hudson, of Bakersfield, for appellant.

Alfred Siemon, of Bakersfield, for respondent.

WORKS, Judge pro tem. The respondent moves to dismiss the appeal on the ground that the appellant has not compiled with that portion of section 953c of the Code of Civil Procedure to the effect that, in filing briefs on an appeal, the parties must "print in their briefs, or in a supplement appended thereto, such portions of the record as they desire to call to the attention of the court."

The reproductions of parts of the record, made in appellant's brief, are very meager; perhaps we might even assert, from the inspection we have made of the brief for the purposes of the present motion, that they are insufficient to present the merits of the case for our consideration, when we come to dispose of the appeal. That, however, is far from saying that the appeal should be dismissed. The printing of parts of the record in the briefs, under section 953c, involves a considerable expense, and it may be that, in individual cases, counsel have entered and will enter into understandings designed to obviate the necessity of printing. might be done, for instance, through a statement of a case in one brief, with an express assent to its correctness in the opposing brief. For us to dismiss appeals for an apparent insufficiency of an appellant's brief in the particular now insisted upon, in any case, would lay down a rule depriving litigants of the right to fully and satisfactorily state an agreed case in their briefs without the printing required by the section now under consideration. We must take this occasion, however, to reiterate the established rule, so many times stated by the Supreme Court and by this court, that, in default of a compliance with the terms of section 953c by appellants, the judgments from which they appeal must be affirmed, unless, indeed, a compliance with the section is obviated by such a condition of the briefs as is above mentioned. The dangers of a departure from the requirements of section 953c are illustrated by a quotation from our opinion in Sou. Cal. Iron & Steel Co. v. Maier, 172 Pac. 615, No. 2115, decided March 15, 1918:

"There is only a typewritten transcript of the record. The quotations from pleadings and from evidence, as printed in the briefs, are less complete than they should have been. But by piecing together a scrap found in one brief with other scraps found here and there in other briefs, together with positive admissions of fact by counsel, we find enough, although barely enough, material for a decision on the merits. It is a dangerous practice for attorneys, in preparing their briefs, to neglect the provisions of section 953c, Code of Civil Procedure."

The motion is denied.

We concur: CONREY, P. J.; JAMES, J.

BAY SHORE LAUNDRY CO. v. INDUS-TRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (Civ. 1822.)

(District Court of Appeal, Third District, California. March 20, 1918.)

1. Master and Servant \$\sim 380\to Workmen's Compensation Act - "Willful Miscon-DUCT."

An experienced laundryman, who while op-erating a wringing machine removed, for a defierating a wringing machine removed, for a den-nite purpose and contrary to Workmen's Com-pensation, Insurance, and Safety Act (St. 1913, p. 279) §8 55, 62, 67, a guard which he knew was provided for his safety, was chargeable with "willful misconduct" within section 12, subd. 3, and could not recover for resulting in-juries; the removal of the guard being inten-tional, deliberate, and willful, because done for a definite purpose, and also a misdemeanor un-der sections 55 and 67.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Willful Misconduct.]

2. Master and Servant 4=348-Workmen's COMPENSATION ACT-PRESUMPTION-"WILL-FUL."

It must be presumed that in Workmen's Compensation, Insurance, and Safety Act, \$ 12, subd. 3, as to willful misconduct barring recovery, the Legislature had in view the definition of "willful" as found in Pen. Code, \$ 7, being a purpose to do an act, without necessarily intending to violate a law or injure another.

Proceedings under Workmen's Compensation Act by Paul Verdier against the Bay Shore Laundry Company. From an award of the Industrial Accident Commission for applicant, the company makes application for writ of review. Order awarding compensation annulled.

C. F. Laumeister, of San Francisco, for petitioner. Chris. M. Bradley, of San Francisco, for respondents.

BURNETT, J. The commission awarded one Paul Verdier compensation in the sum of \$675 for injuries received while in the employment of petitioner, and the question involved herein is whether said commission exceeded its jurisdiction in making said award. In fact, the only question in dispute before us is whether the applicant is chargeable with "willful misconduct" within the contemplation of the Workmen's Compensation. Insurance, and Safety Act (Stat. 1913, p. 279).

[1] Subdivision 3 of section 12 of said act excludes from its beneficial provisions every case where the injury is proximately caused "by willful misconduct of the injured employé." As to this, the law was changed in 1917, but the amendment did not take effect until January 1, 1918, and it is not disputed that the said statute of 1913 is applicable to the case at bar.

There is herein no controversy as to the facts, but the whole argument revolves around the conclusion of the commission that the applicant was not guilty of willful mis-

commission may be had from the following findings:

"That said injury arose out of and in the course of said employment, was proximately caused thereby, and occurred while the employé was performing service growing out of and incidental to the same as follows: His minor hand and arm were accidentally caught in a wringing machine which the employe was operating while it was in motion and while the safety guard thereto attached was not in a position to prevent such an accident. \* \* \* That the operation of said wringing machine in said manner was not in deliberate violation of an enforced rule of instruction made by the employer for the protection of the employe, and, al-though careless and negligent, it was not in-trinsically reckless or foolbardy. That the said injury was not proximately caused by willful misconduct."

It is to be observed that the commission does not find what caused the safety guard to be displaced. The evidence herein shows that the applicant himself displaced it while the machine was in motion. There is no dispute, also, that he did this intentionally. It was not the result of thoughtlessness, inadvertence, accident, forgetfulness, or stress of emergency. Nothing of that kind is claimed. Indeed, the only attempted excuse is that he thought he might gain some time and that he had seen other employes do likewise. To remove the covering it was necessary to manipulate a lever, and this was done by Verdier thoughtfully and, we may say, deliberately. Neither is there any finding that the removal of the guard contributed to the accident and was therefore a proximate cause of the injury. But as to the evidence of that there can be no possible dispute. If the guard had been in place, the applicant would not have been hurt. There were, indeed, two conditions or circumstances inseparably connected with the injury. One was that Verdier's foot slipped from the brake, thereby causing him to lose his balance and fall toward the revolving machine. and the other was the fact that said machine was exposed to contact with his hand in consequence of the removal of said guard. If either of these conditions had not been present and co-operating, the injury to the hand and arm would have been avoided. It is plain, therefore, that the removal of the covering had a proximate causal connection with the injury and, indeed, this is not disputed.

It was found that the act of the applicant was not "in deliberate violation of an enforced rule or instruction made by the employer for the protection of the employé." As a fact this is partly true, but it carries an erroneous implication. The act of removing the guard was "deliberate," but there was no "enforced rule or instruction of the employer." However, it is plain that no such rule or instruction was required. This safety device was furnished by the employer for the protection of the employe. The very conduct. The view of the case taken by the object was to prevent such accidents, and its

purpose was well known to the applicant, who was an experienced workman, having been engaged in that line for 20 years, and being entirely familiar with the use of such device. There is no contention that he did not fully comprehend the significance of its use and the danger attending its operation without the covering. The applicant could not have been better informed if specific instruction had been given. He must have known that this protection was furnished for his safety, and how important it was that he should not remove it while the machine was in operation. The commission does, indeed, find that he was "careless and negligent," but not guilty of willful misconduct. In this connection, it is admitted by respondents that he is properly chargeable with misconduct, but it is claimed that it lacks the element of willfulness contemplated by the statute. The contention is that there must be a "mens rea," a condition of mind bordering upon criminality, to justify the commission or the court in repudiating his claims for compensation. In support of the position this quotation is made from In re Burns, 218 Mass. 8, 105 N. E. 601:

"Willful misconduct is much more than mere negligence or even gross culpable negligence,

\* \* conduct of a quasi criminal nature."

Attention is called, also, to what was said in Diestelhorst v. Industrial Accident Commission, 32 Cal. App. 771, 164 Pac. 44, as follows:

"May not a person, although guilty of an in-fraction of an order given for his protection, show that at the time he was unmindful of the order and that his act was the result of inat-tention and thoughtlessness and without any real purpose to be contumacious."

The doctrine of the foregoing decisions may be fully indorsed and accepted, but it is difficult to see what comfort is thereby afforded to the applicant herein. The Compensation Act of 1913, § 55, provides:

"No employé shall remove, displace, \* \* destroy or carry off any safety device or safeguard furnished and provided for use in any employment or place of employment, or interfere in any way with the use thereof by any other person, or interfere with the use of any method or process adopted for the protection of any employé in such employment, or place of employment, or fail or neglect to do every other thing reasonably necessary to protect the life and safety of such employes."

Section 67 of said act provides:

"Every employer, employe or other person who, either individually or acting as an officer, agent or employé of a corporation or other person, violates any safety provision contained in sections fifty-two, fifty-three, fifty-four or fifty-five of this act, or any part of any such provision, or who shall fail or refuse to comply with any such provision, or any part thereof, or who, directly or indirectly, knowingly induces another so to do is guilty of a misdemeanor.

It is to be observed, furthermore, that respondents, said commissioners, by virtue of the authority conferred upon the commission by said compensation act, made and issued certain laundry safety orders, effective Au- and empty phrase. Besides, we may add,

gust 1, 1916, in which the following is provided:

"(a) All extractors must be equipped with metal guards which must entirely cover the openings to the outer shell. The guard must always be kept in position when the extractor is in motion." is in motion.

Section 62 of said act provides that every employé shall obey and comply with the requirements of the safety orders of the commission. Hence it cannot be disputed that Verdier was guilty of a crime when he removed the guard, and that he knew that his act was likely to result in injury to himself. The Massachusetts case, therefore, does not save him. We have already seen that there is no room for the application of the Diestelhorst decision.

[2] Moreover, there can be no doubt that the misconduct of Verdier was willful within the meaning of the statute. The definition of the term is found in the Code, and it must be presumed that in said Compensation Act the Legislature had in view that definition. Section 7 of the Penal Code provides:

"The word 'willfully,' when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage.

That Verdier had a willingness and purpose to commit the act of removing the guard is beyond question. From the act itself such presumption would follow, but he makes it certain by his testimony as to why he performed the act. It is not required to show that the injured person committed the wrongful act maliciously to prevent his recovery. If the Legislature had so intended it would. of course, have so provided. It was deemed proper to exclude one who was guilty of intentional or willful wrongdoing, and if we are to regard the facts in this case and the plain ordinary significance of the terms employed by the Legislature, it must be held that the applicant herein is in the excluded

In brief, the situation is this: Verdier's act constituted a misdemeanor and was therefore of a criminal nature. According to his testimony he performed said act for a definite purpose. It was therefore intentional. deliberate, and willful. Furthermore, he was an experienced laundryman, and understood the construction and operation of the mechanism. He realized that it was a highspeed machine and dangerous; he knew that the guard was provided for his protection and to prevent accidents, and that if he removed it the danger of accident was greatly increased. There was no good reason for his act. In fact, the only excuse offered by him was that he thought he might save time and he had seen other employes do the same thing. No such explanation could be accepted as satisfactory by any court. If he is to be exonerated for a reason like that, the provision of the statute becomes a meaningless

that it is quite apparent that he would not have saved any appreciable time by removing for a writ of review to review an order of the guard while the machine was in motion, as the performance of that act required only a fraction of a second.

Indeed, the case is covered and controlled by the decision of the Supreme Court in Great Western Power Co. v. Pillsbury, 170 Cal. 180, 149 Pac. 35, and Fidelity & Deposit Co. v. Industrial Accident Com., 171 Cal. 728, 154 Pac. 834, L. R. A. 1916D, 903. In the former it is held that:

"A workman who violates a reasonable rule made for his own protection from serious bodily injury and death is guilty of misconduct and that where the workman deliberately violated the rule with knowledge of its violation he is guilty of willful misconduct."

Therein the willful misconduct consisted in handling "hot" electrical wires without the use of rubber gloves, contrary to an express rule of the employer. In the other case the Supreme Court held that the employé was guilty of willful misconduct where he met his death, while engaged in his employer's business, from the overturning of an automobile driven by him in violation of the state motor vehicle act fixing a speed limit of 30 miles per hour.

As suggested by petitioner, these two cases represent two different classes of offenders; the first, where the provision breached by the employé is contained in a private rule or regulation of the employer. In this class the employé must have actual knowledge of the existence of the rule, and must be bound to obey it to make his willful breach thereof willful misconduct. The second class represented by the Fidelity Case, supra, is where the provision breached is embodied in a public statute. In this class the employé is charged with knowledge of the provision, and the breach thereof is willful misconduct as a matter of law. The case herein manifestly belongs to this latter class. It may be added that there was not even an attempt made to dispute the presumption that the applicant had knowledge of the existence of the statute and regulations in reference to safety devices.

We do not feel called upon to consider specifically all the cases cited. The essential principles herein involved are well settled, and we feel constrained to hold that the order awarding compensation was beyond the jurisdiction of the commission, and it is therefore annulled.

We concur: CHIPMAN, P. J.; HART, J.

BRANDES v. SUPERIOR COURT IN AND FOR SANTA BARBARA COUNTY. (Civ. 2513.)

(District Court of Appeal, Second District, California. March 22, 1918.)

CONTEMPT 23—Service of Order.

Before a party can be brought into contempt for not complying with an order of court, such order must be served upon him.

Original application by Sarah A. Brandes the Superior Court of the State of California in and for the County of Santa Barbara, adjudging her guilty of contempt. Order an-

B. F. Thomas, of Santa Barbara, for petitioner. Thompson & Robertson, of Santa Barbara, and Robert M. Clarke, of Los Angeles, for respondent.

WORKS, Judge pro tem. The petitioner was granted a divorce from her husband, H. L. Brandes. The interlocutory decree was, in part, to the effect that Brandes should make certain conveyances of real and personal property to petitioner, and that "at the time of the execution and delivery" of such conveyances the petitioner should deliver to a certain bank a certain sheriff's certificate of sale held by her. Upon the allegation that he had himself complied with the decree, Brandes initiated a proceeding for contempt of court against petitioner on the ground that she had not delivered up the certificate of sale. In the affidavit which instituted the proceeding, Brandes averred that a copy of the decree had been served on petitioner, and that demand had been made upon her to comply with its terms. In an answering affidavit, petitioner alleged that the decree was never served upon her, and that no demand had ever been made that she deliver up the certificate of sale. Upon the issues thus framed the trial court found with the petitioner, but, nevertheless, it made its order adjudging her guilty of contempt. It is this order which is sought to be annulled in the present proceeding.

The action of the trial court was errone-"Before a party can be brought into contempt for not complying with an order of court, such order must be served upon him." Hennessy v. Nicol, 105 Cal. 138, 142, 38 Pac. 649, 650.

The order is annulled.

We concur: CONREY, P. J.; JAMES, J.

In re BIAGGI. (Civ. 2333.)

(District Court of Appeal, First District, Cal-ifornia. April 1, 1918. Rebearing Denied by Supreme Court May 31, 1918.)

1. ATTORNEY AND CLIENT \$\infty\$54, 57 - DISBARMENT-FINDINGS.

Findings are not required in proceedings for disbarment of an attorney at law; but they are not prohibited, and, when present, are properly a part of the record which the appellate court may review.

ATTORNEY AND CLIENT \$\infty 56-Order of Suspension-Prejudgment.

Part of order suspending attorney from practice, requiring disbarment at the end of two years at another hearing, probably before another judge, and on other evidence of additional conduct involving moral turpitude, was im-

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proper, as an attempt to prejudge and predetermine matters not before the court when the order was made.

3. Attorney and Client €=56 — Obder of Suspension—Invalid Part—Disregard as Suspelurage.

Where the latter part of the trial court's order suspending an attorney at law from practice for five years, with the privilege to apply for reinstatement at the end of two years, which was invalid as an attempt to prejudge him on evidence of additional conduct involving moral turpitude, could be separated from the first part of the order, which was certain, and met all the requirements of a final judgment, it might be disregarded as surplusage.

4. ATTGKNEY AND CLIENT @39 — ADVERTISING TO PROCURE DIVORCE—STATUTE.

The conduct of an attorney at law in publishing in newspapers of general circulation an advertisement reading, with his name: "Attorneys. \* \* Divorce, Probate, and Criminal Law My Specialties. Notary Public. Consultation of Pen. Code, § 159a, making a misdemeanor advertising to procure divorce, or to act as attorney in any suit for alimony or divorce, etc.

Appeal from Superior Court, Santa Clara County; Curtis D. Wilbur, Judge.

In the matter of the proceedings for the disbarment of William R. Biaggi. From an order of suspension from practice, respondent appeals. Judgment modified, and, as modified, affirmed.

J. P. Fitzgerald, of San Jose, for appellant. C. L. Witten and Clarence C. Coolidge, both of San Jose, and L. D. Bohnett, of Campbell, for respondent,

PER CURIAM. This is an appeal from an order made by the trial court, after a trial and hearing, whereby it was adjudged and decreed:

"That William R. Biaggi, the respondent, be suspended from the practice of law for the period of five years. That at the end of two years respondent may apply to be reinstated, and that, if it be proved to the satisfaction of the court at that time that the respondent has fully and fairly complied with the order of suspension, and has not, directly or indirectly, or by any subterfuge whatsoever, practiced or attempted to practice law, either by securing assignments of causes of action to himself, or in any other manner, then, in that event, that the respondent be restored to the roll of attorneys. On the other hand, at the end of two years, if it shall appear to the court that he has directly violated the order of court, or been guilty of any additional conduct involving moral turpitude, that, at that time, an order of permanent disbarment be entered by the court. In the event that the court is not satisfied by the showing made by the respondent at the end of two years, and does not permanently disbar the respondent, in accordance herewith, then, in that event, the order of suspension shall continue in force for the entire period of five years."

[1] It is contended that, in proceedings for suspension or disbarment, the judgment or order should specify the particular charge or accusation upon which the attorney was disbarred or suspended. The rule contended for is applied chiefly to contempt proceedings, where summary action has been taken without the formalities of accusation, an

swer, etc., and where the record consists of the order of suspension alone. In re Short-ridge, 5 Cal. App. 379, 90 Pac. 478; Ex parte Henshaw, 73 Cal. 497, 15 Pac. 10; State v. Watkins, 3 Mo. 480; Crites v. State, 74 Neb. 687, 105 N. W. 469. It has been held that, where the accusation in a disbarment proceeding charges certain facts, which show conspiracy, and prays that accused be found guilty and be disbarred, the final order of the court that the application of plaintiff shall be granted is a sufficient finding of the guit of the accused; the court saying that:

"There being but one charge, it is clear from the record that defendant was found guilty of that charge." State v. Howard, 112 Iowa, 256, 83 N. W. 975.

The record before this court includes the accusation, answer, findings, and judgment. The findings state specifically the particular charges upon which the judgment in question is predicated, and, while findings are not required in proceedings for disbarment (Matter of Danford, 157 Cal. 425, 108 Pac. 322), they are not prohibited, and, when present, are properly a part of the record which this court may review (In re Wharton, 114 Cal. 367, 46 Pac. 172, 55 Am. St. Rep. 72).

[2, 3] It is urged that the judgment is conditional, and therefore void. The Code defines a judgment to be:

"The final determination of the rights of the parties in an action or proceeding." Code Civ.

Proc. § 577.

"If a judgment though upon the merits or determining some substantial rights, leaves necessary further judicial action before the rights of the parties are settled it is not final." Freeman on Judgments (4th Ed.) vol. 1, § 16.

That part of the court's order which requires the respondent's disbarment at the end of two years, at another hearing, before another judge, most probably, and upon other evidence of additional conduct involving moral turpitude, must be held to be an attempt to prejudge and predetermine matters not before the court at the time the present order was made. Consolidated Mining Co. v. Huff, 62 Kan. 405, 63 Pac. 442. There is no difficulty, however, in separating the latter part of the court's order from the first part, which decrees that William Biaggi be suspended from the practice of law for the period of five years, with the privilege of applying for reinstatement at the end of two years. That decree is certain, and meets all the requirements of a final judgment, and hence the latter part of the order, which is invalid, may be disregarded as surplusage. Philbrook v. Newman (C. C.) 85 Fed. 139.

[4] The trial court found on ample evidence that Biaggi appeared before the superior court of Santa Clara county as attorney in the matter of certain adoption proceedings, and falsely stated to that court that the father of the minor child in question had never taken any interest whatever in said child, and that Biaggi did, at that time, "intention-

ally, willfully, knowingly, and fraudulently | 7. Evidence 513(2)-Expert Testimony. conceal" from the court the fact that the father was then endeavoring, in an action before another department of the same court, to obtain the custody of the child; and, further, that from the month of October, 1911, up to February 22, 1916. Biaggi caused to be published in certain newspapers of general circulation an advertisement reading:

#### "ATTORNEYS

"Wm. R. Biaggi. Divorce, Probate and Criminal Law My Specialties. Notary Public Consultation Free. 426-27 Bank of San Jose Bldg. Phone San Jose 1638."

The court properly held that appellant's conduct in thus advertising was contrary to and in violation of the provisions of section 159a of the Penal Code. This disposes of all of the points worthy of discussion.

The judgment hereinbefore set forth shall be modified, to read that William R. Biaggi. the respondent, be suspended from the practice of law for the period of five years; that at the end of two years respondent may apply to be reinstated. As so modified, the judgment stands affirmed.

LONG v. JOHN BREUNER CO. (Civ. 1783.)

(District Court of Appeals, Third District, California. March 29, 1918. Rehearing Denied by Supreme Court May 27, 1918.)

1. Negligence 5 136(22) — Sloping Entrances to Buildings — Question for

JURY. Whether a storekeeper was negligent in maintaining a 35 to 50 per cent, incline at the entrance to the store held, under the evidence, for

2. NEGLIGENCE \$\infty\$44—ENTRANCES TO STORES
—DUTY TO KEEP SAFE.

It is the duty of a merchandise storekeeper to keep the entrances to the store in a safe condition, and to use ordinary care to avoid accidents to those outcomes. dents to those entering.

3. NEGLIGENCE ← 136(26) — CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.
Whether plaintiff who walked rapidly, in an

occupied state of mind, out of a store entrance inclined at 35 to 50 per cent., was guilty of contributory negligence, held, under the evidence, for the jury.

4. Negligence 4 68 Contributory Negli-GENCE-DUTY OF INJURED PERSONS.

It was the duty of a patron of a store to exercise ordinary care in passing out of a defective entrance.

5. TRIAL \$\infty 139(1)\$—Province of Jury—Evi-DENCE.

Motion for nonsuit will not be granted when there is any substantial evidence which, with the aid of all legitimate inferences favorable to plaintiff, would support a verdict or finding that the material allegations of the complaint are true.

6. Negligence \$==136(9) - Question for JURY.

Negligence is a question of fact for the jury, even where there is no conflict of the evidence, if different conclusions upon the subject can be drawn from the evidence by reasonable and impartial men.

Where negligence alleged was maintenance of 35 to 50 per cent. incline at the entrance of a store, it was proper to allow architects to testify that the usual grade was 3 per cent. and that 10 per cent. was the greatest approved grade.

8. EVIDENCE 505 - EXPERT TESTIMONY-OPINION OR FACT.

Testimony of an architect as to the usual grade for entrances to buildings and as to the highest approved grade are expressions of fact, and not opinions.

9. Negligence 6=125 - Similar Facts-EVIDENCE.

In action for injuries by slipping on inclined entrance to store, it was competent to show that other persons had previously slipped and fallen on such incline, as such evidence tended to show the dangerous character of the incline, the cause of plaintiff's fall, and to bring home to the defendant knowledge of the dangerous condition gerous condition.

0. Negligence 🖚 125 — Similab Facts— EVIDENCE.

In action for injuries by falling on steep incline at entrance of store, previous accidents on such incline may be shown, if they are similar in their general character, and circumstances need not be shown to be precisely similar.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Margaret Long against the John Breuner Company, a corporation. From a judgment for plaintiff, and an order denying a motion for a new trial, defendant appeals. Affirmed.

Myrick & Deering and J. Walter Scott, all of San Francisco, for appellant. Irving D. Gibson, of Sacramento, and E. L. Stockwell, of San Francisco, for respondent.

HART, J. A jury returned a verdict in favor of plaintiff in the sum of \$4,500 as damages sustained by her on account of injuries caused by her slipping and falling upon an incline in front of the main entrance to the store of the defendant in Sacramento. Judgment was entered for that amount, from which, and from the order denying its motion for a new trial, defendant appeals.

The defendant conducts a furniture store on the south side of K street between Sixth and Seventh streets in said city of Sacramento. At the time of the accident to plaints there was a concrete incline or apron leading from the entrance to the store to the sidewalk. The grade of this incline was from nothing. where it joined the sidewalk, to 35 per cent., as testified by one witness, or 50 per cent. according to another, at the point where plaintiff was injured. On each side the concrete of the apron was rounded off to meet the grade of the sidewalk. This rounded off portion was about a foot in width and gradually diminished as it approached the edge of the curbing, and it had been chipped with a chisel to roughen the surface. There is a column at each side of the entrance; the distance between them being about 12

feet. On the easterly column two steel rods supporting an awning were affixed to it, the lower end of the rod being 31/2 feet above the sidewalk. These rods prevented one from walking within about 8% inches of the post. On October 24, 1914, the plaintiff, who was then 60 years of age and engaged as a teacher in the public schools of Sacramento, did some shopping in defendant's store. Upon leaving the store she went obliquely out of the door, turned to the east, and slipped on the rounding part of the incline, very close to the column at the east side of the entrance. There had been no rain that day and the incline was dry. The seriousness of the injuries suffered by plaintiff is not questioned by

It is first contended by appellant that its motion for a nonsuit should have been granted; the grounds of the motion being that defendant was not negligent in maintaining the inclined passageway, and that plaintiff was guilty of contributory negligence in failing to look and pay attention to the passageway as she went out.

The plaintiff, testifying on direct examination, said that there was "no foreign substance" on the floor near the approach, and that she did not stumble; that she merely slipped and fell. "I could not say," she proceeded. "whether I was standing on my toes or flat on my foot. I was just walking, that is all. I slipped on the right foot, my foot nearest to the building. I had not observed the nature of the incline or approach before I slipped." She further testified that on the occasion of the accident she wore a pair of Oxford ties or low shoes, with low heels, which "were broader and flatter than these." referring to the shoes she was wearing when testifying. On cross-examination she stated: That she had frequently gone into the store in question through the front entrance and the entrance at which she sustained her injuries: that she could not say whether she had ever particularly noticed the slope or the nature thereof before the accident, although, she said, at the time of the mishap she had "no present knowledge" of the slope or the approach or its character—that is to say, she was then "conscious of knowing" nothing of the slope. She said that her son had just returned to her home in ill health and that, while that fact "probably would have caused me some disturbance of my mind that day," she "was not at all out of my mind in any way. I knew what I was doing all the time. \* \* I myself had been perfectly well prior to this time. I was probably walking rather rapidly at the time this happened, for I always do, or always did. I could not give any idea about how rapidly I proceeded as I left the store. I know probably I walked as I generally do, in rather a rapid manner. The skirt I wore that day was neither broad nor narrow.

wide. It was what you call a sensible skirt." She was asked whether she walked directly into the iron rod or column standing near the entrance, and whether, as she was in the act of falling, she attempted to grab the rod. She replied that she did not think so; that she was looking straight ahead. "I know," she added, "my mind is generally occupied."

It is not deemed necessary to reproduce herein in detail the testimony of the expert witnesses as to the grade or slope of the incline and as to the usual grade or slope of entrances to public buildings. It is enough to say that from the testimony of those witnesses the jury were, so far as it may be determined from the bare record before us, justified in finding, as impliedly they did find, that the incline upon which the plaintiff fell had a grade or slope of 50 per cent. or, in other words, where the plaintiff was injured, an abrupt descent of approximately 1 foot to each 2 feet of distance; that the passageway over and through which the plaintiff passed, at a point just before she reached the point at which she fell, had a grade of at least 22 per cent. the part having the lowest degree of steepness having a gradient of 141/2 per cent.; that the degree of grade or slope maintained generally to entrances from sidewalks to buildings employed for business purposes is a maximum of 5 per cent. to 10 per cent. the usual grade, however, being about 3 per cent. Thus, as is suggested by counsel for respondent, it is clear that there was evidence from which the jury could justly have concluded, as manifestly they did conclude, that the grade at the point where the plaintiff fell and was injured, being 50 per cent. was from five to ten times in excess of the maximum grade which it was the custom to establish, maintain and use for entrances to public buildings, and over sixteen times greater than the usual grade of such entrances, which it was testifled is 3 per cent.

[1.4] The above is a sufficient reference to the evidence to show that, without question, the case as made by the plaintiff was one which the court was required to submit to the arbitrament of the jury. In other words, the evidence as to the character of the entrance, that is, as to the grade or slope thereof, was such as to make the question whether the defendant was guilty of negligence in thus maintaining it, or whether the entrance as so maintained was unsafe or dangerous for the use for which it was intended and to which it was put, peculiarly one for the jury's solution. And in clear and readily understandable language the question was submitted to the jury by the trial court in its charge, wherein it correctly instructed the jury that the defendant being engaged in conducting a merchandise store which it invited the public to patronize, the duty rested upon it to keep the entrances and pas-It was a medium width skirt—it was not sageways to and from the premises as so

occupied and used by it in a safe condition, "and to use ordinary care to avoid accidents or injury to those properly and lawfully entering upon or leaving its premises through such entrances or passageways in connection with the transaction of business on such premises"; and, further, that "if you find that said entrance or passageway (the entrance or passageway where the plaintiff here was injured) was in an unsafe or dangerous condition, and that such condition was the proximate cause of said injuries to plaintiff, defendant is liable therefor if its managers, officers, or agents knew of such alleged unsafe or dangerous condition, or if, as careful and prudent men, they should have known it, provided that plaintiff was in the exercise of ordinary care."

Nor can we say, on the evidence, that, as a matter of law, the plaintiff was herself guilty of negligence proximately causing or contributing to the accident and her consequent injuries. It was, of course, the duty of the plaintiff in passing over the entrance to exercise ordinary care to avoid being injured by reason of the alleged defectiveness of the passageway, or, as the court instructed the jury, to exercise ordinary prudence under the circumstances—that degree of care which would or should be observed under the given circumstances by the average ordinarily careful person. Whether the conduct of the plaintiff when attempting to pass through and over the entrance measured up to that degree of care was, in our view, a question for the jury under the proofs as adduced before them. The plaintiff declared that she started to pass through the passageway in rather a rapid walk, her usual manner of walking. She had frequently passed through the same entrance, but had never particularly noticed the character of the grade from the store to the sidewalk. While she had her mind to some extent on an invalid son, she said she was "not at all out of her mind in any way," and "knew what she was doing all the time." She further testified that it was not a wet or rainy day; that there was no "foreign substance" on the floor of the passageway, by which she meant, undoubtedly, that there was nothing thereon which would cause her to slip or stumble; and that she did not slip or strike anything which would cause her to lose her footing. Counsel for the defendant insist, however, that the plaintiff failed "to look and pay attention to the nature of the passageway as she went out from the store, thereby occasioning her downfall." There is no testimony warranting that assertion, except in so far as such an inference might be drawn from her statement that she had never particularly noticed the nature of the incline, and that she left the store through the entrance at her usual rapid walking gait. But from her statement that she was "not at all out of

doing all the time," referring to the time that she was in the act of passing over the approach, the inference is equally reasonable that she was paying attention to her steps or exercising reasonable care for her own protection when attempting to pass down the incline.

[5, 6] It would seem to be hardly necessary to repeat herein these well-settled propositions: (1) That a motion for a nonsuit is not to be granted when there is any substantial evidence which, with the aid of all legitimate inferences favorable to the plaintiff, would support a verdict or finding that the material allegations of the complaint are true. Burr v. United Railroads, 163 Cal. 663, 665, 126 Pac. 873; Kimic v. San Jose-Los Gatos, etc., Ry. Co., 156 Cal. 379, 104 Pac. 986; Archibald Estate v. Matteson, 5 Cal. App. 441, 90 Pac. 723; Nonrefillable Water Co. v. Robertson, 8 Cal. App. 103, 96 Pac. 324: Bush v. Wood, 8 Cal. App. 651, 97 Pac. 709; O'Connor v. Hooper, 102 Cal. 528, 36 Pac. 939. (2) That "negligence is a question of fact for the jury, even where there is no conflict of the evidence, if different conclusions upon the subject can be drawn from the evidence." Wahlgren v. Market St. Ry. Co., 132 Cal. 656, 62 Pac. 308, 64 Pac. 993. (3) That "it is only where the evidence is such that but one conclusion with respect to negligence could be reached by a reasonable and impartial man that the question becomes one for the court." Burr v. United Railroads, 163 Cal.

Considering the testimony in view of the foregoing rules, it is clear that the motion for a nonsuit was properly disallowed upon both the grounds upon which it was predicated: (1) That the evidence failed to show that the defendant was guilty of negligence in the manner in which it maintained the passageway where the plaintiff was injured; (2) that it was the plaintiff's own negligence which directly caused or contributed to her injuries. After the motion for a nonsuit was denied, the defendant introduced testimony which, naturally enough, tended to destroy the effect of that presented in support of the complaint. The effect, however, was only to create an evidential conflict, which it was for the jury to settle.

[7,8] It is next contended that the ruling whereby certain architects and building contractors, testifying as experts, were permitted to give testimony relative to the standard or generally approved grade of approaches to public buildings was erroneous and prejudicial. The disposal of this point will at the same time dispose of the statement by counsel for the defendant that the court allowed the same witnesses to testify directly to the dangerous condition of the approach in question.

usual rapid walking gait. But from her statement that she was "not at all out of her mind in any way," "knew what she was ready shown, the usual or approved grade

for such slopes is 3 per cent. and the maximum no greater than 5 to 10 per cent. The importance and significance of this testimony is obvious, since, accepting it as showing what the customary or standard and approved grade of the inclines to such approaches is, readily it is thus made to appear that the slope of the approach to the defendant's building, where the plaintiff was injured, was greatly in excess of what it should be to render it reasonably safe to those passing over it. The contention is that the testimony involved mere opinions of the witnesses upon a subject not coming within the category of those upon which opinion testimony is required or allowable, and therefore the ruling permitting it to be received involved an invasion of the province of the jury.

But, in point of fact, the testimony referred to, while that of experts, did not involve a direct expression of the opinions of those witnesses as to the safety of the approach in question. They were not asked, nor did they express, their opinions as to the character of the grade or the condition for safety to those using it of the approach where the plaintiff received her injuries. They were merely asked to state as a fact—a matter within their own knowledge-what the standard or generally approved grade of approaches to public buildings is. In reply, they stated what such grade is as a fact of which they had knowledge and not as their opinions of what it is. They stated no conclusion from their own opinions respecting the ultimate issues which it was for the jury to draw. But their testimony, it is to be admitted, was as to a matter not within common knowledge; and if we should concede that it was in the strictest sense opinion testimony, we would still be of the belief that it was not only proper but essential to an enlightened consideration and determination of the questions whether the defendant was negligent in the maintenance of the approach where the plaintiff was injured, and, if so, whether such negligence was the proximate cause of her injuries. In other words, it was proper and necessary to the elucidation of other pertinent facts in iggne.

Manifestly, to determine whether there was negligence in the act and fact of maintaining the approach in the condition in which it then was, the jury were required first to find whether the approach, as then maintained, was in and of itself dangerous or unsafe as a passageway to the defendant's store. The average person, without experience in or knowledge of such matters, certainly would not know from his own knowledge or observation what the standard and approved grade of such approaches is. Nor would he probably know or comprehend, from a mere description of the incline or the degree of the grade thereof by others, wheth-

er it was of a degree of grade to make it a dangerous place for persons to pass over. By a comparison of what the architects and building contractors declared to be the standard or uniformly approved grade of such approaches with the grade of the approach to the defendant's store, as it was described by the witnesses who had taken measurements of it with a view of ascertaining the degree of the grade thereof, the jury could the more readily and intelligently determine whether the latter approach was safe or unsafe to pass over.

Thus it is clear that the testimony was important and relevant, and that it was competent we make no doubt. It belongs to a class of testimony which has been uniformly sanctioned by the courts and text-writers as essential if, indeed, not well-nigh indispensable, in many instances, particularly in jury trials, to the crystallization of intelligent and just results. In Ruling Case Law, vol. 11, p. 573, we find the rule with respect to opinion testimony, as deduced from the cases, of which there is an almost unlimited number, as follows:

"It may be stated as a general proposition that there are two classes of cases in which expert testimony as to the facts is admissible. To the one class belong those cases in which the conclusions to be drawn by the jury depend on the existence of facts which are not common knowledge and which are peculiarly within the knowledge of men whose experience or study enables them to speak with authority upon the subject. If, in such cases, the jury, with all the facts before them, can form a conclusion thereon, it is their sole province to do so. In the other class we find those cases in which the conclusions to be drawn from the facts stated, as well as knowledge of the facts themselves, depend upon professional or scientific knowledge or skill not within the range of ordinary training or intelligence. In such cases not only the facts, but the conclusions to which they lead, may be testified to by qualified experts. The distinction between these two kinds of testimony is apparent. In the one instance the facts are to be stated by the experts and the conclusion is to be drawn by the jury; in the other, the expert states the facts and gives his conclusion in the form of an opinion which may be accepted or rejected by the jury. If the knowledge of the experts consists in descriptive facts which can intelligently be communicated to others not familiar with the subject, the case belongs to the first class."

[9] The last point is as to the testimony of one Williams, who testified for the plaintiff. This witness was permitted, over the objection of the defendant, to testify that he had. on two different occasions prior to the accident to the plaintiff, slipped and fallen while walking over the approach where the plaintiff received the injuries of which she here complains. It is contended that this testimony was inadmissible because it brought into the case a collateral issue, a matter res inter aiios acta. The specific ground of objection was, first, that there was no showing that the defendant or any of its officers or agents knew that Williams had fallen upon the incline, "or that they had knowledge that the incline was of such a character as might reasonably be expected to lead to the fall of some customer." Further objecting, counsel urged that, if the testimony was offered for the purpose of showing that the entrance was inherently unsafe, it was not admissible in the absence of a showing that the circumstances and conditions "surrounding the falls of Williams" were the same as those existing at the time the plaintiff fell, and that no such showing was made.

We think the evidence was admissible upon the general proposition that testimony of previous accidents similar to the one in question not only tends to show the dangerous character of the place, but, where the previous accidents have occurred under substantially the same general circumstances of the subsequent accident, tends to disclose the cause of the latter, and, furthermore, tends to bring home to the person maintaining the place where the injury occurred knowledge of the dangerous condition of such place. Dyas v. S. P. Co., 140 Cal. 296, 305, 306, 73 Pac. 972: District of Columbia v. Armes, 107 U. S. 519, 2 Sup. Ct. 840, 27 L. Ed. 618; Smith v. Seattle, 33 Wash. 481, 74 Pac. 674; Wigmore on Evidence, § 458; Chamberlayne, Modern Law of Evidence, § 3198.

In the Armes Case, a policeman who saw Armes fall on a sidewalk which was defectively constructed and maintained was asked, after testifying to the accident, whether, while on his beat, other accidents had happened at that place. The question was objected to on the ground that it tended to introduce collateral issues into the case, but the objection was overruled, and the witness replied that he had witnessed other accidents there. The United States Supreme Court, replying to the point as thus made with reference to that testimony, said, speaking through Mr. Justice Field:

"The admission of this testimony is now urged as error; the point of the objection being that it tended to introduce collateral issues, and thus mislead the jury from the matter directly in controversy. Were such the case, the objection would be tenable; but no dispute was made as to these accidents, no question was raised as to the extent of the injuries received, no point was made upon them, no recovery was sought by reason of them, nor any increase of damages. They were proved simply as circumstances which, with other evidence, tended to show the dangerous character of the sidewalk in its unguarded condition. The frequency of accidents at a particular place would seem to be good evidence of its dangerous character—at least it is some evidence to that effect. Persons are not wont to seek such places, and do not willingly fall into them. Here the character of the place was one of the subjects of inquiry to which attention was called by the nature of the action and the pleadings, and the defendant should have been prepared to show its real character in the face of any proof bearing on that subject. Besides this, as publicity was necessarily given to the accidents, they also tended to show that the dangerous character of the locality was brought to the attention of the city authorities."

See, also, Quinlon v. Utica, 74 N. Y. 603; Chicago v. Powers, 42 Ill. 169, 89 Am. Dec. 418. There are many other cases to the same effect, but the doctrine is too well settled to make further citations herein necessary.

[10] It is in effect contended, however, that before previous accidents may be shown it must be made to appear that such previous accidents occurred under circumstances precisely similar to those characterizing the later or subsequent one, and that no such showing was made in this case. We think, though, that the rule is that the previous accidents need only be similar in their general character to the one in question to render proof of them admissible. There is no claim that Williams did not fall upon the approach upon which the plaintiff fell and received her injuries. Nor is there any claim that the approach, as it existed at the time of the accident to the plaintiff, had not been in the same condition continuously for a long period of time prior and down to the time when the plaintiff fell thereon. deed, it appears that Williams was able to identify the approach from a photograph thereof which was taken shortly after the plaintiff was injured and which was exhibited at the trial, and this was some evidence that the general conditions surrounding the approach when he fell thereon on the two occasions referred to by him were substantially the same as they were when the plaintiff received her injuries.

We have now considered all the general propositions upon which a reversal is urged, and, as is manifest from the foregoing discussion, we have discovered in the record no just reason for disturbing the result arrived at below.

The judgment and the order appealed from are affirmed.

We concur: CHIPMAN, P. J.; BUR-NETT, J.

STATE ex rel. MIERA v. FIELD, County Treasurer. (No. 2119.)

(Supreme Court of New Mexico. May 6, 1918.)

(Syllabus by the Court.)

COUNTIES @==113(\*)--COUNTY COMMISSIONERS
--CONTRACT -- ULTRA VIRES--PREPARATION
OF ASSESSMENT ROLLS.

Where, by law, the duty of performing certain work is cast upon a designated county official, for which compensation is provided by law, it is not competent for the board of county commissioners to employ other persons to do the work required of such county official and pay for such services. The duty of preparing the assessment roll rests upon the county assessor, and a contract made by the board of county commissioners with a private individual to do such work is ultra vires.

Appeal from District Court, Socorro County; Mechem, Judge.

Mandamus by the State, on the relation of

Constancio Miera, against N. A. Field, Treasurer of Socorro County. Demurrer to petition sustained, and judgment entered for defendant, and relator appeals. Affirmed.

E. Baca, of Socorro, and M. U. Vigil (M. J. McGuinness, of Santa Fé, of counsel), for appellant. H. L. Patton, Atty. Gen., and H. P. Owen, Dist. Atty., of Los Lunas, for appellee.

ROBERTS, J. Appellant, as relator, applied for a writ of mandamus against the appellee, as treasurer of Socorro county, to compel him to pay two warrants issued to and in favor of appellant by the board of county commissioners of said county. The petition for the writ alleged that relator had been employed by the board of county commissioners to complete the assessment books of Socorro county for the year 1916; that it was agreed between the board and relator that he should be paid the sum of \$300 for the work: that after relator had completed the assessment books, and extended the taxes thereon, it was discovered that the state tax commission had, by mistake, included an erroneous levy by which it became necessary to correct the assessment rolls; that relator was employed to make the necessary corrections by the board, and it was agreed that he should be paid the sum of \$300 therefor. He alleged the full performance of the contract on his part, the drawing of the warrant by the order of the board of county commissioners, and the refusal of the county treasurer to pay the same. The court sustained a demurrer to the petition, and judgment was entered for the appellee.

The case here turns on the single question as to the authority of the board of county commissioners to employ and pay for services which the law requires to be performed by a county official, and for the doing of which he receives a compensation fixed by law. The statute provides for the election of a county assessor, prescribes his duties, and fixes his salary. Chapter 54, Laws 1915, makes it the duty of the county assessor to prepare the assessment roll for his county, and he is required to correct such roll upon the order of the state tax commission.

Appellant argues that because, by virtue of the statute, the board of county commissioners has the care of the county property and the management of the interests of the county, and the right to make contracts and do all other acts with reference to its property and affairs, necessary to the exercise of corporate or administrative powers by the county, it had the power to make the contract in question. This contention, however, is not tenable. Where, by law, the duty of performing certain work is cast upon a designated county official for which compensation is provided by law, it is not competent for

the board of county commissioners to employ other persons to do the work required of such county official and to pay for such services. Chase v. Boulder County, 37 Colo. 268, 86 Pac. 1011, 11 Ann. Cas. 483; Stevens v. Henry, 218 Ill. 468, 75 N. E. 1024, 4 L. R. A. (N. S.) 339, 4 Ann. Cas. 136. A great many cases discussing the proposition and in accord with the views herein expressed will be found referred to in the cases cited. See, also, State ex rel. Coleman v. Board of Com'rs of Dickinson County, 77 Kan. 540, 95 Pac. 392, 16 L. R. A. (N. S.) 476; Storey v. Murphy, 9 N. D. 115, 81 N. W. 28; Platte County v. Gerrard, 12 Neb. 244, 11 N. W. 298; Baker v. Commissioners (Okl.) 150 Pac. 714. In the case of State ex rel. Baca v. Montoya, 20 N. M. 104, 146 Pac. 956, this court held that the board of county commissioners cannot employ a deputy assessor and pay him a salary, as this would be clearly an increase in the assessor's compensation, because the county would thereby pay such compensation, which otherwise the assessor himself would be required to pay.

Appellant cites some cases which seemingly support his contention; but, when examined carefully and read in connection with the statutory provisions of the different states, they are clearly distinguishable from the present case. He cites many cases from Indiana which will be found collected in the case of Garrigus v. Howard County, 157 Ind. 103, 60 N. E. 948. The right of the board of county commissioners to compensate for searching for omitted property and placing the same upon the tax roll in the cases from Indiana was sustained upon the theory that it was not the duty of any county official to perform this work. This is clearly pointed out in the cases of State ex rel. Workman v. Goldthait, 172 Ind. 210, 87 N. E. 133, 19 Ann. Cas. 737, and Board of Commissioners v. Workman (Ind.) 116 N. E. 83.

In the present case the warrants were drawn in favor of appellant to pay for services which the law required the county assessor to perform, and for this reason the contract between the board of county commissioners and appellant was ultra vires.

The court properly sustained the demurrer, and its judgment will be affirmed; and it is so ordered.

HANNA, C. J., and PARKER, J., concur.

STATE ex rel. COBB et al. v. RAITHEL et al., Board of Education. (No. 2114.)
(Supreme Court of New Mexico. May 7, 1918.)

(Syllabus by the Court.)

performing certain work is cast upon a designated county official for which compensation is provided by law, it is not competent for the relation of a private citizen is not, as a

general rule, a writ of right, nor is leave now granted as a matter of course; a petition to file a writ in the nature of quo warranto being addressed to the discretion of the court.

2. QUO WARRANTO \$\ightharpoonup 6 -- Discretion of Court--Denial.

In the exercise of this discretion it is said that the writ may be denied on the ground of public policy or in consideration of general justice, all the circumstances being considered, and the question determined from a standpoint of public interest; and thus the court may deny an application for leave to file an information, although the facts are such that, if the proceeding was entertained, judgment would have to be given against the respondent.

3. Quo Warranto \$55-Evidence.

Evidence examined. Held to show no abuse of judicial discretion in dismissing a rule to show cause why leave should not be granted to file an information in the nature of quo warranto.

Appeal from District Court, Luna County; Ryan, Judge.

Rule to show cause why leave should not be granted to State of New Mexico, on relation of J. N. Cobb and others, to file an information in the nature of quo warranto against A. C. Raithel and others, as members of the Board of Education of the Village of Deming. From an order discharging the rule, relators appeal. Affirmed.

This appeal is taken from an order of the district court for Luna county, discharging a rule to show cause why leave should not be granted to file an information in the nature of quo warranto against appellees to oust them from their offices as members of the board of education of the village of Deming. The facts are substantially as follows: At the school election held in Deming on the first Tuesday in April, 1917, pursuant to section 4870 et seq., Code 1915, there were to be elected three members of the board of education for the full term of four years, and one member for two years to fill an unexpired term. Relators and respondents were candidates at this election, the returns and canvass showing that respondents received, respectively, 362, 348, 345 votes, while relators received, respectively, 104, 108, and 113 votes. Of the votes canvassed for the respondents, 300 were upon a printed ballot called the "election ticket," upon which four names appeared and were voted for without any marking to indicate which were voted for the four-year term and which for the two-year term. These ballots, relators claim, were void for uncertainty, and should not have been counted, and that had they been thrown out the votes received by the relators were sufficient to have elected them. Pursuant to the returns and canvass, certificates of election were delivered to the respondents, which certificates indicate no distinction between the four-year and the twoyear terms, and relators claim that these certificates are also void for uncertainty. Pursuant to the certificates of election, respondents took possession of the offices in ques-

tion, and now hold them. The votes cast for the relators Cobb and Schurtz were for the full term, and those cast for relator McCreary were "to fill unexpired term." But no distinction was made by the election judges or the canvassers in counting, returning, or canvassing these ballots as between the full and the unexpired terms, and the 113 ballots cast for relator McCreary for the unexpired term were counted, returned, and canvassed merely as received "for member of Bd. of Ed." So far as known and so far as shown by the record, no votes were cast for the unexpired term except the 113 votes for relator McCreary. An affidavit by one Edward Pennington was incorporated in the record as a part of the agreed statement of the case, to which was appended as exhibits the ballots used at the election in question, from which exhibits it would appear that there was no party emblem at the head of either ballot, nor did they contain an indorsement as to their official character or fac simile signature of the county clerk.

H. L. Patton, Atty. Gen., and Vaught & Watson, of Deming, for appellants. R. F. Hamilton, A. W. Pollard, and A. A. Temke, all of Deming, for appellees.

HANNA, C. J. (after stating the facts as above). [1] While there are numerous assignments of error presented by the brief of appellants raising troublesome questions, yet this case, in our opinion, turns upon but one point, i. e., whether the trial court abused its discretion in discharging the rule to show cause. In this connection, as stated in 32 Cyc. 1433, in quo warranto proceedings:

"The writ upon the relation of a private citizen is not, as a general rule, a writ of right, nor is leave now granted as a matter of course, a petition to file a writ in the nature of quo warranto being addressed to the discretion of the court."

See also High's Ex. Leg. Rem. (3d Ed.) § 605.

[2] In the exercise of this discretion it is said that the writ may be denied on the ground of public policy or in consideration of general justice, all the circumstances being considered, and the question determined from a standpoint of public interest; and thus the court may deny an application for leave to file an information, although the facts are such that if the proceeding was entertained, judgment would have to be given against the respondent. 32 Cyc. 1434. Many authorities are cited in support of the text quoted, to which we will not particularly refer.

[3] The trial court, in an able opinion, reviewed at length his reasons for discharging the rule. These grounds assigned are, to some extent, objected to by appellants on the ground that they are not supported by the record. While in many respects this contention may be true in some degree, we do not

think it necessary to stand on the questioned | Election held conclusions of the trial court, as there are doubtless ample grounds which cannot be objected to, to support his conclusion. The trial court said that if the writ be granted and the case decided upon strict legal rules. the certificates of election would be held void for uncertainty, and the respondents ousted from office. The court pointed out that the writ, when granted, exhausts its force when it ousts the respondents from office, and could not operate to install relators into office; that should the respondents be ousted, the relators in this case would then have to proceed by mandamus to compel the clerk of the village of Deming to issue to them certificates of election. In that proceeding they would be required to stand on the validity of their own title. The court concluded that the ballots cast for the relators and for the respondents as well were not valid or in conformity with the statute relative thereto. He said that the situation, in view of this condition, would be that in the mandamus proceeding the relators could not be installed into office, with the result that the village of Deming would have but one school\_director, or as a result of entertaining the proceeding the school would be without a managing board; that vacancies in the board can only be filled by the board itself, and, there being insufficient members thereof, as a result of the litigation referred to, to constitute a quorum, the board could not make appointments to fill such vacancies. The trial court therefore held that it was for public interest that the litigation should be terminated. In his conclusion in this respect we find no abuse of discretion, but, on the contrary, the exercise of sound discretion.

By section 4872, Code 1915, relative to the election of boards of education in incorporated towns and villages, it is provided that the elections shall be held, returns thereof made and canvassed, and certificates of election issued, in accordance with the laws applicable to the election of officers in incorporated towns and villages, except that no registration shall be required. By section 3591, relating to elections for municipal corporations, it is provided that all elections for municipal officers shall, in all respects, be held and conducted in the manner prescribed by law in cases of county elections. By section 1993, prescribing the form and method of furnishing ballots for county elections, it is provided that the county clerk of each county shall provide printed ballots for every election for public officers in which the electors, or any of the electors within the county participate, and that ballots other than those printed by the county clerks shall not be cast, counted, or canvassed in any election, further providing that each ballot shall have printed thereon an indorsement substantially as follows:

- (insert date), with the fac simile signature of the county clerk.

The election in question was held before the Australian ballot law of 1917 (Laws 1917, c. 89) became effective, and was, in our view of the matter, governed by the statutory provisions referred to above. In view of our conclusion in this respect, we find that the trial court was not in error in dismissing the rule to show cause.

The judgment of the trial court will therefore be affirmed; and it is so ordered.

PARKER and ROBERTS, JJ., concur.

JASTRO et al. v. FRANCIS et al. (No. 2096.) (Supreme Court of New Mexico. Feb. 16, 1918. On Motion for Rehearing, May 31, 1918.)

(Syllabus by the Court.)

1. PUBLIC LANDS @== 17 - PASTURAGE - IN-JUNCTION.

Where a party is the owner of the oddnumbered sections of land, acquired by purchase from a railroad company of grant lands, sections having been granted by the government to aid in the building of the railroad, and the even-numbered sections are largely owned by the government, the remainder of the even-numbered sections being either school sections or held in private ownership, a court of equity will not, at the instance of the owner of the odd-numbered sections, enjoin an owner of live stock from grazing his sheep or cattle on the odd-numbered sections, in the absence of a legal fence maintained by such owner or compliance by such tained by such owner, or compliance by such owner with the provisions of section 39, Code 1915, as such an injunction would have the effect of giving to the owner of the odd-numbered sections absolute control and dominion over the government lands, included in the townships embracing such privately owned odd-numbered sections.

2. ANIMALS €==90 - TRESPASS - NOTICE OF BOUNDARIES.

Under section 39, Code 1915, an owner of private lands may protect the same from trespass by stock under herd, by conspicuously marking the boundaries of the same, and posting notices in conspicuous places thereon warning against trespass or serving written notice giving description of such lands by metes and bounds. *Held*, that where it is not shown that a party knows the boundaries of privately owned land, surrounded by government domain, he cannot be enjoined from driving his flocks and herds upon such lands, unless the owner has complied with this statute.

On Motion for Rehearing.

(Additional Syllabus by Editorial Staff.)

tions held in private ownership, the utmost reasonable care is to be exercised by the claimants of the right, so as to do the least damage to the servient estate, which, practically applied, would require herds to cross at section corners rather than at any other place upon the servient sec-

Appeal from District Court, McKinley County; Raynolds, Judge.

Suit for injunction by H. A. Jastro and A. B. McMillen against Elias Francis Nar-Official Ballot. ciso Francis, and others. From a judgment awarding permanent injunction and damages, defendants appeal. Judgment reversed, and cause remanded, with instructions to enter judgment for defendants, and to dismiss the complaint.

Appellants Elias Francis and Narciso Francis were partners, doing business under the firm name of Elias Francis & Son. They were engaged in the raising of sheep and cattle, and had under lease a 42,000-acre tract of land immediately east of townships 15 and 16 north of range 7 west, N. M. P. M. Within the two townships named they owned three patented ranches of 160 acres each, and had leased school lands belonging to the state of New Mexico within such townships aggregating something over 1.800 acres. They also owned certain lands and had others leased in the two townships immediately west of townships 15 and 16 aforesaid. The odd-numbered sections in the townships in controversy were railroad grant lands belonging to the Atlantic & Pacific Railroad Company. In 1915 and for some time prior thereto appellants held these odd-numbered sections under lease from the railroad comnany.

The Fernandez Company, a corporation, the stock of which was largely owned by the appellees herein, owned the Bartholome land grant and the Felipe Tafeya land grant south and east respectively of said townships 15 and 16 north of range 7 west, and townships 15 and 16 north of range 8 west, and held under lease from the railroad company the odd-numbered sections in townships 15 and 16, range 8 west. Both the Fernandez Company and appellants ranged their cattle and their live stock over lands in the townships in both ranges, and from time to time controversies arose because the sheep of appellants were grazing upon the range of the Fernandez Company, and the Fernandez Company's cattle grazed on the range of appellants.

On the 9th day of April, 1915, the Fernandez Company and Elias Francis & Son entered into a written contract by which it was agreed that a line of iron posts should be erected on the range line between ranges 7 and 8 west; that Francis & Son should surrender all their rights of pasturage upon all lands west of such range line to Fernandez Company, Francis & Son at said time owning and having under lease certain lands west of such range line; that Fernandez Company should likewise surrender all rights of pasturage upon lands east of such range line in said townships named, such corporation at that time owning and having under lease certain lands east of such range line; that Francis & Son would keep their sheep and cattle on lands east of such range line, and Fernandez Company should keep their cattle west of the same. The contract was to continue in existence for a period of ten fore the expiration of five years, it should have been established as a principle of law by competent public authority in New Mexico, that the right by injunction does not exist to prevent sheep from being driven across leased railroad or school lands in order to gain access to enjoy the free use of the government sections intervening, then and in such event either party was to have the right to terminate the agreement at the end of five years, by giving six months' notice in advance of an intention to so terminate the same.

In August, 1915, the lease of Francis & Son for the railroad lands in townships 15 and 16 north of range 7 west expired, and the railroad company refused to renew the same. Francis & Son, however, continued to graze their flocks upon the lands in said two townships. In 1916 A. B. McMillen and H. A. Jastro, appellees herein, purchased from the railroad company all the odd-numbered sections in said two townships, and in the fall of 1916 the foreman of the Fernandez Company ordered the herders of appellants to take their sheep from the lands in the two townships. The contract for the purchase of the lands was made in the name of Fernandez Company, but was immediately thereafter assigned to Jastro & McMillen by the Fernandez Company, by A. B. McMillen, as president. Practically all of the even-numbered sections in said two townships, except school sections 16 and 36, and 2 and 32, were part of the public domain.

In November, 1916, appellee filed a complaint in the district court of McKinley county against appealants, in which they set up the facts that they were the owners of the odd-numbered sections of land in townships 15 and 16 north of ranges 7 and 8 west; that Francis & Son were the owners of large herds of sheep; that they drove about 18,000 head of sheep upon and over the lands of appellees during the month of October, 1916, trampled down and ate up the grass upon said lands of appellees, despite warnings to keep their sheep off of said lands; that appellants threatened to continue to depasture the same; that owing to the nature of the injury appellees had no adequate remedy at law, and an injunction was prayed restraining appellants from going upon or across any of said oddnumbered sections with their sheep and pasturing thereon, and for damages in the sum of \$5,000. Appellants answered, denying that they were notified to refrain from going upon the lands in question; denied that there were irreparable damages; alleged that they were financially responsible; denied that they threatened to continue trespassing upon said lands.

Francis & Son would keep their sheep and cattle on lands east of such range line, and Fernandez Company should keep their cattle west of the same. The contract was to continue in existence for a period of ten years, with the proviso, however, that if, be-

pasture lands, and that it was made up of state lands, public domain, railroad lands, and small ranches, all of the latter being owned by the partles to this suit: that appellants were the owners of several private land grants in that vicinity, and had title in fee simple to and improvements upon several ranches of about 160 acres each in the townships, for which they paid more than \$10,000, and that they had put upon such ranches large and valuable improvements; that appellants had much state land in these townships, and that if any of the appellants' sheep went upon appellees' land it was owing to the fact that appellees had neither marked nor fenced any land they might own in said townships, and because of lack of notice of claim to such land by appellees; that said trespass upon the lands of appellees was unintentional because of the fact that such lands were not marked so that it was possible for appellants' herders to determine when they were upon appellees' lands. This paragraph of the answer further sets up the fact that if they trespassed upon the lands of appellees, it was by leave and license of the appellees themselves under their contract executed under the name of Fernandez Company with appellants on April 9, 1915, which ran for a period of five years, a copy of which contract was annexed to the answer. Appellants also filed a cross-bill, which is not material, hence need not be further referred to.

The court, upon motion, struck out paragraph 6 of the answer, and after hearing proof awarded appellees a permanent injunction restraining and enjoining appellants from driving their sheep upon any of appellees' land described in their complaint, or in any other way pasturing or using appellees' land for driveways, or for herding any of their sheep upon any of appellees' land, "except that the court does not restrain or enjoin the said defendants (appellants) or any of them from driving their sheep over any portion of plaintiffs' (appellees') lands by any traveled road or highway now in use, or that may be hereafter established, and for a distance of 30 feet on each side of the center line of said road or highway."

Judgment was given also for \$2,000 damages against appellants. It is to review this judgment that this appeal is prosecuted.

Rodey & Rodey, of Albuquerque, for appellants. A. B. McMillen, of Albuquerque, for appellees.

ROBERTS, J. (after stating the facts as [1] Appellants have filed assignments of error setting forth 13 alleged errors. The brief filed does not undertake to discuss each of the assignments, and the points therein presented are not arranged in logical order. We think, however, appellants present one

practically all of said country was unfenced the effect that the trial court erred in granting appellees injunctive relief because, under the facts developed by the evidence, appellees were not entitled to the injunction or the damages awarded.

> By Act Cong. Feb. 25, 1885, c. 149, entitled "An act to prevent unlawful occupancy of the public lands" (23 Stat. at Large, 321), the assertion of a right to the exclusive use and occupancy of any part of the public lands of the United States in any state or territory, without claim, color of title, or asserted right, was declared unlawful and prohibited. This act also prevented the inclosure of public lands. In the case of Camfield v. United States, 167 U. S. 518, 17 Sup. Ct. 864, 42 L. Ed. 260, it was held that the owner of the odd-numbered sections in a township could not, by constructing a fence upon his lands, inclose the even-numbered government sections.

> Equity regards substance and not form, or, as the principle is expressed in the shape of an equitable maxim, "Equity looks through forms to substance." If the owner of the odd-numbered sections in a township, the even-numbered being government domain, and none of the land being fenced, can procure the aid of the court of equity to restrain others from pasturing their animals upon said evennumbered sections, or driving their stock across any portion of such odd-numbered sections, he would be able to accomplish indirectly, and by the aid of a court of equity. that which he could not do directly, viz. maintain the exclusive use and occupancy of that part of the public domain so situated. That appellees expect to pasture, not only the odd-numbered sections in the two townships which they own, but the government lands, is apparent, for it would be physically impossible for them to utilize their own lands, unfenced as they are, without also grazing the government lands. The injunction, if sustainable, in its practical effect is every whit as effective as a fence surrounding the entire tract would be, in excluding appellants from using the government land in the townships, and the same nostrum could be readily applied to all others who might seek to graze their animals upon such government land. In other words, the court fences the land for appellees by its writ of injunction, and incloses for them a large area of government domain, and does it much more effectively than the parties did in the There Camfield erected Camfield Case. swinging gates at each section line in the fence to afford access to so much of the public domain as was inclosed; while here no means of ingress and egress are afforded, save by a few isolated roads which may or may not touch any of the government sections.

Appellants argue that a denial of the writ of injunction herein would be the taking of private property without just compensation, but this argument is without merit. By folpoint which is decisive of the case and which lowing the local statute of the state, hereinshould be considered by the court. It is to after referred to, appellees can prohibit appellants from depasturing the lands owned by (section 39, Code 1915) which reads as folthem, if not precluded by other equitable consideration, but they cannot prohibit appellants or others desiring to pasture the government even-numbered sections from crossing with their flocks from one government section to another, where such sections corner, or in some reasonable manner. In the case of Buford v. Houtz. 133 U. S. 320, 10 Sup. Ct. 305, 33 L. Ed. 618, an identical question was brought before the Supreme Court of the United States upon appeal from the Supreme Court of the state of Utah. 5 Utah, 591, 18 Pac. 633. In that case Buford and others were the owners of the railroad odd-numbered sections in a given locality in the state of Utah. Houtz and others were raisers of sheep, and pastured their sheep upon the public domain and other lands in the townships within which Buford and others owned such odd-numbered sections. There, as here, the owners of the odd-numbered sections sought to obtain a writ of injunction prohibiting the owners of the sheep from depasturing their lands. The court held that there was an implied license growing out of the custom of nearly 100 years that the public lands of the United States should be free to the people who seek to use them, where they are left unfenced, and no act of the government forbids their use. The court denied their right to injunctive relief. The Utah court, in discussing the question, said:

"If this injunction were granted, it would become obligatory for all settlers passing through the country, and all herdsmen, to be constantly hunting the corners and boundaries of the plaintiff's lands, none of which lands are fenced. It would be a source of great vexation and annoyance to the settlers and herdsmen, and virtually prevent their use of the public lands. The plaintiffs have had the privilege of passing over government lands in reaching their lands, and have had the privilege of pasturing on government lands in connection with their own. As long as they do not fence their lands, they ought not to complain that other people use their lands in the manner they had used the public lands.

The state of Utah, at the time this question was raised, had a fencing statute somewhat similar to our sections 2340 to 2345, inclusive. In a late case (McKay v. Uinta Developing Co., 219 Fed. 116, 135 C. C. A. 18), the Circuit Court of Appeals, Eighth Circuit, in an opinion by Judge Hook, held that the act of February 23, 1885, above referred to, prohibits every method that works a practical denial of access to and passage over the public lands, either by person or stock, and that the owner of a large quantity of railroad government lands, comprising the odd-numbered sections, the alternate sections being public lands, the entire tract being uninclosed, cannot by a warning notice deprive a stock owner of a reasonable right of way for his stock across the tract, or make him a trespasser and liable in damages, because, in crossing, his stock necessarily passes over and consumes grass from some of the land of the private owner.

[2] In this state we have another statute

"It shall be unlawful for any person, persons, company or corporation, or their or either of their agents or employés having charge of any drove of bovine cattle, horses, sheep, goats or other animals to permit or allow such herd of other animals to permit or allow such here of animals to go upon the lands of others in this state for the purpose of grazing or watering upon any waters upon such lands, without the permission of the owner or legal claimant, or his or their agent. The provisions of this sec-tion shall apply not only to titled lands in this state, but to any lands upon which any person may have a valid existing filing under the laws of the United States, or any lands which may e leased by any person from the state of New

"Any person, persons, company or corpora-tion who may claim the benefits of the protec-tion of this section, shall carefully and conspicuously mark the line or lines of his or its lands, so that such mark may be easily seen by per-sons handling such droves, flocks or herds of animals, and shall post a notice upon such land conspicuously, warning against trespassing thereon; or shall serve personal written notice giving description of such land by government surveys or by metes and bounds."

Appellees did not allege or show a compliance with this section. Had they complied with its provisions they would doubtless be able to prevent appellants from depasturing their lands, save as it might become necessary in crossing from one section of the government domain to another by the most accessible route. Under this section it is possible for the owner of private lands to prevent the depasturing of the same by others by conspicuously marking the boundaries of the same, so that those in charge of flocks or herds of animals will be able to know where the lines are, and prevent trepassing thereon by animals under their charge. After marking the boundaries as provided by the statute, they are able to prevent trespassing therein by either of two methods: (1) By posting notices on the land in a conspicuous place warning against trespass; or (2) by serving a written notice upon parties sought to be bound not to trespass upon such lands. Appellees did not comply with this statute. On their behalf, however, it is contended that neither the fencing statute nor said section 39 justifies a willful trespass, and rely upon the case of Light v. United States, 220 U. S. 523, 31 Sup. Ct. 485, 55 L. Ed: 570. That was a suit instituted by the government of the United States to enjoin Light from trespassing upon a forest reserve in the state of Colorado. There is evidence showing that Light knew the boundaries of the forest reserve, and deliberately turned out his cattle so that they would go upon the same, and he admitted that he intended for his cattle to go upon such reservation, and proposed to continue to permit them to so do.

The Light Case has no application to the present case, because of said section 39 of our Code, and the situation of the land. Under the implied license from the government, appellants had a right to graze their sheep and cattle upon the even-numbered sections of public domain within the two townships. Appellees could not lawfully exclude them from exercising such right. Hill v. Winkler, 21 N. M. 5, 151 Pac. 1014. So long as the government of the United States extended to them this implied privilege, they were as much entitled to pasture the government sections as were appellees to pasture their own lands. They had no means of knowing where the section lines were, and which sections belonged to appellees, without having the lands surveyed and the lines marked. In the Light Case, the defendant knew the boundary of the reserve, and purposely grazed his cattle thereon. No statute similar to our section 39 was asserted to exist in Colorado, and such a statute might have no application, were it shown that a party was familiar with the boundaries of private property, and deliberately depastured the same with his animals.

In New Mexico, as in the other states, comprising vast areas of government land where there are but small portions of the land owned in private ownership, it has been the custom always to turn animals loose for grazing purposes, and the owner of the same has not been held liable for the depasturing by such animals of privately owned lands, except where such liability has been created by fencing statutes, or otherwise by statute. Clearly, if appellants were the owners of cattle, and had turned the same loose upon the public domain, and such animals had wandered upon appellee's lands, they would not be entitled to damages for the depasturing of their lands by such cattle, unless they were able to show that their lands had been fenced as required by the statute.

Appellees argue, however, that a different rule prevails as to sheep which are always under the direct control of a herder or caporal; that in the case of sheep, where they go upon private lands and depasture the same, a willful trespass is necessarily presumed because such sheep are under the control of such herder or caporal. This argument, followed to its logical conclusion, would result in repeated damage cases by owners of private lands unfenced and without mark or monument to indicate the fact that they were under private ownership, where they have been depastured by the sheep of another. In various parts of the state where the government domain is utilized for the pasturing of sheep, there are isolated tracts owned by private individuals, unfenced and unmarked. If we should adopt the rule contended for by appellees the sheepman would be required to be vigilant, indeed, in keeping an accurate record of the entries upon the public domain, and what lands were held in private ownership, and the services of a surveyor would be almost constantly in demand by each individual sheep raiser in order that he might escape liability in damages for trespassing upon such private lands.

Section 39, Code 1915, was enacted, we believe, for the purpose of affording protection to the owners of private lands against flocks of sheep and other animals under herd, and that only by a compliance with such section is the owner of private lands able to secure redress in damages for the depasturing of the same, by flocks under herd, unless such a complainant is able to show knowledge on the part of the herder of the lines of such privately owned lands. In other words, unless the owner of private lands unfenced marks the same as required by such section, and posts warning notices thereon, or serves a written notice as therein provided for, or shows knowledge on the part of the herder as stated, he cannot maintain an action to recover damages for the depasturing of the same by another, nor can he maintain a suit in injunction to prevent such depasturing.

Another question is presented by appellants to the effect that a court of equity should treat appellees herein as bound by the contract made by Fernandez Company with appellants, and should award them no relief. Under the doctrine found in Fletcher's Ency. on Corporations, vol. 1, § 42, and cases therein cited, it might be that the court should so treat appellees. In the case of Linn & Lane Timber Co. v. United States, 196 Fed. 593, 116 C. C. A. 267, will be found an interesting discussion of the same question. In view of our conclusion, however, it is not necessary to consider this point.

For the reasons stated, the judgment of the district court will be reversed, and the cause remanded, with instructions to enter judgment for appellants, and to dismiss appellees' complaint; and it is so ordered.

HANNA, C. J., and PARKER, J., concur.

# On Motion for Rehearing.

ROBERTS, J. In their motion for rehearing filed herein, appellees have called to the attention of the court an error in the statment of facts, in this: It is stated that the appellants were the owners, under lease, of a 42,000-acre tract of land immediately east of townships 15 and 16 north, range 7 west, N. M. P. M., and that the stock of the Fernandez Company was largely owned by the appellees. Further that "on the 9th day of April, 1915, the Fernandez Company and Elias Francis & Son entered into a written contract by which it was agreed that a line of iron posts should be erected on the range line between ranges 7 and 8 west," etc., and the remainder of the third paragraph in the statement of facts. All these facts were alleged in appellant's answer or cross-complaint, but were stricken out on motion of appellees by the trial court. The action of the court in striking out the same was assigned as error, but was not considered by this court, as we did not find it necessary to

pass upon the question presented. The sixth paragraph of the answer, the material facts therein alleged being set forth in the statement of facts, was likewise stricken by the trial court. As our conclusion was not influenced by the facts set forth in the pleadings filed by appellants, stricken as stated by the trial court, such facts could well have been omitted from the statement. I have carefully considered the motion filed for a rehearing and the able brief in support of the same, but find no reason for departing from the conclusion reached in the former opinion. The motion for rehearing will therefore be denied.

PARKER, J. (concurring). I concur in the denial of the motion for rehearing in this case. In so doing I desire to state that I feel bound by the controlling authority of the Circuit Court of Appeals and of the Supreme Court of the United States as to the right of the implied licensee to graze the public domain, and in so doing, if necessary, to cross lands held in private ownership. The holding of the federal courts is based upon the provisions of Act Feb. 25, 1885, c. 149, 23 Stat. 321, which has been interpreted by them to absolutely prohibit any person, by any means, from obstructing the free passage or transit over or through the public lands. And in the case of the owner of alternate railroad sections, he is held not to have the right, by any means whatever, to prevent the passage to or use of the evennumbered sections within the range of his holdings of odd-numbered sections, where such even-numbered sections are owned by the government. This conclusion is contrary to the ordinary rules governing property rights, and is no doubt induced by the terms of the statute as construed. A different conclusion, which commends itself to me, was reached in United States v. Rindge (D. C.) 208 Fed. 611. Feeling bound, however, by the decisions referred to in the opinion by Mr. Justice ROBERTS, I concur in the disposition heretofore made of this case, with such correction in the statement of facts as has been made by him.

[3] In regard to the right of way over the sections held in private ownership, I think the well-known principles governing easements should apply, to the effect that in the exercise of the easement the utmost reasonable care is to be exercised by the claimant of the easement so as to do the least damage to the servient estate. Practically applied to such circumstances as exist in this case, these principles would require the crossing of herds of animals at section corners, rather than at any other place upon the alternate sections held in private ownership.

HANNA, C. J., concurs in the foregoing.

TIETJEN v. McCOY. (No. 2144.) (Supreme Court of New Mexico. May 7, 1918.)

(Syllabus by the Court.)

1. FORCIBLE ENTRY AND DETAINER \$\infty\$ 10(3)—
JUSTICES OF THE PEACE \$\infty\$58(5)—JURISDICTION—RECORD.

An action for forcible entry and unlawful detainer of real property must be prosecuted before the justice of the peace of the precinct in which the property is situated; and, if there be no justice of the peace in that precinct able or qualified to act, this fact must affirmatively appear from the record, and should be incorporated in the complaint in the cause, in order that the jurisdiction of the justice of the peace in an adjoining precinct, who might be called upon to act under such circumstances, may fully appear.

2. JUSTICES OF THE PEACE \$\infty\$31, 58(1), 59—JURISDICTION—RECORD—PRESUMPTION.

The jurisdiction of the justice of the peace is inferior, special, and limited by statute to specific territorial boundaries, established by law as a county, town, or incorporated city, and to specific subject-matters, such as assault and battery, suits to recover debts where the amount claimed does not exceed \$200, etc. Such jurisdiction must appear affirmatively from the record of the proceedings; it cannot be presumed.

Appeal from District Court, McKinley County; Raynolds, Judge.

Action by J. E. Tietjen against L. McCoy in forcible entry and detainer before a justice of the peace. From a judgment for plaintiff, defendant appealed to the district court where, on trial de novo, judgment was rendered for plaintiff, and defendant appeals. Reversed and remanded, with directions.

The action is in forcible entry and detainer brought in the justice of the peace court for precinct No. 3 of McKinley county by appellee. The tract of land involved was described as Sec. 16, Tp. 19 N., R. 12 W. The justice court found the defendant guilty as charged, and directed the issuance of a warrant of removal against the defendant, who appealed to the district court of McKinley county, where on trial de novo the court rendered judgment in favor of the plaintiff for damages in the sum of \$1, from which judgment defendant appeals to this court.

H. B. Jamison, of Albuquerque, for appellant. A. T. Hannett, of Gallup, for appellee.

HANNA, C. J. [1] The first assignment of error urged by appellant is that the court erred in proceeding to render judgment in the case when neither the justice of the peace court, from which the case was appealed, nor the district court, nor this court, had or has jurisdiction of the cause because the suit was not begun or tried in the precinct in McKinley county in which the land in question is situated. Appellant attempts to support this assignment by certain affidavit proof, which, however, we cannot consid-

For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

er as any part of the record. It is to be observed, however, that the complaint did not in any respect point out where the land in question was situated; nor did the evidence adduced throw light upon this question. This court considered in the case of Brasswell v. Halliburton, 19 N. M. 386, 143 Pac. 476, a similar question, construing the statutes of this state. Section 2384 et seq., Code 1915. We pointed out that an action for forcible entry and unlawful detainer of real property must be prosecuted before the justice of the peace of the precinct in which the property is situated; and, if there be no justice of the peace in that precinct able or qualified to act, this fact must affirmatively appear from the record, and should be incorporated in the complaint in the cause, in order that the jurisdiction of the justice of the peace in an adjoining precinct, who might be called upon to act under such circumstances, may fully appear.

In 19 Cyc. at page 1150, it is pointed out that in suits brought under the statutes relating to forcible entry and detainer, instituted in justices courts, great strictness in the complaint or affidavit is not required. "Nevertheless" (continues the text) "to give the court jurisdiction it is necessary that the complaint should embody such a statement of facts as brings the party clearly within some one of the class of cases for which the statutes provide a remedy, as these proceedings are summary and contrary to the course of the common law."

As pointed out in the same work at page 1151, in actions in forcible entry and detainer instituted before a justice of the peace, the complaint must show that the premises in question were within the precinct of the justice, or where there is no justice in the precinct, where the premises are situated and the action is brought in an adjoining precinct, as is provided for under our statute, that fact must appear.

[2] The text referred to in Cyc. is supported by the New Mexico case of Sanchez v. Candelaria, 5 N. M. 400, 23 Pac. 239. In an early territorial case, that of Territory v. Valencia, 2 N. M. 108, it was held that:

"The jurisdiction of the justice of the peace is inferior, special, and limited by statute to specific territorial boundaries, established by law as a county, town, or incorporated city, and to specific subject-matters, such as assault and battery, suits to recover debts where the amount claimed does not exceed \$100, etc. Such jurisdiction must appear affirmatively from the record of the proceedings; it cannot be presumed."

In the case of Lasater et al. v. Fant (Tex. Civ. App. 1897) 43 S. W. 321, it was held that a complaint which did not locate the land in the precinct in which the action was begun was fatally defective in that it stated no cause of action whatever.

In Haskins v. Haskins, 67 Ill. 446, it was held that:

"A complaint which fails to show a case within any provision of the statute relative to forcible entry and detainer is insufficient to give the court jurisdiction."

It is true that under the statute in question in Illinois it was required that the complaint should particularly describe the lands, tenements, or possessions in question, but we apprehend that the holding in this jurisdiction in the case of Territory v. Valencia, supra that the jurisdiction of a justice of the peace must affirmatively appear from the record of the proceedings, would call for an allegation in the complaint showing the jurisdiction, even though our statute does not provide that the complaint must specifically set forth a description of the lands.

From an examination of section 2384, Code 1915, it is apparent that a limitation as to the jurisdiction of the justices of the peace is clearly implied from the requirement that an action for forcible entry or unlawful detainer of real property must be prosecuted before the justice of the precinct where the property is situated, and also by section 2388, Code 1915, by the provision that where no justice of the peace in the precinct where the premises are situated is able or qualified by law to act, then suit may be brought before some justice of the peace in any adjoining precinct. By section 3231, Code 1915, it is further provided that where the jurisdiction of the justice of the peace may not affirmatively appear upon the face of the papers transmitted upon any appeal, and yet such jurisdiction actually existed in the justice of the peace before whom such cause was tried, it shall be the duty of the district court to allow any amendment necessary to set forth correctly the fact of jurisdiction, and no appeal shall be dismissed for any defect in the papers so transmitted, provided the same can in truth be amended to correctly set forth the jurisdictional facts. This latter section clearly calls for an affirmative showing on the face of the papers as to jurisdictional matters, and permits amendment of the papers transmitted upon any appeal to the district court in conformity with the truth which may be necessary to correctly set forth jurisdictional facts.

The question being one of jurisdiction, it can be raised in this court for the first time, as has been frequently held; and, although the objection is in this case raised for the first time, we find it necessary, by reason of the error pointed out, to reverse the judgment of the district court and remand the cause, with instructions to proceed in conformity with this opinion; and it is so ordered.

ROBERTS and PARKER, JJ., concur.

LARUE et al. v. FARMERS' & MECHAN-ICS' BANK. (No. 14059.)

(Supreme Court of Washington. May 11, 1918.)

Brokers 43(3) - Commissions-Contract

BY CORRESPONDENCE.

Where realty brokers wrote an officer of the bank which owned a ranch: "We are writing you in regard to the 907 acres located 14 miles southwest of Pullman, belonging to the bank. If this place is still on the market we would be pleased to have you send us a new description of it;" and the officer answered: "I am inclosing herewith description of the ranch below Pullman. The price at which we hold this is \$32,000, subject to \$1,000 commission. I hope that you will get busy and sell something is \$32,000, subject to \$1,000 commission. I hope that you will get busy and sell something for me at once"—the inclosed description being a typewritten unsigned paper headed "Hillcrest Ranch, Property of Farmers' & Mechanics' Bank, Spokane, Washington," consisting of a statement of the number of acres, pasture, buildings, etc., such writings were insufficient to satisfy the statute of frauds as to a contract for commissions. for commissions.

Appeal from Superior Department 1. Court, Spokane County; F. W. Girand,

Action by G. W. Larue and Chas. R. Larue, copartners doing business under the name and style of G. W. Larue & Co., against the Farmers' & Mechanics' Bank, a corporation. Judgment for plaintiffs, and defendant appeals. Reversed and remanded, with instructions to enter judgment of dismissal.

Hurn & Hurn and J. Webster Hancox, all of Spokane, for appellant. McCroskey & Stotler, of Colfax, and John Pattison, of Spokane, for respondents.

PER CURIAM. Respondents brought this action to recover a commission on a sale of certain property belonging to the appellant. The contract is to be gathered from a letter by respondents to Mr. Orris Dorman, of the appellant bank:

"We are writing you in regard to the 907 acres located 14 miles southwest of Pullman, belonging to the bank. If this place is still on the market, we would be pleased to have you send us new description of it."

A letter from Mr. Dorman:

"I am inclosing herewith description of the ranch below Pullman. The price at which we hold this is \$32,000.00, subject to \$1,000.00 commission. I hope that you will get busy and sell something for me at once"

-and the description inclosed therewith. The description is a typewritten unsigned paper reading as follows:

#### "Hillcrest Ranch.

"Property of Farmers' & Mechanics' Bank, Spokane, Washington.
"This ranch consists of 907 acres of which there are about 500 tillable, most in cultiva-

there are about 500 thiable, most in cultiva-tion, practically level and as good land as there is in the Palouse country, crop on about 250 acres, summer fallow.

"Pasture. The pasture lays in two fields of about equal amounts. One field sloping to-ward the Snake river has the advantage of climate making it a number one winter grazing of the conditions imposed.

Department 1. Appeal from Superior Court, Spokane County; Hugo E. Oswald, Judge.

Suit by Jessie F. McDonald, legatee un-der the will of William P. Nichola, deceased,

proposition. The other slopes to the north into the Wai-Wai Canyon and like all north slopes

the Wai-Wai Canyon and like all north slopes of the Palouse country is subject to more moisture and heavier growth of grass.
"Buildings. The house is one of seven rooms, plastered, practically new and in fine condition. The barn will hold 40 head of horses and 100 tons of hay. Other buildings such as are required on a place of this character are in good condition. condition.

"Orchard. There are about 2 acres in orchard with several varieties of fruit sufficient for the

with several varieties of fruit sufficient for the place and all the neighbors in the country.

"Location. Twelve miles southwest of Pullman and 7 miles from Johnson, a town on the N. P. Ry. south of Pullman. Lies in township 13, range 44, more fully described as parts of sections 17, 18, 19 and 20.

"Stock Possibilities. This place could easily maintain 125 to 150 head of horses and cattle, besides 200 to 300 head of horses and cat

The controlling question in the case is whether these writings are sufficient to satisfy the statute of frauds. It is our opinion that they are not under the final holdings of this court upon this vexed question; and, upon the authority of Rogers v. Lippy. 169 Pac. 858, and Nance v. Valentine, 169 Pac. 862, the judgment of the lower court is reversed, and the case will be remanded, with instructions to enter a judgment of dismissal.

# in re NICHOLS' ESTATE. McDONALD v. IMUS.

(No. 14417.)

(Supreme Court of Washington. May 9, 1918.)

1. WILLS \$\infty\$647-RESTRAINT OF MARRIAGE -"CONDITION PRECEDENT."

A will bequeathing to a legatee a named sum, provided she is legally divorced from her husband and still bears his name, imposed a "condition precedent" which is not in restraint of marriage or an inducement to obtain a divorce, since to have such effect a condition must be a condition subsequent.

2. WILLS 4=481—Construction.

A will speaks as of the date of testator's death.

3. WILLS €==776 — Construction — Condi-TIONAL BEQUESTS.

Under will bequeathing to legatee a named sum, provided she is legally divorced from her husband and still bears his name, where legatee had not been divorced at death of testator, the legacy lapsed, and a subsequent divorce was unavailing.

4. WILLS \$\infty 439-Intention of Testator-DUTY OF COURT.

When testator's wishes are ascertained and found to be legal, it is the duty of the court to carry them out regardless of reasonableness of the conditions imposed.

against E. N. Imus, executor of the estate of that event occurs, it is ambulatory and subsaid deceased, to obtain a construction of a clause in the will of said deceased. From decision rendered, plaintiff appeals, Af-

Roche & Onstine, of Spokane, for appellant. Skuse & Merrill, of Spokane, for respondent.

FULLERTON, J. This is a proceeding instituted in the superior court of Spokane county to obtain a construction of a clause in the will of William P. Nichols, deceased. The case was heard in the lower court, and is before us upon an agreed statement of facts. The statement summarized shows the following:

(1) That William P. Nichols died on October 15, 1915, leaving estate in Spokane county, consisting of real and personal property, of the approximate value of \$22,000.

(2) That he left a will bearing the date of November 6, 1912, which among others contained the following bequest: "I also give and bequeath to Jessie F. McDonald of Spokane, provided she is legally divorced from her husband A. S. McDonald and still bears his name, the sum of one thousand dollars."

- (3) That the will was admitted to probate in. Spokane county on October 26, 1915. That one E. N. Imus was named in the will as executor thereof and duly confirmed by the court as such. That the estate has been closed but not distributed, and that there now remain in the hands of the executor sufficient funds to pay all the legacies provided for in the will, including the legacy to the legatee Jessie F. McDonald.
- (5) That after the death of the testator the legatee obtained a divorce from A. C. McDonald, and has not since remarried, and now bears the name of Jessie F. McDonald.
- (6) That the testator, at the time of the execution of his will and at the time of his death, knew that the legatee was not di-

The trial court on the facts stipulated held that the legatee, because she did not occupy the status defined in the will, was not competent to take thereunder, and adjudged the legacy to have lapsed. From this conclusion the legatee has appealed.

[1-3] It is the contention of appellant's learned counsel that the condition imposed on the taking effect of the legacy is one tending to induce the separation of husband and wife and to operate in restraint of marriage, and is thus void as against public policy; contending further that, if the condition be void, the legatee takes under the will as if no condition had been imposed. But without considering the effect of the condition, were it such as the contention implies, we cannot conclude that it is capable of the construction put upon it. A will speaks as of the date of the testator's death. Until day.

ject to the control of the testator. Strand v. Stewart, 51 Wash. 685, 99 Pac. 1027. The condition here imposed is plainly a condition precedent. It merely provides that, if the legatee at the time the will goes into effect has a certain defined status, that is to say, if she is then legally divorced from her husband and has not remarried, she may take the legacy willed her, otherwise not. Such a condition is not an inducement to obtain a divorce, nor is it in restraint of marriage. A condition to have such an effect must be a condition subsequent; it must provide for a future separation and operate as a restraint upon a subsequent marriage. It is almost too evident to be capable of demonstration that this condition does neither of these things. Since the will speaks as of the time of the death of the testator, no subsequent divorce could avail the legatee; nor if she had received the legacy could any subsequent marriage avoid it.

[4] The reasonableness of the condition imposed is not an inquiry for the courts. The property to be given away was the property of the testator. He was privileged to dispose of it in any lawful manner. And when his wishes are ascertained and found to be legal, it is the duty of the courts, in justice to his memory, to carry his wishes into effect.

The order appealed from is affirmed.

ELLIS, C. J., and WEBSTER, MAIN, and PARKER, JJ., concur.

STATE ex rel. GREB v. HURN, Judge of Superior Court. (No. 14652.)

(Supreme Court of Washington. May 9, 1918.)

1. TIME 2=11—PER DIEM COMPENSATION—FRACTIONS OF A "DAY."

Under Laws 1913, p. 386, § 1, providing that when an omcial court reporter shall be appointed he shall thereupon become an officer of the court, section 2 making it the duty of the official court reporter to be in attendance upon the court at such times as the presiding judge may direct, and section 2 providing ing judge may direct, and section 3 providing that each official reporter so appointed shall be paid a compensation at the rate of \$10 per diem for every day he is actually in attendance upon said court pursuant to the direction of the court, where official court reporter of superior court in response to request of presiding judge was in attendance during the morning session, he was entitled to per diem of \$10; the law not considering fractions of a day in fixing salaries and fees for the performance of public services at so much per day.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Day.]

2. Officers 4 94 - Per Diem Compensa-TION

Where a statute fixes an officer's compensation at a certain sum per day, such officer, per-forming any substantial service on a particu-lar day, has a right to the per diem for that

Department 1. Application for a writ of for the superintendent? mandamus by the State, on the relation of John W. Greb, against David W. Hurn, Judge of the Superior Court in and for the County of Spokane. Writ granted.

Henry L. Kennan, of Spokane, for appellant. Joseph B. Lindsley, of Spokane, for respondent.

MAIN, J. This is an application for a writ of mandamus. The petitioner is the official reporter in the department of the superior court of Spokane county, the presiding judge of which is the Hon. David W. Hurn, the respondent.

[1] On the 1st day of November, 1917, the petitioner was directed by the respondent to be in attendance as official court reporter. Responding to this request the petitioner was in attendance, and reported certain testimony and proceedings in the court during the morning session or forenoon of the day mentioned. He was not directed by the presiding judge to be in attendance during the afternoon session of that day. The statement subsequently prepared by the petitioner called for the payment of \$10 for the 1st day of November, 1917. This statement the presiding judge declined to certify, claiming that the petitioner was only entitled to one-half of the per diem fixed by the statute.

This case calls for a construction of the statute authorizing official court reporters. Laws of 1913, c. 126. Section 1 of this statute, among other things, provides that, when an official court reporter shall be appointed, "such stenographer shall thereupon become an officer of the court. \* \*" By section 2 it is made the duty of the official reporter to be in attendance upon the court "at such times as the judge presiding may di-\*" By section 3 it is provided rect. \* \* that:

"Each official reporter so appointed shall be paid a compensation at the rate of ten dollars (\$10) per diem for every day that he is actually in attendance upon said court pursuant to the direction of the court \* \* \* \*" direction of the court.

The question then is: If the official reporter is only in attendance a portion of the day, shall his per diem, fixed by the statute, be split or prorated? In this state there is no statute which fixes the length of time that the court shall be in session each day. The session of the court may consist of any number of hours, within the limit of 24, between two successive midnights. In Smith v. Board of County Com'rs of Jefferson Co., 10 Colo. 17, 13 Pac. 917, the Supreme Court of Colorado had before it a statute which provided for the compensation of the county superintendent of schools as follows:

"For the time necessarily spent in the discharge of his duty he shall receive five dollars per day.

The question there was: Under this statute, what would constitute a day's service available.

Answering this question it was said:

"We answer, the law does not recognize frac-tions of days; and, when it provides a per diem compensation for the time necessarily de-voted to the duties of an office, the officer is entitled to this daily compensation for each day on which it becomes necessary for him to perform any substantial official service. if he does perform the same, regardless of the time occupied in its performance."

In White v. Dallas County, 87 Iowa, 563, 54 N. W. 368, the Supreme Court of the state of Iowa construed a statute which fixed the compensation of commissioners of insanity "at the rate of three dollars per day, each, for all the time actually employed in the duties of their office." It was there held that the commissioners, when employed in the duties of their office on a given day, were each entitled to \$3 per diem fixed by the statute, regardless of the number of hours of such employment on a particular day. See, also, Board of Com'rs of McIntosh County v. Whitaker (Okl.) 158 Pac. 1136, and Robinson v. Dunn, 77 Cal. 473, 19 Pac. 878, 11 Am. St. Rep. 297.

[2] Other authorities might be cited, but it is useless to multiply citations where all of the authorities, so far as we are advised, support the view that, where the statute fixes an officer's compensation at a certain sum per day, such officer, performing any substantial service on a particular day, has a right to the per diem for that day.

In the present case we think that under the statute the official court reporter is entitled to the per diem named in the statute for every day that he is directed by the presiding judge to be in attendance upon the court, and he is in fact in attendance, regardless of the period of time which such attendance for a particular day may cover. In fixing salaries and fees for the performance of public services at so much per day the law does not consider fractions of such day.

Let the writ issue.

ELLIS, C. J., and PARKER and FUL-LERTON, JJ., concur. WEBSTER, J., took no part.

HOUGHTON v. HOY et al. (No. 14410.) (Supreme Court of Washington. May 10, 1918.)

1. CONTRACTS \$\infty\$166—REFERENCE TO OTHER CONTRACT—CONSTRUCTION.

Where a contract incorporates another contract by reference, the two contracts must be construed as one.

2. Contracts == 208-Construction-Incor-PORATION OF OTHER CONTRACT — RAILROAD BUILDING—FURNISHING MATERIALS.

A contractor's agreement with a subcontractor to furnish materials, incorporating by ref-erence certain provisions of contractor's agree-ment with the railroad company, held not to require the contractor to deliver materials west of a certain street, or where tracks were not 8. Principal and Surety 4=161—Contract —Subcontractor's Bond — Notice of Breach—Evidence.

Evidence held to show that, as required by the bond the contractor had duly notified the subcontractor's surety, a corporation, and given it opportunity to complete the contract after the subcontractor's breach, which it failed to do, rendering it liable for contractor's loss in completing the work.

4. Principal and Surety \$\infty\$ 100(6)—Extras -Release of Surety.

Where a subcontractor's contract provided for extras, his surety was not released by the inclusion of contractor's loss thereon, in completing the work after subcontractor's breach of performance.

Department 2. Appeal from Superior Court, Spokane County; Henry L. Kennan, Judge.

Action by Shirley Houghton against William J. Hoy doing business as the William J. Hoy Company, in which the defendant set up a counterclaim against the plaintiff and the Guardian Casualty & Guaranty Company. From a judgment for the defendant, both the plaintiff and the defendant Casualty Company appeal. Affirmed.

Nuzum, Clarke & Nuzum, of Spokane, and John Hubert Mee, of San Francisco, Cal., for appellants. Cannon & Ferris, of Spokane, for respondent.

MOUNT, J. This action was brought to recover the sum of \$50,856.30 alleged to be due from the defendant on account of work done for the defendant under certain con-The defendant, after denying certain material allegations of the complaint, alleged a counterclaim and set-off, and demanded judgment against the plaintiff and the Guardian Casualty & Guaranty Company in the sum of \$33,485.57. After issues were joined, the case was tried to the court without a jury, and findings were made and judgment entered in favor of the defendant for \$22,736. The plaintiff and the Guardian Casualty & Guaranty Company have appealed from that judgment. facts may be briefly stated as follows:

On October 8, 1914, the Northern Pacific Railway Company let a contract to W. J. Hoy Company for the construction of an elevated roadway through the city of Spo-This elevated roadway was about three miles in length. It consisted of concrete retaining walls on each side of the right of way and overhead bridges across the public streets of the city over which the railway line extended. On November 14, 1914, the W. J. Hoy Company, original contractor for the Northern Pacific Railway Company, entered into a subcontract with R. H. Van Sant, Jr., Shirley Houghton, Raymond Ashton, and G. T. Bridgman, copartners doing business under the name of the Pacific Concrete Placing Company (which shall hereafter be referred to as the Placing Company). by which contract the Placing Company undertook to mix and place so much of the concrete as would be required for the retaining walls, cross-walls and bridges, at an agreed price of 90 cents per cubic yard. Thereafter, on February 11, 1915, the W. J. Hoy Company entered into another subcontract with the Placing Company by which the latter company agreed to construct and maintain with materials furnished by the Hoy Company the wooden forms for retaining walls, cross-walls, and abutments. These two contracts provided that the Placing Company should furnish surety bonds for the faithful performance of these contracts, and bonds were furnished by the Guardian Casualty. & Guaranty Company in the sum of \$40,000 for the faithful performance of the concrete contract, and \$7,000 for the faithful performance of the other contract. These bonds were both under date of April 9, 1915. Work was commenced on these contracts by the Placing Company in March, 1915, and continued until in December of that year, when the work was stopped on account of the winter months.

During the time the work was in progress payments were made by the Hoy Company to the Placing Company in accordance with the terms of the contracts to the amount of 90 per cent. of the estimates made by the supervising engineers. After the work was closed down in December of 1915, the superintendent of the railway company notified the Hoy Company, and in turn the Hoy Company notified the Placing Company, that no more deliveries of sand and gravel or concrete would be permitted upon railway tracks west of Division street. The Placing Company insisted that it was entitled to deliveries of sand and gravel and cement at the work sites where work was being done, and for failure of the Hoy Company to make such deliveries declined to proceed with the contract for concrete work when the work was required to be started in March of 1916. The Hoy Company thereupon notified the Guardian Casualty & Guaranty Company of this fact, and that work would be started on the 28th day of March, 1916, and that unless the Placing Company or the Guardian Casualty & Guaranty Company proceeded with the contract for concrete work the Hoy Company would take charge of the work and finish it at the cost of the Guardian Casualty & Guaranty Company and of the Placing Company, which it did. Placing Company continued with the contract for retaining wall, cross-wall, and abutment forms under the retaining wall contract, until the month of August, 1916. At that time the Hoy Company refused to pay the monthly estimate of work done by the Placing Company upon this contract, because the Placing Company was then indebted to the Hoy Company in excess of the amount of the monthly estimate. The Placing Comcontract, and shortly afterwards the partners of the Placing Company dissolved the copartnership, and assigned to Shirley Houghton all their interest in the assets of the partnership, and he assumed all the liabilities thereof. He thereafter brought this action, alleging the amounts due from the Hoy Company to the Placing Company to be The Hoy Company thereafter \$50.856.30. filed its answer, brought in the Guardian Casualty & Guaranty Company as defendant, and alleged that it had expended in excess of the amount due the Placing Company the sum of \$33,485.57, for which the Hoy Company prayed judgment against the Placing Company and the Guardian Casualty & Guaranty Company.

The trial of the case involved a multitude of accounts on the part of both the appellants and the respondent. The record is voluminous; but the primary question, and the one which controls the disposition of the case, depends upon a construction of the different contracts.

The contract between the Northen Pacific Railway Company and the Hoy Company provided, among other things, as follows:

"The contractor agrees to furnish all labor, services and material for, and construct, complete and finish in the most thorough workmanlike and substantial manner in every respect to the satisfaction of the chief engineer of the company, within the time hereinafter specified, and according to the specifications hereto annexed and made part of this contract, all concrete construction, waterproofing, foundations. \* \*

"Date of Completion. The work is to be commenced immediately and completed on or before the 1st day of June, A. D. 1916. \* \* \* "The company will furnish free transportation over its own line subject to the review and instructions of the chief engineer as to the necessity for any proper use of same for concessity for and proper use of same, for con-tractor's outfit to the work and return to point of origin or to a point having an equivalent tariff rate.

"Free transportation will be furnished for ce-

ment west of Logan, Montana.

"The contractor to pay full tariff rate on all other material and supplies entering into or used on the work, and contractor shall buy all such on the work, and contractor shan buy an such material if possible at points which will permit the company to receive the haul on such materials, routing same via the lines of the company and its connecting lines. \* \* \*

"Nothing herein contained shall be construed to relieve the contractor of payment of demurrage charges under car service association rules, for shipments of equipment and material by either the railway company or the contractor to be used on this contract."

In the specifications above referred to it was provided as follows:

"Plans and Ordinance. All work must conform in every respect to the general and detail plans and specifications of the railway company."

pany. \* \* \* The price paid for excavation shall include backfilling and the actual haul of materials for any distance not exceeding 600 feet. The limit to which any materials may be required to be hauled shall be 3,500 feet.

Engine, Work Train Service and Equipment. tween the railway company as \*\* Necessary engine, work train service Company, it was provided that:

pany thereupon refused to comply with that | and equipment will be furnished the contractor at the railway company's regular rates for com-

pany work.

"Maintaining Traffic. \* \* The engineer
will not permit the contractor to disturb or ob-

will not permit the contractor to disturb or obstruct the track except as directed by the division superintendent of the railway company. "The railway company will furnish such number of flagmen as the division superintendent may direct for the protection of traffic. The expense of flagmen services will be borne by the railway company.

"Rearrangement of Existing Tracks. The necessary rearrangement of the existing tracks of the railway company in order to give the contractor access to the site of the work will be done by the railway company's forces under the direction of the engineer.

"The general plan of track rearrangement as

now proposed by the railway company may be seen at the office of the engineer, and the railway company will carry out this plan or a modi-fication of same as rapidly as the business of the railway company will permit and the prog-ress of the work requires, but it shall be dis-tinctly understood that the railway company assumes no responsibilities for delays to the con-tractor account of track changes, the transfer-ring of traffic from surface to elevated grades, obstruction of the work by the traffic of the

"No changes whatever will be made in the existing tracks of the railway company except in cases where it is practically impossible to construct the work otherwise.

"Delivery of Material. Material received at the work in carload lots will be set out on the most convenient spur track available east of Division street.

"If the railway company furnishes cement, storage room will be provided at some point east

of Division street.
"The contractor shall unload all cars within 48 hours of receipt of same, or pay regular car demurrage.

The contract between the Hoy Company and the Placing Company contained the following provisions:

"The Hoy Company shall furnish all sand, gravel or crushed rock and cement required for all concrete work done in connection with said separation work delivered as follows: Sand and gravel or crushed rock f. o. b. cars in said city of Spokane as near as available railway trackage shall permit to bunker, hopper or working sites of said Placing Company, and furnish cement in cars at points where railway trackage is available and most suitable to the Placing is available and most suitable to the Placing

Company. \* \* \*
"Said Hoy Company agrees to furnish not less than 500 cubic yards of gravel or rock, 250 cubic yards of sand and 500 barrels of cement per working day of twenty-four hours and shall, if larger quantities are desired by the Placing Company, endeavor to furnish such additional quantities but not be bound to do so. \* \* \* \* "To take and keep an accurate check on all

cement cars, as to quantity, and report same to the local office of said Hoy Company. To ex-ercise all possible diligence in the care of ce-ment sacks, and when emptied tie the same in bundles in multiples of one hundred, ready for

"To unload all sand, gravel, rock or cement delivered for any one day, in such way and at such time as to protect the Hoy Company from demurrage charges, and if demurrage charges are assessed they shall be paid by the Placing Company.

Then, after referring to the contract between the railway company and the Hoy "The provisions of said contract between the Hoy Company and the railway company, in so far as they relate to the part of the grade separation work covered by this contract, are made a part of this contract."

It will be noted from these two contracts that:

"Material received at the work in carload lots will be set out on the most convenient spur track available east of Division street.
"If the railway company furnishes cement, storage room will be provided at some point east of Division street.

"The contractor shall unload all cars within 48 hours of receipt of same, or pay regular car demurrage. \* \* \* \*" demurrage.

"The engineer will not permit the contractor to disturb or obstruct the track except as directed by the division superintendent of the railway company. \* \* \* "

And that:

"The Hoy Company shall furnish all sand, gravel or crushed rock and cement required for all concrete work done in connection with said separation work delivered as follows: Sand and gravel or crushed rock f. o. b. cars in said city of Spokane as near as available railway trackage shall permit, to bunker, hopper or working sites of said Placing Company.

[1, 2] It is vigorously contended by the appellants that the Hoy Company was bound to deliver sand, gravel, cement, and other materials at the bunker, hopper, or working sites of the Placing Company. We think it is plain from the language of these two contracts-which must be construed as one (State ex rel. Noble v. Bowlby, 74 Wash. 54, 132 Pac. 723)—that the Hoy Company did not agree to furnish the sand, gravel, crushed rock, or cement at the bunker, hopper, or working sites of the Placing Company, unless railway tracks were available for that purpose. The record shows without dispute that a large number of cars of sand, gravel, and cement were furnished by the Hoy Company at the bunker, hopper, and working sites of the Placing Company when railway tracks were available. A few cars, during the year 1915, were not so furnished; but the contract of Hoy with the railway company is clear to the effect that the tracks and the traffic thereon were entirely under the control of the division superintendent. The railway company, in the original contract, very plainly indicated that the traffic over its line should not be interfered with, and for that reason the division superintendent had control of the tracks and the traffic thereon. If he refused permission for the use of the railway or spur tracks, such tracks were clearly not available for use to the contractor or his subcontractors. It is no doubt true that the Hoy Company, if it desired to do so might have agreed that sand, gravel, and cement would be delivered by it at particular places, such as at the bunker, hopper, or working sites of the Placing Company; but the Hoy Company did not make that agreement, because the contract states that

near as available railway trackage shall permit to bunker, hopper or working sites. . . . . This meant, of course, that if available trackage would not permit, the Hoy Company was not required to deliver the sand, gravel, and cement at the working sites. When the division superintendent, in his letter in December, 1915, notified the contractor that he would not permit sand, gravel, and cement to be delivered upon the tracks west of Division street, those tracks were then not available for that purpose, and consequently a delivery of the cars in the yards east of Division street was a delivery under the contract. This being trueand it seems no other reasonable construction of the contract can be indulged-it follows that the Placing Company was not authorized to refuse to complete the concreting contract because the Hoy Company did not deliver cars at the work sites. The appellants argue at length that there were delays in the delivery of materials in 1915. Such delays were caused partly, at least, by the fault of the Placing Company. A careful reading of the abstract of the record fails to convince us that the trial court erred in finding that the Hoy Company substantially performed its contract.

It is unnecessary to enter into a consideration of the different items in the accounting upon which appellants have written many pages of their brief, such as demurrage, insurance, pilot wages, water, failure to pay August estimate upon form contract, etc. Some of the items, considered in detail by the trial court, appear upon their face not to be justly chargeable against the appellants, but when explained as they seem to be in the record we are satisfied that the trial court arrived at a correct conclusion as to the allowance and rejection of items referred to in the briefs.

[3] It is argued by the appellants that the Guardian Casualty & Guaranty Company is not liable upon its bond because the notice required in the bond was not given. The record shows that the Hoy Company sent a notice by registered mail on March 23, 1916, to the Guardian Casualty & Guaranty Company at Salt Lake City, Utah, its home office. There was no agent in the city of Spokane upon whom notice could be served. On the next day the Hoy Company sent a telegram stating that the Placing Company refused to proceed with its contract, and that it would be necessary to commence work on the contract on March 27th, and asking the Guardian Casualty & Guaranty Company what it proposed to do. The Hoy Company received no reply to either the notice or the telegram. and on the 28th day of March, 1916, took over the work and thereafter completed it. No effort was made to show that the Guardian Casualty & Guaranty Company would have taken over the work, or that it had delivery of these materials shall be made "as | made any effort to take over the work after notice was received by it of the refusal of [5. Constitutional Law 4-62, 70(1), 74 the Placing Company to proceed. It is plain, we think, that the surety was duly notified and had an opportunity to take over the We think it was the duty of the Guardian Casualty & Guaranty Company to proceed at once upon the receipt of the notice to take over the work, or to notify the Hoy Company of its intention to do so. It evidently determined not to do so, and is liable of course for the damage which the Hoy Company sustained by reason of the Placing Company's not proceeding with the work.

[4] Some contention is made by the appellants that because extras were included in work which was done by the Placing Company for the Hoy Company, the surety was released. Extras were provided for in the contract, and this court has held that in such cases the doing of extra work by the contractor would not release the surety upon the bond. Jenkins v. American Surety Co., 45

Wash. 573, 88 Pac. 1112.

A number of other points are discussed in the briefs, but our conclusion to the effect that the Placing Company was not justified in refusing to carry out its work under the concreting contract, and was therefore in default of that contract, necessarily leads to the conclusion that the respondent is entitled to the damages resulting from a breach of that contract by the Placing Company.

As we have intimated above, we are satisfied that the trial court correctly found the facts upon the different items in the accounting between the parties.

The judgment must therefore be affirmed.

ELLIS, C. J., and PARKER and HOL-COMB, JJ., concur.

### In re BRUEN. (No. 8.)

(Supreme Court of Washington. May 11, 1918.)

COURTS \$\sum\_206(18)\$—SUPREME COURT—IN-HERENT POWERS.

The inherent power of the Supreme Court is the power to protect itself, to administer justice whether any previous form of remedy has been granted or not, to promulgate rules for its practice, and provide process where none exists.

2. ATTORNEY AND CLIENT 4=36(1)-DISBAR-MENT-JURISDICTION.

The inherent power of the Supreme Court to admit attorneys at law to practice necessarily includes the power to disbar.

ATTORNEY AND CLIENT @==3-ADMISSION

TO PRACTICE—JUBISDICTION.

The Supreme Court is the only court entitled to admit and enroll attorneys in the state.

CONSTITUTIONAL LAW 4 52 - JUDICIAL FUNCTIONS-REGULATION.

Admitting to practice, suspending, and dis-barring attorneys being a judicial function, the Legislature may regulate, but cannot take it

COMBINING LEGISLATIVE, JUDICIAL AND AD-MINISTRATIVE FUNCTIONS.

Laws 1917, c. 115, giving board of law examiners power to initiate complaints against attorneys and hear and determine their rights to practice, creates a judicial tribunal, having administrative and delegated legislative powers in violation of Const. arts. 1, 2, and 4, providing for three separate branches of government.

6. STATUTES \$==64(3)—ELIMINATING INVALID

PROVISION

Laws 1917, c. 115, being valid in so far as it makes the board of law examiners an inas it makes the board of law examiners an intermediary whereby the power of the Supreme Court can be more generally and efficiently exercised, will be sustained, since the invalid portion, giving the board power to make a final order of disbarment, is separable from the valid portion.

7. Constitutional Law == 275(1) - Dur

PROCESS OF LAW.
Laws 1917, c. 115, as to disbarment of at-Laws 1917, c. 110, as to disbarment of attorneys, does not take private property or property right without due process of law in violation of state Const. art. 1, § 3, and federal Const. Amend. 14, since notice and hearing are provided for, and a final hearing will be had in the court of last resort.

8. ATTORNEY AND CLIENT \$\infty\$36(1)—DISBARMENT—STATUTE—VALIDITY.

Laws 1917, c. 115, as to disbarment, is in
all respects constitutional, except the provision
for a final order or judgment of disbarment by the board of law examiners.

En Banc. Petition to Review Ruling of Board of Law Examiners.

Proceedings before the Board of Law Examiners for the disbarment of James B. Bruen, an attorney at law. Order of disbarment, and Bruen petitions to review findings of the board. Petitioner's name ordered stricken from the roll of attorneys.

Walter Schaffner, of Seattle, for petitioner. W. V. Tanner and Hance H. Cleland, both of Olympia, and Thomas F. Murphine, of Seattle, for respondent.

HOLCOMB, J. This proceeding was instituted under the Laws of 1917, chapter 115. The complaint in disbarment by the chairman of the board of law examiners alleges that Bruen's "conduct of the affairs of said Charlotte Isom constituted unprofessional conduct as an attorney at law and involved moral turpitude to such an extent that his right to practice his profession as an attorney at law in the state of Washington should be revoked." The matter was brought on for hearing before the chairman of the board of law examiners, who heard the testimony at Seattle, Wash., in October, 1917. After taking the testimony and hearing the argument in the matter, the full board of law examiners made findings to the effect that the charges against the attorney were true, and conclusions to the effect that his right to practice law had been forfeited; that he should be disbarred, and his name stricken from the roll of attorneys of this court and of the state of Washington. They thereupon made an order to that effect, which was filed in



this court under the provisions of rule 21 of this court. Within 30 days after the filing of the report and findings, Bruen filed his petition to review the findings of the board of law examiners.

In limine he contends that the act of 1917, in so far as it seeks to delegate to the board of law examiners the function of hearing and determining the question of his fitness to continue in the practice of the law is unconstitutional as an encroachment upon the judicial powers conferred by the Constitution upon the courts. Several briefs and arguments have been filed by amici curiæ, all of which take the same position as to the constitutionality of the law, except that of Mr. Rummens. The principal propositions advanced to defeat the law are: (1) That it attempts to confer upon the state board of law examiners judicial powers and functions which can only be exercised by the courts provided for in the Constitution. (2) That it violates section 6 of article 4 of the Constitution, which provides that the superior court shall have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested in some other court. (3) That it violates the fundamental principles and purposes of the state Constitution, and particularly articles 1, 2, and 4 thereof, which provided for the three separate and distinct branches of government, because the act provides that the board shall exercise administrative, legislative, and judicial powers and functions in the same matter or proceeding. (4) That the act violates section 3 of article 1 of the state Constitution and the fourteenth Amendment to the Constitution of the United States, in that it deprives persons of their liberty and property without due process of law. (5) That it violates section 12 of article 1 of the state Constitution and the fourteenth Amendment to the United States Constitution, in that (a) it constitutes class legislation; (b) abridges privileges and immunities of the citizens of the United States: (c) denies to persons within the jurisdiction of the state of Washington the equal protection of the laws. (6) That it violates section 8 of article 6 and section 7 of article 27 of the state Constitution, which require that all state officers be elected by the people.

It is apparent that the act was modeled after the legislation providing for the regulation and forfeiture of licenses of physicians and surgeons, which was sustained in State Board of Medical Examiners v. Jordan, 92 Wash. 234, 158 Pac. 982, and State Board of Medical Examiners v. Macy, 92 Wash. 614, 159 Pac. 801. Similar legislation regulating certain professions has been sustained in regard to dentists (State v. Brown, 37 Wash. 97, 79 Pac. 635, 68 L. R. A. 889, 107 Am. St. Rep. 798) and school-teachers (Van Dyke v. School District, 43 Wash. 235, 86

Pac. 402). We have held, in Re Lambuth, 18 Wash. 478, 51 Pac. 1071, that the power to strike from the rolls an attorney is inherent in the court itself: that no statute or rule is necessary to authorize punishment in proper cases; that statutes and rules may regulate the power, but they do not create it; that this power is necessary for the protection of the court, the proper administration of justice, the dignity and purity of the profession, and for the public good and the protection of clients; that attorneys may forfeit their professional franchise by abusing it, and the power to exact the forfeiture is lodged in the courts which have authority to admit attorneys to practice; that such power is indispensable to protect the court, the administration of justice, and that attorneys themselves are vitally concerned in preventing the vocation from being sullied by the conduct of unworthy members.

[1-3] The inherent power of the court is the power to protect itself; the power to administer justice whether any previous form of remedy had been granted or not: the power to promulgate rules for its practice; and the power to provide process where none exists. It is true that the judicial power of this court was created by the Constitution. but upon coming into being under the Constitution, this court came into being with inherent powers. Among the inherent powers is the power to admit to practice, and necessarily therefrom the power to disbar from practice, attorneys at law. Formerly attorneys were admitted in various courts. The Legislature, with a view of bringing about uniformity in the requirements and standards for admission of attorneys, conferred the whole matter of admission of attorneys upon this court, and this court is the only court entitled to admit and enroll attorneys in the state of Washington. evident purpose of chapter 115, Laws of 1917, was to remedy and prevent mischiefs. "At common law, an attorney was always liable to be dealt with in a summary way for any ill practice attended with fraud or corruption, and committed against the obvious rules of justice and honesty. No complaint. indictment, or information was ever necessary as the foundation of such proceedings. Usually they are commenced by rule to show cause, or by an attachment or summons to answer; but these are issued on motion or bare suggestion to the court, or even on the knowledge which the court may acquire of the doings of an attorney by their own observation. No formal or technical description of the act complained of is deemed requisite to the validity of such a proceeding. Sometimes they are founded on affidavit of the facts, to which the attorney is summoned to answer; in other cases, by an order to show cause why he should not be stricken from the roll; and, when the courts judicithey will, of their own motion, order an in-, a certain class of our society to the contrary. quiry to be made by a master without issuing any process whatever, and on the coming in of his report will cause his name to be stricken from the roll." In re Randall. 11 Allen (Mass.) 473.

[4] Under the statutes of this state a comprehensive system has been adopted with reference to the admission, suspension, and disbarment of attorneys. The power to admit, so far as the statutes of this state are concerned, is vested in the Supreme Court. The cases are fairly uniform upon the proposition that admitting to practice, suspending, and disbarring are judicial functions. The legislative power, in the interest of uniformity of standard and to remedy and prevent mischiefs in the profession, may regulate and restrict this power, but cannot take it away. It may provide machinery for the administration of the regulation provided by the Legislature, as in carrying into effect such regulations some agency is necessary. In this instance it has provided the machinery and agency of the state board of law examiners. This board has, as urged in several of the arguments before us, been granted powers which partake of the nature of legislative, administrative, or executive and judicial. Certainly it is judicial power that is conferred when it is given the power to hear and determine the right of a person to continue the practice of law, and it not only hears and determines the right of a person to practice law, but it initiates complaints against such persons, which is the function of an administrative officer. These functions, it has been urged, have been combined in the state board of medical examiners. in the state board of dental examiners, and in other such boards, and their powers and functions have been upheld. But those professions and occupations are not filled by persons who are solely and exclusively officers of the court and under the control and regulation of the courts. The boards regulating them are administrative boards, with some incidental quasi judicial powers which cannot be exercised by them finally, but are subject to review by the courts, and a review by the courts in those cases must go before a court of original and general jurisdiction, to wit, the superior courts. It is obvious that the board of law examiners has been created a sort of inferior court, inferior only to this court, for a review is provided for from that board to this court only.

[5] These functions being essentially judicial and inherent in the courts, we are of the opinion that the Legislature has attempted to create a judicial tribunal which at the same time has administrative and delegated legislative powers. Such a system is not warranted under our constitutional form of government. The legislative, executive, and judicial functions have been carefully sepa-

the courts have ever been alert and resolute to keep these functions properly separated. To this is assuredly due the steady equilibrium of our triune governmental system. The courts are jealous of their own prerogatives, and at the same time studiously care. ful and sedulously determined that neither the executive nor legislative department shall usurp the powers of the other, or of the courts. Now, it is evident that under our Constitution this board may exercise such delegated legislative powers as have been granted to it, which are the examination of applicants for admission to the bar and the prescribing of certain rules; and they are competent to exercise the administrative powers conferred upon them of investigating the conduct of attorneys who have been admitted, to ascertain whether or not they should be permitted to continue to practice their profession, in order that the mischlefs sought to be remedied by the Legislature may be remedied and prevented, and may initiate compiaints in such cases and hear the evidence, and make reports and findings thereon. But the board is not a court, and cannot exercise the functions of a court, except the limited function of passing upon evidence received by them and reporting it. They can make no order striking the name of an attorney from the rolls or disbarring him from practice.

[6] The question then arises whether effect can be given to chapter 115 by eliminating the provisions authorizing the board to enter judgment or enter judicial orders or simply have the board make their findings and reports to this court. It is vigorously contended in several of the arguments before us that no court in this state has original and general jurisdiction except the superior court, and that therefore any report or findings made by any such administrative board should be made to the superior court for review and order, and that, the legislation before us not so providing, there is no way to proceed to disbar an attorney except by proceeding originally in the superior court. Much strength is given to this view by the decision of this court in Re Waugh, 32 Wash. 50, 72 Pac. 710. In that case Judge Dunbar, writing for the court, held that the Supreme Court has no jurisdiction of proceedings for the disbarment of an attorney, either under constitutional authority or by virtue of its inherent powers, although the attorney may have perpetrated a fraud upon the superior court in gaining admission to practice. The decision was by a divided court; three of the judges signing the prevailing opinion and two of them the dissenting. It has long been held that the court which has power to admit attorneys has also the power to disbar them. That principle was overlooked in the Waugh Case. If this court has not the powrated, and, notwithstanding the opinions of er conferred upon it by legislation to pass



bar of applicants therefor, and of enrolling them as the only court of the state having such power, a great many attorneys in this state have not been legally admitted to practice. The Lambuth Case, hereinbefore quoted, in our opinion held contrary to the decision in the Waugh Case; and Robinson's Case, 48 Wash, 153, 92 Pac. 929, 15 L. R. A. (N. S.) 525, 15 Ann. Cas. 415, also held to the contrary. We are of the opinion that the Lambuth and the Robinson Cases proceeded upon the right principles and are in conflict with the Waugh Case, and that the Waugh Case is in conflict with the very great weight of authority. As to the matter of original jurisdiction in such proceedings, we now believe it should be, and it is, overruled.

We are of the opinion that this court, having been exclusively vested with the power of admitting attorneys to practice, may also be exclusively vested with the power of disbarring attorneys from practice. While it is a matter of great importance to the private practitioner, it is also a matter of great public concern. Having the sole and exclusive power in such matter, not prohibited by any constitutional provision, and not infringing in any way upon any legislation of the state except that part of chapter 115 last discussed, the Legislature provided an intermediary agency, whereby the power of the court could be more generally and efficiently exercised. To that extent the legislation was warranted and valuable. The invalid portion is manifestly separable from the valid portions of the act, which may therefore be sustained.

[7] There is no merit in the contention that the legislation takes property or property right without due process of law, in violation of the state and federal Constitutions. Notice and hearing are provided for, and the final hearing will be speedily had in the court of last resort of the state without any considerable expense to the person accused.

[8] This meets every requirement of the Constitutions. We hold, therefore, that the act is in all respects constitutional, except the provision for a final order or judgment of disbarment by the board of law examiners. It will be their duty henceforth, upon proceeding against any person accused under the act, to have a hearing and report their findings to this court. No judgment or order shall be made by them, but the matter shall be determined and reviewed by this court in accordance with the rules which we have already adopted. Rules 21, 22, and 23, entered March 27, 1918. Rule 23 will necessarily have to be amended to conform to this decision.

The matter is before us to review the report and findings of the investigating board, made after a hearing upon due notice.

As to the facts in this case, we have ex-

upon the qualifications for admission to the amined the record, and are firmly convinced that of applicants therefor, and of enrolling them as the only court of the state having of law examiners are justified, and that the such power, a great many attorneys in this petitioner has forfeited his right to practice, state have not been legally admitted to practice. The Lambuth Case, hereinbefore quot-

ELLIS, C. J., and CHADWICK, MOUNT, PARKER, WEBSTER, and MAIN, JJ., concur. FULLERTON, J., concurs in the result.

CLARK v. CITY OF SEATTLE (two cases). (No. 14416.)

(Supreme Court of Washington. April 8, 1918.)

MUNICIPAL CORPORATIONS \$= 736—LIABILITY FOR NUISANCE.

Where wading pool in city playground was drained and cleaned each Friday, that a broken bottle was cast therein by some one between Friday and Sunday following, when a girl wader was injured by cutting her foot on such a bottle, would not be sufficient to charge the city with maintaining a nuisance, in the absence of any showing that the city or park board had any notice that the pool contained broken glass prior to the accident.

Department 1. Appeal from Superior Court, King County; Ralph C. Bell, Judge,

Consolidated actions by Virginia A. Clark and by Virginia A. Clark, a minor, against the City of Seattle. From a judgment for defendant, plaintiffs appeal. Affirmed.

Vanderveer & Cummings, of Seattle, for appellants. Hugh M. Caldwell and Frank S. Griffith, both of Seattle, for respondent.

MAIN, J. This is an appeal from a judgment dismissing two actions which had been consolidated for the purpose of trial. One action was brought on behalf of a child, who had sustained a personal injury; the other, by the mother of the child, for the loss and expense which she had sustained by reason of the injury to the child.

In one of the public parks of the respondent city there was constructed and maintained what is known as the Lincoln Playfield. In this playfield had been constructed a cement wading pool, the water in which at its deepest place was about one foot. In this pool children were accustomed, during the warm weather, to wade for recreation and amusement. On the 27th day of August, 1916, Virginia A. Clark, a child then about the age of 10 or 11 years, while wading in the pool, cut her foot on a broken glass bottle. How the bottle got into the pool is not known. After the injury there was taken from the pool a small glass bottle, which was broken in two pieces. At the conclusion of the evidence offered in support of the recovery, the city challenged the sufficiency thereof, and moved the court for a judgment of dismissal. This motion was sustained, and from the judgment dismissing the actions the appeal is prosecuted.

The appellants recognize the rule of non-phearing thereon was continued, an order changability of the city, while acting in a governmental capacity, for the tortions acts or tice to the moving party. liability of the city, while acting in a governmental capacity, for the tortious acts or omissions of its agents, as stated in Russell v. Tacoma, 8 Wash. 156, 35 Pac. 605, 40 Am. St. Rep. 895, and Howard v. Tacoma School District No. 10, 88 Wash. 167, 152 Pac. 1004, Ann. Cas. 1917D, 792; but it is claimed that the facts in the present case show that the city was guilty of maintaining a nuisance, and for this reason the rule stated in the cases referred to does not apply. For the purposes of this case only it will be assumed, but not decided, that the city, even though acting in a governmental capacity, would still be liable for the maintenance of a nuisance to a person who sustained injury thereby. The evidence shows that the wading pool was drained and cleaned on Friday of each week. The accident in the present case occurred on Sunday. If the pool was drained and cleaned on the Friday previous, the fact that some thoughtless person may have cast into the pool a broken bottle between that time and the time of the injury would not be sufficient to charge the city with maintaining a nuisance. There is no evidence that either the city or the park board, under whose control the playfield was operated, had any notice, actual or constructive, that the pool contained broken glass prior to the accident. The judgment will be affirmed.

ELLIS, C. J., and PARKER, FULLER-TON, and WEBSTER, JJ., concur.

STATE ex rel. GILES et al. v. FRENCH, Judge. (No. 14729.)

(Supreme Court of Washington. May 8, 1918.)

continue the hearing.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Forthwith.1

2. JUDGES 4 56-DISQUALIFICATION-CALL-ING IN JUDGE.

Where, under Rem. Code 1915, § 209—1, on affidavit of prejudice, a judge decides to let the case proceed in his own court and calls in another judge, and for some reason such judge is unable to conclude it, the disqualified judge can call in another, but where a judge judge can call in another, but where a judge is called in, the disqualified judge cannot reas-sume jurisdiction and order the cause trans-ferred to another jurisdiction, and it is imma-terial that there was no formal order calling in the other judge.

 Judges ← 51(4)--Affidavit of Prejudice Where a motion for change of judge was made under Rem. Code 1915, § 209—1, and the judge would hear the pending motions in the

Mandamus by the State of En Banc. Washington, on the relation of M. E. Giles and others, to compel Hon. Walter M. French, as judge of the superior court of Kitsap County, to vacate an order for a change of ven-Writ granted.

F. W. Moore and Walter D. Peters, both of Bremerton, and Higgins & Hughes, of Seattle, for plaintiffs. J. W. Bryan, of Seattle, for respondent.

FULLERTON, J. This is an application for a writ of mandamus, directed to Hon. Walter M. French, as judge of the superior court of Kitsap county, commanding him to vacate an order for a change of venue entered in a cause pending in the court named.

The cause is before us on the application for the writ and the return of the judge thereto. From these we do not find any substantial disagreement as to the facts. It appears that in April, 1917, Marion Garland and Arthur C. McLane, as plaintiffs, began an action against M. E. Giles, Frye & Co., John C. Higgins, Herman Behrens, and others, as defendants, to recover in damages, charging a conspiracy on the part of the defendants to ruin the plaintiffs' business. On May 1, 1917, the defendant Giles appeared in the action by counsel, and timely filed a motion for a change of judge, accompanying the motion with an affidavit of prejudice against the presiding judge, Walter M. French, in the form prescribed by the Code. Rem. § 209-2. The motion was regularly placed upon the motion calendar and noted for hearing at the next regular motion day. namely, May 5, 1917, and on that day was called to the attention of the presiding judge and by him ordered continued. Other defendants thereafter appeared, and, together with the defendant Giles, filed motions against the complaint, and noted the same for hearing on Saturday May 19, 1917, a regular motion day of the court. There was then pending in the court another proceeding between the same plaintiffs and the defendant Giles, in which a similar motion and affidavit had been filed by the defendant Giles. Certain preliminary motions had been heard in this proceeding by a judge of King county, called in to preside because of the disqualification of Judge French, and the cause had been set down for trial upon its merits for Friday May 18, 1917, the day prior to the day the motions were noted for hearing in the cause now under consideration. When it became known that the King county judge would be in attendance in Kitsap county on May 18, 1917, counsel, some of whom resided in King county and had their

present case on that day, notwithstanding investigation, inconvenient or impossible to the actions had been noted for hearing on the day following. Counsel on both sides gave heed to the notice and appeared and on that day presented the motions on their merits to the visiting judge. Rulings were also made by the visiting judge on the same day, and orders made thereon, which were duly entered of record by the clerk in the minutes kept by him of the proceedings. tween the date of this hearing and January 15, 1918, other motions were heard by the same judge and orders made thereon. These were heard by the judge sitting in chambers at his office in King county, pursuant to stipulation of counsel that they might be so heard. It appears further, however, that this was merely for the convenience of the judge and of counsel, all of the papers in the proceedings being entitled as of the court in the county where the action was then pending. On the date last given Judge French, purporting to rule upon the motion made on May 1, 1917, and noticed for hearing five days later, entered an order changing the venue of the action to King county. This order was made without notice to the defendants or to their counsel and without knowledge on their part; the plaintiffs alone being represented at the time. This is the order sought to be vacated by the present proceeding.

[1, 2] The statute prescribing the action of a judge of the superior court against whom prejudice is established by the filing of the affidavit mentioned therein reads in part as follows:

"In such case the presiding judge shall forth-with transfer the action to another department of the same court, or call in a judge from some other court, or apply to the governor to send a judge, to try the case; or, if the convenience of witnesses or the ends of justice will not be on witnesses or the ends of justice will not be interfered with by such course, and the action is of such a character that a change of venue thereof may be ordered, he may send the case for trial to the most convenient court." Rem. Code, § 209—1.

This statute, while somewhat imperative in its language, cannot be given, it is plain, a too literal interpretation. As we said in State ex rel. Lefebvre v. Clifford, 65 Wash. 313, 118 Pac. 40, the spirit and reason of the law must be regarded, to the end that there should be no undue interference with the orderly administration of justice, holding that the application must be made timely, and it is too late if made after hearings have been had or a trial has been entered upon before the judge against whom the charge of prejudice is made. Since therefore the statute was to promote and not to interfere with the orderly administration of justice, the command of the statute that the presiding judge "forthwith" do some one of the things therein provided must be construed so as to best accomplish its purpose. In a county where there is only one judge the proper disposition of the case may require an

make at the time the affidavit is called to the judge's attention, and in such an instance we are clear that the judge may continue the cause until such time as the investigation can be properly made. We are clear also that, if the judge decides to let the cause proceed in his own court and call in another judge to hear it, his power is not exhausted by a single attempted exercise of the power. If, for example, another judge is called to try the case and for any reason may be unable to conclude it, the disqualified judge may call in another, and his powers in that respect continue until final judgment is entered. But we think that when a course is once determined upon, the presiding judge is without power to recall it and determine upon another; that, after he has determined that the cause shall be tried in the court of original jurisdiction and another judge has been called in to hear it, he cannot reassume jurisdiction and order the cause transferred to another jurisdiction. If the power exists it can be exercised in the midst of a trial as well as at another time, and in effect do the very things the statute sought to avoid. This is the effect of our holding in the case of State ex rel. O'Phelan v. Superior Court, 88 Wash. 669, 153 Pac. 1078. In that case an affidavit of prejudice had been filed and another judge called to try the cause. Ten days thereafter the presiding judge entered an order changing the venue to another county. This was held to be beyond the powers of the presiding judge. A parallel situation is presented here. Not only had another judge been called in to hear the case, but he had entered orders therein, and was proceeding regularly with the hearings when the order changing the venue was entered.

It is true that here no formal entry was made, calling in another judge to hear the cause, and it is true also that the trial judge states in his return that the judge who entered upon the hearing did not do so under his direction. But elsewhere it appears that the presiding judge recognized his own disqualification and had knowledge that another judge was proceeding with the hearings. A formal order calling in another judge was not a jurisdictional requirement. To act or acquiesce was sufficient in this regard, and we think there is no question other than that there was here both action and acquiescence. It follows that the subsequent order changing the venue was beyond the powers of the court.

[3] The order was erroneous for another reason. It was made ex parte. The defendants had appeared in the action, and the statute entitled them to notice of all subsequent proceedings.

The writ will issue.

ELLIS, C. J., and CHADWICK, MOUNT, MAIN. PARKER, HOLOOMB, and WEB-STER, JJ., concur.

## CROOKS V. STEVENS COUNTY. . (No. 14435.)

(Supreme Court of Washington, May 8, 1918.)

HIGHWAYS \$\insigma 197(3) — Injuries from Defects—Proximate Cause.

Plaintiff cannot recover against a county for personal injuries resulting from the overturning of his load of hay, where he knew the condition of the road and the accident resulted from his own negligence in the character of the load and in the manner of his driving.

Department 2. Appeal from Superior Court, Stevens County; J. T. Ronald, Judge. Action by S. W. Crooks against Stevens County. From a judgment for the defendant notwithstanding verdict, plaintiff appeals. Affirmed.

Roche & Onstine, of Spokane, and R. A. Thayer, of Colville, for appellant. L. B. Donley and L. C. Jesseph, both of Colville, for respondent.

MOUNT. J. This action was brought to recover damages for personal injuries which the plaintiff received by the overturning of a load of hay upon which he was riding while driving over one of the public roads of Stevens county. The case was tried to the court and a jury. At the close of the plaintiff's case the defendant moved the court for a directed verdict. The trial court apparently had no doubt that he should grant this motion, but stated in substance that, in order to avoid another trial in case he was in error. he would hear all the evidence and submit the case to the jury, and later enter such judgment as in his opinion was proper. After the close of the defendant's evidence the motion was renewed and denied. The case was submitted to a jury, and resulted in a verdict of \$3,000 in favor of the plaintiff. Thereupon the trial court granted a judgment in favor of the defendant notwithstanding the verdict. The plaintiff has appealed from that judg-

The facts are as follows: Prior to the 28th day of October, 1914, Stevens county had constructed a road from the town of Orient down a hill leading to a bridge across the Kettle river. This road was constructed upon a hillside. At the point where the appellant was injured different witnesses placed the width of this road at from 6 feet, 10 inches, to 8 feet. At this point the road was blasted out of solid rock so that there was an embankment about 5 feet high on the upper side, and the lower side was somewhat above the slope of the hill. At this point the road was somewhat rough because of the rocky condition. There was also a slight turn in the road at this point. It is contended by the appellant that a large rock sloped down from the embankment on the upper side of the road to or into the traveled way. There is some dispute

named the appellant went over this road for a load of hay. After going over the road he loaded the loose hay upon his wagon and started back to his home. He was familiar with the road, having been over it a number of times. Being asked to describe the event he testified as follows:

"Well, I started down this grade—when I came to the top of the grade I got out to see that everything was all right; the wagon was all right; the hay was seemingly in the proper position; the rack sat solid on the wagon. I got out to see to this before I started down this grade to be sure that everything was all right! I examined to see that all of these things. right. I examined to see that all of these things were just so. I knew it was a dangerous road. I took particular pains to have the lines just so in my hands, and the brake rope. So I started down. I held the lines in one hand and the brake rope in the other. Possibly at and the brake rope in the other. Possibly at times I held both together, but most all of the time I had one hand holding the lines and the other the brake rope. The team was a gentle team, and everything was all right. There was no unusual thing happened that I know of.

\* \* I came down to the place, right to the place where this accident happened. I knew that it was rough right at that point; I knew there were several rocks there, but just exactly where this particular rock was I didn't know. I didn't know there was such a big rock as that one, but I knew there was rocks there, because going up that road I could experience more or less of the roughness, so coming down I knew, that being so, that I would have to be very careful in going over that part of the road, the road being so narrow and all of those rocks there, so I drove the team very carefully, and I came right down to this rock, I could feel several bumps there right around where this accident happened. I came down a little further, and I could feel more bumps, and as I came around this angle, the front wheel I could feel took an unusual jar, and as I went over it I knew I had scraped across over one of those big rocks, so immediately as soon as I crossed over that—I was holding onto the lines-holding the team as best I could, as good as any teamster could do when the horses, being pressed by the load, and maybe being a little nervous, and when the hay bumped into them they give a quick step, and immediately after that the hind wheel I could feel it take a great bump, which was right over that rock, and when it struck the rock the load of hay and the rack went right over, and of course I went right over with it; the rack and the hay and I went over the embankment, and I was thrown a little in front of the hay, so that I escaped being buried.

This is the explanation which the appellant himself gives of the accident and how it occurred. He was the only eyewitness to the accident. The wagon did not turn over. The hay and the rack upon the wagon fell from the wagon. The wagon and the team remained upon the road. Other witnesses testified that at this particular point a ledge of rock sloped and extended from the bank down near the wheel tracks. There was a slight curve in the road at this point, and the appellant, while coming down the grade and attempting, no doubt, to hold the load in close to the bank at the upper side, turned his front wheel against this sloping ledge of rock. The rear wheel struck the rock where it was upon this particular question. On the date somewhere between 12 and 15 inches high,

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and in that way the load and the appellant travel, that the load of loose hay piled high were thrown from the wagon.

It is argued by the appellant that the road was not a reasonably safe road by reason of this rock and by reason of the fact that the road was on a grade and by reason of the fact that the road was narrow. A number of cases are cited to the effect that it was error of the trial court to grant a judgment notwithstanding the verdict, because the court may not say that there was neither evidence nor reasonable inference from evidence to sustain the verdict. While it is true the evidence shows that the road was narrow and rocky at the point where this accident occurred, the evidence clearly shows that the road was reasonably safe for ordinary travel, and that if the appellant had kept his wagon in the tracks where wagons were accustomed to go at that particular point, the accident would not have happened. The accident was caused solely by the appellant's veering from the beaten way to the side of the road and striking against the ledge of rock in the bank on the upper side. The hind wheel of the wagon struck this rock at a height of from 12 to 15 inches, which was sufficient to, and no doubt did, cause the load of hay upon the wagon to be thrown from the road. The appellant was familiar with the character of the road; he knew that it was narrow, he knew that it was rough at this particular place, and he knew that it was on a hill. Whatever dangers there were were open and apparent to him, and it was his duty, under these circumstances, to follow the beaten track, and not to veer therefrom so as to run his wagon against the embankment or a rock which was located therein. It is common knowledge that in a mountainous country the roads are frequently graded out of hillsides through rocky cuts, and are narrow of necessity. Counties are not insurers of the safety of such roads for loads such as the appellant was carrying. As we said in Culley v. King County, 171 Pac. 1034, in quoting from Leber v. King County, 69 Wash. 134, 124 Pac. 397, 42 L. R. A. (N. S.) 267:

"'We think it will require no argument to make plain the fact that here there was no extraordinary condition or unusual hazard of the road. A similar condition is to be found upon practically every mile of hill road in the state. The same hazard may be encountered a thousand times in every county of the state. Roads must be built and traveled, and to hold that the public cannot open their highways until they are prepared to fence their roads with barriers strong enough to hold a team and wagon when coming in violent contact with them, the condition being the ordinary condition of the country, would be to put a burden upon the public that it could not bear. It would prohibit the building of new roads and tend to the financial ruin of the counties undertaking to maintain the old ones.'"

It is plain from a reading of the whole conclusion of all the evidence, defendant evidence in the case that the road at the point moved the court for a directed verdict. in question was reasonably safe for ordinary. These motions were denied, and the jury re-

was not ordinary travel, and that, if the appellant had kept his wagon in the tracks which were worn upon the road at this particular point, and had not deviated so as to run his wagon against the bank upon which the rock was located, the accident would not have happened. In short, while the appellant undertakes to testify that he was careful in every respect-in examining his wagon and his load, and in handling his team-it is plain that the cause of the accident was his own negligence in carrying the character of load he did and in veering from the road and striking the rock, causing the wagon to throw the load and injure him. We are satisfied that there was neither evidence, nor inference which could properly be drawn from the evidence, to sustain the verdict.

The judgment is therefore affirmed.

ELLIS, C. J., and PARKER, CHAD-WICK, and HOLCOMB, JJ., concur.

FRENCH v. SPOKANE & I. E. R. CO. (No. 14503.)

(Supreme Court of Washington. May 8, 1918.)

CARBIERS \$\infty 320(13)\$—Injury to Passenger —Negligence—Snow and Ice on Street Car Platform—Evidence.

Evidence in action for injury to passenger by slipping on snow and ice on street car platform held sufficient for the jury on the issue of negligence, on the theory that it had not been cleared at end of previous run.

Department 2. Appeal from Superior Court, Spokane County; Bruce Blake, Judge. Action by Lizzie French against the Spokane & Inland Empire Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Graves, Kizer & Graves, of Spokane, for appellant. Robertson & Miller and Mulligan & Bardsley, all of Spokane, for respondent.

MOUNT, J. Action for personal injuries. Plaintiff, in her complaint, alleged that on February 1, 1916, she became a passenger on one of defendant's street cars in the city of Spokane, and that when she left the car at her destination she slipped and fell upon ice which had accumulated upon the platform of the car, thereby receiving serious injuries. Defendant, for answer to the complaint, admitted that the plaintiff was a passenger on one of its cars at the time alleged, and that she fell while leaving the car, but denied all other allegations of the complaint. Contributory negligence was pleaded as an affirmative Upon these issues the case was tried to the court and a jury. At the close of the plaintiff's evidence, and again at the conclusion of all the evidence, defendant moved the court for a directed verdict.

\$600. Thereafter the defendant moved for judgment notwithstanding the verdict. This motion was denied. Judgment was entered upon the verdict. The defendant has appealed.

The only question made upon this appeal is whether the evidence is sufficient to sustain a recovery. The respondent testified that she left her home in the south side residence district of Spokane at about 7:30 o'clock p. m. of February 1, 1916, to visit a friend on the north side of the city. She started to return home between 9:30 and 10 o'clock, taking a car on one of the appellant's lines to a junction point at Olive and Madelia streets in the northeastern part of the city. There she changed to a car of another of its lines. This car had come from the end of the line at Sprague and Freya streets, a distance of about 20 blocks from Olive and Madelia streets. The car continued on its run into the downtown business district, through that, and out into the south side residence district. It reached the respondent's destination. Second and Sherman streets, at about 10:45 o'clock The run from Olive and Madelia D. 13. streets to that point had taken about 45 minutes. The conductor's trip report showed that 27 passengers got on the car between the end of the line and Second and Sherman streets, nearly all of them during the passage through the business district. When the respondent was attempting to leave the car, after she passed from the inclosed portion through the door and onto the rear platform of the car, she slipped and fell, receiving injuries for which the recovery was had.

It is not claimed that the appellant was in any other way negligent than that it permitted snow and ice to accumulate on the plat-Respondent testified that when she boarded the car she noticed snow and ice on the platform above the steps leading thereto from the ground. She testified that the snow and ice looked as if it had been tracked in by people coming in; that it was where traffic would come in and out of the steps into the door; that there was snow on the ground, but that it did not snow from the time she left home about 7:30 o'clock until after she returned that evening; that somewhere between 5 and 7 o'clock there had been some snow; and that there was about an inch of fresh snow on the ground. There was dispute in the evidence as to whether it snowed that day between the hours of 7 and 10:45 o'clock. The conductor who was on the car at the time of the accident testified that he cleaned the snow from the car at the end of his run. Counsel for appellant argues that there was no negligence shown on the part of the company, and that the evidence shows that the snow and ice which had accumulated upon the platform accumulated upon that particular trip. Appellant relies principally upon the case of Caywood v. Seattle Electric after the end of the run, were questions which Co., 59 Wash. 566, 110 Pac. 420. That was a the jury were competent to decide; and, if

turned a verdict in favor of the plaintiff for; case where the jury had found in favor of the defendant. In that case it was alleged that snow and ice existed on the steps of the car and in the entrance way at the time the appellant fell from the car. We said in that CARA:

> "Nor was there any evidence tending to show that it [meaning the snow and ice] had existed there for any considerable length of time. On the contrary, the evidence that does touch the question is the other way. The appellant himself testified that when he boarded the car in sent testined that when he boarded the car in the downtown district he saw no snow or ice either on the steps of the car or in entrance way, and thinks there was none. Such snow and ice as had accumulated in these places, therefore, must have accumulated during the passage of the car from the place where the passage of the car from the place where the appellant boarded it to the place where he fell therefrom, and as but a trace of snow fell during that trip, the ice and snow must have been brought in by the feet of the passengers who boarded the car between those points. But the fact that some snow and ice may have accumulated by this means is not evidence of negligence on the part of the company. It is not practicable to prevent such a condition when there is snow falling or there is snow upon the ground."

> We think that case is distinguishable from this by reason of the fact that when respondent boarded the car she saw snow and ice had accumulated upon the platform. She also testified that snow had not fallen between the hours of 7:30 and 10:45, the time she was injured. The fact that snow and ice had formed upon the back platform of the car was at least some evidence of the fact that the snow was not cleared from the platform at the end of the trip, because ice will not ordinarily form from snow which is freshly tracked upon the car. Whether the company was negligent in permitting snow and ice to accumulate upon the platform of the car under the evidence offered by the respondent we think was a question for the jury. It is no doubt true, as stated in Caywood v. Seattle Electric Co., supra, that some snow and ice may necessarily accumulate upon the steps of a street car when there is fresh snow upon the ground; and it is probably true that in running a distance measured by 45 minutes in the time the wheels of the car might throw some snow upon the steps; but in this case there was snow above the steps, on the platform, which was some distance above the wheels. It is improbable that the wheels of the car had anything to do with putting the snow there. The snow which was upon the platform was no doubt carried there by passengers entering the car. The ice was evidently the result of snow which had accumulated previously. It is quite unlikely that a dangerous quantity of snow would be carried there by the number of passengers who entered the car that evening between the time the respondent entered the car and the time she fell. Whether the snow and ice was so carried, or whether it was permitted to remain

they found that the conductor did not properly clear the car of snow and ice at the end of the run, they were justified, we think, in finding that the company was negligent. We are satisfied that the case is not controlled by the Caywood Case, and that there was sufficient evidence upon the question of appellant's negligence to go to the jury.

The judgment is therefore affirmed.

ELLIS, C. J., and PARKER, HOLCOMB, and CHADWICK, JJ., concur.

CITY OF SEATTLE v. WASHINGTON RE-FINING CO. (No. 14172.)

(Supreme Court of Washington. May 9, 1918.)

1. Eminent Domain ♣⇒221 — Damages — Property Not Taken—Questions of Fact.

In a proceeding to seize land for an alley under the power of eminent domain, the question as to damages to adjacent property not taken held for the jury.

2. TRIAL \$\infty 260(3) - Instructions - Requests-Matters Already Covered. In a suit to condemn land for an alley, where condemnation would result in cutting defendant's property in two, so as to make it two industrial units instead of one, a requested instruction that, in determining damages to land not taken, the jury could not consider that the city might in the future permit the two pieces to be connected with overhead crossings, or underground conduits, was not covered by an instruction given that when the alley was taken, the city became the owner of the fee thereof, and abutting owners had no greater right to its use than others.

3. EMINENT DOMAIN €==222(5)-PROCEED-INGS-INSTRUCTIONS.

In proceedings to condemn an alley, the result of which would be to divide defendant's property into two industrial units, an instruction that the jury could not consider the future construction of overhead bridges or underground conduits should have been given: there being no binding agreement or duty on the part of the city to construct such connections of the city to construct such connections.

4. EMINENT DOMAIN 250—PROCEEDINGS—RECORD ON APPEAL—INSTRUCTIONS.
On appeal in an eminent domain proceed-

ing, the question as to refusal and giving of instructions will be considered, notwithstanding all the instructions are not embodied in appellant's abstract, where they appear in the supplemental abstract as well as in the record.

Department 1. Appeal from Superior Court, King County; Everett Smith, Judge.

Proceeding by the City of Seattle against the Washington Refining Company to condemn land for an alley extension in blocks 14, 17, and 22, Eden's Addition, pursuant to Ordinance No. 32451. From a judgment for petitioner, defendant appeals. Reversed and remanded.

Tucker & Hyland, of Seattle, for appellant. Hugh M. Caldwell and James A. Dougan, both of Seattle, for respondent.

MAIN, J. This is a proceeding instituted by the city of Seattle, under its power of eminent domain, for the purpose of taking a

strip of land 39 feet wide, to be used as an alley. The appellant, the Washington Refining Company, was the owner of a portion of the property through which the proposed alley was to be extended. This property consisted of a tract, rectangular in form, about 130 or 140 feet by 240 feet. It was bounded on the east by Westlake avenue, on the west by Dexter avenue, and on the south by Highland drive. The property was used for a storage and distributing station for gasoline, lubricating oils, kerosene, distillate, and other petroleum products. The property before the alley was proposed consisted of one industrial unit, and after being separated by the alley it would consist of two such units. In other words, the property now devoted to the purpose specified will, after the alley is established, instead of being one tract of land, consist of two, of approximately the same size, on opposite sides of the alley. The evidence as to the value of the land taken was not disputed by the appellant. No damages were allowed by the jury to the property not taken by reason of the severance of the property taken.

The appeal presents only questions as to whether there was error relating to the question of the assessment of damages to the portion of the property not taken. The proposed alley passed over the property of a considerable number of persons other than the appellant here; but, since there is but the one appeal, no reference need be made to other property owners affected by the improvement.

[1, 2] It is first argued that there was no competent testimony in the case to warrant a verdict of no damage to the remainder. Whether the remainder was damaged was, of course, a question of fact, the city's witnesses testifying that there was no such damage, and the appellant's witnesses testifying that there was damage in a considerable amount. Even though it might appear that the weight of the testimony upon this question was with the appellant, yet it was a matter for the jury to determine. It cannot be here held, as a matter of law, that there was no evidence to sustain the verdict. A number of the assignments of error relate to the failure of the court to give certain requested instructions and to certain instructions which were given. Upon the question of damage to the remainder, the appellant requested an instruction to the effect that in determining such damage the jury were not to take into consideration the fact that the city might at some future time grant a permit to the appellant to connect the operations in the two units of its plant, separated by the alley, by either an overhead crossing or underground conduits. The respondent does not seem to question the correctness of this request, but claims that it was covered

in an instruction given, wherein the jury were told that when the alley was taken for street purposes the city became the owner of the fee thereof, and the owners of abutting property had no greater rights to the use of such alley than any other inhabitants of the city. It does not seem to us, however, that this instruction covers the ground contained in the request which was refused. To say that the abutting property owner has no greater rights to the alley than any other inhabitant of the city is not the same thing as telling the jury that in determining damages to the remainder they should not take into consideration the fact that the city might at some future time permit an overhead crossing or underground conduit. It must be remembered that in this case it was not proposed by the city in any legally binding form, or at all, to grant to the appellant the right to such overhead crossing or under-The requested instruction ground conduit. was appropriate in the light of the evidence taken. When the appellant's engineer was testifying in chief, he was asked, in substance, whether his testimony as to damage to the remainder was based on the assumption that the appellant had no right to connect the two units of the plant by crossing the alley either overhead or underground. and answered in the affirmative. On crossexamination, over objection, he was asked whether, if the city should permit such a crossing of the alley, it would modify the amount of damage to the remainder. view of the fact that the city did not bring into the case, in any legally binding form, the fact that it would in the future grant such a permit, it seems to us that the jury should have been expressly told that they should not take that fact into consideration in determining damages to the remainder.

[3] The respondent refers to another instruction in which the jury were told that, if they found from the evidence that any ordinance of the city governs the erection of such plants as the Washington Refining Company. they should, in arriving at their verdict, take into consideration such damages, if any, as might be caused in order to comply with such ordinance of the city. This instruction obviously does not relate to any ordinance under which the appellant might obtain a permit either to arcade the alley or to cause pipes to be placed thereunder; but it unquestionably does relate to the fire ordinance which was introduced in evidence. though it did relate to the permit ordinance. if there be such, it still would not cover the question. As already pointed out, this record does not show that the city is legally bound to grant a permit, and in the absence of such a showing the fact that it might at some future time in its discretion grant such permit had no proper place in this case. The

instruction requested, or one of like import, should have been given.

[4] But the respondent claims that the question as to the requests refused and the instructions given is not properly here because all of the instructions are not embodied in the appellant's abstract. They do, however, appear in the supplemental abstract, as well as in the record. All the cases cited by the respondent upon this question were decided prior to the passage of the abstract law, and were cases where all of the instructions given were not embodied in the record. As to the other assignments of error not here specially mentioned, relating to the requests refused and the instructions given. it may be said, without reviewing them in detail, that we find no error in the instructions given; and, as to the requests refused. in so far as they were applicable to the case and correctly stated the law, they were sufficiently covered by the instructions given.

The judgment will be reversed, and the cause remanded, with direction to the superior court to grant a new trial.

ELLIS, C. J., and PARKER, FULLER-TON, and WEBSTER, JJ., concur.

WOLDSON v. RIGHMOND MINING, MILL-ING & REDUCING CO. (No. 14586.) (Supreme Court of Washington. May 18, 1918.)

CORPORATIONS 77 - STOCK - OPTIONS—CONSTRUCTION.

An option on shares of mining stock, "to be taken and paid for in such sums and amounts as may be required in prosecution of the work of the development," was only an option to purchase so much of the stock as was required to pay for development work, and ended when the mine became self-supporting.

Department 2. Appeal from Superior Court, Spokane County; Bruce Blake, Judge.

Action by Martin Woldson against the Richmond Mining, Milling & Reducing Company, for specific performance of a contract. From a judgment decreeing plaintiff damages, both appeal. Reversed, and action dismissed.

Merritt, Lantry & Merritt, Graves, Kizer & Graves, Stephens & Jack, and E. O. Connor, all of Spokane, for appellant. Voorhees & Canfield, of Spokane, for respondent.

PARKER, J. The plaintiff, Woldson, commenced this action in the superior court for Spokane county, seeking specific performance of a contract entered into with the defendant company for the sale to him by it of 100,000 shares of its treasury stock, at 10 cents per share. Trial upon the merits resulted in findings and judgment in favor of the plaintiff, awarding him damages in the sum

of \$15,000 against the defendant; the trial ent's vote, in so far as its lawful adoption court being of the opinion that while he was entitled to recovery he was entitled to damages' only, measured by the difference between the contract and market value of the stock at the time he was entitled under the contract, as viewed by the court, to have the sale thereof consummated. From this disposition of the cause the defendant company has appealed to this court, contending that the plaintiff is not entitled to any recovery, either by way of specific performance or damages. The plaintiff also has appealed to this court, contending that he is entitled to a more favorable judgment, but, since we conclude he cannot have any recovery, we shall refer to him as respondent and the defendant mining company as appellant.

Appellant is a corporation organized and existing under the laws of the state of Washington, having its principal place of business in Spokane. In August, 1916, appellant owned and was engaged in developing and operating its mine known as "the Richmond Mine," which mine it may be assumed it has continued to own and operate ever since. On August 15, 1916, appellant had in its treasury some 300,000 shares of its capital stock, which it was holding in trust for its stockholders. This stock was placed at the disposal of the officers of the corporation with a view to selling it as might become necessary to raise funds to defray the cost of the development of the mine. A by-law of the company authorized its board of directors to sell this stock as in their judgment the best interests of the company might require at not less than 10 cents per share. On August 15, 1916, the company had developed its mine to a considerable extent. While its development work up to that time had uncovered some ore of some apparent value, the policy of the company had been to prosecute development work rather than attempt to mine and market the ore already uncovered. The company was then indebted about \$3,000 for development work. that day at a meeting of the board of directors of the company the following proceedings were had:

"The matter of financing the further development of the company's property was discussed,

"Resolved that an option on 100,000 shares of the treasury stock of the company he given to Martin Woldson at the rate of 10 cents per share, be taken and paid for in such sums and amounts as may be required in the prosecution of the work of the development of the company's property, Martin Woldson to have the right to throw up said option at any time on reasonable notice so as not to leave this company in debt for any work contracted. Stock to be issued as each payment is made at the rate of 10 cents per share."

At that time respondent was a member of the board, and was also the president of the company. This resolution was adopted, however, by the vote of the other members of the

was concerned. This was done, however, in response to an offer made by respondent to purchase 100,000 shares at 10 cents per share to further the development work of the mineand to complete such purchase from time to time as stated in the resolution. Respondent thereupon orally agreed to the terms of the resolution as evidencing a contract between himself and the company. Immediately thereafter the respondent became the general manager of the company and its affairs, as well as its president, having in charge the operation and development of the mine. About two weeks following the entering into of this contract, work was done in the mine rendering it evident that there was valuable ore uncovered such as would be profitable to mine and market. Thereupon, instead of pursuing development work, respondent caused the work to be changed to that of mining, shipping, and marketing the ore. This was pursued under respondent's management of. the mine with such success that the indebtedness owing at the time of entering into contract with respondent was paid off, together with all indebtedness incurred in the mining and marketing of ore, all of which was paid wholly from the proceeds of the ore so mined. It thereupon became apparent that no money was needed from other sources in order to make the mine a profitable working mine. At the beginning of September, 1916, this condition of the mine became so apparent that the market value of the shares of stock of the company was at least 25 cents per share, and a short time thereafter increased very much more in market value. About this time respondent ceased to be president and manager of the company, and thereafter, on December 6, 1916, respondent tendered to the company \$10,000 as the purchase price of the sale to him of the stock mentioned in the contract evidenced by the resolution of August 15, 1916, and demanded the delivery of the whole of the 100,000 shares of stock, then claiming the right thereto under that contract. This demand the officers of the company refused to comply with; the board adopting a resolution, in effect; declaring that it was under no further obligation under the contract made with respondent on August 15. 1916. Up to that time neither the corporation nor any one representing it ever made any demand upon respondent to complete the purchase of any portion of the stock so that the money could be used "in the prosecution of the work of development of the company's property;" nor up to that time did the respondent, though the president and manager of the company at all times since the making of the contract of August 15, 1916, ever tender or even suggest to the other officers of the company that he receive any portion of the 100,000 shares of stock and pay therefor. or that the money was needed for the develboard and without the necessity of respond-opment of the mine. Indeed, the very man-

demonstrated that no money was ever "required in the prosecution of the work of the development of the company's property" in order to make it a profitable working mine. On December 6, 1916, all of the debts and obligations of the company were paid; it had a substantial bank balance; and its mine was being profitably worked without the aid of funds other than was being produced by the mining and marketing of the ore taken therefrom. The words "development of the company's property" as used in the resolution and contract of August 15, 1916, we think, plainly has reference to this particular mine. These facts, we think, are proven by the evidence all but conclusively; indeed, they are for the most part admitted.

This, it seems to us, is one of those cases which finds its correct determination in a plain statement of its controlling facts, and has little need of argument to demonstrate what the rights of the parties are in the premises. This was not a contract for an outright, unconditional sale of stock by the company to respondent, but it was plainly a conditional sale to be consummated in part or in whole as the need for raising funds to prosecute the development of its mine might arise; nor was it an option open to acceptance by the respondent for an unlimited time in the future, though there was no specified time for the consummation of the sale. It seems to us unnecessary to look beyond the plain terms of the contract and the conditions attending its making to render it plain that the need for the money to be derived from the purchase price of the stock was to be the controlling fact determinative of what amount, if any, of the 100,000 shares of stock should ultimately be sold to respondent. Respondent himself, by his own actions in the management of the mine and the company's affairs, so construed and acted upon the contract up until the time for the need of the money for the purposes contemplated had wholly ceased. Looking to the contract and all the surrounding circumstances, nothing could seem plainer than that there was no intent that the contract should have any binding force upon either the respondent or appellant after the mine should become a profitable working mine. Respondent not having sought to consummate the purchase of any portion of the stock under the contract until after the mine had become a profitable working mine and the need for the money for development work from that source had ceased, we are of the opinion that respondent cannot now have either specific performance of the contract or damages. Suppose the mine had suddenly, following the making of the contract, yielded ore worth millions, as sometimes happens in the mining world, and the need of development money from the purchase price of the sale of stock under respondent's contract had with instructions.

agement of the mine by respondent himself; thereby ceased, is it possible that respondent could thereafter enforce the contract and acquire the stock at the nominal price therein specified? The mere asking of such a question gives its own answer contrary to respondent's contentions; yet the principle here controlling is the same as in the supposed case. It is suggested that the contract with respondent for the purchase of the stock was, in effect, a loaning of his credit to the company enabling it to proceed with the work of development. Plainly, we think, the contract had no such effect. There is no evidence that any workman or creditor ever contracted with the company relying upon or even having knowledge of this contract.

The judgment is reversed, and the action dismissed. Appellant mining company shall recover costs in this court.

ELLIS, C. J., and MOUNT. HOLCOMB. and CHADWICK, JJ., concur.

CLARK v. GROGER et al. (No. 14538.)

(Supreme Court of Washington. May 7, 1918.)

1. Corporations \$==619 - Winding Up of DEFUNCT CORPORATION-POWERS OF TRUS-

Trustees have general powers to wind up a defunct corporation and pending a formal dissolution conduct its affairs.

2. Corporations &=385—Engaging in Business Without Charter Powers.

As between stockholders a corporation may engage in any lawful business, whether within or without the powers as defined by its franchise, and continue to do so until restrained at the suit of a stockholder or by the state.

3. TROVER AND CONVERSION 4-4 - WHAT CONSTITUTES.

To constitute conversion there must be some assertion of right or title that is hostile to the true owner, and a willful or even an unlawful taking will not always amount to a conversion.

4. TROVER AND CONVERSION 4-1-TRUSTEES OF CORPORATION.

Where plaintiff, who had taken possession of and was operating at sufferance the plant of a corporation, was notified by trustees that corporation was to take possession and directed to remove his property, he cannot hold trustees individually liable for damages for conversion, where he failed to remove his property in obedience to demand.

5. LANDLORD AND TENANT 4=180(4)-OUST-EE-DAMAGES.

Where plaintiff was operating the plant of a corporation at sufferance only, the trustees had the right to repossess themselves of the plant at any time for the benefit of the corporation, and plaintiff had no right to recover for loss of profits.

Department 2. Appeal from Superior Court, Kittitas County; John B. Davidson, Judge.

Action by James Clark against Frank Groger and others. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

Eugene E. Wager, of Ellensburg, and Bogle, Graves, Merritt & Bogle, of Seattle, for appellants. Ralph Kauffman, of Ellensburg, for respondent.

CHADWICK, J. For 15 or 20 years prior to January 1, 1916, the Ellensburg Brewing & Malting Company, a corporation, had engaged in the manufacture of beer and conducted a brewery business at Ellensburg. With the dawn of that day its occupation was gone. At the time the earth slipped out from under it James Clark, the plaintiff, was the owner of stock of the par value of \$13,500. Frank Groger owned stock of the par value of \$11,-500. Clark conceived the idea of operating the plant as a place for the manufacture of soft drinks, etc., and accordingly leased the stock of Frank Groger. Clark, with one August Sold, former brewmaster and who owned 10 shares of the stock, at once began to manufacture near beer, cider, and other products upon a profit-sharing basis. The annual meeting of the stockholders occurred on May 10, 1916. Clark voted his own and Groger's stock. He was thereafter elected, by the trustees of his own choosing, president. He had already taken possession of the plant and all of the personal property and stock on hand of the brewing company and put it to the uses of the new business. In the summer of 1916 Groger, who after the lease of his stock had gone to California for his health. returned and began buying other outstanding stock, including Sold's stock, so that at the time the lease expired on January 1, 1917, he was the owner of 181 shares, being a clear majority of the whole. A part of this stock was taken over in the name of his wife, Emma Groger, and a part in the name of his son Casper Groger. On January 6, 1917, at a special meeting of the stockholders Casper Groger, son of Frank Groger, and Emma Groger, wife of Frank Groger, were elected trustees in place of Sold and one Brown whose stock had been bought by Groger. It is said that the mother and son never qualified as trustees, but they assumed to act as such for at a meeting of the trustees held on January 19, 1917, the following proceedings were had:

"Upon motion of Emma Groger, duly made and seconded and carried by a vote of all trus-tees present, it was ordered that as the brewing building was idle, and that the occupancy of the Ellensburg Bottling Works had terminated. the same be at once operated by the company for the making and manufacturing and selling of soft drinks and substitutes for beer, and that, as the vats in said building were being injured and destroyed by being filled with vinegar and other materials, they be cleaned and the vinegar and so forth be removed therefrom, and work on the cleaning and operating of said plant commence at once, and the trustees proceed at once to take the processory stems to once ceed at once to take the necessary steps to operate said plant, and notify Clark to remove the vinegar and so forth therefrom."

Clark was not present at this meeting, although he had called the meeting and given notice of the time and place where it was to

and August Sold went to the brewery and notified plaintiff that it was the intention of the corporation to take possession, and called upon him to remove his property. When he returned after his dinner hour he found the doors barred and locked and a guard in charge, who informed him that he would not be permitted to enter. He did enter the building later in the afternoon, after securing permission from Groger and a pass from his attorney. Plaintiff did not remove any of his property at that time, nor did he attempt then or thereafter to do so. Being convinced. however, that the defendants as trustees for the corporation were about to engage in the business of manufacturing soft drinks, and conceiving that such an undertaking was ultra vires of the corporation as its powers had been defined in its articles: "the manufacture and sale of beer, and to establish, conduct and operate a brewery," he brought an action to restrain the further prosecution of the business. Such proceedings were thereafter had in that case that a receiver was appointed and he took possession of all of the property then on hand, that owned by plaintiff as well as that which was admittedly the property of the Ellensburg Brewing & Malting Company.

Before passing to the pertinent issues, let it be known that plaintiff never made any demand upon the receiver for the property he now claims, nor has he ever accounted to the receiver or to the corporation for the use of its property in the prosecution of his indi-Contrariwise he brought vidual business. this action on the 6th day of February, 1917, against these defendants as individuals to recover damages as for conversion of the property owned by him individually at the time he was ousted of his possession. He fixes his damages as the value of the property at the time of the alleged conversion and anticipated profits upon the sale of stock on hand and goods to be manufactured out of the unmanufactured stock on hand. though combatted vigorously at all stages of the proceeding and at the trial, the trial judge followed the theory advanced by plaintiff, and has rendered a judgment against the defendants Groger upon the verdict of a jury in the sum of \$5,000. A verdict was returned in favor of Sold who was made a party defendant.

Plaintiff's whole case is predicated upon the assumption that the Ellensburg Brewing & Malting Company, having corporate power limited to "the manufacture and sale of beer, and to establish, conduct and operate a brewery," had no legal existence after the 1st day of January, 1916: (a) Because its corporate powers were impliedly repealed by the spirit, if not the terms, of the prohibition law; and (b) under the general rules of law as they pertain to defunct corporations, the trustees having no power to engage in the be held. On January 26, 1917, Mrs. Groger | brewing business or to do anything other than to wind up the affairs of the corporation and to distribute its assets, it follows that they are liable as individuals. Counsel says:

"Our contention is that the shareholders of the corporation become at once tenants in common of this property, subject, however, to the lien of the dead corporation's debts. See Cook on Corporations, § 641. Now, the law unquestionably is that cotenants have equal rights to the possession and occupancy of the property of which they are cotenants. 7 Ruling Case Law, Cotenancy, pars. 14, 15. And so when the corporation died on January 1, 1916, Clark had a perfect right to enter into the occupancy of the tangible property of the defunct organization, and could maintain that occupancy against his fellow shareholders. Indeed, if anything, he had the best right to enter into such occupancy because he was by long odds at that time the largest shareholder as owner and lessee. So that, so far from being a trespasser when he went into the occupancy of the property he was only exercising what were his unquestionable and undoubted rights. It may be true that he might be called to account by his cotenants for the reasonable rental or value of the occupancy in question, but that is very far from saying that he was not rightfully there, and that he might be rightfully dispossessed."

[1,2] We cannot follow counsel in his contention that defendants were without power to act as trustees. Trustees of a corporation have a general power to wind up a defunct corporation; that is, assemble its assets, liquidate its indebtedness, and, pending a formal dissolution, conduct its affairs. And as between stockholders it may engage in any lawful business, whether within or without the powers as defined by the franchise. and continue to do so until restrained at the suit of a stockholder, which was done in this case at the suit of plaintiff, or by the state ex rel. under a writ of quo warranto. 7 R. C. L. Corporations, § 516. If this view is sound, it follows that the stockholders of the Ellensburg Brewing & Malting Company were not tenants in common. But if it were held otherwise, plaintiff is in no position to assert a right of possession over his fellow stockholders. His dispossession and their possession would put them in the same position he was in when in possession. If plaintiff had a right of possession by reason of stock control. defendants would have the same right when in control. We are not committing ourselves to this doctrine, but advance it only to show that, if there be merit in the theory of plaintiff, he is hoist by his own petard.

Plaintiff had certain property, apples, malt, etc., and some manufactured products on hand at the time he was ousted, and the brewing company started in the business of manufacturing soft drinks on its own account. The receiver would no doubt be liable to account for the value of these goods, subject, of course, to an accounting on the part of plaintiff for such goods as were on hand and used by him at the time he began to manufacture on his own account.

But it is insisted that, even though it be did not have, and it follows that his loss on held that the act of taking possession of the unmanufactured products, if any, must be

brewery plant was the act of the corporation, the taking being in the nature of a trespass, the officers of the corporation who participated in the act are personally liable to answer in a suit for conversion. 7 R. C. L. Corporations, § 493. We have heretofore affirmed this principle. Lytle Logging, etc., Co. v. Humptulips Driving Co., 60 Wash. 559, 111 Pac. 774.

[3, 4] But it cannot be held arbitrarily that the mere taking of goods is sufficient to sustain an action for conversion. A willful or even an unlawful taking will not always amount to conversion. There must be some assertion of right or title that is hostile to the true owner. In the instant case the trustees by resolution disclaimed any intention of claiming as owners. They not only admitted the title of the plaintiff, but made a demand that he remove his property. His answer to this demand was not made with a moving van, but by filing an action in damages for conversion. This phase of the case is learnedly treated in Lee Tung v. Burkhart, 59 Or. 194, 116 Pac. 1066, where it is said:

"In an action of trover it is not sufficient that the facts show a mere trespass, without showing a conversion. \* \* There may be an actual, wrongful exercise of dominion over chattels without constituting a conversion, if such dominion is not a denial or repudiation of the owner's right or title."

And this we understand to be the doctrine of Browder v. Phinney, 37 Wash, 70, 79 Pac. 598. In answer to this it may be urged that the use of the malt, apples, and manufactured stock was the assertion of a right in derogation of the title of the plaintiff. would be so ordinarily, but the personal liability of the defendants could not be extended over a time beyond which plaintiff should have removed his property in obedience to the demand of the trustees. He had his choice of remedies. He could comply with the request of the trustees and remove his property, or he could undertake to sell it to the corporation or to the trustees as individuals by resort to a claim for damages as for a conversion. He chose to hold the trustees as individuals, and must fail, for it is shown that his loss, if any, is due to his own omission. He cannot recover upon a personal liability the value of that which he might have had for the taking. His remedy, if any, is against the corporation.

[8] While it is not necessary to a decision in this case it may not be out of place to observe that in the adjustment of the rights of plaintiff and of the corporation plaintiff could not recover as for lost profits. His occupation of the brewery plant was at sufferance only. The trustees had a right to repossess themselves of the plant for the benefit of the corporation. His right to recover lost profits would depend upon his right to manufacture at the brewing plant. This he did not have, and it follows that his loss on unmanufactured products, if any, must be

measured by the value of his goods at the time of the taking.

Reversed and remanded, with instructions to entertain appellants' motion for judgment.

ELLIS, C. J., and FULLERTON and MOUNT, JJ., concur.

## In re KING'S ESTATE. SCHRADER v. BUFFUM.

(No. 14413.)

(Supreme Court of Washington. May 9, 1918.)

1. COURTS \$\infty 202(3)\$—Probate Court—Equity Action — Special Proceeding — Findings and Conclusions.

In a probate proceeding by the creditor of a decedent's estate against the executor to compel him to take action on her claim, the proceeding being either an action of equitable cognizance, or a special proceeding mandatory in its nature, neither findings of fact nor conclusions of law were necessary to sustain the order or judgment dismissing the proceeding.

In such proceeding, the burden to establish due presentation of the claim to the executor, the fact being denied, was on the creditor; the burden not being changed by the form of the proceeding, or by the creditor's assumption in her petition that the claim had been regularly presented, the assumption being in itself an assertion

3. Executors and Administrators \( \bigcolom=234 - \)
PRESENTATION OF CLAIM - SUFFICIENCY OF EVIDENCE.

In such proceeding evidence held to sustain the trial judge's conclusion that the claim was not in fact presented to the executor.

 APPEAL AND EBBOR ⇐⇒1011(1)—REVIEW— CONFLICTING EVIDENCE.

The Supreme Court will not reverse the conclusion of the trial judge on conflicting evidence, unless able to find that the evidence preponderates against the conclusion.

5. NEW TRIAL 6-79-DENIAL OF MOTION-PROPRIETY.

Where the motion for new trial set out no new matter, but merely sought another review by the trial judge of the evidence then in the record, on which he had reached his original conclusion, and was heard on the merits, and not declined to be heard for insufficient technical reasons, its denial was not erroneous.

Department 1. Appeal from Superior Court, Walla Walla County; Edward C. Mills, Judge.

In the matter of the estate of Martha King, deceased. On petition by Marie Schrader against Charles S. Buffum, as executor, for an order requiring respondent to show cause why her claim against the estate should not be acted upon, and allowed or rejected. From an order dismissing the proceeding, petitioner appeals. Judgment affirmed.

Evans & Watson, of Walla Walla, and Hartman, Nafe & Hartman, of Seattle, for appellant. Rader & Barker, of Walla Walla, for respondent.

FULLERTON, J. The appellant filed a petition in the superior court of Walla Walla county in a probate proceeding asking for an order requiring the respondent as executor of the estate of Martha King, deceased, to show cause why her claim against the estate named should not be acted upon and either allowed or rejected. Issue was taken by the executor upon the allegations of the petition, and a hearing had resulting in an order dismissing the proceeding. The petitioner appeals, assigning that the court erred in failing to make and file findings of fact and conclusions of law; that it erred in holding that the burden of proof was on the petitioner; that it erred in holding that the petitioner had not sustained her case by a preponderance of the evidence and in dismissing the proceeding; and that it erred in denying the petitioner's motion for a new trial.

[1] We find no error in the failure of the court to make findings and conclusions. The action was not one to enforce or recover upon a claim which had been rejected by the executor, which might be triable as an action at law before a jury, but was a proceeding to compel action on a matter on which she contended no action had been taken by the executor. It was therefore either an action of equitable cognizance or a special proceeding mandatory in its nature, in neither of which are findings of fact or conclusions of law necessary to sustain the order or judgment entered.

[2] The second objection is also without merit. The issue on which the case hinged was whether or not the petitioner had presented her claim to the executor, and clearly the burden of establishing a due presentation when the fact was denied was upon the petitioner. This burden was not changed by the form of the proceeding. It was a fact necessary to be established before any inquiry as to whether the claim had been acted upon could be entered into, and since the petitioner was bound to assert its due presentation the burden was upon him to prove it. Merely because the petitioner assumed in her petition that the claim had been regularly presented, and did not directly allege the fact, the rule is not changed. The assumption was in itself an assertion, and when the executor put the fact in issue the burden still rested where it is rested by legal rnles.

[3,4] On the principal question, whether the claim was in fact presented, we can discover no reason for a reversal of the conclusion of the trial judge. The circumstances under which the claim is asserted to have been presented, as testified to by the only witness of the petitioner testifying directly upon the matter, are somewhat out of the ordinary. The claimant resides in the city of Seattle, while the executor resides in the

city of Walla Walla, the place where the court in which the estate was in process of administration is held. The witness testifled that the claim was prepared in the city of Seattle, and that he carried it from that city across the state to the city of Walla Walla and presented it to the executor in person, making the trip solely for that purpose. Yet he also testified that, notwithstanding this extreme caution, he handed the claim to the executor while walking on the streets of the city of Walla Walla going to the executor's home for lunch, not at the place where the published notice to creditors required claims against the estate to be presented: that no one else was present at the time; that he exacted no receipt for the claim, and made no request for notice of the executor's action upon it. It is in evidence, moreover, that no inquiry was made by the petitioner, or by any one on her behalf, until some three years after that time, and that her activity was then aroused by an action brought against her by the executor upon a promissory note she had executed to the decedent in her lifetime. On the other hand, the executor emphatically denies that the claim was presented to him at the place mentioned or elsewhere. He testified that the witness claiming to have presented the claim was in Walla Walla at about the time mentioned and lunched with him at his home, but testified that they did not walk to the home but rode there in an automobile. He also testified that the witness at the time accounted for his presence in Walla Walla in another manner; stated that he had business which had brought him to that side of the state and took advantage of his presence there to perform an errand at Walla Walla not connected with the estate. The executor is corroborated as to some of the details of his version of the visit by other witnesses. while the petitioner's witness is practically alone.

While the foregoing is but an outline of the evidence, it seems to us sufficient to sustain the conclusion of the primary judge of the facts. As we have often said, the trial judge has the advantage of having the witnesses before him, and is thus in a much better position than are we, who must gather the facts from the typewritten record, to determine wherein lies the truth in conflicting testimony. Following our established rule in such cases, namely, that we will not reverse the conclusion of the trial judge on conflicting evidence unless we are able to find that the evidence preponderates against the conclusion, we have no warrant to interfere with the judgment before us.

[5] The motion for a new trial set up no matter. By it the petitioner but sought another review by the trial judge of the evidence then in the record and on which he M. S. Stout and George L. Reid, Sheriff of

had reached his original conclusion. Contrary to the intimation contained in the petitioner's brief, the record does not disclose that the judge declined to hear it for insufficient technical reasons. On the contrary. it appears that it was heard on its merits and that it was denied because the judgewas not convinced that his original conclusion was wrong. The denial of the motion therefore furnished no basis for the predication of error.

The judgment is affirmed.

ELLIS, C. J., and PARKER, MAIN, and WEBSTER, JJ., concur.

HARTFORD v. STOUT et al. (No. 14550.) (Supreme Court of Washington. May 8, 1918.)

JUDGMENT \$363-VACATION-MISTAKE.

1. JUDGMENT \$=363—VACATION—MISTAKE, NEGLECT, OR OMISSION OF CLEEK.

Where judge signs findings of fact and order for judgment, and gives them to the clerk, but before they are entered tells the clerk tohold them, and the entry clerk thereafter enters them, not being informed of the judge's desire that they be held, there is a mistake, neglect, or omission of the clerk, for which the judgment can be vegeted under the statute. can be vacated under the statute.

2. Judgment 🗫 388 — Vacation — Notice JURISDICTIONAL.

Under Rem. Code 1915, \$ 468, relating tonotice of proceeding to vacate judgment, notice is unnecessary, where the opposing party ap-pears voluntarily and makes no objection on that ground.

3. Appeal and Error \$==517-Matters Re-

VIEWABLE-RECORD.

Recital in bill of exceptions that attorneys appeared at a hearing to vacate a judgment was sufficient to show appearance, on the question whether there was a waiver of irregularity in the notice, although the order vacating the judgment did not so recite.

4. JUDGMENT \$384-VACATION-PROCEDURE

FORMALITY.

Under Rem. Code 1915, \$ 468, governing procedure for vacation of judgment, no formal pleadings are required, and the objections of the party opposing vacation need not be formal, but must be preserved in the record.

5. EXECUTION \$\iff 194(3) — CLAIM OF THIRD-PERSON—OWNERSHIP—PROOF.

In replevin by third person to recover property seized under execution, evidence held to-sustain finding of title in such third person.

6. ESTOPPEL 4 TO PROPERTY OWNERSHIP OSTENSIBLE CREDITORS.

That a son in purchasing an automobile allowed it to be mortgaged, and the license issued iowed it to be mortgaged, and the incense issued in his father's name, and made false affidavits-concerning ownership of the car, does not estop him from showing ownership as against his father's judgment creditors, although he is absolutely estopped as far as to the mortgagee, and probably as to innocent purchasers from the father, because the purchaser under executions takes only the title of the judgment debtar. tion takes only the title of the judgment debtor.

Department 1. Appeal from Superior Court, Spokane County; Wm. A. Huneke. Judge.

Action by John Wilbur Hartford against

Spokane County. and defendants appeal. Affirmed.

L. H. Brown, of Spokane, for appellants. W. B. Mitchell, of Spokane, for respondent.

FULLERTON, J. The respondent, John W. Hartford, as plaintiff, brought this action in replevin to recover as his own property an automobile seized by the sheriff under an execution issued upon a judgment in an action in which M. S. Stout was plaintiff and William T. Hartford, father of the respondent, was defendant. Issue was taken on the complaint and a trial had before the court sitting without a jury. At the conclusion of the trial the court filed a written memorandum announcing his conclusion upon the evidence and the law applicable thereto, and directed counsel for the defendants, the conclusions being in his clients' favor, to prepare formal findings of fact, conclusions of law, and a judgment in conformity therewith. In his memorandum decision the trial judge did not find that the plaintiff was not the actual owner of the automobile, but intimated that his conclusion on the facts was to the contrary, resting the judgment on the ground that the plaintiff was estopped to claim title, since, as he recited in his written opinion, the plaintiff in order to maintain his claim of title had to prove a violation on his part of a positive mandatory statute. Findings of fact, conclusions of law, and a judgment were prepared by counsel and submitted to the court for signing. These complied with the judge's memorandum, save as to his conclusions on the facts. Instead of a finding showing an estoppel on the part of the plaintiff to claim title, it was found that plaintiff had no title. The court nevertheless signed the papers and handed them to counsel to be filed with the entry clerk. No sooner had counsel left the courtroom, however, than it occurred to the judge that he had probably been mistaken as to the order of the proofs; that is, whether the plaintiff had himself introduced evidence tending to show his violation of the statute, or whether such evidence had been introduced by the defendant to discredit the plaintiff as a witness. The judge thereupon directed the clerk in attendance upon his department to notify the entry clerk not to enter the judgment signed, but to hold it in abeyance until he received further directions. The court then sent for the counsel of the respective parties, notifled them of his probable mistake, and intimated to them that if he had been mistaken judgment should go for the other side. Counsel were not able to agree as to the order of the proofs, whereupon the court announced that he would have the evidence read to him from the stenographer's notes. and inform them of his conclusion later. Afterwards the judge ascertained that he had been mistaken in regard to the evidence, and

Judgment for plaintiff, I the opinion that the plaintiff was entitled to a judgment. It was then discovered that the clerk, whom the judge had instructed to have the judgment held in abeyance, had neglected to so inform the entry clerk, and that the judgment had actually been entered. When this fact was disclosed the judge informed counsel for the plaintiff that he doubted his power to vacate or set aside the judgment on his own motion, but that he would entertain a petition to vacate it under the provisions of the statute relating to the vacation of judgments entered by mistake, neglect, or omissions of the clerk. A petition for vacation was filed, setting up this ground, and a notice served upon the defendants that it would be called up for hearing on a day certain, some three days after the service of the petition and notice. The petition was heard on the day appointed and an order entered vacating the judgment. Later on new findings of fact and conclusions of law were signed by the judge, and a judgment entered allowing a recovery by the plaintiff. The defendants appeal from the judgment so entered.

> The appellants first question the sufficiency of the procedure by which the original judgment entered was vacated. If we have correctly gathered the grounds of the contention it naturally divides itself into two parts: First, that the causes set forth in the petition for the vacation of the judgment are not causes for which a judgment may be vacated under the statute; and, second, that the procedure followed was not sufficient to give the court jurisdiction over the person of the several judgment creditors.

[1] In the argument in support of the first of these objections it is not contended, of course, that mistakes, neglect, or omission of the clerk are not grounds provided by statute for the vacation of a judgment, but it is contended that the neglect of the clerk shown in this instance is not the neglect contemplated by the statute. It is said that the mistake, if a mistake at all, was the mistake of the judge; that after signing the judgment he concluded he had drawn an erroneous legal conclusion from the facts, and sought to correct it after the cause had passed from his jurisdiction; that the order given by him to the clerk was one beyond his power to give, and hence it was not a mistake, neglect, or omission of the clerk for which any legal right arises, even if the clerk did not give heed to the order. This suggests an inquiry as to the point of time when the trial judge so far loses control over a proceeding tried before him that he may not arrest the proceeding on his own motion. We have held that point of time to be when the judgment is rendered and entered. Here we think the judge had not lost that control when he gave the order to the clerk. The judgment had not then been entered. True, the announced to counsel that he was then of judge had signed a formal order for a judgment, but the order was nothing more than a direction to enter the judgment, as much within his control as it would have been had he merely outlined his conclusions orally and diregted the clerk to prepare and record a wriften entry in accordance therewith. It was therefore a neglect or omission of the clerk to enter the signed order after the judge had directed him to withhold its entry; a neglect or omission authorizing the litigant injuriously affected to petition for its vacation.

[2, 3] The claim of want of jurisdiction of the persons of the judgment creditors is founded on the fact that the notice served with the petition required them to appear within three days after the service, whereas the statute governing the procedure (Rem. Code, § 468) provides that the party shall be brought into court in the same way, on the same notice as to time, mode of service, and mode of return, as in an original action by ordinary proceedings; which means in the present case that they should have been given 20 days in which to appear. But the statute also provides that the proceeding shall be governed, with certain specified exceptions, by the rules governing ordinary actions, and it is not necessary in an ordinary action that a summons be issued and served in order to obtain jurisdiction of the person of the defendant. The defendant may waive the issuance of the summons by appearing voluntarily, either in person or by an authorized attorney, and a judgment entered after such an appearance is neither void nor voidable for want of jurisdiction over the person. In this instance the defendants did appear at the time appointed and contest the application upon its merits without suggesting want of proper service of summons upon them. We have not overlooked counsel's contention that the record fails to show an appearance by them. It is true the formal order vacating the judgment does not so recite, but it so appears in the bill of exceptions upon which we are asked to review the order. This recites that the defendants appeared by their attorney and made objections to the hearing of the application upon other grounds, but not upon the ground now under consideration. Since the appellants in order to procure a reversal must show error, it is probably not necessary that the record recite an appearance, on the principle that regularity in the orders and judgments of courts of superior and general jurisdiction is presumed, unless the contrary affirmatively appears. But if recital be necessary, the recital in the bill of exceptions is sufficient.

[4] Counsel in his brief, after calling attention to the shortness of the time in which his clients were required to appear and to the fact that they filed no formal pleadings, says this:

"From this it will be apparent that respond-

not even to have a demurrer heard. sel could do was to object and remain in a beligerent attitude."

But belligerency is all that is required of the defendant in such a proceeding. The Code (supra) requires no formal pleadings. All he needs to do is to make his objections and see that they are properly preserved in the final record. It is not here held that the objections now made cannot be reviewed because of want of formality in presenting them. It is held that they came too late; that they should have been urged when the cause came on for hearing, and, not being then urged, were waived.

[5] On the merits of the controversy, we think the evidence clearly establishes that the automobile was the property of the plaintiff, and not the property of his father, the judgment debtor in the writ under which the car was seized. While it was shown that the title to the car when purchased was taken in the name of the father, that the state license was taken and the car insured in his name, and that he executed a mortgage upon it to procure a part of the purchase price, yet it was shown that these things were done for reasons satisfactory to the father and son, and that as between them the car was the property of the son. It was shown, moreover, that the son paid from his own funds all of the purchase price of the car not procured by the mortgage; and that he paid the state license fee, the insurance premium, the costs of the upkeep and operating expenses of the car, and the installments coming due on the mortgage prior to its seizure.

[6] These facts we think are sufficient to show that the plaintiff was the actual owner of the car, and the real question is whether he is estopped to set up ownership as against the judgment creditor of his father after permitting his father to appear as the ostensible owner. We cannot conclude that he is so estopped. He is undoubtedly estopped from asserting title as against his father's mortgagee, and it may be that he would be estopped from asserting title as against an innocent purchaser for value from his father. and it may be also, as the appellants contend, that he has made false assertions and false affidavits concerning the title to the property; but it does not follow because of this that he may not assert title as against his father's judgment creditors. A judgment creditor under our practice can never become an innocent purchaser of property sold under his writ of execution. He takes only the title of his judgment debtor, and if the judgment debtor has no title he takes none. For the other wrongs mentioned he must answer to the state or to the party wronged; their commission confers no right on others to seize his property.

The judgment of the court was for a reents were given no opportunity to plead or prepare to meet the allegations of the petition, turn of the property, or, if return thereof



could not be had, then judgment for its value street, when the driver of the automobile in the sum of \$400. It is complained that the judgment for value is too large. It is true the witnesses differed as to the value of the car, but the value found is well within the proofs, and we see no cause for disturbing it.

The other errors assigned are met by the view we have taken of the principal questions discussed, and require no separate no-

The judgment is affirmed.

ELLIS, C. J., and PARKER, WEBSTER, and MAIN, JJ., concur.

JOHNSON v. BLOEDEL et al. (No. 14409.) (Supreme Court of Washington, May 9, 1918.) Trial \$\infty 296(4, 5)\-Instructions-Care Re-QUIRED OF PEDESTRIANS.

Than action for personal injury to a pedestrian struck by an automobile while crossing a street in front of a moving street car, an instruction as to contributory negligence and the care required of him under such circumstances was proper, when considered with other instructions defining contributory negligence.

Department 1. Appeal from Superior Court, King County; A. W. Frater, Judge. Action by Julius Johnson against Julius H. Bloedel and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Vanderveer & Cummings, of Seattle, for appellant. Kerr & McCord and Peters & Powell, all of Seattle, for respondents.

WEBSTER, J. Appellant brought this action to recover damages for injuries sustained by him on account of being struck by an automobile owned and operated by respondents. The facts are these: The appellant, while engaged in delivering milk in the vicinity of Bellevue avenue and Thomas street, in the city of Seattle, left his milk wagon on the east side of Bellevue avenue at a point about 70 feet south of the intersection of Bellevue avenue with Thomas street. Bellevue avenue runs north and south, Thomas street east and west; the former being 36 feet in width from curb to curb. A street car track extends along Bellevue avenue; the same being located west of the center line of the street; there being a distance of only 101/2 feet between the west rail of the car track and the curb on the west side of Bellevue avenue, while the distance on the east side of the car track to the curb on the east side of Bellevue avenue is 201/2 feet. Prior to the happening of the accident upon which the action is based, a street car going south on Bellevue avenue crossed Thomas street and slowed down for the purpose of stopping south of the street intersection. An automobile driven by respondents followed in the rear of the street car to the point where the

passed to the left of the street car to avoid the passengers who were alighting from the street car on the west side of Bellevue avenue. There were no vehicles or objects in view on the east side of the street when the automobile attempted to pass on the left-hand side of the street car. As the street car slowed down after crossing Thomas street, the appellant left the sidewalk on the west side of Bellevue avenue, and started to cross in front of the moving street car, intending to reach his delivery wagon on the opposite side of Bellevue avenue. Before leaving the sidewalk he went south a distance of more than 25 feet, and after entering the street followed along the course of and beside the moving street car, passing over the car tracks in front of the street car before it stopped. The point where appellant crossed the car tracks was from 60 to 70 feet south of the street intersection, and from 4 to 6 feet in front of the moving street car. He says he was in a hurry, "trotting" to and around the front end of the street car, looking ahead and toward the south. He frankly admits that he never looked toward the north or in the direction of the approaching automobile from the time he left the west sidewalk on Bellevue avenue. After he had passed in front of the street car, and had proceeded 6 or 7 feet beyond the car tracks, he was struck and injured by respondents' automo-

At the close of the plaintiff's case, respondents' motion for nonsuit was overruled, and thereafter the cause was submitted to the jury, which returned a verdict for the defendants. From a judgment entered thereon the plaintiff has appealed. The only errors assigned relate to the refusal of the court to give two instructions requested by appellant, and the giving of one instruction which was excepted to by appellant. The instructions requested and not given were as follows:

"I instruct you, members of the jury, that a pedestrian in crossing a city street is not bound

pediestrian in crossing a city street is not bound to stop, look and listen, but is bound only to use ordinary care, and what is ordinary care depends upon the circumstances of the case."

"I instruct you that the plaintiff was not bound, as a matter of law, to anticipate an automobile or other vehicle coming south on the left-hand side of the street. There are certain rules or laws of the road, reliance upon which becomes instinctive, and one of these is that vebecomes instinctive, and one of these is that vehicles will run upon the right-hand side of the street. If, therefore, you should find the fact to be that the plaintiff in this case passed in front of the street car and onto the east side of Bellevue avenue, without first looking to the Bellevue avenue, without first looking to the left for an approaching vehicle, then I instruct you the plaintiff would not, as a matter of law, be guilty of negligence; but whether or not the plaintiff was, in fact, guilty of negligence in so doing would be for you to determine from all of the circumstances of the case."

It is urged by appellant that the failure to give these requested instructions constitutes reversible error under the rule laid car began to stop after crossing Thomas down by this court in Mickelson v. Fischer.

81 Wash. 423, 142 Pac. 1160, and cases there ed to take such precaution for his own safety cited. In that case instructions similar to as an ordinarily prudent person would have the requests made by appellant in this case the requests made by appellant in this case were given, which was held not error as applied to the facts there presented. But it does not follow that the refusal to give the instructions requested is reversible error. where the law as applied to the facts of this case was elsewhere properly defined in the court's instructions to the jury.

With respect to the use of the street by defendants' automobile and the duty arising therefrom, the jury were instructed as follows:

"I instruct you that there is, arising from usage and custom, what is known as the law of the road which requires the driver of automothe road which requires the driver of automobiles traveling upon a continuously used street or highway to keep upon the right-hand side of such street or highway in the direction in which they are traveling. While this rule is not inflexible, and one may use what is to him the left-hand side of the road, he cannot do so if his conduct in so doing will be a source of danger to others; and if he does use the left-hand side of the road he must always exercise a degree of care commensurate with his nosia degree of care commensurate with his position."

And with respect to the duty devolving upon appellant the court gave the following instruction, which is assigned as error by the appellant:

by the appeliant:

"You are instructed that it is the duty of a
pedestrian, in attempting to cross a street in
front of a street car, and at a point other than
the street intersection, to reasonably exercise
for his personal safety the faculties with which
he is endowed by nature for self-preservation,
and if he fails to do so and is by reason of such
failure injured, he has at least contributed to
his injure by his own neeligence and cannot lerailure injured, he has at least contributed to his injury by his own negligence and cannot legally recover for such injuries. As applied to this case, if you find from the evidence that plaintiff attempted to run across the street in front of a moving street car, and that in so doing he failed and neglected to use his faculties for his own sefety and that hy reason ties for his own safety, and that by reason thereof he collided with defendants' car and was injured, I instruct you he cannot recover for injuries so received."

And the following instruction upon which error is not based:

"You are further instructed that the defendants have set up the defense of contributory negligence, and it will devolve upon them to prove the same, if they are to prevail thereunder, by a preponderance of the evidence, as that term has been hereinbefore defined. A person is term has been hereinbefore defined. A person is guity of contributory negligence when he does something which an ordinarily careful person would not do under the circumstances and conditions of a given case, or when he fails to take such precautions for his own safety as an ordinarily prudent person would take under the same circumstances and conditions. And it makes no difference in this connection whether you find the defendants were guilty of negligence as charged in the complaint, if you find the plaintiff was also guilty of negligence. Therefore, if you should be satisfied by a preponderance of the evidence that the injury to the plaintiff, Julius Johnson, if any, was caused through the negligence of the defendants' chauffeur, as set forth in the complaint, but that the plaintiff, Julius Johnson, failed to use such care as a sensible, prudent person would have used under like circumstances, and that plaintiff fail-

that his negligence and carelessness in failing to take such reasonable precautions for his own to take such reasonable precautions for his own safety was the proximate cause of, and that he himself contributed to, such injury, and was thus guilty of contributory negligence on his part, notwithstanding the negligence of the defendants, if any is shown, that would be a defense, and your verdict must be for the defendants." ants.

The giving of the instruction complained of was not error, when considered in connection with the other instructions defining contributory negligence and the law as applicable to the facts of the case. It is based upon appellant's own testimony wherein he admits that he hurried into the street approximately 60 feet from the street intersection, ran or "trotted" across the car tracks only a few feet in front of a moving street car without looking in the direction from which the automobile was approaching. Under such circumstances we are of the opinion that the instructions given were as fair to the plaintiff as the facts would justify, and that the failure to give the requested instructions, under the facts of the case, taking into consideration the width of the street, the location of the car tracks thereon, the traffic conditions disclosed by the evidence, and the conduct of the plaintiff at the time he received the injury, was not error requiring a reversal of the judgment. Moreover, assuming the facts to be as stated by the appellant, it is difficult to conceive how any other verdict could be sustained.

The judgment is therefore affirmed.

ELLIS, C. J., and FULLERTON, MAIN, and PARKER, JJ., concur.

BENTLEY V. WESTERN UNION TELE-GRAPH CO. (No. 14039.)

(Supreme Court of Washington. May 11, 1918.)

TELEGRAPHS AND TELEPHONES \$\infty 70(1)\to ERROR IN MESSAGE—LIABILITY—DAMAGES. ERROR IN MESSAGE—LIABILITY—DAMAGES. Where the shipper of apples drew on the consignee for \$2 a box, and, after the consignee's refusal to accept and its offer of \$1.75 a box, sent a telegram to the bank holding the draft to accept \$1.80 a box, which message, by the negligent mistake of the telegraph company was made to read \$1.08 a box, the telegraph company was liable to the shipper for the difference between the price of \$1.08 received by him on the completed sale when the consignee received the altered message and the \$1.80 per box which was the fair market value of the apples.

2. TRIEGRAPHS AND TELEPHONES &=70(1)—

Was the fair market value of the apples.

2. TRLEGRAPHS AND TELEPHONES \$\insup 70(1)\$ —

EREOR IN MESSAGE — DAMAGES — Ex POST
FACTO OFFER.

The telegraph company, by procuring the
consignee of the apples to make, and the consignee by making, an ex post facto offer to pay
\$1.50 a box for the apples, could not deprive
the shipper of any part of his actual damages.

En Banc. On rehearing. Former opinion overruled, and verdict and judgment affirmed.

For former opinion, see 98 Wash. 431, 167 Pac. 1127.

HOLCOMB, J. A rehearing en banc was granted in this case from the decision heretofore made and reported in 98 Wash. 431, 167 Pac. 1127.

[1, 2] The facts at issue and the legal propositions involved are sufficiently stated in the former prevailing opinion and the dissenting opinion therein, and no amplification is necessary now.

For the reasons stated in the dissenting opinion, which the majority of the court now adopt as the correct view of the law and of the disposition of the case, the former opinion is overruled and the verdict and judgment affirmed.

ELLIS, C. J., and WEBSTER, MAIN, and PARKER, JJ., concur.

OLSEN v. HAGAN et al. (No. 14620.)
(Supreme Court of Washington. May 9, 1918.)

1. EXECUTORS AND ADMINISTRATORS &= 221(5)
-ALLOWANCE OF CLAIMS—SUPPORT—EVIDENCE.

Evidence held to establish promise of the deceased to pay claimant a definite sum for past services during the life of deceased's husband.

2. Executors and Administrators ← 205(1) — Allowance of Claims — Support — Waiver.

Where deceased, pursuant to promise to pay claimant for services during life of her deceased husband, executed notes as evidence of the debt, claimant's subsequent surrender of the notes "because they worried deceased" did not constitute waiver of the claim.

3. CONTRACTS \$= 76-CONSIDERATION.

Promise of wife to her dying husband to pay definite sum to claimant for services rendered the husband even if not enforceable by claimant, was a moral obligation, and constituted consideration for the wife's promise to give claimant the sum specified.

4. WILLS \$\infty 714 - Construction - Payment of Dert by Legacy.

of Debt by Legacy.

Where will provided for payment of all debts and gave a legacy to a creditor, no presumption necessarily arose that the bequest was in payment of the debt, and the presumptions that it was could not be indulged where the legacy was less than the debt, nor would the presumption be aided by the fact that creditor was named as a residuary legatee, where the residuum was uncertain in amount or time of payment.

5. EXECUTORS AND ADMINISTRATORS 4 241—CLAIMS—WAIVER.

Where one claimant had two claims on separate accounts for different subject-matters, he need not join them in presentation against the estate.

6. Assignments 4=121-Right to Sue.

In view of Rem. Code 1915, § 191, permitting an assignee to maintain action notwithstanding the assignor may retain an interest, where one executor assigned claim against estate to third person, the assignee could sue the executors of the estate thereon, though the assignment was colorable and the executor was the real party in interest.

Department 1. Appeal from Superior Court, Spokane County; Wm. A. Huneke, Judge.

Action by O. C. Olsen against William H. Hagan and others, as executors of the estate of Marion C. Wharton, deceased. Judgment for defendant dismissing the action, and plaintiff appeals. Reversed, with instructions.

F. E. Langford and Lucius G. Nash, both of Spokane, for appellant. Peacock & Ludden, of Spokane, for respondents.

FULLERTON, J. Marion C. Wharton died on June 15, 1915, leaving a last will in which the respondents were named as executors. One of the executors, Thomas C. Hooker, presented a claim against the estate in the sum of \$16,670 for work; labor, and services performed for the testatrix from April, 1890, to June 15, 1915. The claim was rejected by the majority of the executors, whereupon Hooker brought an action to enforce it. This action was dismissed on the ground that Hooker could not sue himself as representative of the estate. He thereupon assigned the claim to the appellant, Olsen, who brought this action as assignee. On a trial to the court, findings and conclusions were made in favor of respondents and judgment rendered dismissing the action. The appellant assigns a number of errors which are discussed under general heads, a plan which will be followed by us in the consideration

The first contention of appellant is that there was undisputed evidence of an express contract by the decedent to pay Hooker for his services. The evidence shows that Thomas C. Hooker, when a child ten years of age, was taken into the home of Samuel and Marion C. Wharton and always resided with them. He was never legally adopted, but was always treated as a member of the family and in his character of foster son proved more dutiful, considerate, and serviceable to his foster parents than many a natural child. For the years for which recovery is sought Hooker undoubtedly rendered valuable services in the household and minor business affairs of the Whartons. That such services were appreciated and deemed worthy of remuneration appears from the fact that Samuel Wharton on his deathbed in 1908 requested his wife Marion to provide for Hooker to the extent of \$10,000. This she undertook to do in wills made by her in 1909 and 1911, in each of which she bequeathed him that sum. Both of these wills had been revoked, but in 1913, just prior to undergoing a surgical operation, she gave him her three promissory notes aggregating that sum, due in one, two, and three years. On her return home after successfully withstanding the operation, she had Hooker return these notes to her. In

her last will and testament executed in May, 1915, about a month prior to her death, she devised to Hooker a life estate in her summer resort property at Spirit Lake, Idaho, with all the personal property and effects used in conjunction with such property. There was a limitation attached, however, that in case he married a certain woman such bequest was to be void and he was to have in lieu thereof the sum of \$5,000, but if he married any other woman and had a child or children by her such issue was to take the fee in perpetuity. In addition to bequeathing to Hooker a quantity of personal property, he was also named as one of the residuary legatees of the estate. There is no showing as to the full value of the estate and what would be the possible value of such residuary interest, but it appears that the property directly passed to Hooker, assuming that his children took title to the Spirit Lake property, would be something in excess of \$10,000 at the lowest valuations.

[1, 2] There is no proof of an express contract by Mrs. Wharton to pay Hooker for his services, other than her statement to him at the time of delivering the notes for \$10,000 that it was in accordance with a promise to her husband to compensate him for his past services. Nor is there anything in the evidence showing an implied contract by Mrs. Wharton to remunerate Hooker upon which an action of quantum meruit could be based. But a promise to pay Hooker a definite sum for past services during the lifetime of Mr. Wharton was established, we think, by a clear preponderance of the evidence. Not only were notes to evidence the debt executed and delivered, but there was a promise on her part to make good her husband's request. The subsequent surrender of the notes by Hooker cannot be deemed a waiver or relinquishment of that promise, since it was upon her request and explanation that it worried her to have the notes outstanding and subject to negotiation. There was no evidence of any promise by Mrs. Wharton at this time to give any equivalent for the surrendered notes, but the relations of the parties justified Hooker in assuming that Mrs. Wharton would subsequently provide for that indebtedness by will or otherwise. This she failed to do, as no mention of such liability occurs in her last will, although prior wills had expressly named a legacy in the amount represented by the promise to her husband. Her bequests to Hooker were the natural ones that a person in her situation would make to one occupying the close relation that he did to her, and were due to him rather for personal service to her than as a carrying out of Mr. Wharton's request. Whether it was an oversight that provision for \$10,000 was omitted, or whether the testatrix had in mind that the bequests as made by her were to cover all obligations to Hooker for his long

ily, it is impossible to tell, but it certainly does not appear upon the face of the will that provision was therein made for carrying out her promise to her husband and to Hooker wherein a cash payment of \$10,000 was agreed to be made. An earlier will in 1911 gave Hooker not only \$10,000 but also the Spirit Lake property.

[3] Her promise to her dying husband in 1908 to pay the sum named to Hooker, even if one incapable of enforcement by Hooker, was a moral obligation on her part to carry out. Such obligation constituted a consideration for her promise to Hooker to give him that sum. It was not a promise to answer for the debt of another since, if a debt at all, it was a community debt. She took her husband's estate burdened with her promise to make provision therefrom for Hooker.

The evidence is convincing that Mrs. Wharton as a member of the community promised her husband prior to his death to give Hooker \$10,000. This promise was consummated by her gift to Hooker of notes for that sum. She thereby recognized the promise as an obligation on the part of her deceased husband and herself. Her agreement to give Hooker such sum was a direct promise upon which he was entitled to rely, and constituted an existing debt on her part, notwithstanding the surrender of the evidences of the debt, since there is no evidence of the intent of either party to treat it as a waiver or cancellation of the debt. While there was no promise shown at this time to take care of Hooker to that extent in the will, he had a right to rely upon such provision, as she had often indicated both to himself and to others her intent to amply care for him. We think this promise of Mrs. Wharton to pay Hooker \$10,000 unquestionably under the circumstances constituted a debt for which she was liable.

[4] While it is true the will of Mrs. Wharton is apparently liberal in its bequests to Hooker, it nowhere appears in its provisions that such bequests are designed as satisfaction for any claims he has against the estate. The will itself provides for the payment of all debts, and in such a case, if a legatee were in fact a valid creditor, no presumption necessarily arises that the bequest was given in payment of the debt, but the intent must appear that the legacy is in satisfaction. Glover v. Patten, 165 U.S. 394, 17 Sup. Ct. 411, 41 L. Ed. 760; In re Dailey's Estate, 43 Misc. Rep. 552, 89 N. Y. Supp. 538. Such presumption could not be indulged where the amount of the legacy is less than the alleged indebtedness, nor would the presumption be aided by the fact that the creditor was named as a residuary legatee, where the residuum is uncertain in amount or time of payment. In re Sherman, 24 Misc. Rep. 65, 53 N. Y. Supp. 376.

to cover all obligations to Hooker for his long and faithful service as a member of the fam- ed by Hooker up to the year 1908, or the

community, and would not constitute a personal liability on the part of Marion C. Wharton. It fails to make any finding as to her liability subsequent to that year. The evidence shows that the Whartons owned their respective properties in severalty, and that much of the services rendered by Hooker from 1892 onward were rendered in and about the separate property of Mrs. Wharton, and that his other services prior to 1908 were largely in connection with family affairs falling within necessary family expenses. However, after the year 1908, his services were solely in the interest of Mrs. Wharton for a period of over seven years, for which period his itemized claim amounts to \$7.850. But, in our view of the facts as we have indicated above, the question of whether the services rendered up to the year 1908 were for the community, and hence not a separate liability of Mrs. Wharton, becomes immaterial in so far as the liability for the sum of \$10.000 is concerned. Any other contract, either express or implied, for payment to Hooker for his services was not satisfactorily established.

[5] The respondents raised the objection that, inasmuch as Hooker had presented a claim against the estate for \$1,055.06 for moneys expended by him, which had been allowed, he should have incorporated and presented at the same time the claim now in suit for \$16,670 for the value of his services. The latter claim was not presented until the lapse of ten months following the prior presentation, but was within the year succeeding the first publication of notice to credi-The two claims were upon separate accounts for different subject-matters, and there was no necessity for their joinder in presentation against the estate. Gedney v. Gedney, 19 App. Div. 407, 46 N. Y. Supp. 590 (affirmed in 160 N. Y. 471, 55 N. E. 1).

[6] The respondents also object that appellant could not maintain this action for the reason that the assignment to him was only colorable, and that Hooker was the real party in interest. Our statute (Rem. Code, § 191) provides that an assignee may maintain an action "notwithstanding the assignor may have an interest in the thing assigned." As said in State ex rel. Adjustment Co. v. Superior Court, 67 Wash. 355, 121 Pac. 847:

"This court has uniformly held that an assignee of an account or chose in action could maintain a suit in his own name, although such an assignment is made for the purpose of col-lection only, and the assignee had no other in-terest in the thing assigned."

It is our conclusion from the record that the decedent, Mrs. Wharton, obligated her-

death of Mr. Wharton, were rendered to the think no other contract obligation on her part to remunerate Hooker was established.

The judgment of the trial court will be reversed, with instructions to render judgment in favor of appellant in the sum of \$10,000.

ELLIS, C. J., and WEBSTER, MAIN, and PARKER, JJ., concur.

STATE v. KELLY. (No. 14681.)

(Supreme Court of Washington, May 8, 1918.)

1. PROSTITUTION COLORD TO ACCEPTING EARNINGS OF PROSTITUTE—"EVERY PERSON."
"Every person" as used in Rem. Code 1915, § 2440, providing that "every person" who shall live with or accept any earnings of a common prostitute, etc., shall be punished, etc., includes females as well as males.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Every.]

2. PROSTITUTION & 3—ACCEPTING EABNINGS OF PROSTITUTE — INFORMATION — SUFFI-CIENCY.

In a prosecution for accepting earnings of a prostitute contrary to Rem. Code 1915, \$ 2440, an information, charging that defendant willfully, unlawfully, and feloniously, without any lawful consideration therefor, accept the earnings, to wit, money, of a common prostitute, and the said money having been earned by her in the practice of prostitution was sufficient, without stating the purpose of accepting such earnings. such earnings.

Department 2. Appeal from Superior Court, King County; Kenneth Mackintosh,

Jane Doe Kelly, alias White, was convicted of accepting the earnings of a prostitute, and appeals. Affirmed.

Walter Metzenbaum, of Seattle, for appellant. Alfred H. Lundin and Lane Summers, both of Seattle, for the State.

MOUNT, J. This appeal is from a judgment convicting the appellant of accepting the earnings of a prostitute.

Two questions are presented upon the appeal: First, that the statute upon which the prosecution is based refers to male persons only, and was not intended to include female persons; and, second, that the information does not contain a statement of the acts constituting the offense in ordinary and concise language such as to enable a person of common understanding to know what is intended. The charging part of the information is as follows:

"She, said Jane Doe Kelly, alias White. "She, said Jane Doe Kelly, alias White, whose true name is to the prosecuting attorney unknown, in the county of King, state of Washington, on or about the 18th day of September, 1916, did then and there willfully, unlawfully, and feloniously, without any lawful consideration therefor, accept the earnings, to wit, money, of one Alice Axtell, the said Alice Axtell then and there being a common prestitute and self to make payment to the appellant's as-signor in the sum of \$10,000. This she did not do in her lifetime nor by her will. We | Alice Axtell in the practice of prostitution."

The statute, at section 2440, Rem. Code, provides as follows:

"Every person who-

"(5) Shall live with or accept any earnings of a common prostitute or entice or solicit any person to go to a house of prostitution for any immoral purpose, or to have sexual intercourse with a common prostitute;

"Shall be punished by imprisonment in the state penitentiary.

[1] It is argued by the appellant that the statute refers only to male persons and not to females. It is probably true that the language "every person who shall live with a common prostitute" refers only to male persons, because living with a prostitute carries the idea of cohabitation; but when the statute reads:

"Every person who • • shall • • • accept any earnings of a common prostitute, or entice or solicit any person to go to a house of prostitution for any immoral purpose, or to have sexual intercourse with a common prostitute, \* \* \* "

it seems plain that this language refers to females as well as to males; for, while a female might not cohabit with another female. it is plain that a female might meretriciously accept the earnings of a common prostitute, or might solicit a person to go to a house of prostitution for an immoral purpose, or solicit other persons to have sexual intercourse with a common prostitute. When the Legislature used the words "Every person" at the beginning of this section, it intended, we think, to include females as well as males. This position is strengthened by a reference to the old statute (Rem. & Bal, Code, \$ 2903) which was in force before section 2440 was enacted, and which provided that:

"Any male person (who lives with or accepts any of the earnings of a prostitute,

tellipse etc., should be guilty of a felony.

[2] Upon the other question it is contended that the information does not state the purpose of accepting the money or how it was accepted. We think it was not necessary to state the purpose of accepting the earnings of a common prostitute. In the case of State v. Schuman, 89 Wash. 9, 153 Pac. 1084, Ann. Cas. 1918A, 633, this court held an information sufficient which was not as definite as the one under consideration. In that case, after reviewing a number of authorities, we :hlea

"The information charges the crime in the language of the statute so far as applicable to the facts, and in words well calculated 'to enable a person of common understanding to know what was intended.' It is sufficient.'

We think that case is controlling upon this question.

We find no error. The judgment is therefore affirmed.

ELLIS, C. J., and HOLCOMB and FUL-LERTON, JJ., concur.

CITY OF RAYMOND v. WILLAPA POWER CO. (No. 14003.)

(Supreme Court of Washington. May 9, 1918.)

1. WATERS AND WATER COURSES \$\ins 156(5) GRANTING OF WATER RIGHTS - EASEMENT.
A deed to a city, granting the exclusive right to appropriate water flowing into a river through extension decorated well seater with right. through certain described real estate, with right to enter upon such lands for constructing flumes, and right to overflow same conveys an ease ment, and not title to the water itself.

Waters and Water Courses 4 156(5)-Easement—Rights of Servient Estate.

Where a deed conferring on a city the power to appropriate the waters of a river on a tract of land conveyed an easement merely, the owner of the servient estate may make such use of his estate as is not inconsistent with the easement.

3. WATERS AND WATER COURSES \$\ins 138-Pre-SCRIPTION-ADVERSE CHARACTER.

There can be title by prescription to a water right, where there has been no adverse or hostile assertion of right.

Fullerton, Mount, and Main, JJ., dissenting.

En Banc. On rehearing. Judgment affirmed.

For former opinion, see 98 Wash. 317, 167 Pac. 914.

WEBSTER, J. This case was originally heard and decided in Department 2. After the opinion was filed, which may be found in 98 Wash. 317, 167 Pac. 914, a petition for a rehearing was granted, and the case was thereafter considered by the whole court. The facts, which are fully set forth in the departmental opinion, are correct, with the exception that the court was in error in stating that the water to be diverted by respondent's dam for power purposes would be returned to the stream at a point above the city's contemplated intake pipes. By reference to the blueprint or map which was filed as an exhibit in the case, as well as to the findings of the trial court, we ascertain that the power dam of respondent in section 6 is several miles below the intake dam which appellant contemplates constructing in section 19, and the water diverted will be returned to the stream about 900 feet below respondent's dam. All of the judges agree that a proper solution of the questions presented depends upon the nature of the rights acquired by appellant under the deed from the Raymond Water Company; the respondent contending that the instrument conveyed an easement only, while appellant insists that it acquired the absolute ownership of the water itself. In the former opinion it was held that:

"It is a grant of the water itself, conveying to the grantee all of the title and interest there-in, in so far as the title was vested in the grantor by reason of the ownership of the fee of the land. As against the grantor, the of the land. As against the grantor, the grantee can, under the terms of the grant, divert the water from the stream prior to the time it reaches the land, can divert it at any point upon the lands, and may, by dams or



other obstructions, cause it to overflow, flood, or back upon the lands, or it may, as a matter of right, insist that it continue to flow thereover as it is wont to flow by nature, free from mo-lestation by any one."

[1] A majority of the court are of the opinion that in thus construing the deed the department was in error; our present view being that the deed conveyed to appellant merely an easement for the purposes therein stated. The granting clause of the deed, in so far as it relates to the property here involved, reads:

"Also giving and granting unto the party of the second part, its successors and assigns, the exclusive right and privilege to take and appropriate to its own use for any and all pur-poses any or all of the water flowing, or which poses any or all of the water flowing, or which may hereafter flow, into the south fork of the Willapa river or any of the tributaries of said river, over, across or through the following described real estate. [Here follows a description of the property.] Also giving, granting and conveying unto the party of the second part, its successors and assigns forever, the right to enter upon the said lands above described or any part thereof for the purpose of taking or any part thereof for the purpose of taking and appropriating said water or any part thereof, and for the purpose of laying and construct-ing flumes and pipe lines or both and for the purpose of repairing, relaying or renewing said pipe lines so as to convey and conduct said pipe lines so as to convey and conduct said water from said lands in such manner and by such means as the second party, its successors and assigns, may deem advisable. Also giving and granting unto the party of the second part the sole and syclusive right and privilege to the sole and exclusive right and privilege to overflow, flood, or back water upon all that part of the above-described real estate."

Thus it will be seen the deed does not purport to convey to appellant title to the land itself, nor the right to erect a dam thereon. The extent of the privilege granted is to take and appropriate the water, to enter upon the lands for the purpose of laying and constructing pipes and flumes thereon, with the right to repair, relay, or renew the same as necessity may require, also the privilege of flooding or backing water upon the premises.

Prior to the execution of the deed to appellant the Raymond Water Company had never used or appropriated the water for any purpose; its right thereto being merely that of a riparian owner. No title to the water itself passed by the deed, which by its terms merely granted the privilege of taking and appropriating the water and performing certain acts essential to the accomplishment of such purpose. Crook v. Hewitt. 4 Wash. 749, 31 Pac. 28; Rigney v. Tacoma L. & W. Co., 9 Wash. 576, 38 Pac. 147, 26 L. R. A. 425; Benton v. Johncox, 17 Wash. 277, 49 Pac. 495, 39 L. R. A. 107, 61 Am. St. Rep. 912; New Whatcom v. Fairhaven Land Co., 24 Wash, 493, 64 Pac. 735, 54 L. R. A. 190; Still v. Palouse Irr. & Pow. Co., 64 Wash. 606, 117 Pac. 466; Saunders v. Bluefield Waterworks & Imp. Co. (C. C.) 58 Fed. 133; 2 Kinney on Irrigation and Water Rights (2d Ed.) § 772; 40 Cyc. 552.

[2] Holding as we do that the right ac-

merely an easement to take and appropriate the water, it follows that the owner of the servient estate may make such use of it as is not incompatible or inconsistent with the easement granted. Hayward v. Mason, 54 Wash. 649, 104 Pac. 139; Burnham v. Nevins, 144 Mass. 88, 10 N. E. 494, 59 Am. Rep. 61; Colegrove Water Co. v. Hollywood, 151 Cal. 425, 90 Pac. 1053, 13 L. R. A. (N. S.) 904; Hoyt v. Hart, 149 Cal. 722, 87 Pac. 569; St. Joseph River Valley Co. v. Galligan, 120 Mich. 468, 79 N. W. 685; Smith Canal Co. v. Col. Ice & Storage Co., 34 Colo. 485, 82 Pac. 940, 3 L. R. A. (N. S.) 1148.

Since the respondent acquired all the right and title to the property, subject only to the easement conveyed by the prior deed to appellant, it may devote the property to any use it may see fit which is not inconsistent with the easement granted. It is not contended that appellant's right to take and appropriate the water is being interfered with or threatened; the theory of appellant's case being that it is the absolute owner of the water, and that respondent's present and contemplated use of the same constitutes a continuous or repeated trespass which will be enjoined in equity. over the decree of the lower court in express terms provides:

terms provides:

"This action is dismissed without prejudice on the part of the appellant, the city of Raymond, as to any other action against the defendant, Willapa Power Company, should at any time hereafter said defendant interfere in any manner whatsoever with any of the rights granted to the said city of Raymond, which said city of Raymond may have by virtue of that certain deed executed on the 17th day of August, 1915, wherein the Raymond Water Company is grantor and the city of Raymond is grantee;

\* \* \* it being at the time decreed that the defendant in this action is not now interfering, and is not threatening to interfere, with any rights the plaintiff in this terfere, with any rights the plaintiff in this action may have under and by virtue of said

In the former opinion the department took judicial notice of the fact that modern science had demonstrated that the use of water in power plants and for other purposes where human beings must of necessity be in attendance about it seriously endangers its purity, rendering it unfit for human consumption. This, however, was upon the assumption that the water which respondent intends to divert to its power plant would be returned to the stream at a point above appellant's contemplated intake pipes. As we have already noted, such is not the fact, and in the nature of things a pollution of a stream at a point miles below appellant's intake dam could not affect the purity of the water entering its intake pipes.

[3] It is also suggested in the departmental opinion that if respondent's present or intended use of the property should remain unchallenged, such use might ripen into a title by prescription. This argument is necessarily predicated upon the construction placed by quired by appellant under the deed was the department upon the deed to appellant.

Since we now hold that the deed conveyed a of said South fork of the Willapa river. That mere easement, and there is no interference, either present or threatened, with the rights therein granted, this argument must fail. There can be no title by prescription as a matter of law where there has been no adverse or hostile assertion of rights as a matter of fact. Wintermute v. Tacoma Light & Water Co., 3 Wash. 727, 29 Pac. 444.

Should respondent at any time hereafter assert the right to take any action which may be hostile or adverse to the enjoyment of the rights conveyed by appellant's deed, there is ample protection afforded by the provisions of the decree above set forth. The judgment is affirmed.

ELLIS, C. J., and HOLCOMB, CHAD-WICK, and PARKER, JJ., concur.

FULLERTON, J. (dissenting). I am unable to concur in the opinion of the majority. think it wrong in its construction of the deed, the operative parts of which are recited in the opinion, but I am clear that it is wrong for another reason. The cause was tried upon an agreed stipulation as to the facts. This stipulation contains the following provisions:

"That plaintiff is the owner of and is maintaining and operating a water plant and waterworks and by and with the same, is furnishing and supplying said city of Raymond and the inhabitants thereof with water for domestic uses and for municipal uses and purposes, and the point on the South fork of the Willapa river where the plaintiff is taking water from said river for such purposes is in the northeast quarter of the southwest quarter of section 31, township 14 north, range 8 west W. M., and that the city of Raymond and the inhabitants thereof depend entirely upon the waters of the South fork of the Willapa river so taken out of the South fork of the Willapa river for domestic use and for municipal uses and purposes. That the said water supply is inadequate to meet the requirements and necessities of said city and the inhabitants thereof, and that said "That plaintiff is the owner of and is mainmeet the requirements and necessities of said city and the inhabitants thereof, and that said city of Raymond and the inhabitants thereof depend upon the plaintiff's water plant for a supply of water for domestic uses and municipal uses and purposes. That in order to furnish and supply an adequate amount of fresh water for said city of Raymond and the inhabit-ants thereof, it is necessary that plaintiff use ants thereof, it is necessary that plaintiff use the water of said South fork of the Willapa river at the point and place aforesaid where plaintiff intends and proposes to locate its dam and works, to the extent of 30 cubic feet of water per second of time, and by said dam and works impound said waters and divert the said and carry the same into and through the city of Raymond for the purpose, in said city, of supplying said city and the inhabitants thereof with an adequate supply of fresh water for domestic uses and municipal uses and purposes; and that, in order that plaintiff may protect said water from pollution, it is necessary that plaintiff use the lands above described for said purposes, and the same is necessary and required by the plaintiff for said uses and purposes and the object of said condemnation suit is for said purposes and for the purpose of supplying the city of Raymond and the inhabitants with water for domestic use and for municipal uses and purposes. That the city of Raymond is the owner of the water and also the land at the place aforesaid where it takes said water out change deposited deeds with the agent, with in-

the city of Raymond has expended a large sum of money, to wit, the sum of \$140,000, and the said water plant consists of dams, water pipes, said water plant consists of dams, water pipes, reservoir, pumping station, supply and distribution mains, and the water is taken from said South fork of the Willapa river at the place hereinabove mentioned, and said water is used by the city of Raymond for the purpose of supplying the city and the inhabitants thereof with water for domestic use and municipal uses and purposes; and the city of Raymond intends to continue to correte its said water. tends to continue to operate its said water plant and system to furnish said water to its inhabitants thereof for domestic use and municipal uses and purposes.

The land described as the place where the city of Raymond is now taking water from the river named is below the place on the stream where the respondent is constructing its power plant. The opinion therefore is in error in assuming that the city is not making use of the waters of the stream below the place of location of the respondent's plant. It is true that the city contemplates changing its place of diversion from a point below to a point above the place; and, while I freely confess a mistake in this and in another regard in my statement of the fact in the former opinion, the principle on which the opinion rests remains the same. The city desires to keep the water which it uses free from the possibility of pollution, and in my opinion the deed is sufficient to enable it to do this by the remedy of injunction, even if it does not convey title to the water flowing over the land in dispute.

That there is danger of pollution from this source is evidenced by the fact that the city has already found it necessary to resort to the public health officers to maintain cleanliness about the respondent's works. health of so considerable a community as the city of Raymond being at stake, there ought not to be any too nice refinements in the construction of its deeds of conveyance, and it is too much of a refinement to say that it acquired nothing by its deed other than what it already had as a lower riparian proprietor on the stream.

MOUNT and MAIN, JJ., concur.

NELSON et ux. v. DAVIS et al. (No. 14502.) (Supreme Court of Washington. May 9, 1918.)

EXCHANGE OF PROPERTY \$3(1)—FRAUDS, STATUTE OF \$110(1) — MEMORANDUM—SUFFICIENCY—CONDITIONAL ACCEPTANCE.

Written offer to exchange property, consisting of lot and store building in specified town, county, and state for land in another city, county, and state and on a certain street, even when accepted, did not remove the con-tract from the statute of frauds, since no sufficient description appeared therein; and, in view of further clause accepting upon condition, there was no valid written contract.

structions not to deliver until they had respectively inspected the properties, they retained such control that there was no valid escrow agreement.

3. Frauds, Statute of \$\infty\$=129(4) — Land-Part Performance—Possession.

Where parties to exchange of real property merely procured key and went on premises for inspection, remaining only a reasonable time for such purpose, they did not take such possession, as to render operative a contract invalid under the statute of frauds.

4. EXCHANGE OF PROPERTY 4 -5 -SION-IMPROVEMENTS-REIMBURSEMENT.

Where persons agreed to exchange realty, and one of them went on the land he was to receive and made improvements thereon voluntarily before the other had definitely accepted, and the one in possession retained possession for a considerable length of time, the other, on rescission on account of misrepresentations, could not be required to reimburse for the improvements made.

Department 1. Appeal from Superior Court, Asotin County.

Suit by N. A. Nelson and wife against W. H. Davis and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Elmer E. Halsey, of Clarkston, and Ben F. Tweedy, of Lewiston, Idaho, for appellants. J. Webster Hancox, of Spokane, and E. J. Doyle, of Clarkston, for respondents.

PARKER, J. The plaintiffs Nelson and wife seek delivery of a deed which they claim was deposited for them in escrow with the defendant Wallace by the defendants Maxum and wife, which deed was signed and acknowledged by Maxum and wife, purporting to convey to Nelson and wife land in Clarkston, Asotin county, in this state. The plaintiffs also seek to quiet title to the land in themselves as against the claims of the defendants Davis and wife, and the interveners Witherby and wife, grantees of Maxum and wife. Trial in the superior court for Asotin county resulted in findings and judgment in favor of the defendants, from which the plaintiffs have appealed to this court.

The contentions of counsel for appellants are, in substance, that the deed in question was deposited for them by the Maxums, in escrow, with Wallace; that the conditions of the escrow agreement have been fully performed, entitling them to delivery of the deed: and that the facts shown are such as to render the defendant and intervener, grantees of the Maxums, purchasers with notice of appellants' rights in the premises. The contentions of counsel for respondents are, in substance, that there never was any valid, binding contract for the conveyance of the land, nor any valid and binding escrow agreement as claimed by appellants, and that the grantees of the Maxums are, in any event, innocent purchasers for value. Our conclusion renders it necessary for us to notice only the question of appellants' claim of right to the delivery of the deed as against the defendants Maxums.

Early in June, 1915, negotiations were commenced looking to the exchange of the land of the Maxums. situated In Clarkston, Asotin county, in this state, for a lot and personal property consisting of a bakery plant thereon of the Nelsons, situated in Wendell, Gooding county, Idaho. These negotiations were conducted by the husbands, assisted by the defendant Wallace. a real estate agent at Lewiston, Idaho, and resulted in the signing of a writing as fol-

## "Offer to Exchange.

"Offer to Exchange.

"I hereby offer to exchange my property described as follows: One lot and store building in Wendalelll, Idaho, in the county of Gooding state of Idaho for the property of Mr. L. V. Maxum described as follows: % of an acre on Bridge street in Clarkstom, in the county of Asotin state of Washington. Each party is to furnish an abstract showing good title and execute a warranty deed or contract for warranty deed. Also each party is to have a reasonable time for furnishing an abstract, examination of title, and for closing the deal. Also each party acknowledges the receipt of \$1.00 from the other as part payment on these properties. This proposition is to be accepted by Mr. L. V. Maxum within eight days from this 9th day of June, 1915. 9th day of June, 1915.

"[Signed] N. A. Nelson.

"I hereby accept the above proposition this 9th day of June, 1915, providing the statement from the bank at Wenda[e]ll, Idaho, is satisfactory and according to the description given me by Mr. N. A. Nelson.

"[Signed] L. V. Maxum."

The Nelsons had seen and examined the Clarkston property, which is situated a short distance from Lewiston, while the Maxums were wholly unacquainted with the Wendell property, which is situated in Southern Idaho. a long distance from Lewiston. There was no attempt to make any written contract relating to the personal property to be exchanged with the Wendell lot, though Nelson made a rough statement in writing in a separate paper touching the nature of the personal property. The bank at Wendell was communicated with by mail, bringing an answer which proved unsatisfactory to the Maxums. This would have put an end to the trade had no further negotiations been had. However, Nelson insisted on the Maxums going to Wendell and examining the property for themselves. It was then orally agreed that the parties should sign and acknowledge deeds to their respective properties, and leave the deeds with Wallace to be delivered by him. should the Maxums, after going to Wendell and examining the property there and finding it satisfactory, write to Wallace that they were willing to consummate the exchange and authorize him to deliver their deed to the Nelsons, upon receiving from them their deed for the Wendell property. Deeds were signed, acknowledged, and left with Wallace accordingly. Maxum then started overland by team and wagon to Wendell, his wife preceding him by train. About the time of the

departure of the Maxums the Nelsons moved; on to the Clarkston property. Whether it was with the consent of the Maxums is a matter of dispute between them, but that it was not in consummation of the exchange we think it quite clear from the evidence. When the Maxums arrived at Wendell they immediately examined the Nelson property there, and, being dissatisfied with it, promptly wrote to Wallace, advising him of that fact, in effect declining to complete the exchange, and warning him not to deliver their deed to the Nelsons. It is apparent that the Nelsons were promptly advised of this decision on the part of the Maxums.

[1] Looking to the agreement of June 9. 1915, as evidenced by the writing above quoted, it seems plainly to fall far short of satisfying our statute of frauds as a contract to convey real property, in that no sufficient description of any real property appears Rogers v. Lippy, 169 Pac. 858; Nance v. Valentine, 169 Pac. 862. It also seems plain that this writing does not evidence the meeting of the minds of the parties except as to matters merely preliminary to an ultimate exchange of the properties. It also seems plain from the conceded facts that this writing in no event evidences the entire agreement between the parties, since it makes no mention of any personal property, which, plainly, was contemplated to become part of the property to be exchanged. So whatever the agreement was, both as to the exchange of the properties and as to the leaving of the deeds with Wallace claimed by the Nelsons to have been in pursuance of an escrow agreement, is in law, in no event, other than an oral agreement. 13 C. J. 246.

[2] Conceding for argument's sake that an escrow agreement for the delivery of a deed conveying real property may rest in parol, where there is no valid written contract for the conveyance of real property, which, however, seems doubtful (Nichols v. Oppermann, 6 Wash. 618, 34 Pac. 162; Manning v. Foster, 49 Wash. 541, 96 Pac. 233, 18 L. R. A. [N. S.] 337, 126 Am. St. Rep. 876, 16 Ann. Cas. 95; King v. Upper, 57 Wash. 130, 106 Pac. 612, 1135, 31 L. R. A. [N. S.] 606), we are of the opinion that the evidence does not warrant the conclusion that there was any meeting of the minds of the Nelsons and the Maxums, constituting in law an escrow agreement. We see nothing in the understanding arrived at between the parties when the deeds were left with Wallace, other than that the deeds were left with him as a mere matter of convenience, pending the final decision of the Maxums as to whether they would consummate the contemplated exchange, they being privileged to refuse to consummate it upon the inspection of the Wendell property, which at that time, as we have noticed, they had never seen. In other words, the Maxums did not, in placing their deed in the hands of

view of having it delivered to the Nelsons upon their performing some specified agreed condition, entitling them to have it delivered. The law of escrow agreements is well stated by the learned editors in 10 R. C. L. 626, as follows:

"Where the possession of the depositary is subject to the control of the depositor, an instrument cannot be said to be delivered, and it is not an escrow. While, as will be seen, the depositor's right of possession may return if depositor's right of possession may return if the specified event does not happen, or the conditions imposed are not performed, yet to constitute an instrument an escrow it is essential that the deposit of it should be in the meantime irrevocable; that is, that when the instrument is placed in the hands of the depositary, it should be intended to pass beyond the control of the depositor, and that he should actually part with all present or temporary right of possession and control over it. In case the deposit is made in furtherance of a contract between the parties, the contract must be so nearly complete that it remains only for the grantee or obligee or another person to perform the required condition, or for the event to happen, to have the instrument take effect according to its import."

This deed was not beyond the recall of the Maxums. Its delivery was not dependent upon the happening of an event beyond the control of the Maxums, but its delivery was dependent wholly upon the determination of the Maxums as to whether they would complete the exchange after their inspection of the Wendell property. Our recent decision in Rhines v. Young, 97 Wash. 437, 166 Pac. 642, while not dealing with an escrow agreement, supports this conclusion. Counsel for appellants place some reliance upon our decision in Bahrs v. Runkle, 79 Wash. 45, 139 Pac. 637. In that case, while the plaintiff was attempting to enforce an escrow agreement, there was no question as to the validity or binding force of the escrow agreement as such, but the real controversy was over the question of rescission of the entire contract, including the escrow agreement, upon the ground of fraud.

[3] Some contention is made in appellants' behalf, rested upon the theory that the Nelsons took possession of the Clarkston property and the Maxums took possession of the Wendell property. We think the record does not warrant the conclusion that the Nelsons took possession of the Clarkston land with any understanding whatever on the part of any of the parties that the taking of such possession was in consummation of the exchange. Their possession was, in no event, anything more than merely permissive on the part of the Maxums, with the understanding that such possession was to be surrendered should the Maxums elect not to make the We think the Maxums did not exchange. take possession of the Wendell property in the sense that their acts could be construed as a consummation of the trade. It does appear that they obtained from the agent of the Nelsons at Wendell the key to the property and went upon the premises, but only Wallace, part with the control of it with a for such reasonable time as would enable them to properly inspect them and reach a decision as to whether they would consummate the trade. Their acts in this respect covered a very short period of time, and we think plainly were not such as evidenced an intent on their part to retain possession in consummation of the exchange.

[4] Some contention is made in appellants' behalf rested upon the fact that the Nelsons, after going upon the Clarkston land, made some improvements thereon, and also paid an installment of interest upon a mortgage there-We are convinced, however, that this was wholly voluntary on their part, and that they were not induced to make any such improvements or payment by any act of the Maxums. This was not an issue upon the trial, in any event; and, if it should be considered as having been an issue, we are satisfied that good conscience and equity would not require the Maxums to reimburse the Nelsons therefor, in view of the long time that the Nelsons have remained in possession. depriving the Maxums of the use of the land.

Respondents have moved to dismiss the appeal because the appellants have not prepared a proper abstract, the evidence covering somewhat more than 100 pages. While we think the form of the abstract as prepared by counsel for appellants is subject to some criticism, we have concluded to not dismiss the appeal, but dispose of the case on the merits, which leads to the same result in so far as the ultimate determination of the controversy is concerned.

The judgment is affirmed.

ELLIS, C. J., and WEBSTER, MAIN, and FULLLATON, JJ., concur.

HILLS v. C. D. STIMSON CO. (No. 14380.) (Supreme Court of Washington. April 30, 1918.)

1. FIXTURES \$\infty 27(2)\to Lease of Building to

BE CONSTRUCTED—CONSTRUCTION.
Where lessee, in consideration of lease for building to be consideration. where lessee, in consideration of lease for a building to be constructed, agreed, in addition to stipulated rent, to install machinery, which should immediately become the property of the lessor, it became immediately, when placed in the building prior to delivery of premises to lessee, the property of lessor, subject only to lessee's leasehold.

BANKBUPTCY \$\infty 165(2) - PREFERENCE - SUBBENDERING POSSESSION OF LEASEHOLD. Where the only right which lessee had in machinery installed by him in building leased was a leasehold right to use the same subject to payment of rent, surrender of possession of leased premises, together with such machinery, after default, within four months prior to bankruptcy of lessee, did not constitute a preference of lessor as creditor, for, when the leasehold was forfeited, the possession simply reverted to the lessor.

3. BANKRUPTCY \$\infty 184(2)-Rights of Cred-ITORS-RECORDING LEASE.

sequently became bankrupt, were concerned, to record lease which provided that title to machinery installed by lessee should immediately vest in lessor.

4. BANKRUPTCY \$\insigm 184(2) — CHATTEL MORT-GAGE—WHAT CONSTITUTES.

Where original lease provided that title to property installed by lessee should immediately property installed by lessee should immediately vest in lessor, an agreement modifying the same, so that, upon failure of lessee to pay rent, lessor might take immediate possession for a period of six months, when lessee might again take possession, provided it had paid its obligations and rent at an increased rental, was not a chattel mortgage on machinery installed by lessee, and did not have to be recorded as such by the lesser of far as subsequent handranter. by the lessor, so far as subsequent bankruptcy of lessee was concerned.

Department 2. Appeal from Superior Court, King County; King Dykeman, Judge. Replevin by S. T. Hills, as trustee in bankruptcy of the Natatorium Company, bankrupt, against the C. D. Stimson Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with direc-

Hughes, McMicken, Ramsey & Rupp, of Seattle, for appellant. Cassins E. Gates, Jones & Riddell, and R. C. Hazen, all of Seattle, for respondent.

MOUNT, J. This is an action in replevin, brought to recover possession of certain personal property alleged to be of the value of \$18,000. Issue was made as to the ownership of the property. Upon this issue the case was tried to the court without a jury, and resulted in a judgment in favor of the plaintiff for the return of certain of the property or its value, conceded to be \$15,641. The defendant has appealed from that judgment.

The facts are briefly as follows: The respondent, S. T. Hills, is trustee in bankruptcy of the Natatorium Company, a corporation. On November 11, 1915, the Natatorium Company entered into an agreement with the appellant, by which agreement the appellant engaged to erect a building upon three certain lots in the city of Seattle for a natatorium building to be used by the Natatorium Company. It was agreed that the cost of this building should not exceed \$115,000: that as part consideration for the lease. which was provided for in the agreement, the Natatorium Company was to pay \$50,-000 in cash to the appellant, and was also to install in the building, at the terminal of the pipe line necessary to connect the building with the salt water of Elliott Bay, salt water pumps, dynamos, motors, laundry machinery and appliances, opera chairs, furniture, fixtures, filters, and other necessary machinery and equipment, all of which, when installed in the building, should become a part of the property of the appellant. It was provided in the agreement that Where title to premises was of record and stood in the name of lessor, it was not necessary, so far as creditors of lessee, which sub\$20,000, except that it was provided in the agreement that these appliances should not cost less than \$20,000, except that it was provided that cer-

tain machinery, chairs, etc., might be purchased upon conditional sale, if not incumbered in excess of \$4,328. It was also provided that, if the building and pipe line should cost in excess of \$115,000, the Natatorium Company should pay such excess, and that all improvements placed upon the premises by the Natatorium Company should be deemed a part of the building and belong to the appellant, except as to any additional equipment or property in excess of said \$20,-000 worth of equipment, or replacement or substitutions thereof. The contract of lease also provided that upon the completion of the building, when it should be occupied by the Natatorium Company, that company should pay a monthly rental of \$900, payable in advance. It also provided that in case the rent was not paid the appellant might terminate the lease and take possession of the premises, subject to redemption within three months at an increased rental for that time. On March 6, 1916, a supplementary agreement between the parties was made, which provided for installing a heating and lighting plant necessary for the natatorium building, at a cost of \$10,000, and that the Natatorium Company should pay an additional rent on account of the heating and lighting plant in the sum of \$100 per month. The building was entirely completed, and the necessary equipment was placed therein, prior to the 28th day of June, 1916. On that date the appellant turned over the possession of the building, with the equipment, under the terms of the lease, to the Natatorium Company. After the building was completed, and had been taken possession of by the Natatorium Company, it was ascertained that the cost of the building had exceeded the stipulated price of \$115,000. Materialmen were threatening to file liens against the property.

The appellant then insisted that the Natatorium Company should pay the excess cost to the lien claimants in accordance with the terms of the original contract, and because of failure to do so the appellant asserted its right to a forfeiture of the lease. The business of the Natatorium Company. from the time of its opening in June, 1916, had prospered for a short time, and afterwards it failed to meet its obligations. On the 25th day of August, 1916, another agreement was made between the appellant and the Natatorium Company, by which agreement it was recited that the Natatorium Company had failed to pay the cost of the building in excess of \$115,000, and that the appellant was entitled to the surrender of the premises and the termination of the lease. It was thereupon stipulated that the Natatorium Company should surrender to the appellant the possession of the leased premises, together with the appurtenances and equipment used in the conduct of the business; and it was should have six months; instead of three months, stipulated in the original lease, in which to redeem the leasehold estate upon paying the appellant any sums it might pay off to clear the property of liens, with interest at 7 per cent., and further paying the accrued rentals therein provided in case of redemption after forfeiture. This arrangement continued until the 17th day of November. 1916, when the Natatorium Company abandoned and surrendered the premises, together with all the equipment, to the appellant. Thereafter, within four months after August 25, 1916, the Natatorium Company was adjudged a bankrupt in the United States court, and Mr. Hills was appointed trustee in bankruptcy and brought this action to recover certain of the equipment placed in the building prior to the delivery of the premises to the Natatorium Company and certain goods held in store after that time.

[1] There is substantially no dispute upon the facts in the case. The question of the ownership of the property depends largely, if not entirely, upon the construction of the contracts entered into between the Natatorium Company and the appellant. After carefully reading these contracts, and the statement of facts in the case, we are convinced that all the property sued for, except that which was stipulated at the trial to belong to the Natatorium Company, is clearly the property of the appellant. The original contract entered into between the parties on the 11th day of November, 1915, plainly and definitely recites that in consideration for the lease, which was to run for a period of 25 years, the Natatorium Company was to pay to the appellant the sum of \$50,000: that in addition thereto the Natatorium Company was to pay the cost of the building in excess of \$115,000; and that it was required to install in the building machinery, appliances, chairs, furniture, fixtures, filters, and other machinery and equipment, at a cost of not less than \$20,000, "and it is agreed that said personal property and equipment, together with all replacements and substitutions thereof, shall immediately become the property of the party of the first part, as additional consideration for this lease." So it is apparent from the terms of the contract of lease itself that all the furniture, fixtures, etc., placed in the building immediately became the property of the appellant. The subsequent additional agreement with reference to a heating and lighting plant did not change the terms of the original lease, except to increase the rent \$100 per month by reason of the additional cost of the heating and lighting plant paid for by the appellant. The agreement of August 25, 1916, made no change in the original agreement so far as the ownership of the property designated as appliances, etc., was concerned. That agreement simply modprovided that the Natatorium Company ified the original lease agreement, so that,

upon failure of the Natatorium Company to pay the rent, or to pay the obligations of the Natatorium Company, the appellant might take immediate possession of the premises and conduct the business as a natatorium for a period of six months, and if, in the meantime, the Natatorium Company paid up its obligations and rent at an increased rental figure, then the property might be again taken possession of by the Natatorium Company. The possession of the property was surrendered to the appellant on August 25, 1916, and became under the terms of the lease the absolute property of the appellant, because it was not redeemed within the time limited.

A careful examination of all the evidence in the case, and a reading of the contracts which were received in evidence, convinces us that the consideration for the original lease was \$50,000 in cash, which is conceded to have been paid, the payment of the excess cost of the building over \$115,000, and the purchase of \$20,000 worth of furniture, etc., and that these considerations were considerations for the original lease contract, and the furniture, etc., when placed in the building, became the property of the appellant company. The fact that the Natatorium Company went into bankruptcy within four months after August 25, 1916, did not change the character of the property. The machinery, appliances, etc., when put into the building, became immediately the property of the appellant. The surrender of the leased premises, together with the property placed therein by the Natatorium Company, did not change the character of the ownership.

[2,3] It is argued by the respondent that the surrender of the leased premises to the appellant was in substance a preference of the appellant as creditor; but we think this argument is without force, because the property surrendered by the Natatorium Com-

pany was in fact and in law at that time the property of the appellant. The only right which the Natatorium Company had to this property was a leasehold right to use the property, subject to the payment of its rent. When the leasehold was forfeited, the possession simply reverted to the lessor, which cannot be said to be in any way a preference. Nor was it necessary that the lease should be recorded, so far as creditors were concerned. The title to the property was of record, and stood in the name of the appellant; and persons doing business with the Natatorium Company must, of course, take notice of that fact.

[4] Neither was the agreement of August 25, 1916, a chattel mortgage, and it was not necessary to be recorded as such. As we have above intimated, the real property, together with the building and the equipment placed therein under the original lease, was at all times the property of the appellant. The equipment never became the property of the Natatorium Company after it was placed in the building subject to the lease. Like the \$50,000 cash, which no doubt also went into the building, it became a part of the building by the terms of the lease. We are clearly of the opinion that the trial court erred in concluding that the property sought here, except that which was conceded upon the trial to be the property of the Natatorium Company, was the property of that company. to which the trustee in bankruptcy was entitled.

The judgment of the trial court is therefore reversed, and the cause remanded, with direction to the lower court to enter a judgment for the appellant in accordance with this opinion; the appellant to recover costs.

ELLIS, C. J., and HOLCOMB and CHAD-WICK. JJ., concur.

END OF CASES IN VOL. 172

## INDEX-DIGEST



#### THIS IS A KEY-NUMBER INDEX

It Supplements the Decennial Digests, the Key-Number Series and Prior Reporter Volume Index-Digests

## ABANDONMENT.

See Waters and Water Courses, == 151.

## ABATEMENT AND REVIVAL.

See Appeal and Error, \$\sim 334; Election of Remedies.

## V. DEATH OF PARTY AND REVIVAL OF ACTION.

#### (A) Abatement or Survival of Action.

6-56 (Okl.) Where the execution of a mortgage is procured by duress, the cause of action therefor is not personal to the mortgagor, and his heirs may set up duress in an action to foreclose, or they may maintain an action for cancellation on such ground.—Drake v. High, 172 P. 53.

#### VI. WAIVER OF GROUNDS OF ABATE-MENT AND TIME AND MANNER OF PLEADING IN GENERAL.

8-84 (Okl.) A party who denies jurisdiction of the court over his person must raise the point before answering to the merits.—Phillips v. Mitchell, 172 P. 85.

## ABBREVIATIONS.

See Frauds, Statute of, == 106.

## ABDUCTION.

See Seduction.

## ABORTION.

See Criminal Law, \$371, 423, 507, 780.

## ABSENCE.

See Continuance, \$\iff 20; Criminal Law, \$\iff 543, 594, 595; New Trial, \$\iff 85.

## ABUTTING OWNERS.

See Eminent Domain, == 84-126.

## ACCEPTANCE.

See Contracts, ← 22; Dedication, ← 31; Guaranty, ← 7.

## ACCESSION.

See Confusion of Goods; Fixtures.

## ACCOMPLICES.

See Criminal Law, 507, 780.

## ACCORD AND SATISFACTION.

See Compromise and Settlement; Payment.

e=7(1) (Kan.) Where contractor signed voucher as "received on account" and after an indorsement qualifying his acceptance received the amount named in the estimate, the payment and acceptance was not an accord and satisfaction.—Lantry Contracting Co. v. Atchison, T. & S. F. Ry. Co., 172 P. 527.

## ACCOUNT.

See Account Stated; Partnership, 327.

## ACCOUNT STATED.

€=12 (Or.) One to whom statement of account was rendered, though having made no objection, may impeach it for fraudulent concealment of facts.—Haines v. First Nat. Bank, 172 P. 505.

#### ACQUIESCENCE.

See Estoppel, \$\sim 93.

## ACTION.

See Abatement and Revival; Appeal and Error, 4=1239; Dismissal and Nonsuit; Pleading, 4=249.

#### II. NATURE AND FORM.

25(1) (Utah) Where insurer required bond indemnifying it against claims of insured's creditors who alleged that assignment of policy to plaintiff was fraudulent, the adequacy of plaintiff's remedy at law did not preclude her maintaining action to cancel the bond; there being no distinction between equity and law.—O'Neill v. Mutual Life Ins. Co. of New York, 172 P. 306.

## III. JOINDER, SPLITTING, CONSOLI-DATION, AND SEVERANCE.

45-45(1) (Kan.) In action for damages from mortgagee's breach of contract to make releases to purchasers from mortgagor, and to enjoin a foreclosure sale and to quiet title, there was no misjoinder of causes.—Nelson v. Hoskinson, 172 P. 993.

Hoskinson, 172 P. 595.

\$\infty\$=48(1) (Cal.App.) Under Code Civ. Proc. \\$
427, subd. 8, as to joinder of causes arising out of same transaction, purchaser at commissioner's sale may join his causes to quiet title and to compel commissioner to make new deed conveying all of land which original deed failed to do.—Morris v. Judkins, 172 P. 163.

e=50(2) (N.M.) Under Code 1915. \$ 4105, taxpayer cannot, in same complaint, set up cause of action against members of school

For cases in Dec. Dig. & Am. Dig. Key No. Series & Indexes see same topic and KEY-NUMBER 172 P.—75 (1185)



board individually for moneys unlawfully paid out by them and against them officially to enjoin further payments.—Board of Education of City of Roswell v. Seay, 172 P. 1040.

6-50(3) (Okl.) Under Rev. Laws 1910, §§ 4690, 4738, a cause of action by a husband for fraud inducing exchange of land for corporate stock may properly be joined with his wife's cause of action for fraud in being induced to execute a mortgage on her separate property to secure her husband's obligations.—Phillips v. Mitchell, 172 P. 85.

#Milips v. Milchell, 112 r. S.

59 (Ariz.) Where a bank brought separate actions on pledged notes against seven defendants and upon motion of defendants, the issues being the same, the suits were consolidated, a single verdict and judgment is sufficient.

Ellis v. First Nat. Bank, 172 P. 281.

€=59 (Okl.) Where parties consent to the consolidation of two separate actions and agree that they may be tried together, the jurisdiction of the court is the same as if one action containing all the issues of the consolidated case had been brought.—Phillips v. Mitchell, 172 P. 85.

## **ACTIVE TRUSTS.**

See Trusts, == 135.

## ADJOINING LANDOWNERS.

See Boundaries.

## ADJUDICATION.

See Courts, \$==89-97; Judgment.

## ADMINISTRATION.

See Executors and Administrators; Guardian and Ward, \$\sim 53, 71.

## ADMISSIONS.

See Criminal Law, \$\infty\$406, 409, 741, 814; Evidence, \$\infty\$208-253; Pleading, \$\infty\$127, 129, 214, 349.

## ADVERSE POSSESSION.

## II. OPERATION AND EFFECT.

(B) Title or Right Acquired.

€=109 (Wash.) Title or right acquired by adverse possession can be parted with only in manner that a title or easement right otherwise acquired may be parted with.—McInnis v. Day Lumber Co., 172 P. 844.

### ADVERTISEMENT.

See Evidence, \$\sim 355.

## AFFIDAVITS.

See Appeal and Error, \$\infty\$616; Judgment, \$\infty\$17; New Trial, \$\infty\$140, 150; Process; Venue, \$\infty\$68.

## AFTER-ACQUIRED PROPERTY.

See Chattel Mortgages, =18, 124.

AGE.

See Witnesses, \$==40.

AGENCY.

See Principal and Agent.

AGREEMENT.

See Contracts.

**ALIBL** 

See Criminal Law, ==31.

## ALIENATION.

See Indians, 6=15.

## ALIMONY.

See Divorce, \$\sim 240.

## ALTERATION OF INSTRUMENTS.

See Reformation of Instruments.

em16 (Okl.) Where instrument when executed is complete on its face and after delivery by maker is materially altered, it is nullity except as against party who may have authorized or assented to alteration.—First Nat. Bank v. Ketchum, 172 P. 81.

## ALTERNATIVE METHOD.

See Appeal and Error, \$= 760.

## ALTERNATIVE WRITS.

See Mandamus, 4=160.

## AMBIGUITIES.

See Evidence, €== 450-459.

## AMENDMENT.

See Appeal and Error, \$\infty\$ 422, 655; Indictment and Information, \$\infty\$ 161, 198; Pleading, \$\infty\$ 249-261.

## AMUSEMENTS.

See Municipal Corporations, \$\sim 736.

## ANIMALS.

See Carriers, \$\simes 218; Railroads, \$\simes 411-443.

&-72 (Wash.) One harboring a vicious animal knowing of its vicious propensities, although not its owner, is liable in damages for the injuries it causes another.—Miller v. Reeves, 172 P. 815.

#===74(5) (Wash.) Evidence held to sustain judgment, in favor of person who went on defendant's premises on business errand and was bitten by a vicious dog harbored by defendants.

—Miller v. Reeves, 172 P. 815.

-miner v. Reeves, 172 F. 515.

2-90 (N.M.) One not knowing the boundaries of privately owned land surrounded by government domain cannot be enjoined from driving his flocks and herds upon such land. unless owner has complied with Code 1915, \$39, by conspicuously marking boundaries and posting notices against trespass.—Jastro v. Francis, 172 P. 1139.

## ANNEXATION.

See Fixtures.

## ANSWER.

See Pleading, \$\\_122-129, 166, 258, 261.

## APPEAL AND ERROR.

See Certiorari; Courts, \$\simes 204-207; Criminal Law, \$\simes 1018-1188; Evidence, \$\simes 43; Exceptions, Bill of.

For review of rulings in particular actions or proceedings, see also the various specific topics.

#### I. NATURE AND FORM OF REMEDY.

€=2 (Cal.App.) Though plaintiff had initiated motion for new trial prior to St. 1915, p. 209, amending Code Civ. Proc. § 963, limiting right to appeal from judgment only, law in effect at time of entry of order denying motion for new trial must control, so that purported appeal therefrom was in itself of no avail.—Nathan v. Porter, 172 P. 170.



(Cal.App.) Having filed valid appeal lower court.—Hubbard v. Tacoma Eastern R. from judgment against him, plaintiff was precluded from taking second appeal while first was pending and undetermined.—Nathan v. plead a set-off against plaintiff's claim for Porter, 172 P. 170.

their first notice of appeal had expired, appeal having been perfected by service of notice and filing required undertaking, plaintiffs' rights were exhausted, and they could not take another appeal.—Ogden v. Hoffman, 172 P. 503.

## III. DECISIONS REVIEWABLE.

## (D) Finality of Determination.

\$\insertain \text{3.5} (Kan.) An order refusing to consider a motion to correct a judgment nunc protunc, and striking such motion from the files, is a final order from which an appeal is allowed under Code Civ. Proc. \\$\\$ 565, 566 (Gen. St. 1915, \\$\\$ 7469, 7470).—Miller v. Miller, 172 P. 1010.

(E) Nature, Scope, and Effect of Decision. sillo (Okl.) Party against whom judgment is rendered for any default of appearance may appeal from order overruling motion.—Laclede Oil & Gas Co. v. Miller, 172 P. 84.

€=110 (Okl.) An order overruling a motion for a new trial is an appealable order.—Hoffman Bros. Inv. Co. v. Porter, 172 P. 632.

#=110 (Wash.) An order denying a motion for a new trial is not appealable under Rem. Code 1915, § 1716.—Carlson v. Vashon Nav. Co., 172 P. 860.

# (F) Mode of Rendition, Form, and Entry of Judgment or Order.

8=134(1) (Wyo.) Comp. St. 1910, § 5135, permitting practice of common law to be adopted where necessary to prevent failure of justice where redress cannot be had under Code of Civil Procedure, does not apply to authorize appellate jurisdiction of a case wherein no judgment has been entered of record in the court below.—Hahn v. Citizens' State Bank, 172 P.

\$\equiv 134(2)\$ (Wyo.) Record entry of judgment in the court below, necessary for appeal, cannot be shown by entries upon trial docket for use of the trial judge under Comp. St. 1910, \(\xi \) 4455; such docket not being the journal of the court, nor entries thereon journal entries.—Hahn v. Citizens' State Bank, 172 P. 705.

## V. PRESENTATION AND RESERVA-TION IN LOWER COURT OF GROUNDS OF REVIEW.

(A) Issues and Questions in Lower Court.

45-171(1) (Okl.) Where parties presented their case or defense to trial court on certain theory, they are bound thereby, and cannot thereafter change such theory in appellate court.—Incorporated Town of Comanche v. Works, 172 P. 60.

(Cokl.) The parties upon appeal are bound by the same theories upon which they tried their case in lower court.—Edwards v. Phillips, 172 P. 949.

\$\int\_{11}(1)\$ (Wash.) Where appellant's case below was found by trial court to be wholly unsupported by evidence, he could not change theory of his case in Supreme Court.—Thayer v. Snohomish Logging Co., 172 P. 552.

173(1) (Wash.) In an action for death of brakeman claimed to be due to breaking of coupler and consequent parting of train, where coupler and consequent parting of train, where evidence showed coupler was defective in having a broken pin, railroad's argument, upon appeal, that pin was intended only to hold coupler together when open, supporting no strain when closed, will not be considered because presenting a question not in issue in been taken to the findings, and there is no

\$\mathre{\text{Fig. 12.1.}}\$ (Okl.) Where defendant fails to plead a set-off against plaintiff's claim for damages, insisting that such matter is not available as set-off, he cannot on appeal urge such matters as a set-off.—Phillips v. Mitchell, 172 P. 85.

## (B) Objections and Motions, and Rulings Thereon.

185(1) (Cal.) In proceeding under Code Civ. Proc. § 1664, to determine rights of persons claiming as heirs or next of kin, claimants, having failed to object to allegations, and submitted to jurisdiction, were not in a position to question trial court's jurisdiction.—In re Friedman's Estate, 172 P. 140.

—In re Friedman's Estate, 172 P. 140.

—185(3) (Wyo.) Objection to substitute judge called from one district to sit in another district on grounds that there was not sufficient reason for calling in of such judge, and that resident judge was sitting in another case at same time that the substitute judge was presiding in case to which he was called, cannot be made for first time on appeal.—Hoglan v. Geddes, 172 P. 136.

e=230 (Okl.) In action where defendant defaults and suffers judgment, assignment that testimony was not sufficient to sustain judgment, timely presented by motion for new trial, to overruling of which exceptions were reserved, properly presents question of sufficiency of testimony to sustain judgment, although not challenged during the trial.—Laclede Oil & Gas Co. v. Miller, 172 P. 84.

Where defendant defaults and judgment for damages is entered, assignment of excessive damages under passion and prejudice based on exceptions to overruling of motion for new trial on such ground authorizes review as to damages, although not challenged during trial. 230 (Okl.) In action where defendant de-

damages, although not challenged during trial.

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©=231(1) (N.M.) Objections by motion or otherwise to the pleadings, evidence, instructions, arguments, etc., to preserve the questions for review, must be specific, and point out the grounds relied upon and a mere general objection is not sufficient.—Tietjen v. Mc-Coy, 172 P. 1042.

&==233(1) (Okl.) Where court directs a verdict for plaintiff before defendant rests, and de-fendant excepts and objects because case has not been concluded, the error is sufficiently saved, defendant not being required to offer

additional evidence to preserve his exception.

-Williamson v. Holloway, 172 P. 44.

237(3) (Okl.) Where the sufficiency of the evidence to sustain the verdict was not challenged by demurrer or motion to direct a verdict, no asssignment of error can be predicated on the insufficiency of the evidence.—Bank of Commerce of Sulphur v. Webster, 172 P.

### (C) Exceptions.

e=248 (Utah) Where no exceptions were taken below to the court's rulings, they cannot be reviewed.—Beck v. Lee, 172 P. 686.

coviewed.—Beck v. Lee, 172 P. 686.

254 (Okl.) Demurrer to petition and order sustaining it are a part of a judgment roll or record proper, and trial error in passing upon the demurrer will be reviewed, though no exception was taken to the ruling.—Pace v. Pace, 172 P. 1075.

€==265(1) (N.M.) In a trial by the court, its findings are conclusive, and not reviewable without proper exception thereto, which need not be formal, and under the statute complainstatement of facts, the court on appeal must dismiss the appeal and affirm the judgment.

—Hatch v. Hover-Schiffner Co., 172 P. 817.

#### (D) Motions for New Trial.

e=294(1) (Ariz.) Civ. Code 1913, par. 1231, providing that in an appeal from a final judgment in an action tried before a jury the Supreme Court shall not consider the sufficiency preme Court shall not consider the sumceency of evidence unless a motion for a new trial shall have been made, held to preclude consideration of sufficiency of evidence, where motion was ineffectual because made before rendition of judgment, contrary to paragraph 590.—Ellis v. First Nat. Bank, 172 P. 281.

## VI. PARTIES.

2325 (Okl.) All parties to a joint judgment must be joined in a proceeding in error in the Supreme Court, either as plaintiffs or defendants in error, before such judgment can be reviewed.—Mann v. Mann, 172 P. 777.

\$ 1743, and Laws 1917, c. 156, \$ 116, for substitution, for purpose of appeal, for party dying after final judgment in superior court, motion must be served on his executor or administrator within 90 days after first publication of notice to creditors.—Mohney v. Davis, 172 P. 919.

# VII. REQUISITES AND PROCEEDINGS FOR TRANSFER OF CAUSE.

#### (A) Time of Taking Proceedings.

€=338(3) (Okl.) The court can consider no question sought to be brought up on cross-appeal, where more than six months have expired since the judgment before said cross-appeal was filed in the Supreme Court.—Rivers v. School Dist. No. 51, Noble County, 172 P. 778.

2339(2) (Kan.) When action is dismissed as to certain defendants, all orders made prior to the order of dismissal, and of which complaint is made by those defendants, must be appealed from within six months after order of dismissal.—State v. Independence Gas Co., 172 P. 713.

\$\instructure \text{ Independence Gas Co., 112 I. 113.} \$\instructure \instructure \text{ 345(1) (Cal.) Under Code Civ. Proc. \frac{9}\$ 939, before amendment in 1915, where judgment was entered January 27, 1914, appeal dated, served, and filed January 20, 1915, was taken too late, pendency of proceedings for new trial not extending 60 days' time.—Ackerman v. Schultz, 172 B 200 172 P. 609.

345(1) (Cal.App.) If new trial proceeding is not initiated within 10 days after receiving notice of entry of judgment, or within 10 days after verdict, as required by Code Civ. Proc. \$ 59, no proceeding on motion for new trial can be held to be pending within \$\$ 939, 941B, and appeal from final judgment must be taken within 60 days from entry.—Whiting-Mead Commercial Co. v. Bayside Land Co., 172 P. 598.

cai Co. v. Baysne Land Co., 172 F. 598.

345(1) (Okl.) Where plaintiff in error appeals from order overruling motion for new trial on ground prescribed by Rev. Laws 1910, \$5033, subd. 9, of impossibility of making casemade, and petition in error and case-made are filed in Supreme Court within six months after order, appeal is timely.—Hoffman Bros. Inv. Co. v. Porter. 172 P. 632. v. Porter, 172 P. 632.

\$\iff 3301, 3329, serving and filing of motion for new trial pursuant to extension granted by trial court more than six months after entry of judgment does not suspend time within which judgment becomes final for purpose of appeal.— Minneapolis Threshing Mach. Co. v. Fox. 172

€=351(1) (Kan.) Where defendant's motion in district court for new trial after referee's decision was overruled less than six months before appeal, it was entitled to a review, although referee previously disposed of similar motion filed more than six months before appeal.

-Lantry Contracting Co. v. Atchison, T. & S. F. Ry. Co., 172 P. 527.

R. Ry. Co., 172 P. 527.

356 (Okl.) Where plaintiff in error does not file his appeal within six months from judgment or order appealed from, as required by Sess. Laws 1910-11, c. 18, appeal will be dismissed for want of jurisdiction.—Littlefield v. Garner, 172 P. 438.

€=356 (Okl.) A proceeding in error in Supreme Court to reverse, vacate, or modify a judgment or final order commenced more than Judgment or final order commenced more than six months from the judgment or final order, as required by Sess. Laws 1910-11, p. 35, c. 18, will be dismissed.—Bricklayers, Masons & Plasterers International Union of America v. Bradley, 172 P. 440.

## (C) Payment of Fees or Costs, and Bonds or Other Securities.

373(1) (Cal.) Where an appeal is taken under Code Civ. Proc. §§ 941a to 941c, no undertaking is essential, and the law in this respect is not changed by the amendments to the Codes made in 1915.—Chung Sing v. Southern Pac. Co., 172 P. 1103.

\$\infty 376 (Wash.) In view of Rem. Code 1915. \$\frac{1}{3}\$, preventing abatement of action because 193, preventing abatement of action because of transfer of interest in cause, where plaintiff after judgment assigned his claim, it was not necessary that the appeal bond name the assignee as an obligee; the original plaintiff being the adverse party within section 1721, designating the person to whom the bond shall run.—Wright v. Seattle Grocery Co., 172 P. 245

€=384(1) (Nev.) Where judgment in justice's court went against defendant, who brought certiorari against justice for review in district court, which dismissed writ, bond on appeal to Supreme Court bearing title of cause in justice's court gave no jurisdiction of the appeal, in view of Rev. Laws, §§ 5325, 5330.—Mazade v. Justice's Court of Goldfield Tp., Esmeralda County, 172 P. 378.

County, 112 P. 3/8.

\$\sim 386(1)\$ (Nev.) Bond on appeal from order dismissing writ of certiorari to review judgment of justice's court, which was never filed in district court as required by Rev. Laws, \$5346, nor approved by the justices of the Supreme Court, under section 5358, conferred no jurisdiction of the appeal.—Mazade v. Justice's Court of Goldfield Tp., Esmeralda County, 172 P. 378.

## (D) Writ of Error, Citation, or Notice.

23419(1) (Wash.) A notice that a party would appeal from order denying new trial "and all proceedings had in said cause" was not sufficient notice of an appeal from the judgment or other prior order, under Rem. Code 1915, § 1719.—Carlson v. Vashon Nav. Co., 172 P. 860.

6-3422 (Cal.) That a notice of appeal by three defendants misnamed one of them does not necessitate the dismissal of the appeal as

not necessitate the dismissal of the appeal as to the others.—Chung Sing v. Southern Pac. Co., 172 P. 1103.

Where notice of appeal by three defendants misnamed one of them by substituting a name of a person not a party to the record, such notice was nevertheless sufficient as to the defendant omitted, where it was obvious from the remainder of the record that the omission was a clerical mistake.—Id. was a clerical mistake.—Id.

was a cierical mistage.—10.

\$\mathrightarrow 422 \text{ (Wash.) Under Rem. Code 1915, \$\frac{1}{3}4\$, a notice of appeal from order denying new trial "and all proceedings had in said cause" was deficient in substance, and could not be amended to make it notice of appeal from the judgment, in view of section 1719.—Carlson v. Vashon Nav. Co., 172 P. 860.

430(2) (Wash.) Rem. Code 1915, \$ 1734, providing that no appeal shall be dismissed by reason of formal defects in notice of appeal, was not intended to do away with notice within time.—Carlson v. Vashon Nav. Co., 172 P.

# X. RECORD AND PROCEEDINGS NOT IN RECORD.

## (A) Matters to be Shown by Record.

493 (N.M.) The record on appeal must show such parts of the record of the trial court as are necessary for a consideration of the questions presented, such as the court's want of jurisdiction, based on Code 1915, § 4291, relating to reinstatement of an abated cause.—H. A. Seinsheimer & Co. v. Jacobson, 172 P. 1042.

شهـ 501(4) (Colo.) Assignments of error in giving instructions will not be reviewed, where record fails to show reservation of any exceptions.—Dourte v. Shirey, 172 P. 423.

e=501(5) (Colo.) Assignments of error that evidence did not support judgment will not be reviewed, where record fails to show reserva-tion of any exceptions.—Dourte v. Shirey, 172 P. 423.

65502(7) (Colo.) Assignments of error in overruling motion for new trial will not be reviewed, where record fails to show reservation of any exceptions.—Dourte v. Shirey, 172 P. 423.

#### (B) Scope and Contents of Record.

517 (Wash.) Recital in bill of exceptions that attorneys appeared at a hearing to vacate a judgment was sufficient to show appearance, on the question whether there was a waiver of irregularity in the notice, although the order vacating the judgment did not so recite.—Ha.rford v. Stout, 172 P. 1168.

5527(2) (N.M.) Under Code 1915, § 4491, requested findings of fact and conclusions are not part of record proper, unless ordered to be filed by court.—Gradi v. Bachechi, 172 P. 188.

188.
2536 (Wyo.) Where no time had been granted within which to present bill of exceptions and court so certifies when bill is presented to him for allowance, and in addition certifies as to contents of bill, but does not allow same, it cannot be considered as bill of exceptions, and matters therein contained do not become part of record.—Hoglan v. Geddes, 172 P. 136. \$\insightarrow\$ (Cal.) Of two stipulations as to transcript on appeal from order granting defendant's motion for new trial, held that neither sufficiently identified what documents, records, or evidence were actually presented to and used by trial judge on hearing and determination of motion.—Soper v. Dominguez, 172 P. 586.

## (C) Necessity of Bill of Exceptions, Case, or Statement of Facts.

€==544(2) (Wash.) In the absence of bill of exceptions or statement of facts, the question on appeal is, What is the proper judgment under the facts as found by the trial court?—Schwabacher Bros. & Co. v. Orient Ins. Co., 172 P.

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\$\instructure{\intity}}}}}}}}}}} \right.} \right. \right.

€553(1) (Wyo.) Where objection is made to authority of substitute judge because regular judge was trying case at same time, facts in support of objection, on writ of error, must appear from record of trial as shown by bill of exceptions, and statements in notice of motion and affidavits in support thereof are insuffi-cient.—Hoglan v. Geddes, 172 P. 136.

## (D) Contents, Making, and Settlement of Case or Statement of Facts.

\$\infty\$=561 (Okl.) If case requires introduction of testimony in order to render judgment, party against whom it is rendered is entitled to have against whom it is rendered is entitled to have testimony transcribed by official reporter and incorporated into case-made on proper request and payment of lawful charges.—Laclede Oil & Gas Co. v. Miller, 172 P. 84.

& Gas Co. v. Miller, 172 P. 84.

5-564(3) (Okl.) Inclusion of "30-10-5 for case-made" in order overruling motion for new trial, and entry of notice of appeal construed as allowing plaintiff in error an extension of time in which to make and serve a case-made, so that case-made served within extension was timely.

-Hoffman Bros. Inv. Co. v. Porter, 172 P. 632

6-564(3) (Wash.) Order, extending time for filing statement of facts, obtained on ex parte application, is void.—Siegley v. Kelley, 172 P. 203.

Affidavit of one of appellant's attorneys that Affidavit of one of appellant's attorneys that before procuring order of extension of time for filing statement of facts he orally advised respondents' attorney extension would be applied for, and that respondents' attorney assured affiant he would not object, sets out no facts meeting requirement of notice under Rem. Code, 1915, § 393, or estopping respondents from asserting right.—Id.

Oral stipulation between attorneys that appellant's application for extension of time for filing statement of facts would not be contested was not legally binding on respondents.—Id.

ning statement of facts would not be contested was not legally binding on respondents.—Id. 567(2) (Okl.) Where due notice is given of time and place that case-made will be presented for settlement, party upon whom it is served cannot treat it as nullity, though time fixed ed cannot treat it as numry, though time fixed may be earlier than case-made could properly be settled, and, where it was settled without objection, Supreme Court will treat it as valid in absence of showing that application was made for time to which appellee was entitled, and that by reason of failure to grant time appellee was prevented from suggesting amendments, etc.—Southwestern Surety Ins. Co. v. Dietrich, 172 P. 51. Dietrich, 172 P. 51.

## G) Authentication and Certification.

613(1) (Cal.) On appeal from order granting or denying new trial, either certificate of trial judge must be inserted in bill of exceptions as to evidence presented and used on hearing and determination of motion, or matter must be covered by stipulation.—Soper v. Dominguez, 172 P. 586.

€=614 (Cal.) Where transcript contains matter designated by appellants as statement of case, but it is not made subject of stipulation, and not authenticated, there is no record on which Supreme Court can say error was committed in rulings on evidence.—Hammond Lumber Co. v. Brawley Co-op. Bldg. Co., 172 P. 381.

em616(2) (Wash.) Affidavits used on hearing of application for temporary alimony cannot be considered on appeal unless by certificate of the trial judge they are made part of record and included in the statement of facts or bill of exceptions, and it is not sufficient that they are found in the clerk's transcript.—Hendrix v. Hendrix, 172 P. 819.

## (H) Transmission, Filing, Printing, and Service of Copies.

620 (Cal.App.) Under Code Civ. Proc. § 963, as amended by St. 1915, p. 209, section

956, as amended by St. 1915, p. 328, and section 650 et seq., as amended by St. 1915, p. 207, and Supreme Court Rule No. 2 (119 Pac. ix), held, appeal from judgment, before determination of motion for new trial order on which was not appealable, did not need record until after determination of motion, when exceptions or heaving of motion would be considered rate. on hearing of motion would be considered record.—Nathan v. Porter, 172 P. 170.

636.—Nathan v. Forter, 112 F. 110.

636.25 (Cal.App.) Under Code Civ. Proc. §
187, though apparently no procedure is provided for transmitting to appellate court record used as basis for motion for new trial where appeal from judgment had been rightfully taken in advance of determination of motion, it is permissible relations which

nn advance of determination of motion, it is permissible to adopt any suitable procedure, which, conformably to Code, would achieve result.—Nathan v. Porter, 172 P. 170.

200628(2) (Wash.) Failure of appellant to file record in Supreme Court within time provided by law held excussable, being fault of clerk.—Armstrong v. Spokane International Ry. Co., 172 P. 578.

## (I) Defects, Objections, Amendment, and Correction.

e=655(2) (Wyo.) Where a decree was rendered May 5th, and motion for new trial denied May 13th, and bill of exceptions was not presented for allowance until September 30th, the bill of exceptions must be stricken.—Arnold v. Nichols, 172 P. 335.

# (J) Conclusiveness and Effect, Impeach-ing and Contradicting.

6-662(2) (Cal.) That a judgment itself recites that it is entered on the pleadings is not controlling, and will not prevent a reviewing court from examining the entire record to learn all the facts.—Stow v. Superior Court of California in and for Alameda County, 172 P. 598.

## (K) Questions Presented for Review.

(R) Questions Presented to Review.

671(2) (Wash.) Where, on appeal, the instructions of the lower court are not made a part of the record, and numerous exhibits introduced during the trial and having an important bearing on the issues are not copied into the record, the court on appeal cannot determine the issues considered by jury in reaching verdict.—Easley v. Elmer, 172 P. 575.

dict.—Easiey v. Eimer, 172 F. 515.

5-679(2) (Wash.) Plaintiff's assignment of error in requiring him to elect upon which of two theories of negligence he would proceed was not reviewable where record contained neither original or amended complaints, and did not show ruling complained of.—Green v. Bouton, 172 P.

704(2) (N.M.) Where record on appeal does not contain transcript of evidence, findings of trial court are conclusive.—Gradi v. Bachechi, 172 P. 188.

e=704(2) (Wash.) A finding of fact by the trial court is conclusive on appeal, where the evidence is not brought up.—Thayer v. Snohomish Logging Co., 172 P. 552.

#### (L) Matters Not Apparent of Record.

em717 (Cal.) The Supreme Court, on appeal, cannot consider a complaint of parts of the opinion of the trial court.—In re Friedman's Estate, 172 P. 140.

#### XI. ASSIGNMENT OF ERRORS.

⇒728(3) (Wash.) Where burden of proving its defense or counterclaim was on defendant, and its evidence in discharge of that burden was excluded, and there was no assignment of error based upon such ruling, judgment must be affirmed.—Price v. Hornburg, 172 P. 575.

231 (5) (Utah) Rule of Practice 26 (97 Pac. x), requiring the evidence to be set out if alleged to be insufficient, and the particulars of court from ruling sustaining demurrer to the insufficiency to be specified, being mandatory, exception, reciting "the court erred in render-lobjection will not be considered for purpose

ing the following finding of fact," and setting out the finding, is insufficient.—Egelund v. Fayter, 172 P. 313.

e=750(7) (Or.) An assignment that "the court erred in failing to decree the said assessments void, and in failing to remove the cloud thereof from the title of plaintiffs' real property," was sufficient to raise the question of the validity of such assessments on any ground set up in the complaint.—Manley v. City of Marshfield, 172 P. 488.

€=753(2) (Cal.) Lack of specifications of error is not a ground for dismissal.—Kurtz v. Cutler, 172 P. 590.

#### XII. BRIEFS.

€=757(8) (Okl.) To obtain review of admission or rejection of evidence, the brief must clearly show the evidence complained of and the ground upon which the objection thereto was predicated.—Iowa Nat. Bank v. Citizens' Nat. Bank of Woonsocket, R. I., 172 P. 924.

\$\iff \( \)757(4) (Okl.) To have reviewed by this court instructions given or refused, it is mandatory that such instructions, to which exceptions have been taken, be set out in totidem verbis in brief.—City of Duncan v. Brown, 172

€==759 (Wash.) Where defendant excepted to exclusion of parol testimony, but no assignment of error based thereon was made in brief, ruling was not reviewable.—Price v. Hornburg, 172 P.

6.⇒760(1) (Cal.App.) One presenting his appeal by the alternative method must print in his brief such portion of the record as he desires reviewed, as required by Code Civ. Proc. § 953c, and references to the transcript are insufficient.—Borba v. De Mello, 172 P. 1113. since defective parts might be supplied from the respondent's brief.—Verdier v. Stoll, 172 P.

# XIII. DISMISSAL, WITHDRAWAL, OR ABANDONMENT.

\$\infty\$ 781(1) (Kan.) An appeal may be dismissed, when it appears that all the orders from which it is taken were made under a stipulation signed by appellant.—State v. Independence Gas Co., 172 P. 713.

### 781(1) (Okl.) Where questions involved in a proceeding in error have become abstract and hypothetical, the proceeding will be dismissed.—Muirheid v. Noell, 172 P. 435.

\$\infty\$=790(1) (Kan.) An appeal may be dismissed when Supreme Court cannot make any order that will affect the rights of the parties.—State v. Independence Gas Co., 172 P. 713.

e=801(1) (Okl.) Motion to dismiss appeal be-cause frivolous will be denied, where question cannot be determined without examination of evidence adduced on motion for new trial, and case has not been submitted or briefed on the merits.—Hoffman Bros. Inv. Co. v. Porter, 172 P. 632.

#### XVI. REVIEW.

## (A) Scope and Extent in General.



of reversing such ruling.—Fuss v. Cocannouer, 172 P. 1077.

هــــــ841 (Ariz.) Defendant appellant's concession in brief that evidence presented by plaintiffs as to two items of account in suit is same as on former trial, and held sufficient by Su-preme Court, relieves court of necessity of com-paring evidence with such evidence in former record.—Costello v. Cunningham, 172 P. 664. &=3843(4) (Wash.) Where an action is brought against a surety company and the clerk of court and sheriff for damages for repudiating a bond for stay of execution, sustaining demurrers of clerk and sheriff will not be reviewed on appeal, after lower court's decision that bond was invalid has been sustained.—Mills v. Title Guaranty & Surety Co., 172 P. 248.

\$\infty\$=\$854(2) (Okl.) Where court trying a case renders a proper final judgment, it is immaterial that it is predicated upon an erroneous finding of fact or a misinterpretation of the law, as ground on which court proceeded is not a subject of review by appellate court.—Kibby v. Binion, 172 P. 1091.

## (B) Interlocutory, Collateral, and plementary Proceedings and Questions. Sup-

Questions.

23873(3) (Cal.App.) By direct provision of Code Civ. Proc. § 956, as amended by St. 1915, p. 328, on appeal from judgment, appellate court, among other things, may review order or motion for new trial.—Nathan v. Porter, 172 P. 170.

Plaintiff was not required to wait until motion for new trial was determined before taking appeal from judgment against him, and Code Civ. Proc. § 939, having deprived him of right to appeal from order denying new trial, but giving him 80 days after denial to appeal from judgment, it is not necessary, to bring merits of motion for new trial before appellate court, that he file second appeal from judgment.—Id. Where bill of exceptions on hearing of plaintiff's motion for new trial, authenticated, is included in transcript, which, by stipulation, constitutes record on appeal from judgment, plaintiff having rightfully appealed from judgment, on record appellate court may decide error of law at trial.—Id.

&=874(5) (Cal.) On appeal from order on motion for new trial, the Supreme Court can review the propriety of an order denying a motion for a change of judges, which may also be reviewed on direct appeal.—In re Friedman's Estate, 172 P. 140.

#### (C) Parties Entitled to Allege Brror.

877(2) (Cal.) Claimants against an estate seeking distribution to them as heirs or next of kin, properly found not to be next of kin to testator, had no interest in other questions involved in decree, and could not urge error in decree for other claimants, or as to the evidence in support thereof.—In re Friedman's Estate, 172 P. 140.

877(2) (Colo.) In mandamus by de facto officer to compel payment of salary to him, after another was declared the de jure officer, decree awarding compensation to the latter would not be disturbed.—Drach v. Leckenby, 172 P.

\$\infty\$=877(4) (Mont.) Where plaintiff on appeal in ejectment does not complain of the judgment in so far as it adjudicates that plaintiff has no interest in the property, he cannot complain that the adjudication therein of title in defendant was not supported by a cross-complaint or counterclaim asking such relief.—Great Falls Town-Site Co. v. Kowell, 172 P. 321.

8=378(1) (Okl.) Where a defendant in error fails to file a cross-petition in error, only those questions presented for assignments in the petition in error are properly reviewable by Su-

preme Court on appeal.—Kibby v. Binion, 172 P. 1091.

€ 882(8) (Wash.) Appellant cannot complain of error in refusing to strike testimony of witnesses as to transactions with one since deceased, where such testimony was in response to questions by appellant's counsel.—Hoffman v. M. Gottstein Inv. Co., 172 P. 573.

## (D) Amendments, Additional Proofs, and Trial of Cause Anew.

8-895(2) (Wash.) On trial of an equity cause de novo in Supreme Court, where there is sufficient testimony to sustain the judgment below, without that of a witness whose competency was challenged, the witness' competency need not be determined.—Rubens v. Rubens, 172 D 621 172 P. 831,

8-898 (Wash.) In action for damages tried without a jury, the trial court having been better situated to judge the credibility of the witnesses, the court on appeal, though it tries the case de novo, will not disturb his findings unless clearly against the preponderance of the evidence.—Miller v. Reeves, 172 P. 815.

\$\infty\$ (Wash.) Upon appeal in equity, Supreme Court tries the case de novo, and will examine the evidence and determine the case on evidence properly admitted.—Rubens v. Rubens, 172 P. 831.

#### (E) Presumptions.

e=907(1) (Cal.) Testimony that at one place in a track locomotives wobbled about, the wit-ness indicating the motion, cannot be disre-garded, but the court must assume that it in-dicates undue movement resulting from a bad condition of the track, because all reasonable deductions from the evidence must be indulged in favor of the judgment.—Neale v. Atchison, T. & S. F. Ry. Co., 172 P. 1105.

€=907(1) (Or.) In the absence from the record of any evidence, it must be assumed that there was evidence to support the finding.—Tyler v. Bier, 172 P. 112.

e=907(3) (Cal.) On appeal by executrix from decree of distribution, record, which contained no bill of exceptions, could not support any one of contentions of fact that brother of testator or contentions of fact that brother of testator named in residuary clause as nephew could not be brother of that name to whom specific legacy was given, etc., since it must be presumed that a showing was made that no nephew of the brother's name ever existed.—In re O'Hore's Estate 172 P. 285

the brother's name ever existed.—In re O'Hare's Estate, 172 P. 385.

—907(3) (Or.) The findings of fact by the trial court sitting without a jury being equivalent to a verdict, the court on appeal must, in the absence of bill of exceptions, presume that there was evidence to support them.—Thomas v. Peebler 172 P. 648. ler, 172 P. 648.

### 909(1) (Kan.) Temporary injunction will not be reversed, where the order, to be correct, must be supported by evidence tending to prove certain facts, and there is nothing in the abstracts to show that such evidence was not introduced, or that such facts did not exist.—Arnold v. Garnett Light & Fuel Co., 172 P. 1012 1012.

9:6(4) (Okl.) Under Supreme Court rule 26 (165 Pac. ix) the court had the right to assume that the answer was not verified, where neither of the briefs filed showed that it was verified.—Bean v. Rumrill, 172 P. 452.

\$\operatorname{\operatorname{A}} = 927(7) (Mont.) In order to sustain a judgment based upon a directed verdict, the question is not whether the inferences necessary to maintain respondent's case were permissible from the evidence, but whether they were necessary.—St. Paul Machinery Mfg. Co. v. Bruce, 172 P. 330.

\$\inspec 928(3)\$ (Cal.) In the absence of record showing to the contrary, it is presumed that

the court's statement in instruction that certain facts were conceded was true.—Edmonds v. Wilcox, 172 P. 1101.

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8=936(1) (Wash.) It will be assumed on appeal, in absence of anything in the record to the contrary, that witnesses who appeared or were examined on the trial before a referee were entitled to compensation.—Hopkins v. Craib, 172 P. 201.

€=939 (Cal.App.) Under Code Civ. Proc. § 953c, it will be presumed that counsel have, by their briefs, presented all portions of record which they desire to have considered by appellate court.—Anderson v. Wilcox, 172 P. 398.

#### (F) Discretion of Lower Court.

\$\inspec 957(1)\$ (Okl.) Where it did not clearly appear that court below abused its discretion in overruling motion to reinstate default judgment, its action will not be disturbed on appeal.—North v. Hooker, 172 P. 77.

960(3) (Wash.) Treating a motion to strike out an amended answer as a demurrer, and hearing it as such, is so far within the trial court's discretion as hardly to be reviewable in any case, and certainly not unless for manifest abuse.—Maltbie v. Gadd, 172 P. 557.

e=962 (Wash.) Exercise of discretion of trial court as to disposition of motion to dismiss cross-complaint for want of prosecution will not be disturbed, except for abuse.—National Surety Co. v. American Savings Bank & Trust Co., 172 P. 264.

co., 112 F. 204.

am 973 (Cal.) Appellant could not complain of denial of nonsuit, as to one party, where its real effect was to regulate order of procedure, which under Code of Civil Procedure was within trial court's discretion.—In re Friedman's Estate, 172 P. 140.

Estate, 172 P. 140.

\$\infty\$=979(2) (Wash.) Though it may have been error to hold the evidence insufficient to support the verdict, the order granting new trial on that ground will not be disturbed if there is a substantial conflict in the evidence.—Carkonen v. Columbia & P. S. R. Co., 172 P. 816.

\$\infty\$=982(1) (Wash.) Trial court's action as to opening or vacating indgment for excusable

e=982(1) (Wash.) Trial court's action as to opening or vacating judgment for excusable neglect and imposing terms as condition thereof will not be interfered with unless there is a gross and manifest abuse of discretion.—Hendrix v. Hendrix, 172 P. 819.

\$\epsilon\$=\text{384}(1) (Utah) Under Comp. Laws 1907, \$\frac{8}{3}\$\$ 3005, 3321, 3351, where appellant did not within 30 days have remittitur sent down, and appellees thereafter caused remittitur to be filed in district court without notice to appellant, and appellant did not within 30 days file its cost bill, decision of district court denying motion to be relieved of default in failing to file cost bill within time will be affirmed, no abuse of discretion being shown.—Hirsh v. Ogden Furniture & Carnet Co., 172 P. 318.

tion to be relieved of default in falling to file cost bill within time will be affirmed, no abuse of discretion being shown.—Hirsh v. Ogden Furniture & Carpet Co., 172 P. 318.

23984(5) (Cal.App.) In action on note empowering court to fix attorney's fees, the court has a discretion which will not be disturbed, in the absence of abuse as to the amount to be awarded.—Johnston v. Murphy, 172 P. 616.

## (G) Questions of Fact, Verdicts, and Findings.

e=995 (Cal.) The weight of the evidence is for the jury or court, unless obviously false or inherently improbable.—In re Jepson's Estate, 172 P. 1107.

€=997(2) (Okl.) When there is no competent evidence reasonably tending to support plaintiff's case, judgment of trial court, sustaining demurrer to plaintiff's evidence, will not be reversed.—Fuss v. Cocannouer, 172 P. 1077.

\$\colon 999(1)\$ (Okl.) Where issue as to whether plaintiff below was real party in interest entitled to maintain action under Rev. Laws 1910, \( \) 4690, was properly submitted to jury, its verdict, reasonably supported by the evidence, will not be disturbed on appeal.—Lusk v. Ricks, 172 P. 782.

e=999(1) (Utah) Plaintiff having made a prima facie case, and defendant having produced no evidence, finding of jury is conclusive on appeal. —Kuchenmeister v. Los Angeles & S. L. R. Co., 172 P. 725.

e=1001(1) (Okl.) In actions at law finding and verdict of jury upon questions of fact, reasonably supported by evidence, will not be disturbed by appellate court.—Incorporated Town of Comanche v. Works, 172 P. 60.

\$\insigma1001(1)\$ (Okl.) Verdict on a disputed question of fact in an action at law, and judgment of court thereon, will not be disturbed on appeal, where there is evidence reasonably tending to support them.—Oklahoma State Bank of Caddo v. Airington, 172 P. 462.

&=1001(1) (Utah) Questions raised on defendant's appeal which were determined adversely to him by verdict are not, when sustained by substantial evidence, properly before appellate court for determination.—Rampton v. Cole, 172 P. 477.

e=1001(1) (Wash.) The jury's conclusion upon competent evidence is conclusive upon the parties and the court on appeal.—Stanton v. Zercher, 172 P. 559.

\$\infty\$=1002 (Ariz.) Supreme Court will not determine weight of evidence and revise jury's verdict reached from conflicting evidence.—Costello v. Cunningham, 172 P. 664.

emi002 (Cal.) Verdict of jury on conflicting evidence cannot be disturbed on appeal.—Sharpless v. Pantages, 172 P. 384.

⇒ 1002 (Okl.) Where evidence in action at law is in conflict, if there is sufficient competent evidence to reasonably sustain verdict rendered, this court will not disturb verdict.—City of Duncan v. Brown, 172 P. 79.

€=1002 (Okl.) Where the evidence in action at law is in conflict, if there is sufficient competent evidence to reasonably sustain the verdict rendered Supreme Court will not disturb the verdict.—Iowa Nat. Bank v. Citizens' Nat. Bank of Woonsocket, R. I., 172 P. 924.

6-1003 (Or.) In considering whether speed of a train which killed a section man was negligence, the Supreme Court on appeal cannot judge as to the weight of the testimony, but can only inquire whether there was any testimony tending to show alleged negligence.—Stool v. Southern Pac. Co., 172 P. 101.

€ 1004(2) (Utah) In action for damages for breach of contract to exchange property, although there was a sharp conflict as to values of the property, it was wholly within province of jury to determine the ultimate fact so long as their verdict found support in testimony.—Rampton v. Cole, 172 P. 477.

mampton v. Cole, 172 F. 4(1.

1005(4) (Wash.) Though evidence supporting a verdict is weak, and the weight of evidence would seem to be the other way, the appellate court cannot interfere; the lower court having denied a new trial.—Bruenn v. North Yakima School Dist. No. 7, Yakima County, 172 P. 569.

6-1008(1) (Kan.) Where there is room for difference of opinion in the determination of an ultimate and controlling fact, the opinion and judgment of the trial court thereon is conclusive on appeal.—Evans v. Diehl, 172 P. 17.

\$\equiv \text{1008}(1) (Or.) Some weight must be given fact that lower court which saw witnesses determined issues in favor of defendants.—Rowe v. Freeman, 172 P. 508.

©=1008(3) (Colo.) Where the evidence on which findings are based consists of a transcript of the evidence taken in a former trial

of the same action, the court on appeal, in determining if judgment is sustained by the evidence, will review and weigh such evidence uninfluenced by such findings.—Carlson v. Akeyson, 172 P. 1058.

son, 172 f. 1008.

=1009(1) (Or.) Where it cannot be determined in equity case whether decree for defendant was based on assumption that plaintiff's evidence was incompetent, or that testimony preponderated in favor of defendant, that the trial judge saw the witnesses will not be given weight.—Gress v. Wessinger, 172 P. 495.

e=1010(1) (Cal.) Where in an action for damages to property the only evidence of value was that of plaintiff, the court on appeal will not disturb finding based on such evidence.—Hood v. Bekins Van & Storage Co., 172 P. 594.

\*\*Definition of the principle of the purpose of setting saide a finding of fact by the trial court, based not only on its own inspection of a writing, but also upon the opinions of witnesses peculiarly qualified.—In re Jepson's Estate, 172 P. 1107.

e=1010(1) (Colo.) A finding of the trial court will not be disturbed, on appeal, where it is supported by ample evidence.—Schwartz v. King, 172 P. 1054.

\*\*Emilify 1/2 P. 1004. In action for conversion of personal property tried to court, its findings will be given same weight as, verdict of jury and will not be set aside if reasonably supported.—Mitchell v. Guaranty State Bank of Okmulgee, 172 P. 47.

e=1010(1) (Okl.) Where there is any evidence reasonably supporting trial court's findings, they should not be disturbed on appeal.

American Nat. Bank of Stigler v. Funk, 172 P. 1078.

P. 1078.

201010(2) (Okl.) Where there is no competent evidence to sustain the findings, cause will be reversed.—American Nat. Bank of Stigler v. Funk, 172 P. 1078.

201011(1) (Cal.) Discretion of the trial court in resolving conflicts in the testimony will not be interfered with on appeal.—Citizens' Trust & Savings Bank v. Tuffree, 172 P. 586.

E=1011(1) (Cal.) Findings of court based on conflicting evidence are conclusive on appeal.

Butler v. Union Trust Co., 172 P. 601.

1011(1) (Cal.) Supreme Court will not disturb fordings of trial court between the court of the court between the court of the court o

turb findings of trial court when evidence is in substantial conflict.—Levi v. Chesley, 172

forcement of city ordinance regulating water rates, valuation of property of water company arrived at on conflicting evidence will not be disturbed on appeal.—Union Hollywood Water Co. v. City of Los Angeles, 172 P. 983.

€ 1011(1) (Cal.) Where the evidence is conflicting, the findings of fact of a trial court is conclusive on appeal.—In re Jepson's Estate, 172 P. 1107.

ficting, the finding of the trial court will not be disturbed on appeal.—Snyder v. Hamilton Nat. Bank, 172 P. 1069.

⇔1011(1) (Wash.) Finding as to damages on conflicting evidence will not be disturbed.— Little-Wetzel Co. v. Lincoln, 172 P. 746.

⇒1011(1) (Wash.) Where it cannot be said that the evidence does not preponderate in support of the trial court's decision based upon conflicting evidence, the judgment will not be set aside.—Courtis v. Freeburn Coal Co., 172 P. 860.

e=1011(1) (Wash.) Supreme Court will not reverse conclusion of trial judge on conflicting evidence, unless able to find evidence preponderates against conclusion.—In re King's Estate. 172 P. 1167.

e=1015(1) (Kan.) Where new trial was ordered because trial judge disagreed with jury in their view of facts, decision is not reviewable.—Warner v. Snook, 172 P. 521.

e=1015(5) (Colo.) Where the trial court investigated a report that an effort was made to bribe a juror and took evidence in connection therewith and on motion for new trial found that the attempted bribery did not affect the verdict, such finding will not be disturbed on appeal when supported by abundant evidence.—Harvey v. Beard, 172 P. 420.

#### (H) Harmless Error.

1027 (Ariz.) Error committed on trial with reference to matters connected with claims from which no portion of money adjudged to be paid by defendant in accounting is found to have arisen, was harmless to defendant.—Costello v. Cunningham, 172 P. 664.

an amendment of a verdict which decreases his liability and reduces the amount of the judgment against him.—Asebez v. Bliss, 172

P. 595.

P. 595.

201037 (Colo.) Where action in conversion is brought against persons stealing ore, and against smelting company using it, liability of defendants is joint and several, and judgment against one without prejudicial error, under Code Civ. Proc. § 84, providing errors not affecting substantial rights shall be disregarded, is not affected by defective service upon other.

—American Smelting & Refining Co. v. Hicks, 172 P. 1055.

112 P. 1000.

1040(10) (Cal.App.) In action for unlawful detainer by plaintiff doing business under fictitious name, that complaint was uncertain as to whether rent was due plaintiff or company held not to prejudice defendant, whose demurrer was overruled, since compliance with Civ. Code, §§ 2468, 2468, as to filing certificate by person doing business under fictitious name need not appear on face of complaint.—Amundson v. Shafer, 172 P. 173.

Ludgment will not be reversed because trial

er, 172 P. 173.

Judgment will not be reversed because trial court erroneously overruled demurrer to complaint on ground of uncertainty, where substantial rights of defendant have not been prejudiced and cause has been tried on merits.—Id.

emi040(11) (Cal.App.) Assuming that plaintiff's second and third counts were uncertain or unintelligible in some particulars, overruling defendant's demurrer thereto would not constitute ground for reversal, where by his answer defendant raised all issues necessary for determination of action upon merits.—Prophet v. Katzenberger, 172 P. 775.

S=1046(1) (Cal.) In proceeding under Code Civ. Proc. § 1664, to determine rights of persons claiming to be heirs or next of kin in which the executors are parties, their active participation by offering evidence and objecting to testimony held not so far erroneous or prejudicial as to authorize a reversal.—In re Friedman's Eatate. 172 P. 140 Friedman's Estate, 172 P. 140.

1046(5) (Okl.) Remarks of court to counsel while instructing the jury are not prejudicial in the absence of showing that the verdict of the jury was influenced.—Phillips v. Mitchell, 172 P. 85.

1047(3) (Kan.) Judgment will not be reversed for withdrawal of evidence impeaching persons who are neither parties nor witnesses, where evidence is on matter wholly collateral.

—Berry v. Dewey, 172 P. 27.

€=1048(1) (Or.) In action under federal Employers' Liability Act for death of section man, plaintiff's examination of his witness to show that he had been subpœnaed by defendant and had talked with counsel for defendant held not prejudicial to defendant.—Stool v. Southern Pac. Co., 172 P. 101. 1050(1) (Utah) Where there was no controversy as to the time defendant drove his motor truck along a road, a conclusion of a witness that he admitted driving it there "about the time of the accident" was harmless.—Barker v. Savas, 172 P. 672.

wherein it was alleged that insured represented that he had never had tuberculosis, admission of evidence by the beneficiary that the attending physician had never imparted to her the information that insured was tubercular was harmless error, being negative evidence neither proving nor disproving any of the issues.—Askey v. New York Life Ins. Co., 172 P. 887.

€=1051(1) (Wash.) In an action on a life insurance policy, admission of evidence by the wife of insured, who was the beneficiary, that insured had told her that the attending physician said he had stomach trouble was not prejudicial, where it was otherwise proven that he did suffer from such aliment.—Askey v. New York Life Ins. Co., 172 P. 887.

€=1053(3) (Wash.) When trial court, by instructions, in terms eliminates from consideration specified improperly admitted evidence of special damages, or in terms confines recovery to specific proper items of damage, error in admission of evidence of improper items is cured.—Armstrong v. Spokane International Ry. Co., 172 P. 578.

e=1053(4) (Colo.) If there was any error in admitting an ordinance requiring sounding of gongs on street cars over an objection that there was no evidence from which it could be inferred that the sounding of the gong might have prevented the collision, it was cured by an instruction given at defendant's request covering such matter.—Denver Tramway Co. v. Orbach, 172 P. 1063.

\$\iffsim 1053(4)\$ (Wash.) In action against railroad for injuries, instruction \$held\$ not to cure error in admitting testimony of loss of earnings unsupported by special pleading.—Armstrong v. Spokane International Ry. Co., 172 P. 578.

\*\*1056(3) (Or.) Where proof of agency that was wrongfully excluded was insufficient, if introduced, to establish the relation, the error was harmless.—Scales v. First State Bank, 172 P. 499.

€=1058(2) (Cal.) Error in excluding testimony is not prejudicial, where the witness afterwards gives substance of the excluded testimony.—Neale v. Atchison, T. & S. F. Ry. Co., 172 P. 1105.

•= 1058(2) (Mont.) Error in sustaining objection to a question to a witness was cured when the question was thereafter repeated and the witness answered.—Roberts v. Oechsli, 172 P. 1037.

\$\insigma\_1059\$ (N.M.) Where instructions assume existence or proof of facts sought to be established by excluded evidence, the party obtains all the benefit he could have had from its admissions, and any error in its exclusion is rendered harmless.—Skala v. New York Life Ins. Co., 172 P. 1046.

&=1061(2) (Utah) Where defendant in replevin waived his counterclaim and tendered into court the amount claimed by plaintiff, which plaintiff accepted, the court's action in dismissing the case at the time, while perhaps somewhat unusual and irregular, was not prejudicial error; there being nothing further to litigate.—Beck v. Lee, 172 P. 686.

e=1062(2) (Aris.) If substantial evidence has been received on trial which would sustain verdict for plaintiffs finding defendant liable to account, and court refused to submit evidence to jury for determination of fact, it committed error prejudicial to plaintiffs.—Costello v. Cunningham, 172 P. 664.

\*\*Control of the second of the second of the second of personalty by sheriff under writ of execution against husband, instruction close to line between law and fact, and somewhat confusing, held harmless to plaintiff.—Jolly v. McCoy, 172 P. 618.

to sudden starting of train, where defendant was unable to explain sudden starting, instructing that sudden starting "raises" inference of negligence was reversible error.—Williamson v. Salt Lake & O. Ry. Co., 172 P. 686.

1064(4) (Wash.) If it were technical error to instruct that one claiming fraud should show the facts alleged by evidence "clear, positive and convincing," it was not prejudicial, on the ground that word "positive" prevented the jury from considering the circumstances in the case.—Brown v. Jamison, 172 P. 853.

© 1066 (Utah) In action for false imprisonment, where there was no evidence indicating defendant was guilty of restraining plaintiff by personal violence, instruction correctly defining intentional restraint, and referring to restraint by personal violence, was harmless to defendant.—Salisbury v. Poulson, 172 P. 315.

erendant.—Sansoury v. Poulson, 112 P. 515.

1066 (Utah) Where there was no contributory negligence, there was no prejudicial error, if error, in instructing that, under the pleadings, the jury could not take the question of contributory negligence into consideration.

Barker v. Savas, 172 P. 672.

action.—Assocz v. Diss, 112 r. 350.

201071(5) (Cal.App.) An erroneous finding that plaintiff could have avoided collision with a street car by turning his truck to the right or left was immaterial, where plaintiff was negligent in not having control of the truck when approaching the crossing.—Lobbett & Dean v. Oakland, A. & E. Ry., 172 P. 1123.

em1071(6) (Cal.App.) Right to have material pleaded issue determined by finding of court is important, and failure to make such finding results in prejudicial error, entitling complaining suitor to reversal.—Huntington v. Vavra, 172 P. 166.

#### (I) Error Waived in Appellate Court.

6-1078(5) (Utah) Error in overruling motion for new trial, if not argued, is waived.—Egelund v. Fayter, 172 P. 313.

1078(6) (Mont.) Where, on appeal from an order denying new trial no argument is advanced challenging the justice or accuracy of the verdict, the order will be affirmed.—Great Falls Town-Site Co. v. Kowell, 172 P. 321.

#### (K) Subsequent Appeals.

1097(1) (Okl.) A question decided by Supreme Court on a former appeal becomes the law of the case in all its stages, and will not ordinarily be reversed on a second appeal of the same case when the facts are substantially the same.—Western Casualty & Guaranty Ins. Co. v. Capitol State Bank of Oklahoma City, 172 P. 954.

@=1099(3) (Ariz.) Where, on former appeal in action for accounting with respect to mining claims held in trust, assigned claim was finally adjudicated, such claim will not be considered on second appeal.—Costello v. Cunningham, 172 P. 664.

#### XVII. DETERMINATION AND DISPO-SITION OF CAUSE.

#### (C) Modification.

(Cal.) Sum awarded by judgment for particular item should agree with allegations and prayer of cross-complaint, and judg-



man v. Schultz, 172 P. 809.

1151(2) (Kan.) Where verdict and judgment in action on policy were for more than policy called for, judgment would be modified to conform to terms of policy, and, as modified, affirmed.—Taylor v. Farmers' & Bankers' Life Ins. Co., 172 P. 35.

#### (D) Reversal.

emile9(1) (Okl.) If a demurrer to plaintiff's evidence is wrongfully sustained, the cause, on appeal, may be remanded for new trial, or judgment either rendered or directed as the record warrants.—Bean v. Rumrill, 172 P. 452. e=1170(1) (Kan.) Code provisions and rules of court as to presentation of appeals must be read with Code, § 581, providing that mere technical errors and irregularities not affecting substantial rights are to be disregarded, under Code Civ. Proc. § 581 (Gen. St. 1915, § 7485).—Miller v. Miller, 172 P. 1010.

miller v. miller, 1/2 f. 1010.

=1170(1) (Okl.) In action for possession and to quiet title wherein there was a verdict for plaintiff, held that error complained of did not probably result in a miscarriage of justice or a substantial violation of any constitutional or statutory right within Rev. Laws 1910, \$ 6005.—Linsey v. Jefferson, 172 P. 641.

وسازات (Wash.) Where the case was fully tried and all the facts put before the court, it cannot be sent back for retrial on an objection which is wholly technical, in view of Rem. Code 1915, § 307, prohibiting reversal for harmless error.—Whitaker v. Ellis, 172 P. 881.

=1170(6) (Okl.) To compel parties over their objection to proceed to trial earlier than the 10 by Rev. Laws 1910, § 5043, is a denial of a substantial right within section 6005 as to reversal only for substantial error.—Harn v. Interstate Building & Loan Co., 172 P. 1081.

e=1170(7) (Utah) Although testimony of a witness was a conclusion, it was harmless, where every fact with which the witness was acquainted was known to the jury, and the jury knew it was a conclusion, under Comp. Laws 1907, \$ 3285.—Barker v. Savas, 172 P.

(Or.) In action on benefit certificate, instruction abstractly correct, but partly without support in the evidence, and apparentty not misleading, in view of Const. Amend. art. 7, § 3, authorizing disregard of technical errors, would not require a reversal.—Robinson v. Knights and Ladies of Security, 172 P. 116.

e=1171(6) (Cal.App.) Case will not be reversed for mere failure to leave to jury bringing in of a verdict for nominal damages.—Holmes v. Snow Mountain Water & Power Co., 172 P. 178.

emili75(1) (Kan.) Where trial court, on granting new trial, set aside part of special findings as without support in evidence, and stated that there was some evidence to support others, it did not necessarily approve other findings so as to justify Supreme Court in ordering judgment thereon.—Warner v. Snook, 172 P. 521.

### 176(1) (Wash.) Where judgment was rendered canceling defendant's contract to remove and pay for timber from plaintiffs' land, he was bound by judgment until reversed, and had no right to go upon land, so that, judgment being reversed on appeal, he should have extension of time in which to perform.—Colvin v. Clark, 172 P. 214.

from agent's failure to take security for money loaned on note, where he introduced no evidence, and failed to meet burden placed upon him by law, judgment against him for nominal damages only would be reversed, and cause See Appeal and Error, \$\infty\$=517.

ment will be modified to that extent.—Acker-remanded for judgment for amount of note, man v. Schultz, 172 P. 609. with interest and costs.—Green v. Bouton, 172 p. 1151(2) (Kan.) Where verdict and judg. P. 576.

Gen. St. 1915, § 7485), where all the control-ling facts to determine a liability are estab-lished, and defense wholly fails, a new trial is unnecessary, and final judgment on the lia-bility should be ordered.—Great Western Mfg. Co. v. Porter, 172 P. 1018.

## (F) Mandate and Proceedings in Lower Court.

E 1188 (Cal.App.) The appellate court has in-

E-1188 (Cal.App.) The appellate court has inherent power to grant application for stay of issuance and transmission of remittitur in order to permit application to Supreme Court of the United States for certiorari, where a jurisdictional question is involved.—Reynolds v. E. Clemens Horst Co., 172 P. 623.

Where there is ground on which the United States Supreme Court might issue a writ of certiorari to review a state court decision, though there is some doubt, stay of issuance and transmission of remittitur to the trial court pending application for such writ will be granted, where no prejudice will result, and otherwise irreparable injury might be done.—Id.

== 1207(1) (Wash.) Since, after an appeal and remittitur, superior court has no power to enter any other judgment than that directed by the appellate court, it has no power to render judgment against sureties on a supersedeas bond where the Supreme Court, in directing judgment, does not provide therefor.—Empson v. Fortune, 172 P. 873.

# XVIII. LIABILITIES ON BONDS AND UNDERTAKINGS.

@==1232 (Okl.) Surety on redelivery bond in replevin, as well as sureties on supersedeas bond and bonds for stay of execution given on appeal, judgment having gone against defend-ant, are all liable to plaintiff in replevin.— Southwestern Surety Ins. Co. v. King, 172

€=1232 (Wash.) In view of Rem. Code 1915, § 1722, notwithstanding reversal by Supreme Court of judgment for respondents, sureties on supersedeas bond were liable thereon where judgment for respondents was ordered rendered by trial court.—Empson v. Fortune, 172 P.

\*\*E=1234(1) (Wash.) A supersedeas bond, not expressed as joint or several, providing that the principal and "K. and F., sureties, are held and firmly bound unto defendants," was joint and several.—Empson v. Fortune, 172 P. 873.

⇒1236 (Wash.) Under Rem. Code 1915. 1739, relating to rendering of judgment against sureties on supersedeas bond by the Supreme Court, that court has no power to render such judgment except when it affirms judgment of superior court for payment of which bond was given.—Empson v. Fortune, 172 P. 873.

s=1239 (Wash.) Whatever statutory right a successful party upon appeal may have to a summary judgment against sureties on a supersedeas bond is merely cumulative of the com-mon-law remedy and does not affect his right to maintain an independent action on the bond in lieu thereof.—Empson v. Fortune, 172 P.

e=1244 (Wash.) The assignment of a judgment by the judgment creditor carries with it the right to sue upon the appeal bond, even though the assignment is made and filed before the bond is executed.—Wright v. Seattle Grocery Co., 172 P. 345.

### APPEARANCE.

## APPOINTMENT.

See Corporations, \$=553.

## APPROPRIATION.

See Waters and Water Courses. \$\sim 133-152.

## ARBITRATION AND AWARD.

See Reference.

#### III. AWARD.

award and a part payment thereunder to one of them constituted waiver of any irregularities in the award.—Ramish v. Marsh, 172 P.

## ARCHITECTS.

See Evidence, \$\sim 505.

## ARGUMENTATIVE INSTRUCTIONS.

See Criminal Law. 4=807.

## ARGUMENT OF COUNSEL.

See Criminal Law, \$\infty\$713-730, 779, 1037, 1055, 1171; Trial, \$\infty\$129.

## ARMY AND NAVY.

See Elections, @= 9.

### ARREST.

See Bail; False Imprisonment; Homicide,

## ARREST OF JUDGMENT.

See Criminal Law, 5-974.

#### ARSON.

22 (Wash.) One accused of setting fire to a building in the nighttime while more than one person was in such building, if guilty, was guilty of arson in the first degree.—State v. Murphy, 172 P. 544.

## ASSAULT AND BATTERY.

See Homicide, @== 257.

## ASSESSMENT.

See Damages, 216; Eminent Domain,

## ASSIGNMENT OF ERRORS.

See Appeal and Error, €==728-753, 759.

#### ASSIGNMENTS.

See Bills and Notes, \$315-318; Corporations, \$123; Covenants, \$57-69; Fraudulent.Conveyances; Judgment, \$683; Landlord and Tenant, \$57; Receivers, \$144.

## I. REQUISITES AND VALIDITY.

## (A) Property, Estates, and Rights Assignable.

ا 8 (Wash.) Notwithstanding general rule against assignability of insurance contracts, held, that rights of surety company under indemnity bond were assignable.—Island Gun Club v. National Surety Co., 172 P. 209.

(B) Mode and Sufficiency of Assignment. 6=48 (Or.) A written order by a contractor to a county to pay a bank money due on a monthly estimate of work done and "all retained percentage" was an equitable assignment of the designated money.—Wasco County v. New England Equitable Ins. Co., 172 P. 126. 

€=58 (Kan.) Written order by employé to his employer to pay creditor out of salary account of employé did not create liability against employer, unless it agreed to make payment.— Emerson-Brantingham Co. v. Lyons, 172 P. 513.

#### II. OPERATION AND EFFECT.

em74 (Wash.) City's payments to bank under assignment of contractor for street improvement, such payments being without notice of labor or material claims, and before contrac-tor's default, held to pass absolute title to money to bank under assignment.—National Surety Co. v. American Savings Bank & Trust Co., 172 P. 264.

#### IV. ACTIONS.

(Cal.App.) A mere assignment for collection, when sufficient in form to vest the legal title in the assignee, authorizes him to prosecute the action.—Ingle Mfg. Co. v. Scales, 172 P. 169.

Where claim is assigned for the purpose of including it in suit by assignee on other demands, so as to avoid separate action, title passes, and assignee may maintain the action. \_Td.

—Id.

—Id. (Wash.) In view of Rem. Code 1915, \$191, permitting an assignee to maintain action notwithstanding the assignor may retain an interest, where executor assigned claim against estate to third person, the assignee could sue the estate thereon, though the assignment was colorable and the executor was the real party in interest.—Olsen v. Hagan, 172 P. 1173.

—126 (Cal.App.) The plea of ultra vires, as applied to plaintiff's right to receive an assignment of the assignor's interest in the contract sued upon, is not available to the defendant

who owes the debt.—Ingle Mfg. Co. v. Scales, 172 P. 169.

## ASSIGNMENTS FOR BENEFIT OF CREDITORS.

See Bankruptcy.

#### II. CONSTRUCTION AND OPERATION IN GENERAL.

6:184 (Wash.) By an assignment for benefit of creditors under which the assignee takes possession of the assignor's property, the general creditors acquire, not merely a lien, but at least an equitable title and ownership.—Keyes v. Sabin, 172 P. 835.

# IV. ADMINISTRATION OF ASSIGNED ESTATE.

em228 (Wash.) Where assignee for benefit of creditors took possession of debtors' stock of goods which, unknown to him or general creditors, was covered by prior chattel mortgage to secure creditors, who had an understanding with mortgagors that they should remain in possession and continue their business, but no understanding that any part of proceeds from business should be retained for application up-



on mortgage debt, assignee could assert invalidity of the mortgage as representative of general creditors.—Keyes v. Sabin, 172 P. 835.

### V. RIGHTS AND REMEDIES OF CREDITORS.

#### (A) In Aid of Assignment.

295(8) (Cal.App.) Where plaintiff and de-295(8) (Cal.App.) Where plaintiff and defendant, creditors, made agreement with debtor whereby debtor assigned his business to defendant, in trust for benefit of all creditors, defendant, in action by plaintiff for breach of such agreement, was, notwithstanding such action purported to be one at law for damages, entitled not only to accounting, but to adjudication of rights of all creditors, to protect defendant from any actions by other creditors.—A. P. Hotaling & Co. v. Hamilton, 172 P. 393.

### ASSOCIATIONS.

See Building and Loan Associations.

### ASSUMPSIT, ACTION OF.

See Account Stated.

### ASSUMPTION OF RISK.

See Master and Servant, 203-219, 288.

### ATTACHMENT.

See Execution; Garnishment; Homestead.

### XI. WRONGFUL ATTACHMENT.

e=374 (Okl.) In a suit for damages for the wrongful retention of property levied on under an order of attachment after the order had been dissolved, evidence held sufficient to support a verdict and judgment for plaintiff.—James McCord Co. v. Johnson Grocery Co., 172 P. 438.

### ATTESTATION.

See Wills, \$\infty\$119, 144.

### ATTORNEY AND CLIENT.

See Constitutional Law, \$\infty\$52, 62, 70, 74, 275; Continuance, \$\infty\$20; Statutes, \$\infty\$64; Threats, \$\infty\$7; Trial, \$\infty\$129; Witnesses,

#### I. THE OFFICE OF ATTORNEY.

### (A) Admission to Practice.

€=3 (Wash.) Supreme Court is only court entitled to admit and enroll attorneys.—In reBruen, 172 P. 1152.

#### (C) Suspension and Disbarment.

36(1) (Wash.) Inherent power of Supreme Court to admit attorneys at law to practice necessarily includes power to disbar.—In re Bruen, 172 P. 1152.

Laws 1917, c. 115, as to disbarment, is in all respects constitutional, except provision for final order or judgment of disbarment by board of law examinates. Id

by board of law examiners.-Id.

39 (Cal.App.) Conduct of attorney in pubwith his name: "Attorneys. \* \* Divorce, Probate, and Criminal Law My Specialties. Notary Public. Consultation Free"—was in violation of Pen. Code, § 159a, making a misdemeanor advertising to procure divorce, etc.—In re Biaggi, 172 P. 1130.

8—340 (Cal.App.) District Court of Appeal held justified in revoking order admitting to practice attorney who when he applied failed to apprise court he had previously applied to another District Court of Appeal to be admitted and had withdrawn application on objections by bar association.—In re Wells, 172 P. 93.

\$\infty\$=44(1) (Mont.) Where an attorney settled a claim in full, but gave part of the money back, netting less than he was authorized to settle for, hiding the true settlement from his client, he will be disbarred.—In re Waddell, 172 P.

\$\insert \text{3}(2) (Mont.) Evidence held to show that an attorney was employed by a client, and after discharge from the case for inexcusable delay appeared for the adverse party without returning expense money to the first client, requiring that he be disbarred.—In re Waddell, 172 P. 1036.

6-54 (Cal.App.) Findings are not required in proceedings for disbarment of attorney, but they are not prohibited.—In re Biaggi, 172 P. 1180.

evidence of additional conduct involving moral turpitude, keld improper, as attempt to prejudge matters not before court when order was made.—In re Biaggi, 172 P. 1130.

Where latter part of order suspending attorney from practice, with privilege to apply for reinstatement, which was invalid as attempt to prejudge him on evidence of additional conduct involving moral turpitude, could be separated from first part of order, which was certain, and met all requirements of final judgment, it might be disregarded as surplusage.—Id.

most required in proceedings for disbarment of attorney, they are not prohibited, and, when present, they are properly part of record, which appellate court may review.—In re Biaggi, 172 P. 1130.

### II. RETAINER AND AUTHORITY.

\$\int\_{\text{3.00}}\$ (Cal.App.) Code Civ. Proc. \\$ 286, requiring party whose attorney withdraws, before further proceedings are had against him to be required in writing to appoint another attorney or appear in person, does not apply when client serves notice that he appears in person, since giving notice would be futile.—
Unwin v. Barstow-San Antonio Oil Co., 172
P. 622.

### IV. COMPENSATION AND LIEN OF ATTORNEY.

#### (A) Fees and Other Remuneration.

e=166(3) (Or.) In action for attorney's fees paid for services rendered on behalf of plaintiff corporation in defending suit to foreclose attorney's lien, for which defendants were liable, charge of \$775 held, under evidence, not excessive.—Montana Coal & Iron Co. v. Hoskins, 172 P. 118.

### (B) Lien.

e=182(1) (Okl.) An attorney has a general possessory or retaining lien on property or

money of his client in his hands for his fees, etc., which lien is not lost while the money is still under control of attorney's agent.—American Nat. Bank of Stigler v. Funk, 172 P. (C) Preferences and Transfers by Rank-1078.

### **AUTHORITY.**

See Principal and Agent, 65-69-136, 178.

### AUTOMOBILES.

See Bailment, \$18; Carriers, \$235, 321; Damages, \$131; Evidence, \$68, 471; Highways, \$173, 184; Intoxicating Liquors, \$246; Licenses; Master and Servant, \$30; Municipal Corporations, \$705; Negligence, \$93; Railroads, \$348; Trial, \$253.

### AWARD.

See Arbitration and Award, 6564, 68.

### BAIL.

See Certiorari, 6=5.

### II. IN CRIMINAL PROSECUTIONS.

8—77(1) (Mont.) Since the Code contains no other provisions regarding forfeiture of bail bonds and proceedings for collection of penalties than Rev. Codes, \$\$ 9467-9473, those alone define the court's power, and are the exclusive guide as to mode of exercising it.—State v. District Court of Fourteenth Judicial District in and for Wheatland County, 172 P. 540.

6-80 (Colo.) The surety upon a bail bond is entitled to discharge from liability if he surrenders the principal, the defendant in the criminal case, before judgment is rendered in an action on the bond.—Scott v. People, 172 P. 9. action on the bond.—Scott v. People, 112 P. 9.

2008. (Mont.) Under Rev. Codes, §§ 9468,
9471, authorizing summary judgment of forfeiture of bail bond, and authorizing proceedings to be taken to recover judgment against
the sureties, the court is wholly without power
to render judgment summarily against sureties on bail bonds.—State v. District Court of
Fourteenth Judicial District in and for Wheatland County, 172 P. 540.

county, 172 P. 540.

5393 (Colo.) In action against surety upon bail bond, a finding of the issues for plaintiff staying judgment until final disposition of motion for a new trial was not a "judgment," within Mills' Ann. St. 1912, § 2075 (Rev. St. 1908, § 1948), authorizing surrender of principal before judgment, or within Mills' Ann. Code, § 221. defining judgment.—Scott v. People, 172 P. 9.

### BAILMENT.

See Carriers, 4-42, 158; Depositaries; Pledges; Warehousemen.

© 18(3) (Cal.App.) Under Civ. Code, \$8,3049, 3051, providing for liens on personal property, where machine company repairs a dredger and constructs new parts therefor, its lien for repair charges and price of new parts is dependent upon company retaining possession of the dredger.—Union Mach. Co. v. Chicago Bonding & Surety Co., 172 P. 1113. 6.3 18(5) (Wash.) Where one who claimed lien for work on taxicab which had been confiscated by plaintiff city proceeded to foreclose lien by notice of sale under Rem. Code 1915, §§ 1104–1109, and defendant sheriff seized taxicab and sold it by authority of foreclosure proceeding, plaintiff, which did not contest foreclosure, could not maintain replevin against sheriff.—City of Everett v. McCulloch, 172 P. 863.

### BANKRUPTCY.

See Assignments for Benefit of Creditors; Mechanics' Liens, 260.

## (C) Preferences and Transfers by Bank-rupt, and Attachments and Other Liens.

165(2) (Wash.) Where only right which lessee had in machinery installed by him in building leased was to use same subject to payment of rent, surrender of possession of leased premises, together with such machinery, after default, within four months prior to bankruptcy of lessee, did not constitute a preference of lessor as creditor.—Hills v. C. D. Stimson Co., 172 P. 1181.

8=184(2) (Wash.) Where title to premises was of record and stood in name of lessor, it was not necessary, so far as creditors of lessee which subsequently became bankrupt were concerned, to record lease which provided that title to machinery installed by lessee should immediately vest in lessor.—Hills v. C. D. Stimson Co., 172 P. 1181.

Agreement modifying lease, so that, upon failure of lessee to pay rent, lessor might take immediate possession, subject to redemption by lessee, held not a chattel mortgage on machinery installed by lessee, so that it was not necessary for lessor to record it, so far as subsequent bankruptcy of lessee was concerned.

214 (Mont.) Where a trustee in bankrupt-\$\frac{1}{2}\$214 (Mont.) Where a trustee in bankruptcy has sold certain property belonging to the
bankrupt subject to an attachment lien, a
judgment in the attachment suit against such
property cannot be complained of by the bankrupt.—Strong v. Butte Central & Boston Copper Corp., 172 P. 1033.

### (F) Claims Against and Distribution of Estate.

\$\infty\$ 350 (Wash.) Rem. Code 1915, \\$ 1153, providing that receiver or assignee pay all claims for which lien could be filed, does not apply to trustee in bankruptcy.—McDermott v. Tolt Land Co., 172 P. 207.

### BANKS AND BANKING.

See Evidence, 5 244.

### I. CONTROL AND REGULATION IN GENERAL.

GENERAL.

20 (Wash.) An information held to charge an offense under that part of Rem. Code 1915, \$ 3314, relating to knowingly subscribing to false papers, for which accused was tried and convicted, so that he could not claim he was charged with one offense and found guilty of another, on the theory that he was charged with another crime under another portion of the section.—State v. Pierson, 172 P. 236.

The false paper mentioned in Rem. Code 1915, \$ 3314, defining the offense of subscribing to false papers to deceive bank examiners, refers to a paper, duly subscribed, containing an untrue statement in the body thereof.—Id.

Evidence held to support a conviction, under Rem. Code 1915, \$ 3314, of knowingly subscribing to a false paper with intent to deceive the state bank examiner.—Id.

#### II. BANKING CORPORATIONS AND ASSOCIATIONS.

### (A) Incorporation, Organisation, and Incidents of Existence.

©=23 (Okl.) Amended articles of incorporation may be filed by directors and officers of banking corporation under Rev. Laws 1910, § 1225, and amended charter issued relates back to and forms a part of original articles of incorporation.—Western Casualty & Guaranty Ins. Co. v. Capitol State Bank of Oklahoma City, 172 P. 954

Where insolvent state bank was taken over by bank commissioner who sold part of its as-

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sets to purchasers who obtained a banking charter under a different name, there was no amendment to articles of incorporation of insolvent bank within Rev. Laws 1910, § 1225.—Id.

#### (B) Capital, Stock, and Dividends.

e=40 (Cal.) Escrow instructions to return unpaid for bank stock to vendors at the end of six months, held not inconsistent with passing of title to vendees under an agreement that, if the stock was not paid for in six months, the

the stock was not paid for in six months, the vendors had the option of rescinding or suing for the purchase price.—Hughes Mfg. & Lumber Co. v. Elliott, 172 P. 584.

Where purchaser of bank stock held in escrow till payment of price agreed to accept substituted stock which the bank took in exchange for its stock, purchaser was liable for price of either the bank stock or its equivalent, where there was a doubt as to validity of exchange of bank stock; the bank commissioner disapproving the exchange.—Id.

#### (E) Insolvency and Dissolution.

63/2 (Wash.) Where funds were deposited in a bank by a county clerk in an ordinary checking account, the bank examiner, while in charge of the bank, investigating its solvency, could not appropriate collaterals to secure such account, regardless of good or bad faith; such appropriation constituting an unlawful preference.—Kies v. Wilkinson, 172 P. 351.

6=65 (Okl.) An insolvent bank may be reorganized by the stockholders on compliance with Rev. Laws 1910, § 306, and not otherwise.

Western Casualty & Guaranty Ins. Co. v. Capitol State Bank of Oklahoma City, 172 P.

954.
Where insolvent state bank was taken over who sold part of its by bank commissioner, who sold part of its assets to purchasers who obtained banking charter under different name, there was no reorganization within Rev. Laws 1910, § 306.

-1d. (277(6) (Wash.) In an action by a receiver of an insolvent bank against a denositor to recover a preference, a complaint which failed to allege the amount of claims filed and the value of the assets, so that necessity of setting aside preference and determining depositor's liability could be adjudicated, was fatally defective.—Kies v. Wilkinson, 172 P. 351.

sective.—Ries v. Whithson, 112 P. 351.

3.30(7) (Wash.) Funds deposited by the country clerk in a bank in an ordinary checking account under his name as country clerk constitute, in the absence of statute, a general, and not a special, deposit.—Kies v. Wilkinson, 172 P. 351.

Fund deposited in a bank by a country clerk subject to check held not a wrongful or unlawful deposit exempting it from being included.

ful deposit exempting it from being included in the assets available for payment of creditors generally, on insolvency of the bank.—Id.

A deposit of funds in a bank by a county clerk in his own name as such subject to check

and without any understanding that it should be treated as a special fund was not a public or trust deposit.-Id.

### III. FUNCTIONS AND DEALINGS.

### (B) Representation of Bank by Officers and Agents.

20106 (Or.) President of bank may as individual borrow money for his private account from depositor in bank; dealing with one who is president of bank not necessarily making his acts those of bank.—Haines v. First Nat. Bank, 172 P. 505.

emili6(2) (Ariz.) That the agent of a bank discounting a note knew that the payee of the note did not have sufficient money in bank to erect a building held insufficient to charge the bank with knowledge that collateral notes taken

by the bank were obtained by such payee on fraudulent representations that it had sufficient funds for such purpose.—Ellis v. First Nat. Bank, 172 P. 281.

#### (C) Deposits.

em127 (Colo.) Where a bank credits a check drawn on itself to person presenting it on the drawn on itself to person presenting it on the strength of a check payable to drawer of former check and deposited simultaneously therewith, if payment was stopped on the latter check, the bank has the right to recharge former check to person to whom it had been credited.—Snyder v. Hamilton Nat. Bank, 172

P. 1069.
Where such depositor, upon stoppage of payment, gives his note for amount of bank's loss, the check will be construed to have been accepted upon understanding that check on the other bank would be paid.—Id.

Signature and would be paid.—13.

Signature 134(1) (Ariz.) Bank and depositor could validly agree, as consideration for further credit to depositor, that bank might apply all funds from whatever source received to depositor's account, to satisfaction of indebtedness due or to become due from depositor.—P. Pastene & Co. v. First Nat. Bank, 172 P. 656. Pastene & Co. v. First Nat. Bank, 172 P. 656.

144 (Mont.) Where demand note was payable at bank to which plaintiff indorsee sent it for collection, negligence of such bank in failing to charge note to account of defendant makers when they had funds to meet it cannot be imputed to plaintiff in view of Rev. Codes, \$5935.—United States Nat. Bank of Red Lodge v. Shupak, 172 P. 324.

154(5) (Okl.) Where, in action to recover deposits, bank alleged that if check had been raised such alteration was made possible by negligent manner in which plaintiff made it, plaintiff was entitled to testify as to alteration, as against objection that pleadings did not put in issue the amount of check.—First Nat. Bank v. Ketchum, 172 P. 81.

Nat. Bank v. Ketchum, 172 P. 81.

@=154(6) (Okl.) In action by depositor against bank to recover balance due, where bank pleads payment it has burden of showing that money was paid out on checks drawn by depositor.—First Nat. Bank v. Ketchum, 172

اهشا (7) (Or.) Statement, by depositor in bank, that he had loaned his money to its president, is competent evidence for bank that he had withdrawn his money from bank.—Haines v. First Nat. Bank, 172 P. 505.

@==154(8) (Colo.) In an action against a bank to recover amount on deposit, evidence held sufficient to sustain finding that a check was credited to plaintiff upon the assumption that a check deposited at same time would be paid.
—Snyder v. Hamilton Nat. Bank, 172 P. 1069. €=154(8) (Okl.) A deposit slip issued by a bank is only prima facie evidence that it received amount of deposit on date shown by slip.

—American Nat. Bank of Stigler v. Funk, 172

P. 1078.

Evidence held to show that the bank deposit made by a third person to plaintiff's credit was a conditional deposit, and that plaintiff and the bank had knowledge of such conditions.—Id.

Evidence held to show that bank was not liable to plaintiff for charging to her account a sum paid by it to the person lawfully entitled to the possession of such sum, though deposit had been made to plaintiff's credit.—Id. had been made to plaintiff's credit .-

#### (D) Collections.

emi61(1) (Mont.) Where certificate of deposit was left with bank for collection, but payment was refused because not yet due, the bank had no authority to discount the certificate to another bank to which it was indebted and to give credit to depositor's account.—State v. Farmers' State Bank of Bridger, 172 P. 130.

emil67 (Mont.) Where certificate of deposit was left with bank for collection and bank went into hands of receiver, depositor was entitled to follow certificate into hands of another bank which discounted certificate, or could proceed against first bank and have preference to precede which could be identified. erence to proceeds which could be identified, although, unknown to him, the bank had credited the amount to his account.—State v. Farmers' State Bank of Bridger, 172 P. 130.

171(3) (Mont.) Although note was payable at bank to which plaintiff sent it for collection, rule that bank which undertakes to collect commercial paper for its customers must select as subagent some one other than party who is to make payment was inapplicable where plaintiff bank was acting for itself, and bank to which note was sent for collection was not interested in it or expected to pay it.—United States Nat. Bank of Red Lodge v. Shupak, 172 P. 324.

### V. SAVINGS BANKS.

W. SAVINGS BANKS.

301(1) (Cal.App.) Where deceased deposited money in savings bank to joint account of himself and another, payable to their survivor, his heirs were not entitled to the moneys as against the survivor, where the intent to provide for her was clearly manifest.—Halsted v. Central Sav. Bank, 172 P. 613; Same v. Oakland Bank of Savings, Id. 614.

Where deceased deposited money in savings bank to joint account of himself and another payable to their survivor, further provision in deposit agreement that "the parties agree to become partners" therein did not affect the right of survivorship, when the contract was construed as a whole.—Id.

### BAR.

See Estoppel; Judgment, \$\sim 569-735.

### BASTARDS.

### I. ILLEGITIMACY IN GENERAL

e=12 (Okl.) Under laws of Arkansas, which were extended over Indian Territory, the only mode by which an illegitimate child could be made legitimate was by marriage of its finther and mother and by the father's acknowledgment of paternity.—Rentie v. Rentie, 172 P. 1083.

#### IV. PROPERTY.

emili (Okl.) Where father of illegitimate child dies intestate, the only way in which the child can be made the heir, under laws of Arkansas enforced in Indian Territory, is for father to make declaration in writing, under Mansfield's Dig. § 2544, which must be recorded under section 2545.—Rentie v. Rentie, 172 P. 1083.

### BENEFICIARIES.

See Insurance, 5-784, 789.

BENEFITS.

See Death, 591.

BEQUESTS.

See Wills. €=714.

### BEST AND SECONDARY EVIDENCE.

See Criminal Law, 400; Evidence, 4165.

BETTING.

See Gaming.

BIAS.

See Witnesses, @=369, 370.

### BILL OF EXCEPTIONS.

See Exceptions, Bill of.

### BILL OF LADING.

See Carriers. \$\infty 58.

### **BILLS AND NOTES.**

See Insurance, 4=349.

### I. REQUISITES AND VALIDITY.

(E) Consideration

@==90 (Okl.) A note must be supported by lawful consideration.—Bank of Commerce of Sulphur v. Webster, 172 P. 943.

### IV. NEGOTIABILITY AND TRANSFER.

(B) Transfer by Indorsement.

em186 (Colo.) Where jury might find that automobile was bought for defendant company, was used in its business, and became its propwas used in its business, and became its property, it received consideration for its indorsement of note given in payment by president, and was bound by it.—Western Investment & Land Co. v. First Nat. Bank, 172 P. 6.

## V. RIGHTS AND LIABILITIES ON IN-DORSEMENT OR TRANSFER.

(A) Indorsement Before Delivery to or Transfer by Payee.

e=225 (Mont.) Provisions of Negotiable Instruments Law deal with negotiable, not with nonnegotiable, instruments.—United States Nat. Bank of Red Lodge v. Shupak, 172 P. 324.

### (B) Indorsement for Transfer.

8-293 (Cal.App.) Under Civ. Code, § 3118, providing that an indorser may qualify his indorsement with words "without recourse" or equivalent words, assignment of "all our interest in this promissory note" is equivalent to indorsement without recourse, and the assignors, on the maker's default, were not liable.—Hammond Lumber Co. v. Kearsley, 172 P. 404.

### (0) Assignment or Sale.

\$\iff 315 (Kan.) One who acquires a negotiable promissory note, by an assignment written on a separate piece of paper, from one who is not a holder in due course, takes the note sub-ject to all equities and defenses in favor of the maker.—Stevens v. Keegan, 172 P. 1025.

e=316 (Cal.) In a suit for foreclosure of a note assigned with mortgage, the existence of a consideration as between the original holder of the note and its transferee was a matter of no concern to the maker.—Anderson v. Wick-liffe, 172 P. 381.

e=318 (Cal.) A note secured by and assigned with a mortgage is nonnegotiable, and defenses against the holder may be set up as fully as against the original payee.—Anderson v. Wickliffe, 172 P. 381.

em318 (Mont.) Assuming that note is nonne-gotiable, and that plaintiff indorsee for value took it subject to equities and defenses exist-ing in favor of defendant makers at time of ing in layor of derendant makers at time of transfer, defendants might interpose any defense which they had against original payee at such time.—United States Nat. Bank of Red Lodge v. Shupak, 172 P. 324.

### (D) Bona Fide Purchasers.

2339 (Ariz.) In view of Civ. Code 1913, pars. 4201, 4202, a purchaser of negotiable paper in good faith and without knowledge of infirmity or defects is not required to make original and independent investigation of the circumstances surrounding the issue of the paper and the relations of the parties thereto.

—Ellis v. First Nat. Bank, 172 P. 281.

\$\infty\$=365(1) (Kan.) Under Gen. St. 1915. \$\frac{45}{5}\$ (5579, 6561, 6586, no defense, counterclaim, or

set-off can reduce amount of judgment which should be rendered on note in action of purchaser from bona fide purchaser.—Stevens v. Keegan, 172 P. 1025.

©=376 (Okl.) Exaction of usury on loans for which negotiable note is executed renders consideration of the state of the state

sideration of note illegal, and title of one taking it is defective within Rev. Laws 1910, § 4105, to extent of such usury.—Daniels v. Bunch, 172 P. 1086.

### VI. PRESENTMENT, DEMAND, NO-TICE. AND PROTEST.

395 (Mont.) Under Rev. Codes, \$\$ 5918-5920, where action was brought within period of limitations, defendant makers of demand note could not complain of failure to sooner present note for payment.—United States Nat. Bank of Red Lodge v. Shupak, 172 P. 324.

### VII. PAYMENT AND DISCHARGE.

@---431 (Mont.) Where, when a check on a bank collecting a note was given it in payment of the note, the bank was insolvent, the check was not a payment of the note.—United States Nat. Bank of Red Lodge v. Shupak, 172 P. 324.

#### VIII. ACTIONS.

451(1) (Wash.) Where defendant, manager of a company, received for his own use money, and gave his own due bill therefor to plaintiff, who furnished the money, that defendant gave company credit for amount of duebill would not preclude recovery from him.—Nebraska Inv. Co. v. Corlett, 172 P. 851.

\$\infty\$-473 (Okl.) In action on note, answer pleading usury, no consideration, agency between present payee and cashier of former payee, and present payee and casher of former payee, and present payee's knowledge of usury, was good, and the striking of such answer was error.—
Callaham v. Thurmond, 172 P. 798.

Callaham v. Thurmond, 172 P. 798.

23489(5) (Or.) Where the condition upon which a promissory note was to become operative never happened, such fact need not be specially pleaded, but is a failure of consideration provable under the general issue.—

Gress v. Wessinger, 172 P. 495.

23497(2) (Okl.) When title of any one negotiating an instrument is defective, the burden is on the holder to prove that he or some one under whom he claims acquired title as a holder in due course without notice, save under exception provided in Rev. Laws 1910, \$4109, and otherwise he cannot recover against maker.—Daniels v. Bunch, 172 P. 1088. maker.-Daniels v. Bunch, 172 P. 1086.

\$\instyle=518(1)\$ (Kan.) In action on note given in part payment of commission on farm loan obtained by the payee for the maker, facts held not to show a total failure of consideration.—Fontron v. Kruse, 172 P. 1007.

Fontron v. Kruse, 172 P. 1007.

5-518(1) (Wash.) In action against a corporation on its note, which plaintiff claimed was given in consideration of transfer to corporation of a personal note of corporation's president, evidence held insufficient to show such consideration.—Hoffman v. M. Gottstein Inv. Co. 172 P. 573.

5-537(2) (Colo.) In suit against company as indorser of note, held, on evidence, that whether note made to it by its president, who had indorsed it, was ever delivered to defendant, was for jury.—Western Investment & Land Co. v. First Nat. Bank, 172 P. 6.

First Nat. Bank, 172 P. 6.

\$\instructure \text{Sains, 12.1.0.}}\$ \$\instructure \text{Colo.}\$ In suit against company as indorser of note, \$held\$, on evidence, that whether it had indorsed note by indorsement in its name made by its president, also maker of note, was for jury.—Western Investment & Land Co. v. First Nat. Bank, 172 P. 6.

### BLACKMAIL.

See Threats.

### BLIND.

Brokers

See Master and Servant, 385.

### BLUE PRINT.

See Contracts. 4=232.

### BOARDS.

See Constitutional Law, 6-80; Counties, 6-

### BONA FIDE PURCHASERS.

See Bills and Notes, \$339-376; Sales, \$239; Vendor and Purchaser, \$233.

### BONDS.

See Appeal and Error, \$\iffsize 376-386, 1232-1244; Bail; Costs, \$\iffsize 119; Counties, \$\iffsize 123, 182; Indemnity, \$\iffsize 4; Municipal Corporations, \$\iffsize 145; Principal and Surety; Replevin, \$\iffsize 145; Principal and Surety; 120; States.

### BOOKS OF ACCOUNT.

See Criminal Law. 6= 434.

### BOTTLES.

See Municipal Corporations. 4=736.

### **BOUNDARIES.**

See Animals, \$==90; Counties, \$==8, 16.

### I. DESCRIPTION.

and otherwise, monuments govern measurements, where surveyor of a plat overlapped line of railroad right of way by reason of a mistake as to the center line of the way his notations on the map must yield to the boundary of the easement of way, and lots conveyed adjoining the right of way will be bounded accordingly.—Oregon Home Builders v. Eisman, 172 P. 114.

10 (Or.) Surveyor's affidavit and certificate attached and made part of a recorded plat should be regarded as incorporated in the description of outboundaries of the tract platted.

Oregon Home Builders v. Eisman, 172 P. 114.

### II. EVIDENCE, ASCERTAINMENT, AND ESTABLISHMENT.

\$\iff 37(5)\$ (Mont.) Evidence hdd to show practical location of boundary line.—Borgeson v. Tubb. 172 P. 326.

6-348(2) (Or.) Recorded plat making boundaries lines of lots therein coincident with the surveyed line of railroad right of way recognizes the way as a monument determining the lot lines contiguous thereto.—Oregon Home Build-ers v. Eisman, 172 P. 114.

49 (Mont.) Practical location of boundary line by owners of adjoining lands and their subsequent acquiescence therein concludes them and their privies.—Borgeson v. Tubb, 172 P. 326.

### BRIEFS.

See Appeal and Error, \$\infty 757-773; Criminal Law, \$\insigm\$1130.

### BROKERS.

### II. EMPLOYMENT AND AUTHORITY.

€ 9 (Wash.) Where defendant employed plaintiff brokers to secure loan, and later plaintiff's employé in telephone conversation with another loan broker, by mutual mistake as to loan involved, stated that it would not be made, plaintiff was not estopped to deny release of defendant from its obligation and

#### V. COMPENSATION AND LIEN.

43(3) (Wash.) Correspondence between realty brokers and officer of bank as to ranch owned by bank and sold by brokers held insufficient to satisfy statute of frauds as to contract for commissions.—Larue v. Farmers' & Mechanics' Bank, 172 P. 1146.

Mechanics' Bank, 172 P. 1146.
250 (Washi) Where defendant applied to plaintiff for loan "to or through" such broker, to be made within reasonable time, but both parties contemplated securing loan from insurance company, and plaintiff never attempted to make loan itself, defendant could repudiate application if not accepted by insurance company within reasonable time.—Calvin Philips & Co. v. Newoc Co., 172 P. 355.

\$\iffsize \text{Col. App.}\$\) When broker agrees to "consummate" exchange of land within 30 days, he has done his part by bringing parties together so that his principal could have carried through deal in such time.—Turner Watkins, 172 P. 620.

watkins, 172 P. 620.

5-52 (Wash.) Where defendant applied to plaintiff brokers for loan to be made through them from insurance company, insurance company's acceptance "subject to inspection" and requiring additional sureties was not binding acceptance.—Calvin Philips & Co. v. Newoc Co., 172 P. 355.

63(1) (Okl.) In action for commission for making an oil and gas lease, it was no defense that agent did not procure a written lease, where nonprocurement of lease was due to lessor's own act.—Strickland v. Palmer, 172 P.

### V. ACTIONS FOR COMPENSATION.

€=86(1) (Wash.) Evidence held insufficient to show acceptance within reasonable time of apshow acceptance within reasonable time of application for loan by contemplated lender so as to show performance of broker's contract to procure loan.—Calvin Philips & Co. v. Newoc Co., 172 P. 355.

8....86(7) (Cal.App.) In action by broker for furnishing one ready to exchange lands, evidence held sufficient to sustain finding that deal did not fall through by reason of false representations of broker.—Turner v. Watkins, 172

## BUILDING AND LOAN ASSOCIA-

\$\instructure{39}(8)\$ (Okl.) Evidence held insufficient to support judgment for amount awarded for plaintiff, purported building and loan association, in action to foreclose mortgage.—Cole v. Industrial Sav. Soc., 172 P. 451.

### BUILDING CONTRACTS.

See Contracts, == 199; Principal and Surety, **€**==82, 100.

#### BUILDINGS.

See Covenants, \$51; Negligence, \$44, 136.

### CANCELLATION OF INSTRUMENTS.

See Contracts, 270, 271; Fraudulent Conveyances, 286, 295; Reformation of In-

#### I. RIGHT OF ACTION AND DEFENSES.

COMMON CARRIERS.

(Litah) Where general creditors of insured filed with insurer that assignment of policy was fraudulent, and insurer before paying policy required bond indemnifying it against such claims, to secure which assignee deposited part of proceeds of policy, since in fact there was no consideration for the bond, equity would afford the assignee relief by canceling the indem-

contract for commission.—Calvin Philips & Co.
v. Newoc Co., 172 P. 355.
nity bond, though a court of equity will not inquire into quantum of consideration.—O'Neill v. Mutual Life Ins. Co. of New York, 172 P.

&==24(1) (Utah) Where insurer required assignee of life policy to give indemnity bond against claims of creditors of insured, for which \$800 of the policy was deposited as security, and the assignee sued to cancel the bond, she was not bound to restore what she had received from the policy.—O'Neill v. Mutual Life Ins. Co. of New York, 172 P. 306.

24(2) (Colo.) Plaintiff, suing for cancellation of note, has not lost her right to such retion of note, has not lost her right to such re-lief by failure to tender defendants, before com-mencement of action, the shares of stock she received in consideration for her note, when undisputed evidence shows stock to be worth-less, and where defendants refused to accept such stock when tendered during the trial.— Carlson v. Akeyson, 172 P. 1058.

### II. PROCEEDINGS AND RELIEF.

37(6) (Colo.) In an action to cancel a note and deed of trust on the ground of misrepresentation, a complaint is not defective for failsentation, a complaint is not defective for failure to allege reliance on the false statement, where it alleges that plaintiff relied on the representations, and thereupon and at defendant's request executed the note and deed of trust.—Carlson v. Akeyson, 172 P. 1058.

A complaint for cancellation alleging misrepresentation is not defective for failure to allege that the representations were material, where it sufficiently appears from the complaint as a whole that the representation related to a material fact.—Id.

8=57 (Cal.) Where an absolute deed given by 1 mortgagor to the creditor was set aside, and the previous mortgage restored, it was not error to direct a sale of the property by a commissioner appointed by the court instead of by the trustee named in the original mortgage.—Boal v. Gassen, 172 P. 588.

5-59 (Cal.) Where a deed by a mortgagor to the creditor was set aside as having been obtained without adequate consideration and under undue influence, it was not error to restore the creditor to his former condition, give ing him the benefit of the security of the mortgage, which was given up in consideration of the conveyance.—Boal v. Gassen, 172 P. 588. €==63 (Wash.) Where widow, individually and as executrix, brought action against a son to set aside a deed of community property, a judgment setting aside the deed merely reinstated the property as that of the estate. and did not deprive the son of his right as an heir.—Hastings v. Hastings, 172 P. 833.

### CAPACITY.

See Deeds, 4 211; Witnesses, 4 327.

### CAPITAL.

See Joint Adventures, 5; Partnership, 5

### CARNAL KNOWLEDGE

See Rape.

### CARRIERS.

See Licenses, @==14.

### L CONTROL AND REGULATION OP COMMON CARRIERS.



4 (Wash.) "Common carrier" is one who transports persons or things from place to place for hire or reward, and holds himself out to the world as ready and willing to serve the public indifferently, but if the undertaking be a single transaction, not a part of the general business or occupation engaged in, service is that of a private and not a common carrier.—Cushing v. White, 172 P. 229.

S=12(4) (Wash.) Public Service Commission Law, §§ 9, 53, do not authorize commission to increase the fares which may be charged by street railroad within city limits to more than five cents, although company's income is not sufficient to pay reasonable return and provide an adequate and sufficient service, in view of sections 25 and 112.—State v. Public Service Commission of Washington, 172 P. 890.

commission of Washington, 172 P. 890.

212(7) (Kan.) Evidence held to support finding that schedule of freight rates on rough stone, etc., from Galena, Kan., to points in Kansas on plaintiff railway established by Public Utilities Commission were unreasonably low and discriminatory.—Missouri, K. & T. Ry. Co. v. Public Utilities Commission, 172 P. 1022.

Carrier man and the commission of the commission of

Carrier may sufficiently maintain burden of showing that freight schedule is unreasonable or noncompensatory by whatever evidence may be available, without undertaking to prove ultimate fact with mathematical precision.-Id. \$\insigma 13(2)\$ (Colo.) Switching being a terminal service that is rendered only in connection with certain parts of the traffic, and that may not be required, and being a service that is separate and distinct from transportation service. rate and distinct from transportation service, a carrier has no right, in view of Laws' 1910 (Ex. Sess.) pp. 46, 48, §§ 3, 5, to fix a rate that includes switching charges, regardless of whether switching services are rendered.—Consumers' League of Colorado v. Colorado & S. Ry. Co., 172 P. 1064.

18(6) (Kan.) Under evidence that schedule of freight rates on rough stone, etc., from Galena, Kan., to points in Kansas on plaintiff railway established by Public Utilities Commission were unreasonably low and discriminatory, such rates were properly enjoined.—Missouri, K. & T. Ry. Co. v. Public Utilities Commission, 172 P. 1022.

### (B) Interstate and International Transportation.

8-30 (Kan.) Where interstate bill of lading authorizes consignee to pay freight, an implied contract of consignee to pay freight arises from his acceptance of delivery into which is read Elkins Act Feb. 19, 1903, requiring payment of full charges at established rate.—Atchison, T. & S. F. Ry. Co. v. Wagner, 172

P. 519.
Where consignee, obligated to pay charges by interstate bill of lading, pays the charges, which are less than the established rate, the carrier may maintain an action against it for the unpaid balance of the legal charge.—Id.

and balance of the legal charge.—Id.

In carrier's suit against consignee for unpaid balance of freight, where it was admitted that schedule of rates was duly filed and approved by Interstate Commerce Commission, the presumption was that the rates were duly published, and against violation of Elkins Act Feb. 19, 1903, imposing penalties for failure to publish rates.—Id.

### II. CARRIAGE OF GOODS.

### (A) Delivery to Carrier.

42 (Nev.) Railroad which transported ore for third person after true owner had notified it of his title and forbidden it to transport held liable to owner as for conversion.—Dixon v. Southern Pac. Co., 172 P. 368.

### (Wash.) "Common carrier" is one who (B) Bills of Lading, Shipping Receipts, transports persons or things from place to place

258 (Ariz.) Where borrower, being heavily indebted to bank, had agreed that proceeds of shipments by it were to be applied on such indebtedness, and borrower had sent bank draft on consignee of goods sold with bill of lading attached, the bank had a special interest in consigned property to extent of amount of draft, taking precedence over an attachment under writ of garnishment.—P. Pastene & Co. v. First Nat. Bank, 172 P. 656.

### (D) Transportation and Delivery by Carrier.

e=85 (Wash.) One who delivers property to a carrier consigned to himself at a place where he does not reside and has no representatives or place of business is bound to put himself in a position to receive notice, and, failing to do so, cannot be heard to complain that notice was not given.—Rosenbaum v. Northern Pac. Ry. Co., 172 P. 238.

Failure to notify consignor of arrival of ship-ment of apples consigned to himself, would im-pose no liability, where party with whom con-signor had made arrangements to care for apples knew of their arrival in good condition.—Id. 8=91 (Nev.) Carrying goods by carrier from terminus to terminus on requirement of person unlawfully in possession is not conversion, though if owner intervenes before delivery and demands them and carrier refuses to deliver he is liable in trover.—Dixon v. Southern Pac. Co., 172 P. 368.

### (E) Delay in Transportation or Delivery.

(E) Delay in Transportation or Delivery.

⇒103 (Okl.) Without pleading and proof of special damages for delay in transit of shipment, it was error to admit evidence of depreciation of value of merchandise after delivery to consignee, because he had to carry it over to another season.—Wichita Falls & N. W. Ry. Co. v. D. Cawley Co., 172 P. 70.

⇒104 (Okl.) Evidence, in an action for damages for the delay in merchandise in transit, held insufficient to support a verdict for plaintiff.—Wichita Falls & N. W. Ry. Co. v. D. Cawley Co., 172 P. 70.

⇒105 (1) (Okl.) Under Rev. Laws 1910. §

Cawley Co., 172 P. 70.

105(1) (Okl.) Under Rev. Laws 1910, §
2869, measure of damages for delay in transit without shipper's communication of unusual circumstances of shipment is depreciation of merchandise at market value at place of delivery between delivery and when it should have been delivered.—Wichita Falls & N. W. Ry. Co. v. D. Cawley Co., 172 P. 70.

In action for delayed carriage of merchandise, demogracy occurring after its receipt by consigner.

damages occurring after its receipt by consignee, because of fact that merchandise had to be carried over to another season, are not recoverable.-Id.

for delay in shipment of freight, it must be shown that such damages were within contemplation of both parties to contract.—Wichita Falls & N. W. Ry. Co. v. D. Cawley Co., 172 P. 70.

#### (F) Loss of or Injury to Goods.

(r) loss of railway delivers a carload of vegetables to consignee, who accepts same and starts removing vegetables from the car, the railway's responsibility for the safety of the vegetables ceased; and, where vegetables remaining in car freeze, the railway is not liable for damages sustained.—Lynch v. Union Pac. R. Co., 172 P. 1061.

134 (Colo.) In an action against a railroad for damages for the freezing of a part of a carload of vegetables, evidence held sufficient to show vegetables had been delivered to plaintiff before time of freezing.—Lynch v. Union Pac. R. Co., 172 P. 1061.

#### (G) Carrier as Warehouseman.

42—140 (Colo.) Where a railway has completed transportation of a carload of vegetables and is awaiting delivery thereof, its liability as carrier terminates, and it becomes and will remain until delivery a bailee liable only for want of ordinary care.—Lynch v. Union Pac. R. Co., 172 P. 1061.

&=140 (Wash.) Where a consignor shipped a carload of apples to himself at C., with directions to stop for partial unloading at K., and party with whom consignor had made arrangements to care for apples at K. had actual knowledge of their arrival in good condition, carrier's duty thereafter was that of a warehouseman.—Rosenbaum v. Northern Pac. Ry. Co., 172 P. 238.

Co., 1/12 P. 238.

3-146 (Colo.) Where a railway is in possession of a carload of vegetables as bailee, the freezing of such vegetables is prima facie, but not conclusive, evidence of its negligence, and can be rebutted by evidence that consignee had access to car and was removing vegetables at time of freezing.—Lynch v. Union Pac. R. Co., 172 P. 1061.

#### (H) Limitation of Liability.

em150 (Colo.) A common carrier cannot exempt himself from liability for negligence of himself or his servants.—Denver & R. G. R. Co. v. Teufel, 172 P. 1060.

\$\operatorname{\operatorname{\text{cons}}} \operatorname{\text{S}} \operatorname{\text{(Colo.)}} \ \text{In view of Sess. Laws 1910, p. 49. \$ 8, limiting carriers' liability to value stated in the contract, shipper of trunk, under bill of lading with released valuation, could not recover actual value of the contents of the trunk, but only the stipulated liability.

Denver & R. G. R. Co. v. Teufel, 172 P.

Sess. Laws 1910, p. 49, \$ 8, providing that nothing in this section shall deprive any holder of a bill of lading of any remedy or right of action under existing law, did not preserve common-law right of recovery of actual value of goods lost, where bill of lading contained clause limiting liability.—Id.

### III. CARRIAGE OF LIVE STOCK.

€=218(10) (Cal.App.) Shipper of live stock was not required to give written notice of loss within 10 days as specified by contract, where extent and character of damage could not be ascertained within such time.—Bliss v. Southern Pac. Co., 172 P. 760.

e=218(11) (Cal.App.) Under contract for intrastate shipment of stock, providing that shipper should give written notice of loss within 10 days after unloading, carrier waived right to notice, where after less \(\frac{1}{2}\) rmal notice it gave directions as to care and disposition of injured stock.—Bliss v. Southern Pac. Co., 172 P. 760.

#### IV. CARRIAGE OF PASSENGERS (A) Relation Between Carrier and Passenger.

\*\*235 (Wash.) A carrier, engaged in the automobile rent business, held to be a common carrier within Laws 1915, p. 227, regulating common carriers of passengers on public streets, etc.—Cushing v. White, 172 P. 229.

\*\*241 (Okl.) Postal clerks while on duty are passengers for reward.—Lusk v. Wilkes, 172 P. 929.

(B) Fares, Tickets, and Special Contracts. 253(1) (Okl.) A passenger ticket is not a contract, but only evidence of the right of transportation furnished by virtue of the contract for transportation.—Dickinson v. Bryant, 172 P. 432.

## (C) Performance of Contract of Transportation.

269 (Okl.) Where wreck and delay neces- passenger in jitney bus, instruction on right of sitates a transfer of passenger, and carrier way and care required held not so confused

pending the transfer provides suitable coaches, properly heated, open for passengers' use, it has performed its full duty.—Lusk v. Wilkes, 172 P. 929.

#### (D) Personal Injuries.

e=280(1) (Okl.) Carrier's contract is that it will carry a passenger safely, and afford a safe and convenient means for entering and leaving cars, though it does not contract to render personal services or attention, except as to passengers unable to help themselves.—Dickinson v. Bryant, 172 P. 432.

€=280(1) (Okl.) Carrier of persons for re-ward must use the utmost care and diligence for their safe carriage, must provide every-thing necessary for that purpose, and must ex-ercise to that end a reasonable degree of skill. —Lusk v. Wilkes, 172 P. 929.

\$\insertable\$ (Okl.) In the case of passengers who, from illness, age, or infirmity are unable to help themselves, there is an exception to the general rule that a carrier does not contract to render personal services or attention.—Dickinson v. Bryant, 172 P. 432.

clerk prevented him from occupying heated coaches furnished by carrier after the wreck, so that he remained in charge of mail and contracted illness, carrier's failure to provide warmth and shelter other than such coaches was not actionable negligence.—Lusk v. Wilkes, 172 P. 929. 172 P. 929.

\$\ightarrow\$3.14.02. Amended complaint in action for injury to passenger thrown from rear platform of a street car while it was rounding a curve held to state a cause of action.—
Gumpel v. San Diego Electric Ry. Co., 172 P.

\$\insigma\_316(1)\$ (Cal.) Where personal injury to passenger arises from carrier's operation of car, there is a prima facie case of negligence, and burden is on carrier to show that thing done by it causing injury was not negligent.—Graff v. United Railroads of San Francisco, 172 P. 603.

\$=316(3) (Utah) The doctrine of res ipsa loquitur, as applied to the sudden starting of a passenger coach, warrants or authorizes an inference or assumption that sudden starting was due to negligence of those controlling train, but does not compel such inference or presumption.—Williamson v. Salt Lake & O. Ry.

Co., 172 P. 680.
In action for injuries to passenger due to sudden starting of car, under exclusive management and control of defendant, doctrine of res ipea loquitur held applicable.-Id.

\$\infty\$=\frac{318(7)}{318(7)} (Wash.) Evidence held to warrant recovery against a jitney bus owner for injuries to passenger in collision.—McDorman v. Dunn, 172 P. 244.

\$\instructure 320(8)\$ (Utah) In action for injuries sustained by plaintiff while attempting to board defendant's passenger train, question of defendant's negligence held, under evidence, for jury.—Williamson v. Salt Lake & O. Ry. Co., jury.-Willia 172 P. 680.

e=320(13) (Wash.) Evidence in action for injury to passenger by slipping on snow and ice on street car platform held sufficient for the jury on the issue of negligence, on the theory that it had not been cleared at end of previous run.—French v. Spokane & I. E. R. Co., vious run.—F 172 P. 1159.

€=320(19) (Cal.) In an action for injury when thrown by sudden jerk from the rear platform of a street car while it was rounding a curve, held, on the evidence, that defendant's negligence was for the jury.—Gumpel v. San Diego Electric Ry. Co., 172 P. 605.

هــــــ321(12) (Wash.) In action for injuries to passenger in jitney bus, instruction on right of



and involved as to be unintelligible.—McDorman v. Dunn, 172 P. 244.

8=321(21) (Utah) Instruction, in effect, that sudden starting of car "raises," was erroneous, and should have been "warrant" or "authorize," an inference of negligence.—Williamson v. Salt Lake & O. Ry. Co., 172 P. 680.

### (E) Contributory Negligence of Person injured.

8-347(7) (Cal.) In passenger's action for personal injury when thrown from front platform of electric car while rounding curve, held that plaintiff's contributory negligence was for jury.—Graff v. United Railroads of San Francisco, 172 P. 603.

Independently of statute, it is not negligence per se for passenger to stand on front platform

of moving electric car.—Id.

\$\iff 347(7)\$ (Cal.) In an action for injury from being thrown from the rear platform of a street car while rounding a curve, held, on the evidence, that plaintiff's contributory negligence was for the jury.—Gumpel v. San Diego Electric Ry. Co., 172 P. 605.

\$\ildes\rightarrow{\text{348}(5)}\$ (Cal.) In passenger's action for injury when thrown from front platform of electric car, requested instruction as to his assumption of risk while standing there was properly refused, where it included risk from motorman's negligent operation of car.—Graff v. United Railroads of San Francisco, 172 P. 603.

In passenger's action for injury when thrown from front platform of electric car, requested instruction as to his assumption of risks while standing in that position held properly refused.

arose from manner of operating electric car or from passenger's carelessness in standing too near side thereof, held question for jury.—Graff v. United Railroads of San Francisco, 172 P. 603.

348(13) (Cal.) In action for personal injury, instruction that, where passenger is riding in unusual position, increasing his danger, no presumption arises that resulting injury was due to carrier's negligence held misleading.—
Graff v. United Railroads of San Francisco, 172

Graff v. United Railroads of San Francisco, 142 P. 603.

In passenger's action for injury, instruction that as matter of law, notwithstanding his place of added peril on front platform legal presumption of negligence arose against carrier from fact of injury was erroneous.—Id.

#### (F) Ejection of Passengers and Intruders.

\$\colon \infty 355\$ (Okl.) Passenger who purchased ticket, and, while hurrying to board train, left it in her purse at station, after selling agent notified conductor that she had purchased ticket, was entitled to transportation on train she took, and her ejection was wrongful.—Dickinson v. Bryant, 172 P. 432.

e=382(1) (Okl.) Where a carrier unlawfully ejects a passenger, it is liable for whatever damages he sustains.—Dickinson v. Bryant, 172 P.

\*\*382(7) (Oki.) Verdict of \$750 awarded a passenger voluntarily ejected, while suffering with rheumatism and other infirmities, and who was compelled to wait a day for the next train, in view of the humiliation, etc., was not excessive.—Dickinson v. Bryant, 172 P. 432.

©=383 (Okl.) In action for damages for wrongful ejection from a train. held, that whether plaintiff, by reason of infirmity, was, in exception to the general rule, entitled to personal service or attention, was for the jury.—Dickinson v. Bryant, 172 P. 432.

### CASE-MADE.

See Appeal and Error, \$\infty\$561-567; New Trial, \$\infty\$3.

### CATTLE GUARDS.

See Railroads. 4 413.

### CAUSA MORTIS.

See Gifts, €==82.

### CERTIFICATE.

See Appeal and Error, \$\infty\$613, 614, 616.

### CERTIFICATE OF DEPOSIT.

See Banks and Banking, 6=161, 167.

### CERTIORARI.

See Criminal Law, \$\infty\$1018-1188; Eminent Domain, \$\infty\$264.

### I. NATURE AND GROUNDS.

\$\ightharpoonup\_5(1)\$ (Cal.App.) The writ of certiorari cannot be used to take the place of an appeal or to add to or modify a record with respect to any jurisdictional fact therein determined.—Lanterman v. Anderson, 172 P. 625.

€==5(1) (Mont.) Certiorari is the proper rem-

\$\\_5(1)\$ (Mont.) Certiorari is the proper remedy of sureties on a bail bond against whom summary judgment has been entered, in view of Rev. Codes, \(\frac{5}{2}\) 7098, 7203, as to remedy by appeal, etc.—State v. District Court of Fourteenth Judicial District in and for Wheatland County, 172 P. 540.

\$\\_5(1)\$ (Nev.) Where on defendant's appeal on questions of law only to district court from adverse judgment in justice's court judgment was affirmed, defendant's right to certiorari was limited to review of district court judgment, from which there was no appeal.—State v. Pacific Wall Paper & Paint Co., 172 P. 380.

\$\\_228(1)\$ (Cal.App.) Office of writ of certiorari is to determine only whether inferior board or court acted in excess of jurisdiction, and the court will only inspect record as writand the court will only inspect record as writ-ten and determine therefrom whether the action was unwarranted by the powers given to the board or court.—Lanterman v. Anderson, 172 P. 625.

### II. PROCEEDINGS AND DETER-MINATION.

&==56(2) (Cal.App.) In certifrari to review order of board of medical examiners revoking license of the petitioner to practice medicine, where the record recital was that a quorum of the board was present on the hearing, petitioner could not make a showing that one of the board absented himself for a time from the session.—Lanterman v. Anderson, 172 P. 625.

### CHALLENGE.

See Jury, 4 136.

### CHANCERY.

See Equity.

### CHANGE OF VENUE.

See Criminal Law, 4=145; Venue, 4=41, 68.

### CHARACTER.

See Homicide, \$==163; Witnesses, \$==352,

### CHARGE.

By carriers, see Carriers, 4=12. Telephones, \$66 Carriers, \$6012.

By telephone companies, see Telegraphs and Telephones, \$33.

To jury, see Criminal Law, \$761-829, 1056-1173; Trial, \$191-296.

### CHARITIES.

### I. CREATION, EXISTENCE, AND VA-LIDITY.

LIDITY.

Emi (Wash.) Benevolence and charity do not consist wholly of almsgiving, but gratuitous improvement of spiritual, mental, social, and physical condition of young men by the maintenance of lectures, gospel services, libraries, reading rooms, gymnasiums, recreation grounds, social meetings, etc., is charity.—Susman v. Young Men's Christian Ass'n of Seattle, 172 P. 554.

Since "charity" implies a gift, it implies the bestowal of goods or money, rendition of services, or awarding of privileges free to recipient without gainful return.—Id.

without gainful return.-Id.

## II. CONSTRUCTION, ADMINISTRA-TION, AND ENFORCEMENT.

\$\iff 45(1) (Kan.) A charitable hospital corporation is not liable in damages for the failure of its medical superintendent to comply with a contract made by him for the care of a patient at the hospital.—Davin v. Kansas Medical Missionary & Benevolent Ass'n, 172 P. 1002.

aud5(2) (Wash.) A benevolent or charitable institution is not liable for torts of its servants against a patron of the institution in the absence of showing of failure to exercise reasonable care in selection of such servant.—Susman v. Young Men's Christian Ass'n of Seattle, 172 P. 554.

Complaint for injuries in elevator accident in Y. M. C. A., held not to show that the Y. M. C.

Y. M. C. A., held not to show that the Y. M. C. A. was a charitable corporation so as to relieve it from answering.—Id.

A municipal ordinance, regulating operation of elevators, imposes no liability against charitable institutions, otherwise exempt for injury resulting from violation, in the absence of such express or implied intent.—Id.

The mere fact that Y. M. C. A. took out indemity policy for elevator, though evidence of construction by the corporation of its liabilities, created no liability for tort of the elevator operator, if none theretofore existed.—Id.

### CHASTITY.

See Seduction, @==17.

### CHATTEL MORTGAGES.

See Pledges.

### I. REQUISITES AND VALIDITY.

### (A) Nature and Essentials of Transfers of Chattels as Security.

€==6 (Cal.) Allegation that defendant operated his theater and its carpets negligently, in that strip of carpet was so laid that plaintiff in passing downstairs was tripped and thrown in passing downstairs was tripped and thrown by reason of fact that carpet was loose and thereby she sustained injuries, was not too general allegation of negligence.—Sharpless v. Pantages, 172 P. 384.

In action for injuries occasioned by loose carpet on stairs in theater, it was within discretion of the court to permit witness to testify as to condition of carpet two days after accident—Id

accident.-−Id.

Testimony of injured patron of theater that as she was going down stairs her foot slipped because of loose condition of carpet and that gor and mortgagee have been such as to unher fall was occasioned thereby, was sufficient lawfully defeat rights of general creditors of

to sustain finding that theater was negligent.

It is duty of theater to use ordinary care to so maintain carpets on its stairs that it would be safe for persons to pass thereon in ordinary manner.—Id.

manner.—Iu.

\$\limes 18\$ (Okl.) Under Rev. Laws 1910, \$\frac{3829}{3829},
mortgage may be given upon chattels to be subsequently acquired.—Mitchell v. Guaranty State
Bank of Okmulgee, 172 P. 47.

amilia (Or.) Chattel mortgage upon future acquired personal property, or fluctuating stock of goods, is valid as between mortgager and mortgagee.—Kenney v. Hurlburt, 172 P. 490.

(B) Form and Contents of Instruments. e=47 (Okl.) Description in chattel mortgage is sufficient if it enables third person, aided by inquiry, when pursued, to identify property.— Mitchell v. Guaranty State Bank of Okmulgee, 172 P. 47.

Where chattel mortgage of certain oxen accurately described property mortgaged, mere fact that oxen were not at place recited in mortgage does not vitiate it.—Id.

### II. FILING, RECORDING, AND REG-ISTRATION.

#### (A) Original.

(A) Original.

90 (Okl.) Under Rev. Laws 1910, § 4032, filing of chattel mortgage after its execution in county to which property was subsequently removed constitutes notice, though mortgage had not been filed in county wherein property was situated at time of execution thereof.—Mitchell v. Guaranty State Bank of Okmulgee, 172 P. 47.

#### III. CONSTRUCTION AND OPERA-TION.

### (C) Property Mortgaged, and Estates and Interests of Parties Therein.

≈124 (Okl.) Where chattels were acquired by w=124 (Ukl.) Where chattels were acquired by mortgagor soon after execution of mortgage and were particularly described therein, in absence of evidence that property was not intended to be covered, mortgagor's intent that mortgage was to cover such property is sufficiently disclosed.—Mitchell v. Guaranty State Bank of Okmulgee, 172 P. 47.

#### (D) Lien and Priority.

6:::135 (Okl.) Lien of mortgage on chattels to be subsequently acquired attaches from time that mortgagor acquires interest therein.— Mitchell v. Guaranty State Bank of Okmulgee, 172 P. 47.

\$\infty\$ 138(1) (Wash.) Creditor who in payment of his antecedent debt takes quitclaim deed to of his antecedent debt takes quitelaim deed to buildings on premises owned and leased by him to debtor and takes possession thereof, with notice of prior chattel mortgage thereon in form of a bill of sale, without affidavit of good faith required by Rem. Code 1915, \$ 3660, and not recorded, given to secure another creditor, is "purchaser for value" within section 3660, and has rights superior to the prior chattel mortgage.—Embagi v. Northwestern Improvement Co., 172 P. 834.

وسا47 (Okl.) Where owner of personalty executes bill of sale without consideration to obwith owner's knowledge, executes mortgage and delivers proceeds of assignment to owner, lien of such mortgage is prior to that of owner's subsequent mortgage to mortgage having knowledge of prior mortgage.—Iowa Nat. Bank of Woonsocket, R. I., 172 P. 924.

### V. RIGHTS AND REMEDIES OF CREDITORS.



mortgagor thereby perpetrating a fraud, mort-gagee, by taking possession of the remaining property, does not better his position as against such creditors.—First Nat. Bank of Ft. Collins v. Shafer, 172 P. 1; Same v. Daniels Mercantile Co., Id. 3.

SE-187 (Or.) Where lender to purchaser of stock of goods made loan in good faith and took chattel mortgage on stock as security, believing mortgage was security, and mortgage was not given for benefit of purchaser, at inception of transaction mortgage was valid as between lender and purchaser.—Kenney v. Hurlburt, 172 P. 490.

8-194 (Wash.) Where a chattel mortgage was not recorded as required by Rem. & Bal. Code 1915, § 3660, within the time limited by section 3661, nor until after the property had been assigned by the mortgagors for benefit of creditors and the assignee had taken possession thereof, it was void as to the general creditors.—Keyes v. Sabin, 172 P. 835.

198 (Ur.) Though chattel mortgage executed in good faith by purchaser of stock of goods to person who lent him money was invalid as against creditors of purchaser, being on fluctuating stock, lender's mortgage lien was perfected when he was put in possession by the purchaser.—Kenney v. Hurlburt, 172 P. 490. €==198 (Or.) Though chattel mortgage

Mere existence of claims of creditors of mortgagor without attachment or seizure upon execution was not intervention of rights of third persons, preventing subjection of after-acquired goods to lien of chattel mortgage on mortgagee's taking possession before rights of third persons intervened .- Id.

Fact that lender who took chattel mortgage on fluctuating stock as security, when he took possession under stipulation of mortgage and proceeded to sell at private sale, was not unmindful of claims of unsecured creditors and proposed to get all he could for them, did not lessen nor defeat his security.—Id.

200 (Colo.) Where chattel mortgagee per-€=200 (Colo.) Where chattel mortgagee permitted and aided mortgagor in selling part of property sufficient to pay mortgage debt, and in converting proceeds to his own use, held mortgage was void as to a judgment creditor of mortgagor, and the latter could subject to garnishment the proceeds of the remaining property in the hands of the mortgagee.—First Nat. Bank of Ft. Collins v. Shafer, 172 P. 1; Same v. Daniels Mercantile Co., Id. 3.

### CHEAT.

See False Pretenses; Fraud.

### CHECKS.

See Payment, 21.

### CHILDREN.

ee Bastards; Guardian and Ward; Home-stead. €=142; Infants; Parent and Child. See Bastards;

### CHOSE IN ACTION.

See Assignments.

CITATION.

See Process.

CITIES.

See Municipal Corporations.

### CITIZENS.

See Constitutional Law, 240; Indians.

### CIVIL RIGHTS.

See Constitutional Law. 4=240.

P. 412.

© 13 (Cal.App.) A complaint for damages under Civ. Code, §§ 51, 52, for causing removal from a hotel held to show a causal connection between the defendant's act and plaintiff's removal.—Piluso v. Spencer, 172 P. 412.

In an action under Civ. Code, §§ 51, 52, for

In an action under Civ. Code, §§ 51, 52, for causing removal from a hotel, evidence of defendant's treatment of plaintiff in other respects held admissible to show malice and as indicative of oppression.—Id.

In an action under Civ. Code, §§ 51, 52, for causing removal from a hotel, a letter from defendant to the proprietor asking him to inform plaintiff he would need his rooms and that board would be doubled was admissible to show malice and hostility.—Id.

In an action under Civ. Code, §§ 51, 52, for causing removal from a hotel, the jury might award punitive damages for malice or oppression in excess of the \$50 minimum fixed by

sion in excess of the \$50 minimum fixed by the statute.—Id.

In an action under Civ. Code, §§ 51, 52, for causing removal from a hotel, a refused instruction that the law does not require the keeper to furnish a place of residence or business was too sweeping.-Id.

### CLAIMS.

See Execution, \$\iiint\$194; Municipal Corporations, \$\iiint\$1002.

### CLAMS.

See Constitutional Law, \$\sim 278; Domain, \$\sim 2; Fish, \$\sim 7, 9, 12. **H**minent

### CLERKS OF COURTS.

17 (Utah) The provision in Comp. Laws 1907, § 972, that district court clerks may charge 25 cents for filing of papers not otherwise provided for, does not apply to affidavits supporting motion for new trial, since the same section provides specifically for a fee of \$2.50 from the moving party.—Beck v. Lee, 172 P.

### CODICIL

See Wills, \$\infty\$123.

COLLATERAL AGREEMENT. See Evidence, 4-441-444.

### COLLATERAL SECURITY.

See Pledges.

### COLLATERAL UNDERTAKINGS.

See Frauds, Statute of, \$23; Guaranty.

### COLLECTION.

See Banks and Banking, \$\leftharpoonup 161-171; False Imprisonment, \$\leftharpoonup 5, 10, 23.

### COLLEGES AND UNIVERSITIES.

See Mandamus, \$\sim 100.

### COLLUSION.

See Fraudulent Conveyances, 299.

### COLOR OF TITLE.

See Adverse Possession.

### COMBINATIONS.

See Conspiracy.

### COMMERCE.

See Carriers; Territories, 4=18.

#### II. SUBJECTS OF REGULATION.

6=27(1) (Utah) To recover under Federal Employers' Liability Act, both employer and employe must at time of injury be engaged in interstate commerce.—Kuchenmeister v. Los Angeles & S. L. R. Co., 172 P. 725.

6-27(5) (Or.) Section man on railroad engaged in interstate commerce who arrived at place of work before time for beginning actual work, and who was killed by a work train before that time, was employed in interstate commerce within Employers' Liability Act, § 1.—Stool v. Southern Pac. Co., 172 P. 101.

Section man who reached place of work before time for actual work, and who started up a complete of the province work, and who started up a contract of the province work and work, and who started up a contract of the province work, and who started up a contract of the province work, and who started up a contract of the province work, and who started up a contract of the province work and contract of the province

Section man who reached place of work before time for actual work, and who started up a track toward place of his previous work, and was killed by a train, held engaged in employment so connected with interstate commerce as to bring his dependents within Employers' Liability Act, § 1, if defendant's servants were negligent.—Id.

negligent.—10. ——1

6-28 (Wash.) Employés engaged in constructing telegraph lines were not engaged in interstate commerce, although the company employing them was so engaged.—State v. Postal Telegraph-Cable Co. of Washington, 172 P.

### COMMERCIAL PAPER.

See Bills and Notes.

### COMMISSION.

See Brokers, @==43-86.

### COMMITMENT.

See Criminal Law, == 241.

### COMMON CARRIERS.

See Carriers.

### COMMON SCHOOLS.

See Schools and School Districts.

### COMMUNITY PROPERTY.

See Husband and Wife, 248-274.

### COMPARATIVE NEGLIGENCE.

See Negligence, 4=101.

### COMPENSATION.

See Attorney and Client, \$\insigma 166\$; Contracts, \$\insigma 232\$, 322\$; Eminent Domain, \$\insigma 84-126\$; Master and Servant, \$\insigma 383-393\$; Officers, \$\insigma 94\$, 101\$; Schools and School Districts, \$\insigma 144\$.

### COMPETENCY.

See Evidence, \$\infty\$=155, 546; Witnesses, \$\infty\$=40-219, 852, 354.

### COMPLAINT.

See Covenants, 114; Indictment and Information; Pleading, 249, 279.

### COMPROMISE AND SETTLEMENT.

See Accord and Satisfaction; Arbitration and Award; Payment.

e=12 (Wash.) In action on duebill given by defendant, managing director of a lumber company, in which action defendant set up payment through settlement of a suit between plaintiff and lumber company. held, that amount evidenced by duebill was not included in such settlement.—Nebraska Inv. Co. v. Corlett, 172 P. 851.

65-15(2) (Kan.) A defendant in an action without merit may compromise the litigation without making himself liable in any way to any third party.—Avery v. Howell, 172 P. 995.

### COMPUTATION.

See Limitation of Actions, 4-46-130; Time.

### CONCLUSION.

See Pleading, 5=8.

### CONCLUSIVENESS.

See Appeal and Error, \$\$\\$62, 999, 1008, 1009; Criminal Law, \$\$\\$1159; Indemnity, \$\$\\$14; Pleading, \$\$\\$36; Principal and Surety, \$\$\\$14K.

### CONDEMNATION.

See Eminent Domain.

### CONDITIONAL SALES.

See Sales, 6=479.

### CONDITIONS.

See Cancellation of Instruments; Escrows; Wills, \$\infty\$647.

### CONDUCTING

See Gaming, \$\infty 75.

### CONFIRMATION.

See Guardiau and Ward, \$\iiin103; Mortgages, \$\iiin526\$

### CONFLICT OF LAWS.

See Damages, 2.

### CONFUSION OF GOODS.

### II. RIGHTS AND REMEDIES OF PERSONS INTERESTED.

(Mont.) Owner of property intrusted to an agent may follow and retake it from the agent or his privy, not a bona fide holder for value, whether in its original or substituted form, provided it can be identified, and includes moneys, even though prima facie mingled with the private moneys of the agent, or his privy, who has knowledge of the source from which they have been obtained; the burden being on the agent, or the privy, to rebut the prima facie case made by the owner, or to separate and discinguish his own moneys.—State v. Farmers' State Bank of Bridger, 172 P. 130.

### CONSENT.

See Assignments, &=58.

### CONSIDERATION.

See Bills and Notes, \$\, 90, 186, 316, \$18; Contracts, \$\, 48-88; Evidence, \$\, 419; Guaranty, \$\, 414.



### CONSOLIDATION.

See Action, \$==59.

### CONSPIRACY.

See Criminal Law, \$\sim 423.

### I. CIVIL LIABILITY.

(B) Actions.

(E) Actions.

(I) Actions.

(I

### CONSTITUTIONAL LAW.

See Civil Rights.

For validity of statutes relating to particular subjects, see also the various specific topics. Enactment and validity of statutes in general, see Statutes, \$\infty\$35\\(\frac{1}{2}\)-64. Subjects and titles of statutes, see Statutes, \$\infty\$100.

# II. CONSTRUCTION, OPERATION, AND ENFORCEMENT OF CON-STITUTIONAL PROVISIONS.

em31 (Wyo.) Const. art. 5, § 11, providing that "the judges of the district courts may hold courts for each other,"—is self-executing, and confers authority on judge of one district to call in judge of another district without reference to statute and independent of reserve ence to statute, and independent of request or reason for substitution.—Hoglan v. Geddes, 172 P. 136.

### III. DISTRIBUTION OF GOVERN-MENTAL POWERS AND FUNCTIONS.

### (A) Legislative Powers and Delegation Thereof.

52 (Wash.) Admitting to practice, suspending, and disbarring attorneys being a judicial function, Legislature may regulate, but cannot take it away.—In re Bruen, 172 P. 1152. not take it away.—In re Bruen, 172 P. 1152. 6—62 (Wash.) Laws 1917, c. 115, giving board of law examiners power to initiate complaints against attorneys and hear and determine their rights to practice, creates a judicial tribunal, having delegated legislative powers in violation of Const. art. 1, 2, and 4, providing for three separate branches of government.—In re Bruen, 172 P. 1152.

#### (B) Judicial Powers and Functions.

e=70(1) (Wash.) Laws 1917, c. 115, giving board of law examiners power to initiate complaints against attorneys and hear and determine their rights to practice, creates a judicial tribunal having legislative powers, in violation of Const. art. 1, 2, and 4, providing for three separate branches of government.—In re Bruen, 172 P. 1152.

\*\*274 (Wash.) Laws 1917, c. 115, giving board of law examiners power to initiate complaints against attorneys and hear and determine their rights to practice, creates a judicial tribunal having administrative powers, in violation of Const. arts. 1, 2, and 4, providing for three separate branches of government.

—In re Bruen, 172 P. 1152.

### (C) Executive Powers and Functions.

€=380(2) (Cal.App.) St. 1915, p. 184, providing for revocation of a physician's license to practice for professional misconduct, is not unconstitutional as conferring upon a board powers belonging strictly to the judicial department.—Lanterman v. Anderson, 172 P. 625.

### V. PERSONAL, CIVIL, A CAL RIGHTS. AND POLITI-

82 (Utah) Act Feb. 1, 1917 (Laws 1917, c. 2), entitled "An act to define, prohibit, and regulate sale, manufacture, use and possession of intoxicating liquors," does not violate Const. art. 1, § 1, as to right to life and property, since it is a valid exercise of police powers.—State v. Certain Intoxicating Liquors, 172 P.

### VIL OBLIGATION OF CONTRACTS.

### (B) Contracts of States and Municipalities.

135 (Wash.) An accepted telephone franchise ordinance is a contract, and the company cannot destroy the right of city residents to the minimum service rate provided therein by declaring the provision abrogated while operating under the franchise.—State v. Home Telephone & Telegraph Co. of Spokane, 172 P. 899.

### (C) Contracts of Individuals and Private Corporations.

e=154(1) (Wash.) Rem. Code 1915, § 6604—1 et seq., requiring employers of persons engaged in constructing telegraph lines to pay premiums for industrial insurance, is not invalid as impairing the obligation of the contract between the company and its employés as members of an employés' association.—State v. Postal Telegraph-Cable Co. of Washington, 172 P. 902.

### X. EQUAL PROTECTION OF LAWS.

€=240(3) (Utah) Act Feb. 1, 1917 (Laws 1917, c. 2), relating to sale, manufacture, use, and possession of intoxicating liquors, does not deny equal protection of the laws.—State v. Certain Intoxicating Liquors, 172 P. 1050.

#### XI. DUE PROCESS OF LAW.

E=25! (Okl.) "Due process of law" means the enforcement of right or prevention of wrong before a legally constituted tribunal having jurisdiction over the class of cases to which one in question belongs, with notice to party on whose property rights it operates and an opportunity to appear and defend.—Wilhite v. Cruce, 172 P. 962.

E=275(1) (Wash.) Laws 1917, c. 115, as to disbarment of attorneys, does not take private property or property right without due process of law in violation of Const. art. 1, § 3, and federal Const. Amend. 14.—In re Bruen, 172 P. 1152.

P. 1152.

P. 1152.

2278(6) (Wash.) Laws 1915, p. 108, \$ 100, protecting clams on Puget Sound tidelands between April and September, does not violate Const. U. S. Amend. 14, nor Const. art. 1, \$ 3.— State v. Van Vlack, 172 P. 563.

2296(1) (Utah) Act Feb. 1, 1917 (Laws 1917, c. 2), relating to sale, manufacture, and possession of intoxicating liquors, does not deny due process of law contrary to Const. art. 1, \$ 7, and Fourteenth Amendment of federal Constitution.—State v. Certain Intoxicating Liquors, 172 P. 1050.

2318 (Okl.) Exercise by commissioner of

318 (Okl.) Exercise by commissioner of land office of ministerial and judicial functions and omce of ministerial and judicial functions as to state school lands under Laws 1907-08, c. 49, art. 2, and Rev. Laws 1910, §§ 7177, 7186, 7187, is not a denial of "due process of law," either under Const. Amend. U. S. 14, or Const. Okl. art. 2, § 7.—Wilhite v. Cruce, 172 P. 962.

### CONSTRUCTION.

See Compromise and Settlement, \$\instac{12}\$; Constitutional Law, \$\infty{31}\$; Contracts, \$\infty{-147}\$-232. 353; Corporations, \$\infty{77}\$; Covenants, \$\infty{51}\$-69; Deeds, \$\infty{99}\$4; Exceptions, Bill

of; Mortgages, \$\infty\$153, 154; Sales, \$\infty\$61; Statutes, \$\infty\$181-263; Wills, \$\infty\$439-647.

### CONSTRUCTIVE NOTICE.

See Notice. 4 5.

### CONSTRUCTIVE TRUSTS.

See Trusts, \$==91-104.

### CONTEMPT.

### I. ACTS OR CONDUCT CONSTITUT-ING CONTEMPT OF COURT.

\$\iff 23\$ (Cal.App.) Before a party can be brought into contempt for not complying with an order of court, such order must be served upon him.—Brandes v. Superior Court in and for Santa Barbara County, 172 P. 1130.

### CONTINUANCE.

See Criminal Law. 4=594-599.

€=20(2) (Kan.) Defendants' application for a continuance on the ground that one of their attorneys was a member of the Legislature and could not be present at the trial because the Legislature was in session was properly denied.

—Berry v. Dewey, 172 P. 27.

20(5) (Okl.) Denial of motion for continuance, on ground of absence of counsel by reason of illness, held not an abuse of the trial court's discretion, where party was represented by two able lawyers present.—Snyder Co-op. Ass'n v. Brown, 172 P. 789.

em37 (Kan.) Denial of continuance on ground that applicant desired to attend trial as a witness, but was prevented by sickness in his family, was not error, where no one with knowledge of sickness swore to either certificate or application.—Berry v. Dewey, 172 P. 27.

### CONTRACTS.

CONTRACTS.

See Accord and Satisfaction; Account Stated; Alteration of Instruments; Assignments; Bailment; Bills and Notes: Cancellation of Instruments; Carriers, \$\infty\$58, 150, 158, 219; Chattel Mortgages; Compromise and Settlement; Constitutional Law, \$\infty\$13-154; Counties, \$\infty\$13-123; Covenants; Damages, \$\infty\$79: Deeds; Depositaries; Evidence, \$\infty\$355, 400-459; Exchange of Property; Executors and Administrators, \$\infty\$96; Frauds, Statute of; Guaranty; Husband and Wife, \$\infty\$154; Indemnity; Insurance; Interest; Joint Adventures; Mechanics' Liens; Mortgages; Municipal Corporations, \$\infty\$328-376; Partnership; Payment; Principal and Agent, \$\infty\$101, 148, 166; Principal and Surety; Reformation of Instruments; Sales; Specific Performance; Stipulations; Subrogation; Vendor and Purchaser; Venue, \$\infty\$7; Warehousemen; Wills, \$\infty\$58, 88; Witnesses, \$\infty\$159.

### I. REQUISITES AND VALIDITY.

### (B) Parties, Proposals, and Acceptance.

e=22(1) (Kan.) Where principal offered to bill goods to local dealer or agent for him to make settlement with purchaser, and agent made no reply, contract to make such settlement never became effective for want of acceptance of principal's offer or proposition.—J. I. Case Plow Works v. Thorne, 172 P. 38.

22(1) (Kan.) Where principal offered to bill goods to local dealer or agent for him to make settlement with purchaser, and agent made no reply, contract to make such settlement never became effective for want of acceptance of principal's offer or proposition.—J. I. Case Plow Works v. Thorne, 172 P. 38.

(D) Consideration.

(D) Consideration.

(D) Consideration only prima facie, and the want thereof may be shown as a matter of defense.—Gates v. Herr, 172 P. 912.

(E) 51 (Okl.) Under laws in force in the Indian Territory prior to statehood, as in this state, any detriment to a promisee suffered at request of the promisor is a sufficient consideration only to consider the contract in light of Civ. Code, § 1641, providing whole is to be taken together, to give effect to every part, some reasonable effect, if possible, must be given, not only to contract and the promisor is a sufficient consideration of parties agreement, and intention is not expressed by any single clause or stipulation, but by each part and provision is not expressed by any single clause or stipulation, but by each part and provision is not expressed by any single clause or stipulation, but by each part and provision is not expressed by any single clause or stipulation, but by each part and provision is not expressed by any single clause or stipulation, but by each part and provision construed together, so construed as to be consistent with every other part.—Withington v. Gypsy Oil Co., 172 P. 634.

(E) 52 (Okl.) The court must place itself in position of parties when contract was made and consider the contract and its purpose and determine upon what sense or meaning of the terms used their minds actually met.—Withington v. Gypsy Oil Co., 172 P. 634.

(E) 53 (Okl.) Under laws in force in the Indian Territory prior to statehood, as in this state, any detriment to a promise suffered at request of the promisor is a sufficient consideration in some construction is not expressed by any single clause of supplication.

tion to sustain such promise, though promisor receives no benefit therefrom.—Riddle v. Hudson, 172 P. 921.

son, 172 P. 921.

5252 (Wash.) Where an executor as an individual undertook by an agreement with a legatee to buy from himself as executor a half interest in decedent's estate, and to apply the agreed price upon the legacy, neither the legatee's agreement to accept such agreed price nor the acceleration of payment of her legacy constituted a valuable consideration, since no detriment was suffered by the legatee the promiser. riment was suffered by the legatee, the promisee.—Gates v. Herr, 172 P. 912.

\$\iffsize \frac{\pi}{3}(1)\$ (Or.) Contract, in consideration of care and support, to give land and cancel note and mortgage for money loaned to build on land, on full performance by mortgagors, is enforceable.—Lytle v. Ramp, 172 P. 503.

&==56 (Kan.) A binding contract can be made by mutual promises; each promise furnishes a sufficient consideration for the other.—Kramer v. Walters, 172 P. 1013.

6-374 (Kan.) Party may bind himself in writing to pay debt of another, and may make binding promise to debtor to pay his debt to third person.—Emerson-Brantingham Co. v. Lyons, 172 P. 513.

e=76 (Wash.) Promise of wife to her dying husband to pay definite sum to claimant for services rendered the husband, even if not enforceable by claimant, was a moral obligation, and constituted consideration for the wife's promise to give claimant the sum specified.—Olsen v. Hagan, 172 P. 1173.

88 (Cal.) The written assignment of a note and mortgage imports a consideration under Civ. Code, § 1614, providing that a written instrument is presumptive evidence of a consideration.—Anderson v. Wickliffe, 172 P. 381.

e=88 (Okl.) Where the detriment suffered by the promisee is a benefit to a third person in-stead of to the promisor, it will be implied that such benefit was at the request of the promisee. —Riddle v. Hudson, 172 F. 921.

### (F) Legality of Object and of Consideration.

141(3) (Wash.) Where all negotiations were had between defendant and P. and evidence sufficiently warranted belief that defendant believed that P. was acting as agent for another than plaintiff, jury might well conclude that there never was any contract between plaintiff and defendant.—Kahlotus Grain & Supply Co. v. Blair, 172 P. 818.

#### II. CONSTRUCTION AND OPERA-TION.

### (A) General Rules of Construction.

6=147(2) (Okl.) Where a contract is ambiguous, the true intention of the parties, if it can be ascertained from the contract, prevails over verbal inaccuracies, inapt expressions and the dry words of the stipulation.—Withington v. Gypsy Oil Co., 172 P. 634.

(Okl.) Intention of parties must be deduced from entire agreement, and inten-

whole, but as to meaning and effect of modifying clause.—Nathan v. Porter, 172 P. 170.

\$\instructure{\instructure{\text{construct}}}\$ (Okl.) Where language of contract is doubtful and susceptible of two constructions, that must be preferred which makes it fair and reasonable.—Withington v. Gypsy Oil Co., 172 P. 634.

e=166 (Wash.) Where a contract incorporates another contract by reference, the two contracts must be construed as one.—Houghton v. Hoy, 172 P. 1148.

€=176(1) (Or.) Where the language of a contract introduced in evidence is plain and unambiguous, it is, under L. O. L. § 136, the province of the court to determine its legal effect.— Scales v. First State Bank, 172 P. 499.

#### (C) Subject-Matter.

98(1) (Wash.) Contract held to require a contractor to furnish labor and material at his own cost and expense and protect property against liens.—Island Gun Club Co. v. National Surety Co., 172 P. 209.

&=189(2) (Kan.) Under building contract providing for payment of extras ordered by defendant's chief engineer and change in plan by agreement that work of cutting niches should be paid for as lumber, such work was not an extra.—Lantry Contracting Co. v. Atchison, T. & S. F. Ry. Co., 172 P. 527.

### (D) Place and Time.

208 (Wash.) A contractor's agreement with a subcontractor to furnish materials incorporating by reference certain provisions of contractor's agreement with the railroad company held not to require the results of the contractor's agreement with the railroad company held not to require the requirement. pany, held not to require the contractor to de-liver materials west of a certain street, or where tracks were not available.—Houghton v. Hoy, 172 P. 1148.

### (F) Compensation.

e=232(4) (Kan.) Chief engineer's order, that posts be reset with foundations instead of on floor of tunnel and his blueprint of such work, met contract requirement that extra work must be done on written order.—Lantry Contracting Co. v. Atchison, T. & S. F. Ry. Co., 172 P. 527.

### III. MODIFICATION AND MERGER.

238(2) (Okl.) While under Rev. Laws 1910, § 988, parties to written contract cannot alter it by parol, they may, independent of statute, rescind contract by parol and substitute a new parol contract to which section does not apply. —Levin v. Hunt, 172 P. 940.

### IV. RESCISSION AND ABANDON-MENT.

e=270(1) (Cal.App.) One having right to rescind contract must make offer promptly upon discovering facts entitling him to rescind, if he is free from duress, menace, undue influence, or disability, and is aware of his right to rescind, under Civ. Code, \$ 1691.—Greene v. Locke-Paddon Co., 172 P. 168.

Under rule that one must promptly rescind on discovering facts entitling him thereto, notice of facts which would put ordinarily prudent and intelligent man on inquiry is equivalent to knowledge of facts that reasonably diligent inquiry would disclose.—Id.

dmgent inquity would distribute.—271 (Kan.) Under contract providing that either party might terminate it on 30 days' written notice, notice given by one of parties held sufficient, so that it did not become liable to other for damages by exercising that option.—Emerson-Brantingham Co. v. Lyons, 172

#### V. PERFORMANCE OR BREACH.

\$\ightharpoonup 286 (Kan.) Under building contract requiring contractor to present his written objections to engineer's failure to allow items within 10 days after estimate, \*held\*, in view of engineer's acts and words, that failure to present such objection did not preclude recovery on such items.—Lantry Contracting Co. v. Atchison, T. & S. F. Ry. Co., 172 P. 527.
\$\ightharpoonup 306(4) (Cal.App.) Where contract with subcontractor provided that if latter should delay work, the contractor might proceed therelay work, the contractor might proceed therewith if after three days' notice to prosecute the work subcontractor does not do so, no notice was required to authorize contractor to complete work, where subcontractor entirely abandoned contract.—New England Equitable Ins. Co. v. Chicago Bonding & Surety Co., 172 P. 1122.

F. 1122.

\$\colon=322(5)\$ (Kan.) In action by building contractor for compensation for extra items of work, material, etc., evidence held to support special findings on which judgment for plaintiff rested.—Lantry Contracting Co. v. Atchison, T. & S. F. Ry. Co., 172 P. 527.

#### VI. ACTIONS FOR BREACH.

&=324(1) (Okl.) On breach of contract injured party may sue for damages sustained by the breach, may consider contract terminated and sue on quantum meruit for his services and amount expended, or may have recourse to equity for specific performance.—Levin v. Hunt, 172 P. 940.

6-346(8) (Cal.App.) In action for damages due to defective drain installed by defendant contractor in building constructed for plaintiff, held, under pleadings, that it was unnecessary for plaintiff to introduce in evidence specifications as foundation for proof that work did not conform thereto.—Prophet v. Katzenberger, 172

\$\iffsigm 349(2)\$ (Or.) In suit to cancel note and mortgage, evidence held insufficient to warrant cancellation on ground of contract to give lot and cancel note in consideration of care and support.—Lytle v. Ramp, 172 P. 503.

&=350(1) (Cal.App.) In action for damages resulting from settling of building constructed by defendant for plaintiff, it being alleged that settling was due to too narrow footing for foundations are the second being the second was due to too narrow tooting for foundation and accumulation of water in basement because of defective drain, evidence held to support findings for plaintiff.—Prophet v. Katzenberger, 172 P. 775.

@=353(6) (Colo.) An instruction which submits to the jury the construction of a written contract is erroneous.—Trimble v. Collins, 172 P.

### CONTRADICTION.

See Witnesses. 380-397.

### CONTRIBUTION.

See Indemnity, 4=13.

### CONTRIBUTORY NEGLIGENCE.

See Negligence, €==68-101, 136.

#### CONVERSION.

See Trover and Conversion.

### CONVEYANCES.

ee Assignments for Benefit of Creditors; Chattel Mortgages; Deeds; Fraudulent Con-veyances; Homestead, \$118, 122; Hus-band and Wife, \$119; Mortgages; Wa-ters and Water Courses, \$156.

### CORPORATIONS.

See Banks and Banking, \$23; Building and Loan Associations; Carriers; Counties; Mines and Minerals, \$100; Municipal Corporations; Principal and Surety, \$55; Quo Warranto; Railroads; Street Railroads; Telegraphs and Telephones; Waters and Water Courses, \$203, 242.

### IV. CAPITAL, STOCK, AND DIVI-DENDS.

#### (B) Subscription to Stock.

Em77 (Wash.) An option on shares of mining stock, "to be taken and paid for in such sums and amounts as may be required in prosecution of the work of the development," was only an option to purchase so much of the stock as was required to pay for development work, and ended when the mine became self-supporting.—Woldson v. Richmond Mining, Milling & Reducing Co., 172 P. 1162.

#### (D) Transfer of Shares.

6:123(14) (Cal.) A note, giving a third party the right to call for additional security as it may deem proper, and on failure to respond forthwith the note was immediately to become due and payable, "or on the nonperformance of this promise" said payee may collect the securities without demand or notice, authorized sale of stock securing such note upon default in payment thereof.—Williams v. Youtz, 172 P. 383.

### VII. CORPORATE POWERS AND LIABILITIES.

### (A) Extent and Exercise of Powers in General.

General.

385 (Wash.) As between stockholders a corporation may engage in any lawful business whether within or without powers defined by franchise, and continue to do so until restrained, at suit of a stockholder or by state.—Clark v. Groger, 172 P. 1164.

387(2) (Okl.) State alone can question as ultra vires acquiring title to and holding real property by corporation.—Union Trust Co. v. Hendrickson, 172 P. 440.

### (B) Representation of Corporation by Officers and Agents.

\*\*25(5) (Wash.) Where president to deep the for illegality and lack of consideration.—

\*\*A25(5) (Wash.) Where presidents note was issued without its authority or knowledge, by its president and secretary in lieu of president's personal note, and act was not ratified by corporation, and payee was presumed to know that corporation's consent thereto was required, corporation was not estopped to defend for illegality and lack of consideration.—

\*\*Hoffman v. M. Gottstein Inv. Co., 172 P. 573. €-426(1) (Wash.) Where president and secretary issued corporation's note for president's debt without its knowledge or consent, president cannot, by payment of interest thereon from corporation funds, ratify for corporation his own wrongful act.—Hoffman v. M. Gottstein Inv. Co., 172 P. 573.

8:em 1nv. Co., 172 F. 515.

2-426(8) (Kan.) Where elevator association guaranteed payment for machinery furnished to contractor, the inaction of its board of directors at their subsequent monthly meetings acquiesced in and ratified its secretary's letter containing the guaranty.—Great Western Mfg. Co. v. Porter, 172 P. 1018.

\$\infty\$ 432(1) (Wash.) Payee giving up personal note of president of corporation and receiving corporation's note instead is presumed to know that officer may not bind corporation, where his interests are adverse, without its knowledge and consent.—Hoffman v. M. Gottstein Inv. Co., 172 P. 573.

of authority of the officer executing it.—Anderson v. Wickliffe, 172 P. 381.

#### (D) Contracts and Indebtedness.

e=486 (Cal.) Payments by corporation as mortgagor for retirement of bonds under prior mortgage held not applicable in reduction of annual payments to sinking fund required under its mortgage.—California Gas & Electric Corp. v. Union Trust Co. of San Francisco, Corp. v. U. 172 P. 146.

Interest paid by corporation as mortgagor under provisions of prior mortgage into sinking fund thereof held not applicable in reduction of annual payments for sinking fund under its own mortgage.--Id.

Interest paid by corporation as mortgagor on bonds of corporation taken over by it subsequent to execution of refunding mortgage held not applicable in reduction of annual payments into sinking fund provided for by its mortgage.—Id.

Profits made by trustee under corporate mortgage because of redemption by mortgagor of bonds held under prior mortgages held not applicable in reduction of annual payments to sinking fund provided for by mortgage.—Id.

### VIII. INSOLVENCY AND RECEIVERS.

e=544(6) (Okl.) Mortgage of corporation to secure loan, in absence of fraud, is valid, though at time of executing mortgage it was insolvent.—Union Trust Co. v. Hendrickson, 172 P. 440.

172 P. 440.

5533(6) (Okl.) Where corporation's property is in danger of being lost to stockholders through mismanagement, etc., of its officers and directors, court of equity can appoint a receiver of its property until minority stockholders' rights could be determined and accounting by officers had.—Union State Bank of Shawnee v. Mueller, 172 P. 650.

### XI. DISSOLUTION AND FORFEITURE OF FRANCHISE.

### COSTS.

Appeal and Error, 984; Clerks of Courts, 6=17.

#### I. NATURE, GROUNDS, AND E OF RIGHT IN GENERAL. AND EXTENT

€=3 (Cal.App.) Costs are allowable by statutory authority only.—Smith v. McCallum, 172 P. 408.

6-3 (Utah) Costs are a creature of statute, and a party who is entitled thereto must comply with conditions imposed by statute.—Hirsh v. Ogden Furniture & Carpet Co., 172 P. 318.

#### IV. SECURITY FOR PAYMENT.

© 119 (Utah) Under Comp. Laws 1907, \$\frac{1}{3769}, a bond as security for costs by a non-resident corporation in a replevin action is filed in time if filed within 20 days after order therefor.—State v. West Pub. Co., 172 P.

#### VI. TAXATION.

203 (Cal.App.) Since, under Code Civ. Proc. \$\frac{1}{2}\$ 1033, 1035, costs cannot be determined until disposition of pending motion to tax, order just prior to denial thereof, fixing keeper's fees in favor of sheriff, as permitted by Pol. Code, \frac{5}{2}\$ 4300b, was in time, and such item was properly included in cost bill.—Unwin v. Barstow-San Antonio Oil Co., 172 P. 622 Inv. Co., 172 P. 573.

\$\iff 220 (Utah) Plaintiff's counsel, who appeared specially for purpose of striking the cost assignment of a note and mortgage transferred bill, and also to retax or strike certain items, by a corporation makes a prima facie showing | held not to waive right to strike bill because

# VII. ON APPEAL OR ERROR, A ON NEW TRIAL OR MOTION THEREFOR.

256(1) (Wash.) Where appellant's record is unnecessarily voluminous, he may be allowed costs for only portion thereof.—Colkett v. Hammond, 172 P. 548.

\$\infty 260(1)\$ (Cal.App.) Where appeal is without merit, and made for delay, judgment will be affirmed, and sum as damages will be assessed.—Duncan v. Tom Poste, Inc., 172 P. 163. sessed.—Duncan v. Tom Poste, Inc., 172 P. 163.

260(1) (Cal.App.) Where an appeal is taken obviously for purpose of delay, the court may assess damages for the prosecution of a frivolous appeal.—Union Mach. Co. v. Chicago Bonding & Surety Co., 172 P. 1113; New England Equitable Ins. Co. v. Chicago Bonding & Surety Co., 172 P. 1122.

Surety Co., 172 P. 1122.

2260(4) (Cal.) In mortgage foreclosure suit, an appeal by subsequent purchasers who had answered, denying execution of note and mortgage, payment of \$15 for a search of title, and reasonableness of attorney's fees demanded by plaintiff and alleged estoppel by reason of three prior dismissals on plaintiff's direction held frivolous, within rule calling for imposition of damages on appellants.—Foster v. Branen, 172 P. 382.

### COUNTER AFFIDAVITS.

See Venue, 6568.

### COUNTERFEITING.

See Forgery.

### COUNTIES.

# I. CREATION, ALTERATION, EXIST-ENCE, AND POLITICAL FUNCTIONS.

FUNCTIONS.

S=8 (Ariz.) Survey and marking of boundary line by county supervisors in 1889, held not taken under Rev. St. 1887, par. 369, as the judicial fact of "indefinite description" of county boundary line defined by Civ. Code 1913, pars. 2378, 2380, did not exist.—Yuma County v. Maricopa County, 172 P. 276.

Survey made by boards of supervisors of Yuma and Maricopa counties, under Civ. Code, 1913. pars. 2373, 2380. and Laws 1889, No. 42, fixing county boundary line, was binding until in regular course of law the true boundary line was located upon the ground.—Id.

Under Const. art. 6, § 4, and Civ. Code 1913, pars. 2381–2385, held that in original suit by Yuma county against Maricopa county to establish disputed boundary line, court could define and mark the true boundary line fixed by statute, paragraphs 2373, 2380.—Id.

e=16(1) (Ariz.) Where boards of county supervisors fixed and agreed upon a boundary line, and collected taxes accordingly for many years, the county to which a strip of the other county was adjudged to belong was not entitled to recover taxes so collected by other county.—Yuma County v. Maricopa County, 172 P. 276.

### III. PROPERTY, CONTRACTS, AND LIABILITIES.

### (B) Contracts.

© 113(6) (N.M.) Where duty of performing certain work is devolved upon a designated county official, for which compensation is provided, board of county commissioners cannot employ others to do such work.—State v. Field, 172 P. 1136.

Duty of property of the compensation of the county commissioners.

not filed within time required.—Hirsh v. Ogden 54, contract by board of county commission-Furniture & Carpet Co., 172 P. 318. was ultra vires.-Id.

\$\ins \text{113}\$ (Wash.) Where bank loaning money to county contractor took assignment of deferred payments, which failed to recite that it had claim against bond for labor and materials or claim against bond for labor and materials or provisions or money advanced and used for paying for such articles, failing to name principal or surety or to refer to the bond, and not signed by the claimant or filed with the county auditor as a claim against the bond, was not sufficient notice to the surety within Rem. Code 1915, § 1161.—Aberdeen State Bank v. Spokane Paving & Const. Co., 172 P. 827.

# IV. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.

8=182 (Ariz.) Under Civ. Code 1913, par. 5284, amount paid by county supervisors to broker for selling county road bonds was not an expense of proceeding to be deducted from proceeds of bonds, but items for advertising sale of bonds were a proper charge against the proceeds.—Maxey v. Board of Sup'rs of Yuma County, 172 P. 285.

### COURTS.

See Appeal and Error, \$\inspec\$185, 493; Clerks of Courts; Contempt; Criminal Law, \$\inspec\$90, 207. 1018, 1019; Habeas Corpus, \$\inspec\$44; Highways, \$\inspec\$29; Indians. \$\inspec\$28; Judges: Justices of the Peace; Mandamus. \$\inspec\$190; Prohibition.

### I. NATURE, EXTENT, AND EXERCISE OF JURISDICTION IN GENERAL.

(Wash.) "Jurisdiction" is power to hear and determine, being power whereby courts take cognizance of and decide cases.—State v. Superior Court of King County, 172 P. 257.

### TION, AND PROCEDURE IN GENERAL. II. ESTABLISHMENT,

### (D) Rules of Decision, Adjudications, Opinions, and Records.

89 (Wash.) Decision in mandamus proceeding by mayor of city to compel county tax assessor to extend upon county rolls certain excess taxes levied by city, not having been appealed from, will not be adhered to under doctrine of stare decisis.—Northern Pac. Ry. Co. v. Snohomish County, 172 P. 878.

e=90(1) (Cal.) Supreme Court's general approval of instructions is not a specific approval of instruction not criticized.—Graff v. United Railroads of San Francisco, 172 P. 603.

as to whether an employé is engaged in inter-state commerce, especially if more recent, should be followed in preference to decision of S. L. R. Co., 172 P. 725.

### III. COURTS OF GENERAL ORIGINAL JURISDICTION.

### (B) Courts of Particular States.

(Okl.) Equitable jurisdiction of the district court extends to all actions of fraud including fraudulent sales or exchanges of land, except where a judgment for damages would afford adequate relief.—Phillips v. Mitchell, 172

### V. COURTS OF PROBATE JURISDIC-TION.

e==202(3) (Wash.) In probate proceeding by creditor of decedent's estate against executor Duty of preparing assessment rolls resting creditor of decedent's estate against executor upon county assessor, under Laws 1915, c. to compel him to take action on claim, proceeding being either action of equitable cognizance or special mandatory proceeding, neither findings of fact nor conclusions of law were necessary to sustain order dismissing proceeding.—In re King's Estate, 172 P. 1167.

### VI. COURTS OF APPELLATE JURIS-DICTION.

(A) Grounds of Jurisdiction in General. em204 (Mont.) Application to Supreme Court for order under its supervisory power annulling order granting motion for change of venue and requiring court to retain case for trial held appropriate remedy.—State v. District Court of First Judicial Dist. in and for Lewis and Clark County, 172 P. 1030.

€=206(18) (Wash.) Inherent power of Supreme Court is power to protect itself, administer justice whether any previous form of remedy has been granted or not, promulgate rules for its practice, and provide process where none exists.—In re Bruen, 172 P. 1152. where none exists.—In re Bruen, 112 r. 1102. 207(5) (Wash.) The Supreme Court can issue a writ of prohibition to restrain the exercise of unauthorized judicial or quasi judicial acts, although not issued in aid of its appellate or revisory jurisdiction, under Const. art. 4, § 4.—State v. Taylor, 172 P. 217.

### VIII. CONCURRENT AND CONFLICT-ING JURISDICTION, AND COMITY.

#### (A) Courts of Same State, and Transfer of Causes

e=485 (Cal.) The Supreme Court may transfer to itself and exercise jurisdiction to vacate the decision of the District Court of Appeal as to annulling reassessment of lands for street improvements.—Rockridge Place Co. v. City Council of City of Oakland, 172 P. 1110. &=486 (Cal.) The action of the District Court of Appeal, in regard to an assessment of land for street improvements may be vacated and case transferred to Supreme Court, notwithstanding no error appears on the face of the opinion when considered without regard to the record.—Rockridge Place Co. v. City Council of City of Oakland, 172 P. 1110.

487(2) (Cal.) The Supreme Court may transfer to itself certionary proceeding in Discourage of the court of the cour transfer to itself certiorari proceeding in District Court of Appeal relating to assessment for public impropersions. for public improvements, on petition of one not a party to the proceeding, or on its own motion.—Rockridge Place Co. v. City Council of City of Oakland, 172 P. 1110.

of City of Oakland, 112 f. 1110.

E33488(1) (Cal.) An order by the Supreme Court granting hearing of certiorari proceeding in the District Court of Appeal as to an assessment of lands for public improvements vacates the decision of the District Court of Appeal.—Rockridge Place Co. v. City Council of City of Oakland, 172 P. 1110.

### COVENANTS.

#### II. CONSTRUCTION AND OPERA-TION.

(C) Covenants as to Use of Real Property. €==51(2) (Cal.) Courts are slow to declare existence of building restrictions, unless it clearly appears from conveyances, not only that general scheme of improvement is contemplated, but also that covenant is not merely personal.

—Bresee v. Dunn, 172 P. 387.

Reasonable construction of deed containing covenant that no building should be placed less than 35 feet from front line, and that no fence should be erected "within five years from the of deed, is to apply time limit to both. date"

(D) Covenants Running with the Land. e=53 (Utah) Parol agreement in no event runs with land.—Knight v. Southern Pac. Co., rebuttal of the state's case, and literally means 172 P. 689.

57 (Cal.) Where fee is passed to covenantor and no reversion left in covenantee, there is no privity of estate or tenure between parties, and burden imposed upon land conveyed is solely for personal benefit of covenantee.—Bresee v. Dunn, 172 P. 387.

68 (Utah) Agreement or covenant of railroad to maintain and keep in repair wing fences at private crossing on farm is limited to landowner, because it does not run with land.—Knight v. Southern Pac. Co., 172 P. 689

&==69(2) (Cal.) Deed to plaintiff's purchaser, when construed with deeds to other lots front ing on same street, held to show intention of grantor to put personal covenant in each deed terminable after five years.—Bresee v. Dunn, 172 P. 387.

#### III. PERFORMANCE OR BREACH.

6-34 (Okl.) Under laws in force in Indian Territory prior to statehood, as in this state, covenant of seisin in purported conveyance to land to which grantors had no title was breach-ed at execution and delivery of deed, and gave an immediate right of action, though grantee was never evicted.—Riddle v. Hudson, 172 P. 021 921.

#### IV. ACTIONS FOR BREACH.

tion of house in violation of building restrictions, complaint was demurrable, where it failed to show that there was any reversion left in original covenantee or that any penalty attached to disobedience of restriction.—Bresee v. Dunn, 172 P. 387.

### COVERTURE.

See Husband and Wife.

### CREDIBILITY.

See Criminal Law, \$553, 785, 829; Edence, \$588; Witnesses, \$317-397.

### CREDITORS.

ee Assignments for Benefit of Creditors; Bankruptcy; Chattel Mortgages, \$\infty\$179-200; Fraudulent Conveyances; Husband and Wife, \$\infty\$269; Insurance, \$\infty\$590; Principal and Surety, \$\infty\$136-162; Subrogation; Wills, Surety,

### CREDITORS' SUIT.

See Assignments for Benefit of Creditors, 295; Fraudulent Conveyances, 4=286.

### CRIMINAL LAW.

See Arson; Bail, \$\sim 77-93\$; Contempt; Depositions, \$\sim 6\$; Embezzlement; Extortion; False Pretenses; Forgery; Gaming, \$\sim 75\$; Homicide, \$\sim 163\$, 290\$; Indictment and Information; Injunction, \$\sim 103\$; Intoxicating Liquors, \$\sim 131-139\$, 236-238; Larceny; Malicious Prosecution; Mandamus, \$\sim 141\$; Obscenity; Perjury; Prostitution; Rape; Becaiving Stolen Goods: Robbery: Seduction Obscenity; Perjury; Prostitution; Rape; Receiving Stolen Goods; Robbery; Seduction, \$\instructure{1}{2}7; Threats.

# I. NATURE AND ELEMENTS OF ORIME AND DEFENSES IN GENERAL.

65-15 (Utah) A defendant, in a prosecution for selling intoxicating liquors in violation of law, tried and convicted October 27, 1916, cannot object that the ordinance under which he was convicted was repealed by Laws 1917, c. 2, where such statute did not become effective until August 1, 1917.—Salina City v. Lewis, 172 P. 286; Same v. Neilsen, Id. 290.

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that the accused was at another place so far IX. ARRAIGNMENT AND PLEAS. AND away or under such circumstances that he could NOLLE PROSEQUI OR DISCONnot, with ordinary exertion, have reached the place of the crime in time to have participated in it.—Azbill v. State, 172 P. 658.

#### IV. JURISDICTION.

8=90(6) (Cal.App.) Where a misdemeanor is admittedly committed within the city of Los Angeles, the police courts of that city have exclusive jurisdiction under St. 1913, p. 469, so that a commitment issued by the justice of the peace of a township on an offense committed within the city of Los Angeles is void.—Ex parte Dowell, 172 P. 1121.

#### V. VENUE.

### (A) Place of Bringing Prosecution.

6-106 (N.M.) The word "district," as used in Const. art. 2, § 14, is descriptive of territory which in legal contemplation comprises the visne over which court's jurisdiction for purposes of prosecutions for crimes and misdemeanors extends.—State v. Balles, 172 P. 196.

#### (B) Change of Venue.

\$\equiv 145\$ (N.M.) Where the venue in a criminal case is changed under Code 1915, \$ 5575, at the instance of the accused, he will not be heard to question its regularity, after selecting for himself the place of trial.—State v. Balles, 172 P. 196.

# VIII. PRELIMINARY COMPLAINT, AF-FIDAVIT, WARRANT, EXAMI-NATION, COMMITMENT, AND SUMMARY TRIAL.

\$\infty\$207(4) (Wash.) Under Rem. Code 1915, \$\frac{4}{3}\$ 1949, 1955, in view of sections 46, 1928, a mag-istrate has no authority to inquire into a gross misdemeanor, nor any offense not within the exclusive jurisdiction of the superior courts.—State v. Taylor, 172 P. 217.

e=221 (Okl.) Where one charged with a felony and brought before a magistrate for preliminary examination, pursuant to Rev. Laws 1910, § 6149, applies for a change of venue, his right to such change is absolute, and duty of magistrate to grant it is mandatory, involving the exercise of no judicial discretion.—Marshall v. Sitton, 172 P. 964.

8-225 (Utah) Where the case was, pursuant to stipulation, transferred to municipal court, where preliminary examination was duly held, defendant, who proceeded to trial in district court without objection, cannot successfully assail conviction on ground that he was not given a preliminary examination, in view of Comp. Laws 1907, § 686x13.—State v. Hay, 172 P. 721.

©==238 (Cal.App.) Uncorroborated testimony of an accomplice may be sufficient to establish probable cause for magistrate's action in holding accused to answer for trial, and in committing him.—Ex parte Schwitalla, 172 P.

While defendant cannot be convicted upon uncorroborated testimony of accomplice, such testimony may be sufficient on preliminary examination to establish probable cause.—Id.

8==241 (Cal.App.) A justice of the peace of a township has no authority to commit an offender to the custody of the chief of the police of Los Angeles city; commitment by justice of the peace of townships running to the sheriff of the county and not to local police officers.—Ex parte Dowell, 172 P. 1121.

## TINUANCE

€==274 (Wash.) Application to withdraw plea of guilty must be denied unless made before judgment, under Rem. Code 1915, § 2111.—State v. Scott, 172 P. 234.

### X. EVIDENCE.

### (A) Judicial Notice, Presumptions, and Burden of Proof.

@=304(1) (Utah) Cupidity is everywhere recognized as one of the most powerful motives to human action.—State v. De Weese, 172 P. 290.

em304(1) (Wash.) Courts will take notice of scientific facts and natural laws which are well known and which may be found in standard publications treating of the subject.—State v. Van Vlack, 172 P. 563.

### (B) Facts in Issue and Relevant to Issues, and Res Gestæ.

e=361(1) (Cal.App.) Where experts had testified that injury from assault with intent to kill would likely cause victim to accept statements of others as his own, and it was developed on cross-examination that he had testified before grand jury to details of shooting which he could not recall at trial, it was proper to question assistant district attorney as to conversations which he had had with victim.—People v. Shaw, 172 P. 401.

\$\infty\$ \text{3.563} (Cal.) In a prosecution for extortion, a conversation between prosecuting witness and a police officer, in defendant's absence, held competent, as part of the res gestæ to show fear.—People v. Beggs, 172 P. 152.

### (C) Other Offenses, and Character of Accused.

8=369(1) (Nev.) Evidence of other crimes can generally be considered only when it tends to establish motive, intent, absence of mistake or accident, a common plan or scheme, or identity.—State v. McFarlin, 172 P. 371.

=State v. incrarin, 112 P. 371.

=371(1) (Utah) In prosecution for abortion, defense being operation was necessary, testimony of young woman, other than prosecutrix, that about same time like operation was performed upon her by defendants for criminal purpose, was admissible to prove intent.—State v. McCurtain, 172 P. 481.

McCurtain, 172 P. 481.

E=371(4) (Utah) In prosecution for murder, where victim, defendant's wife, knew of other crimes committed by defendant and admitted by him, and there was evidence of bitter feelings between parties, evidence of such other crimes held admissible to establish motive.—State v. De Weese, 172 P. 290.

If commission of other crimes by defendant, of which his wife, victim of homicide, had knowledge, offered any motive, defendant's admissions thereof were admissible, it being for jury, and not for the court, to say whether motive disclosed was adequate.—Id.

Where document written by defendant in explanation of murder of his wife contained many admissions, in addition to admissions of

explanation of murder of his wire contained many admissions, in addition to admissions of commission of other crimes, which were not inadmissible from any point of view, held it was not error to admit document over objection that proof of other crimes would prejudice jury, document being confined to question of motive.—Id.

### (E) Best and Secondary and Demonstra-tive Evidence.

parte Dowell, 172 P. 1121.

242(1) (Utah) A criminal prosecution for a felony may, by stipulation of counsel, be transferred from city justice to municipal court for preliminary hearing.—State v. Hay, 172 P. 721. 172 P. 286; Same v. Neilsen, Id. 290.

#### (F) Admissions, Declarations, and Hearsay.

406(1) (Wash.) An "admission" is a concession or voluntary acknowledgment of the existence or truth of a fact, or a statement suggesting any inference material to an issuable fact made by an interested party.—State v. Duncan, 172 P. 915.

Concan, 112 P. 915.

4-409 (Wash.) While evidence of admissions should be received with caution, admissions deliberately made and clearly proved are very strong and satisfactory evidence against the party making them.—State v. Duncan, 172 P. 915.

2-417(2) (Cal.) In a prosecution for extortion, conversations between the prosecuting witness and his father and between the latter and another as to propriety of consulting an attorney were incompetent.—People v. Beggs, 172 P. 152.

172 P. 152.

2-419, 420(11) (Cal.) In a prosecution against a deputy constable for killing a person whom he was attempting to arrest on a misdemeanor charge, a statement by a witness as to an answer to a question that he had asked a third person as to whether he knew who owned the gun that had been found at the scene of the crime was inadmissible as hearsay.—People v. Wilson, 172 P. 1116.

### (G) Acts and Declarations of Conspirators and Codefendants.

\*\*23(1) (Utah) Where defendants charged with abortion conspired together or acted in concert in committing act, acts, declarations, and conduct of one in furtherance of object in view were admissible as against other, but, if acts charged had ended, statements or admissions of one were inadmissible as against other, unless made in his presence.—State v. McCurtain, 172 P. 481.

### (H) Documentary Evidence and Exion of Parol Evidence Thereby.

2310 of Parol Evidence Thereby.

233 (Cal.App.) In a prosecution for murder, a letter headed "Dear Charley" and signed "Billy," addressed to defendant's brother-inlaw, whose name was not Charley, and opened by defendant's mother-in-law, was improperly admitted in evidence as a letter meant for defendant, where, though defendant's name was Charles, the evidence did not connect letter with defendant, and did not show identity of sender or that defendant knew of the existence of the letter before the trial.—People v. Lee, 172 P. 158.

€=434 (Nev.) In prosecution for embezzle-ment, it was improper to introduce books of account, where defendant was not familiar with the books, and his attention had not been call-ed to the particular accounts introduced.—State v. McFarlin, 172 P. 371.

### (J) Testimony of Accomplices and Code-tendants.

507(1) (Cal.) The victim of extortion is not an accomplice.—People v. Beggs, 172 P. 152. e=507(6) (Utah) Prosecutrix is not an accomplice of defendant charged with abortion.—State v. McCurtain, 172 P. 481.

### (L) Evidence at Preliminary Examination or at Former Trial.

\$\\_543(1)\$ (Okl.Cr.App.) It was not error to refuse to permit defendant to read testimony of witness given for him on former trial where by exercising reasonable diligence the attendance of the witness could have been obtained.—Dunn v. State, 172 P. 463.

e=543(2) (Kan.) It is not a good objection to admission of transcript of testimony of absent witness formerly given on preliminary examination that justice's docket showed it was given nation that justice's docket showed it was given on one day, while stenographer testified that it ment of certain money, the court should inwas taken on following day, where there was struct as to the purpose for which other short-

no doubt that both referred to the same testimony.—State v. Will, 172 P. 1003.

### (M) Weight and Sufficiency.

\$\instructure{\intity}}}}}}}}} \enderver\end{initial}}}}}}} \rmonint{initial case the right of the considers of the con 8-554 (N.M.) Jury need not believe defendant's evidence, and may take into consideration fact that he is defendant, and give his evidence such weight as they think him entitled to.—State v. Moss, 172 P. 199.

### XI. TIME OF TRIAL AND CONTIN-UANCE.

594(3) (Wash.) In a prosecution for murder, it was an abuse of discretion for the trial court to refuse a continuance for the purpose of securing witnesses from a foreign state as to the mental responsibility of defendant, it ap-pearing that there was a fair probability that such testimony could be procured.—State v. Musselman, 172 P. 346.

\$\insightarrow\$ 595(1) (Okl.Cr.App.) Denial of motion for continuance by reason of the absence of material witnesses for defendant, charged with murder, held error.—Westbrook v. State, 172 P. 464.

€-599 (N.M.) Refusal of continuance, on ground of surprise at introduction of evidence which defendant from nature of case should naturally anticipate or when by law he is chargeable with knowledge that it would be competent, is not error.—State v. Johnson, 172 P. 189.

### XII. TRIAL.

#### (A) Preliminary Proceedings.

€=627/2 (Okl.Cr.App.) In prosecution for statutory rape, refusal to modify an order for examination of prosecutrix by witnesses se-lected by defendant, and at his expense to provide for an examination at county's expense, where examination at county's expense had already been made, was not abuse of discretion.—Harkins v. State, 172 P. 469.

### (B) Course and Conduct of Trial in General.

e=635 (Ariz.) Though Const. art. 2, § 24, guaranties a public trial, the court in a proseguaranties a public trial, the court in a prose-cution for contributing to the dependency of a girl, involving disclosures of indecent language and conduct, and subjecting her to a gruelling cross-examination, properly restricted attend-ance to newspaper reporters.—Keddington v. State, 172 P. 273.

State, 172 P. 275.

656(5) (Ariz.) Court's remarks upon testimony of Indian children generally held not objectionable, as comment on testimony of Indian boy witness, where jury were instructed that weight of testimony was for their exclusive determination.—Sheek v. State, 172 P. 482 662

660 (Ariz.) Accused, by not objecting to an order clearing people from the courtroom after it was modified by allowing newspaper reporters to remain, waived any right of his involved in the order as modified.—Keddington v. State, 172 P. 273.

### (C) Reception of Evidence.

e=673(1) (Utah) Where defendant did not ask for a deletion or segregation, but objected to written document in its entirety, and to have excluded document would have deprived state of evidence to which it was entitled, proper procedure was to admit document and limit its application by proper instructions.—State v. De Weese, 172 P. 290.

ages might be considered by the jury.—State v. (F) Province of Court and Jury in Gen-McFarlin, 172 P. 371.

73(2) (Utah) Where evidence is admissible only for certain purpose, it is better practice for court, when evidence is received, to instruct jury of purpose for which it is received, and tell them not to consider it for any other.—State v. McCurtain, 172 P. 481.

### (D) Objections to Evidence, Motions to Strike Out, and Exceptions.

693 (Ariz.) An objection to evidence made after answer comes too late.—Azbill v. State, 172 P. 658.

6-696(1) (Cal.) Where evidence of conversa-tions was admitted on the statement that a conspiracy would be shown, and no proof of a conspiracy was made, the court should have granted a motion to strike it out.—People v. Beggs, 172 P. 152.

#### (E) Arguments and Conduct of Counsel.

em713 (Cal.) Remarks as to how the law protected defendant, and how unprotected the district attorney was against improper instructions and unfair argument for accused, were improper.—People v. Beggs, 172 P. 152.

e=718 (Cal.App.) There was no excuse for conduct of assistant district attorney, in saying what he would do, had prosecutrix in rape case been his daughter.—People v. Webster, 172 P. 768.

€==719(1) (Cal.App.) Where a love letter was not sent to or in any way connected with de-fendant, who was a married man with children, statements of prosecuting attorney in prosecu-tion for murder, in his address to jury, that it was from a woman and intended for defendant and that mysterious phrases thereof were in-tended for a married man with domestic trouble, held improper.—People v. Lee, 172 P. 158.

\$\insertail \tau 722(2)\$ (Cal.) In a prosecution for extortion, remarks of prosecuting attorney, inferring that defendant must be experienced in this class of shakedown, and knew to a nicety just how far he could go, held to be legitimate argument in the particular case, and not to assert the same as a fact.—People v. Beggs, 172

€=722½ (Cal.App.) There can be no excuse for fingrantly improper conduct of assistant district attorney, in referring to prior conviction for similar offense after the court had stricken out all reference thereto.—People v. Webster, 172 P. 768.

€==730(1) (Cal.) Defendant held not prejudiced by improper remarks of the prosecuting attor-ney, in view of an instruction to disregard statements not made as witnesses under oath, or not supported by evidence.—People v. Beggs, 172 P. 152.

\$\inspec 7.30(1)\$ (Cal.App.) Where prosecuting attorney improperly referred to certain matters in his argument, on defendant's motion to admonish the jury, a statement of the court, "I think I will take the view of the defendant, and instruct the jury to disregard that part of it," was a sufficient admonition, especially where the matter referred to was known to the jury.—People v. Hill, 172 P. 1114.

€-730(3) (Okl.Cr.App.) Criminal Court of Appeals would not be authorized to reverse conviction because county attorney asked defendant questions calling for incompetent answers, where objections were promptly sustained and evidence of guilt was clear and punishment was not prescribed by jury.—Harkins v. State, 172 P. 469.

e=741(3) (Wash.) The weight to be given admissions is to be determined by the jury.—State v. Duncan, 172 P. 915.

em761(11) (Cal.) In a prosecution against a deputy constable for killing a person he was attempting to arrest on a misdemeanor charge, instruction held not erroneous in assuming that the killing by defendant had been proved.—People v. Wilson, 172 P. 1116.

### (G) Necessity, Requisites, and Sufficiency of Instructions.

€=780(2) (Utah) In prosecution for abortion, where alleged father of child with which pros-ecutrix was pregnant was present at operations, and testified respecting them, defendants were entitled to instruction defining accomplice and not convict, unless his testimony was corrobo-rated.—State v. McCurtain, 172 P. 481.

4-785(3) (Cal.App.) The jury, in prosecution for rape was sufficiently cautioned by instructions that a charge of rape is easy to make and difficult to disprove; that testimony of a child of tender years such as prosecutrix ought to be viewed with care and caution; and that evidence in such case must be weighed with utmost care and without bias or prejudice.—People v Fraysier 172 P. 1126 People v. Fraysier, 172 P. 1126.

e=785(3) (N.M.) Instruction as to credibility of witnesses in prosecution for murder, held correct.—State v. Moss, 172 P. 199.

4-799 (N.M.) Instruction that remarks of counsel are not evidence, and that verdict must be founded solely on evidence and laws given by court, was proper.—State v. Moss, 172 P.

€==807(1) (Utah) Argumentative requests to charge, every legal proposition being supported by argument, were faulty and properly refus-ed.—State v. McCurtain, 172 P. 481.

\$\insp\\00e4808\begin{align\*}{2}\$ (Cal.App.) Code Civ. Proc. \$ 1826, is applicable to criminal cases, and was properly read to the jury in connection with instructions on reasonable doubt.—State v. Lima,

≈ 811(6) (N.M.) Instruction which does no more than call jury's attention to rule that they may consider the fact that witness is defendant, and give his evidence weight accordingly, is not erroneous.—State v. Moss, 172 P. 199.

€==814(3) (N.M.) In prosecution for murder, instruction on mutual combat is properly refused where evidence does not warrant it.—State v. Moss, 172 P. 199.

w. Moss, 172 P. 189.

3814(16) (Wash.) In prosecution for murder, statements of accused showing his relations with deceased from which the inference of motive of jealousy and revenge could be drawn were not, strictly speaking, admissions, so that it was not error to refuse requested charge on the weight to be given admissions.—State v. Duncan, 172 P. 915.

€=314(20) (Wash.) The law does not warrant an instruction covering an included crime, when there is no evidence to sustain it.—State v. Murphy, 172 P. 544.

@==823(1) (Wash.) Reading an entire statute to the jury cannot be held misleading, where an instruction thereafter clearly and specifically defined to the jury the subdivision defining the offense charged.—State v. Pierson, 172 P. 236.

8:3(5) (Cal.) In a prosecution against a deputy constable for killing a person he was attempting to arrest on a misdemeanor charge, an instruction as to intent, taken in connection with the remainder of the charge, held correct.—People v. Wilson, 172 P. 1116.

#### (H) Requests for Instructions.

€325(2) (Cal.App.) There is no merit in claim that conviction of assault with intent to merit in murder should be reversed because court did not specifically instruct that intent to kill was sessential, defendant having made no request for such instruction, sufficiently covered by given instructions.—People v. Shaw, 172 P. 401. 8=829(1) (Wash.) Error cannot be predicated on the refusal of requests for instructions, where the issues were fully covered by instructions given.—State v. Pierson, 172 P. 236. \$\insertage \text{N.M.}\$ An instruction defining essential elements of indictment as to manslaughter omitting to state that killing must have been unlawful and not justifiable, though followed by an instruction that if the indictment had been established beyond a doubt they should consist of soluttons and the state of the state convict of voluntary manslaughter, was erroneous.—State v. Pruett, 172 P. 1044.

neous.—State v. Pruett, 172 P. 1044.

23829(16) (Wash.) In prosecution for murder, instruction that the jury should consider the conduct of the witnesses, the reasonableness of their story, and all the facts, and were not bound to believe the witnesses, sufficiently covered requested instruction that evidence of statements alleged to have been made by defendant should be received with great caution, considering the liability to mistake or misunderstanding.—State v. Duncan, 172 P. 915.

### XIII. MOTIONS FOR NEW TRIAL AND IN ARREST.

\$\igsim 919(2)\$ (Okl.Cr.App.) Motion for new trial because county attorney asked defendant questions calling for incompetent answers was properly overruled, where it was clear that no prejudice resulted therefrom and trial court sustained objections thereto.—Harkins v. State, 172 P. 469.

e=951(2) (Wash.) Motion for new trial in criminal cases must be denied unless made before judgment, under Rem. Code 1915, § 2181.—State v. Scott, 172 P. 234.

6.364 (Wash.) In view of Rem. Code 1915, §§
402, 2181, where motion for new trial was made in time and disposed of and judgment was then entered, whereupon accused moved to set aside the former order, the court had lost jurisdiction.—State v. Duncan, 172 P. 915.

974(2) (Wash.) Motions in arrest of judgment in criminal case must be denied, unless made before judgment, under Rem. Code 1915, § 2181.—State v. Scott, 172 P. 234.

## XIV. JUDGMENT, SENTENCE, AND FINAL COMMITMENT.

€=>99!(3) (Cal.App.) Under Penal Code, § 1168, added by St. 1917, p. 665, providing for indeterminate sentence, not greater than maximum or less than minimum of the term fixed for the particular offense, a sentence of one convicted of manslaughter to from one to ten years' imprisonment is erroneous in view of section 193, fixing a maximum imprisonment for manslaughter of ten years, but fixing no minimum term.—People v. Lee, 172 P. 158.

minimum term.—People v. Lee, 172 P. 108.

2998 (Wash.) Criminal judgment cannot be vacated under Rem. Code 1915, \$ 464 et seq., except upon clear showing of irregularity or fraud in its procurement and a tender and adjudication of prima facie defense on merits.—State v. Scott, 172 P. 234.

Recitals, in order overruling motion to vacate criminal judgment that plea of guilty was not procured by fraud, promises of leniency, force, duress, or any undue influence, held amply supported by evidence.—Id.

\*\*E-1001 (N.M.) An order suspending sentence under Code 1915, § 5075, during good behavior, contemplates conduct conformable to law, and requires no higher standard of conduct than law demands.—Ex parte Hamm, 172 P. 190.

If restrictions are to be imposed on conduct of person under sentence suspended by virtue of Code 1915, § 5075, they must be specified in order of suspension.—Id.

## XV. APPEAL AND ERROR, AND CERTIORARL

### (A) Form of Remedy, Jurisdiction, and Right of Review.

(Okl.) Violation of Sess. Laws 1915. c. 74, requiring intrastate trains to stop at county seats, is a misdemeanor, and an appeal from a judgment in an action brought thereunder lies to the Criminal Court of Appeals and not to the Supreme Court.—Dickinson v. State, 172 P. 791, 792.

State, 112 F. 131, 192.

\$\infty\$=1019 (Nev.) The Supreme Court under Const. art. 6, \\$ 4, has no jurisdiction of appeal from conviction of violating an ordinance the penalty, which under Sess. Laws 1915. c. 184, Sess. Acts 1917, c. 76. may be prescribed, making the offense a misdemeanor under Rev. Laws, \\$ 6266.—City of Reno v. Dixon, 172 P. 367

623(13) (Cal.App.) Although Pen. Code, § 1239, makes no mention of an appeal from a motion for a new trial, in view of such right given by section 1237, and sections 1201, 1202.

given by section 1237, and sections 1201, 1202, providing that motion for new trial must be made before judgment, an appeal may be taken where judgment has been suspended.—Smith v. McCallum, 172 P. 408.

©—1026 (Cal.App.) One who gave his bond for the support of his minor child under Pen. Code, § 270b, and judgment was suspended. did not waive his right to appeal from an order denying his motion for a new trial.—Smith v. McCallum, 172 P. 408.

### Presentation and Reservation in Low-er Court of Grounds of Review.

€=1032(6) (Wash.) Objection to an informa-tion on the ground of duplicity cannot be raised for the first time on appeal.—State v. Pierson. 172 P. 236.

\$\infty\$=1036(2) (Wash.) No objection having been made to cross-examination at the time of the trial, the question whether it extended beyond

proper limits cannot be raised for the first time on appeal.—State v. Murphy, 172 P. 544. In the absence of objection to impeachment of the accused upon a collateral matter, alleged error in permitting such impeachment cannot be reviewed on appeal.—Id.

emilo37(2) (Cal.) The possibility of injury from improper statement in argument, not properly assigned as misconduct, nor any request made for an instruction to disregard it, cannot be considered on appeal.—People v. Beggs, 172 P. 152.

e=1055 (Utah) Remarks of counsel in arguing case to jury, if deemed prejudicial, must be excepted to at time they are made.—State v. De Weese, 172 P. 290.

em 1056(1) (Utab) If counsel desire to have court charge upon particular phase of case or on collateral issue, they must offer proper request, and, if it is refused, save an exception, otherwise question may not be reviewed.—State v. McCurtain, 172 P. 481.

### (C) Proceedings for Transfer of Cause, and Effect Thereof.

@==1081 (Cal.App.) Notice of appeal to the clerk gives the appellate court jurisdiction in criminal cases, in view of Pen. Code, §§ 1246, 1247, 1247a, relating to duties of clerks in reference to criminal appeals.—Smith v. McCallum, 172 P. 408.



e=1083 (Wash.) Notice of appeal in criminal cases constituting defendant's appeal, trial court has no jurisdiction to set aside an order denying new trial, where motion to set aside is made after notice of appeal.—State v. Duncan, 172 P. 915.

172 F. 910.

⇒1084 (Okl.Cr.App.) One convicted of crime, who perfects an appeal to Criminal Court of Appeals, is not entitled to give a supersedens bond under Rev. Laws 1910, § 5995, and leave the jurisdiction without proper orders permitting him to do so.—Bryce v. State, 172 P. 976.

### (D) Record and Proceedings Not in Record.

€=1090(11) (N.M.) Remarks of trial court made to jury in another case will not be considered when the same have not been authenticated by bill of exceptions or otherwise.— State v. Balles, 172 P. 196.

E-11/2 (Wash.) On appeal from refusal to vacate judgment in criminal case, recitations that court advised defendant as to his right to counsel, and that he refused counsel and voluntarily pleaded guilty. cannot be contradicted by affidavit of clerk.—State v. Scott, 172 P. 234.

### (E) Assignment of Errors and Briefs.

130(4) (Okl.Cr.App.) On appeal from a conviction for felony, where no briefs are filed and no oral argument made, courts will examine informations and instructions and judgment, and if no fundamental error appears and evidence is sufficient to support verdict, will affirm.—Meigs v. State, 172 P. 974.

(F) Dismissal, Hearing. and Rehearing. 131(2) (Okl.) Even though no motion to dismiss appeal is made, the Supreme Court of Oklahoma will not entertain an appeal in a criminal action.—Dickinson v. State, 172 P. 701 702

13(4) (Okl.Cr.App.) Court will not consider appeal from conviction unless defendant is where he can be made to respond to its judgment or order, and, where he leaves state and is convicted in another state pending his appeal, the appeal on proper motion will be dismissed.—Morgan v. State, 172 P. 974.

€=1131(5) (Okl.Cr.App.) Where one appealing from a conviction gives supersedeas bond, and breaches the bond by leaving state without leave of court, court has discretion to proceed to a decision of the cause, or to dismiss the appeal.—Bryce v. State, 172 P. 976.

### (G) Review.

(Cal.) An instruction in a criminal case given at defendant's request cannot be questioned by defendant on appeal.—People v. Wilson, 172 P. 1116.

wilson, 112 P. 1110.

1137(3) (Wash.) Accused in prosecution for murder, having requested instruction on the subject of alibi and introduced evidence attempting to establish alibi could not complain of the giving of a different instruction on alibi, which was more complete and accurate than the one he requested.—State v. Duncan, 172 P. 915.

1137(5) (Ariz.) Defendants in a homicide trial cannot complain of a nonexpert witness giving his opinion as to the age of deceased from the appearance of the body, where such testimony was drawn from the witness on their own cross-examination.—Azbill v. State, 172 P. 658.

137(5) (Wash.) Assignment of error as to the admission of testimony as to a transaction, not materially different from the testimony of accused himself, is without merit.—State v. Pierson, 172 P. 236.

Pierson, 172 P. 236.

——1144(8) (Utah) It will be assumed on appeal that jurors selected at time a prospective juror on his voir dire stated reasons for his prejudice were conscientious men of ordinary intelligence.—State v. De Weese, 172 P. 290.

——1144(10) (Utah) In prosecution for murder, where defendant raised no objection to certain remarks of district attorney until several weeks after close of trial, and did not call court's attention to fact that remarks were prejudicial, held that court on appeal could not presume that defendant was prejudiced.—State v. De Weese, 172 P. 290.

——1144(16) (Cal.) It must be presumed on

speak (16) (Cal.) It must be presumed on appeal that the jury followed an instruction to disregard statements of counsel not made as witnesses under oath.—People v. Beggs, 172 P. 152.

evidence to support a verdict, it will not be disturbed on appeal.—State v. Balles, 172 P. 196.

159(2) (Okl.Cr.App.) Evidence will not be held insufficient to support conviction, where there is any reliable evidence on which the jury might have reasonably concluded defendant was guilty.—Vaughan v. State, 172 P. 975.

\*\*Endfd/2(6) (Utah) That prospective juror, when asked on his voir dire by court for nature of his prejudice, stated, "I believe a burglar would do most anything" held not to prejudice jurors already selected.—State v. De Weese, 172 P. 290.

## 169(1) (Cal.) In a prosecution for extortion, admission of conversations between prosecuting witness and his father and between the latter and another as to propriety of consulting attorney could not have been prejudicial.

—People v. Beggs, 172 P. 152.

emil69(1) (Colo.) Defendant tried for larceny of beef animal cannot be said not to have been prejudiced by evidence, under guise of impeachment, of his having stolen live stock long before.—King v. People, 172 P. 8.

1169(2) (Ariz.) Where a state's witness was asked whether he could tell the age of deceased from the appearance of the body, and answered that he was a young man, the answer was properly permitted to stand; the evidence that the body was that of a young man being uncontroverted.—Azbill v. State, 172 P. 658.

1170½(5) (Cal.) In a prosecution for extortion, held, that defendant was not prejudiced by error excluding a question asked prosecuting witness on cross-examination, substantially and fully covered by subsequent questions negatively answered.—People v. Beggs, 172 P. 152.

4-11701/2(5) (Okl.Cr.App.) Criminal Court of Appeals will not reverse a conviction because several argumentative questions were asked defendant on cross-examination upon matters the proper subject of inquiry by question in proper form.—Dunn v. State, 172 P. 463.

@=1170½(5) (Okl.Cr.App.) That county attorney, on cross-examination of defendant, asked questions calling for incompetent answers, does not of itself establish prejudicial error.—Harkins v. State, 172 P. 469.

1171(1) (Cal.App.) Misconduct of assistant district attorney, in referring to prior conviction for similar offense after the court had stricken out all reference thereto, and in saying what he would do, had prosecutrix in rape case been his daughter, was harmless, where the record of defendant's guilt was very clear and convincing.—People v. Webster, 172 P. 768.

1173(2) (Utah) In prosecution for abortion, failure to charge that jury could not consider against one defendant statements and admissions of other held prejudicial error; court having promised so to charge at conclusion of case, so that counsel for defendants did not offer any request on subject.—State v. McCurtain, 172 P. 481.

E-1173(4) (Nev.) In prosecution for robbery, charge that state must prove beyond reasonable doubt that "a drug" was actually administered to the person robbed, given instead of charge requested using the phrase "such chloral hydrate," held harmless to defendants.—State v. Bond, 172 P. 367.

\*\*If74(2) (Cal.) In a prosecution for manslaughter, evidence of improper conduct of a juror in giving a witness a ride in his automobile and discussing a map of the scene of the crime, in violation of the instructions, held, not to require reversal.—People v. Wilson, 172 P. 1116.

### (H) Determination and Disposition of Cause.

@=1183 (Okl.Cr.App.) Where defendant's guilt was clearly shown, court would not consider errors in overruling of application for commission to take deposition, or denial of motion for continuance to demand a reversal, but under Rev. Laws 1910, \$ 6003, would reduce sentence of death to imprisonment for life and affirm.—Westbrook v. State, 172 P. 464.

464. (Cal.App.) In prosecution for murder of a married man with children, improper admission of a love letter not written by defendant's wife and containing mysterious phrases interpreted by prosecutor as intended for a married man with domestic trouble held prejudicial error not avoided by Const. art. 6, § 4½.—People v. Lee, 172 P. 158.

emiles (Cal.App.) A conviction will not be reversed for error in giving an indeterminate sentence for an offense committed before the indeterminate sentence law went into effect, but the case will be remanded, with instructions to give a proper sentence.—People v. Hill, 172 P. 1114.

#### XVII. PUNISHMENT AND PREVEN-TION OF CRIME.

\*\*E=1207 (Cal.App.) Where an offense was committed before the indeterminate sentence law took effect, an indeterminate sentence cannot be given.—People v. Hill, 172 P. 1114.

### CROSS-APPEAL.

See Appeal and Error, \$338.

### CROSS-EXAMINATION.

See Criminal Law, \$\infty\$1170\frac{1}{2}; Witnesses, \$\infty\$269-287.

#### CROSSINGS.

See Railroads, ==97, 320-350.

#### CRUELTY.

See Divorce, \$\sim 130.

### CUMULATIVE EVIDENCE.

See New Trial, == 104.

CURTESY.

See Dower.

CUSTODY.

See Divorce, 298.

### DAMAGES.

See Carriers, \$\insertail 105\$; Costs, \$\insertail 260\$; Death. \$\insertail 91\$; Eminent Domain, \$\insertail 84-126\$; Fraud, \$\insertail 50\$; Frauds, Statute of, \$\insertail 125\$; Judgment, \$\insertail 439\$; Master and Servant. \$\insertail 385\$; Municipal Corporations, \$\insertail 385\$; Principal and Agent, \$\insertail 79\$; Replevin, \$\insertail 84\$; Taxation, \$\infertail 613\$; Telegraphs and Telephones, \$\infertail 70\$, 79\$; Trespass; Trover and Conversion, \$\infertail 44\$.

### I. NATURE AND GROUNDS IN GENERAL.

€=2 (Okl.) In an action upon a contract, the measure of damages is that given by the law of the place of the contract at the time it was entered into.—Riddle v. Hudson, 172 P. 921.

### III. GPOUNDS AND SUBJECTS OF COMPENSATORY DAMAGES.

#### (B) Aggravation, Mitigation, and Reduction of Loss.

e=59 (Utah) In action for injuries sustained by plaintiff servant, where defendant railroad set up negligence of plaintiff in refusing to follow direction of physician, evidence respecting acts of plaintiff's mother in treating plaintiff's eye were properly excluded.—Kuchenmeister v. Los Angeles & S. L. R. Co., 172 P. 725.

## IV. LIQUIDATED DAMAGES AND PENALTIES.

€ 79(5) (Cal.) Provision of lease for extracting oil on royalty, that if lessees fail to commence work by a certain day they will pay lessor \$100 per month during default, held for liquidated damages, and not for penalty; it being impossible to compute amount of damage.—Allen v. Narver, 172 P. 980.

### VII. INADEQUATE AND EXCESSIVE DAMAGES.

131(3) (Wash.) Verdict of \$2,500 for injuries in automobile collision to veterinary surgeon 64 years of age, who sustained a sixinch cut over his right eye, was rendered unconscious, suffered a broken collar bone, and partial loss of motion of his right arm, continuing to the time of the trial three months after the accident and suffered great pain, was nervous, sleepless, and unable to dress himself without assistance, was not excessive.—McDorman v. Dunn, 172 P. 244.

nervous, steepless, and unable to dress nimself without assistance, was not excessive.—Mc-Dorman v. Dunn, 172 P. 244.

Epi32(6) (Wash.) Where child suffered greatly, had a number of operations, and one leg would probably grow shorter than the other, \$5,000 damages was not excessive.—Bruenn v. North Yakima School Dist. No. 7, Yakima County, 172 P. 569.

Epi32(7) (Wesh.) Verdict of \$2,500 held not

€—132(7) (Wash.) Verdict of \$2,500 held not excessive in favor of 78 year old physician who fell into elevator shaft in store, suffering dislocation of kneecap and foot bones, was confined to his bed several weeks, and compelled to use crutches for 8 months with permanent stiffening of the ankle, destruction of the bones of the arch, necessitating tight bandages and heavy iron brace, effect of all of which was constant pain and suffering.—Rust v. Washington Tool & Hardware Co., 172 P. 846.

## VIII. PLEADING, EVIDENCE, AND ASSESSMENT.

### (A) Pleading.

144 (Wash.) A farmer whose business was to oversee operations on his own land and other lands held by him under lease, who sued a railroad and claimed damages "by reason of said injuries to his person" and for the destruction of his automobile in collision. could not prove loss of earnings, not having specially pleaded it.—Armstrong v. Spokane International Ry. Co., 172 P. 578.



#### (C) Proceedings for Assessment.

==216(8) (Cal.) In action for injury, an instruction to consider the future pain and sufstruction to consider the future pain and suf-fering and loss of earning power which could be traced to an injury resulting from defend-ant's negligence, correctly stated the measure of damages and those permissible under Civ. Code, § 3283.—Gumpel v. San Diego Electric Ry. Co., 172 P. 605.

### DAMS.

See Waters and Water Courses, 6=164.

### DEATH.

See Abatement and Revival, \$\infty\$56; Appeal and Error, \$\infty\$334; Master and Servant, \$\infty\$ 405

### II. ACTIONS FOR CAUSING DEATH.

#### (D) Pleading and Evidence.

€=58(1) (Utah) A child killed on the road on a tricycle by an overtaking motor truck, in the absence of evidence to the contrary, will be presumed to have been exercising due care, the burden being on defendant to rebut the presumption.—Barker v. Savas, 172 P. 672.

6-64 (Or.) In action under federal Employers' Liability Act by widow and children of deceased section man, evidence that plaintiff was infirm and as to the habit of her husband in taking care of her was admissible.—Stool v. Southern Pac. Co., 172 P. 101.

Southern Fac. Co., 112 1. 12...

5767 (Kan.) In action for damages for wrongful death, it is proper to prove the amount of property owned by, and the wage-earning capacity of, the deceased person.—

Berry v. Dewey, 172 P. 27.

€==70 (Kan.) In action for damages for wrongful death, it is proper to prove the amount of property owned by, and the wage-earning capacity of, the deceased person.—Berry v. Dewey, 172 P. 27.

#### (E) Damages, Forfeiture, or Fine.

(Kan.) Financial benefits to sole heir of person who has lost his life by wrongful act of another cannot be deducted from damages sustained, and the verdict and judgment reduced by such benefits.—Berry v. Dewey, 172 P. 27. \$\insigma 99(5)\$ (Kan.) In mother's action for damages for wrongful death of son, a verdict for \$5,000 was not excessive, where deceased was 33 years of age, was in good health, able to earn \$1,000 a year, and was accumulating property.—Berry v. Dewey, 172 P. 27.

### DEATH CERTIFICATE.

See Insurance, 4 550.

### DEBTOR AND CREDITOR.

ee Assignments for Benefit of Creditors; Bankruptcy; Chattel Mortgages, \$\square\$179-200; Fraudulent Conveyances.

### DECEDENTS.

See Executors and Administrators; Witnesses. **4**59.

DECEIT.

See Fraud.

### DECLARATIONS.

See Criminal Law, 4-417; Evidence, 4-291-813.

### DEDICATION.

### I. NATURE AND REQUISITES.

€=31 (Cal.App.) City was not compelled to accept dedication of street by a private owner,

and, if it did so, it took advantages with burdens, and is liable to pay damages to abutting owner injured by establishment of official grade.

—Partridge v. City of Richmond, 172 P. 166.

### DEEDS.

See Cancellation of Instruments, 4-63; Covenants; Evidence, 4-400-459; Fraudulent Conveyances; Homestead, 4-118, 122; Husband and Wife, 4-119; Mortgages.

### L REQUISITES AND VALIDITY.

### (B) Form and Contents of Instruments.

43 (Mont.) Acceptance by a grantee of a deed of correction in lieu of a prior deed misdescribing the land intended to be conveyed constitutes an election to take the land conveyed by the deed of correction.—Borgeson v. Tubb, 172 P. 326.

#### (D) Delivery.

6-54 (Cal.App.) An undelivered deed conveys no title legal or otherwise.—Nelson v. Thomas, 172 P. 398.

59(4) (Okl.) Where deed made without consideration to infant was placed on record by grantor, and then returned to him and never deprantor, and then returned to him and hove a diverse to grantee, and grantor did not intend to pass title and retained possession, there was no such delivery of deed as would convey title.—King v. Antrim Lumber Co., 172 P. 958.

#### (E) Validity.

\$\infty\$=\frac{72(3)}{1}\$ (Or.) If son's power of attorney from mother created relation of trust laying upon him burden, in sister's suit to cancel mother's deed to him, to prove the good faith

mother's deed to him, to prove the good faith of the transaction, termination of relation by revocation of power destroyed son's disqualification to deal with mother unadvised.—Rowe v. Freeman, 172 P. 508.

Fiduciary relation may exist in absence of trust or agency, being found, with accompanying burdens and disqualifications, wherever there is confidence reposed on one side and resulting superiority and influence on other.

Id —Id.

em72(7) (Or.) Execution of deed at suggestion or request of grantee, grantor, his mother, reserving life estate and revenues adequate to her necessities, did not constitute undue influence nor vitiate conveyance.—Rowe v. Fresman, 172 P. 508.

#### III. CONSTRUCTION AND OPERA-TION.

### (A) General Rules of Construction.

94 (Utah) Where written antecedent option agreement to convey real property is merged into deed, grantor ordinarily must re-ly on covenants in deed, and cannot predicate right of action upon antecedent agreement.— Knight v. Southern Pac. Co., 172 P. 689.

### IV. PLEADING AND EVIDENCE.

6=196(2) (Utah) Where 'deed was executed to grantor's son voluntarily, relation between parties gave rise to no presumption of fraud or undue influence casting on son burden to show good faith in action by heirs to cancel deed.—Furlong v. Tilley, 172 P. 676.

\$\operation{\text{\sqrt{0}}} \text{(96(3) (Or.) If fiduciary relation existed} between mother and son, in suit by daughter to cancel mother's deed to son burden devolved on son to sustain transaction.—Rowe v. Freeman, 172 P. 508.

Mother's giving of power of attorney to son, his only act thereunder being to withdraw deed deposited in escrow, held not to have created such relation of trust between mother and son that in daughter's suit to cancel mother's deed to him son had burden of proving she

er's deed to him son had burden of proving she acted under independent advice.—Id.

Relation of parent and child, accompanied by affection and companionship incident thereto, does not make child fiduciary within rule casting burden upon him to justify a deed in his favor from his parent.—Id.

In daughter's suit to cancel mother's deed to son, where daughter failed to show fiduciary relation between mother and son, burden was on her to establish undue influence and other matters relied on to set aside deed.—Id.

No presumption of invalidity attaches to deed

No presumption of invalidity attaches to deed from mother to son wherein mother reserves life estate and adequate revenue, though ex-ecuted without monetary consideration at suggestion or request of son; mother being competent and no trust relation existing.—Id.

6-203 (Okl.) An order of county court adjudging a person incompetent is not admissible as evidence of his incompetency at time of his previous conveyance of real estate.—McIntosh v. Peason, 172 P. 446.

\$\equiv 208(1)\$ (Cal.App.) Evidence held to show that a deed was never delivered, but was intended as a testamentary disposition to take effect after death, and not as a present conveyance of property.—Nelson v. Thomas, 172

mother's deed to son, evidence held to show mother understood deed when she executed it, and that she realized thereafter that her son had title.—Rowe v. Freeman, 172 P. 508.

211(1) (Utah) In action to cancel deed for grantor's incompetency, evidence on question of grantor's incompetency held to support judgment dismissing action.—Furlong v. Tilley, 172 P. 676.

deed executed by mother to son on ground of undue influence and trust relationship, that mother executed power of attorney to son was circumstance to be given weight in determining whether trust relation existed between them.—Rowe v. Freeman, 172 P. 508.

### DEFAMATION.

See Libel and Slander.

### DEFAULT.

See Appeal and Error, @= 957.

### DELAY.

See Carriers, \$\infty\$103-105.

### **DELEGATION OF POWER.**

See Constitutional Law. 4 62.

### DELIVERY.

See Deeds, \$==54, 59, 208; Escrows.

### DEMAND.

See Bills and Notes, \$=395.

### DEMURRER.

See Appeal and Error, 1040; Pleading, 205-214.

### DENIALS.

See Pleading, 4=122.

### DE NOVO.

See Justices of the Peace, =174.

#### DENTISTS.

See False Imprisonment, 5, 10, 23.

### DEPOSITARIES.

See Election of Remedies, 4=3; Escrows.

© 3 (Cal.App.) Where under agreement between buyer and seller money is deposited in bank with instructions to deliver it to seller on delivery of property, bank is agent for both parties, and must pay sum deposited to seller if there is delivery, and to buyer if there is not.—Foster v. Los Angeles Trust & Savings Bank, 172 P. 392.

### DEPOSITIONS.

6—6 (Okl.Cr.App.) The taking and using of depositions of nonresident witnesses in behalf of defendant in a criminal case is statutory, and Pen. Code, art. 17 (Rev. Laws 1910, §§ 6025–6048), relating thereto, must be substantially complied with.—Westbrook v. State, 172 P. 464.

€=12 (Okl.Cr.App.) In trial for murder, over-ruling of defendant's application, made after the statutory notice, for a commission to take the deposition of a nonresident witness. Acid erroneous.—Westbrook v. State, 172 P. 464.

⇒83(4) (Cal.) On a motion to suppress deposition because not fairly taken, the depositions of those present at its taking, including those of the deponent herself, subsequently taken. were admissible as bearing upon the weight of earlier deposition.—In re Friedman's Estate, 172 P. 140.

### DEPOSITS.

See Banks and Banking, == 106, 127-154.

### DESCENT AND DISTRIBUTION.

See Cancellation of Instruments, \$\$\sim63\$; Dower; Executors and Administrators; Indians, \$\$\sim18\$; Wills.

### RIGHTS AND LIABILITIES OF HEIRS AND DISTRIBUTEES.

(A) Nature and Establishment of Rights in General.

@==71(1) (Cal.) In proceeding under Code Civ. Proc. § 1664, to determine rights of per-sons claiming to be heirs or next of kin, whether letters testamentary had been properly is-sued was not a jurisdictional question.—In re Friedman's Estate, 172 P. 140.

r recuman s Estate, 172 P. 140.

There is a very strong presumption that a decedent left heirs, which presumption is merely a recognition of that expressed in Code Civ. Proc. § 1963, subd. 28, that things have happened according to the ordinary course of nature.—In re Friedman's Estate, 172 P. 140.

Estate, 172 P. 140.

2771(7) (Cal.) In proceeding under Code Civ. Proc. § 1664, to determine rights of alleged heirs or next of kin, finding that they were not related to testator in any degree was a finding of the ultimate fact in issue, and rendered unnecessary detailed findings upon degree of relationship alleged.—In re Friedman's Estate, 172 P. 140.

In proceeding under Code Civ. Proc. § 1664, to determine the rights of all persons claiming to be heirs or next of kin, held that failure of a charity acting as plaintiff. to prove that

a charity acting as plaintiff, to prove that testator left no heirs, did not require a non-suit, in view of section 607.—Id.

### DESCRIPTION.

See Boundaries; Chattel Mortgages, 47; Frauds, Statute of, 4110; Names; Wills, 4561.

### DICTAGRAPH.

See Telegraphs and Telephones, 4-79.

#### DILIGENCE.

See New Trial, 6 102, 150.



### DIRECT EVIDENCE.

See Marriage, 4=47.

### DIRECTING VERDICT.

See Appeal and Error, \$\sim 927; Trial, \$\sim 170-178.

### DISABILITIES.

See Insane Persons, 6=2.

### DISBARMENT.

See Attorney and Client, 36.

### DISCHARGE.

See Accord and Satisfaction; Compromise and Settlement; Guaranty, \$\infty\$53; Principal and Surety, \$\infty\$100-118.

### DISCOVERED PERIL.

See Railroads, \$\sim 338, 390; Street Railroads, \$\sim 103.

### DISCOVERY.

### IL UNDER STATUTORY PROVISIONS.

#### (A) Interrogatories and Examination of Parties and of Other Persons.

144 (Mont.) Parties whose testimony was sought to be taken in effect agreed that their testimony should be taken when they stipulated for a change in the time and place of taking.—State v. District Court of Seventeenth Judicial Dist. in and for Phillips County, 172 P. 329.

8-329. When the state of the st

6.351 (Mont.) Under Codes, §§ 8042, 8043, as to taking of testimony of adverse parties, a petition conforming to the statutes stating the facts required thereby, is sufficient.—State v. District Court of Seventeenth Judicial Dist. in and for Phillips County, 172 P. 329.

### DISCRETION OF COURT.

See Appeal and Error, \$\,\\_957-984; Quo Warranto; Witnesses, \$\,\\_40.

### DISCRIMINATION.

See Civil Rights, 4=5.

### DISMISSAL AND NONSUIT.

See Appeal and Error, \$\inspec\$753, 773, 781-801, 962, 973, 1061; Criminal Law, \$\inspec\$1131; Judgment, \$\inspec\$570; Mandamus, \$\inspec\$4; New Trial, \$\inspec\$38; Trial, \$\inspec\$165.

### II. INVOLUNTARY.

60(1) (Wash.) Disposition of motion to dismiss cross-complaint for want of prosecution is within discretion of trial court.—National Surety Co. v. American Savings Bank & Trust Co., 172 P. 264.

### DISQUALIFICATION.

See Judges, \$== 46-56.

### DISSOLUTION.

See Corporations, \$\infty\$619; Partnership, \$\infty\$261.

### DISTRIBUTION.

See Descent and Distribution; Executors and Administrators, \$\sim 315\$.

### DIVORCE.

See Homestead, \$\sim 57; Judges, \$\sim 46;\$ States, \$\sim 9.

### IV. JURISDICTION, PROCEEDINGS, AND RELIEF.

(D) Evidence.

\$\epsilon\$ 130 (Wyo.) In an action by a wife against her husband for divorce on account of cruelty, evidence held not sufficient to require judgment for plaintiff.—Bonham v. Bonham, 172 P. 333.

#### (F) Judgment or Decree.

\$\instruct\infty\$ 165(1) (Wash.) Opening or vacating judgment for excusable neglect is discretionary with the trial court, which may impose just and reasonable terms.—Hendrix v. Hendrix, 172 P. 819.

Where husband having sued for divorce removed from state to defeat wife's claim in cross-complaint for alimony, it was within the discretion of the court as a condition to granting his motion to vacate the judgment to require him to subject all of his property to the jurisdiction of the court and to comply with alimony and expense money orders previously made.—Id.

mane.—10.

==165(2) (Wash.) On showing that plaintiff in divorce suit in order to avoid payment of alimony removed from state and failed to defend against wife's cross-complaint, on which she took judgment, he was not entitled to vacation of the judgment on the ground of excusable neglect.—Hendrix v. Hendrix, 172 P. 819.

### V. ALIMONY, ALLOWANCES, AND DISPOSITION OF PROPERTY.

\$\instructure 240(5)\$ (Wash.) Findings that the husband earned about \$135 per month and was possessed of property of value between \$7,000 and \$10,000, that he abandoned his wife and child and failed and refused to support them, and that he failed and refused to comply with orders for expense money and temporary alimony, warranted a decree of divorce and the award of \$5,250 as alimony and suit money.—Hendrix v. Hendrix, 172 P. 819.

e=284 (Cal.App.) In divorce suit, plaintiff's appeal from a judgment apportioning the property did not deprive the court of jurisdiction to modify the judgment on motion for new trial, which was an independent proceeding.—Machado v. Machado, 172 P. 1124.

uo v. Macnado, 172 P. 1124.

2285 (Utah) On appeal from judgment refusing to modify decree for alimony, court on appeal is unable to determine whether findings are or are not supported by evidence, no evidence having been certified.—Willis v. Willis, 172 P. 685.

Affidavit filed in support of motion to amend decree for alimony being merely evidence, cannot be considered on appeal where not certified by district court.—Id.

€=286 (Utah) No evidence having been certified, presumption is that findings conform to evidence.—Willis v. Willis, 172 P. 685.

evidence.— Willis v. Willis, 172 P. 685.

In absence of evidence to contrary, court on appeal from a judgment refusing to modify decree for alimony, and compel defendant to pay certain claims, is bound to presume that reasons given by trial court for refusal to require defendant to pay amount of plaintiff's claim are well founded.—Id.

&==287 (Cal.App.) Where court apportioned property in divorce suit, and plaintiff on retrial awarded by appellate court introduced testimony as to value and character of properties of the parties, the court could, without going

beyond its issues, make a new apportionment, and set aside previous orders.—Machado v. Machado, 172 P. 1124.

### VI. CUSTODY AND SUPPORT OF CHILDREN.

298(1) (Utah) In divorce proceedings, where the custody of an 11 year old child was awarded the husband although the child preferred the mother, and the husband stipulated that she was a fit person to have its custody, evidence held not to justify a finding that the mother was morally unfit.—Dorsey v. Dorsey, 172 P. 722.

as amended by Laws 1907, § 1212, as amended by Laws 1909, c. 109, § 4, giving 10 year old child the privilege of choosing with which divorced parent it shall live, is not conclusive, and the court may determine the custody and control otherwise.—Dorsey v. Dorsey, 172 P. 722.

### DOCUMENTS.

See Criminal Law, 433, 434; Evidence, 333-383.

DOGS.

See Animals, @= 72, 74.

DONATIONS.

See Gifts.

### DOWER.

### I.' NATURE AND REQUISITES.

a. NATURE AND REQUISITES.

□ 12(1)(Kan.) Gen. St. 1915, § 3831, giving widow one-half in value of realty in which husband had a legal or equitable interest refers only to such interests capable of inheritance, and not to interests extinguished by husband's death.—Osborn v. Osborn, 172 P. 23.

□ 12(5) (Kan.) Under Gen. St. 1915, § 3831, a widow has no interest in land purchased by her husband with his own funds and deeded to him "and at his death to his sons"; his interest being a life estate only.—Osborn v. Osborn, 172 P. 23.

### III. RIGHTS AND REMEDIES OF WIDOW.

(Kan.) Petition in widow's action for statutory share of lands in which her deceased husband had been interested held not to allege

husband had been interested held not to allege contract whereby on her surrender of her marital interest in lands sold by him he agreed to substitute a marital interest in other land.—Osborn v. Osborn, 172 P. 23.

Petition in action by widow for her statutory share of land in which deceased husband had been interested held not to charge husband's fraud on wife with respect to surrender of her marital interest in land belonging to him and which he had sold.—Id. which he had sold.—Id.

In order to recover under petition claiming widow's interest in real estate under Gen. St. 1915, § 3831, she must claim under the statute and through her husband.—Id.

### DRAMSHOPS.

See Intoxicating Liquors.

### DUE PROCESS OF LAW.

See Constitutional Law, 251-318.

### DUPLICITY.

See Criminal Law, \$\infty\$1032; Indictment and Information, \$\infty\$196.

### DURESS.

See Abatement and Revival, 556; Threats.

### EARNINGS.

See Parent and Child. 455.

### EASEMENTS.

See Dedication; Highways; Waters and Water Courses, \$== 156.

### EJECTION.

See Carriers. 6 355.

### ELECTION.

See Wills, \$\sim 781.

### **ELECTION OF REMEDIES.**

©3(4) (Cal.App.) Where buyer deposits money with instructions to deliver to seller on delivery of property, seller waives its rights against depositary, where, on refusal of buyer to accept delivery, it sells property at public auction and sues buyer alone and gets judgment for full amount of difference between sale proceeds and contract price.—Foster v. Los Angeles Trust & Savings Bank, 172 P. 392.

### **ELECTIONS.**

See Municipal Corporations, 4=108.

## I. RIGHT OF SUFFRAGE AND REGU-LATION THEREOF IN GENERAL.

(Nev.) St. 1917, c. 197, providing for taking of votes of electors in the military service of United States is a compliance with Const. art. 2, § 3, and is not void for discrimination, since "military service" includes every branch of service in either the armies or navies of United States.—Maclean v. Brodigan, 172 P. 375.

### **ELECTRICITY.**

(Okl.) In action against town for services in making ordered extensions to plaintiff's electric light plant, and in refusing to pay for full number of lights it was required to subscribe for under franchise, evidence held to sustain verdict for plaintiff.—Incorporated Town of Comanche v. Works, 172 P. 60.

Comanche v. Works, 172 P. 60.

11 (Okl.) On appeal from Corporation Commission's rate order, presumption obtains, under Const. art. 9, § 22, that order is reasonable and correct, and where evidence reasonably supports findings of fact as to valuation, order will not be disturbed on review in Supreme Court.—Comanche Light & Power Co. v. Turner, 172 P. 792.

Evidence in connection with objections as to value fixed by Corporation Commission held to reasonably support its findings of fact as to value of electric plant, and in view of presump-

value of electric plant, and in view of presumption, under Const. art. 9, § 22, that order is reasonable, it must be affirmed.—Id.

### **ELEVATORS.**

See Charities, 45.

### EMBEZZLEMENT.

See Criminal Law. 434; Indictment and Information, 4110.

≈32 (Nev.) An information alleging that deper 32 (Nev.) An information alleging that defendant was manager of a county owned telephone system, and as such manager came into possession of certain money for transmission to the county treasurer, and feloniously converted it to his own use, sufficiently charged embezzlement as defined by Rev. Laws, § 6653.

—State v. McFarlin, 172 P. 371.

@==38 (Nev.) In prosecution of county official for embezzlement, it was improper to admit evidence that he played slot machines for trade



checks to a limited extent.—State v. McFarlin, 172 P. 371.

EMINENT DOMAIN.

See Municipal Corporations, \$\iff=278-514\$.

I. NATURE, EXTENT, AND DELEGATION OF POWER.

\$\iff=2(4)\$ (Wash.) Laws 1915, p. 108, \$ 100, protecting clams on Puget Sound tidelands between April and September, in restricting rights of owner of such tidelands, neither takes nor destroys his property, but merely regulates use of it.—State v. Van Vlack, 172 P. 563.

they appear in the supplemental abstract as well as in the record.—City of Seattle v. Washington Refning Co., 172 P. 1161.

E-26! (Kan.) In trial in district court on owner's appeal from award in condemnation proceeding, instruction held not objectionable as failing to state the issues.—Craig v. Salina Northern R. Co., 172 P. 21.

In trial in district court on owner's appeal from award in condemnation proceeding, refusation as the record.—City of Seattle v. Washington Refining Co., 172 P. 1161.

E-26! (Kan.) In trial in district court on owner's appeal from award in condemnation proceeding, refusation award i

#### II. COMPENSATION.

### (B) Taking or Injuring Property Ground for Compensation.

\*\*84 (Wash.) Though under Rem. Code 1915, \$605, 8010-8, a municipality may take the waters of a stream to supply its inhabitants for domestic and other uses, it must proceed by condemnation and compensate owners of riparian rights to the extent of the property taken.—Domrese v. City of Roslyn, 172 P. 243.

#### (C) Measure and Amount.

\*\*En126(1) (Kan.) Where daughter of an intestate occupies his homestead under circumstances exempting it from liability for intestate's debts, and property is condemned, she is entitled to compensation for share of her property and also for right to occupy it.—Koehler v. Gray, 172 P. 25.

# III. PROCEEDINGS TO TAKE PROPERTY AND ASSESS COMPENSATION.

45-166 (Kan.) A proceeding to condemn private property for public use does not involve a tort.—Calkins v. Salina Northern R. Co., 172 P. 20.

(Wash.) In a proceeding to seize land for an alley under the power of eminent domain, the question as to damages to adjacent property not taken held for the jury.—City of Seattle v. Washington Refining Co., 172 P.

### 222(5) (Wash.) In proceedings to condemn an alley, the result of which would be to divide defendant's property into two industrial units, an instruction that the jury could not consider the future construction of overhead bridges or underground conduits should have been given.—City of Seattle v. Washington Refining Co., 172 P. 1161.

223 (Kan.) In condemnation proceeding, a 223 (Kan.) In condemnation proceeding, a special jury finding that these was no evidence of depreciation of part of farm lying on either side of right of way did not conflict with finding of damage to farm as a whole.—Calkins v. Salina Northern R. Co., 172 P. 20.

In condemnation proceeding, a special jury finding that there was no evidence of depreciation of parts of farm on each side of right of way did not indicate that finding as to damages awarded for land not taken for right of way was not supported by evidence.—Id.

€=247(2) (Kan.) An owner, whose land is condemned for public use, is entitled to interest on the damages between the appropriation and the rendition of judgment.—Calkins v. Salina Northern R. Co., 172 P. 20.

6=247(2) (Kan.) In condemnation proceedings, the allowance of interest from a defendant subsequent to appropriation held not erroneous.—Craig v. Salina Northern R. Co., 172 P. 21.

6-259 (Wash.) On appeal in an eminent domain proceeding, the question as to refusal and giving of instructions will be considered, notwithstanding that all the instructions are not embodied in appellant's abstract, where

from award in condemnation proceeding, refusal to require jury to enumerate considerations tending to make farm less valuable by reason of location of railroad held not error.—Id.

of location of railroad held not error.—Id. 2264 (Wash.) County commissioners having under Rem. Code 1915, \$ 5623—1 et seq., general jurisdiction of the establishing of roads, their order on hearing after notice as required by section 5633, finding that petition for road was signed by required number of householders and that bond had been presented, could not be collaterally attacked in certiorari on issue of public necessity for appropriation of land.—State v. Superior Court for King County, 172 P. 254. P. 254.

### IV. REMEDIES OF OWNERS OF PROPERTY.

E=270 (Kan.) Landowner, entitled to warrant for condemnation money and submitting to county board the question whether he or his grantee was entitled to warrant, after its delivery of warrant to grantee, was estopped from suing board to recover amount of warrant.—Lillard v. Board of County Com'rs of Johnson County, 172 P. 518.

sonnson County, 172 F. 518.

273 (Wash.) A corporation with the power of eminent domain, having taken land, though in a wrongful manner, and devoted it to its corporate uses, will not be enjoined; but the complaining party will be left to his remedy at law.—Irwin v. J. K. Lumber Co., 172 P. 911.

### EMPLOYERS AND EMPLOYES.

See Master and Servant.

### EMPLOYERS' LIABILITY ACTS.

See Commerce, \$\insigm27\$; Death, \$\infty\$-64; Master and Servant, \$\infty\$-180, 204, 267, 276, 286, 288, 347-417; Negligence, \$\infty\$-101; Pleading, \$\infty\$-430; Territories, \$\infty\$-18; Trial, \$\infty\$-208, 253.

### ENCROACHMENT.

See Constitutional Law, 652, 62, 70-80.

#### ENTRY.

See Appeal and Error, 4 134.

### EPILEPSY.

See Evidence, =14.

### EQUITABLE ASSIGNMENTS.

See Assignments, 43, 50.

### EQUITABLE ESTOPPEL

See Estoppel, 558-110.

### EQUITY.

ee Action, \$\simes 25\$; Appeal and Error, \$\simes 1009\$; Cancellation of Instruments; Fraudulent Conveyances; Injunction; Judgment, \$\simes 407-439\$; Nuisance, \$\simes 32\$, 84; Pleading, \$\simes 249\$; Quieting Title; Receivers; Reforma-

tion of Instruments; Specific Performance; erwards takes an assignment of such mortgage, Subrogation; Trusts.

### I. JURISDICTION, PRINCIPLES, AND MAXIMS.

#### (C) Principles and Maxims of Equity.

57 (Or.) Where member of fraternal benefit society observed requirements of by-laws in making change of beneficiary, but, through delay for which he was not responsible, the change was not perfected until after his death, the new beneficiary is entitled to recover under the equity maxim that equity will regard as done that which ought to have been done.—United Artisans v. Cronise, 172 P. 109.

e=65(2) (Cal.App.) One who deceived mort-gagee into giving deed, and then conveyed to his wife, could not defeat recovery on note latnis wire, could not dereat recovery on note inter given, on the ground that questionable instrument given with note was a mortgage. so that suit should have been for foreclosure, especially where limitations could have been invoked against later suit on the note.—Johnston

w. Murphy, 172 P. 616.

—65(2) (Okl.) Where deed is put on record to defeat grantor's creditors, and was not delivered to grantee, but was surreptitiously taken by her, grantor's action for removal of cloud created by such deed and for its cancellation will be denied, as he does not come into court with clean hands.—King v. Antrim Lumber Co., 172 P. 958.

### II. LACHES AND STALE DEMANDS.

237(1) (Wash.) Courts of equity in case of concurrent jurisdiction consider themselves bound by statute of limitation which govern courts of law in like cases.—Hotchkin v. Mc-Naught-Collins Improvement Co., 172 P. 864. Courts of equity apply a statute of limitations as it would have been applied at law, and give it the same effect and operation in one court as in the other.—Id.

in the other.-Id.

### X. DECREE AND ENFORCEMENT THEREOF.

e=437 (Wash.) Court of equity has power not only to decree, but to enforce its decrees in its own way, in absence of definite procedure.— State v. Superior Court of King County, 172 P.

### ERROR. WRIT OF.

See Appeal and Error.

### ESCROWS.

(Cal.App.) The term "escrow," ordinarily considered, applies to deposit of deeds, etc., and not to money.—Foster v. Los Angeles Trust & Savings Bank, 172 P. 392.

estate exchange deposited deeds with the agent, with instructions not to deliver until they had respectively inspected the properties, they retained such control that there was no valid escrow agreement.—Nelson v. Davis, 172 l. 1178.

### ESTATES.

See Descent and Distribution; Dower; Executors and Administrators; Life Estates; Wills.

### ESTOPPEL.

See Appeal and Error, \$\inser\*882: Corporations, \$\inser\*425; Criminal Law, \$\inser\*1137: Homestead, \$\inser\*122: Insurance, \$\inser\*389, 789: Judgment, \$\inser\*569-735; Partnership, \$\inser\*34; Trial, **€==**75.

### II. BY DEED.

### (B) Estates and Rights Subsequently Acquired.

the mortgage becomes discharged by coming into his hands.—Arnold v. Nichols, 172 P. 335.

#### III. EQUITABLE ESTOPPEL.

#### (A) Nature and Essentials in General.

58 (Kan.) The doctrine of estoppel requires of a party consistency of conduct, when inconsistency would work substantial injury to the other party.—Lillard v. Board of County Com'rs of Johnson County, 172 P. 518.

#### (B) Grounds of Estoppel.

©=75 (Wash.) That a son in purchasing an automobile allowed it to be mortgaged and license issued in his father's name, and made false affidavits concerning ownership of the car, does not estop him from showing ownership as against his father's judgment creditors.—Hartford v. Stout, 172 P. 1168.

\$\insertarrow\$ \insertarrow\$ \text{\text{\$\sigma}} \text{90(2) (Kan.) In action on note given August 29, 1913, for obtaining a farm loan, under which defendant received proceeds on February. 1913, and did not complain of interest rate until his answer, in May, 1915, he was estopped to complain that rate was more than he agreed to pay.—Fontron v. Kruse, 172 P. 1007.

\$\insigheta\_{\text{-Fotor}}\$ (Cal.App.) That plaintiff seeking to enjoin diversion of water of river by defendant water company waited four years after public use began, and until thousands of people had become dependent upon it, held to bar right to injunction.—Holmes v. Snow Mountain Water & Power Co., 172 P. 178.

### (E) Pleading, Evidence, Trial, and Review.

emiio (Or.) An estoppel must be pleaded in order to be available.—Robinson v. Knights and Ladies of Security, 172 P. 116.

\$\insigma \text{110}\$ (Or.) Estoppel cannot be taken advantage of without pleading it, if there is opportunity to do so.—Vogt v. Marshall-Wells Hardware Co., 172 P. 123.

#### EVICTION.

See Landlord and Tenant, =180.

### EVIDENCE.

See Depositions; Discovery; Pleading, \$\sim 380; Witnesses.

For evidence as to particular facts or issues or in particular actions or proceedings, see also the various specific topics.
For review of rulings relating to evidence, see Appeal and Error.

Reception at trial, see Criminal Law, \$\infty\$ 673; Trial, \$\infty\$ 39-105.

### I. JUDICIAL NOTICE.

em14 (Utah) Court will notice, as matter of common knowledge, that where person is af-flicted with epilepsy to extent of attack once or twice a month, he is not necessarily disqualified from transacting business during intervals.—Furlong v. Tilley, 172 P. 676.

Furiong V. Thiey, 172 P. 0.6.

18 (Wash.) It is common knowledge that at least up to time the Public Service Commission Act was passed, the economic judgment of society was that the maximum fare to be charged by a street railroad company for one continuous ride within city limits was five cents.—State v. Public Service Commission of Washington, 172 P. 890.

em20(1) (Nev.) Courts cannot take judicial notice of what percentage of mineral can be extracted from particular class of ore.—Dixon v. Southern Pac. Co., 172 P. 368.

=22(2) (Wash.) The court cannot take judi-(B) Estates and Rights Subsequently Acquired.

Q=38 (Wyo.) Where one who has conveyed with warranty land subject to a mortgage aft
| Q=22/2 (Wash.) The court cannot take judicial notice of the objects and purposes of a Y. M. C. A. local branch, duly incorporated, whose objects, purposes, powers, and privileges must be determined from its articles of incorpo-

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ration.—Susman v. Young Men's Christian Ass'n of Seattle, 172 P. 554.

\$\ightharpoonup 43(2)\$ (Wash.) On appeal from an order sustaining a demurrer to a petition in a probate proceeding, the Supreme Court will take judicial notice of the entire probate proceedings, and hence will not strike a transcript of such proceedings from the record, because such proceedings must be considered a part of the petitioner's petition.—Parkes v. Burkhart, 172 P. 808.

e=344 (Cal.) Supreme court is bound to take judicial cognizance of fact that judge who denied motion for new trial retired from office on a certain date.—Kurtz v. Cutler, 172 P. 590.

#### II. PRESUMPTIONS.

\$\isim 68\$ (Wash.) Where defendant, who had procured license under Laws 1915, p. 227 (Rem. Code 1915, \\$ 5562\to 37\$ et seq.), to operate his automobile for hire in city, failed to remove his number plates for the year when he sold car, it will be conclusively presumed, as far as rights of public are concerned, that he was owner for such year, and that whoever was operating car with said number was his agent in view of Laws 1915, p. 391, \\$ 13 (Rem. Code 1915, \\$ 5562\to 13).

—Peters v. Casualty Co. of America, 172 P. 220.

&= 80(2) (Or.) In absence of evidence, it must be assumed that common-law right of a person to change her name obtains in a sister state.—State v. Ford, 172 P. 802.

€=83(1) (Wash.) The law presumes that the official acts of public officers are properly performed.—Hill v. Calkins-Rice, 172 P. 829.

#### IV. RELEVANCY, MATERIALITY, AND COMPETENCY IN GEN-ERAL.

#### (A) Facts in Issue and Relevant to Issues.

when locomotive was derailed, the roadmaster should have been allowed to say whether it was the usual custom to burn ties when unfit for service, after he had testified that the ties at the point where the locomotive was derailed were burned.—Neale v. Atchison, T. & S. F. Ry. Co., 172 P. 1105.

### (B) Res Gestæ,

23(3) (Colo.) Where president of defendant company had indersed its note for company, his declarations to witness as to his authority and his own testimony to such declarations was admissible as part of transaction in controversy.

—Western Investment & Land Co. v. First Nat. Bank, 172 P. 6.

### (E) Competency.

455(1) (Utah) Where deed, in form prescribed by Comp. Laws 1907, § 1981, conveying land and part of water from spring on grantors' land, was silent as to whether there was ditch or right of way for the water across grantors' land when deed was executed, and grantee had introduced parol evidence to show existence of ditch and right of way as appurtenant to his land, grantors could show parol agreement that right of way was for pipe line and not ditch.—Egelund v. Fayter, 172 P. 313.

#### V. BEST AND SECONDARY EVIDENCE.

e=165(5) (Ariz.) In an action by bank on pledged note given as security for discounted note subsequently renewed, parol evidence as to state of indebtedness at time of renewal without production of original note is not in violation of best evidence rule.—Ellis v. First Nat. Bank, 172 P. 281.

### VII. ADMISSIONS.

(A) Nature, Form, and Incidents in General.

208(6) (Okl.) Allegations in petition, which have been superseded by amended petition complete within itself and not referring to original petition, may be introduced in evidence as admissions against interest subject to plaintiff's denial or explanation.—Letcher v. Maloney, 172

€==220(3) (Utah) Declarations of plaintiff's mother relating to treatment of his eye after injury, not made in plaintiff's presence, were inadmissible.—Kuchenmeister v. Los Angeles & S. L. R. Co., 172 P. 725.

### (D) By Agents or Other Representatives.

E-244(4) (Okl.) Cashier's statement, in response to inquiries by bank examiner relating to matters under his charge and as to which he was required to give information to examiner, may be given in evidence against bank.—Oklahoma State Bank of Caddo v. Airington, 172 P. 462.

6.⇒244(4) (Or.) Circular received by depositor in defendant bank announcing its consolidation with D. bank, and letter signed by D.'s president to that effect, held inadmissible against defendant; it not being shown such president was its agent, or that it sent the circular.—Haines v. First Nat. Bank, 172 P.

E==253(1) (Okl.) In a suit for fraud based on an exchange of corporate stock for property, a statement by plaintiff's associate relative to financial condition of the corporation held inadmissible.—Phillips v. Mitchell, 172 P. 85.

### VIII. DECLARATIONS.

### (C) As to Pedigree, Birth, and Relatiouship.

8=291 (Cal.) Under Code Civ. Proc. § 1870, subd. 4, declarations of a decedent that he had no surviving relatives were declarations that members of his family "related by blood or marriage" were dead, and were admissible, any error therein going only to their weight.—In re Friedman's Estate, 172 P. 140.

#### (E) Proof and Effect.

2313 (Cal.) Declarations of deceased members of family or alleged family of a decedent by depositions on written interrogatories through an interpreter, while properly admissible, are extremely unsatisfactory, as witnesses testify without any fear of incurring penaltics of perjury.—In re Friedman's Estate, 172 P. 140.

### IX. HEARSAY.

€=317(10) (Cal.App.) Testimony of purchaser of land attempting to rescind, as to what soil expert told him concerning land, was hearsay.—Greene v. Locke-Paddon Co., 172 P. 168.

### X. DOCUMENTARY EVIDENCE.

### (A) Public or Official Acts. Proceedings, Records, and Certificates.

\$\infty\$ 333(5) (Wash.) In proceeding to determine necessity for appropriation of lands for county road, plat made by deputy county engineer based on field notes of survey under his own direction was admissible in view of Rem. Code 1915, \$ 3975.—State v. Superior Court for King County, 172 P. 254.

### (B) Exemplifications, Transcripts, and Certified Copies.

\$\epsilon 345(1)\$ (Wash.) In proceeding to determine necessity for appropriation of lands for county road, copy of record for proceedings before county commissioners certified by the deputy county auditor was admissible in view of Rem.

Code 1915, § 3925, as to deputies.—State v. (O) Separate or Subsequent Oral Agree-Superior Court for King County, 172 P. 254.

#### (C) Private Writings and Publications.

€=355(5) (Cal.) In an action to recover the \$\insertail 355(5)\$ (Cal.) In an action to recover the value of goods destroyed in storage, evidence that defendant had inserted an advertisement in a telephone directory stating that its warehouses were fireproof was properly admitted as corroborating evidence of a contract whereunder defendants were to have stored the goods in a fireproof depository.—Hood v. Bekins Van & Storage Co., 172 P. 594.

### (D) Production, Authentication, and Effect.

€=370(5) (Cal.) In an action on a note, it was not error to exclude an agreement between defendant and the payee's manager, whereby defendant was to be employed for ten years, payment to be applied on the notes; it not appearing that such agreement was within the manager's authority.—Williams v. Youtz, 172

383(3) (Ariz.) Documents filed, signed, and sworn to by administratrix while such, and also guardian of minors, being record evidence, are deemed of very high grade as evidence of pertinent facts to which they relate.—Costello v. Cunningham, 172 P. 664.

383(6) (Kan.) An association is estopped to dispute the accuracy of its corporate minutes.— Great Western Mfg. Co. v. Porter, 172 P. 1018. Minutes of elevator association's record could

not be impeached by parol evidence of directors, who did not remember the directors' meeting or what transpired thereat.—Id.

### I. PAROL OR EXTRINSIC EVI-DENCE AFFECTING WRITINGS.

### (A) Contradicting, Varying, or Adding to Terms of Written Instrument.

\$\iff 400(2)\$ (Utah) Testimony tending to vary terms of written contract for exchange of realty, execution of which was admitted, was erroneously admitted.—Rampton v. Cole, 172 P.

\$\operate{\operate{\text{cond}}}\$408(4) (Okl.) A deposit slip issued by a bank has the same force as that of any other form of receipt, and is open to explanation as to the conditions of the deposit and as to the circumstances under which it was given.— American Nat. Bank of Stigler v. Funk, 172 P.

\$\infty\$=419(1) (Okl.) Under Rev. Laws 1910, \$\frac{4}{8}\$ 4066, 4078, a note and the contracts under which it was received are not conclusive as to consideration and the purpose for which the in-struments were given.—Bank of Commerce of Sulphur v. Webster, 172 P. 943.

419(10) (Wash.) Under a mortgage given upon lots in payment for their excavation, parol evidence is inadmissible to diminish the stated amount of indebtedness, in the absence of allegations of fraud or mistake.—Kelley v. Smith, 172 P. 542.

\$\insert \text{1.012.}\$
\$\insert \text{2419(13)}\$ (Wash.) In a suit for the specific performance of contract for sale of real estate which recited receipt of a certain sum as part of consideration, it was not error to admit oral testimony showing that true consideration consisted in retention by defendants of part of premises.—Roberts v. Stiltner, 172 P. 738.

424 (Or.) Where a bank hired one to move wood under a contract creating relation of employer and independent contractor in a suit by a third person against the bank to recover for goods sold independent contractor, plaintiff was not bound by agreement, and could prove agency or estoppel without pleading modification of contract.—Scales v. First State Bank, 172 P. 499.

€==441(1) (Kan.) In action on note given for obtaining farm loan, where answer showed that defendant signed application to procure a loan at 6½ per cent. interest, it was error to admit his oral evidence of statements as to rate of interest prior to application.—Fontron v. Kruse, 172 P. 1007.

6-441(8) (Wash.) Where contract for exchange of property unconditionally required defendant and son to execute a mortgage as defendant and son to execute a mortgage as part of the consideration, it was not permissible to show by parol a contemporaneous oral agreement that defendant was not to be personally bound.—Rhodes v. Owens, 172 P. 241. 6=441(9) (Cal.App.) Where agent represented musical instrument to have certain qualities, not mentioned in contract, and clause separately signed stated that seller would not be bound by any representations not appearing therein, parol evidence of agent's representations was not admissible.—George J. Birkel Co. v. Curtet, 172 P. 165.

ment constituting condition precedent to taking effect of written contract.—Waggoner Bank & Trust Co. v. Doak, 172 P. 61.

Trust Co. v. Doak, 172 P. 61.

2344(4) (Wash.) Where contract for exchange of property unconditionally required defendant and son to execute a mortgage, it was not permissible to show by parol a contemporaneous oral agreement that mortgage was not to be paid until plaintiff should pay off a mortgage on the land deeded to him.—Rhodes v. Owens, 172 P. 241.

### (D) Construction or Application of Language of Written Instrument.

was e of Written Instrument.

← 450(3) (Utah) Where deed, in form prescribed by Comp. Laws 1907, § 1981, conveying land and part of spring water on grantors' land, was silent as to whether there was ditch or right of way for water across grantors' land when deed was executed, there was a latent ambiguity which either party could explain by parol.—Egelund v. Fayter, 172 P. 313.

← 450(6) (Wash.) Where plaintiff brokers agreed to procure loan for defendant, parol evidence was admissible to show purposes for

idence was admissible to show purposes for which loan was asked, on issue of whether acceptance was procured within reasonable time.

—Calvin Philips & Co. v. Newoc Co., 172 P.

e-450(6) (Wash.) Where a contract for farm employment provided that plaintiff furnishing labor should receive share of increase of live labor should receive share of increase of live stock then on farm and of profits from chickens and eggs, admission of parol evidence to in-terpret provisions as to increase of live stock and profits was not error.—Bookhout v. Vuich, 172 P. 740.

Where oral evidence was admissible to ex-

plain uncertain terms of farm employment con-tract to show understanding claimed by plaintiff, it was unnecessary to reform the contract before it could be given a meaning contended for by plaintiff.—Id.

\$\infty 450(7) (Kan.) Where the terms of a building contract were ambiguous, testimony of the circumstances of its execution were admissible to show its intended meaning.—Lantry Contracting Co. v. Atchison, T. & S. F. Ry. Co., 172 P. 527.

452 (Or.) Clauses of trust deed, when construed together, held to disclose latent ambigu-

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ity as to means to be adopted to accomplish purpose intended, so that parol testimony as to intended construction was admissible.—Crown Co. v. Cohn, 172 P. 804.

\$\&\\_459\$ (Wash.) Upon question whether alleged contract between defendant and P. as agent of plaintiff was in fact made, evidence tending to show that P. made contract as agent for another was admissible.—Kahlotus Grain & Supply Co. v. Blair, 172 P. 818.

#### XII. OPINION EVIDENCE.

### (A) Conclusions and Opinions of Witnesses in General.

8-471(2) (Colo.) Where question involves fact clearly within witness' knowledge and does not call for opinion upon facts proven, it is admissible; but, where it involves construction of facts proven, it is inadmissble.—Western Investment & Land Co. v. First Nat. Bank, 172 P. 6.

e=471(17) (Wash.) An offer to show that a school district was in the exercise of reasonable care in providing a teeter board for playgrounds was an offer to show a conclusion of the witness, and was properly refused.—Bruenn v. North Yakima School Dist. No. 7, Yakima County, 172 P. 569.

8-471(22) (Utah) Testimony that defendant and admitted driving his automobile on the R. road "about the time we figured the accident happened" was a conclusion, and should have been stricken.—Barker v. Savas, 172 P. 672.

\$\insertail \text{-471}(24)\$ (Utah) Testimony of a witness that he went to the scene of an accident and saw deceased lying there and saw the track of the automobile "that had run over him" was a conclusion, and should have been stricken.—Barker v. Savas, 172 P. 672.

\$\, 471(26)\$ (Colo.) Testimony as to ownership of automobile of which witness had only such knowledge as might be acquired from facts proved was inadmissible.—Western Investment & Land Co. v. First Nat. Bank, 172 P. 6.

€=3473 (N.M.) Where mere descriptive language is inadequate to convey to the jury the precise facts, a witness may state his opinion thereon.—Skala v. New York Life Ins. Co., 172 P. 1046.

6.3474(3) (Wash.) In action on a life insurance policy, it was not error to admit, on question of intentional misrepresentations, the testimony of the wife and mother-in-law of the insured as to his physical condition, and the absence of indications of tubercular disease.—Askey v. New York Life Ins. Co., 172 P. 887.

474(19) (Cal.) In an action to recover the value of goods destroyed while in storage, the owner was competent to testify as to the value of the goods.—Hood v. Bekins Van & Storage Co., 172 P. 594.

Co., 172 F. 594.

2—478(1) (Wash.) In action for injuries to customer in store by falling into elevator shaft, witnesses who saw him shortly after the accident could testify that he was not then in possession of his mental faculties, when such testimony was based on their observations of his physical condition, evident suffering, incoherent speech, and acquaintance with his previous condition.—Rust v. Washington Tool & Hardware Co., 172 P. 846.

\$\insigma\_501(3)\$ (Okl.) In suit to cancel deed on ground of grantor's mental incapacity, nonexpert witnesses acquainted with grantor, who stated facts which they observed and on which they passed their opinion, may express an opinion as to grantor's mental capacity.—Campbell v. Dick, 172 P. 783.

502 (Kan.) Where witness for owner testified that he could give opinion as to value

of farm as a whole, but not of its separate tracts, the sustaining of objections to cross-examination as to how he could tell what whole tract was worth was not error.—Craig v. Salina Northern R. Co., 172 P. 21.

€=502 (Mont.) In action for injuries to pedestrian struck by automobile, evidence that he was intoxicated was admissible in cross-examination after he had estimated speed of the automobile, since intoxication reflects on capacity for accurate observation, and renders such cross-examination admissible under Rev. Codes, § 8021, which must be liberally construed.—Herzig v. Sandberg, 172 P. 132.

#### (B) Subjects of Expert Testimony.

€=505 (Cal.App.) Testimony of architect as to usual grade for entrances to buildings and as to highest approved grade are expressions of fact, and not opinions.—Long v. John Breuner Co., 172 P. 1132.

mer Co., 172 P. 1132.

5-513(2) (Cal.App.) Where negligence allegded was maintenance of 35 to 50 per cent. incline at entrance of store, it was proper to allow architects to testify that usual grade was 3 per cent., and that 10 per cent. was greatest approved grade.—Long v. John Breuner Co., 172 P. 1132.

e-514(1) (Wash.) In a servant's action for personal injuries in falling from a carload of logs which he was unloading, it was not error to admit expert testimony as to whether it was safe and proper method to place the jammer upon a track alongside the load and fix the hooks from a cable in the logs and unload them in that manner.—Jones v. Chicago, M. & St. P. Ry. Co., 172 P. 810.

#### (C) Competency of Experts.

\$\instruct\$=546 (Cal.) It was within the discretion of the trial court to refuse to allow life guards to give their opinion whether an insured found in the water died from drowning, their competency not appearing as a matter of law, where medical experts differed on the question.—Kinsey v. Pacific Mut. Life Ins. Co of California, 172 P. 1098.

### XIII. EVIDENCE AT FORMER TRIAL OR IN OTHER PROCEEDING.

6.581 (Okl.) It is within the sound discretion of the trial court to determine the degree of preliminary proof necessary to admit the testimony of an absent witness given at a former trial in the same case.—Phillips v. Mitchell, 172 P. 85.

### XIV. WEIGHT AND SUFFICIENCY.

584(1) (Ariz.) Jury must determine weight to be given all evidence submitted to them.—Costello v. Cunningham, 172 P. 664.

€=588 (Cal.App.) Where statements of witness on cross-examination, though apparently contradicting his statements on direct examination, were capable of reconciliation therewith, it was the duty of the court to reconcile them.

—Johnston v. Murphy, 172 P. 616.

€-589 (Cal.App.) Where party's testimony was conflicting and uncertain, the court was justified in resolving it against her.—Machado v. Machado, 172 P. 1124.

### EXAMINATION.

See Criminal Law, \$\sim 221-238\$, 919, 1036, 1170\(\frac{1}{2}\); Evidence, \$\sim 501\$, 502; Witnesses, \$\sim 269-302\$.

### **EXCEPTIONS.**

tified that he could give opinion as to value | See Appeal and Error, \$248-265, 501, 502.

### **EXCEPTIONS, BILL OF.**

See Appeal and Error, \$\infty\$536, 544, 553, 613, 655, 907; Criminal Law, \$\infty\$1090.

### I. NATURE, FORM, AND CONTENTS IN GENERAL.

@===26 (Cal.) An ambiguity created by filing marks on purported bill of exceptions showing that it was indorsed as filed on two different dates will be settled against party seeking to establish error.—Kurtz v. Cutler, 172 P. 590.

### **EXCESSIVE DAMAGES.**

See Damages, \$\sim 131, 132; Death, \$\sim 99.

### EXCHANGE OF PROPERTY.

\$\iffsize 3(1)\$ (Wash.) Where written offer to exchange property was accepted upon condition, held that there was no valid written contract.

Nelson v. Davis, 172 P. 1178.

€=5 (Wash.) Plaintiff need not have offered or tendered restitution prior to suit to rescind contract for exchange of properties, but it is enough that he makes offer in his complaint, and shows preservation of status quo.—Tyner v. Stults, 172 P. 850.

v. Stults, 172 P. 850.

5 (Wash.) Where persons agreed to exchange realty, and one of them went on the land he was to receive and made improvements thereon voluntarily before the other had definitely accepted, and the one in possession retained possession for a considerable length of time, the other on rescission on account of misrepresentations could not be required to reimburse for the improvements made.—Nelson v. Davis, 172 P. 1178.

5 (1) (Utsh.) In action for demages for

€=8(1) (Utah) In action for damages for breach of contract for exchange of realty, instruction as to damages held to correctly state law and not to be subject to objection that it did not leave it to jury to determine whether plaintiff had sustained damages.—Rampton v. Cole, 172 P. 477.

In action for damages for breach of contract to exchange realty, an instruction which in effect told jury that they might, in estimating damages, consider values "between" dates of execution and for performance of the contract, was faulty.-Id.

احتها (Okl.) In an action for damages and equitable relief based on fraudulent misrepresentation in an exchange of corporate stock for real property, defendant held properly charged with the stock retained by him as indemnity against an outstanding incumbrance, and plaintiff's obligation thereon discharged.—Phillips v. Mitchell, 172 P. 85.

### **EXECUTION.**

See Attachment; Garnishment; Homestead; Justices of the Peace, \$135.

### UIL ISSUANCE, FORM, AND REQUISITES OF WRIT.

\$\epsilon\$ (Kan.) Where judgment is rendered by justice and transcript is filed in district court of that county, and copy is filed in district court of another county in which execution issues under Code Civ. Proc. \(\xi\_8\) 517-519 (Gen. St. 1915, \(\xi\_8\) 7421-7423), sale and sheriff's deed are void, as latter district court was without invisidation to issue execution; in view of secjurisdiction to issue execution in view of section 416 (Gen. St. 1915, § 7320), providing that execution shall issue only from court in which the judgment was rendered, which court confirms sale under sections 469, 470 (Gen. St. 1915, §§ 7373, 7374).—Duncan v. Benton & Hopkins Inv. Co., 172 P. 522.

tion.-Duncan v. Benton & Hopkins Inv. Co., 172 P. 522.

### VI. CLAIMS BY THIRD PERSONS.

194(3) (Wash.) In replevin by third person to recover property seized under execution, evidence held to sustain finding of title in such third person.—Hartford v. Stout, 172 P. 1168.

### VII. SALE.

### (A) Manner, Conduct, Validity, and Con-firming or Vacating.

256(1) (Kan.) Where grantee sheriff's deed afterwards conveys realty, ex-ecution sale and deed and also subsequent conveyance may be attacked and set aside in action therefor; motion under Code Civ. Proc. § 598 (Gen. St. 1915, § 7502) not being only remedy.

—Duncan v. Benton & Hopkins Inv. Co., 172 P. 522.

### EXECUTIVE POWER.

See Constitutional Law, \$\infty\$74, 80.

### EXECUTORS AND ADMINISTRATORS.

See Courts, \$\sim 202; Descent and Distribution; Trusts; Wills; Witnesses, \$\sim 159.

### II. APPOINTMENT, QUALIFICATION, AND TENURE.

Cal.) Decedent's widow, entitled by Code Civ. Proc. § 1365 to letters of administration, unless she waived prior claim, held not estopped to apply for letters of administration on her husband's estate by her prior request that letters in favor of children be granted.—In re Lowe's Estate, 172 P. 583.

€=20(8) (Cal.) Where widow requested that petition of children for letters of administration be granted, but before hearing applied for let-ters herself, it was for trial court, in exercise of sound discretion, to determine whether she had waived her prior claim to administer.—In re Lowe's Estate, 172 P. 583.

## IV. COLLECTION AND MANAGEMENT OF ESTATE.

(A) In General.

\$2.3 In General.

\$2.3 16 (Wash.) Where an executor entered into an agreement with a legatee to buy a half interest in decedent's separate property and to apply the proceeds on the payment of the legacy, such agreement did not render the executor personally liable for such payment.—Gates v. Herr, 172 P. 912.

### VI. ALLOWANCE AND PAYMENT OF CLAIMS.

### (A) Liabilities of Estate.

\$\insert 205(1)\$ (Wash.) Where deceased, pursuant to promise to pay claimant for services during life of her deceased husband. executed notes as evidence of the debt, claimant's subsequent surrender of the notes "because they worried deceased" did not constitute waiver of the claim.

-Olsen v. Hagan, 172 P. 1173.

&=221(5) (Wash.) Evidence held to establish promise of the deceased to pay claimant a definite sum for past services during the life of deceased's husband.-Olsen v. Hagan, 172 P. 1173.

### (B) Presentation and Allowance.

@==222(1) (Wash.) Where administrator agreed with mortgagee that, if he would waive his mortgage and permit the property to be sold, his note would be first paid, mortgagee need not file a formal claim.—In re Spark's Estate, 172 P. 545.

Hopkins Inv. Co., 172 P. 522.

©=227(1) (Wash.) It is not essential that claims against estates should recite the facts with the precision and particularity of a compant of jurisdiction in court issuing it does not plaint, and a claim against a relation for servatify proceedings or cure defects in jurisdiction that the precision and particularity of a companion of proceedings or cure defects in jurisdiction to continuous the precision and particularity of a companion of proceedings or cure defects in jurisdiction to continuous the precision and particularity of a companion of the precision

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sumption that they were gratuitous.—Parkes v. Burkhart, 172 P. 908.

v. Burkhart, 172 P. 908.

227(2) (Wash.) As preliminary to an action on a supersedeas bond against the executors of a deceased surety, requirement of Rem. Code 1915, §§ 1472-1479, of presentation of claim to the executors was not complied with by presentation merely of the abstract of the judgment against the principal rendered by the superior court by direction of the Supreme Court.—Empson v. Fortune, 172 P. 873.

227(3) (Wash.) Under Rem. Code. 1915.

\$227(3) (Wash.) Under Rem. Code 1915, \$1473, a claim against the executors of a deceased surety on a supersedeas bond based on his liability thereon must be supported by oath.

—Empson v. Fortune, 172 P. 873.

==234 (Wash.) In probate proceeding by creditor of decedent's estate against executor to compel him to take action on claim, burden to establish due presentation of claim to executor, fact being denied, was on creditor.—In re King's Estate, 172 P. 1167.

In probate proceeding by creditor of decedent's estate against executor to compel him to take action on claim, evidence held to sustain trial judge's conclusion claim was not in fact

presented to executor.-Id.

&==241 (Wash.) Filing of claim for services and expenditures in probate court was not a waiver of items of like character, and allow-ance of such claim did not operate as a former adjudication.—Parkes v. Burkhart, 172 P. 908.

241 (Wash.) Where one claimant had two claims on separate accounts for different subject-matters, he need not join them in presentation against the estate.—Olsen v. Hagan, 172 P. 1173.

### (D) Priorities and Payment.

e=263 (Wash.) Where administrator agreed with mortgage that if he would waive mortgage and permit property to be sold, his note would be first paid. even after time expired without his having filed claim, he was entitled to payment as a preferred claimant.—In re Spark's Estate, 172 P. 545.

#### VII. DISTRIBUTION OF ESTATE.

@=315(6) (Cal.) Validity of decree of distribution of testator's estate establishing trust in realty for testator's children and their heirs is not open to attack in suit to partition realty involved by devisee of one of devisee children.
—Sweinhart v. Plant Inv. Co., 172 P. 386.

## VIII. SALES AND CONVEYANCES UN-DER ORDER OF COURT.

### (B) Application and Order.

349(1) (Wash.) Where assignee of executor's commissions applied for order directing the executor to mortgage or sell property as required by law, an order directing the executor to mortgage or sell the property containing nothing indicating that the procedure was to be otherwise than as prescribed by law, should be construed to require the executor to take the construed to require the executor to take the statutory steps preparatory to sale.—In re Ferguson's Estate, 172 P. 813.

### X. ACTIONS.

\$\infty\$=431(2) (Wash.) Under Rem. Code 1915, \$\frac{85}{1472-1479}, as to presentation of claims against estates of decedents, such presentation is essential to the cause of action.—Empson v. Fortune, 172 P. 873.

443(7) (Cal.) Under Code Civ. Proc. \$\frac{4}{8}\$
1493, 1500, requiring claims to be presented to executrix and rejected prior to action, complaint against executrix stating cause of action for money on implied contract against decedent was inaufficient because of failure to allege presentation of claim.—Reed v. Reed, 172 P.

&=444(3) (Cal.) If intention of plaintiff who sued executrix on cause of action for money on sued executrix on cause of action for money on implied contract with decedent was to charge executrix as trustee of specific property, complaint should have contained allegations showing she had come into possession of property, and that it was charged, with trust.—Reed v. Reed, 172 P. 600.

### **EXECUTORY CONTRACTS.**

See Assignments, \$==18.

### EXEMPTIONS.

See Homestead; Taxation, \$==245, 876.

### EX PARTE ORDERS.

See Appeal and Error, 4=564.

### EXPERT TESTIMONY.

See Evidence, \$==505-546.

### EXPRESS TRUSTS.

See Trusts. @==44.

### EXTORTION.

See Criminal Law, 417, 507; Threats.

⇒7 (Cal.) To constitute extortion, the wrongful use of fear must be the operating cause producing consent.—People v. Beggs, 172 P. 152.

### FACTORS.

See Brokers.

### FALLING ARTICLES.

See Master and Servant, == 265.

### FALSE IMPRISONMENT.

### I. CIVIL LIABILITY.

### (A) Acts Constituting False Imprisonment and Liability Therefor.

and Liability Therefor.

5. (Utah) Where dentist, claiming woman patient owed him \$33 for plate work, while she claimed she owed only \$22, kept patient in his office, locking door, to force her to return plate or to pay, he falsely imprisoned her.—Salisbury v. Poulson, 172 P. 315.

5. (Utah) Where dentist did work for patient for agreed price of \$33, and she claimed agreed price was \$22, he had no right to take law into his own hands and imprison her in his office to force her to pay amount due under agreement, or to enforce any rights to which he was entitled.—Salisbury v. Poulson, 172 P 315. 315.

### (B) Actions.

©==23 (Utah) Where agreement is made as to price to be paid for dental work, such agree-ment controls, and reasonable value of dentist's services, if otherwise competent, is immaterial

in action by patient for false imprisonment by him to make her pay what he claimed she owed.
—Salisbury v. Poulson, 172 P. 315.

### FALSE PRETENSES.

2601, denouncing larceny committed by color or aid of false and fraudulent representations, though he intended to repay.—State v. Wheeler, 172 P. 225.

### FALSE SWEARING.

See Perjury.

### FALSIFYING.

See Account Stated, =12.

### FEDERAL EMPLOYERS' LIA-BILITY ACT.

See Commerce, \$\insigma 27\$; Death, \$\infty 64\$; Master and Servant, \$\infty 180, 204, 267, 276, 286; Negligence, \$\infty 101\$; Pleading, \$\infty 430\$; Territories, \$\infty 18\$; Trial, \$\infty 208, 253.

### FEES.

See Appeal and Error, \$\sim 984; Clerks of Courts, \$\sim 17; Extortion.

### FELLOW SERVANTS.

See Master and Servant, == 180.

### FENCES.

See Animals, \$\sim 90; Railroads, \$\sim 412.

### FILING.

See Appeal and Error, \$\sim 628, 773; Chattel Mortgages, \$\sim 90; Criminal Law, \$\sim 1130.

### FINDINGS.

See Appeal and Error, \$\sim 527, 704, 931, 1008-1015, 1071; Principal and Agent, \$\sim 123.

### FIRES.

See Arson.

### FISH.

See Constitutional Law, 278; Eminent Domain, 22.

cm7(2) (Wash.) Because of the peculiar characteristics of the clam—its fixed habitation when imbedded in the soil—clam beds may become subject of private ownership, which passes to grantee by conveyance from state of tidelands in which beds are located.—State v. Van Vlack, 172 P. 563.

(Wash.) Laws 1915, p. 108, § 100, protecting clams on Puget Sound tidelands between April and September, held not invalid.—State v. Van Vlack, 172 P. 563.

em12 (Wash.) Laws 1915, p. 108, § 100, protecting clams on Puget Sound tidelands between April and September, applies to all such lands, regardless of whether title thereto remains in the state or has been vested in private ownership.—State v. Van Vlack, 172 P. 563.

### FIXTURES.

emi4 (Utah) Courts generally favor tenant, and recognize right to remove fixtures without material injury to freehold, and in every case intention of parties as to whether fixtures are to be regarded as realty or personalty will be controlling.—Calder's Park Co. v. Corless, 172 P. 310.

€=15 (Utah) Under common law, structures such as scenic railway, when once annexed to freehold, become part of it, and were not subject to removal by tenant.—Calder's Park Co. v. Corless, 172 P. 310.

A==27(2) (Utah) Where park company leased land for erection of scenic railway by tenants, and lease provided option in company to purchase railway, it was personal property, subject to removal after expiration of term if not purchased.—Calder's Park Co. v. Corless. 172 P. 310.

8-27 (2) (Wash.) Where lessee, in consideration of lease for a building to be constructed, agreed to install machinery, which should immediately become property of lessor, keld machinery, when placed in building prior to delivery of premises to lessee, became immediately property of lessor, subject only to lessee's lease-hold.—Hills v. C. D. Stimson Co., 172 P. 1131.

moin.—Hills V. C. D. Stimson Co., 142 P. 1181.

2—28 (Utah) In view of lessee's obligations to operate railway and pay lessor 12½ per cent. of gross receipts, purchasers of scenic railway under execution sale held without right to remove railway, though personalty, from leased land on which it was erected until expiration of 10-year term of lease.—Calder's Park Co. v. Corless, 172 P. 310.

### FLOWAGE.

See Waters and Water Courses, == 164.

### FOOD.

See Sales, €==274.

### FORBEARANCE.

See Guaranty, 4-16.

### FORCIBLE DEFILEMENT.

See Rape.

### FORCIBLE ENTRY AND DETAINER.

See Justices of the Peace, 558; Landlord and Tenant, 521.

#### I. CIVIL LIABILITY.

e=6(1) (Wash.) Unlawful detainer being a special statutory proceeding, each step prescribed by statute must be strictly complied with to confer jurisdiction.—State v. Superior Court of Pierce County, 172 P. 826.

€ 16(3) (N.M.) Under Code 1915, \$\$ 2384, 2388, forcible entry and detainer must be prosecuted before justice of precinct in which property is situated.—Tietjen v. McCoy, 172 P. 1144.

\$\iffsize 32\$ (Wash.) Defendant having been brought into court under special summons, and compelled to defend in unlawful detainer a special proceeding, the court had jurisdiction to determine issues in such proceeding only.—State v. Superior Court of Pierce County, 172 P. 826.

### FORECLOSURE.

See Building and Loan Associations; Mechanics' Liens, \$260; Mortgages, \$440.

### FOREIGN CORPORATIONS.

See Taxation, \$\sim 168.

#### FORFEITURES.

See Insurance, 339-354, 378-389, 665.

### FORGERY.

(Or.) False recital in deed that E., who signed deed with defendant, was his wife, deed purporting to be deed of such parties, and being executed by E. under name by which she was



known. did not constitute forgery under L. O. L. § 1996.—State v. Ford, 172 P. 802.

2026 (Wash.) Under Rem. Code, § 2583, the crime of forgery may be charged by setting forth the instrument, saying that it was forged with intent to defraud.—State v. Thomas, 172 P. 650.

101. PROMISES TO ANSWER FOR DEBT, DEFAULT, OR MISCAR-

#### FORNICATION.

See Prostitution.

#### FRAUD.

See Account Stated, \$12; Attorney and Client, \$4; Deeds, \$196; False Pretenses; Frauds, Statute of; Fraudulent Conveyances; Husband and Wife; Insurance, \$55; Limitation of Actions, \$100; Mortgages, \$78; Pleading, \$8; Sales, \$38.

# I. DECEPTION CONSTITUTING FRAUD, AND LIABILITY THEREFOR.

\*\*Exercises to the confirmed statement of original seller thereof, confirmed statement of original seller thereof that "they wouldn't take \$5 a share for their shares if they couldn't get more," and that the bank regarded the stock as ample security for a loan of its face value, this was not mere expression of opinion, but statement of value.—Edmonds v. Wilcox, 172 P. 1101.

== 18 (Wash.) Where plaintiff agreed to take \$70 for his share in option contract, and not

\$70 for his share in option contract, and not more than \$300, dependent on a renewal of the option, the other parties interested owed no duty to inform him at the time of settling the exact amount that the option, subsequent to such agreement, had been sold at a great profit, as far as his interest in more than \$300 was concerned.—Brown v. Jamison, 172 P. 853.

Owens, 172 P. 241.

21 (Wash.) Representations that insurance business was increasing in value, and profits averaged \$500 net income per month, and had a valuable good will, if false, constituted actionable fraud and deceit; the purchasers having the right to rely upon such representations.—Stanton v. Zercher, 172 P. 559.

#### II. ACTIONS.

#### (C) Evidence.

€==50 (Wash.) The burden of proving fraud is upon the party asserting it.—Florence v. De Beaumont, 172 P. 340.

8=38(1) (Cal.) Notwithstanding judicial expressions concerning necessity of clear and satisfactory proof of fraud, the rule of Code Civ. Proc. § 2061, subd. 5, that a preponderance of the evidence controls in a civil case applies in a civil case, where fraud is claimed.—Edmonds v. Wilcox, 172 P. 1101.

#### (D) Damages.

59(1) (Wash.) The seller's representabeing untrue, the purchaser's representations as to net income and value of good will being untrue, the purchaser's measure of damages was the difference between the net value of the business as it was and the net value of the business as it was represented to be, and in addition thereto the value of the good will of the business as represented.—Stanton v. Zercher, 172 P. 559.

Fraud in a sale of an insurance business be-

# DEBT, DEFAULT, OR MISCAR-RIAGE OF ANOTHER.

©=23(2) (Wash.) A verbal promise by a railway company and, the general contractor to see that a subcontractor's subcontractor should be paid for his work was not such an original or collateral undertaking as to take it out of the statute of frauds.—Dixon & Oliver v. Parker, Moran & Parker, 172 P. 856.

## VI. REAL PROPERTY AND ESTATES AND INTERESTS THEREIN.

56(7) (Wash.) An oral gift of community real estate from one spouse to another is void, in view of Rem. Code 1915, \$ 8745.—Union Savings & Trust Co. of Seattle v. Manney, 172 P.

231.

(Kan.) A parol contract for the sale of lands or of any interest therein is within the statute of frauds (Gen. St. 1915, § 4889), and unenforceable, unless it is taken out of the statute by some fact or circumstance connected with it.—Engelbrecht v. Herrington, 172 P. 715.

# VIII. REQUISITES AND SUFFICIENCY OF WRITING.

e=106(1) (Wash.) Although order for goods contained abbreviations which required parol evidence to explain, it was a sufficient memorandum within statute of frauds (Rem. Code 1915, § 5290).—The Nut House v. Pacific Oil Mills, 172 P. 841.

107(2) (Wash.) A purchaser as well as a seller must be designated in memorandum of contract for sale to satisfy statute of frauds.—Kahlotus Grain & Supply Co. v. Blair, 172 P.

Signature of the statute of the surface of the contract from the statute of frauds, since no sufficient description appeared therein.—Nelson v. Davis, 172 P. 1178.

son v. Davis, 112 F. 1110.

=110(4) (Okl.) In contract for exchange of property, description of farm to be conveyed by general warranty deed as 975 acres of land, more or less, in a certain county, section, township, known as the "Beeler Farm," was sufficient to take transaction without the statute of frauds.

—Edwards v. Phillips, 172 P. 949.

# IX. OPERATION AND EFFECT OF STATUTE.

€=125(2) (Wash.) Where an heir conveyed to another heir his share of real estate under oral agreement of the latter to will him the entire estate, such agreement cannot be proved, and no damages can be had from the estate for its breach nor claim be allowed in probate proceedings.—Parkes v. Burkhart, 172 P. 908.

129(4) (Wash.) Where parties to exchange of real property merely procured key and went on premises for inspection, remaining only a reasonable time for such purpose, they did not take such possession as to render operative a contract invalid within the statute of frauds.—Nelson v. Davis, 172 P. 1178.

Stanton v. Zercher, 172 P. 559.

Fraud in a sale of an insurance business being established, the defrauded vendee is entitled to the highest measure of damages allowable under the law and facts, which could services take the sale out of the statute, if val-

ue of services may be compensated in money .-Engelbrecht v. Herrington, 172 P. 715.

\$\instrum\$129(8) (N.M.) Possession, pursuant to parol contract for sale of land and part or full payment of purchase price, is sufficient part performance to take the case out of the statute of frauds.—Osborne v. Osborne, 172 P. 1039.

2-129(8) (Okl.) Taking possession in pursuance of a contract together with full or part payment of the purchase price is a sufficient part performance; the amount of the part payment being immaterial.—Bowker v. Linton, 172 P. 442.

## X. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

€=150(3) (Or.) Complaint alleging oral contract on June 16th, to remodel building, and on completion of changes to lease to defendant for one year, and that on August 15th a lease for one year in accordance with the agreement was made operative by giving and taking possession, held not demurrable as plending invalid contract under L. O. L. § 808. subd. 6, making void a lease for a period longer than one year.—Thomas v. Peebler, 172 P. 648.

\$\ins 158(2)\$ (Wash.) In suit for specific perfermance of a contract for sale of real estate, reciting receipt of a certain sum as part of consideration, oral testimony showing that the true consideration consisted in retention by defendants of part of premises was not objectionable as contravening statute of frauds.—Roberts v. Stiltner, 172 P. 738.

#### FRAUDULENT CONVEYANCES.

See Attorney and Client, 4-104.

#### I. TRANSFERS AND TRANSACTIONS INVALID.

#### (B) Nature and Form of Transfer.

€=30 (Colo.) That a creditor to whom a debtor confessed judgment promised such debtor to or confessed judgment promised such debtor to withhold execution was no concern of other creditors, and did not tend to show that the confession of judgment by the debtor was with fraudulent intent as to other creditors.—Coryell v. Olmsted, 172 P. 14.

That an insolvent and a creditor to whom judgment was confessed had previously agreed on a confession of judgment would not render the confession fraudulent as to other creditors.—Id.

#### (F) Confidential Relations of Parties.

e 101 (Or.) Relationship is merely circumstance to be scrutinized with other circumstances in determining the good or bad faith of a conveyance to mere relatives or close friends, and, good faith and adequate consideration being shown, the circumstance loses its value.—Vogt v. Marshall-Wells Hardware Co., 172 P. 123. stance to be scrutinized with other circumstanc-

#### (H) Preferences to Creditors.

123 (Colo.) An insolvent can prefer a bona fide creditor, and can confess judgment in his favor.—Coryell v. Olmsted, 172 P. 14.

An insolvent can confess judgment on notes not yet due without being guilty of an unlawful preference.—Id.

#### (J) Knowledge and Intent of Grantee.

\$\iftharpoonup \text{159(2)}\$ (Or.) As affecting validity of deed by husband to wife of property, which in fact belonged to her, it is immaterial whether or not she had notice of his embarrassed condition.—
Vogt v. Marshall-Wells Hardware Co., 172 P.

# II. RIGHTS AND LIABILITIES OF PARTIES AND PURCHASERS.

#### (A) Original Parties.

# III. REMEDIES OF CREDITORS AND PURCHASERS.

#### (G) Evidence.

271(2) (Or.) In a suit to quiet title, wherein it is claimed plaintiff's apparent legal title is void because the property was conveyed in fraud of creditors, defendant has burden of proof to establish fraudulent character of conveyance.— Vogt v. Marshall-Wells Hardware Co., 172 P. 123.

\$\iffsize 278(2)\$ (Or.) Conveyances from husband to a wife, he being at the time greatly indebted, will be subjected to strictest scrutiny by a court of equity, but it is going too far to say that such conveyance creates legal presumption of fraud.

-Vogt v. Marshall-Wells Hardware Co., 172 P. 123.

= 286(3) (Colo.) In action by creditors to set aside a confessed judgment, the answer of the judgment debtor is not evidence against the judgment creditor, and constituted no basis for setting aside the judgment as fraudulent.—Coryell v. Olmsted, 172 P. 14.

■ 295(1) (Wash.) In a suit for specific performance and to set aside a deed by defendants to another as in fraud of plaintiff's rights, evidence held to support a finding that such conveyance was fraudulently made.—Roberts v. Stiltner, 172 P. 738.

■ 299(7) (Colo.) Evidence held not to show a

299(7) (Colo.) Evidence held not to show a confession of judgment by an insolvent was cov-inly, maliciously, or wantonly made with intent to hinder and delay creditors.—Coryell v. Olm-sted, 172 P. 14.

seed, 172 F. 14.

=299(12) (Or.) Whatever presumption or inferences, either of law or fact, may be drawn from circumstance that grantee is the wife of grantor, is overcome by evidence indicating that through her natural wifely confidence in her husband great portion of her inheritance has been wasted.—Vogt v. Marshall-Wells Hardware Co., 172 P. 123.

#### FREEZING.

See Carriers, @==114, 134.

#### FRIGHTENING ANIMALS.

See Municipal Corporations, 6-816.

#### GAME.

See Fish.

#### GAMING.

#### III. CRIMINAL RESPONSIBILITY. (A) Offenses.

\$\iff 75(1)\$ (N.M.) Laws 1917, c. 110, prohibits the conducting of a game of chance for money or anything of value, but does not prohibit the mere playing of such game.—Ex parte Hamm, 172 P. 190.

#### GARNISHMENT.

See Attachment; Carriers, 4=58.

# II. PERSONS AND PROPERTY SUB-JECT TO GARNISHMENT.

51 (Kan.) Rule followed that a garnishment only reaches the property which actually belongs



to the debtor, and does not lawfully reach that which the debtor has already assigned in good faith to other creditors.—Rich v. Roberts, 172 P. 996.

#### GAS.

See Robbery, 556, 24.

\$\instructure 11 (Kan.) In view of Gen. St. 1915, \$\\$ \$358, courts have no jurisdiction to appoint receivers to regulate rates of public service corporations, and neither the courts nor the receivers can change legal rates of gas company without the consent of Public Utilities Commission State 1 Indoorders Conf. Commission State 1 Indoorders Conf. Commission State 1 Indoorders Conf. Conf Commission.—State v. Independence Gas Co.,

When legal rates charged by receiver of a gas company have been enjoined by a court of competent jurisdiction, receiver may put into effect rates to be charged until commission establishes a new rate.—Id.

#### GIFTS.

See Charities; Husband and Wife, 431/2.

#### II. CAUSA MORTIS.

82(2) (Wash.) Evidence showing an actual delivery by deceased in her lifetime of jewelry to defendants, coupled with evidence of donor's love for defendants, and evidence of witnesses of her intention to make the gift, held sufficient to support the findings that the gift was made.

—Wilson v. Joseph, 172 P. 745.

#### GOOD FAITH.

See Bills and Notes, &==339-376; Sales, &===239; Vendor and Purchaser, &===233.

#### GOOD WILL.

(Wash.) Good will of the business is the faith of the public and the probability of continuance of patronage, the advantage inuring to the purchaser from succeeding to the business, but is not the business itself, but is personal property, and a part of the assets.—Stanton v. Zercher, 172 P. 559.

Good will of insurance business, though the sale price was computed on the basis of the amount of commissions on premiums and loans shown by the books. was something more than

shown by the books, was something more than such amount, and included the advantage to be gained by the reputation of the seller .- Id.

#### GRAND JURY.

See Indictment and Information.

#### GRANTS.

See Public Lands.

#### **GUARANTY.**

See Frauds, Statute of; Indemnity; Principal and Surety.

#### I. REQUISITES AND VALIDITY.

6-4 (Kan.) One guaranteeing payment of note by contract with payee without maker's request or knowledge, and required to make payment, is a virtual purchaser of the note rather than a surety, and if five years elapse after maturity without maker's recognition of guaranty, the statute of limitations may bar guarantor's claim against maker.—Leslie v. Compton, 172 P. 1015. amount is not necessary; compliance of a guaranty is not necessary; compliance or performance by the party for whose protection it is given being sufficient.—Great Western Mfg. Co. v. Porter, 172 P. 1018.

6 14 (Okl.) Contract of guaranty to answer for obligation of another, made subsequent to original obligation, must be supported by a dis-

tinct consideration.—Bank of Commerce of Sulphur v. Webster, 172 P. 943.

phur v. Webster, 172 P. 943.

16(1) (Cal.App.) Where a machine company does repair work on, and furnishes new parts for, a dredger, and without receiving payment therefor gives up possession of dredger upon guaranty of payment by a bending company, the relinquishment of the lien is sufficient consideration for the guaranty.—Union Mach. Co. v. Chicago Bonding & Surety Co., 172 P. 1113.

16(4) (Cal.App.) Where a machine company did repair work, and furnished new parts for a dredger, and without receiving payment therefor when due gives up possession of the dredger, for when due gives up possession of the dredger, and extends time of payment upon a guaranty of payment by a bonding company, the extension of time of payment is sufficient consideration for the guaranty.—Union Mach. Co. v. Chicago Bonding & Surety Co., 172 P. 1113.

#### III. DISCHARGE OF GUARANTOR.

53(1) (Okl.) Under Rev. Laws 1910, §§ 4174, 4175, holder's procuring of additional signer to note without assent of guarantors discharges the guarantors as between themselves and the holders.—Bank of Commerce of Sulphur v. Webster, 172 P. 942.

### V. RIGHTS AND REMEDIES OF GUARANTOR.

@== 100 (Kan.) One guaranteeing the payment of a note by a contract with the payee, without the request or knowledge of the maker, and who by reason of such guaranty is required to make the payment, may thereby acquire a valid claim against the maker for reimbursement.—Leslie v. Compton, 172 P. 1015.

#### GUARDIAN AND WARD.

See Insane Persons, @==30.

## III. CUSTODY AND CARE OF WARD'S PERSON AND ESTATE.

53 (Okl.) Petition by subsequent guardian 6-53 (Okl.) Petition by subsequent guardian to recover purchase price paid by former guardian on ground that deed had passed no title to ward because order was made by judge related to former guardian within degrees promoted by Rev. Laws 1910, § 5812, stated no cause of action.—Berryhill v. Jackson, 172 P.

Where guardian, without authority of county court, purchases realty for his ward, and transaction is free from fraud, and had deed made to the ward, the title to property passes to the ward.—Id.

8-53 (Okl.) Guardian for four wards is not protected in investment in land of funds belonging to three wards by order of court on his petition, mistakenly alleging that funds belonged to estate of other ward, and directing such investment, where title was taken in name of other ward.—Pace v. Pace, 172 P. 1075.

© 71 (Okl.) Where both guardians have qualified, the authority vested in them is joint and must be exercised by both together in the making of a lease, etc.—Sargent v. Shaver, 172 P. 445.

# IV. SALES AND CONVEYANCES UNDER ORDER OF COURT.

court in confirming a guardian's sale of real estate will be accorded like force, effect, and legal presumption as the judgments and decrees of other courts of general jurisdiction.—Berry v. Tolleson, 172 P. 630.

105(1) (Okl.) Where guardian was authorized to sell land, his exchange for other realty was a fraud upon the ward's estate, and sale or exchange might be set aside in action

sale or exchange might be set aside in action against purchaser or any one taking land with

#### HABEAS CORPUS.

## I. NATURE AND GROUNDS OF REMEDY.

€3 (Colo.) Since all proceedings, judgments, and orders under Laws 1915, p. 336, as to commitment and discharge of lunatics, are of a continuing character and open to modification on petition of any party in interest, one committed as insane, if in fact cured, could apply for modification of the order, and was therefore not entitled to write the behavior of the course of the titled to writ of habeas corpus to secure release.

Ex parte Rainbolt, 172 P. 1068.

34 (Wash.) Where wife secured divorce with custody of both children, and modified decree gave husband custody of daughter, whereupon wife removed from state to defeat the order, on her return the wife could not, on application to modify the order as to custody as a defense to the writ of habeas corpus brought by the husband, be heard to say that she is a fit and proper person to have the care of the child, and the husband was entitled to custody.—Beers v. Walker, 172 P. 861.

# II. JURISDICTION, PROCEEDINGS, AND RELIEF.

44 (Colo.) The Supreme Court should not, on original application for habeas corpus, exercise jurisdiction, if the plaintiff's rights can be fully protected and enforced in the county court.

—Ex parte Rainbolt, 172 P. 1068.

#### HARBORING.

See Animals, 4-72.

#### HARMLESS ERROR.

See Appeal and Error, \$\infty\$1027-1071; Criminal Law, \$\infty\$1166\(\frac{1}{2}\)-1174; Homicide, \$\infty\$ 340.

#### HEARSAY EVIDENCE.

See Criminal Law, 420; Evidence, **æ**⇒317.

#### HEIRS.

See Descent and Distribution; Husband and Wife, €==274.

#### HIGHWAYS.

See Railroads, 4=97, 324-350.

#### I. ESTABLISHMENT, ALTERATION, AND DISCONTINUANCE.

# (A) Establishment by Prescription, User, or Recognition.

(Wash.) A highway may be established by prescription although it is merely a trail used by travelers on foot and on horseback, and for pack horses and "go-devils," but not for wheeled vehicles.—Hamp v. Pend Oreille County, 172 P. 869.

\*\*El4 (Wash.) Where a highway has been established by prescription, the right of the public is not measured by the actual beaten path, but includes a width sufficient for the requirements of travel.—Hamp v. Pend Oreille County, 172 P. 869.

### (B) Establishment by Statute or Statu-tory Proceedings.

5623—2, a petition for establishment of road is not jurisdictional where there is evidence that the commissioners acted unanimously.—State v. Superior Court for King County, 172 P. 254. (2) (Wash.) Under Rem. Code 1915, \$ 5627, it is within power of county commissioners after petition for road is filed to adopt a Traction Co., 172 P. 990. 29(1) (Wash.) In view of Rem. Code 1915, \$

knowledge or chargeable with notice of fraud. different route recommended by the county en-Berry v. Tolleson, 172 P. 630. different route recommended by the county en-gineer after due notice and opportunity to be heard.—State v. Superior Court for King County, 172 P. 254.

# III. CONSTRUCTION, IMPROVEMENT, AND REPAIR.

109 (Kan.) Call for bids for construction of a hard surface road of 'bituminous macadam' is no departure from petition for roadway of "crushed stone or macadam with top surface of Bermudez asphalt, or other asphalt equally as good."—Washburn v. Board of Com'rs of Shawnee County, 172 P. 997.

# IV. TAXES, ASSESSMENTS, AND WORK ON HIGHWAYS.

work on highway improvement was begun under Gen. St. 1915, §§ 8815–8826, it was competent for Legislature, as by Laws 1917, c. 265, §§ 6, 14, to change distribution of costs, as Legislature may impose any part of highway cost upon county.—Washburn v. Board of Com'rs of Shawnee County, 172 P. 997.

To validate Laws 1917, c. 265, changing apportionment of cost under Gen. St. 1915, §§ 8815–8826, no provision was necessary for notice to owners other than those in the benefit

district; the tax as to them being general, or, if special, they are assumed to have notice through their legislative representatives.—Id.

# V. REGULATION AND USE FOR TRAVEL

#### (A) Obstructions and Encroachments.

153 (Kan.) Plaintiffs in taking their threshing outfit into a field adjoining a highway in order to thresh a crop were entitled to use not only the worn part of the highway but the whole width so far as necessary.—Thompson v. Union Traction Co., 172 P. 990.

# (B) Use of Highway and Law of the Road.

(73(2) (Mont.) Where a pedestrian saw an approaching automobile 10 or 15 minutes before it struck him and knew that it was continuously approaching, failure to give warning was not the proximate cause of his injury.—Herzig v. Sandberg, 172 P. 132.

am automobile driver to see persons on the road in front of him, where his view is unobstructed.—Barker v. Savas. 172 P. 672.

obstructed.—Barker V. Savas, 112 F. 612.

3. 184(2) (Mont.) In action for injuries to pedestrian on highway when struck by automobile, evidence that he was intoxicated was admissible in support of the defense of contributory negligence, although intoxication alone does not necessarily bar recovery.—Herzig v. Sandberg. 172

6-184(2) (Utah) Evidence held sufficient to sustain a finding that plaintiff's child was kill-ed by an automobile, and that defendants' au-tomobile killed it.—Barker v. Savas, 172 P.

in action for death of child killed while riding his tricycle on a broad open highway in the daytime, evidence held sufficient to sustain a finding that an automobile driver was negligent, although no one saw the accident.—Id.

Evidence held to show that child on tricycle on a road, killed by an overtaking motor truck, was not guilty of contributory negligence.—Id.

(C) Injuries from Defects or Obstructions.

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197(3) (Wash.) Plaintiff cannot recover against a county for personal injuries resulting from the overturning of his load of hay, where he knew the condition of the road and the accident resulted from his own negligence in the character of the load and in manner of his driving.—Crooks v. Stevens County, 172 P. 1158. 97(3) (Wash.) Plaintiff cannot recover

e=213(2) (Kan.) In action for damages to a threshing outfit from breaking of an exposed oil pipe, held, on the evidence, that the negligence of the defendant company in maintaining the pipe was for the jury.—Thompson v. Union Traction Co., 172 P. 990.

==213(4) (Kan.) In action for damages to threshing outfit from the breaking of an exposed oil pipe on the highway, held, on the evidence, that plaintiff's contributory negligence was for the jury.—Thompson v. Union Traction Co., 172 P. 990.

#### HOLOGRAPHIC WILLS.

See Wills, =130.

#### HOMESTEAD.

See Eminent Domain, 4=126.

### I. NATURE, ACQUISITION, AND EXTENT.

#### (C) Acquisition and Establishment.

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#### II. TRANSFER OR INCUMBRANCE

•== 118(5) (Kan.) In married woman's action to establish homestead right, held that instruments relied on by defendants as affecting homestead were void because executed by her alone; her husband not joining therein or consenting thereto.—Thompson v. Millikin, 172 P. 534

stead property, fully explained to grantees the long absence of her husband, she was not estopped by her conveyance or conduct, or acquiescence from maintaining action to establish her homestead rights.—Thompson v. Millikin, 172 P. 534.

# III. RIGHTS OF SURVIVING HUS-BAND, WIFE, CHILDREN, OR HEIRS.

=142(1) (Kan.) Property occupied as homestead of owner and family remains exempt from sale for payment of his debts after death of himself and wife intestate, so long as an unmarried daughter of full age, who had lived as a part of the family, continues her residence there.

—Koehler v. Gray, 172 P. 25.

# IV. ABANDONMENT, WAIVER, OR FORFEITURE.

em161 (Kan.) The homestead provided for by Const. art. 15, § 9 (Gen. St. 1915, § 3825), being one occupied by owner's family as residence, homestead character of property of wife remaining in possession with her children, was not destroyed or impaired by husband's absence.—Thompson y. Millikin, 172 P. 534.

€ 162(1) (Kan.) Findings that claimant of homestead had not abandoned residence in city in which it was situated, and that she consider-

in which it was situated, and that she considered it as her residence, held to imply an intent to return and occupy the property as a home.—Keehler v. Gray, 172 P. 25.

164 (Kan.) That husband, describing himself as unmarried, proved up homestead in Oregon under law requiring it to be occupied only by some member of a family did not described. only by some member of a family, did not deprive him of his interest in Kansas homestead occupied by wife and children, so as to validate her conveyances without his consent.—Thompson v. Millikin, 172 P. 534.

#### HOMICIDE.

See Criminal Law, @=371, 991.

#### II. MURDER.

€=14(1) (Wash.) "Premeditated design" is a mental operation of thinking upon an act before doing it, or upon an inclination before carrying it out.—State v. Duncan, 172 P. 915.

### V. EXCUSABLE OR JUSTIFIABLE HOMICIDE.

\$\infty\$=105 (Cal.) An officer is not justified in shooting a man in order to compel submission to arrest for a misdemeanor.—People v. Wilson, 172 P. 1116.

Cal.) An officer, properly engaged in attempting to make an arrest, on a misdemeanor charge, has the right to resist attack made upon him, and, being rightfully there and not legally considered the aggressor, may in his own defense take life.—People v. Wilson, 172 P. 1116.

(N.M.) That a person has reason to expect an unlawful attack on him does not give him the right to arm himself with a deadly weapon to resist it.—State v. Moss, 172 P. 199.

# VI. INDICTMENT AND INFORMA-TION.

(35(1) (Ariz.) An indictment or information for murder is not bad for failure to describe the means employed to effect death.—Azbill v. State, 172 P. 658.

#23136 (Ariz.) An indictment or information for murder is not bad because it fails to describe the wounds causing death.—Azbill v. State, 172 P. 658.

#### VII. EVIDENCE.

#### (A) Presumptions and Burden of Proof.

65151(1) (Wash.) If accused seeks to justify killing, the burden of proof is on him.—State v. Duncan, 172 P. 915.

S⇒152 (Wash.) If the killing of one human being by another is proved beyond a reasonable doubt, the presumption of law is that it is mur-der in the second degree.—State v. Duncan, 172 P. 915.

#### (B) Admissibility in General.

63 163(2) (N.M.) The good character of deceased is not a subject of proof in prosecution for killing him, where his character had not been attacked by the defense.—State v. Johnson, 172 P. 189.

P. 189.

\$\instructure 165 (Ariz.) In murder trial, defense being controversy with deceased, necessitating killing in self-defense, evidence by state as to what accused did when his cattle were driven from deceased's field, which accused claimed was the cause of deceased's rage towards him, was relevant as tending to establish relations between parties.—Sheek v. State, 172 P. 662.

#### (E) Weight and Sufficiency.

244(3) (N.M.) One accused of homicide who relies on self-defense need not produce evidence

satisfying the jury that he acted in self-defense, but only such evidence as will raise a reasonable doubt as to whether he acted in necessary self-defense.—State v. Pruett, 172 P. 1044.

€==253(1) (Utah) Evidence held to sustain verdict of murder in first degree.—State v. De Weese, 172 P. 290.

€==253(2) (Wash.) In a prosecution for murder, evidence largely circumstantial held to sustain verdict of first degree murder.—State v. Duncan, 172 P. 915.

©=257(1) (Cal.App.) Evidence held to justify conviction of assault with intent to murder.

—People v. Shaw, 172 P. 401.

©=257(8) (Cal.App.) Wound producing instantaneously complete relaxation of muscular

system and utter helplessness when deliberately inflicted carries with it implication that perpetrator intended to kill victim.—People v. Shaw, 172 P. 401.

#### VIII. TRIAL.

#### (B) Questions for Jury.

e=268 (Cal.) In a prosecution against a deputy constable for killing a person whom he was attempting to arrest on a misdemeanor charge, evidence as to whether the bullet that killed deceased came from defendant's gun or from that of another held to make a question for the jury.—People v. Wilson, 172 P. 1116.

the jury.—reopie v. Whison, 112 F. 1110.

276 (Cal.) In a prosecution for masslaughter against deputy constable who shot deceased while attempting to arrest him for disturbing the peace, evidence held not as a matter of law to make the act justifiable.—People v. Wilson, 172 P. 1116.

#### (C) Instructions.

@==286(3) (Wash.) In prosecution for murder, instruction that malice aforethought or premedinstruction that mainer alteration for premediated malice occurs where intention unlawfully to take life is deliberately formed and meditated upon before the actual killing, and that there need be no fixed time between the formation of intent and the act, is not erroneous.—State v. Duncan, 172 P. 915.

e==290 (N.M.) It is not error for court to define deadly weapon in terms of statute.—State v. Moss, 172 P. 199.

300(2) (N.M.) Instruction that self-defense does not imply the right to attack and will not permit acts done in retaliation or revenge, and that if defendant brought on difficulty to engage deceased in conflict with deadly weapons he could not set up self-defense, held proper.—State v. Pruett, 172 P. 1044.

State v. Pruett, 172 P. 1044.

\$\colon=300(14) (N.M.) Where there is evidence that deceased made threats against defendant which were communicated to him, and that deceased brought about the difficulty and was in fault at the time of the killing, the court, on request, must instruct on threats.—State v. Pruett, 172 P. 1044.

#### X. APPEAL AND ERROR.

€=325 (Cal.) In a prosecution against a deputy constable for killing a person he was attempting to arrest on a misdemeanor charge, admission of evidence as to malice would not be considered, in the absence of an objection at the time offered.—People v. Wilson, 172 P. 1116.

am 332(3) (Cal.) In a prosecution for man-slaughter by a deputy constable in an attempt to make an arrest for disturbing the peace, the question on conflicting evidence as to whether the shooting was a crime for which conviction should be had is for the jury, and its finding is conclusive.—People v. Wilson, 172 P. 1116.

\$\ightharpoonup 340(4) (N.M.) Verdict of guilty of murder in second degree will not be set aside because of erroneous instructions on involuntary manslaughter.—State v. Moss, 172 P. 199.

#### HOTELS.

See Civil Rights, 5, 13.

#### **HUMANITARIAN DOCTRINE.**

See Railroads, 4=338, 390; Street Railroads,

#### HUSBAND AND WIFE.

See Divorce; Dower; Frauds, Statute of, 56; Fraudulent Conveyances, 278, 299; Homestead, 118; Marriage.

# I. MUTUAL RIGHTS. DUTIES, AND LIABILITIES.

© 6(1) (Kan.) Money paid a married man as the consideration for a conveyance of his real estate, in which his wife joins, belongs to him, unless it be definitely agreed that a specific portion shall belong to her individually.—Osborn v. Osborn, 172 P. 23.

Without actual fraud in procuring a wife to join in a conveyance of her husband's land, giving her a clear right to impound the consideration received by him or to control its use she

tion received by him or to control its use, she cannot pursue the fund.—Id.

ly contended for, an appearance intended to conceal or to deceive.—Osborn v. Osborn, 172 P. 23.

Deeds conveying to a married man a life estate

and to his sons the remainders in fee held not to be colorable.—Id.

# III. CONVEYANCES, CONTRACTS, AND OTHER TRANSACTIONS BETWEEN HUSBAND AND WIFE.

491/2(8) (Wash.) In action by plaintiff, a judgment creditor of defendants as a marital community, to set aside a deed given by defendant husband to defendant wife, evidence held insufficient to show that money with which property involved was purchased was given to wife by her husband.—Union Savings & Trust Co. of Seattle v. Manney, 172 P. 251.

### V. WIFE'S SEPARATE ESTATE.

#### (A) What Constitutes.

\$\frac{\text{Emily(3)}}{\text{\$\frac{5}{2}}}\$ (Wash.) In view of Rem. Code 1915. \$\frac{5}{2}\$ 5919, 5925. 8766, 8771, where a husband procures a deed in wife's name, and so conducts himself with reference thereto, as to evidence no claim or interest therein, the property will constitute separate estate of wife.—Lanigan v. Miles, 172 P. 894.

Miles, 172 P. 894.

—131(1) (Cal.App.) In wife's action against sheriff for conversion of personalty sold under execution against husband, burden to prove ownership of property was upon wife.—Jolly v. McCoy, 172 P. 618.

—133(1) (Wash.) If property acquired after marriage has stood in name of husband, and he has been active agent in care, management, and disposition thereof, his widow, or any one claiming under her, will be put to a greater burden than mere preponderance, where it is claimed that property was separate property of wife.—Lanigan v. Miles, 172 P. 894.

—333(4) (Wash.) That husband caused his

#== 133(4) (Wash.) That husband caused his wife's name to be inserted as grantee, etc., held to warrant conclusion in conformity with wife's testimony that it was always understood between husband and wife that he had no interest whatsoever in property.—Lanigan v. Miles, 172 P. 894.

#### (C) Liabilities and Charges.

8-154 (Or.) Where attorney had rendered services for husband and wife, wife held jointly liable with her husband to indemnify assignee of cause of action for expenditures to discharge attorney's lien, and to defend a suit for its enforcement, the assignee having had no notice of the lien when he took the transfer.—Montana Coal & Iron Co. v. Hoskins, 172 P. 118.

#### VII. COMMUNITY PROPERTY.

248 (Wash.) Since status of property as community or separate property of defendant wife became fixed at time of purchase, such status, unless divested by deed, due process of law, or working of an estoppel, remained.—Union Savings & Trust Co. of Seattle v. Manney, 172 P. 251.

262(1) (Cal.App.) Where personalty was in possession of husband, and treated by him as though it were community or his own separate property, from circumstances disputable presumption follows, under Code Civ. Proc. § 1963, subd. 12, that such was its character.—Jolly v. McCoy, 172 P. 618.

\$262(1) (Wash.) That husband permitted title to be taken from third persons in wife's name presumptively vested title in community.—Union Savings & Trust Co. of Seattle v. Manney,

172 P. 251.

2262(1) (Wash.) Where a course of dealings between spouses, running over a period of 30 years, which is confirmatory of claim of one who asserts a separate estate, overcomes presumption that all property acquired after marriage is community property, at least to extent of putting burden on one who asserts contrary.—Lanigan v. Miles, 172 P. 894.

2262(2) (Wash.) In action to set aside deed by defendant husband to defendant wife, since property was not acquired by defendant wife through devise or descent, but during coverture, it was incumbent upon her to show that she ac-

it was incumbent upon her to show that she acquired it by gift, in view of Rem. Code 1915, \$5917.—Union Savings & Trust Co. of Seattle v. Manney, 172 P. 251.

\$\iff 264\$ (Wash.) In action by plaintiff, a judgment creditor of defendants as a marital community to set aside a deed given by defendant husband to defendant wife at a time when plainhusband to defendant whe at a time when plaintiff was an existing creditor of community, and subject property to lien of judgment, evidence held insufficient to show that property involved was separate property of wife.—Union Savings & Trust Co. of Senttle v. Manney, 172 P. 251.

& Trust Co. of Seattle v. Manney, 172 P. 251.

2269 (Wash.) Deed to property acquired during coverture from defendant husband to defendant wife, made at a time when plaintiff was an existing creditor of community, was void unless it can be sustained as a ratification by husband of a prior parol gift of his community interest, in view of Rem. Code 1915, § 8766.—
Union Savings & Trust Co. of Seattle v. Manney, 172 P. 251.

If attempted gift by defendant husband to defendant wife of interest in community was void, an attempted ratification by deed would also be void as to plaintiff, an existing creditor of community at time deed was made.—Id.

270(10) (Wash.) Where notes and mort-

@=270(10) (Wash.) Where notes and mort-gages have been given by partners in the con-duct of a mercantile business, the obligations become prima facie community obligations, and in the absence of rebutting evidence the mortgagee on foreclosure is entitled to a deficiency judgment against the community.—Tacoma Ass'n of Credit Men v. Lyons, 172 P. 823.

© 274(1) (Wash.) Children and their issue claiming through husband would have no greater right in property acquired during marriage than he could have claimed during his lifetime.

—Lanigan v. Miles, 172 P. 894.

#### VIII. SEPARATION AND SEPARATE MAINTENANCE.

e=297 (Utah) In wife's action for separate maintenance under Comp. Laws 1907, §§ 1216, 1218, evidence held sufficient to sustain decree for plaintiff.—Willardson v. Willardson, 172 P. 719.

172 P. (19. a) 29834 (Cal.) In suit by wife against her husband for support, she cannot obtain, as ancillary relief, removal of cloud on title caused by deed given by her husband where he has ample property remaining to maintain plaintiff.—Garrett v. Garrett, 172 P. 587.

#### IDENTIFICATION.

See Evidence. 459.

### ILLEGITIMATE CHILDREN.

See Bastards.

#### IMPAIRING OBLIGATION OF CON-TRACT.

See Constitutional Law, \$==135-154.

#### IMPEACHMENT.

See Criminal Law, \$1036; Witnesses, \$1036; 327-397.

#### IMPLIED CONTRACTS.

See Account Stated: Indemnity. 4=13.

#### IMPLIED REPEAL.

See Statutes, \$== 159-170.

#### IMPRISONMENT.

See False Imprisonment; Habeas Corpus.

#### IMPROVEMENTS.

See Landlord and Tenant, =158; Mechanics' Liens; Municipal Corporations, =278-514.

#### IMPUTED NEGLIGENCE.

See Negligence, \$\sim 93, 96.

#### INCOMPETENT PERSONS.

See Insane Persons.

#### INCONSISTENCY.

See Witnesses, \$\sim 380-397.

#### INCUMBRANCES.

See Life Estates.

#### INDEMNITY.

See Insurance, 512; Principal and Surety. cand (Utah) Where insured's creditors filed claim against insurer on ground that policy assignment was fraudulent, payment of policy proceeds by the insurer was not a valuable consideration for indemnity bond for the benefit of creditors exacted from the assignee.—O'Neill v. Mutual Life Ins. Co. of New York, 172 P. 306. Mutual Life Ins. Co. of New York, 172 P. 306.

11 (Wash.) Cause of action on indemnity bond, to protect surety company from liability on bond to protect property against liens, accrued not before judgment and decree of foreclosure of lien, and is not barred within less than two years thereafter.—Island Gun Club v. National Surety Co., 172 P. 209.

13(2) (Kan.) One voluntarily committing an actionable wrong at instigation of others or by acting jointly with them, for which wrong a judgment is rendered against him, cannot recover from such others any loss or

cannot recover from such others any loss or

damage sustained by reason of judgment.—Rucker v. Allendorph, 172 P. 524.

214 (Wash.) Where brewing company obtained property in replevin, and defendants obtained judgment for the property against sheriff and against surety on replevin bond, which was paid, and surety filed claim with receiver for brewing company, which was allowed, and the surety on the receiver's bond paid the claim and sued sheriff's bondsman, notice to brewing company and receiver's bondsmen of the action, with demand that they defend, did not obligate them unless they were liable over by express contract or operation of law.—McRae v. Angeles Brewing Co., 172 P. 263.

Plaintiff in replevin and bondsmen of receiver for such plaintiff 'held not required to defend action against sheriff on assigned judgment after judgment for return of property, on theory that obligation arose by operation of law because sheriff on demand turned over

theory that obligation arose by operation of law because sheriff on demand turned over property to plaintiff in replevin, when there was no redelivery bond given.—Id.

#### INDEPENDENT CONTRACTORS.

See Principal and Agent, 43.

#### INDETERMINATE SENTENCE.

See Criminal Law, \$= 991.

#### INDIANS.

See Criminal Law, 4=656; States, 4=9.

655 15 (1) (Okl.) Allottee of Choctaw Nation on attaining majority may make a valid conveyance for a lawful and independent consideration, notwithstanding his former invalid con-

eration, notwithstanding his former invalid conveyance to such grantee during his minority.

—Jones v. Smyth, 172 P. 785.

Where under Act Cong. May 27, 1908, member of Choctaw Nation, of one-fourth Indian blood, during minority delivers contract for sale of part of his allotment and a warranty dead to same person the dead and contract are deed to same person, the deed and contract are absolutely void.—Id.

ausolutely void.—Id.

2-18 (Okl.) Inheritance of land allotted to a Creek Freedman, who died after Creek Supplemental Agreement of June 30, 1902, c. 1323, 32 Stat. 500, had become effective and before statehood was cast, according to Mansfield's Dig. Ark. §§ 2522-2545, as modified by section 6, of such agreement.—Ross v. Wertz, 172 P. 968.

Inheritance of allotted lands of Creek Freednneritance of anotted lands of Creek Freedman, none of whose ancestors were of Creek blood, dying intestate without issue in 1903, is cast upon nearest next of kin of nearest common ancestral lineage, who are Creek citizens or descendants thereof, and otherwise the surviving spouse, if of Creek blood, may take, and otherwise inheritance goes to receive heirs. otherwise inheritance goes to noncitizen heirs as provided by Mansfield's Dig. Alk.—Id. Where Creek Freedman, none of whose ances-

Where Creek Freedman, none of whose ancestors are of Creek blood or citizenship, died in 1903 intestate, and without issue, fact that kinsmen, who are themselves Creek citizens, must trace their kinship to decedent only through noncitizen blood, is not a bar to inheriting allotted lands of decedent.—Id.

Under Mansfield's Dig. Ark. §§ 2522-2545, construed with Creek Supplemental Agreement of June 30, 1902, c. 1323, § 6, 32 Stat. 501, living children of Creek Freedman dying intestate in 1903, and of his brother, take equally, the grandchild taking by representation, and each of children and the grandchild take one-tenth of inheritance.—Id.

tenth of inneritance.—10.

18 (Okl.) Where duly enrolled Seminole freedman, after receiving allotment, died in 1901 or 1902, leaving widow and daughter enrolled as Chickasaws, the descent was cast under Mansfield's Dig. §§ 2522-2545, and whether the widow and daughter were Seminole

citizens was not involved.—Rentie v. Rentie, 172 P. 1083.

28 (Okl.) Under Act Cong. April 18, 1912, \$ 3, a final judgment or order by the county court in the administration of the estate of a deceased Osage Indian is appealable as in case of other citizens.—Wah-tsa-e-o-she v. Webster, 172 P.

#### INDICTMENT AND INFORMATION.

See Criminal Law, \$\infty\$1032; Embezzlement, \$\infty\$32; Homicide, \$\infty\$135-136; Larceny; Obscenity, \$\infty\$11; Perjury, \$\infty\$25; Prostitu-

# V. REQUISITES AND SUFFICIENCY OF ACCUSATION.

€==60 (Wash.) Under Rem. Code, § 2583. the crime of forgery may be charged by setting forth the instrument, saying that it was forged with intent to defraud, and such an information is sufficient under Const. art. 1, § 22, requiring the nature and cause of the accusation to be stated, and Rem. Code, § 2055, subd. 2, requiring a statement of the facts in ordinary and concise language.—State v. Thomas, 172 P. 650.

(Wash.) In view of Rem. Code, § 2303, subd. 5, and section 2292, an information charging forgery need not name the person incharging lorgery need not name the person intended to be defrauded, notwithstanding section 2057, requiring the particular circumstances of the crime to be charged, section 2065, subd. 6, requiring a concise statement of the facts, and subd. 7, requiring the act to be stated with certainty.—State v. Thomas, 172 P.

emilo(13) (Nev.) Embezzlement is a statutory crime, and all that is necessary in charging the offense is to follow the statute.—State v. McFarlin, 172 P. 371.

(Okl.Cr.App.) Matters of surplusage not misleading or contradictory of the material elements as pleaded will not vitiate an information.—Dunn v. State, 172 P. 463.

#### VIII. AMENDMENT.

6=161(7) (Utah) Amendment of information by changing figures so as to make year conform to year stated in the original complaint was properly permitted being expressly authorized by Laws 1913, c. 42.—State v. Hay, 172 P. 721.

#### IX. ISSUES, PROOF, AND VARIANCE.

176 (Cal.App.) Failure to prove the exact day and hour of the crime is not fatal, where accused is not prejudiced thereby.—People v. Fraysier, 172 P. 1126.

G=176 (Kan.) Allegation in information under Gen. St. 1915, § 5541, for persistent violation of prohibition law as to former conviction on particular day does not preclude proof that verdict was returned on that day, although sentence was entered a few days later.—State v. Will, 172 P. 1003.

# XI. WAIVER OF DEFECTS AND OB-JECTIONS, AND AIDER BY VERDICT.

196(7) (Wash.) Objection to an information on the ground of duplicity cannot be raised any time after entry of the plea of not guilty, unless such plea be withdrawn.—State v. Picrson, 172 P. 236.

e=198 (Utah) Where defendant's counsel, who was informed before trial commenced that information had been amended to conform to complaint by changing year 1916 to 1915, made no objection, error, if any, in permitting amendment was waived.—State v. Hay, 172 P. 721.

#### INDORSEMENT.

See Bills and Notes, 4=186-376.

#### INDUSTRIAL INSURANCE.

See Constitutional Law. @== 154.

#### INFANTS.

See Divorce, 298; Guardian and Ward; Indians, 15; Limitation of Actions, 72; Master and Servant, 398; Parent and Child.

#### VII. ACTIONS.

emili5 (Okl.) Where member of bar, appointed guardian for minor, appeared and acted in trial court as attorney, and accepted service of case-made, and was present at settling of or case-made, and was present at setting or case, contention that case-made was not properly served, and that notice of time of settling thereof was not given, or that summons in error was not properly served, was without merit.—Rentie v. Rentie, 172 P. 1083.

#### INFORMATION.

See Indictment and Information.

#### INHERITANCE.

See Descent and Distribution.

#### INHERITANCE TAX.

See Taxation, \$= 876.

#### INITIATIVE.

See Municipal Corporations, @== 108.

#### INJUNCTION.

See Eminent Domain, \$\sim 278\$; Intoxicating Liquors, \$\sim 279\$; Mortgages, \$\sim 504\$; Municipal Corporations, \$\sim 513\$; Nuisance, \$\sim 32\$, 84; Waters and Water Courses, \$\sim 124\$.

### II. SUBJECTS OF PROTECTION AND RELIEF.

(B) Property, Conveyances, and Incumbrances.

\$\ist\$ 38 (N.M.) Though title to land covered by state's lieu selection is in litigation before Land Department, the state and its lessee may maintain injunction to prevent waste pending final determination by the department.—Elliott v. Rich, 172 P. 194.

# (H) Criminal Acts, Conspiracies, and Prosecutions.

6-103 (Colo.) Injunction will not lie to restrain storekeepers and assayers from carrying on the business of purchasing, knowingly, stolen ores, from plaintiff's employes; this being a felony by statute.—Heber v. Portland Gold Mining Co., 172 P. 12.

#### INNKEEPERS.

See Civil Rights, 5, 13.

#### INQUISITION.

See Insane Persons, 23, 29,

#### INSANE PERSONS.

See Taxation. 4 59.

#### I. DISABILITIES IN GENERAL

2 (Wash.) Evidence held sufficient to show that petitioner's sister was incompetent to manage her business affairs, so that court erred in failing to appoint a guardian for her es-

state.—In re Guardianship of Bayer's Estate, 172 P. 842.

An improvident business transaction should

be taken into consideration in determining question of mental incompetency of one for whom guardianship is asked.—Id.

#### II. INQUISITIONS.

23 (Colo.) Proceedings under Laws 1915, p. 336, relating to the commitment and discharge of lunatics, may be reopened upon petition of the next friend of the party in interest or by the conservator or guardian, and if his interests are antagonistic, or he refuses to act, the party committed may institute such proceedings.—Ex parte Rainbolt, 172 P. 1068. ings.—Ex parte Rainbolt, 172 P. 1068.

229 (Wash.) Notwithstanding repeal by Probate Code of 1917 (Laws 1917, p. 642) of Rem. Code 1915, § 1671, giving superior court jurisdiction to discharge one committed as insane, and enactment in 1915 of Rem. Code, § 5967, giving superintendents of insane hospitals power to discharge patient on finding him sane, inherent power of the superior court to discharge person committed as insane is not taken away.

—State v. Superior Court of King County, 172 P. 257. P. 257.

#### III. GUARDIANSHIP.

\$\ightharpoonup 30\$ (Wash.) Test in determining whether a guardian should be appointed for estate of a person is whether she is incapable of managing her business affairs by reason of mental unsoundness.—In re Guardianship of Bayer's Estate, 172 P. 842.

#### IX. ACTIONS.

\$\circ\$ 97 (Wash.) Where purchasers at tax sale sued to quiet title against incompetent former owner, his guardian ad litem being under duty to hold plaintiffs to strict proof, which could be accomplished by general denial, was not bound to plead any affirmative defenses, nor ask affirmative relief by cross-complaint.—Whitaker v. Ellis, 172 P. 881.

#### INSOLVENCY.

See Assignments for Benefit of Creditors; Bankruptcy; Banks and Banking, \$\colon 63\\\ \d\cdot \)=80; Corporations, \$\colon 544.

#### INSPECTION.

See Master and Servant, \$== 124.

#### INSTRUCTIONS.

To jury, see Criminal Law, \$\=761-829, 1056-1173; Damages, \$\=216; Trial, \$\=191-296.

#### INSURANCE.

See Assignments, 18; Equity, 57; Notice, 55.

# III. INSURANCE AGENTS AND BROKERS.

#### (A) Agency for Insurer.

95 (Wash.) Where assignment of fire policy after loss was made in presence of policy writing agent, and draft in payment of loss was sent him, indorsed by property owner and used by owner and agent in paying other creditors than the assignee, the latter could recover from insurance company the amount of his claim; agent's knowledge being imputed to the company.—Schwabacher Bros. & Co. v. Orient Ins. Co., 172 P. 568.

#### V. THE CONTRACT IN GENERAL.

(A) Nature, Requisites, and Validity.

surance term it came under the law, the parties might modify contract by agreeing that an unearned premium should stand as insurance compensation for injuries for remainder of insurance year.—Blanton v. Kansas City Cotton Mills Co., 172 P. 987.

\*\*IV. NOTICE AND PROOF OF LOSS.\*\*

STORY OF LOSS.\*\*

Of any disease suffered by insured prior to

# X. FORFEITURE OF POLICY FOR BREACH OF PROMISSORY WARRANTY, COVENANT, OR CONDITION SUBSEQUENT.

(C) Matters Relating to Person Insured.

339 (Colo.) Where usual occupation of insured is mining superintendent, he is not deemed to have changed his occupation to that of timberman at time of accident, where, although he had been temporarily employed as timberman for several weeks prior thereto, he had ceased such work when accident occurred and was planning to resume his former work.—Midland Casualty Co. v. Anderson, 172 P. 1067.

### (E) Nonpayment of Premiums or Assess-

€349(3) (Kan.) Where insurer sent policy to agent and returned insured's premium note, stating that delivery of policy to insured would be at agent's risk, it relied on ultimate liability of agent, and could not defeat action on policy because insured did not pay note.—Taylor v. Farmers' & Bankers' Life Ins. Co., 172 P. 35. \$\frac{1}{2}\$ \text{Tamers' & Bankers' Life ins. Co., 142 f. 50. \$\frac{1}{2}\$\$ \$354(3) (Wash.) Under Insurance Code, \$\frac{1}{2}\$\$ 180, recovery cannot be had on life policy, last premium not having been paid in time limited or to agent with receipt, and it not appearing the company received it.—Gibson v. New York Life Ins. Co., 172 P. 920.

# XI. ESTOPPEL, WAIVER, OR AGREE-MENTS AFFECTING RIGHT TO AVOID OR FORFEIT POLICY.

\$\iffsize 378(1)\$ (Okl.) In action on fire insurance policy, that insurer's agent knew of condition of title and of interests of other parties when he delivered policy and accepted premiums showed insurer's knowledge thereof.—Springfield Fire & Marine Ins. Co. v. First Nat. Bank of Taloga, 172 P. 652.

\$\infty\$ 388(4) (Or.) Under accident policy providing premiums are due the 1st of each month, and that acceptance of a renewal premium is and that acceptance of a renewal premium is optional with the company, in effect insurance from month to month, it need not accept a premium after the first, though its agent had for several months been in the habit of calling therefor later.—Yett v. Oregon Surety & Casualty Co., 172 P. 486.

any Co., 112 P. 480.

\$\sim 389(2)\$ (Okl.) Insurer with full knowledge of conditions of title and of insured's interest and of changes in ownership when policy was issued and delivered was estopped from setting up such conditions of title and change of ownership as a defense to an action on policy.—
Springfield Fire & Marine Ins. Co. v. First Nat. Bank of Taloga, 172 P. 652.

### XII. RISKS AND CAUSES OF LOSS.

(E) Accident and Health Insurance.

23466 (Cal.) If an accident was the proximate cause of drowning of insured, the nature of accident was immaterial on the question liability on an accident policy.—Kinsey v. Pacific Mut. Life Ins. Co. of California, 172 P. 1098.

## XIII. EXTENT OF LOSS AND LIABILITY OF INSURER.

(C) Guaranty and Indemnity Insurance. e=512 (Kan.) Policy issued by a casualty company held to indemnify against mere liability so that it was subject to garnishment at suit of employe when employer is insolvent.—Blan-

€=550 (Wash.) Death certificate is not proof of any disease suffered by insured prior to death, and is conclusive only of fact of death. —Askey v. New York Life Ins. Co., 172 P. 887.

#### XVI. RIGHT TO PROCEEDS.

€=590 (Utah) Mere fact that general creditor of deceased served notice on insurer that assignment of policy to claimant was fraudulently made to avoid payment of the debt did not conmade to avoid payment of the debt did not constitute any lien, claim, or right against the moneys payable under the policy nor against the insurer.—O'Neill v. Mutual Life Ins. Co. of New York, 172 P. 306.

#### XVIII. ACTIONS ON POLICIES.

⇒645(3) (Cal.) Where insurer alleges a certain specific breach of warranty, in that insured in accident policy falsely stated he did not have heart trouble, it cannot introduce evidence of breach of warranty as to apoplexy or other warranties, which may have caused death.—Kinsey v. Pacific Mut. Life Ins. Co. of California, 172 P. 1098.

nia, 172 P. 1098.

3-655(2) (Wash.) In an action on a life insurance policy, wherein it was claimed that assured failed to disclose that he had suffered from tuberculosis, it was not error to admit on question of good faith declarations of the insured tending to show that he believed he was suffering from pneumonia.—Askey v. New York Life Ins. Co., 172 P. 887.

In an action on a life insurance policy, defended on ground of false representations, evidence as to character of insured for truth and

dence as to character of insured for truth and veracity was properly admitted, fraud having been imputed to decedent at the time of the trial.—Id.

8--859(2) (N.M.) In an action upon a life policy, evidence tending to show a motive for committing suicide was admissible on that issue.—Skala v. New York Life Ins. Co., 172 P.

6=62(1) (N.M.) In an action on a life policy, proof of fact that blank forms of proof of death were delivered to a physician by insurer's local agent held irrelevant.—Skala v. New York Life Ins. Co., 172 P. 1046.

8=665(2) (Kan.) Evidence held to support theory that employer and indemnifying company modified contract by agreeing that unearned premiums should stand as insurance for compensation for injuries for remainder of insurance year.—Blanton v. Kansas City Cotton Mills Co., 172 P. 987.

ton Mills Co., 172 P. 987.

\$\infty\$65(3) (Colo.) In action on accident policy where company seeks to avoid payment of full amount because of change of occupation by beneficiary, evidence held to sustain finding that usual occupation was mining superintendent, as at issuance of policy, and that although temporarily employed as timberman he had censed working as such before accident and intended resuming his former work.—Midland Casualty Co. v. Anderson, 172

8-665(5) (Cal.) Evidence held sufficient to sustain finding that insured in accident policy was drowned, and did not die from heart trouble.—Kinsey v. Pacific Mut. Life Ins. Co. of California, 172 P. 1098.

6=665(6) (N.M.) In an action on a life policy containing suicide clause, evidence held to show that insured committed suicide.—Skala v. New York Life Ins. Co., 172 P. 1046.

668(7) (Wash.) In an action on a life insurance policy, wherein it was claimed that the assured represented that he had suffered from pneumonia, when in fact it was tuberculosis, the question as to his intent to deceive was, on conflicting evidence, for the jury, in view

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of Rem. Code 1915, \$ 6059-34.—Askey v. New York Life Ins. Co., 172 P. 887.

#### XX. MUTUAL BENEFIT INSURANCE. (B) The Contract in General.

\$\ightharpoonup 723(2) (Okl.) Where applicant warranted that his answers to medical examiner's questions were true, and agreed that answers and application should be a warranty, and certificate so recited, answers were warranties, and false statement therein avoided policy.—Knights and Ladies of Security v. Grey, 172 P.

\$3402, insured's answer on medical examination for membership in fraternal association that he had not applied for membership with insurer, or any other life insurance company, held to embrace life insurance companies in general.—Knights and Ladies of Security v. Grey, 172 P. 933.

#### (E) Beneficiaries and Benefits.

\$\infty\$-784(2) (Or.) Where a member of fraternal organization died after having forwarded, according to the by-laws, a request to change the beneficiary, but before such change had actually been made by the grand secretary, held, that the new beneficiary was entitled to recover.—United Artisans v. Cronise, 172 P. 109.

artisans v. Cronise, 172 F. 109. €=789(1) (Or.) Where the widow of insured was fraudulently induced to assent to a physi-cian's certificate of death to the effect that in-sured died from the use of chloroform, she could be bound only by an estoppel.—Robinson v. Knights and Ladies of Security, 172 P. 116.

#### (F) Actions for Benefits.

815(2) (Or.) In action on benefit certificate,

\$\instyle=\mathbb{8}\$15(2) (Or.) In action on benefit certificate, insurer's plea of tender of all dues paid in by deceased held insufficient.—Robinson v. Knights and Ladies of Security, 172 P. 116.

Where, in an action on a benefit certificate, the answer alleged that defendant on being informed of the facts tendered plaintiff all dues which insured had paid and that she accepted them, but it was not alleged that the sum was tendered or accepted in satisfaction, or as an accord and satisfaction, the pleading did not show a waiver of the demand.—Id.

A waiver must be pleaded with the same particularity as an estoppel.—Id.

ticularity as an estoppel.-Id.

\$\insertail \text{3.5} \text{an interpleader suit to determine the right to receive the benefit on a fraternal certificate wherein the beneficiary had been changed, evidence held not to show that such change was brought about by fraud and under the large text of t due influence by the new beneficiary.—United Artisans v. Cronise, 172 P. 109.

#### INTENT.

See Contracts, \$\infty\$=147; Criminal Law, \$\infty\$=371, 823; Statutes, \$\infty\$=181; Wills, \$\infty\$=439, 440.

#### INTEREST.

See Eminent Domain, 247; Municipal Corporations, 1002; Partnership, 75; Usury; Witnesses, 369, 370.

# I. RIGHTS AND LIABILITIES IN GENERAL.

e=19(1) (Wash.) Claim of bank, assignee of contractor with city for street improvement, against contractor's surety for amounts received by bank from city under assignment and released to labor and material claimants on surety's request, were liquidated, and interest was properly allowed.—National Surety Co. v. American Savings Bank & Trust Co., 172 P.

#### INTERROGATORIES.

See Depositions.

#### INTERSTATE COMMERCE.

See Commerce.

#### INTESTACY.

See Descent and Distribution.

#### INTOXICATING LIQUORS.

See Constitutional Law, \$\infty\$82. 240, 296; Indictment and Information, \$\infty\$176.

# II. CONSTITUTIONALITY OF ACTS AND ORDINANCES.

6-15 (Utah) Act Feb. 1, 1917 (Laws 1917, c. 2), regulating sale, manufacture, use, and possession of intoxicating liquors, is not unconstitutional.—State v. Certain Intoxicating Liquors, 172 P. 1050.

€ 17 (Utah) A city ordinance forbidding the sale of intoxicating liquor held not void for uncertainty in view of Comp. Laws 1907, \$4052.—Salina City v. Lewis, 112 P. 286; Same v. Neilsen, Id. 290.

#### VI. OFFENSES.

6=131 (Ariz.) Under Const. art. 23, forbidding the sale of intoxicating liquors of any kind, defendant's good faith in thinking that he might sell the essence of Jamaica ginger was no defense, as criminal intent or guilty knowledge is not a necessary element of the offense.

—Cooper v. State, 172 P. 276.

€=136 (Ariz.) Const. art. 23, is not a regulatory provision, but one of suppression, not per-

tory provision, but one of suppression, not permitting the sale of ardent spirits compounded with other ingredients labeled Jamaica ginger and sometimes used and sold for medicinal purposes.—Cooper v. State, 172 P. 276.

23 139 (Utah) Act Feb. 1, 1917 (Laws 1917, c. 2) §§ 2, 3, 26, abolishing property rights in liquors, and prohibiting possession thereof, except as provided in sections 6, 7, 8, and 9, permitting use for scientific, manufacturing, and sacramental purposes, forbids possession of liquors, regardless of when or how acquired, for what use, or where kept, aside from the enumerated exceptions.—State v. Certain Intoxicating Liquors, 172 P. 1050.

#### VIII. CRIMINAL PROSECUTIONS.

236(7) (Okl.Cr.App.) Evidence held insufficient to sustain conviction for unlawful possession of intoxicating liquors with intent to sell them.—Brown v. State, 172 P. 1098.

236(11) (Okl.Cr.App.) In a prosecution for an unlawful sale of intoxicating liquor, evidence held to sustain a conviction.—Vaughan v. State, 172 P. 975.

238(3) (Ariz.) In prosecution under Const. art. 23, forbidding the sale of intoxicating liquid art. uors, hold on the evidence that the intoxicating liquors, hold on the evidence that the intoxicating quality of the Jamaica ginger sold by defendant was for the jury.—Cooper v. State, 172 P. 276.

### IX. SEARCHES, SEIZURES, AND FOR-FEITURES.

245 (Utah) Though claimant acquired intoxicating liquors, 170 confiscating the very representation of the confiscating liquors and abolishing property rights therein, they were confiscable after such effective date.—State v. Certain Intoxicating Liquors, 172 P. 1050.

\$\insertains \text{Laws 1910, \cdot 3617, as it was not an unler Rev. Laws 1910, \cdot 3617, as it was not an

"appurtenance" within the act; "appurtenance" meaning that which belongs to something else, adjunct, an appendage.—One Cadillac Automobile v. State, 172 P. 62.

bile v. State, 172 P. 62.

2246 (Okl.) Motor car used in unlawful conveyance of intoxicating liquor is not subject to seizure as an "appurtenance" within Rev. Laws 1910. § 3617, declaring that when offense shall occur in presence of any sheriff or other officer, such officer shall, without warrant to arrest offender, seize liquor, bars, and appurtenances thereunto belonging.—Lebrecht v. State, 172 P. 65.

172 P. 65.
2246 (Okl.) Automobile used for unlawful conveyance of intoxicating liquor in presence of officer empowered to serve criminal process was not subject to seizure by him and to forfeiture by state under Rev. Laws 1910, § 3617, and is not an "appurtenance" within that section.—State v. One Packard Automobile, 172 P. 66; One Moon Automobile v. State, Id.

€=246 (Okl.) Prior to Laws 1917, c. 188, there was no legal authority for the seizure and confiscation of an automobile used for the unlawful transportation of intoxicating liquors.— State Nat. Bank of Ardmore v. State. 172 P. 1073.

a permit to a druggist to ship intoxicating liquors into the state was absolutely void after 30 days and liquor was contraband, although permit was good when shipment started.—State v. Great Northern Ry. Co., 172 P. 546.

#### X. ABATEMENT AND INJUNCTION.

279 (Mont.) In contempt proceedings for violation of an injunction pendente lite against a liquor nuisance, issued ex parte on an allegation in the complaint, on which issue has not been joined, that defendant was the owner or manager of the place, the order for injunction cannot be taken on certiorari, as adjudication of the fact alleged.—State v. District Court of Second Judicial District in and for Silver Bow County, 172 P. 539.

In contempt proceedings for violation of an injunction restraining defendant, as owner of a salcon, from selling liquor to women therein, evidence held insufficient to show defendant was owner or manager or in authority over the place.—Id.

#### INTOXICATION.

See Evidence, 502; Highways, 184; Witnesses, 2327.

#### INVESTMENT.

See Guardian and Ward, \$\sim 53.

#### INVITED ERROR.

See Appeal and Error. \$\sime\$82.

#### IRRIGATION.

See Waters and Water Courses, 242.

### JAMAICA GINGER.

See Intoxicating Liquors, 4=131, 136.

#### JITNEYS.

See Municipal Corporations, 5705: Trial. **æ**⇒253.

#### JOINDER.

See Action, ←45-50; Appeal and Error, ←325; Parties, ←25.

an accounting was necessary, where defendant breached his agreement before time for division of net profits.-Butler v. Union Trust Co., 172

P. 601. Cal.) Where, in action to dissolve alleged partnership and secure an accounting, plaintiff alleged facts which he claimed created a partnership, which facts were found to be true and to show a joint adventure, court did not err in refusing a nonsuit on ground that facts showed a joint adventure only.—Butler v. Union Trust Co., 172 P. 601.

#### JUDGES.

See Appeal and Error, \$\infty\$185; Constitutional Law, \$\infty\$31; Evidence, \$\infty\$44; Guardian and Ward, \$\infty\$53; Justices of the Peace.

#### II. SPECIAL OR SUBSTITUTE JUDGES.

E=15(1) (Wyo.) Comp. St. 1910, § 912. providing that "when from any cause" district judge is unable to try cause he shall call upon judge from another district to preside thereat, held to give judge authority to call in another judge whenever he deems cause sufficient.—Hoglan v. Geddes, 172 P. 136.

Where district judge presides at trial in another district upon order of regular judge thereof, holding of court by regular judge as as same time does not invalidate authority of special judge, whatever effect it may have on the proceeding in which regular judge is sitting.—Id.

—1d. —18 (Wyo.) Order calling district judge to try case in another district, and giving as reason that regular judge thereof is otherwise occupied, held to confer authority upon judge so called upon, under Comp. St. 1910, § 912. providing that, "when from any cause" judge is unable to try case, he may call in a judge, from another district to preside thereat.—Hoglan v. Geddes, 172 P. 136.

19 (Wyo.) Where district judge presides at trial in another district on order of judge of at trial in another district on order of judge of district wherein cause is pending, under Const. art. 5, § 11, and Comp. St. 1910, § 912, he is at least de facto judge; and, where no objection to his authority is made before or during trial, all objection to such authority is waived.—Hoglan v. Geddes, 172 P. 136.

Objection to superitute judge called from one

Objection to substitute judge called from one Objection to substitute judge called from one district to sit in another district on grounds that there was not sufficient reason for calling in of such judge, and that resident judge was sitting in another case at same time that substitute judge was presiding in case to which he was called, cannot be made for first time in motion for new trial.—Id.

### III. RIGHTS, POWERS, DUTIES, AND LIABILITIES.

\$\insertarrow 25(2)\$ (Kan.) Where on disqualification of regular judge another district judge was called in under Code Civ. Proc. \$ 57 (Gen. St. 1915, \$ 6947), his jurisdiction ended when he declined to complete trial, and the regular judge should request judge of some other district to serve.—Berry v. Dewey, 172 P. 27.

€-31 (Cal.) Judge who denied motion for new make an order in diminution of his term, make an order in diminution of record, even if counsel for parties so stipulated, since jurisdiction cannot be conferred by consent.—Kurtz v. Cutler, 172 P. 590.

#### IV. DISQUALIFICATION TO ACT.

JOINT ADVENTURES.

\$\iffilleq 36 \text{ (Kan.) Where judge of district court is related to attorney in cause and is to fix his fee, the attorney is one of the "parties" in interest within Code Civ. Proc. \\$ 57 (Gen. St. 1915, \\$ 6947), providing that where judge is related to parties place of trial shall be changed.

ed, or another district judge called.—Brown v. Brown, 172 P. 1005.

In suit for divorce, where wife's attorney was the son of the judge and asked for counsel fees, it was error to refuse defendant's application for change of venue on ground of relationship.-Id.

€==51(2) (Wash.) By requesting that the case be tried to a jury, a party submitted her cause to the judge, and could not, after the request was denied, avail herself of the statute, providing for change of judge on ground of prejudice.—State v. Bell, 172 P. 221.

\$\iffsize 51(4)\$ (Wash.) Under Rem. Code 1915, \$\frac{3}{2}09-1, where there is only one judge and a motion for change of judge requires an investigation, the judge may continue the hearing.

-State v. French, 172 P. 1156.

Where a motion for change of judge was made under Rem. Code 1915, § 209-1, and the hearing was continued, an order, changing the venue, could not be made without notice to the moving party.—Id.

the moving party.—Id.

556 (Wash.) Where, under Rem. Code 1915, 209—1, on affidavit of prejudice, a judge decides to let the case proceed in his own court and calls in another judge, and for some reason such judge is unable to conclude it, the disqualified judge can call in another, but cannot reassume jurisdiction and order the cause transferred to another jurisdiction, and it is immaterial that no formal order was made calling in the other judge.—State v. French, 172 P. 1156.

#### JUDGMENT.

See Criminal Law, \$\sim 998; Execution: Plead-

For judgments in particular actions or proceed-ings, see also the various specific topics. For review of judgments, see Appeal and Error.

# I. NATURE AND ESSENTIALS IN GENERAL.

17(9) (Okl.) Where affidavit for publication was not sufficient, trial court never acquired jurisdiction of defendants so served, and judgment against them was void, and it was not necessary that they be served with casemade, notice of its settlement, or service of summons in error.—Rentie v. Rentie, 172 P. 1083.

### VI. ON TRIAL OF ISSUES. (A) Rendition, Form, and Requisites in General.

(Sulphur v. Webster, 172 P. 943.

# (C) Conformity to Process, Pleadings, Proofs, and Verdict or Findings.

Proofs. and Verdict or Findings.

250 (Cal.App.) A party is not only entitled to any and all relief which is appropriately within the scope of his pleading, but may be awarded such relief upon any substantial legal or equitable ground coming within the fair and reasonable import of the averments of his pleading.—Haight v. Stewart, 172 P. 769.

In a suit to annul a contract for the exchange of real estate for certain lands and corporation bonds, where complaint alleged that defendant had no title to the lands, and that the bonds were worthless, judgment based on failure of consideration could properly

ed on failure of consideration could properly have been rendered within the pleadings, if supported by the evidence.—Id.

# VIII. AMENDMENT, CORRECTION, AND REVIEW IN SAME COURT.

297 (Wash.) At common law, a court might at any time during the term modify or cusable neglect within one year after rendition

vacate a judgment to make it conform to the

vacate a judgment to make it conform to the judgment actually rendered; but, after adjournment, it was powerless to protect itself from its own errors, or the parties from fraudulent interference in procuring judgments.—State v. Superior Court of Washington for King County, 172 P. 336.

2298 (Okl.) Judgments, decrees, or other orders of court, however conclusive in their character, are under control of court which pronounces them during term at which they are rendered or entered of record, and may during that time be modified.—North v. Hooker, 172 P. 77.

2321 (Wash.) Whether application for mod-

€=321 (Wash.) Whether application for modification of judgment for mistake and inadvertence is made under Rem. Code 1915, § 303, vertence is made under Rem. Code 1915, § 303, as to amendment of proceedings for mistake or inadvertence, or sections 464-473, requiring modification for mistake to be applied for within one year, it must be made within a year from the judgment entry.—In re Shilshole Ave. in City of Seattle, 172 P. 338.

In determining whether application for modification of judgment on ground of mistake and

find determining whether application for mon-fication of judgment on ground of mistake and inadvertence is made within one year as re-quired by Rem. Code 1915, §§ 464-473, time during which appeal from the judgment is pending should not be counted.—Id.

pending should not be counted.—Ad.

325 (Kan.) Matters of evidence and estoppel which might be sufficient to defeat a motion to correct a judgment held insufficient to justify a refusal to consider motion on merits or to justify striking motion from files.

Miller v. Miller, 172 P. 1010.

#### IX. OPENING OR VACATING.

338 (Okl.) Power of trial courts to vacate arial courts to vacate or modify their judgments or orders at or after the term does not authorize setting aside judgment or final order at subsequent term for errors of law reviewable on motion for new trial at former term.—McCornack v. Fleming, 172 P. 962.

\$\insigma 341\$ (Okl.) Judgments, decrees, or other orders of court, however conclusive, are under control of court which pronounces them during term at which they are rendered or entered of record, and may during that time be set aside or vacated.—North v. Hooker, 172 P. 77. @=342(3) (Okl.) District court has no power to vacate or modify its judgment for "an irregularity in obtaining a judgment or order" under Rev. Laws 1910, § 5267, subd. 3, on motion filed after adjournment of term at which judgment was rendered and entered.— McCornack v. Fleming, 172 P. 952

McCornack v. Fleming, 172 P. 952.

363 (Wash.) A judge does not lose control where he signs findings of fact and order of judgment, and gives them to the clerk, where before entry he tells the clerk to hold them, and where the entry clerk enters them, there is a mistake, neglect, or omission of the clerk, for which the judgment can be vacated.—Hartford v. Stout, 172 P. 1168.

384 (Wash.) Under Rem. Code 1915, \$468, governing procedure for vacation of judgment, no formal pleadings are required, and the objection of the party opposing vacation need not be formal, but must be preserved in the record.—Hartford v. Stout, 172 P. 1168. ⊕388 (Wash.) Under Rem. Code 1915, § 468, notice of proceeding to vacate a judgment is unnecessary, where the opposing party appears voluntarily and makes no objection on that ground.—Hartford v. Stout, 172 P. 1168.

#### X. EQUITABLE RELIEF.

#### (A) Nature of Remedy and Grounds.

407(5) (Wash.) In view of Rem. Code 1915, §§ 303, 464, allowing modification of judgment for mistake, inadvertence, surprise, or ex-

of judgment, remedy of party complaining that a judgment entered upon stipulation did not conform to the stipulation is, after one year from the judgment, exclusively by suit in equity.—State v. Superior Court of Washington for King County, 172 P. 336.

8.3419 (Cal.) Affidavit for publication of summons under Code Civ. Proc. § 412, on ground that defendant could not, after due diligence, be found within state, held sufficient to sustain order for publication when attacked by action to set aside judgment.—Clarkin v. Morris, 172 P. 981.

439 (Okl.) In action to enjoin collection of judgment and to have damages ascertained and purgment and to have damages ascertained and set off against the judgment, where plaintiff under Rev. Laws 1910, § 4771. had withdrawn counterclaim in action in which judgment was rendered, he thereby waived it and could not make it the basis of equitable relief.—Kibby v. Binion, 172 P. 1091.

# . MERGER AND BAR OF CAUSES OF ACTION AND DEFENSES.

#### (A) Judgments Operative as Bar.

e=569 (Wash.) The court being without jurisdiction to hear a motion under Rem. Code 1915, §§ 303, 464, to vacate and amend a judgment. its judgment denying such relief, would not bind him in suit on the merits for equitable relief from such judgment.—State v. Superior Court of Washington for King County, 172 P.

\$\infty\$=570(3) (Cal.) Dismissal on plaintiff's direction does not operate as a bar to a subsequent suit.—Foster v. Branen, 172 P. 382.

## (B) Causes of Action and Defenses Merg-ed, Barred, or Concluded.

€==584 (Wash.) Where suit against defendant and surety company on bond given to stay execution of judgment was dismissed with prejudice, though surety was released from liability to pay judgment, defendant, whose liability was not traceable to bond, but existed independently, was not released.—Siegley v. Kelley, 172 P.

e=>592 (Wash.) A party who set off a claim against an assignor of a claim against him in an action by the assignee can sue the assignor for any balance due over and above the amount allowed as a set-off.—The Nut House v. Pacific Oil Mills, 172 P. 841.

#### XIV. CONCLUSIVENESS OF ADJUDI-CATION.

#### (A) Judgments Conclusive in General.

e=634 (Okl.) Matter once passed to final judgment without fraud or collusion, in a court of competent jurisdiction, becomes res judicata, and as between same parties or their privies cannot be reopened or subsequently considered.

—Comanche Ice & Fuel Co. v. Binder & Hillery, 172 P. 629.

⇒634 (Wash.) To make a judgment res judicata in a subsequent action there must be concurrence of subject-matter, cause of action, persons and parties, and quality of persons.—Northern Pac. Ry. Co. v. Snohomish County, 172 P. 878.

#### (B) Persons Concluded.

6-675(1) (Wash.) Defendant who was privy though not formal party to whole of course of litigation is bound by decree in one suit adjudging property was separate property of another defendant, married woman.—Siegley v. Kelley, 172 P. 203.

pendency of suit, although they failed to make defense therein.—Montana Coal & Iron Co. v. Hoskins, 172 P. 118.

e=702 (Wash.) Decree in mandamus pro-ceeding by mayor of city to compel county tax assessor to extend upon county tax rolls cer-tain city levies would not be res judicata in action by taxpayer against county to strike such levy from tax rolls.—Northern Pac. Rv. Co. v. Snohomish County, 172 P. 878.

€=>707 (Or.) One not a party to suit for construction of trust deed is not concluded by decree therein.—Crown Co. v. Cohn, 172 P. 2014

#### (C) Matters Concluded.

e=713(2) (Wash.) Where plaintiff brought action to enjoin alleged violation of a written agreement, the question being as to the intention of the parties, a judgment in such action was a bar to a subsequent action to reform the instrument on the ground of mutual mistake.—Tacoma Mill Co. v. Northern Pac. Ry. Co., 172 P. 812.

\$\infty\$-713(3) (Wash.) Where claim represented by duebill given to plaintiff by defendant, managing director of a lumber company, was in a aging director of a number company, was in a suit between plaintiff and lumber company dismissed and held to be defendant's obligation, plaintiff was not precluded from collecting the claim from defendant by a court order entered by consent in such suit settling disputes between the parties, and not mentioning such claim.—Nebraska Inv. Co. v. Corlett, 172 P. 851.

€=720 (Okl.) A matter directly in issue, and determined by court of competent jurisdiction, is conclusive as to the parties and their privies, and cannot be relitigated by them in action in same court or in court of concurrent jurisdiction on same or different cause of action.—Cumanche Ice & Fuel Co. v. Binder & Hillery, 172 P. 629.

\$\insertarrow 728\$ (Cal.) Court's finding in relation to immaterial matter will not control parties in any subsequent proceeding.—In re Lowe's Estate, 172 P. 583.

729 (Colo.) Although right of attorneys to lien was in issue on first hearing involving dis-tribution of trust fund, and decree rendered made no allowance thereof, where decree was opened on petition of interveners, and right to assert lien expressly reserved in amended decree, interveners cannot, in subsequent proceeding, be heard to say that right to lien is barred by statute of state where estate of deceased beneficiary is under administration.—
Art Institute of Chicago v. Denison, 172 P. 5. Art institute of Chrago v. Denison, 112 P. 5. \$\infty\$-735 (Okl.) A judgment for full amount of principal and interest contracted for in a usurious transaction is not res adjudicata as to an action brought afterwards to recover twice the usurious interest paid in satisfaction of such judgment.—Bean v. Rumrill, 172 P. 452.

# XXII. PLEADING AND EVIDENCE OF JUDGMENT AS ESTOPPEL OR DEFENSE.

em948(1) (Okl.) Where a former adjudication is relied on as a defense, it should be made to appear by the pleadings.—James McCord Co. v.

appear by the pleadings.—James McCord Co. v. Johnson Grocery Co., 172 P. 438.

—3949(2) (Kan.) In an action to enjoin the taxation, as personal property, of the grantor's right under his deed to receive an annual payment from grantee, prior adjudication against its taxability held sufficiently pleaded.—Phillips v. Springer, 172 P. 1017.

Kelley, 172 P. 203.

\$683 (Or.) In suit by attorney against clients and latters' assignees of corporate stock to recover for services and to enforce a lien on the stock, the clients and assignors were concluded by the decree, being in privity with the parties thereto, where they had timely notice of therein held to warrant finding that both hus-

band and wife had notice of pendency of suit, so as to be bound by decree therein against as-signees.—Montana Coal & Iron Co. v. Hoskins, 172 P. 118.

e=958(1) (Okl.) Where a former adjudication is relied on as a defense, it should be made to appear by the verdict and findings or judgment that the issues involved are res judicata.

—James McCord Co. v. Johnson Grocery Co., 172 P. 438.

#### JUDICIAL NOTICE.

See Criminal Law, \$\iiii 304; Evidence, \$\iiii 14-

#### JUDICIAL POWER.

See Constitutional Law, \$\sim 52. 70-80.

#### JUDICIAL SALES.

See Execution, \$\inspec 256; Executors and Administrators, \$\inspec 349; Mortgages, \$\inspec 504-535.

#### JURISDICTION.

See Appeal and Error, \$\infty\$185, 493: Courts; Criminal Law, \$\infty\$90, 207. 1018, 1019; Forcible Entry and Detainer; Habeas Corpus, \$\infty\$4; Highways, \$\infty\$29; Indians, \$\infty\$28.

#### JURY.

See Criminal Law, \$\infty\$741, 761, 1144, 1166\(\frac{1}{2}\); New Trial, \$\infty\$51.

#### II. RIGHT TO TRIAL BY JURY.

e=10 (Cal.) Constitutional provisions guaranteeing the right to a trial by jury establish the right to a trial as known at common law.

-Ex parte Mana, 172 P. 986.

and assayer from carrying on the business of purchasing from plaintiff's employes ore stolen from plaintiff's mine, such act, constituting a felony, would deny defendant the right to trial by jury.—Heber v. Portland Gold Mining Co., 172 P. 12.

# IIL QUALIFICATIONS OF JURORS AND EXEMPTIONS.

a matter subject to legislative control, and, even though prescribed qualifications may differ from those at common law, the legislation is valid.—Ex parte Mana, 172 P. 986.

In view of Const. U. S. Amend. 14, Const. Cal. art. 1, § 7, art. 20, § 18, and article 2, § 1, as amended October 10, 1911, held, that Legislature was justified in considering matter of sex as a question of qualification, and in persex as a question of qualification, and in permitting women to serve as jurors.—Id.

#### V. COMPETENCY OF JURORS, C LENGES, AND OBJECTIONS. CHAL-

dire stated that, if defendant could prove his innocence, it was his duty to do so, held to have qualified himself by subsequent answers that he would follow instructions of court, etc.—State v. De Weese, 172 P. 290.

136(9) (Utah) Under Comp. Laws 1907, \$ 4873, where one juror died after a substantial astrong a substantial part of state's evidence had been introduced, and attorneys stipulated that new juror be sworn, defendant, who had exhausted his peremptory challenge when the situation arose, would not be entitled to additional peremptory challenges.—State v. De Weese, 172 P. 290.

#### JUSTICES OF THE PEACE

See Criminal Law, \$\sim 90, 1174.

#### III. CIVIL JURISDICTION AND AU-THORITY.

e=31 (N.M.) Jurisdiction of justice of peace is inferior, special, and limited by statute to specific territorial boundaries established by law

specinc territorial boundaries established by law and to specific subject-matters.—Tietjen v. McCoy, 172 P. 1144.

538(1) (N.M.) Under Code 1915, \$ 3231, jurisdiction of justice of peace must affirmatively appear from record.—Tietjen v. McCoy, 172 P. 1144.

detainer, there is no qualified justice of precinct in which property is situated, such fact must affirmatively appear from record, and should be incorporated in complaint that jurisdiction of justice in adjoining precinct may fully appear.—Tietjen v. McCoy, 172 P. 1144.

€ 59 (N.M.) Under Code 1915, § 3231, jurisdiction of justice of peace cannot be presumed.

—Tietjen v. McCoy, 172 P. 1144.

#### IV. PROCEDURE IN CIVIL CASES.

\$\iff 34(1) (Utah) A defendant sued in replevin before a justice of the peace who had filed a special demurrer submitting jurisdiction of court cannot, after adverse determination with time given to answer, challenge jurisdiction of justice by application to district court for certiorari.—State v. West Pub. Co., 172 P. 678.

e=91(8) (Utah) Where a complaint in replevin before a justice of the peace was verified June 6th, and not filed until June 12th, the court was not thereby prevented from acquiring jurisdicnot thereby prevented from acquiring jurisdiction by reason of the complaint not alleging a present ownership of the goods, as required by Comp. Laws 1907, § 3046.—State v. West Pub. Co., 172 P. 678.

€=92 (Okl.) A defendant in the justice court without filing pleadings may prove any defense he may have to plaintiff's claim.—St. Louis & S. F. R. Co. v. Whitefield, 172 P. 637.

S. F. R. Co. v. Whiteheid, 172 F. 637.

35(4) (Cal.) Where superior court had jurisdiction of appeal from justice's judgment, and had power to dismiss it and make necessary orders to dispose of it on ground it had not been perfected, its judgment, dismissing appeal, is conclusive, in action to enjoin enforcement of justice's judgment.—Rushton v. Reeve, 172 P. 608.

#### V. REVIEW OF PROCEEDINGS. (A) Appeal and Error.

(A) Appeal and Error.

\$\leftarrow{139}\$ (Okl.) In view of Rev. Laws 1910, \( \frac{5}{5456}\$, the two methods to review judgment of justice of peace court are by appeal to county, superior, or district court to be tried de novo, and by review upon questions of law upon bill of exceptions and petition in error.—Chicago, R. I. & P. Ry. v. Locke, 172 P. 52.

\$\leftarrow{141}\$ (1) (Nev.) District court has final appellate jurisdiction over justice court, so that where defendant after adverse judgment in justice's court, brought certiorari to district court, which dismissed writ, Supreme Court had no jurisdiction over appeal under title of cause followed in justice's court; different title having been used in district court.—Mazade v. Justice's Court of Goldfield Tp., Esmeralds County, 172 P. 378.

145(1) (Okl.) Review of judgment of justice of peace court by county, superior, or district court, upon questions of law, may be presented by bill of exceptions and petition in error, regardless of amount of such judgment.—Chicago, R. I. & P. Ry. v. Locke, 172 P. 52.

€=162(1) (Cal.) Where appeal is taken from justice's judgment to superior court on questions of law alone, and no stay bond is filed, it

is competent for justice, even before disposal of appeal, to enforce judgment by execution.—

Rushton v. Reeve, 172 P. 608.

| Cal.App. In action against agai

E=174(4) (Okl.) On appeal from justice court to county court, where no answer to pleadings has been filed in justice court, defendant may prove any defense he may have to plaintiff's claim.—St. Louis & S. F. R. Co. v. Whitefield, 172 P. 637.

## 174(13) (Okl.) Defendant, filing no answer in justice court, was entitled to make any defense in county court without answer, and might show that interstate shipment of live stock for which plaintiff claimed damages moved under a special contract, limiting defendant's liability.—St. Louis & S. F. R. Co. v. Whitefield, 172 P. 637.

#### JUSTIFIABLE HOMICIDE.

See Homicide, \$== 105-116.

#### JUSTIFICATION.

See Homicide, 4-151; Libel and Slander, 4-54.

#### KNOWLEDGE.

See Notice.

#### LACHES.

See Corporations, 4-426; Wills, 4-259.

#### LANDLORD AND TENANT.

See Fixtures, 4=15.

# I. CREATION AND EXISTENCE OF THE RELATION.

\$\instructure{\intity}}}}}}}}}}} intiltime \text{intervire in the crops, increase of live stock, etc.,}}}}}}}}}} \enderright)}}}}}}} created the relation of master and servant, and not that of landlord and tenant, or landlord and cropper.—Bookhout v. Vuich, 172 P. 740.

# III. LANDLORD'S TITLE AND RE-VERSION.

#### (A) Rights and Powers of Landlord.

57(2) (Cal.App.) Where landlord entered into contract whereby a creditor was to collect the rent from a tenant and apply a certain amount on the indebtedness each month, evidence held insufficient to show that landlord interfered with collection of such rent.—Dodge v. Avery, 172 P. 759.

# VII. PREMISES AND ENJOYMENT AND USE THEREOF.

#### (D) Repairs, Insurance, and Improvements.

655 (Colo.) Where a lease provided that lessor was to make certain improvements and repairs, but did not specify time in which such work was to be done, the completion of such work was not a condition precedent to the vesting of the leasehold estate.—Trimble v. Collins, 172 P. 421.

Where lessor agreed to make certain improvements and repairs, but lease did not specify when they were to be made, he has a reasonable time in which to do the work.—Id.

#### (F) Eviction.

180(4) (Wash.) Where plaintiff was operating plant of a corporation at sufferance, there could be no recovery for loss of profits due to ouster.—Clark v. Groger, 172 P. 1164.

#### VIII. RENT AND ADVANCES. (B) Actions.

delinquent rent, evidence held to support find- See Obscenity, 5-11; Prostitution.

S=231(8) (Cal.App.) In action against assignee of a lease which had assigned it to another person who did not pay his rent, evidence held sufficient to sustain finding that defendant was an assignee of the lease for value, and was not a mere reorganization of the original lessee corporation.—S. C. Smith Estate v. J. M. Dunn Auto Co., 172 P. 415.

€=233(2) (Colo.) In an action for rent under a lease providing for repairs, but not indicating the time for making them, whether such repairs were made within a reasonable time is a question for the jury.—Trimble v. Collins, 172 P. 421.

# IX. RE-ENTRY AND RECOVERY OF POSSESSION BY LANDLORD.

⇒291(11) (Wash.) Under Rem. Code 1915, \$ \$\frac{2329}{(11)}\$ (Wash.) Under Rem. Code 1915, \$\frac{3}{8}\$\$ \$813, providing that tenants of agricultural lands holding over more than 60 days after expiration of term without demand or notice to quit, may hold over for another year, an oral notice before the termination of the lease is sufficient to support an unlawful detainder action.—Smeltzer v. Webb, 172 P. 750.

#### LANDS.

See Indians, 4=15; Public Lands.

#### LANGUAGE.

See Contracts, 4147, 152; Obscenity, 44; Wills, 422.

#### LARCENY.

See Embezzlement; False Pretenses; Receiving Stolen Goods.

# II. PROSECUTION AND PUNISH-MENT.

#### (A) Indictment and Information.

&==28(1) (Okl.Cr.App.) Information alleging unlawful, felonious taking and asportation of live stock without owner's consent, and with felonious intent to deprive owner thereof, and to convert it to taker's use, contained all essen-tial elements of the crime.—Dunn v. State, 172 P. 463.

#### LAST CLEAR CHANCE.

See Negligence, \$\infty\$83; Railroads, \$\infty\$38, 390; Street Railroads, \$\infty\$103.

#### LATENT AMBIGUITY.

See Evidence, €=3452.

#### LAW OF THE CASE.

See Appeal and Error, \$== 1097.

#### LEASE.

See Landlord and Tenant, 57; Mines and Minerals, 56-79; Trusts, 205.

#### LEGACIES.

See Wills, 4=714, 77-3.

#### LEGISLATURE.

See Constitutional Law, 52, 62, 70.

#### LEGITIMACY.

See Bastards, == 12.

#### LETTERS.

See Criminal Law, 433.

#### LEWDNESS.

#### LIBEL AND SLANDER.

# I. WORDS AND ACTS ACTIONABLE, AND LIABILITY THEREFOR.

Though malice is gist of criminal charge of libel, it is not ordinarily essential element in civil action for slander or libel.— Ecuyer v. New York Life Ins. Co., 172 P. 359.

€=6(4) (Okl.) A teacher's entry in a school register, kept under Rev. Laws 1910, § 7828, that a certain pupil was ruined by tobacco and whisky, is defamatory.—Dawkins v. Billingsley, 172 P. 69.

simple (Wash.) Charges of embezzlement and carelessness, made by agents of life insurance company against its cash clerk, held slanderous per se, unless true or privileged.—I yer v. New York Life Ins. Co., 172 P. 359.

# II. PRIVILEGED COMMUNICATIONS, AND MALICE THEREIN.

€-4! (Okl.) A teacher's entry in a school register that a pupil was ruined by tobacco and whisky is not a privileged communication, within Rev. Laws 1910, § 4958.—Dawkins v. Billingsley, 172 P. 69.

2341 (Wash.) Where alleged slanderous communication is prompted by duty to public or third person, or is made in good faith and without malice, touching matter in which party making it has interest, to another having a corresponding interest, it is qualifiedly privileged.—Ecuyer v. New York Life Ins. Co., 172 P. 359.

e=44(3) (Wash.) Communications touching minor's conduct, made to or in presence of parent, are qualifiedly privileged, if made in good faith, particularly if interview was sought by parent, which is also rule, if child, though adult, is female living with parents, otherwise, communication which is invited or sources of the communication. nication. unless invited or acquiesced in, is not privileged, when made to parent.—Ecuyer v. New York Life Ins. Co., 172 P. 359.

&=45(2) (Wash.) Communication to business manager of one life insurance company by cashier of another, in response to inquiry regarding former clerk of cashier's company, who had applied to business manager's company for employment, giving cashier as reference, held qualifiedly privileged.—Ecuyer v. New York Life Ins. Co., 172 P. 359.

⇒47 (Wash.) Where interview in presence of others was invited or even reluctantly consented to by person claimed to have been defamed, occasion was qualifiedly privileged, whether such persons were strangers or kindred.—Ecuyer v. New York Life Ins. Co., 172 P. 359.

€=51(1) (Wash.) To recover for libel or slander in case of qualified privilege, actual malice must be present.—Ecuyer v. New York Life Ins. Co., 172 P. 359.

6.51(4) (Wash.) Where agents of one life insurance company, when they received inquiry from agent of another as to conduct of former employé, who had applied to other company for employment, stated truthfully that he had been at least careless in keeping his cash, they did not exceed qualified privilege of communication.—Ecuyer v. New York Life Ins. Co., 172 P. 359

#### III. JUSTIFICATION AND MITIGA-TION.

€=54 (Wash.) Truth is complete defense to civil action for libel or slander.—Ecuyer v. New York Life Ins. Co., 172 P. 359.

#### IV. ACTIONS.

#### (A) Right of Action and Defenses.

#### (C) Evidence.

emil(4) (Wash.) The burden of proving actual malice to overcome qualified privilege is on plaintiff.—Ecuyer v. New York Life Ins. Co., 172 P. 359.

@==101(5) (Wash.) In action for slander, burden to prove truth of defamatory words is on defendant.—Ecuyer v. New York Life Ins. Co., 172 P. 359.

#### (E) Trial, Judgment, and Review.

(Color) (Okl.) In an action for libel under Rev. Laws 1910, § 4959, evidence held to require submission of case to jury.—Dawkins v. Billingsley, 172 P. 69.

Ellingsley, 172 P. 69.

20123(7) (Wash.) In action for slander, defense of truth, as in other cases where judgment of nonsuit is asked, may be established by plaintiff's own evidence.—Ecuyer v. New York Life Ins. Co., 172 P. 359.

In action for slander against life insurance company by its cash clerk, charged by company's auditor in presence of his father with stealing money collected by him in payment of premiums, whether company had made out its premiums, whether company had made out its defense of truth held for jury.—Id.

23(8) (Wash.) Where it is not disputed slanderous words were uttered, question whethslanderous words were uttered, question whether occasion was privileged is for court; whether good faith existed in statement, or whether it was malicious, is usually question of fact for jury, from language and circumstances.—Ecuyer v. New York Life Ins. Co., 172 P. 359.

In action by life insurance company's cash clerk, 25 years old and living with his father, against company, for slander in charging him, through its auditor, in presence of his father, with stealing premium receipts, question of privilege held for court.—Id.

In action for slander against life insurance company by cash clerk, question of company's malicious excess of privilege in charging clerk, in presence of father, through its auditor, with larceny of cash received in payment of premiums, was for jury.—Id.

#### LICENSES.

See Constitutional Law, \$\sim 80; Evidence. \$\sim\$

#### I. FOR OCCUPATIONS AND PRIVI-LEGES.

© 7(6) (Cal.App.) Provisions of city ordinance for licensing certain businesses, imposing fee of \$60 a year on every person selling certain articles, but excepting persons having regularly incensed places of business in city, were void.—Ex parte Hart, 172 P. 610.

Ex parte Hart, 172 P. 610.

2-14(2) (Wash.) Undertaker who used automobile for hire in carrying families and friends from residences to cemeteries and return while conducting funerals was engaged in "occupation of carrying passengers for hire" within ordinance of city of Spokane levying license fee of \$5 per year for every vehicle so used.—City of Spokane v. Knight, 172 P. 823.

For cases in Dec. Dig. & Am. Dig. Key No. Series & Indexes see same topic and KEY-NUMBER 172 P.--79

#### LIENS.

See Attorney and Client, \$\inser\*182; Bailment; Chattel Mortgages, \$\inser\*135-147; Logs and Logging; Mechanics' Liens; Municipal Corporations, \$373; Pledges.

#### LIFE ESTATES.

See Dower.

(Or.) Under will devising all of estate to the wife, providing that on her death one half should go to her relatives and half to the relatives of the testator, the wife was a life tenant, and under no obligation to pay off the principal of a mortgage, even to prevent fore-closure sale.—Tyler v. Bier, 172 P. 112.

When a life tenant pays an incumbrance with her money she may call on the remaindermen for contribution, and has a lien on the property for the amount of the principal, but she must personally pay the interest, at least to the extent of the income or rental value of the property

erty.—Id.

Where a life tenant paid the principal of a mortgage out of her individual estate, the re-maindermen should not be required to pay interest on the mortgage, since the payment of interest tended to reduce their estate.—Id.

#### LIFE INSURANCE.

See Insurance, == 339, 655, 668.

#### LIMITATION OF ACTIONS.

See Adverse Possession; Equity, 4 87.

#### I. STATUTES OF LIMITATION.

### (B) Limitations Applicable to Particular

16 (Wash.) Rem. Code 1915, §§ 155-157, 159, 165, and other provisions limiting period within which actions shall be prosecuted, are intended to cover every form of action maintainable either in law or equity, in view of section 153.—Hotchkin v. McNaught-Collins Improvement Co., 172 P. 864.

statute of limitations found in Rev. Laws 1910, 4655, subd. 4, applies.—Campbell v. Dick, 172 P. 783.

32(1) (Wash.) Within the statute of limitations, a riparian right to continue to take the flow of water lawfully appropriated is a valuable property right that is so far incident to the land as to become a part of the estate therein.—Domrese v. City of Roslyn, 172 P.

### II. COMPUTATION OF PERIOD OF LIMITATION.

#### (A) Accrual of Right of Action or Defense.

46(5) (Kan.) Where a landowner who had agreed to leave one-half of his farm to his son in consideration of services of the son sold land, son's right of action then accrued, and limitations began to run.—Engelbrecht v. Herrington, 172 P. 715.

\$\infty\$=55(1) (Wash.) Action for tort accrues when wrong is committed.—Rockwell v. Day, 172 P. 754.

172 P. 704.

\$\instylequip 55(4)\$ (Wash.) General rule is that statute of limitations, in case of seduction, runs from time of seduction where action is maintained by woman on her own behalf.—Rockwell v. Day, 172 P. 754.

Where plaintiff, after seduction, broke off her relations with defendant, but thereafter returned to him voluntarily and under no new promise, she was bound to bring her action within three years after her voluntary return.—Id. —Id

em56(2) (Kan.) A guarantor who has become such at the request of the principal has the benefit of an implied promise of indemnity, and a new and independent cause of action arises payment, irrespective of the time of maturity of original debt.—Leslie v. Compton, 172 P. 1015 8---58(1) (Okl.) That a cause of action is created by statute and did not exist at common law does not necessarily prevent the limitation as to time within which same may be brought from being subject to tolling provisions of statute.—Bean v. Rumrill, 172 P. 452 sions of statute.—Bean v. Rumrill, 172 P. 452.

58 (2) (Or.) Under L. O. L. §§ 6, 7, where sheriff, by virtue of execution, levied on property of stranger to writ, rendering his surety liable to such stranger pursuant to section 348. latter was bound to bring her action against sheriff and surety within three years; the sixyear statute as to liabilities created by statute not applying.—Barnes v. Massachusetts Bonding & Ins. Co., 172 P. 95.

ing & Ins. Co., 172 P. 95.

5-59(2) (Okl.) Const. art. 14, \$ 3, and Rev. Laws 1910, \$\$ 1005, 4660, intended that limitation prescribed within which action to recover twice the usurious interest paid must be brought be subject to same tolling provisions of statute applying to other actions for debt.—Bean v. Rumrill. 172 P. 452.

Const. art. 14, \$ 3, and Rev. Laws 1910. \$ 1005, providing that action for twice the amount of interest paid on a usurious contract may be brought within two years from maturity of usurious contract, means after payment and discharge of such contract or from the last payment of interest thereon.—Id.

### (B) Performance of Condition, Demand. and Notice.

66(9) (Or.) Statute of limitations does not begin to run against claim of depositor in bank till his demand has been refused.—Haines v. First Nat. Bank, 172 P. 505.

FIRST Nat. Bank, 172 P. 505.

6-66(15) (Cal.App.) Under two-year statute of limitations, Code Civ. Proc. § 339, where money was paid to corporation for stock, demand and suit within two years and two months for return of money was in time, where purchaser was fulled into belief that he was going to get stock.—Fergus v. Venice Inv. Co., 172 P. 396.

# (C) Personal Disabilities and Privileges.

&=72(1) (Okl.) Under statute of limitations, excepting persons under disabilities, but not specifically excepting infants, they are within saving clause, though an infant has a guardian who might maintain an action in his own name, where right of action is in infant.—Hinton v. Trout, 172 P. 450.

### (E) Absence, Nonresidence, and Concealment of Person or Property.

\$7(1) (Okl.) Rev. Laws 1910, \$ 4660, tolling the statute of limitation on account of absence from state, applies to an action to recover twice the amount of interest paid on usurious contract.—Bean v. Rumrill, 172 P. 452

\$\insigma 87(3)\$ (Okl.) A statute of limitations does not run in favor of a nonresident until summons can be served within state and a valid personal judgment had which can be enforced as provided by law.—Bean v. Rumrill, 172 P. 452.

# (F) Ignorance, Mistake, Trust, Fraud. and Conceniment of Cause of Action.

65100(12) (Okl.) Where on exchange of property the deed to plaintiff expressly provided for assumption of mortgage, in suit to set aside mortgage as being placed on property to defraud plaintiff, he will be deemed to have notice of fraud within two-year statute of limitations when he accepted deed; there being no

showing of illiteracy.-Ostran v. Bond, 172 P.

\$\insigma\_102(6)\$ (Cal.) Code Civ. Proc. \$ 338, subd. 3, giving three years for action to recover chattels, began to run, at least on death, without son, of defendant's father, who, having been given pictures to go to plaintiff, if he died without son, gave them in his lifetime to defendant, his daughter.—Benoist v. Benoist, 172 P. 1109. €==103(2) (Cal.) Rule requiring repudiation of trust to set statute running against action against trustee applies only to express trust, and not to involuntary trust raised by operation of law.—Benoist v. Benoist, 172 P. 1109.

### (G) Pendency of Legal Proceedings, Injunction, Stay, or War.

e=110 (Wash.) Bankruptcy proceedings do not toll the statute of limitations under Rem. Code 1915, § 172, providing that when commencement of action is stayed by injunction or statutory prohibition, time of continuance of such injunction or prohibition shall not be part of time limited for bringing of action.—McDemmott v. Tolt Land Co., 172 P. 207.

### (H) Commencement of Action or Other Proceeding.

em127(4) (Kan.) Where breaches of building contract constituted only a single cause of action, an amendment to petition more than five years after completion of work setting up additional items furnished under contract was not barred by statute of limitations.—Lantry Contracting Co. v. Atchison, T. & S. F. Ry. Co., 172 P. 527.

112 P. 521.

⇒127(16) (Kan.) Amendment to count of petition in action for malicious prosecution to allege defendants' false testimony resulting in a conviction brought in a new cause of action, and, when filed more than one year after cause of action accrued, it was barred by Code Civ. Proc. § 17, subd. 4 (Gen. St. 1915, § 6907, subd. 4).—Smith v. Parman, 172 P. 33.

\$30(10) (Utah) Where plaintiff's first cause of action for false imprisonment, brought withor action for false imprisonment, brought within year limited by Comp. Laws 1907, § 2879, was dismissed, not on merits, but because copy of complaint obtained from clerk was not copy of original complaint, second action instituted within year after order of dismissal was not barred by section 2879, in view of section 2893.—Salisbury v. Poulson, 172 P. 315.

### III. ACKNOWLEDGMENT, I PROMISE, AND PART PAYMENT. NEW

# IV. OPERATION AND EFFECT OF BAR BY LIMITATION.

65-167(1) (Or.) Surety of sheriff, in relation to statute of limitations, held to occupy no worse position than sheriff, so that action against for wrongful levy was required to be begun within three years, period of limitations for action against sheriff.—Barnes v. Massachusetts Bonding & Ins. Co., 172 P. 95.

# V. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

\$\infty\$180(2) (Okl.) Where a petition on its face shows that action is barred by statute of limitations, it is not error to sustain demurrer on ground that it states no cause of action.—Ostran v. Bond, 172 P. 447.

### LIMITATION OF INDEBTEDNESS.

See Municipal Corporations, 6-873.

#### LIMITATION OF LIABILITY.

See Carriers, \$==150, 158, 218,

#### LIQUIDATED DAMAGES.

See Damages, \$\infty 79.

#### LIQUOR SELLING.

See Intoxicating Liquors.

#### LIS PENDENS.

(Okl.) Doctrine of lis pendens cannot be based upon proceeding instituted after conveyance in controversy was taken.—McIntosh v. Reason, 172 P. 446.

#### LITTORAL RIGHTS.

See Waters and Water Courses, 4=38.

#### LIVE STOCK.

See Animals; 411-443. Carriers, 218; Railroads

#### LOAN ASSOCIATIONS.

See Building and Loan Associations.

#### LOANS.

See Principal and Agent, 4=14.

#### LOCAL SELF-GOVERNMENT.

See Municipal Corporations, \$\sim 35.

#### LOGS AND LOGGING.

See Appeal and Error, \$\sim 1176.

€=3(7) (Wash.) If defendant had with contract to remove and pay for timber from plaintiffs' land, he was entitled to demand right of way, as provided, and if it was not furnished he was entitled to deduct from 10,000,000 odd feet of lumber he had agreed to purchase, 1,000,000 feet or more to which right of way was not furnished.—Colvin v. Clark, 172 P. 214.

\$\insigma\_3(11)\$ (Wash.) Under contract whereby defendant agreed to log and pay for 10,825,000 feet of plaintiffs' timber, held, that defendant had five years in which to remove timber, paying each month for such of it as was taken off according to mill scale kept by him.—Colvin v. Clark. 172 P. 214.

v. Clark, 172 P. 214.

30 (Wash.) Rem. Code 1915, \$ 1177, declaring presumption against bona fides of purchaser of "property liened upon," has, under section 1163, no application to lumber sold and delivered by manufacturer before lien notice of laborer thereon is filed.—Douglass v. F. R. Woodbury Lumber Co., 172 P. 906.

€=31 (Wash.) Laborer manufacturing lumber being by Rem. Code 1915, § 1163, given lien thereon only while it remains in mill or manufacturer's possession or control, section 1181, making one eloigning lumber "on which there is a lien" liable to lienholder, gives no right against a purchaser to whom it is delivered at a distance before lien notice is filed.—Douglass v. F. R. Woodbury Lumber Co., 172 P. 906.

#### LUMBER.

See Logs and Logging.

#### LUNATICS.

See Insane Persons.

#### MALIÇE.

See Homicide, 286; Libel and Slander,

#### MALICIOUS PROSECUTION.

See False Imprisonment: Limitation of Actions, \$==127.

#### II. WANT OF PROBABLE CAUSE.

©24(5) (Kan.) Conviction of plaintiff in police court was conclusive of probable cause, notwithstanding his appeal and acquittal in district court.—Smith v. Parman, 172 P. 33.

### IV. TERMINATION OF PROSECU-TION.

em35(1) (Kan.) Count in petition held to state no cause of action, where it showed that alleged malicious prosecution resulted in plaintiff's conviction.—Smith v. Parman, 172 P. 33.

#### V. ACTIONS.

44 (Kan.) Count of petition in action for malicious prosecution held demurrable because action was barred by the one-year statute of limitation (Code Civ. Proc. § 17, subd. 4 [Gen. St. 1915, § 6907, subd. 4]).—Smith v. Parman, 172 P. 33.

#### MANDAMUS.

See Master and Servant, \$394.

# I. NATURE AND GROUNDS IN GENERAL.

(1) (Wash.) Where a cause has been erroneously dismissed by an inferior court for want of jurisdiction, mandamus is the proper remedy to compel that court to assume jurisdiction; such dismissal not being reversible by appeal.—State v. Superior Court of King County, 172 P. 257.

ty, 172 P. 207.

23(1) (Wash.) City fireman under civil service, by reason of indirect interest in establishment of double platoon system, shortening his hours, may maintain mandamus to compel the inauguration of such system, voted for by citizens and refused by council on ground of lack of funds.—State v. City of Everett, 172 P. 752.

erett, 172 P. 102.

23(2) (Okl.) In view of Rev. Laws 1910, § 3067, and Laws 1913, c. 157, § 24, it is the duty of the county election board to create, alter, or discontinue voting precincts, so that no precinct shall contain more than 200 voters, unless in extreme cases of necessity, and such duty may be enforced by mandamus by any qualified elector.—Becknell v. State, 172 P. 1094.

## II. SUBJECTS AND PURPOSES OF RELIEF.

# (A) Acts and Proceedings of Courts, Judges, and Judicial Officers.

© 61 (Okl.) Where application for change of venue of preliminary examination is made under Rev. Laws 1910, § 6149, and magistrate wrongfully refuses to grant it, mandamus is the proper remedy.—Marshall v. Sitton, 172 P. 964.

### (B) Acts and Proceedings of Public Offi-cers and Boards and Municipalities.

e=74(1) (Okl.) Mandamus held to lie to compel the county election board to divide an election precinct where between 450 and 500 voters resided within a precinct eight miles long and six to nine miles wide, the polling place of which was located on one side near an incorporated town around which 90 per cent. of the voters resided.—Becknell v. State, 172 P. 1094. e=100 (Ariz.) Without any law requiring county board of supervisors to transfer from road fund to general fund the sum paid for advertising sale of road bonds, and in view of their fiscal powers, court would not, by man.

damus or otherwise, supervise its fiscal orders.

—Maxey v. Board of Sup'rs of Yuma County,
172 P. 285.

\$\insigma 100\$ (Idaho) As regards right to mandamus, state treasurer receiving money from Secretary of Treasury for use of institutions selected by state is charged with ministerial duty of at once paying it over to board of regents of University of Idaho the beneficiary selected on its order, and state auditor has no authority or duty in the matter.—Melgard v. Eagleson, 172 P. 655.

# III. JURISDICTION, PROCEEDINGS, AND RELIEF.

district court may issue a writ of mandamus directing an examining magistrate to grant a change of venue in a preliminary examination when application therefor has been properly made under Rev. Laws 1910, § 6149, and wrongfully refused by such magistrate.—Marshall v. Sitton, 172 P. 964.

shall v. Sitton, 172 P. 964.

1016, a copy of the order of the court certified by the clerk requiring defendants in mandamus to perform certain acts or to show cause why they did not do so held sufficient as an alternative writ.—State v. Martin, 172 P. 349.

An alternative writ in mandamus was not insufficient as not running in the name of the state, where it bears the title of the court and of the cause, which was "State of Washington on the relation," etc.—Id.

A certified copy of a court order in substance an alternative writ in mandamus bearing the seal of the court is sufficient, although the original order does not bear such seal.—Id.

An order by the court in effect an alternative writ of mandamus, which recited that it was done in open court and bore all the formal

was done in open court and bore all the formal indicia of the action of the court as such, was not defective as being a mere order of a particular judge.-Id.

\$\instructure 172 (Wash.) While the court may inquire whether it is essential to maintain a fire department, it will not ordinarily inquire whether the double platoon system is essential, and the voters having adopted such system, there being nothing unreasonable on the face there-of, the court will require the council to put it in force.—State v. City of Everett, 172 P. 752.

mirote.—State v. City of Everett, 172 F. 62.

20176 (Okl.) A county election board is vested by Laws 1913, c. 157, § 24, with discretion as to the boundaries of the precincts created by them, and judgment of the trial court, ordering that certain boundaries be established will be modified on mandamus so as to leave the boundaries of the proposed district to the discretion of the county election board.—Becknell v. State, 172 P. 1094.

112 P. 1094.

2 186 (Wash.) A county auditor who has been directed by writ of mandamus to countersign, register, and deliver to relator, school district warrants, is not excused from complying with the writ because of having been served with a writ of garnishment in an action against relator.—State v. Wallace, 172 P. 581.

A writ of injunction subsequently issued, restraining the doing of the act commanded, is of no effect, and will not excuse noncompliance with the writ.—Id.

with the writ.—Id.

190 (Cal.App.) In an original proceeding in the appellate court in mandamus to compel a court reporter to transcribe notes in a criminal case to the appellate court, the applicant, if successful, is entitled to coats under Code Civ. Proc. § 1095, although the judge of the superior court refused to order the transcribing of the notes.—Smith v. McCallum, 172 P. 408.

#### MANSLAUGHTER.



#### MARRIAGE.

See Divorce; Husband and Wife; Wills,

e=40(4) (Okl.) That a man and woman openly cohabited together as husband and wife for a considerable time, recognized each other as such by declarations, admissions, etc., and were generally reputed to be such, may give rise to presumption that they previously entered presumption that they previously entered into an actual marriage, as presumption is in favor of marriage and against concubinage.—Linsey v. Jefferson, 172 P. 641.

Linsey v. Jefferson, 172 P. 641.

2-40(11) (Okl.) Evidence that a deceased man and woman had openly lived together as husband and wife and held each other out as such and acknowledged the relation, and were generally reputed to be husband and wife, imposed on party asserting invalidity of marriage the burden of proving it.—Linsey v. Jefferson, 172 P. 641.

47 (Okl.) Repeated acknowledgments by a man, since deceased, of his marriage with a certain woman constitute direct evidence of marriage.—Linsey v. Jefferson, 172 P. 641.

48 (Okl.) On issue whether relation between a deceased man and woman was matrimonial, declarations of friends and relatives that they had lived onesly as husband and wife that they had lived openly as husband and wife for more than a year prior to birth of plain-tiff, and were generally reputed to be such, was competent to show valid marriage.—Linsey v. Jefferson, 172 P. 641.

€=50(1) (Okl.) Marriage may be proven by circumstantial evidence.—Linsey v. Jefferson, 172

#### MARRIED WOMEN.

See Husband and Wife.

#### MARSHALS.

See Municipal Corporations, 4=145.

#### MASTER AND SERVANT.

See Commerce, \$\infty\$27; Constitutional Law, \$\infty\$154; Death, \$\infty\$64; Insurance, \$\infty\$144; Landlord and Tenant, \$\infty\$5; Negligence, \$\infty\$101; Pleading, \$\infty\$430; Principal and Agent, \$\infty\$3; Taxation, \$\infty\$6; Territories, \$\infty\$18; Trial, \$\infty\$208, 253.

#### I. THE RELATION.

#### (B) Statutory Regulation.

161/2. Owing to the great increase of matter heretofore classified to this section, we have made a new subdivision, consisting of number sections 346-420, at the end of this topic, where the matter in this and future index digests will be found.

#### II. SERVICES AND COMPENSATION (A) Performance of Services.

59 (Wash.) Defendant's breach to furnish live stock and chickens of farm employment contract by substantially failing to furnish live stock and chickens of which plaintiff was to have a share of the increase and of the profits warranted plaintiff in rescinding the contract and quitting work.—Bookhout v. Vuich, 172 P. 740.

#### (B) Wages and Other Remuneration.

&=80(11) (Wash.) On defendant's breach and plaintiff's rescission of contract employing plaintiff to operate a farm on shares, held, that defendant was in no position to object to measure of plaintiff's recovery by reasonable value in wages of services actually rendered to defendant's benefit.—Bookhout v. Vuich, 172 P. 740.

# III. MASTER'S LIABILITY FOR IN-JURIES TO SERVANT.

#### (A) Nature and Extent in General.

\$\infty\$ 87\/2. Owing to the great increase of matter heretofore classified to this section, we have made a new subdivision, consisting of \infty\$ number sections 346-420, at the end of this topic, where the matter in this and future index-digests will be found.

# (B) Tools, Machinery, Appliances, and Places for Work.

101, 102(2) (Wash.) Employers are not insurers, and the law recognizes that absolute safety is unattainable.—Griffith v. Washington Water Power Co., 172 P. 822.

water rower Co., 172 P. 822.

101, 102(6) (Wash.) An employer is not required to provide the newest and best appliances, but fulfills his duty when he provides machinery of ordinary character and reasonably safe.—Griffith v. Washington Water Power Co., 172 P. 822.

€==101, 102(9) (Cal.) It is the duty of a railroad company to exercise reasonable care to keep its tracks and locomotives in a reasonably safe condition.—Neale v. Atchison, T. & S. F. Ry. Co., 172 P. 1105.

@==124(1) (Mont.) Where a servant fails to show that piled sacks of flour, which fell while he was climbing them, were not piled straight, it was immaterial that the master failed to inspect to see that they were straight.—Scheytt v. Gallatin Valley Milling Co., 172 P. 321.

v. Galatin Valley Milling Co., 172 P. 321.

22129(6) (Wash.) Where it can be shown that brakeman's death was caused by parting of train due to defective coupler, the railroad is liable for his death though breaking of coupler was caused by bursting of air hose; the defective coupler, although a contributing cause, being an efficient and henceproprints cause. being an efficient, and hence proximate, cause of injury.—Hubbard v. Tacoma Eastern R. Co., 172 P. 222.

#### (C) Methods of Work, Rules, and Orders.

was stopped because cylinder was clogged, the was stopped because cylinder was clogged, the master owed the nondelegable duty to give warning before starting to a servant, who in pursuit of his duties was in a dangerous position cleaning the cylinder.—Daraveleas v. Morrison, 172 P. 814.

Fison, 172 F. 814.

Fig. 137(4) (Or.) As a general rule no rate of speed of a train is per se negligent, though a high rate of speed may become negligence in particular circumstances.—Stool v. Southern Pac. Co., 172 P. 101.

Railroad operating trains in populous village or near a station where its employés congregate, must so regulate their speed and give such signals as experience has shown to be

such signals as experience has shown to be most conducive to safety, and not inconsistent with efficient operation of trains.—Id.

#### (E) Fellow Servants.

\*\*E-180(1) (Wash.) Federal Employers' Liability Act June 11, 1906, embraces common carriers from the states by water while unloading in Alaska.—Walsh v. Alaska S. S. Co., 172 P. 269.

Federal Employers' Liability Act June 11, 1906, although local in its effect, is valid and repeals or modifies any prior general admiralty or maritime laws inconsistent therewith.—Id.

#### (F) Risks Assumed by Servant.

203(1) (Utah) It does not necessarily follow from a jury finding that a servant was negligent that he also assumed risk.—Kuchenmeister v. Los Angeles & S. L. R. Co., 172 P.

204(1) (Or.) Under Employers' Liability Act. § 1, a section man assumes only such risks as railroad employé ordinarily assumes where usual precautions for safety of those lawfully plaintiff on theory that the track was defective upon tracks are observed.—Stool v. Southern Pac. Co., 172 P. 101.

T. & S. F. Ry. Co., 172 P. 1105.

Act, § 1, a section man does not assume any risk arising from negligence of a coemployé.—Stool v. Southern Pac. Co., 172 P. 101.

€=206 (Wash.) An employé assumes the risk incident to the employment.—Griffith v. Washington Water Power Co., 172 P. 822.

e=210(1) (Or.) The general rule is that an employé of a railroad company assumes all the risks ordinarily incident to his employment, including those arising from the ordinary operation of trains.—Stool v. Southern Pac. Co., 172 P. 101.

@==219(7) (Wash.) The rule that a servant assumes the risk of apparent danger applies with special force to electrical appliances, where the servant is experienced in their use.

Griffith v. Washington Water Power Co., 172 P. 822.

#### (G) Contributory Negligence of Servant.

240(1) (Or.) In action for death of section amater of law deceased was guilty of some degree of negligence in walking on the track.—Stool v. Southern Pac. Co., 172 P. 101.

#### (H) Actions.

2503/4. Owing to the great increase of matter heretofore classified to this section, we have made a new subdivision, consisting of mumber sections 346-420, at the end of this topic, where the matter in this and future index-digests will be found.

gests will be found.

265(5) (Mont.) Where from evidence it was as permissible to conclude that piled sacks of flour were caused to fall by plaintiff servential.

of flour were caused to fall by plaintiff servant's manner of climbing them as that the pile was in a dangerous condition, the doctrine of res ipsa loquitur did not apply.—Scheytt v. Gallatin Valley Milling Co., 172 P. 321.

2265(6) (Cal.) While the mere happening of derailment of engine is not proof of negligence of the railroad, it may be considered thereon.—Neale v. Atchison, T. & S. F. Ry. Co., 172 P. 1105. 1105.

E=267(1) (Or.) In action under Employers' Liability Act, § 1, for death of section man, evidence held admissible as tending to show that a street crossing the track on which he was killed had been platted as such and used by the public for foot and horseback travel.—Stool v. Southern Pac. Co., 172 P. 101.

In action for death of section man, evidence

as to proprietorship in person assuming to dedicate plat showing a street crossing the track on which he was killed, or that it had been legally opened to public travel, held irrelevant.

—276(1) (Utah) In action based on federal Employers' Liability Act, evidence held to sustain jury finding that plaintiff, injured while repairing defendant's passenger engine, was engaged in interstate commerce.—Kuchenmeister v. Los Angeles & S. L. R. Co., 172 P. 725.

e=278(16) (Mont.) Evidence hold insufficient to sustain a finding that master did not inspect piled sacks of flour to see that they were not in danger of falling.—Scheytt v. Gallatin Valin danger of falling.—Schey ley Milling Co., 172 P. 321.

e=285(1) (Wash.) In an employe's action against a railroad company for personal injuries sustained in falling from a carload of logs while unloading them, whether his falling was caused by stepping on a piece of bark upon the loaded car or by the sudden jerking of the car due to the operation of a Marion loader was for the jury.—Jones v. Chicago, M. & St. P. Ry. Co., 172 P. 810.

8-285(7) (Wash.) In an action for death of brakeman thrown between moving car on which he was standing and tender, which parted from car by breaking of coupler, there being evidence that tender was well equipped with grabirons and only 2 or 2½ feet from car when coupled up, the question of whether brakeman would have been injured if train had not parted is for the jury.—Hubbard v. Tacoma Eastern R. Co., 172 P. 222.

s=286(24) (Cal.) In action for death of engineer when locomotive derailed, though witness testified that shortly before the accident the track had been inspected, question whether the inspection was proper was for the jury.—Neale v. Atchison, T. & S. F. Ry. Co., 172 P. 1105.

286(31) (Or.) In action under federal Employers' Liability Act by dependents of a section man killed by work train held, that defendant's negligence as to speed of its train and as to signals given was for the jury.—Stool v. Southern Pac. Co., 172 P. 101.

288(1) (Utah) In action for injury sustained by plaintiff while engaged in repairing defendant's passenger engine, question of assumption of risk held, under evidence, for jury—Kuchenmeister v. Los Angeles & S. L. R. Co., 172 P. 725.

8-288(16½) (Or.) In action under federal Employers Liability Act by dependents of section man killed by work train, held, that whether he assumed the risk of negligent failure of trainment to give timely warning when his presence and apparent unconsciousness of danger were perceived was for the jury.—Stool v. Southern Pac. Co., 172 P. 101.

Scales in the Coo., 112 I. 101.

Scales in the Coo., 112 I. 101.

Scales in repairing defendant's passenger engine, question of contributory negligence held, under evidence, for jury.—Kuchenmeister v. Los Angeles & S. L. R. Co., 172 P. 725.

Scales in the Coo. 172 P. 725.

Coo. 172 P. 725.

Coo. 172 P. 725.

modification of instruction as to proof that he was engaged in interstate commerce and was killed through negligence of defendant held not erroneous.-Stool v. Southern Pac. Co., 172 P. 101.

In action for death of section man killed by work train on track before time for actual work had arrived, refusal of instruction that it must be shown that he was not idle held not

must be shown that he was not idle held not error, in view of the evidence.—Id.

278(3) (Wash.) In an action for injuries sustained by an electrical engineer from an electric shock while adjusting a generator, evidence held insufficient to show the proximate cause of the injury.—Griffith v. Washington Water Power Co., 172 P. 822.

278(3) (Mont.) In action by servant for injuries from falling of pile of sacks of flour which he was climbing, evidence held insufficient to sustain finding that the sacks fell by reason of negligence of master.—Scheytt v. Gallatin Valley Milling Co., 172 P. 321.

278(7) (Cal.) In action for death of engineer, evidence held to support judgment for 172 P. 810.

296(16) (Or.) In action for death of section man, modification of requested instruction by stating that, if negligence of deceased was the "proximate" cause of the accident, his dependents could not recover, by substituting the word "sole," held not misleading.—Stool v. Southern Pac. Co., 172 P. 101.

## IV. LIABILITIES FOR INJURIES TO THIRD PERSONS.

#### (C) Actions.

E=330(8) (Kan.) In action for injury in automobile collision, evidence held not sufficient to show relation of master and servant between defendant and his son who jointly owned the automobile, which was driven by the son.—Knight v. Cossitt, 172 P. 533.

# VI. WORKMEN'S COMPENSATION ACTS.

### (A) Nature and Grounds of Master's Lin-bility.

em347 (Wash.) Rem. Code 1915, § 6604—1 et seq., requiring employers of persons engaged in constructing telegraph lines to pay premiums for industrial insurance, is not invalid.
—State v. Postal Telegraph-Cable Co. of Washington, 172 P. 902.

Washington, 172 F. 202.

348 (Cal.App.) It must be presumed that in Workmen's Compensation, Insurance, and Safety Act, § 12, subd. 3, as to willful misconduct barring recovery, Legislature had in view definition of "willful" as found in Pen. Code, § 7.—Bay Shore Laundry Co. v. Industrial Accident Commission of California, 172 P. 1128.

8-348 (Colo.) Workmen's Compensation Act is highly remedial and must be liberally construed.—Industrial Commission of Colorado v. Johnson, 172 P. 422.

⇒351 (Utah) Workmen's Compensation Act, \$ 53, requiring that employers shall insure payment of compensation in one of three ways, is compulsory on all employers.—Industrial Com-mission of Utah v. Daly Mining Co., 172 P. 301. \$\infty\$ 365 (Wash.) Under Industrial Insurance Act, providing that the act shall apply to employers and employés in both intrastate and in interstate commerce to the extent only that m interstate commerce to the extent only that intrastate work is clearly separable from inter-state commerce, the act does not apply to in-terstate telegraph company's operators hand-ling interstate as well as intrastate messages where it is impossible to separate the time when where it is impossible to separate the time when they are engaged in interstate commerce from time they are engaged in intrastate commerce. —State v. Postal Telegraph-Cable Co. of Wash-ington, 172 P. 902.

al route in leaving ship, which was in process of construction, to go to lunch, and was killed, held not in course of his employment.—Moore & Scott Iron Works v. Industrial Accident Commission, 172 P. 1114.

mission, 172 P. 1114.

3380 (Cal.App.) An experienced laundryman, who while operating a wringing machine removed, for a definite purpose and contrary to Workmen's Compensation, Insurance, and Safety Act, § 55, 62, 67, a guard which he knew was provided for his safety, was chargeable with willful misconduct within section 12, subd. 3, and could not recover for resulting injuries.—Bay Shore Laundry Co. v. Industrial Accident Commission of California, 172 P. 1128.

#### (B) Compensation.

383 (Utah) It is for the Industrial Commission alone to decide whether an employer shall deposit security where it has elected to come under Workmen's Compensation Act, § 53, subd. 3.—Industrial Commission of Utah v. Daly Mining Co., 172 P. 301.

\$\infty\$=385(1) (Colo.) Under Workmen's Compensation Act, the amount of the award is to be

based upon the proportion of disability to normal ability, regardless of previous partial impairment of normal ability.—Industrial Commission of Colorado v. Johnson, 172 P. 422. €=385(1) (Kan.) Under Workmen's Compensation Act, a workman engaged for a specific employment at a fixed amount may recover compensation based on earnings of persons in that grade of service for injury while working at less wages at a different grade to which he had been assigned during cessation of work of higher grade.—Bundy v. Petroleum Products higher grade.—B Co., 172 P. 1020.

=385(111/4) (Colo.) One who by accident lost all vision except enough to enable him to recognize a form without distinguishing its outlines is "blind" within Workmen's Compensation Act.—Industrial Commission of Colorado

v. Johnson, 172 P. 422.

\$\infty\$ = 385(17) (Kan.) Workmen's Compensation Act, providing that allowance shall be made for any payment "or benefit" received from employer during the incapacity, authorizes reasonable allowance for hospital charges actually and necessarily incurred and paid by employer.—By. Petroleum Products Co., 172 P. 1020. -Bundy

\$\instyle=385(20)\$ (Kan.) Order that if employer defaulted in payments during employe's partial incapacity the entire compensation should become due, and that execution should issue therefor, held not error.—Lombard v. Uhrich, 172 P. 32.

393 (Wash.) An injured employé, drawing compensation under the Workmen's Compensacompensation under the Workmen's Compensa-tion Act, on resuming work, held entitled to a continuance of payments of an amount repre-senting the difference between his original earning capacity and his present earning ca-pacity under Rem. Code 1915, § 6604—5 (d).— Parker v. Industrial Insurance Department, 172 P. 830.

#### (C) Proceedings.

394 (Utah) The Industrial Commission may proceed in mandamus to compel employers to secure payment of compensation to employés required by Workmen's Compensation Act, § 53.—Industrial Commission of Utah v. Daly Mining Co., 172 P. 301.

4398 (Kan.) Under Gen. St. 1915, \$ 5904, minor's action, by next friend, to recover under Workmen's Compensation Act, is not barred because written claim for compensation was not served within three months from date of injury where no gradien was appointed. Minturn v. Proctor & Gamble Mfg. Co., 172 P. 17.

&==405(1) (Cal.App.) In workmen's compensation case, evidence held to show employe's second injury, while exercising leg by walking under direction of surgeon, arose from conditional death of the strainty which broke needs under direction of surgeon, arose from condi-tion produced by first injury, which broke neck of femur.—Shell Co. of California v. Indus-trial Accident Commission, 172 P. 611. Workmen's Compensation Act does not re-quire demonstration as to cause of death, but only degree of proof which produces convic-tion in unprejudiced mind.—Id.

6=411/2 [New, vol. 5A, Key-No. Series]
(Kan.) Petition alleging that employe acted fraudulently in procuring a judgment under the Workmen's Compensation Act, which provided that when he quit employment payment should begin, and that he had quit and account of the complexity of the procured other employment at increased wages, held not to require a new trial.—Lombard v. Uhrich, 172 P. 32.

Compensation Act, § 77a, as amended by St. 1915, p. 1102, § 28, on petition for writ of review against Industrial Commission to review award, employé's declarations that crutch slipped and he fell, injuring him second time. which second injury was outcome of first and

resulted in death, were admissible.—Shell Co. of California v. Industrial Accident Commission, 172 P. 611.

## 417(5) (Colo.) Under Workmen's Compensation Act, as to review of awards of workmen's compensation by action in the district court, the district court cannot make new findings of fact, but must accept those of the commission if supported by credible and substantial evidence.—Industrial Commission of Colorado v. Johnson, 172 P. 422.

rado v. Johnson, 172 P. 422.

417(5) (Okl.) Where plaintiff fails to serve and file his brief within time required by Supreme Court rule 5 (171 Pac. x), governing appeals from State Industrial Commission, or within any extension granted, appeal will be considered abandoned, and, on motion, will be dismissed.—Davis v. State Industrial Commission, 172 P. 638.

4-417(7) (Cal.App.) In compensation case, evidence held to sustain award on point whether death was caused by operation made neces-

er death was caused by operation made necessary by second injury resulting from first received in employment.—Shell Co. of California v. Industrial Accident Commission, 172 P. 611.

6:3417(7) (Wash.) Under Rem. Code 1915, \$6604—20, the classification by the Industrial Insurance Department of an employé as one suffering from permanent partial disability is one of fact subject to review, while the amount of the award after classification is not.—Parker Valuetrial Insurance Department 172 P. Industrial Insurance Department, 172 P.

the injury constitutes a hernia, as to which, by a rule of the commission, claimant is required to first undergo an operation.—Kline v. Industrial Ins. Commission, 172 P. 343.

#### MAUSOLEUM.

See Taxation, == 245.

#### MAXIMS.

See Equity, \$==57-65.

#### MEASURE OF DAMAGES.

See Damages, 216; Trover and Conversion,

#### MECHANICS' LIENS.

See Municipal Corporations, 4 373.

#### III. PROCEEDINGS TO PERFECT.

\$\infty\ 132(14) (Okl.) Under Rev. Laws 1910, \$\\$3864, subcontractor's lien may be sustained on theory that his material has benefited owner's premises and hence date of actual delivery on the property, and not the date at which the material was loaded on the cars f. o. b. in a distant city, is the date from which the time for filing the lien is to be computed.—Crane Co. v. Naylor, 172 P. 956.

#### VII. ENFORCEMENT.

260(1) (Wash.) Filing claim in bankruptcy 279(3) (Cal.App.) Where oil lease indicated proceedings does not constitute bringing of active profits were to be determined by deducting

tion to foreclose laborer's lien within Rem. Code 1915, § 1138, requiring actions to foreclose such liens to be brought within eight months.—McDermott v. Tolt Land Co., 172 P.

#### MEMORANDA.

See Frauds. Statute of. \$== 106-110.

#### MERGER.

See Deeds, \$\sim 94.

#### MINES AND MINERALS.

See Corporations, \$\infty 77; Injunction, \$\infty 103; Receivers. \$\infty 18. 29.

#### I. PUBLIC MINERAL LANDS.

(B) Location and Acquisition of Claims. \$\infty 38(20) (Mont.) Whether defendants \$\iff 38(20)\$ (Mont.) Whether defendants did representation work of value of \$500 on mining claim, though it might have been proper inquiry before land office, was not material in trial of action to have determined rights of parties to portion of ground claimed by each.

-Roberts v. Oechsli, 172 P. 1037.

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# II. TITLE, CONVEYANCES, AND CONTRACTS.

(C) Leases, Licenses, and Contracts.

Em56 (Kan.) A lease granting the right to enter on land and to explore for oil and gas, and if it be found in paying quantities to operate and produce, is not a lease in the strict sense, and creates no estate in the lands, but merely a kind of license or an "incorporeal hereditament."—Huston v. Cox, 172 P. 992.

&=73½ (Kan.) Under provisions of oil and gas lease, held, that lease ran for 50 years, if oil and gas was found in paying quantities, or if the stipulated annual rental was paid.—Arnold v. Garnett Light & Fuel Co., 172 P. 1012.

\$\infty\$78(1) (Cal.) Oil lease providing if lessees fail to commence operations by certain day they shall pay lessor \$100 per month during default, merely gives lessor option by further provision that lessees' failure to diligently prosecute work will render lease void.—Allen r. Narver, 172 P. 980.

v. Narver, 172 P. 980.

3-78(1) (Okl.) While lessees under oil and gas lease giving right of exploration acquired no vested estate, yet they were entitled to possession to extent reasonably necessary to perform obligations imposed on them by lease.—

Brennan v. Hunter, 172 P. 49.

Under oil and gas lease authorizing explorations, held that lessee, after discovery of oil, acquired vested, though limited, estate in premises for purposes specified in lease.—Id.

An oil and gas lease is not grant of oil and gas that is in ground, but of such part as lessee may find, and passes no estate that can be subject to ejectment or other real action.—Id.

subject to ejectment or other real action .- Id. 8-78(6) (Okl.) Ordinarily, lessor in oil and gas lease is the only one who can take advantage of provision for forfeiture for failure of lessees to comply with its terms, unless there is express stipulation that lease shall be void upon failure to comply therewith.—Brennan v. Hunter, 172 P. 49.

Lessor is the only person who can avoid oil and gas lease on ground that it is rendered unilateral by reason of surrender clause contained therein, and claim cancellation because of such clause.—Id.



from gross income only royalty and operating expenses, words "net proceeds," as used in modifying clause providing after first four years half of certain 15 per cent. of net proceeds from business should be paid to first party, meant net profits.—Nathan v. Porter, 172 P.

79(7) (Okl.) Petition in action against lessee of oil wells for an accounting to the lessor, considered with provisions of lease as to royalties, held to state a cause of action.—Withington v. Gypsy Oil Co., 172 P. 634.

# III. OPERATION OF MINES, QUARRIES, AND WELLS.

(B) Mining Partnerships and Companies. e=97 (Ariz.) Evidence held insufficient to prove establishment of partnership relation.—Costello v. Gleeson, 172 P. 730.

@==97 (Kan.) Unless an ordinary partnership has been created, a mining partnership between cotenants of an oil and gas lease may exist only while they actually engage in working the property.—Huston v. Cox, 172 P. 992. mg the property.—russon v. Cox, 172 P. 892. 2008 (Ariz.) Evidence held insufficient to warrant the finding by the trial court that defendant's testator held one-half of a mining claim in trust for an alleged partner, or that he held other mining claims in trust for the alleged partnership.—Costello v. Gleeson, 172

P. 730. 2010 (Ariz.) Evidence held to show that plaintiff had received from defendant's testator a return of the money he claimed he had paid into the partnership, and had thereby dissolved the partnership, and abandoned any interest therein, if one existed, and that the alleged partnership property was the individual property of defendant's testator.—Costello v. Gleeson, 172 P. 730.

### (C) Rights and Liabilities Incident to Working.

109 (Okl.) Damages for breach of oil and gas drilling contract would include necessary expenses in moving plaintiff's rig and oil-drilling machinery to location and in drilling until interruption, and a reasonable compensation for loss of time in remaining on premises at defendant's request.—Letcher v. Maloney, 172 P. 972.

#### MINORS.

See Infants.

#### MISJOINDER.

See Parties, \$= 92, 93.

#### MISREPRESENTATION.

See False Pretenses: Fraud.

#### MISTAKE.

See Reformation of Instruments. 23.

#### MITIGATION.

See Damages, \$\sim 59.

#### MODIFICATION.

See Appeal and Error, \$\infty\$1151; Contracts, \$\infty\$238; Insurance, \$\infty\$144.

#### MORTGAGES.

See Building and Loan Associations; Cancellation of Instruments, \$\infty\$=57, 59; Chattel Mortgages; Pleading, \$\infty\$=205.

#### I. REQUISITES AND VALIDITY. (A) Nature and Essentials of Conveyances as Security.

\$\iff 32(2)\$ (Cal.) An instrument, though in \iff = 275 (Okl.) Purchaser accepting deed subthe form of an absolute conveyance, will be ject to mortgage which he assumes cannot

treated as a mortgage if in fact it was given as security for performance of an obligation; the question being one of intent.—Boal v. Gassen, 172 P. 588.

32(5) (Cal.) The continued existence of a debt is a circumstance tending to show that a conveyance is a mortgage.—Boal v. Gassen, 172 P. 588

\$\frac{172 \ P. 1000.}{37(2)}\$ (Or.) An assignment of a contract for the sale of land may be shown by parol evidence to be a mortgage.—Gress v. Wessinger, 172 P. 495.

8-38(1) (Cal.) A deed by a mortgagor covering the property mortgaged under a trust mortgage given by the mortgagor on the threat of foreclosure, held, under the evidence, not a mortgage, but a transfer in payment and extinguishment of the mortgage debt.—Boal v. Gassen, 172 P. 588.

#### (B) Form and Contents of Instruments.

23–40 (Cal.App.) Letter accompanying note which read, "This is to certify that there is due you a sum of \$4,000 secured by a lien upon certain land," when not accepted, received, or treated by recipient as a mortgage, and in the absence of showing that it was so intended by the sender would not be considered a mortgage.—Johnston v. Murphy, 172 P. 616.

#### (D) Validity.

(ii) validity.

E---78 (Colo.) Where a woman inexperienced in business is induced to give her note and execute a deed of trust on her land in consideration of shares of stock in a land development company upon the representation that the company owned certain land, she was justified in believing such statement, and was not bound to investigate its truth.—Carlson v. Akeyson, 172 P. 1058.

82 800, 112 F. 1000. 82 863) (Colo.) In an action to cancel a note and deed of trust, evidence held sufficient to show that plaintiff was induced to execute note and deed of trust by reason of fraudulent misrepresentation, and in fact received no consideration therefor.—Carlson v. Akeyson, 172 1050

€-36(3) (Okl.) In a suit to foreclose a mortgage on real estate, evidence held to support the finding that the note and mortgage were procured by duress.—Drake v. High, 172 P. 53.

#### III. CONSTRUCTION AND OPERA-TION.

#### (D) Lien and Priority.

S=153 (Okt.) Where proceedings as to guardian's sale were regular, the lien of the purchaser's mortgage will not be defeated on proof that sale was not made for cash as ordered, but by an exchange where mortgagee did not participate in fraud or have notice putting him on inquiry.—Berry v. Tolleson, 172 P.

\$\instyle=154(2)\$ (Okl.) Evidence relied upon to charge purchaser's mortgagee with notice so as to put him on inquiry held not sufficient to charge him with notice of fraud in guardian's sale.—Berry v. Tolleson, 172 P. 630.

### V. ASSIGNMENT OF MORTGAGE OR DEBT.

239 (Wash.) A purchaser of note secured by mortgage held to have taken necessary pre-caution, as regards right to rescind, by asking for and receiving from seller assurance that the security was ample.—Tyner v. Stults, 172 P. 850.

#### TRANSFER OF PROPERTY MORT-GAGED OR OF EQUITY OF REDEMPTION.

question validity of mortgage and cannot de- der Code Civ. Proc. § 726 after commission-fend action for its foreclosure on ground that er's return showing deficiency.—Ewing v. Richit is invalid due to alleged fraud practiced on vale Land Co., 172 P. 645. it is invalid due to alleged fraud practiced on him by vendor's deed.—Ostran v. Bond, 172 P. 447.

#### X. FORECLOSURE BY ACTION.

#### (E) Parties and Process

440 (Okl.) Rev. Laws 1910, § 4705, does not require summons in foreclosure suit, where personal service has been had, to advise defendant of nature of action and kind of judgment that will be rendered, nor is it necessary to indorse on the writ the amount for which, with interest, default judgment will be taken.

—Littlefield v. Brown, 172 P. 643.

#### (H) Trial or Hearing and Reference.

e=476 (Okl.) In suit on note and to foreclose mortgage, wherein intervener claimed title under tax deed superior to mortgage, it was error to foreclose mortgage without determining issues presented by tax deed.—Ross v. Lee, 172 P. 444.

#### (I) Judgment or Decree and Execution.

494 (Kan.) In suit to foreclose a mortgage, an original judgment reciting that after the sale defendants would be barred and foreclosed from

defendants would be barred and lorcclosed from all equity of redemption was erroneous, but not void.—Marsh v. Votaw. 172 P. 30.

Code Civ. Proc. § 503 (Gen. St. 1915, § 7407), fixing six months' period of redemption in case of foreclosure of a lien for purchase price before one-third has been paid, does not require a recital of the facts in the judgment.—Id.

&=497(1) (Kan.) In suit to foreclose a mort-gage, defendants would be barred by an original judgment erroneously foreclosing them from all equity of redemption, and could only take ad-vantage of the error by appeal, and not by collateral attack.—Marsh v. Votaw, 172 P. 30.

#### (J) Sale.

504 (Kan.) Petition in action to enjoin foreclosure sale under mortgage, on ground of mortgagee's refusal to perform contract to continue arrangement as to releases to purchasers from mortgagor, held to state a cause of action.—Nelson v. Hoskinson, 172 P. 993.

526(2) (Okl.) Objection to confirmation of question, but going merely to certain trial irregularities, are concluded by judgment rendered, and on defendant's failure to except thereto and appeal such irregularities cannot be considered.—McCornack v. Fleming, 172 P.

6-526(7) (Kan.) In suit to foreclose a mort-gage, irregularities in recital in original judg-ment and in sheriff's return as to notice of pub-lication held cured by a confirmation of sale.— Marsh v. Votaw, 172 P. 30.

marsh v. votaw, 112 F. 30.

⇔=526(8) (Kan.) In suit to foreclose a mortgage, where sale was ordered and confirmed in December, 1913, defendants' motion filed September 23, 1916, to vacate order of confirmation and to set aside the sale was too late.—

Marsh v. Votaw, 172 P. 30.

⇒=525(2) (Kan.) Although, helden of first

marsh v. votaw, 172 P. 30.

535(3) (Kan.) Although holder of first mortgage was not a party to the foreclosure of second mortgage, it was proper for the sheriff to sell the land subject to the first mortgage, the validity of which was not in question.—Marsh v. Votaw, 172 P. 30.

#### (K) Deficiency and Personal Liability.

\$\insightarrow\$59(3) (Cal.App.) In action on notes secured by mortgage, prayer being for foreclosure and deficiency judgment, a distinct adjudication and judgment against defendant in sum named is equivalent to judgment that defendant is personally liable, and sufficient to authorize clerk to enter deficiency judgment un- 1907, \( \frac{1}{2} \) 205, as amended by Laws 1911, e. 125,

#### MOTIONS.

See Appeal and Error, \$237, 801; Continuance; Criminal Law, \$919-974; New Trial, \$14-150; Pleading, \$343-367; Trial, €==165.

#### MOTIVE.

See Criminal Law, 4371.

#### MOVING PICTURES.

See Torts. 4 8.

#### MUNICIPAL CORPORATIONS.

See Counties; Criminal Law, \$\sim 400; Licenses, \$\sim 14; Railroads, \$\sim 178; Schools and School Districts; Street Railroads.

#### CREATION, ALTERATION, E ENCE, AND DISSOLUTION. EXIST-

(B) Territorial Extent and Subdivisions, Annexation, Consolidation, and Division.

35 (Colo.) Const. art. 20, an amendment adopted December 1, 1902, creating city and county of Denver, was intended to give to people of city right of local self-government, and to provide for administration of functions of city and county governments in the same territory by the same set of officers.—Linds-ley v. City and County of Denver, 172 P. 707. ley v. City and County of Denver, 172 P. 707.

36(5) (Colo.) Under Const. art. 20, adopted as an amendment December 1, 1902, merging city of Denver, and part of county into city and county of Denver, and by sections 2, 3, and 4 making district attorney ex officio attorney of city and county, he held separate and distinct offices.—Lindsley v. City and County of Denver, 172 P. 707.

36(8) (Colo.) Under Const. art. 20 amenda-

Signature 172 P. 707.

36(8) (Colo.) Under Const. art. 20, amendment adopted December 1, 1902, creating city and county of Denver, and by sections 2, 3, and 4 thereof making district attorney ex officio city and county attorney, his compensation as city and county attorney was fixed by old charter, prescribing his powers and duties, so that he would receive salary of both offices.

Lindsley v. City and County of Denver, 172 P. 707.

# IV. PROCEEDINGS OF COUNCIL OR OTHER GOVERNING BODY.

#### (B) Ordinances and By-Laws in General.

600 (Or.) Const. art. 4, § 1a, providing that cities and towns may provide for manner of exercising initiative and referendum as to muand is component part of charter of each city and town in state.—Curtis v. Tillamook City, 172 P. 122.

Ordinance prescribing method of exercising initiative and referendum powers held substitute for method prescribed by L. O. L. §§ 3470—

3483.—1d. Ordinance, enacted by city, prescribing method of exercising, initiative and referendum powers, under Const. art. 4, § 1a, held to supersedent only method prescribed by L. O. L. §§ 3470–3483, but also amendment to city charter, exacted prior to enactment of constitutional previous products. vision.-Id.

City ordinance providing for amendment of city charter as to street improvements held legally adopted at special election held for such

© 111(4) (Colo.) The section of an ordinance providing for licensing pawnbrokers, being complete in itself, may be valid, though other parts of the ordinance be invalid.—Provident Loan Soc. v. City and County of Denver, 172

#### V. OFFICERS, AGENTS, AND EM-PLOYÉS.

#### (A) Municipal Officers in General.

(A) Menicipal University deferral.

23-145 (Utah) Bond of city marshal conditioned on his performing well, truly, and justly all the duties of his office was not defective for failure to be conditioned. in words of Laws 1911, c. 125, § 216, on "payment of all moneys according to law and ordinances."—Henriod v. Church, 172 P. 701.

Where city marshal filed a bond, the mayor and council's failure to disapprove or reject the bond, or raise any question as to its sufficient.

the bond, or raise any question as to its sufficiency, and their permitting him to perform the duties of office, were sufficient evidence of acceptance and approval of the bond.—Id.

acceptance and approval of the bond.—Id. 3149(4) (Utah) In view of Comp. Laws 1911, c. 125, appointive officers in cities of the third class hold their respective offices until their successors are appointed and qualified.—Henriod v. Church, 172 P. 701.

Even in the absence of statute, municipal officers hold over until their successors are elected and qualified, and until such time are entitled to the compensation attached to the office.—Id.

\$\instructure 173(2)(Okl.) Sureties on bonds of city officers are not liable for the penalty provided by Rev. Laws 1910, \$\frac{5}{3}\$ 6777, 6778, for misappropriation of city funds.—State v. City of Muskogee, 172 P. 796.

### (B) Municipal Departments and Officers Thereof.

e=183(2) (Utah) Mere fact that city marshal's bond had expired did not forfeit his right to the office, where he was permitted to continue to act, and was therefore a de facto officer at least, and entitled to compensation, especially since the city authorities could at any time on notice have required a bond.—Henriod v. Church, 172 P. 701.

Henriod v. Church, 172 P. 701.

183(3) (Utah) Assuming a city marshal was rightfully holding the office, the attempt by the mayor to remove him without the concurrence of the council was wholly ineffectual, in view of Comp. Laws 1907, § 215, as amended by Laws Utah 1911, c. 125, requiring the concurrence of the council.—Henriod v. Church, 172 P. 701.

Church, 172 P. 701.

183(4) (Utah) In the absence of prohibitive statute, a city marshal, having resigned on day preceding effective date of raise in salary, was eligible to reappointment on the next day, especially in view of Laws 1911, c. 125, and Sess. Laws 1917, c. 44, amending Comp. Laws 1907, § 225, prohibiting increase of salary during term of city officer, so as to limit such section to elective officers.—Henriod v. Church, 172 P. 701.

Church, 172 P. 701.

\$\insigma\$ 185(1) (Mont.) A police captain is an officer within the meaning of Rev. Codes, \$\frac{3}{8}\$ 371, 372, making it a crime punishable by disqualification from holding office for officers to buy and sell city warrants, and the application of these sections cannot be avoided by a plea of accommodation to a brother officer.—State v. Mayor of Butte, 172 P. 134.

@=185(7) (Mont.) In a proceeding before the examining and trial board of the police department under Rev. Codes, § 3309, an accusation against a police captain alleging a series of offenses, each tending toward the ultimate in-

§ 1.—Salina City v. Lewis, 172 P. 286; Same v. | quiry as to his fitness for office, is not to be Neilsen, Id. 290. | cested under the rigid rules of criminal procedure.—State v. Mayor of Butte, 172 P. 134. dure.—State v. Mayor of Butte, 112 P. 134.

3. 185(12) (Mont.) Where, in an accusation against a police captain, three out of five specifications of conduct unbecoming an officer stand undisputed, being violations of law, and at least one of them a crime, their quality and consequence were for the board to determine.—State v. Mayor of Butte, 172 P. 134.

#### VII. CONTRACTS IN GENERAL.

\$\\_255 (Okl.) A city, under Rev. Laws 1910, \$\frac{2}{3}\$ 6777, 6778, may recover, from city officers and a railroad company to which money was unlawfully paid to secure location of shops within the city, the property provided by the statute. in the city, the penalty provided by the statute.
—State v. City of Muskogee, 172 P. 796.

#### IX. PUBLIC IMPROVEMENTS.

### (A) Power to Make Improvements or Grant Aid Therefor.

278(3) (Kan.) Gen. St. 1915, § 1974, does not fix order in point of time in which grade shall be established with respect to contract for improvement or levy of assessment, but insures abutting property against expense of bringing street to grade.—Smith v. City of Courtland, 172 P. 1027.

### (B) Preliminary Proceedings and Ordinances or Resolutions.

e=294(2) (Or.) A notice that paving is to extend a certain distance is jurisdictional.—Manley v. City of Marshfield, 172 P. 488.

eey v. City of Marshield, 172 P. 488.

294(3) (Or.) A notice, the council "deems it expedient and necessary to improve,

\* \* " was sufficient notice that paving was "proposed" within Marshield City Charter, §§ 49, 50.—Manley v. City of Marshield, 172 P. 488.

301 (Kan.) Gen. St. 1915, § 887, providing that grade of street may be established by ordinance, and shall not be changed without a three-fourths vote of city council, does not prevent establishment of grade by other method than the adoption of ordinance.—Smith v. City of Courtland, 172 P. 1027.

€=31 (Kan.) Where proceedings of city council as to improvement failed to show compliance with the law, the council had power, after suit for injunction, to cause the record to be changed, so as to show the actual facts.—

Smith v. City of Courtland, 172 P. 1027.

Smith v. City of Courtland, 112 P. 1021.

323(1) (Kan.) Where contract price for curbing and guttering streets included a charge for bringing to established grade the part of streets which were to support the curb and gutter, an injunction against its enforcement was justified.—Smith v. City of Courtland, 172 P. 1027.

323(3) (Kan.) Evidence held to finding that contract price for curbing and guttering street included charge for bringing part of street to established grade.—Smith v. City of Courtland, 172 P. 1027.

€=325 (Kan.) Without a showing to the contrary, the presumption is that as finally adopted by the city council, the record as to an improvement spoke the truth.—Smith v. City of Courtland, 172 P. 1027.

#### (C) Contracts.

2328 (Or.) In the absence of statutory direction to the contrary, a city may make an improvement through more than one contract.—Manley v. City of Marshfield, 172 P. 488.

716, was an ordinary statutory bond, and did | not make the company a joint principal with the contractor.—City of Pasco v. Pacific Coast Casualty Co., 172 P. 566.

Casualty Co., 112 F. 200.

2353 (Wash.) Under contractor's assignment to bank, city held to have acted within rights in paying without notice of claims for labor and materials, and before default of contractor for street improvement, to assignee bank, 70 per cent. of monthly estimates due contractor, so that neither city, labor or material claimants,

that neither city, labor or material claimants, nor contractor's surety, could recover money.—National Surety Co. v. American Savings Bank & Trust Co., 172 P. 264.

When bank, assignee of contractor with city for street improvement, at request of contractor's surety, which in writing agreed bank should forfeit no rights, released moneys received from city under assignment, implied promise arose on part of surety company to repromise arose on part of surety company to re-

pay if contractor did not.-Id.

365 (Or.) The council cannot accept work which does not cover the ground prescribed by the contract.—Manley v. City of Marsh-field, 172 P. 488.

€=370 (Wash.) Where contract with city for street improvement provides city may withhold payments until satisfied all material and labor supplied has been paid for, provision amounts to no more than permission to city to exercise discretion, and creates no duty on its part.—National Surety Co. v. American Savings Bank & Trust Co., 172 P. 264.

\$\iff 373(7)\$ (Wash.) Assignment to bank of contractor with city for street improvement, because subject to claims for labor and material, held not to make money received under it by bank from city trust fund with which to pay claims accruing and filed with city after contractor's monthly estimates were earned and paid bank.—National Surety Co. v. American Savings Bank & Trust Co., 172 P. 264.

@=376 (Wash.) Failure of a city to take from a railway company the bond required by Rem. Code 1915, §§ 1159, 1161, does not make it liable to a subcontractor's subcontractor for labor performed in separating the grade of a railway company's track from the street.—Dixon & Oliver v. Parker, Moran & Parker, 172 P.

The mere fact that a subcontractor has per-formed work of value in changing a railroad grade in a city does not make the city liable therefor in equity, where the subcontractor has filed no lien notice.—Id.

#### (D) Damages.

on street for which official grade is established, to which street is graded to lot owner's damage, is entitled to recover against city, though when grantor dedicated street he knew its natural grade was so steep as to render it inaccessible to teams.—Partridge v. City of Richmond, 172 P. 166.

### (E) Assessments for Benefits, and Special Taxes.

407(1) (Cal.) Improvement Act, §§ 4, 20, held not unconstitutional as failing to provide for an assessment of lands in an improvement district in accordance with the benefits actually received.—Rockridge Place Co. v. City Council of City of Oakland, 172 P. 1110.

S=425(3) (Mont.) A railroad right of way is subject to assessment for special improvements under Laws 1913. c. 89, § 14.—Chicago, M. & St. P. Ry. Co. v. Poland, 172 P. 541.

That part of a railroad right of way crossing diagonally over public street was not assessable for paving such street, under Laws 1913. c. 89, § 14, since the land was not owned or controlled by the railroad, as is prerequisite to assessment, but by the public—Id. uisite to assessment, but by the public.—Id.

22429 (Mont.) That part of a railroad right of way easement crossing diagonally over public street was not assessable for paving such street, under Laws 1913, c. 89, § 14, by the foot frontage method of assessment, since the easement could not abut upon anything.—Chicago, M. & St. P. Ry. Co. v. Poland, 172 P. 541.

That part of a railroad right of way crossing diagonally over public street was not assessable for paving such street, under Laws 1913, c. 89, § 14, by the foot frontage method of assessment, since the land did not abut on the street, but 429 (Mont.) That part of a railroad right

since the land did not abut on the street, but was a part of it.—Id.

=447 (Or.) If by reason of error or mistake a city is unable to complete a part of proposed paving called for by ordinance and notice, it will be held to have abandoned it, and collection of assessments will be enjoined.—Manley v. City of Marshfield, 172 P. 488.

⇒488, 489(5) (Okl.) Where city acquires jurisdiction to pave streets, owner, knowing of improvements and intention to levy special tax to compensate contractor, who fails to sue to test validity of paving ordinance or assessment within time provided by city charter, cannot enjoin collection of assessment on ground of irregularities.—Partee v. Cleveland Trinidad Paving Co., 172 P. 945.

€==488, 489(8) (Or.) A property owner who did not appear at a council meeting called on due notice to equalize assessments for paying cannot afterward object that the front foot rule used was unfair to him, in that his lot was shorter than the others.—Manley v. City of Marshfield, 172 P. 488.

⇒506 (Or.) Where action was brought to enjoin part of paving and the city unreasonably delayed litigating the matter, or in doing the work promptly on removal of legal obstacles, assessments for the completed part should be canceled.—Manley v. City of Marshfield, 172 P.

em513(1) (Or.) In suit by several property owners to enjoin collection of local assessments, only matters affecting all of them can be litigated, and injunction will not be granted on ground that one lot is shorter than others, and the front foot rule unfair.—Manley v. City of Marshfield, 172 P. 488.

A substantial departure from paving notice will entitle property owners to enjoin collection of assessments.—Id.

\$\\_\\_\\$514(11) (Cal.) Reassessment for a street improvement will not be set aside as not being proportionate to benefits for the mere reason that deductions and additions were made to the original assessment at a certain sum per front foot.

—Rockridge Place Co. v. City Council of City of Oakland, 172 P. 1110.

### X. POLICE POWER AND REGULA-TIONS.

#### (A) Delegation, Extent, and Exercise of Power.

\$\instyle=592(1)\$ (Colo.) An ordinance requiring pawnbrokers to obtain a license, and defining pawnbrokers without regard to interest charged, is not invalid as conflicting with Laws 1897, pp. 250, 252, 254, \\$\frac{1}{8}\frac{1}{8}\frac{1}{8}\frac{1}{8}\frac{1}{6}\frac{1}{6}\text{requiring pawnbrokers, defined to include only persons charging certain interest to obtain a license.—Provident Loan Soc. v. City and County of Denver, 172 P. 10. P. 10.

⇒592(1) (Wash.) Provisions of ordinance of city of Spokane that every person, firm, or corporation who by means of any vehicle shall carry any person or persons to or from any point within the city for hire shall pay a license fee of \$5, etc., were not rendered void by Laws 1915. c. 142, § 34.—City of Spokane v. Knight, 172 P. 823.

\$\infty\$=592(1) (Wash.) A city may enact ordinances on subjects covered by the state statutes, operative within the jurisdiction of the city,

# XI. USE AND REGULATION OF PUB-LIC PLACES, PROPERTY, AND WORKS.

#### (A) Streets and Other Public Ways.

\$\inspec 703(4)\$ (Wash.) Acts 1917, p. 640, \\$ 34, held to prohibit a municipality from passing regulations or ordinances regulating the speed of automobiles within the city.—City of Seattle v. Rothweiler, 172 P. 825.

©-705(11) (Cal.App.) Where owner negligently left his automobile unattended on street car

ly left his automobile unattended on street car tracks and a street car was negligently run into it, catapulting it against one working at the curb, the owner of the automobile was liable for the injuries.—Keiper v. Pacific Gas & Electric Co., 172 P. 180.

3-705(12) (Wash.) Surety on bond given pursuant to Laws 1915, p. 227 (Rem. Code 1915, \$5562—37 et seq.), as to operating automobiles for hire in cities, held liable for negligence of driver, where principal failed to remove license number on sale of car, as required by Laws 1915, p. 391, \$13 (Rem. Code 1915, \$5562—13).

—Peters v. Casualty Co. of America, 172 P. 220.

#### XII. TORTS.

### (A) Exercise of Governmental and Corporate Powers in General.

8-736 (Wash.) Where wading pool in city playground was drained and cleaned each Friday, that a broken bottle was cast therein by some one between Friday and a Sunday, when a girl wader was injured by cutting her foot on such a bottle, would not be sufficient to charge the city with maintaining a nuisance.—Clark v. City of Seattle, 172 P. 1155.

### (C) Defects or Obstructions in Streets and Other Public Ways.

6-768(3) (Okl.) Construction of sidewalks six inches lower than connecting sidewalk and failure to correct grade on notice, was actionable negligence, rendering city liable for personal injury resulting from its condition.—City of Duncan v. Brown, 172 P. 79.

\$\iffsim 816(1)\$ (Okl.) Petition, alleging that plaintiff's horses hitched to buggy were frightened by children on roller skates, that city had permitted street to remain in an unsafe condition and that buggy fell into hole and injured plaintiff, held to state cause of action.—City of Cushing v. Stanley, 172 P. 628.

# XIII. FISCAL MANAGEMENT, PUB-LIC DEBT, SEGURITIES, AND TAXATION.

### (A) Power to Incur Indebtedness and Expenditures.

\*\*E864(1) (Wash.) Maintenance of efficient city fire department is an essential of government for which city may incur indebtedness in excess of authorized indebtedness, since the constitutional limitation does not apply to obligations made mandatory by the Constitution or essential to government.—State v. City of Everett, 172 P. 752.

\$\epsilon = 873\$ (Okl.) Officers of city cannot pay out its money to establish or retain railroad yards in city, and if it is done the officers and the railroad receiving money are liable to city for double the amount.—State v. City of Muskogee, 172 P. 796.

# (C) Bonds and Other Securities, and Sinking Funds.

©=919 (Cal.App.) Act relating to incurring of indebtedness by municipalities (St. 1901, p.

when the statute does not expressly prohibit it.—City of Seattle v. Rothweiler, 172 P. 825.

XI. USE AND REGULATION OF PUBLIC PLACES, PROPERTY,

28), requiring municipal bonds to be payable annually in parts not less than one-fortieth part of whole indebtedness, does not require annual payments to be uniform in amount.—Town of Calistoga v. Adams, 172 P. 624.

## (D) Taxes and Other Revenue, and Application Thereof.

956(1) (Wash.) Under Laws 1915, c. 176, \$
1, validating certain excess tax levies in cities of third class, there could be no recovery of excess taxes by a city in which no taxpayer had paid excess tax at time of passage of act.

Northern Pac. Ry. Co. v. Snohomish County, 172 P. 878.

Laws 1915, c. 176, § 1, validating certain excess taxes in cities of third class where there has been "an attempt to collect," same does not apply where attempts were not made until after passage of act.—Id.

#### (E) Rights and Remedies of Taxpayers.

999 (Okl.) Where city after written demand of ten resident taxpayers neglects to sue to recover money unlawfully paid by its officers to railroad, any resident taxpayer may sue in name of state for penalty under Rev. Laws 1910, §§ 6777, 6778; one-half of recovery going to plaintiff as a reward, and remainder to city.—State v. City of Muskogee, 172 P. 796.
When city neglects to sue for money unlaw.

city.—State v. City of Muskogee, 172 P. 796.
When city neglects to sue for money unlawfully paid out by city officials after written demand by resident taxpayers, a taxpayer who sues to recover penalty under Rev. Laws 1910, §§ 6777, 6778, has interest in cause of action not affected by city's subsequent suit.—Id.

© 1000(4) (Okl.) Sureties on official bonds of city officials sued by resident taxpayers to recover penalty prescribed by Rev. Laws 1910, §§ 6777, 6778, for misappropriation of moneys, not being liable for such penalty, are not proper parties therein.—State v. City of Muskogee, 172 P. 796.

# XIV. CLAIMS AGAINST CORPORA-TION.

for services as ex officio city and county attorney of city and county of Denver, created by Const. art. 20, an amendment adopted December 1, 1902, held not entitled to interest upon amount.—Lindsley v. City and County of Denver, 172 P. 707.

#### MURDER.

See Homicide.

#### MUTUAL BENEFIT INSURANCE.

See Insurance, 5723-819.

#### NAMES.

gate common-law right of a person to change his name.—State v. Ford, 172 P. 802.

#### NATURAL GAS.

See Receivers, 4 18.

#### NAVIGABLE WATERS.

See Waters and Water Courses.

#### NEGLIGENCE.

See Carriers, \$\inser\ 140, 150, 158, 162, 218, 280-321; Death: Gas; Highways, \$\inser\ 192-213; Master and Servant, \$\inser\ 101-296, 330; Mu-

nicipal Corporations, \$\infty\$-705; Principal and Agent, \$\infty\$-70; Railroads, \$\infty\$-224 443; Sales, \$\infty\$-274; Schools and School Districts, \$\infty\$-121; Telegraphs and Telephones, \$\infty\$-33-79.

### L ACTS OR OMISSIONS CONSTITUT-ING NEGLIGENCE.

#### (A) Personal Conduct in General.

(Okl.) To constitute actionable negligence, there must exist a duty on the part of defendant to protect plaintiff from the injury complained of, a failure to perform that duty, and an injury to plaintiff proximately caused by such failure.—Lusk v. Wilkes, 172 P. 929.

### (C) Condition and Use of Land, Buildings, and Other Structures.

e=344 (Cal.App.) It is the duty of a store to keep entrances in safe condition, and to use ordinary care to avoid accidents to those entering.—Long v. John Breuner Co., 172 P. 1132.

#### II. PROXIMATE CAUSE OF INJURY.

e=61(1) (Or.) Strictly speaking, there cannot be two "proximate" causes of an injury, and where two or more circumstances, each involving negligence, combine to cause an injury, the circumstances together constitute but one proximate cause.—Stool v. Southern Pac. Co., 172 P. 101.

#### III. CONTRIBUTORY NEGLIGENCE.

#### (A) Persons Injured in General.

€=68 (Cal.App.) One riding in vehicle as passenger or guest of driver must exercise ordinary care for his own safety.—Ilardi v. Central California Traction Co., 172 P. 763.

6.368 (Cal.App.) It was duty of patron of store to exercise ordinary care in passing out of de-fective entrance.—Long v. John Breuner Co., 172 P. 1132.

€=33 (Cal.App.) Where there is no contribu-

where there is no contributory negligence, the doctrine of last clear chance does not arise.—Keiper v. Pacific Gas & Electric Co., 172 P. 180.

33 (Cal.App.) Injured person whose negligence placed him in position of danger, and who negligently failed to extricate himself therefrom whom he might have done as held unable. from when he might have done so, held unable to recover on any theory of last clear chance.— Ilardi v. Central California Traction Co., 172 P. 763.

#### (C) Imputed Negligence.

2-93(1) (Cal.App.) Passenger or guest in vehicle driven by another is not chargeable with latter's negligence, unless having right to exercise control over driver, possessing such power of control in eyes of law, or unless passenger or guest himself actively participated in driver's negligence.—Ilardi v. Central California Traction Co., 172 P. 763.

93(1)(Colo.) Negligence of a city chauffeur cannot be imputed to a policeman, who had no control over nor right of selection of a driver, and who was ordered out with such driver to answer a riot call.—Denver Tramway Co. v. Orbach, 172 P. 1063.

6.⇒96 (Utah) A parent was not guilty of contributory negligence in allowing a bright six year old child to go a short distance down a road with a tricycle, where she watched him until he started to return.—Barker v. Savas, 172 P. 672.

#### (D) Comparative Negligence.

sill (Or.) Combined negligence of section man and of defendant road was the proximate cause of death, as under Employers' Liability Act, § 3, his contributory negligence would go only to reduce the quantum of damages.—Stool v. Southern Pac. Co., 172 P. 101.

#### IV. ACTIONS.

### (A) Right of Action, Parties, Preliminary Proceedings, and Pleading.

em! (3(1) (Cal.App.) In an action for wrongful death, plaintiff need only show that defendant's negligence was the proximate cause, and he need not negative contributory negligence.—Drouillard v. Southern Pac. Co., 172 P. 405.

#### (B) Evidence.

(Mont.) The burden is on one alleging negligence to prove it by substantial evidence.—Scheytt v. Gallatin Valley Milling Co., 172 P. 321.

172 P. 321.

2-125 (Cal.App.) In action for injuries by slipping on inclined entrance to store, it was competent to show that other persons had previously slipped and fallen on such incline.—Long v. John Breuner Co., 172 P. 1132.

In action for injuries by falling on steep incline at entrance of store, previous accidents on such incline may be shown, if they are similar in their general character, and circumstances need not be shown to be precisely similar.—Id.

seem not be shown to be precisely similar.—Id. 6-3134(1) (Mont.) The burden being on one alleging negligence to prove it by substantial evidence, evidence furnishing a basis for two equally permissible inconsistent conclusions is insufficient.—Scheytt v. Gallatin Valley Milling Co., 172 P. 321.

#### (C) Trial, Judgment, and Review.

636(2) (Okl.) Negligence is generally for jury, and when competent evidence thereof has been admitted, it is only where standard of duty may be determined as matter of law, or where on undisputed facts reasonable men could not draw different conclusions, that courts may take question from jury.—City of Cushing v. Stanley, 172 P. 628.

\*\*= 136(9) (Cal.App.) Negligence is question of fact for jury, even where there is no conflict of evidence, if different conclusions can be drawn from the evidence by reasonable and impartial men.—Long v. John Breuner Co., 172 P. 1132. e=136(22) (Cal.App.) Whether a store was negligent in maintaining a 35 to 50 per cent, incline at its entrance, held, under the evidence, for the jury.—Long v. John Breuner Co., 172 P. 1132.

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e=136 (26) (Utah) Question of contributory negligence, like that of defendant's original negligence, ordinarily is one of fact for jury, and can be disposed of as question of law only in rare instances, as when evidence is undisputed.

—Knight v. Southern Pac. Co., 172 P. 689.

#### NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

#### NEWLY DISCOVERED EVIDENCE.

See New Trial, @== 99-104.

#### NEW TRIAL

See Appeal and Error, \$\ins110\, 294\, 345\, 502\, 873\, 874\, 979\, 1015\, 1078\; Criminal Law, \$\ins1919\-964\, 1023\; Master and Servant. \$\ins1919\)

#### I. NATURE AND SCOPE OF REMEDY.

[New, vol. 9 Key-No. Series]
(Cal.App.) Proceedings on motion for new trial are independent of the judgment.—
Machado v. Machado, 172 P. 1124.

#### II. GROUNDS.

(A) Errors and Irregularities in General. e=17 (Cal.) While course of conduct alleged in affidavits used on motion for change of judge on the ground of bias or prejudice under Code Civ. Proc. § 170, subd. 4, can be used as evidence of irregularities in motion for new trial under section 657, subd. 1, the question of bias or prejudice cannot be raised upon the motion for new trial.—In re Friedman's Estate, 172 P. 140.

### (B) Misconduct of Parties, Counsel, or Witnesses.

e=28 (Mont.) Under Rev. Codes, § 6794(1), held that new trial should have been granted, where one defendant and third party concealed one of plaintiff's material witnesses and compelled him to stay in hiding until trial was concluded; such conduct constituting contempt under section 7309(8), a misdemeanor under section 8249.—Buntin v. Chicago, M. & St. P. Ry. Co., 172 P. 330.

#### (C) Rulings and Instructions at Trial.

38 (Cal.) Where a demurrer to the coms=38 (Cal.) Where a demurrer to the complaint had been overruled, and on trial before another judge plaintif's evidence was rejected because complaint was defective, and judgment in defendant's favor was entered, such judgment was not judgment on the pleadings but in effect one of nonsuit, granting of which, if erroneous, was ground for new trial.—Stow v. Superior Court of California in and for Alameda County, 172 P. 598.

Where testimony proffered by plaintiff was rejected as not relevant under complaint believed by court to be faulty, and, plaintiff standing

rejected as not relevant under complaint behaved by court to be faulty, and, plaintiff standing on his pleading, the court gave judgment against him, new trial might be granted because of the court's ruling upon the exclusion of evidence under the complaint, as an alleged "error in law, occurring at the trial," made ground for new trial by Code Civ. Proc. § 657, subd. 7.—Id.

# (D) Disqualification or Misconduct of or Affecting Jury.

51 (Colo.) Defendants will not be granted a new trial on the ground that an attempt was made by a bystander to bribe a juror to hang the jury in behalf of defendants.—Harvey v. Beard, 172 P. 420.

### (F) Verdict or Findings Contrary to Law or Evidence.

e=71 (Or.) In a depositor's action against a bank to recover a deposit alleged to have been wrongfully withdrawn by a third person, where there was evidence on both sides as to such third person's authority, the question was for the jury, decision could not be disturbed by the trial court.—McNamee v. First Nat. Bank, 172 P. 801.

€=79 (Cal.) New trial will not be granted for want of evidence to sustain immaterial findings.

—Benoist v. Benoist, 172 P. 1109.

79 (Wash.) Where motion for new trial set out no new matter, but merely sought another review by judge of evidence then in record, on which he had reached original conclusion, and was heard on merits, and not declined to be heard for insufficient technical reasons, denial was not erroneous.—In re King's Estate, 172 P. 1167.

#### (G) Surprise, Accident. I Mistake. Inadvertence, or

85 (Okl.) Party against whom judgment is rendered for any default of appearance may file motion for new trial.—Laclede Oil & Gas Co. v. Miller, 172 P. 84.

@=93 (Okl.) If errors properly presented on appeal from judgment necessitates review of See Judgment, =199.

evidence and it is impossible to make case-made incorporating testimony, through no fault of such party, new trial will be granted under R. L. 1910, § 5033, subd. 9, on proper application therefor.—Laclede Oil & Gas Co. v. Miller, 172

#### (H) Newly Discovered Evidence.

discovered evidence, as ground for new trial, must be evidence discovered after trial which is material, and which moving party could not. with reasonable diligence, have discovered and produced at trial.—Roberts v. Oechsli, 172 P. 1037.

em102(1) (Cal.) To be entitled to a new trial on the ground of newly discovered evidence, it must be shown that the evidence could not, with reasonable diligence, have been produced at the trial.—In re Jepson's Estate, 172 P. 1107.

e=102(1) (Mont.) New trial was properly denied where motion was based on ground of newly discovered evidence of witness known by a defendant to be in possession of facts seven years before trial.—Roberts v. Oechsli, 172 P. 1037.

accidental drowning, where the only breach of warranty was that deceased had heart trouble, affidavit of physician that his opinion was that deceased had an apoplectic stroke, held not to call for new trial on ground of newly discovered evidence.—Kinsey v. Pacific Mut. Life Ins. Co. of California, 172 P. 1098.

6-104(1) (Cal.) New trial will not be granted for newly discovered evidence which is merely cumulative.—In re Jepson's Estate, 172 P. 1107. e=104(1) (Mont.) Order denying new trial on account of newly discovered testimony which is merely cumulative is proper.—Roberts v. Oechsli, 172 P. 1087.

# III. PROCEEDINGS TO PROCURE NEW TRIAL.

(20), 17(2) (Ariz.) Under Civ. Code 1913, par. 590, providing that motions for new trial shall be made after rendition of judgment, a motion before rendition of judgment was premature and ineffectual.—Ellis v. First Nat. Bank, 172 P. 281.

119 (Utah) Where new trial was moved for on March 26th, it was within the discretion of the court to exclude evidence in support thereof, where the affidavits were not filed until April 26th.—Egelund v. Fayter, 172 P. 313. April 20th.—Egeiund v. Fayter, 112 F. 313.

\$\insigma \text{140(2)}\$ (Cal.) On motion for new trial under Code Civ. Proc. \( \frac{6}{2}\) (57, subd. 1, on ground of irregularities preventing a fair trial it is immaterial whether they result from bias or prejudice; hence it is unnecessary for judge to file a counter affidavit denying bias and prejudice.—In re Friedman's Estate, 172 P. 140. on ground of newly discovered evidence must disclose by his own affidavit that new evidence was not known to him at time of trial.—Roberts v. Oechsli, 172 P. 1037.

#### NOMINAL DAMAGES.

See Appeal and Error, \$\sim 1171.

#### NON OBSTANTE VEREDICTO.

#### NONRESIDENCE.

See Depositions, 12; Limitation of Actions,

#### NONSUIT.

See Dismissal and Nonsuit.

#### NOTES.

See Bills and Notes.

#### NOTICE.

See Appeal and Error, \$\insertarrow\$419-430; Banks and Banking, \$\insertarrow\$116; Bills and Notes, \$\insertarrow\$39; Carriers, \$\insertarrow\$85; Chattel Mortgages, \$\insertarrow\$147; Contracts, \$\insertarrow\$271, 306; Criminal Law, \$\infty\$1081; Fraudulent Conveyances, \$\insertarrow\$159; Guaranty, \$\infty\$7: Highways, \$\infty\$197; Insurance, \$\infty\$95, 354, 378; Judgment, \$\infty\$388; Lis Pendens; Partnership, \$\infty\$37: Principal and Agent, \$\infty\$166, 178; Receivers, \$\infty\$35.

©== 5 (Okl.) Records of office of state insurance commissioner pertaining to status of insurance company are not constructive notice of contents thereof to one dealing with company.

—Union Trust Co. v. Hendrickson, 172 P. 440.

#### NUISANCE.

#### I. PRIVATE NUISANCES.

# (A) Nature of Injury, and Liability There-

(Kan.) A business may be conducted under conditions which will constitute it a private as well as a public nuisance.—Winbigler v. Clift, 172 P. 537.

#### (C) Abatement and Injunction.

€=32 (Kan.) Petition in suit by an individual to enjoin private nuisance arising from keeping of a horse and mule market in close proximity to his residence, held to state a cause of action, so that sustaining of demurrer was error.—Winbigler v. Clift, 172 P. 537.

#### II. PUBLIC NUISANCES.

#### (C) Abatement and Injunction.

**84** (Kan.) In action by state on relation of county attorney, evidence held sufficient to justify finding that horse and mule market conducted by defendant was a public nuisance.-Winbigler v. Clift, 172 P. 537.

#### NUNCUPATIVE WILLS.

See Wills, 4=144.

#### OBJECTIONS.

ee Appeal and Error, \$\insigm\$185-237, 1078; Criminal Law, \$\infty\$600, 693, 1032-1037; Indictment and Information, \$\infty\$196, 198; Parties, \$\infty\$92, 93; Pleading, \$\infty\$406, 427, 430.

#### OBLIGATION OF CONTRACTS.

See Constitutional Law, @=135-154.

#### **OBSCENITY.**

(Okl.Cr.App.) Under Ray. Laws 1910, \$2403, the language used need not consist of words obscene or lascivious per se, and an information setting forth language not obscene or lascivious per se, but the sense and the meaning of which is such, is sufficient in view of sections 5746, 5747.—State v. Payne, 172 P. 1096, 1008.

Emil (Cal.App.) Under Pen. Code, § 311. complaint charging that defendant did "willfully and unlawfully expose his person," etc., was insufficient, in that it did not allege that acts were done "lewdly."—Ex Parte Correa, 172 P. 615.

#### OBSTRUCTIONS.

See Highways, \$==153, 192.

#### OCCUPATION.

See Insurance. \$\sim 339.

#### OFFER.

See Contracts, 4 22.

#### OFFER OF PROOF.

See Trial. 4=63.

#### OFFICERS.

See Clerks of Courts; Constitutional Law, \$\sim 31\$; Corporations, \$\sim 425 - 432\$; Extortion; Judges; Justices of the Peace; Municipal Corporations, \$\sim 183\$; Quo Warranto; Re-

# L APPOINTMENT, QUALIFICATION, AND TENURE.

(F) Term of Office, Vacancies, and Hold-ing Over.

e=55(1) (Cal.App.) Where judgment was against one appointed to office, in action to remove another from such office, and former took appeal which was decided in his favor, he was not "incumbent" of such office pending appeal within Pol. Code, \$ 996. subd. 6, whose absence from the state would render office vacant; other being incumbent under such act, as well as under section 936.—Benton v. Hunt, 172 P. 177.

#### (G) Resignation, Suspension, or Removal.

(G) Resignation, Suspension, or Removal.

2. [New, vol. 17 Key-No. Series]
(Colo.) A mere deposit with the Secretary of State of a petition to recall an officer under Const. Amend. art. 21, § 2 (see Laws 1913, p. 673), is not a filing until the secretary has examined it and determined that it is a petition and has actually filed it, and the filing does not date back to the date of deposit.—Landrum v. Ramer, 172 P. 3.

Under Const. Amend. art. 21, § 2 (see Laws 1913, p. 673), a signature to a recall petition is not complete, and the writer of it not a "signer" unless there be added the date of signing and place of residence.—Id.

# III. RIGHTS, POWERS, DUTIES, AND LIABILITIES.

e=94 (Colo.) Where an officer may and does hold two offices, he is entitled to receive the compensation attached to each.—Lindsley v. City and County of Denver, 172 P. 707.

\$\equiv \text{9.1} \text{ Wash.}\$) Where a statute fixes an officer's compensation at a certain sum per day, such officer, performing any substantial service on a particular day, has a right to per diem for that day.—State v. Hurn, 172 P. 1147.

that day.—State v. Iturn, 112 r. 1131.

101 (Colo.) A de facto officer, having performed the duties of the officer, could not, after a decree that another was the de jure officer, recover from the state the compensation for the period of his performance of the duties.—

1) Tach v. Leckenby, 172 P. 424.

103 (Colo.) Where the law declares that some officer already chosen and acting shall act ex officio in some other capacity, and duties of each capacity are of the same general nature and inseparably blended in law creating and defining the undisputed office, officer holds but one office.—Lindsley v. City and County of Denver, 172 P. 707.

#### OIL.

See Highways, \$\infty\$=192; Mines and Minerals, \$\infty\$=56-79; Receivers, \$\infty\$=18, 290.



#### OPEN AND CLOSE.

See Trial, 25.

#### OPINION EVIDENCE.

See Evidence, 471-546.

#### OPTIONS.

Sec Corporations. \$\sim 77.

#### ORDINANCES.

See Licenses: Municipal Corporations. == 108. 301, 592.

#### PARENT AND CHILD.

See Bastards; Deeds, \$\sim 72; Divorce, \$\sim 298; Guardian and Ward; Infants; Negligence, \$\sim 96; Seduction.

€=5(3) (Utah) If plaintiff, a minor, was supporting himself from his own earnings, his parents not claiming such earnings, he was enti-tled, in an action for injuries, to recover for their loss, in view of Comp. Laws 1907, §§ 1544, 3243.—Kuchenmeister v. Los Angeles & S. L. R. Co., 172 P. 725.

#### PAROL EVIDENCE.

See Evidence, \$\sim 400-459.

#### PARTIES.

For parties to particular proceedings or instruments, see also the various specific topics.

For parties on appeal and review of rulings as to parties, see Appeal and Error.

#### II. DEFENDANTS. (B) Joinder.

==25 (Kan.) In petition to enjoin a foreclo-E-25 (Ran.) In petition to enjoin a foreclosure sale under a mortgage on the ground of the mortgage's breach of a contract to make releases to purchasers from the mortgagor, joinder of the sheriff ordered to make sale and of purchaser from mortgagor was not a misjoinder of parties.—Nelson v. Hoskinson, 172 P. 993.

# V. DEFECTS, OBJECTIONS, AND AMENDMENT.

92(1) (Okl.) The objection that there is a misjoinder of parties must be raised before trial, or it will be deemed waived.—Phillips v. Mitchell, 172 P. 85.

Mitchell, 172 P. 85.

93(2) (Cal.App.) By stipulations in reference to substitution of a plaintiff, held, that defendants waived notice of the motion.—Nelson v. Thomas, 172 P. 398.

Where defendants merely stated on an order for substitution of a plaintiff being made, that they had an exception to the ruling of the court, objection that there was no notice of the motion, not being seasonably and clearly presented, was not reviewable.—Id.

#### PARTNERSHIP.

Sec Husband and Wife, \$\simes 270; Mines and Minerals, 5 97.

#### I. THE RELATION.

#### (B) As to Third Persons.

e=28 (Mont.) No one who has not held them-selves out as a partner is liable as such unless he is a partner in fact, and whether he is so is a question of intent.—St. Paul Machinery Mfg. Co. v. Bruce, 172 P. 330.

€=34 (Okl.) Liability of one holding himself out as a partner rests on ground of estoppel.—Gwinnup v. Walton Trust Co., 172 P. 936.

4 37 (Okl.) One who never understood or supposed defendant to be a partner at the time of dealing with him and giving credit to partnership cannot hold ostensible partner liable, if he was not in fact a partner.—Gwinnup v. Walton Trust Co., 172 P. 936.

#### (C) Evidence.

€=53 (Okl.) Evidence held to show existence of partnership between plaintiff and defendant.

—McNally v. Harley, 172 P. 46.

# III. MUTUAL RIGHTS, DUTIES, AND LIABILITIES OF PARTNERS.

#### (A) Firm Property and Business.

E-75 (Wash.) In an action by a partner for a share of profits, a partner should not be allowed interest on the amount of capital he invested in the business, where interest on withdrawals would completely offset the interest which would otherwise be due.—Hopkins v. Craib, 172 P. 201.

## IV. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

### (D) Actions by or Against Firms or Part-

\$\instruct{\instructure{\in}\inititat{\initity}}}}}}}}}}} }}} } \right) \text{ In an action for the purture \$\inttructure{\initity{\ini

218(3) (Okl.) Whether one relied upon another's assertion of being a partner or permiting himself to be held out as a partner is a question for the jury.—Gwinnup v. Walton Trust Co., 172 P. 936.

# VII. DISSOLUTION, SETTLEMENT, AND ACCOUNTING.

#### (A) Causes of Dissolution.

(A) Causes of Dissolution.

6-261 (Wash.) Under partnership contract providing that, "if second party should want the partnership dissolved" before a certain date, he should lose all his interest as a partner, the word "want" did not mean if the second party expressed desire to dissolve partnership it would be thereby dissolved without affirmative action.—Rubens v. Rubens, 172 P. 831.

#### (D) Actions for Dissolution and Accounting.

em327(6) (Wash.) It was not a fatal variance that in an action by a partner for a share of the profits of a business the complaint alleged a partnership in the entire business and a partnership in only a part was proved.—Hopkins v. Craib. 172 P. 201.

#### PART PAYMENT.

See Accord and Satisfaction, \$= 7; Limitation of Actions, \$\sim 159.

#### PART PERFORMANCE.

See Frauds, Statute of, \$==129.

#### PASSENGERS.

See Carriers, 235-383.

#### PAWNBROKERS.

See Municipal Corporations, \$==111, 592.

#### PAYMENT.

See Accord and Satisfaction; Bills and Notes.

431; Compromise and Settlement;
Frauds, Statute of, 129; Limitation of

Actions, \$\infty\$159; Municipal Corporations, \$\infty\$370; Principal and Agent, \$\infty\$105; Subrogation.

#### I. REQUISITES AND SUFFICIENCY.

€ 21 (Mont.) Check is merely order for money, and, in absence of any agreement to contrary, its acceptance in discharge of indebtedness is conditional upon its payment.—United States Nat. Bank of Red Lodge v. Shupak, 172 P. 324.

#### PENALTIES.

See Civil Rights, \$\infty\$=13; Damages, \$\infty\$-79; Taxation, \$\infty\$=836-845; Usury, \$\infty\$=143; Weights and Measures.

#### PENDENCY OF ACTION.

See Lis Pendens.

#### PEREMPTORY CHALLENGES.

See Jury, €==136.

#### PERJURY.

#### II. PROSECUTION AND PUNISHMENT.

€=25(6) (Cal.App.) Allegations that at a certain time in the superior court of the county of F. there was on trial a certain criminal action, and that it was then material to know where B. was on a certain date, and whether he was with the defendant at a certain place, was a sufficient presentation of the matter in which it was charged defendant committed perjury.—People v. Hill, 172 P. 1114.

€=33(1) (Cal.App.) Evidence held sufficient to support a conviction of perjury.—People v. Hill, 172 P. 1114.

#### PERSONAL INJURIES.

See Animals, \$\infty 72, 74; Carriers, \$\infty 280-321; Damages, \$\infty 131, 132; Highways, \$\infty 192, 197; Negligence; Railroads, \$\infty 324-350.

#### PETITION.

See Highways, ==29.

#### PHOTOGRAPHS.

See Torts, &== 8.

#### PHYSICIANS AND SURGEONS.

See Constitutional Law, \$\$\sime\$80; False Imprisonment, \$\$\sime\$5, 10, 23.

description (Cal.App.) A complaint to the board of medical examiners, charging a physician in the language of St. 1915, p. 198, § 12, subd. 1, with attempting a criminal abortion, was sufficient, without stating the acts of the offense, since Pen. Code, § 950, requiring such statement, does not apply to proceedings before the board of examiners.—Lanterman v. Anderson, 172 P. 625.

Since a proceeding to revoke the license to practice of a physician is not criminal, the rule that a person may not be convicted upon the uncorroborated testimony of an accomplice does not apply in such proceeding.—Id.

Evidence held to warrant revocation of physician's license to practice on the ground that

Evidence held to warrant revocation of physician's license to practice on the ground that he aided in performing a criminal abortion.—Id.

#### PIPE LINES.

See Highways, \$== 192.

#### PLACE

See Contracts, 208.

#### PLAY.

See Municipal Corporations, \$= 736.

#### PLAY GROUNDS.

See Evidence, \$\frac{1}{2}471; Schools and School Districts, \$\frac{1}{2}1.

#### PLEA.

See Criminal Law, \$274; Insurance, \$15; Pleading, \$93.

#### PLEADING.

See New Trial, \$=38.

For pleadings in particular actions or proceedings, see also the various specific topics.

For review of rulings relating to pleadings, see Appeal and Error.

#### L FORM AND ALLEGATIONS IN GEN-ERAL.

€=34 (Okl.) The nature of a pleading is determined, not by the title, but by the subject-matter, and a motion to dismiss, setting up defensive matters, cannot be treated as a motion, but may be treated as an answer.—State v. City of Muskogee, 172 P. 796.

&--8(2) (Wash.) In state's action for premiums on compensation insurance against telegraph company, where it was alleged that construction work was extrahazardous, defendant's denial thereof was of no effect, where it admitted doing telegraph business, in view of Rem. Code 1915, § 6604—2 and 6604—3, conclusively declaring construction of telegraph lines to be extrahazardous.—State v. Postal Telegraph-Cable Co. of Washington, 172 P. 902.

\$\infty\$=38(3) (Cal.) In action to enjoin enforcement of justice's judgment, allegation of complaint as to character of appeal from justice to superior court held mere conclusion.—Rushton v. Reeve, 172 P. 608.

\$\&\tag{8}\$ (Cal.) Allegation that "said building restrictions upon said lots have been faithfully observed" is mere conclusion.—Bresee v. Dunn, 172 P. 387.

\$\insigms 8(15)\$ (Cal.) In action on notes given in renewal of corporation stock subscription notes, allegation in the answer that at time of renewal of the notes the holders thereof "ratified and confirmed the statements and representations" made to induce the execution of the original notes, which were set out, was not the allegation of a conclusion but an allegation that the holders repeated the false statements of the agent who sold the stock.—Edmonds v. Wilcox, 172 P. 1101.

(Mont.) A complaint in an action against an administrator for services rendered decedent, held demurrable in containing inconsistent allegations as to payment.—White v. Hagbery, 172 P. 1034.

Hagbery, 172 P. 1034.

22 (Or.) Where complaint alleged oral contract on June 16th to remodel building, and on completion of changes to lease to defendant for one year, and that on August 15th a lease for one year in accordance with the agreement was made operative by giving and taking possession, the allegations as to the contract of June 16th were unnecessary and redundant.—Thomas v. Peebler, 172 P. 648.

23(7) (Obl.) Allegations in petition which

&=36(7) (Okl.) Allegations in petition which have been superseded by amended petition complete within itself and not referring to original petition are not conclusive upon plaintiff.—Letcher v. Maloney, 172 P. 972.

#### III. PLEA OR ANSWER, CROSS-COM-PLAINT, AND AFFIDAVIT OF DEFENSE.

#### (A) Defenses in General.

\$\infty\$=93(2) (Mont.) One sued as partner for price of tractor sold to partnership may, un-



der Rev. Codes, § 6549, plead nonexistence of partnership and failure of consideration and breach of warranty, and evidence to rebut waiver by showing conditional acceptance was admissible as against objection that, if not a partner, it was immaterial to him.—St. Paul Machinery & Mfg. Co. v. Bruce, 172 P. 330.

(C) Traverses or Denials and Admissions. €=122 (Cal.App.) Denial in answer predicated upon lack of information only, and not upon lack of information and belief, is insufficient under Code Civ. Proc. § 437.—Turner v. Watkins, 172 P. 620.

= 127(2) (Or.) Admission in answer that or-dinance provided for improvement for the endinance provided for improvement for the entire width of a street, and that certain owners had been permitted to have their property approached by a gradual slope, was not an admission of an allegation in the complaint that the street had been improved for only a portion of the prescribed width.—Manley v. City of Marshfield, 172 P. 488.

city of marsaneid, 172 F. 488.

20129(2) (Mont.) In an action to subject certain property to an attachment lien, failure of the purchaser of the property to deny allegations of cause of action constitute a confession on defendant's part that plaintiff's claims were just and could not be successfully controverted.—Strong v. Butte Central & Boston Copper Corp., 172 P. 1033.

# IV. REPLICATION OR REPLY AND SUBSEQUENT PLEADINGS.

colors (N.M.) In an action for the price of goods sold and delivered, answer denying all allegations of the complaint and alleging certain defenses, held not to state new matter.—H. A. Seinsheimer & Co. v. Jacobson, 172 P. 1042.

Affirmative allegations in answer, which are in effect only denials, are not new matter, as that is not new matter in an answer which might have been shown under a general denial.—Id

#### V. DEMURRER OR EXCEPTION.

8-205(2) (N.M.) In a suit to foreclose a mortgage, wherein the answers raised only the question that it was executed and delivered prior to final proof by the mortgagor and to the delivery of a patent to her, demurrers on ground that answers did not state facts sufficient to constitute any defense were sufficient.—Worthington v. Tipton, 172 P. 1048. e=214(2) (Or.) A demurrer admits all averments of facts well pleaded.—Oregon Home Builders v. Eisman, 172 P. 114.

\$\infty\$214(4) (Or.) A demurrer admits any reasonable and proper inference deducible from facts well pleaded.—Oregon Home Builders v. Eisman, 172 P. 114.

### VI. AMENDED AND SUPPLEMENTAL PLEADINGS AND REPLEADER.

249(3) (Wash.) One who has begun an action of unlawful detainer, a special proceeding, cannot, by filing an amended complaint, change action over defendant's objection into one in equity.—State v. Superior Court of Pierce equity.—State v. S County, 172 P. 826.

Gounty, 172 P. 826.

2249(4) (Wash.) Defendant having been brought into court, under a special summons, and compelled to defend in unlawful detainer a special proceeding, court could not by amendment allow proceeding to be changed into a general one.—State v. Superior Court of Pierce County, 172 P. 826.

€==258(1) (Cal.) Where defendant, in an action on a note, applied for permission to amend on day of trial five months after filing origi-nal answer to embrace matters of which he

inal answer, it was not error to refuse such request.—Williams v. Youtz, 172 P. 383.

request.—Williams v. Youtz, 172 P. 383.

261 (Wash.) Refusal to allow defendants' trial amendment, adding matter of affirmative defense, was not error, where at the time defendants had no affirmative answer in the record to which the proffered amendment could be applicable.—Maltbie v. Gadd, 172 P. 557.

279(4) (Cal.) Where, after commencement of action to rescind contract to purchase land for false representations, about four acres of ten purchased were washed away by flood, plaintiff was properly permitted to file a supplemental complaint averring such fact.—Cooper v. Huntington, 172 P. 591.

## VIII. PROFERT, OYER, AND EXHIBITS.

e=309 (Wash.) Where a motion is made for an order to require plaintiff to furnish a copy of a written contract which has been pleaded according to its legal effect, neither a written demand under Rem. Code 1915, § 284, nor notice under section 1262 is necessary.—Gates v. Herr, 172 P. 912.

@=310 (Okl.) Letters attached to petition in action for specific performance of a contract for conveyance of land showing the alleged contract, if in conflict with petition, must control in determining whether an enforceable contract was made.—Bowker v. Linton, 172 P. 442.

#### XI. MOTIONS.

343 (Okl.) A motion for judgment on the pleadings is in the nature of a demurrer, and tests the sufficiency of the pleadings, and presents to the court the question of law whether the facts alleged constitute a defense to the cause of action.—Oliphant v. Crane, 172 P. 1073, 1074.

€=349 (Mont.) In action to subject property to attachment lien, where former owner admitted a decree in bankruptcy against him and sale of property by trustee, and purchaser admitted existence of lien, there was no issue for a trial, and judgment on the pleadings was proper.—Strong v. Butte Central & Boston Copper Corp., 172 P. 1033.

& 349 (Okl.) Where defendant's answer contained a general denial, which, however, was qualified by other allegations admitting all facts necessary to authorize a judgment in plaintif's favor, it was not error to sustain plaintif's motion for judgment on the pleadings.—Oliphant v. Crane, 172 P. 1073, 1074.

#### XII. ISSUES, PROOF, AND VARIANCE.

⇒380 (Cal.App.) In action on corporation debt against stockholder, where upon allegations of complaint as they stood admitted there was no issue as to number of shares corporation had outstanding when debt was incurred, plaintiff was not entitled to raise such issue by introducing evidence.—Southern California Iron & Steel Co. v. Maier, 172 P. 615.

# XIII. DEFECTS AND OBJECTIONS, WAIVER, AND AIDER BY VER-DICT OR JUDGMENT.

406(6) (Okl.) Where parties presented their case or defense to trial court on certain theory, they are bound thereby, and cannot thereafter change such theory in trial court.—Incorporated Town of Comanche v. Works, 172 P. 60. 6-427 (Wash.) In action against railroad for injuries, where plaintiff offered evidence of loss of earnings in his special occupation withhad knowledge at the time of filing such orig- out specific allegations in support, court admiting such evidence, defendant, to render availing its objection, was not required to claim surprise and ask continuance.—Armstrong v. Spokane International Ry. Co., 172 P. 578.

Only where amendment is asked and permitted is it incumbent on adverse party to ask continuance for surprise in introduction of evidence.—Id. ting such evidence, defendant, to render availing

\$\iff \alpha 430(2)\$ (Or.) In action under federal Employer's Liability Act for death of section man killed by train, any variance as to where he was going at time of accident, in view of defendant's failure to object as required by L. O. L. § 97, was waived.—Stool v. Southern Pac. Co., 172

€-330(2) (Wash.) Pleadings can be treated as amended to conform to proof only where evidence was admitted without objection, or where objecting party has met issue with evidence under such circumstances that he may be said to have waived objection.—Armstrong v. Spokane International Ry. Co., 172 P. 578.

#### PLEDGES.

See Corporations, ==123.

62 (Or.) An assignment of a land contract as collateral to a note, and the note, may be shown by parol to be merely security for the performance of a contract.—Gress v. Wessinger, 172 P. 495.

\$\insert\$, 112 1. \$\frac{1}{2}\$. \$\insert\$ \$\intert\$ \$\insert\$ \$\intert\$ \$\insert\$ \$\intert\$ \$\insert\$ \$\intert\$ \$\insert\$ \$\intert\$ \$\insert\$ \$\intert\$ \$\insert\$ \$\i

#### POLICE.

See Municipal Corporations, \$\sim 183.

#### POLICE POWER.

See Municipal Corporations, 45592.

#### POLICY.

See Insurance.

#### POLITICAL RIGHTS.

See Elections.

#### POSSESSION.

See Adverse Possession; Chattel Mortgages, \$\infty\$187, 198; Frauds, Statute of, \$\infty\$129.

#### POSTAL CLERKS.

See Carriers, 241, 290.

#### PRACTICE.

For practice in particular actions and proceedings, see the various specific topics.

#### PREFERENCES.

See Bankruptcy, \$165-214; Fraudulent Conveyances, \$123.

#### PRELIMINARY EXAMINATION.

See Criminal Law, 221-242, 543.

#### PREMEDITATION.

See Homicide, == 286.

#### PREMIUMS.

See Insurance, 349, 354, 388.

#### PRESCRIPTION.

See Adverse Possession; Highways, &-5, : Waters and Water Courses, &-138, 164. **€**==5, 14;

#### PRESUMPTIONS.

See Appeal and Error, \$=907-939: Criminal Law, \$=1144; Evidence, \$=68-83.

#### PRINCIPAL AND AGENT.

See Attorney and Client; Brokers; Confusion of Goods, \$\iiis 8; Corporations, \$\iiis 425-432; Guaranty; Insurance, \$\iiis 95, 378; Principal and Surety, \$\iiis 55; Warehousemen, \$\iiis 8.

#### I. THE RELATION.

#### (A) Creation and Existence.

€=3(2) (Or.) Where bank hired one to move wood within specified time at price per cord, assuming no control over transportation but only agreeing to identify the wood to be moved under the agreement, relationship of employer and independent contractor obtained.—Scales v. First State Bank, 172 P. 499.

v. First State Bank, 172 P. 499.
Where a bank hired one to move wood, neither the absence of a provision requiring contractor to give bond, nor the presence of province wood, and visions requiring care in moving wood, and protection from damage by fire, and that employer could take control upon breach militated against relationship of employer and independent contractor.—Id.

Presence in contract between employer and independent contractor of stipulations to hold employer harmless from liens for labor and material and exempting employer from liability for personal injuries, without clause exempting from liability for labor and supplies, neither makes the contractor a mere agent, nor admits liability for labor and supplies furnished him.—Id.

Payment of workmen by an owner or employer does not necessarily transform an independent contractor into an agent.—Id.

e⇒14(3) (Or.) Arrangement by depositor with president of national bank that it should act as broker for loaning for him, merely because bank could not so act, did not make president individually his agent to so act.—Haines v. First Nat. Bank, 172 P. 505.

## II. MUTUAL RIGHTS, DUTIES, AND LIABILITIES.

#### (A) Execution of Agency.

8=69(1) (Or.) Authority to agent to loan money does not authorize him to borrow the money for himself.—Haines v. First Nat. Bank, 172 P. 505.

€=79(5) (Wash.) In action for agent's negligence in collecting claims when prima facie case for recovery of damages has been made, burden is on agent to show facts relieving him from liabilty.—Green v. Bouton, 172 P. 576.

family.—Green v. Boaton, 112 1. 516.

2. 79(9) (Wash.) Measure of agent's liability for negligence in collecting claims is damages sustained by principal, which is prima facie the amount of debt or claim.—Green v. Bouton, 172

In action against agent for negligence in collecting claims or notes, where, notwithstanding his negligence, principal has suffered no loss, he can recover nominal damages only.—Id.

# III. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

#### (A) Powers of Agent.

6-99 (Kan.) Where no limitation of agent's authority is shown, his apparent, and not his actual, authority, controls.—J. I. Case Plow Works v. Thorne, 172 P. 38.

emiloi(1) (Kan.) A binding contract is made by the meeting of the minds of an authorized agent and of another person with whom the contract is being made for the agent's princi-pal.—Kramer v. Walters, 172 P. 1013.

buyer of hay to cart the hay to be turned over to him by seller has no authority to refuse to

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accept the hay because of its condition, and acceptance by drayman of hay for carting purposes does not constitute acceptance by buyer.—Sevier v. Hopkins, 172 P. 550.

6-105(9) (Mont.) Agent has no implied authority to accept payment in anything but money.—United States Nat. Bank of Red Lodge v. Shupak, 172 P. 324.

⊕=123(1) (Kan.) Agent's actual or apparent authority may be shown by circumstantial evidence.—J. I. Case Plow Works v. Thorne, 172

P. 38. (23(1) (Kan.) In action on note for silo purchased from plaintiff, evidence held to show that plaintiff's agent had authority to bind plaintiff by contracting with defendant for his sale of silos on commission.—Kramer v. Walters, 172 P. 1018.

€==123(3) (Kan.) In action against plaintiff's local dealer for price of plow, evidence held to sustain finding of apparent authority in plaintiff's traveling salesman to make arrangement carried out by local dealer.—J. I. Case Plow Works v. Thorne, 172 P. 38.

(a) [36(1) (Mont.) Agent is not personally liable on contract made by him on behalf of principal if he disclosed principal and made engagement for him.—Farr v. Stein, 172 P. 135.

#### (B) Undisclosed Agency.

\$\to\$146(2) (Okl.) One who without disclosing his agency enters into a contract in his own name with one who has no knowledge of his agency binds himself.—Letcher v. Maloney, 172 P. 972.

#### (D) Ratification.

€=166(1) (Colo.) If principal deliberately ratifies agent's act upon such knowledge as he has, assuming any risk of failing to make full inquiry, he is bound and cannot avoid effect of his act on ground of want of knowledge.—Western Investment & Land Co. v. First Nat. Bank, 172 P. 6.

Bank, 112 F. 6.

3. 166(2) (Or.) Ratification of agent's act, in exceeding his authority to loan by borrowing money for himself, cannot be imputed to principal merely because he was told that loan was made, without being informed of facts.—Haines v. First Nat. Bank, 172 P. 505.

maines v. First Nat. Bank, 112 P. 505.

174 (Colo.) In suit on note made and indorsed by president in name of defendant company and given in payment for automobile, held, on evidence, that whether purchase and indorsement and delivery of note were ratified by company was for jury.—Western Investment & Land Co. v. First Nat. Bank, 172 P. 6.

### (E) Notice to Agent.

\$\(\tag{178}(1)\) (Okl.) The lender of money is charged with notice of the acts of his agent within the scope of the agent's authority.—Bean v. Rumrill, 172 P. 452.

#### (F) Actions.

defendant on his purchase of silo from plaintiff, held, not error to submit to jury defendant's counterclaim based on commissions for sale of silos under contract with plaintiff's agent.—Kramer v. Walters, 172 P. 1013.

193 (Mont.) When evidence of what was said and done at time of transaction by agent in light of circumstances is equivocal question

in light of circumstances is equivocal, question whether agent acted for himself or for his principal is for jury.—Farr v. Stein, 172 P. 135.

In action by attorney for value of professional services relative to note held by defend-

ratification of an unauthorized indorsement in defendant company's behalf unless known to and approved by it was not error, where the issue was as to an express ratification.—West-ern Investment & Land Co. v. First Nat. Bank, 172 P. 6.

### PRINCIPAL AND SURETY.

See Appeal and Error, \$\infty\$1232-1244; Bail; Guaranty; Indemnity; Receivers, \$\infty\$95; Replevin, \$\infty\$120; Subrogation, \$\infty\$6.

### I. CREATION AND EXISTENCE OF RELATION.

### (B) Surety Companies.

€=55 (Wash.) Where plaintiff sucs surety company for repudiation of unauthorized bond and claims bond as valid because agent and attorney in fact signing it had apparent authority so to do, such anthority must be shown by facts that it was apparent to plaintiff, and not facts that it was rendered apparent to some one else.—Mills v. Title Guaranty & Surety Co., 172 P. 248.

## II. NATURE AND EXTENT OF LIABILITY OF SURETY.

66(1) (Cal.) Surety bond of contractor, conditioned that he should "pay all laborers, mechanics and materialmen and persons who shall supply him with provisions or goods, all just debts to such person or to any others to whom any part of the work is given, incurred in carrying on such work did not entitle one who leased mules to the contractor to recover on the bond.—French v. Farmer, 172 P. 1102.

Contractor's bond held not to entitle lessor of

mules to recover thereon for expenses and wa-ges of corral man furnished by him and whom the principal agreed to pay.—Id.

€ 76 (Wash.) Surety for contractor held liable on its bond in at least sum paid it, instead of to contractor pursuant to its bond on its payment of such sum to the contractor and subsequent foreclosure of lien for larger amount.—Island Gun Club v. National Surety Co., 172 P. 209.

€==82(2) (Cal.App.) Where subcontractor abandons work and owner completing the job deductcons work and owner completing the job deducted the cost thereof from amount payable principal contractor under his contract, the principal contractor was damaged to the extent of such deduction, and can recover such damages from subcontractor's bondsmen.—New England Equitable Ins. Co. v. Chicago Bonding & Surety Co., 172 P. 1122.

### III. DISCHARGE OF SURETY.

e=100(6) (Wash.) Where a subcontractor's contract provided for extras, his surety was not released by the inclusion of contractor's loss thereon in completing the work after subcontractor's breach of performance.—Houghton v. Hoy, 172 P. 1148.

e=109 (Kan.) Where surety signs note as co-maker and principal obtained a renewal by prenature, and, in holder's action against principal and surety, the jury on issue of forgery, found for surety and the holder sued surety on original canceled note, surety was liable.—Severy State Bank v. Hoyt, 172 P. 994.

@\_116 (Wash.) Insufficient presentation to executors of deceased surety on a supersedeas bond of the claim for liability thereon held not to release the other surety.—Empson v. Fortune, 172 P. 873.

ant, etc., whether defendant acted for himself. on an appeal bond for three parties, and the jury.—Id. creditor settled with two of such parties and dismissed case as to them without surety's conrefusal to instruct that there could be no sent, he was released under Rev. Laws 1910,

§§ 1043, 1052, 1056.—Shutte v. Colgate Grain Co., 172 P. 780.
It is immaterial whether a release of all the

It is immaterial whether a release of all the principals is affected, as a release of any one operates to release the surety.—Id.

#### IV. REMEDIES OF CREDITORS.

© 136 (Cal.) Recovery for provisions furnished railroad contractor could be had on contractor's bond to the railroad, conditioned to pay for provisions used, by a third person in whose favor the bond did not nominally run, on theory that the bond was made for his benefit.—French v. Farmer, 172 P. 1102.

Farmer, 172 P. 1102.

145(2) (Kan.) In holder's action against principal and surety involving issue as to forging of surety's name in renewal note, judgment rendered in surety's favor was not res judicata in holder's action against surety on original note.—Severy State Bank v. Hoyt, 172 P. 994.

145(2) (Wash.) City's judgment against contractor, in which contractor was assisted by his surety, held not to estop surety, sued by city on the judgment, from setting up defenses not involved in or material to first action.—City of Pasco v. Pacific Coast Casualty Co., 172 P. 566.

One secondarily liable, participating in an action against his principal, is estopped by the judgment entered on the issues actually tried therein.—Id.

em161 (Wash.) In an action against surety company for repudiating bond, claimed by plaintiff to be valid because agents signing bond had apparent authority, evidence held to sustain decision of lower court that as a matter of law bond was executed without apparent authority.—Mills v. Title Guaranty & Surety Co., 172 P. 248.

172 f. 240.

3161 (Wash.) Evidence held to show that as required by the bond the contractor had duly notified the subcontractor's surety, a corporation, and given it opportunity to complete the contract after the subcontractor's breach, which it failed to do, rendering it liable for contractor's loss in completing the work.—Houghton v. Hoy, 172 P. 1148.

Hoy, 112 F. 1148. = 162(2) (Wash.) Where plaintiff brings action against surety company for repudiating an unauthorized bond, claiming bond is valid because signed by agents of company with apparent authority, it is a question of law for court to decide whether agent and attorney in fact signing bond had apparent authority so to do.—Mills v. Title Guaranty & Surety Co., 172 P. 248.

## V. RIGHTS AND REMEDIES OF SURETY.

### (B) As to Principal.

\$\instructure 182 (Kan.) A surety may acquire a claim for reimbursements by paying a debt which is alive as to him, but outlawed as to the principal.—Leslie v. Compton, 172 P. 1015.

### PRIORITIES.

See Bankruptcy, \$350; Chattel Mortgages, \$138, 147; Logs and Logging; Waters and Water Courses, \$140.

### PRIVACY.

See Torts. 6=8.

### PRIVATE NUISANCE.

See Nuisance, 1, 32.

### PRIVILEGE.

See Witnesses, 302.

### PRIVILEGED COMMUNICATIONS.

See Libel and Slander, \$\sim 41-51; Witnesses, \$\sim 219\$

### PRIVITY.

See Covenants, \$\sim 57.

### PROBATE.

See Wills, \$\sim 259-303.

### PROBATE COURTS.

See Courts, == 202.

### PROCESS.

See Appeal and Error, \$\inserpm\$419-430, 1087; Attachment; Execution; Garnishment; Injunction; Judgment, \$\inserpm\$17; Mandamus; Mortgages, \$\inserpm\$440; Prohibition; Quo Warranto: Taxation, \$\inserpm\$642.

### II. SERVICE.

#### (A) Personal Service in General.

€=68 (Okl.) When original summons is served, defendants are in court for every purpose connected with the action, and those served are bound to take notice of the filing of a crosspetition by a codefendant.—Littlefield v. Brown, 172 P. 643.

#### (C) Publication or Other Notice.

&=96(4) (Cal.) Affidavit in publication of summons, under Code Civ. Proc. § 412, as to publication when defendant cannot be found within state, held sufficient to support order for publication, although it did not declare expressly that affiant did not himself know whereabouts of defendant.—Clarkin v. Morris, 172 P. 981.

\$31. \$\colon=96(4)\$ (Okl.) Affidavit for summons by publication, averring that whereabouts of defendants could not be known by affiant, that he had used due diligence and had made trips to find them, was insufficient, where facts as to due diligence used as to service in the state were not set up.—Rentie v. Rentie, 172 P. 1083.

### PROHIBITION.

See Courts, 2007; Intoxicating Liquors.

### L NATURE AND GROUNDS.

€=5(1) (Wash.) Prohibition will lie from the Supreme Court against a judge of the superior court sitting as a magistrate.—State v. Taylor, 172 P. 217.

em10(1) (Cal.) Prohibition runs only against excess of jurisdiction of court.—In re Turner's Estate, 172 P. 759.

© 10(2)(Wash.) Where court only had jurisdiction to determine issues in forcible entry and detainer action, being without power to grant injunctive relief, writ of prohibition will issue.—State v. Superior Court of Pierce County, 172 P. 826.

### PROMISSORY NOTES.

See Bills and Notes.

### PROOF.

See Insurance, \$\sim 550.

### PROPERTY.

See Fish; Good Will.

### PROSTITUTION.

Emi (Wash.) "Every person" as used in Rem. Code 1915, § 2440, providing that "every person" who shall live with or accept any earnings of a common prostitute, etc., shall be punished, etc., includes females as well as males.—State v. Kelly, 172 P. 1175.

earnings of common prostitute contrary to Rem.

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Code 1915, § 2440, information held sufficient, it being unnecessary to state purpose of accepting earnings.—State v. Kelly, 172 P. 1175.

### PROVINCE OF COURT AND JURY.

See Criminal Law, 5741, 761.

### PROXIMATE CAUSE.

See Negligence, \$==61.

### PUBLICATION.

See Municipal Corporations, =110; Process.

### PUBLIC IMPROVEMENTS.

See Municipal Corporations, @==278-514.

### PUBLIC LANDS.

See Mines and Minerals, \$38.

### I. GOVERNMENT OWNERSHIP.

E-17 (N.M.) Under Act Cong. Feb. 25, 1885, court of equity will not at instance of owner of odd-numbered sections enjoin another owner of live stock from grazing them on odd-numbered sections in absence of legal fence maintained by plaintiff under Code 1915, § 39.—Jastro v. Francis, 172 P. 1139.

In exercise of right of way over sections held in private ownership, the utmost reasonable care

In exercise of right of way over sections held in private ownership, the utmost reasonable care is to be exercised by claimants of right so as to do least damage to servient estate, which, practically applied, would require herds to cross at section corners, and at no other place on servient sections.—Id.

## II. SURVEY AND DISPOSAL OF LANDS OF UNITED STATES.

### (E) School and University Lands.

6.31 (N.M.) Enabling Act of New Mexico, §§ 6, 11, and Act Cong. Aug. 18, 1894, § 1, operate as present grant to state of school sections, subject only to identification by survey, whereupon title vested in state as of date of Enabling Act, and state may take possession as soon as land is surveyed.—Dallas v. Swigart, 172 P 416

© 7. 416. © 55 (N.M.) Upon the allowance of a lieu selection of public land by the local land officers, the state and its lessee acquire such an interest in the land as authorizes injunction to prevent waste thereon.—Elliott v. Rich, 172 P. 194.

€=55 (N.M.) Under Enabling Act of New Mexico, as soon as school sections granted to state are surveyed in the field, the state acquires such interest therein as entitles it to lease it to private persons.—Dallas v. Swigart, 172 P. 416.

### (M) Conveyances, Contracts, and Exemptions.

€=136 (N.M.) One having an inchoate interest in public lands may mortgage it, although the statute under which he claims prohibits an alienation of his rights as such a prohibition refers only to attempted conveyances of title and not to mortgages.—Worthington v. Tipton, 172 P. 1048.

### PUBLIC NUISANCE.

See Nuisance, \$= 84.

### PUBLIC SCHOOLS.

See Schools and School Districts.

### PUBLIC SERVICE CORPORATIONS.

See Carriers; Railroads; Street Railroads; Telegraphs and Telephones.

### PUBLIC TRIAL.

See Criminal Law, \$==635, 660.

### PUBLIC USE.

See Dedication: Eminent Domain.

### PUBLIC WATER SUPPLY.

See Waters and Water Courses, 203, 242.

### PUNISHMENT.

See Criminal Law. 4=1207.

### QUALIFIED PRIVILEGE.

See Libel and Slander, \$= 41-47.

### QUESTIONS OF LAW AND FACT.

See Criminal Law, \$\infty\$ 741, 761; Homicide, \$\infty\$ 268; Negligence, \$\infty\$ 136; Trial, \$\infty\$ 139.

### QUIETING TITLE.

See Fraudulent Conveyances, 4=271.

#### I. RIGHT OF ACTION AND DEFENSES.

€=10(1) (Mont.) In action to quiet title, plaintiff must recover on the strength of his own title.—Borgeson v. Tubb, 172 P. 326.

& 10(2) (Cal.App.) Suit to quiet title for want of delivery of a deed from plaintiff to defendants under which the latter claim may be maintained; the legal title in such case being in plaintiff, and not in defendants.—Nelson v. Thomas, 172 P. 398.

Thomas, 172 P. 398.

\$\insigma 15\$ (Cal.App.) Under complaint alleging that plaintiff purchased at commissioner's sale but received deed to only part of property, plaintiff's legal ownership of land conveyed entitled him to sue to quiet title against former owners, and they could not raise defenses existing in favor of commissioner as to that branch of case seeking to compel him to make new deed conveying all the land.—Morris v. Judkins, 172 P. 163.

### II. PROCEEDINGS AND RELIEF.

\$\insertag{\insertage} 30(3)\$ (Cal.App.) In suit to quiet title and to require commissioner to make new deed conveying full interest purchased by plaintiff at commissioner's sale, commissioner was not necessary party to title quieting branch of case. so that though he was named as individual there was no defect of parties.—Morris v. Judkins, 172 P. 163.

6-34(1) (Wyo.) A petition in a suit to quiet title and to cancel a mortgage held to state a cause of action.—Arnold v. Nichols, 172 P. 335.

### QUO WARRANTO.

### I. NATURE AND GROUNDS.

6 (N.M.) Quo warranto upon relation of private citizen is not, as general rule, writ of right, nor is leave granted as a matter of course; petition to file the writ being addressed to court's discretion.—State v. Raithel, 172 P. 1137.

In exercise of court's discretion, quo warranto proceeding on relation of private citizen may be denied on ground of public policy, and question determined from standpoint of public interest, and such application may be denied though facts are such that judgments would have to go against respondent.—Id.

## II. JURISDICTION, PROCEEDINGS, AND RELIEF.

55 (N.M.) Evidence held to show no abuse of judicial discretion in dismissing rule to show

cause why relator should not be granted leave (D) Injuries to Licensees or Trespassers to file information in neture of one warrents to file information in nature of que warranto against members of village board of education, in view of Code 1915, §§ 1993, 3591, 4872.—State v. Raithel, 172 P. 1137.

### RAILROADS.

See Carriers; Commerce; Covenants, \$\sim 68; Master and Servant; Street Railroads.

### V. RIGHT OF WAY AND OTHER IN-TERESTS IN LAND.

€=76(Mont.) A railroad right of way ment over a public street is a mere incorporeal hereditament, or naked right of passage shared by the railroad with the general public, because impressed upon an open street, the fee to which is in the public.—Chicago, M. & St. P. Ry. Co. v. Poland 172 P. 541.

## VI. CONSTRUCTION, MAINTENANCE, AND EQUIPMENT.

97 (Utah) In view of Public Utilities Act, art. 5, § 34, repealing all acts or parts of acts inconsistent therewith, Public Utilities Act provides the exclusive method of regulation, control, and license of the use of grade crossings by railroads, regulated in article 4, § 14, thereof.—Denver & R. G. R. Co. v. Public Utilities Commission of Utah, 172 P. 479.

In view of Public Utilities Act, art. 4, § 14, although commission made rule against grant-

although commission made rule against granting a license for street crossing, unless municipality had granted franchise therefor, and no franchise had been acquired, commission had power and it was its duty to act on application.—Id.

P. 856.

The mere fact that a subcontractor has performed work of value in changing a railroad grade in a city does not make the railway company liable therefor in equity, where the subcontractor has filed no lien notice.—Id.

### VIII. INDEBTEDNESS, SECURITIES, LIENS. AND MORTGAGES.

### (A) Nature and Extent of Liabilities.

178 (Mont.) If railway right of way easement or the land subservient thereto could be lawfully assessed for adjacent street paving, the character of its use would not necessarily prevent sale for failure to pay the assessment.—Chicago, M. & St. P. Ry. Co. v. Poland, 172 P. 541.

### X. OPERATION.

### (B) Statutory, Municipal, and Official Regulations.

e=224 (Okl.) Corporation operating electric street railway and transporting passengers and freight and having a line through an agricultural region outside a municipality along a private right of way, is a "railroad" required to fence its track within Rev. Laws 1910, § 1435.— Muskogee Electric Traction Co. v. Doering, 172

P. 793. A "railroad" within Rev. Laws 1910, § 1435, is any road laid out and graded on which cars are operated for the carriage of passengers or freight, without regard to its motive power.

\$\iff 2731/2\$ (Kan.) A railroad's duty to a trespasser is merely to avoid injuring him willfully.

Carson v. Atchison, T. & S. F. Ry. Co., 172 P. 1000.

€==274(5) (Or.) Railroad operating near a station where public congregate must so regulate their speed and give such signals as experience has shown to be most conducive to safety, and not inconsistent with efficient operation of trains.—Stool v. Southern Pac. Co., 172

P. 101.

276(3) (Kan.) Railroad ordinarily owes no duty to be on the outlook for juvenile trespassers inclined to climb upon moving freight cars, and it is not liable for injuries sustained by them in so doing.—Carson v. Atchison, T. & S. F. Ry. Co., 172 P. 1000.

279 (Kan.) In an action for damages for death of a boy, defendant railroad's violation of city speed ordinance could not be considered as an element in establishing its negligence, unless the damages were traceable to or aggravated by such violation.—Carson v. Atchison, T. & S. F. Ry. Co., 172 P. 1000.

2782(5) (Kan.) In an action against a rail-

\$\insp\cdot 282(5)\$ (Kan.) In an action against a rail-road for the death of a boy who had climbed the truck of a freight car from which he fell, evidence held not to show defendant's negligence.

—Carson v. Atchison, T. & S. F. Ry. Co., 172

In an action against a railroad for the death of a boy who had climbed the truck of a freight train from which he fell, evidence held to establish the negligence of the deceased.—Id.

#### (F) Accidents at Crossings.

\$\iffsize 324(1)\$ (Cal.App.) Mere act of passing over railroad's public street crossing is not negligence per se, but only when attempt is made to pass over without using reasonable care in ascertaining whether there is a train approaching the street of ing, or about to approach.—Ilardi v. Central California Traction Co., 172 P. 763.

€=338 (Cal.App.) If motorman of interurban railroad's car saw wagon on track at cross-ing, and could have stopped without injury to wagon or passengers, but neglected to do so, so that passenger in wagon was killed, plaintiff, suing for death, is entitled to verdict under doctrine of last clear chance.—Hardi v. Central California Traction Co., 172 P. 763.

€=346(5) (Cal.App.) In action against railroad for death at crossing of one riding as passenger in vehicle of another, burden was on defend-ant railroad to show deceased failed to exercise such care for his own safety as was required of him.—Hardi v. Central California Traction Co., 172 P. 763.

There is disputable presumption that one

killed at railroad crossing in collision exercised due care for his own safety, having in view surrounding conditions, with which he was

familiar.—10.

\$\lefta 348(1)\$ (Cal.App.) In an action for wrongful death of a passenger in an automobile struck by defendant's railroad train at a crossing, a special finding that decedent was leaning forward against the front seat, either warning the driver or in the act of jumping, held supported by the evidence.—Drouillard v. Southern Pac. Co., 172 P. 405.

\$\text{250(12)}\$ (Cal.App.) In view of Code Civ.

Southern Fac. Co., 172 P. 405.

350(13) (Cal.App.) In view of Code Civ.

Proc. § 1963, a passenger in an automobile struck by railroad train at a crossing held not negligent as a matter of law.—Drouillard v. Southern Pac. Co., 172 P. 405.

A passenger in an automobile driven by another assenger in an automobile driven by another another another another another another ano

other across a railroad track must exercise or-dinary care for his own safety, and whether he does so is a question of fact.—Id.

€-350(21) (Cal.App.) Where passenger in vehicle crossing railroad track said nothing and did nothing and looked neither up nor down

track before horse was started across by drivtrack defore norse was started across by Griver, such passenger was not negligent per se, and his acts did not justify conclusion as matter of law that he falled to use due care.—Hardiv. Central California Traction Co., 172 P. 763. In action against railroad for death in crossing collision, question whether decedent, passenger in wagon of another, was guilty of negligence directly causing his death held for

ligence directly causing his death, held for jury under circumstances in evidence.—Id.

350(33) (Cal.App.) In action against rail-2350(33) (Cal.App.) In action against railroad for death in crossing collision, evidence held to justify submission to jury of question of last clear chance.—Ilardi v. Central California Traction Co., 172 P. 763.

In action against railroad for death in crossing collision, whether decedent and driver of

wagon in which he was riding as passenger negligently failed to extricate themselves from position of peril after having placed themselves in it, so that original negligence was cause of death, and doctrine of last clear chance had no application, held for jury.—Id. death of a passenger in an action for wrongful death of a passenger in an automobile struck by defendant's railroad train at a crossing, a special finding that if decedent had looked he could have seen the approaching locomotive was not inconsistent with a general verdict against the railroad company.—Drouillard v. Southern Pac. Co., 172 P. 405.

#### (G) Injuries to Persons on or near Tracks.

367 (Or.) Railroad operating trains in populous village must give such signals as experience has shown to be most conducive to safety, and not inconsistent with efficient operation of trains.—Stool v. Southern Pac. Co., 172

372(5) (Or.) Railroad operating trains in populous village must so regulate their speed as experience has shown to be most conducive to safety, and not inconsistent with efficient operation of trains.—Stool v. Southern Pac. Co., 172 P. 101.

\$\iftharpoonup 390 (Wash.) Duty of engineer under last clear chance doctrine to trespasser sitting on track arises only when he realizes his helpless condition, or it can be said as matter of law that the danger is so evident as to charge him with duty to stop.—Schommers v. Great Northern Ry. Co., 172 P. 848.

### (H) Injuries to Animals on or near Tracks.

Tracks.

\$\lime{4}\frac{1}{1}\left(10\frac{1}{2}\right)\$ (Wash.) Since Rem. Code 1915, \$\frac{8}{8}\frac{8}{731}\, 8732\, as to railroad fences, are taken from Acts 1903\, p. 332\, and Acts 1907\, p. 169\, titles of which refer to "stock injured by moving railway trains," and declare law of negligence as to "stock injured by railway trains," and the third sections of which refer to "injury to stock by collision with moving railway trains," section 8731 does not render railroad liable for injury to stock because of unfenced right of way, not caused by moving train, such as fall of stock through treatle.—Thayer v. Snohomish Logging Co., 172 P. 552.

\$\lime{2}\lime{4}\left(2(1)\) (Cal.App.) Railroad is bound to use

€-412(1) (Cal.App.) Railroad is bound to use reasonable diligence in keeping its right of way fences in repair, and it need not resort to exfences in repair, and it need not resort to extraordinary means, such as maintenance of patrol, to insure fences will not be broken or will be promptly repaired if broken.—Jesus Maria Rancho v. Southern Pac. Co., 172 P. 183.

\*\*E=412(4) (Cal.App.) Railroad whose right of way traversed plaintiff's land, where high winds sometimes drifted sand over right of way fences, permitting passage of cattle, held not under duty, in order to properly maintain fences, to build them abnormally high; there being long periods when sand did not move.—Jesus Maria Rancho v. Southern Pac. Co., 172 P. 183.

which might be held down by plants, and which often covers fences, duty of railroad to maintain such fences as will keep cattle from entering upon right of way is absolute under Civ. Code, § 485.—Id. —413(1) (Utah) Under Comp. Laws 1907, § 456x, as amended by Laws 1913, c. 74, railroad is not under duty either to put in cattle guards, or to construct wing fences at private farm crossings.—Knight v. Southern Pac. Co., 172 P. 689.

Where railroad voluntarily constructed wing fences at private crossing on farm intersected by its right of way, doing so purely for owner's convenience, and not pursuant to statutory duty, it did not also impliedly agree to maintain such fences.—Id.

\$\infty\$ \delta 22 (Utah) That railroad fails to comply with statutory duty to fence right of way or fails to maintain fences or keep them in repair does not render it contributory negligence of landowner to turn live stock into fields adjacent to railroad.—Knight v. Southern Pac. Co., 172 P. 689.

Owner of farm and owners of horses pastured on it held guilty of negligence contributing to death of their horses on railroad's right of way on account of defective wing fence.—Id.

€=425 (Utah) Railroad's failure to keep wing fence at private crossing in repair held not proximate cause of killing of horses on right of way.

-Knight v. Southern Pac. Co., 172 P. 689.

429 (Utah) Where railroad made no agreement to maintain wing fences at private crossing ment to maintain wing fences at private crossing on farm of which owners of horses pastured on such farm could avail themselves, law imposing no such duty on it, no recovery against it could be had by farm owner for horses of others killed at crossing with his own; alleged causes of action of owners having been assigned to him.

—Knight v. Southern Pac. Co., 172 P. 689.

—Angat v. Southern Fac. Co., 172 F. 665.

—343(2) (Cal.App.) In action against railroad for killing cow, which resulted in death by
starvation of her calf, evidence held to justify
finding loss of calf was proximate result of
railroad's negligence which killed cow.—Jesus
Maria Rancho v. Southern Pac. Co., 172 P. 183. Maria Rancho v. Southern Pac. Co., 172 P. 183.

33-443(6) (Cal.App.) In action against railroad for killing cattle where wind-drifted sand
had covered fence, enabling cattle to go from
plaintiff's land upon railroad's right of way,
evidence as to whether railroad had actual or
constructive notice of condition of fence held
insufficient to sustain finding for plaintiff.

Jesus Maria Rancho v. Southern Pac. Co., 172
P. 183.

In action against railroad for killing cow, and consequently starving her calf, which cow passed over railroad's right of way fence by means of wind-drifted sand, evidence held sufficient to justify finding cow was killed through railroad's negligence.—Id.

In action against railroad for killing heifer on right of way which heifer come there by pages.

right of way, which heifer came there by passing over fence by sand dune, evidence held sufficient to support finding of railroad's negligence.—Id.

gence.—1d.

In action against railroad for killing four cows on right of way, which cows entered right of way through breach in fence caused by throwing down of gate and part of fence proper, evidence held insufficient to support finding of negligence on part of railroad.—Id.

### RAPE.

See Criminal Law, 6271/2.

### II. PROSECUTION AND PUNISHMENT. (B) Evidence.

@=== 42 (Cal.App.) In prosecution for rape, prosecuting attorney's question whether witness knew that accused had been sentenced to the Despite blowing sand on plaintiff's property penitentiary for rape was improper and un-

fair: the judgment referred to having been reversed.—People v. Webster, 172 P. 768.

In prosecution for rape, the assistant district attorney could properly inquire whether witnesses had heard that accused had been previously accused of rape; such accusations, even if untrue, bearing on reputation.-Id.

even it untrue, bearing on reputation.—10.

5—51(5) (Cal.App.) Where prosecutrix testified that she told arresting officer of the rape in order to avoid being punished, but did not say that her story was false, such matters went to her credibility, but if believed by the jury her testimony was sufficient upon which to rest conviction.—People v. Fraysier, 172 P. 1128. €=53(4) (N.M.) To convict of assault with intent to rape, state must establish beyond reasonable doubt that accused intended to have insonable doubt that accused intended to have intercourse with female by force and against her will, and that he not only used such force, but used it with intent to have sexual intercourse notwithstanding any resistance she might make.

—State v. Duckett, 172 P. 189.

#### (C) Trisl and Review.

\$\colon 59(12)\$ (Cal.App.) It is not error to refuse instruction that if prosecutrix made no complaint of the alleged rape the jury should view her failure to do so as a suspicious circumstance indicating that her story was false.—People v. Fraysier, 172 P. 1126.

### RATIFICATION.

See Corporations, \$\sim 426\$; Principal and Agent, \$\sim 166\$, 174, 194.

### REAL ACTIONS.

See Forcible Entry and Detainer: Quieting Title

### REASSESSMENT.

See Municipal Corporations. 514.

### RECALL

See Officers, \$\opin\_70\frac{1}{2}.

### RECEIVERS.

See Corporations, \$\sim 553.

## I. NATURE AND GROUNDS OF RE-CEIVERSHIP.

(B) Grounds of Appointment of Receiver. €==18 (Kan.) On petition praying for dissoluemils (Kan.) On petition praying for dissolution of partnership, an accounting, and the appointment of a receiver, held, that a receiver was properly appointed for an oil and gas lease, although the interested parties were merely cotenants, where they could not agree upon their rights or management of property.—Huston v. Cox, 172 P. 992.

## II. APPOINTMENT, QUALIFICATION, AND TENURE.

e=29(2) (Kan.) A receiver may be appointed by district court for oil and gas lease beyond the jurisdiction, where lease creates only an incorporeal hereditament, and in any event where court has jurisdiction of persons of in-terested parties.—Huston v. Cox, 172 P. 992. erested parties.—Huston v. Cox, 112 P. 992.

35(1) (Okl.) Where petition for a receiver fails to state facts sufficient to show that delay resulting from giving notice of application to adverse party would defeat or injure petitioner's rights, appointment of receiver without notice is error.—Union State Bank of Shawnee v. Mueller, 172 P. 650.

⊕35(3) (Okl.) Where defendants after appointment of receiver without notice, moved to vacate appointment and filed answers on the merits and issue was tried and evidence was

presented on both sides, error in making appointment without notice was waived.—Union State Bank of Shawnee v. Mueller, 172 P. 650.

## IV. MANAGEMENT AND DISPOSI-TION OF PROPERTY.

#### (A) Administration in General.

(X) Administration in the description of their office alone, are authorized to assign, to obligee on its contractor's bond, company's right under indemnity bond protecting it against liability on contractor's bond, thereby relieving it of liability on its contractor's bond.—Island Gun Club v. National Surety Co., 172 P. 209.

### (D) Sale and Conveyance or Redelivery of Property.

144 (Wash.) Receivers' assignment of right of surety company under indemnity bond, signed by the individual names of receivers without official designation, held not defective in form, as not being assignment by receivers as such.—Island Gun Club v. National Surety Co., 172 P.

#### VII. ACCOUNTING AND COMPENSA-TION.

em199 (Wash.) In corporation insolvency proceedings, orders, purporting to be final, approving expenses incurred by and payments made by receiver to himself and attorneys as compensation, were void, where rendered exparte and without notice to any one interested other than receiver and his attorneys.—Colkett v. Hammond, 172 P. 548.

On appeal from exparte orders as to compensation of receiver and attorneys, the Supreme Court will not determine upon merits amount of compensation allowable, but will reverse orders and remand question of compensa-

verse orders and remand question of compensation and approval of accounts to trial court for determination upon due notice to interested parties.-Id.

### RECEIVING STOLEN GOODS.

€=3 (N.M.) To constitute crime of buying or receiving stolen goods under Code 1915, § 1538, it is essential that accused should have knowledge that they have been stolen.—State v. Floyd, 172 P. 188.

### RECOGNIZANCES.

See Bail.

### RECORDS.

See Appeal and Error, \$\iff 493-717, 939; Chattel Mortgages, \$\iff 194; Costs, \$\iff 256; Criminal Law, \$\iff 1090; Deeds, \$\iff 59; Divorce, \$\iff 284. **\$**==256;

### REDIRECT EXAMINATION.

See Witnesses, \$\sim 287.

### REFERENCE.

See Arbitration and Award.

### III. REPORT AND FINDINGS.

e=94 (Wash.) Where evidence is voluminous and would cost a large sum to transcribe, Rem. Code 1915, § 375, does not require referee to do so, and a statement where evidence of the chief witness may be found, and that referee fairly stated other testimony, is sufficient.—Hopkins v. Craib, 172 P. 201.

### REFERENDUM.

See Municipal Corporations, \$108; Statutes, \$35\%.



### REFORMATION OF INSTRUMENTS.

See Alteration of Instruments; Cancellation of Instruments.

### I. RIGHT OF ACTION AND DEFENSES.

19(1) (Or.) To reform contract, as lease, on ground of mistake, as for mistake respecting time for which lease shall run, mistake must be mutual, not that one party understood contract should be one way, while different understanding was held by other.—Turner v. Hartog, 172 P. 484.

e=23 (Wash.) Where owner of lots contracted to pay a lump sum for excavation to contractors who had excavated adjoining streets tractors who had excavated adjoining streets for city, giving mortgages on lots in payment, such owner is estopped to show that he thought he was contracting with reference to the established grade, whereas he was being charged for a more expensive grade not lawfully authorized.

—Kelley v. Smith, 172 P. 542.

### REHEARING.

See New Trial.

### REIMBURSEMENT.

See Guaranty, 4=100.

### RELEASE.

See Accord and Satisfaction; Compromise and Settlement; Payment; Principal and Surety, **€**===116.

### RELEVANCY.

See Criminal Law, 4=361, 363; Evidence, 4= 123.

### REMITTITUR.

See Appeal and Error, \$==1188.

### REMOVAL

See Homestead, \$\sim 161-164.

### RENT.

See Landlord and Tenant, 4557.

### REOPENING CASE.

See Trial, €==67.

#### REPEAL.

See Criminal Law, 4=15; Statutes, 4=159-

### REPLEVIN.

See Appeal and Error, \$==1061.

### I. RIGHT OF ACTION AND DEFENSES.

@=12(2) (Utah) Ordinarily, counterclaims, or counter demands, cannot be litigated in replevin; but where seller sues to recover possession of automobile sold conditionally, and buyer tenders amount due in court, he may reduce the seller's claim to the extent of damage incurred on account of a defective top.—Beck v. Lee, 172 P. 686.

### III. PROCEEDINGS FOR TAKING AND REDELIVERY OF PROPERTY.

45 (Wash.) Where sheriff held property undepth (Wash.) Where sheriff held property under writ of replevin and no redelivery was ever given, it became his duty after three days, and on payment of his costs, to turn the property over to plaintiff in replevin.—McRae v. Angeles Brewing Co., 172 P. 263.

### IV. PLEADING AND EVIDENCE.

57 (Okl.) Petition in replevin alleging plaintiff's ownership of property and his right to See Taxation.

immediate possession, and defendant's wrongful detention thereof stated a cause of action.

—Walker v. Hinton, 172 P. 73.

—walker v. Hinton, 172 P. 73.

272 (Cal.) In action on claim and delivery, evidence held to justify finding that defendant and his cross-defendants, as inducement to cross-complainant to purchase automobile in which defendant falsely claimed an interest, agreed that if cross-complainant would purchase they would warrant and defend title.—Ackerman v. Schultz, 172 P. 609.

€-72 (Okl.) In action of replevin for cattle covered by mortgage, judgment denying claim of an intervener claiming under subsequent mortgage held sustained by the evidence.—Iowa Nat. Bank v. Citizens' Nat. Bank of Woonsocket, R. I., 172 P. 924.

€-72 (Okl.) In a replevin action, evidence held insufficient to sustain verdict and judgment for plaintiff for possession of property or its value, awarding damages for wrongful detention.—Lucas v. King, 172 P. 939. €=72 (Okl.) In action of replevin for cattle

### V. DAMAGES.

8-84 (Cal.) Where, after transfer of possession and before discovery of fraud, buyer of an automobile expended or became indebted for repairs, he was properly awarded judgment for sum in action of claim and delivery wherein he was made defendant and cross-complained against his vendor.—Ackerman v. Schultz, 172 P. 609.

## VII. LIABILITIES ON BONDS AND UNDERTAKINGS.

20 (Okl.) Surety on redelivery bond in replevin, as well as sureties on supersedeas bond and bonds for stay of execution given on appeal, judgment having gone against defendant, are all liable to plaintiff in replevin.—Southwestern Surety Ins. Co. v. King, 172 P. 74.

### REPLY.

See Pleading, \$==166.

### REPORTS.

See Time, 4=11.

### REQUESTS.

See Criminal Law, \$\simes 825-829; Trial, \$\simes 260-267.

### RESCISSION.

See Cancellation of Instruments; Contracts, \$\infty\$270; Vendor and Purchaser, \$\infty\$109-119.

### RES GESTÆ.

See Criminal Law, \$363; Evidence, \$123.

### RES IPSA LOQUITUR.

See Carriers. \$\infty\$316, 321; Master and Servant, \$\infty\$265.

### RES JUDICATA.

See Appeal and Error, \$\infty\$=1097-1099; Judgment, \$\infty\$=569-735.

### RESULTING TRUSTS.

See Trusts, \$==62-70.

### RETROSPECTIVE LAWS.

See Statutes. \$\infty 263.

### REVENUE.

### REVIEW.

See Appeal and Error; Certiorari; Criminal Law, \$\infty\$1018-1188; Justices of the Peace, \$\infty\$139-174; Waters and Water Courses, \$\infty\$

### REVOCATION.

See Physicians and Surgeons, 4-11.

### REWARDS.

emil (Kan.) A public officer whose compensation is fixed by law cannot legally contract for or demand a larger compensation in the form of a reward for services rendered in the line or scope of his official duties.

—Smith v. Fenner, 172 P. 514.

No rule of public policy forbids a public officer to recover a reward where he is under no obligation arising from his official character to perform the service.—Id.

A nonpay deputy sheriff who was under no

A nonpay deputy sheriff who was under no official duty to discover and apprehend a thief is not barred by any rule of public policy from claiming a reward offered for capture of claiming a thief.—ld.

milton.—10. Specifically a sufficient to prove a contract to pay a reward for discovering, locating, and apprehending a criminal.—

Smith v. Fenner, 172 P. 514.

Evidence held sufficient to support the finding, verdict, and judgment that plaintiff had earned reward offered by defendent for enprehending

reward offered by defendant for apprehending and arresting a thief.—Id.

8-15(5) (Kan.) In action for a reward, findings as to plaintiff's efforts in apprehending and arresting a thief held not materially inconsistent.—Smith v. Fenner, 172 P. 514.

### RIGHT OF WAY.

See Railroads, \$\sim 76; Waters and Water Courses, \$\sim 242.

### RIPARIAN RIGHTS.

See Waters and Water Courses \$38.

### RISKS.

See Master and Servant, 203-219, 288.

### ROADS.

See Highways.

### ROBBERY.

€=6 (Nev.) Where defendant administered poison to produce unconsciousness and took money from saloon of which unconscious person had charge, he was guilty of robbery.—State v. Snyder, 172 P. 364.

24(1) (Nev.) In prosecution for robbery by administering chloral hydrate to render un-conscious barkeeper whose cash register was robbed, evidence connecting defendant with crime, alleged to have been committed by himself and two others, held to sustain conviction.

—State v. Snyder, 172 P. 364.

e=24(1) (Okl.Cr.App.) In a prosecution for conjoint robbery, evidence held to sustain the verdict and judgment of conviction.—Meigs v. State, 172 P. 974.

\$\equiv 24(5)\$ (Nev.) In prosecution for robbery, evidence held not to show that condition in which person robbed was found could not have been caused by administration of chloral hydrate.—State v. Snyder, 172 P. 364.

### ROLLER SKATES.

See Municipal Corporations, \$\sime 816.

#### ROYALTIES.

See Mines and Minerals, 5-79.

### SAFE PLACE TO WORK.

See Master and Servant, \$\sim 101, 102.

### SALES.

See Chattel Mortgages, \$\infty\$6; Corporations, \$\infty\$123; Counties, \$\infty\$182; Execution, \$\infty\$256; Executors and Administrators, \$\infty\$349; Frauds, Statute of, \$\infty\$71; Guardian and Ward, \$\infty\$105; Intoxicating Liquors; Logs and Logging, \$\infty\$30; Mortgages, \$\infty\$504-535; Principal and Agent, \$\infty\$103; Trusts, \$\infty\$191-202; Vendor and Purchaser.

### I. REQUISITES AND VALIDITY OF CONTRACT.

8=38(5) (Wash.) Where seller under contract to sell hay in first-class condition, finely cut, mixed wet hay and snow with the rest of the hay, causing it to spoil while in transit, he perpetrated a fraud on buyer, who had no knowledge thereof until after payment and acceptance of hay.—Sevier v. Hopkins, 172 P. 550.

### II. CONSTRUCTION OF CONTRACT.

@==61 (Wash.) Contract between automobile company and dealer held not contract whereby dealer ordered ten automobiles, but to contemplate future order of cars, especially where it did not mention prepayment of amount required on purchase of ten cars.—Price v. Hornburg, 172 P. 575.

## III. MODIFICATION OR RESCISSION OF CONTRACT.

### (A) By Agreement of Parties,

90 (Kan.) In action for damages for breach of a contract to sell certain iron and steel work, evidence held to support a finding that a new contract had been accepted in satisfaction of any claim for the breach of the original contract.—Capital Iron Works Co. v. Finney, 172

### IV. PERFORMANCE OF CONTRACT.

(C) Delivery and Acceptance of Goods.

\*\*179(4) (Mont.) Failure of consideration cannot be raised by one who accepts and retains property sold.—St. Paul Machinery Mfg. Co. v. Bruce, 172 P. 330.

### V. OPERATION AND EFFECT.

(D) Bona Fide Purchasers.

€==239 (Wash.) Purchaser of property in consideration of a pre-existing debt is within the protection of the statutes as to chattel mortgages thereon.—Keyes v. Sabin, 172 P. 835.

### VI. WARRANTIES.

e=274 (Utah) Retail dealer in delicatessen products, which sold plaintiff potato salad for immediate table consumption. held liable to plaintiff, rendered sick by potato salad, for breach of implied warranty of wholesomeness and fitness for human consumption.—Walters v. United Grocery Co., 172 P. 473.

so that it would pump as warranted, had, after installation, paid greater part of purchase price, and four years after the sale had given a new note for the balance, breach was waived.—Maltbie v. Gadd, 172 P. 557.

### VIII. REMEDIES OF BUYER.

(A) Recovery of Price.

397 (Wash.) Where prepayment of \$500 deposit by dealer in automobiles was admitted,



and terms of contract had expired, it was incumbent upon company receiving the deposit to allege and prove some valid defense and counterclaim entitling it to retain it.—Price v. Hornburg, 172 P. 575.

ground, evidence held sufficient to sustain a finding of negligent supervision of playground.—Id.

(G) Teachers.

## (D) Actions and Counterclaims for Breach of Warranty.

429 (Wash.) Tender of return of the property sold is not necessary to enable buyers to recoup for breach of warranty.—Maltbie v. Gadd, 172 P. 557.

#### IX. CONDITIONAL SALES.

&=479(2) (Cal.) An owner of an automobile, who has leased it under a contract giving an option of sale and providing for taking possession in case of default in payment, is entitled to the possession of the automobile, where the lessee has defaulted.—Adams v. Anthony, 172

479(11) (Cal.) Where a contract for the lease of an automobile provided for retaking possession on the lessee's default in making payments, a suit for such deferred payments held not to affect the right to retake possession.—Adams v. Anthony, 172 P. 593.

### SATISFACTION.

See Accord and Satisfaction; Compromise and Settlement; Payment.

### SAVINGS BANKS.

See Banks and Banking, \$301.

### SCENIC RAILWAYS.

See Fixtures, \$=15, 27, 28.

### SCHEDULE.

See Carriers, \$\sim 30.

### SCHOOLS AND SCHOOL DISTRICTS.

See Action, \$\infty\$50; Libel and Slander, \$\infty\$6, 41; Public Lands, \$\infty\$51, 55.

### II. PUBLIC SCHOOLS.

### (D) District Property, Contracts, and Liabilities.

89 (Wash.) Laws 1917, p. 332, relating to liability of school district in conducting playgrounds, had no effect upon a judgment previously rendered against a school district for negligent supervision of playgrounds, although an appeal was pending.—Bruenn v. North Yakima School Dist. No. 7, Yakima County, 172 P. 569.

## (E) District Debt, Securities, and Taxation.

(Gen. St. 1915, § 7163), before taxpayers of school district can sue to set aside oil and gas lease of school site executed by school board, and enjoin the lessee from entry, it must appear that contract and acts may impose some tax burden.—Abraham v. Weister, 172 P. 998.

### (F) Claims Against District, and Actions.

emil4 (Wash.) To prosecute an appeal is to "maintain an action" within Laws 1917, p. 332, providing that certain actions shall not be maintained against school districts.—Foley v. Pierce County School Dist. No. 10, 172 P. 819. Pierce County School Dist. No. 10, 112 r. clb.

2-121 (Wash.) Where negligence submitted to jury was only lack of, or inadequate, supervision of a school playground, evidence as to whether a teeter board was a dangerous instrumentality was not material.—Bruenn v. North Yakima School Dist. No. 7, Yakima County, 172 P. 569. In action for injury to child on school play
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In action for injury to child

135(2) (Okl.) Contracts with officers of school district to teach schools for year extend-

school district to teach schools for year extending beyond terms of such officers are not, for that reason, invalid.—Rivers v. School Dist. No. 51, Noble County, 172 P. 778.

23135(3) (Okl.) Where, on account of insufficient funds to support term provided for in teacher's contracts, electors of uistrict under Rev. Laws 1910, \$ 7788, later fixed different term and reduced salaries, the contracts became invalid.—Rivers v. School Dist. No. 51, Noble County, 172 P. 778.

=144(4) (Okl.) Such of district teachers as taught in lieu of other teachers later contracted with by succeeding officers of district pursuant to decision of electors reducing term and salaries were entitled to recover salaries fixed therein for teachers in lieu of whom they taught.—Rivers v. School Dist. No. 51, Noble County, 172 P. 778.

### SCIENTIFIC FACTS.

See Criminal Law, 304.

### SEALS.

See Corporations, \$\sim 432.

### SEARCHES AND SEIZURES.

See Intoxicating Liquors, 246.

### SECONDARY EVIDENCE.

See Criminal Law, \$\sim 400; Evidence, \$\sim 165.

### SEDUCTION.

#### I. CIVIL LIABILITY.

Em5 (Wash.) Where seduction is alleged to have been committed under promise of marriage, or where such promise is required by statute, it must be shown that necessary prom-

mise existed at time of seduction.—Rockwell v. Day, 172 P. 754.

To sustain charge of seduction, it is necessary to show that woman's consent was obtained by promises, which, when measured by age and experience of parties, and every other attending circumstance, made struggle unequal.

—Id.

17 (Wash.) Though formal promise of marriage is not essential fact to be proved under laws of Washington to sustain charge of seduction, lack of such promise, considered in light of all testimony, may be strong and even controlling circumstance in civil action for damages.—Rockwell v. Day, 172 P. 754.

There is a presumption that plaintiff suing for seduction was chaste, but such presumption is not absolute, and is attended by a presumption that judgment and discretion come with age and experience, and that a woman so fortified will not readily yield.—Id.

Where it appears that a woman, complaining of seduction, is of mature years, and is as worldly wise as defandant, the law will hold her to a stricter degree of proof than a younger woman with less experience, and she must

ner to a stricter degree of proof than a young-er woman with less experience, and she must show more than an illicit relation.—Id.

In action for seduction by woman of mature years, evidence held to show plaintiff did not yield because of any promise reasonably cal-culated to mislead a chaste woman.—Id.

that defendant threatened to commit suicide and kill prosecutrix.—People v. Lima, 172 P.

Evidence in seduction case held sufficient to sustain finding that prosecutrix was previously chaste.-Id.

In seduction case, evidence held sufficient to sustain finding that prosecutrix was unmarried.

### SELF-DEFENSE.

See Homicide, 4=111, 244, 276, 300.

### SENTENCE.

See Criminal Law, @= 991, 1001, 1183,

### SEPARATE ESTATE.

See Husband and Wife, \$==119-154.

### SEPARATE MAINTENANCE

See Husband and Wife, \$\sim 297, 298\%.

### SERVANTS.

See Master and Servant.

### SERVICE

See Process.

### SET-OFF AND COUNTERCLAIM.

See Appeal and Error, \$\infty\$=173; Judgment, \$\infty\$=439; Replevin, \$\infty\$=12; Usury, \$\infty\$=101.

### SETTLEMENT.

See Accord and Satisfaction; Account Stated; Appeal and Error, \$\infty\$567; Compromise and Settlement; Payment.

### SEX.

See Jury, 4 39.

### SIGNATURES.

See Statutes, \$\infty 35\\\\2; Wills, \$\infty 302.

### SINKING FUNDS.

See Corporations, \$\infty 486.

### SLANDER.

See Libel and Slander.

### SOLDIERS' VOTES.

See Elections, \$=9; Statutes, \$==138.

### SPECIFICATION OF ERRORS.

See Appeal and Error, \$= 728, 731.

### SPECIFIC PERFORMANCE.

### I. NATURE AND GROUNDS OF REMEDY IN GENERAL.

e=13 (Okl.) Where a principal is unable to comply with a contract with his agent to issue comporate stock in return for real estate to be bought by the agent, a judgment, directing the agent to convey property upon mere payment of the purchase price, is error.—Powell v. Adler, 172 P. 55.

### II. CONTRACTS ENFORCEABLE

€=29(2) (Okl.) To entitle one to specific performance of a contract for conveyance of land, based upon letters attached as exhibits, such letters must be certain in terms as to description of land and estate to be conveyed.—Bowker v. Linton, 172 P. 442.

### IV. PROCEEDINGS AND RELIEF.

@mil4(2) (Okl.) Petition in action for specific performance of a contract for the conveyance of land, based upon letters attached thereto, held not to set up an enforceable contract of sale.—Bowker v. Linton, 172 P. 442.

### SPEED.

See Master and Servant, 4=137; Railroads, £==279

### SPIRITUOUS LIQUORS.

See Intoxicating Liquors.

### STARE DECISIS.

See Courts. \$= 89-97.

### STATES.

See Constitutional Law, \$= 52, 62.

### I. POLITICAL STATUS AND RELA-TIONS.

8-9 (Okl.) Since statehood, divorce between members of the Osage Tribe of Indians is controlled by the divorce laws of the state, in view of Enabling Act, § 2, and Const. art. 3, § 1.—Wah-Tsa-e-o-she v. Webster, 172 P. 78.

Since statehood any attempted divorce between members of the Osage Tribe of Indians in accordance with tribal customs is a nullity.—Id.

## III. PROPERTY. CONTRACTS, AND LIABILITIES.

01 (Wash.) Under state building contract providing that the contractor shall not assign contract without written consent of Board of Control and bonding company, an ordinary subcontract not consented to by either state or bonding company does not release bonding company from its liability to either subcontractor or one furnishing subcontractor supplies: the bond being given pursuant to Rem. & Bal. Code, §§ 1159, 1161, as amended by Laws 1915, c. 28.—Crane Co. v. Musgrave & Blake, 172 P. 866.

Under a bond given pursuant to Rem. & Bal. Code, §§ 1159, 1161, as amended by Laws 1915, c. 28, conditioned to pay subcontractors and all persons who shall supply subcontractors with supplies, liability of bonding company to persons furnishing subcontractor's supplies is not affected by absence of privity of contract between arrively contracts and such tract between principal contractor and such person.-Id.

### IV. FISCAL MANAGEMENT, P DEBT, AND SECURITIES. PUBLIC

e=126 (Idaho) Under Act July 2, 1862, c. 130, Act Aug. 30, 1890, c. 841, and Act March 4, 1907, c. 2907, money received by state treasurer from Secretary of the Treasury for use of state institutions cannot be properly placed in state's general fund.—Melgard v. Eagleson, 172 P. 655.

Acts of state treasurer and state auditor in attempting to place money received from Secretary of Treasury for use of University of Idaho in the state's general fund by making entries on their books to that end did not affect legal status of the money.—Id.

### STATUTE OF FRAUDS.

See Frauds, Statute of.

### STATUTE OF LIMITATIONS.

See Limitation of Actions.



### STATUTES.

For statutes relating to particular subjects, see the various specific topics,

### I. ENACTMENT, REQUISITES, AND VALIDITY IN GENERAL.

\$\insignature of 16,800 legal voters to invoke referendum on a Senate Bill, pursuant to Const. art. 5, \(\frac{5}{3}\), and Rev. Laws 1910, \(\frac{5}{3}\) 3368 et seq., 14,621 signatures being necessary, in which addresses opposite signatures of 5,000 were omitted from sheets circulated, held invalid.—In re Referendum Petition No. 31, 172 P. 639.

64(3) (Wash.) Laws 1917, c. 115, being valid in so far as it makes board of law examiners an intermediary whereby power of Supreme Court can be more generally and efficiently exercised, will be sustained, since invalid portion, giving board power to make a final order of disbarment, is separable from valid portion.—In re Bruen, 172 P. 1152.

### III. SUBJECTS AND TITLES OF ACTS.

\*\*ED109 (Okl.) An act to amend a particular section of a general law is limited in its scope to the subject-matter of that section, and the amendment ex vi termini implies merely a change of its provisions upon same subject to which original section relates.—Pottawatomie County v. Alexander, 172 P. 436; Carrell v. Board of Com'rs of Hughes County, Id. 438. Though a particular section may be broadened by amendment so as to include matter which could logically and legally have been originally included, such new matter must be something not already specially and differently provided for in another section of same statute not referred to in amendatory law.—Id.

109 (Wash.) Object of constitutional requirement that subject of act shall be expressed to what matters are being legislated upon.—
Thayer v. Snohomish Logging Co., 172 P. 552.

## IV. AMENDMENT, REVISION, AND CODIFICATION.

(Nev.) Provision of Const. art. 4. 17, that no law shall be revised or amended by reference to its title only, does not render invalid the provision of St. 1917, c. 197, that electors in military service of United States may vote in accordance with St. 1899, c. 94, which was repealed by St. 1913, c. 284; revival by title not being prohibited.—Maclean v. Brodigan, 172 P. 375.

8-141(1) (Okl.) Part of Sess. Laws 1913, c. 210, § 1, limiting compensation of county assessors, being amendatory in form and in fact, held repugnant to Const. art. 5, § 57, forbidding amendment of any law by referring to its title only.—Pottawatomic County v. Alexander. 172 P. 436; Carrell v. Board of Com'rs of Hughes County, Id. 438.

## V. REPEAL, SUSPENSION, EXPIRA-TION, AND REVIVAL.

6=159 (Wash.) Where two statutes cannot be harmonized, the later act prevails, but repeals by implication are not favored.—Walsh v. Alaska S. S. Co., 172 P. 269.

170 (Nev.) Where one act of Legislature specifically adopts provisions of another act upon same general subject, effect is to incorporate the adopted act, making it effective for the designated purpose, and that the adopted act has been repealed is immaterial.—Maclean v. Brodigan. 172 P. 375.

#### VI. CONSTRUCTION AND OPERA-TION.

(A) General Rules of Construction.

=181(1) (Utah) In construing statutes the intent of the Legislature, if ascertainable, necessarily controls.—Industrial Commission of Utah v. Daly Mining Co., 172 P. 301.

of two constructions, the one most beneficial and useful should be adopted, if possible.—Industrial Commission of Utah v. Daly Mining Co., 172 P. 301.

€=206 (Mont.) The form of expression used in a statute is not important when purpose ina statute is not important when purpose intended and sought to be accomplished by Legislature is ascertainable and made reasonably certain by applying the rule that every word and clause must be given effect if possible.—State v. District Court of First Judicial Distin and for Lewis and Clark County, 172 P. 1030.

e=206 (Wash.) It is duty of court within bounds of reason to give to proviso of statute some meaning rather than none.—Northern Pac. Ry. Co. v. Snohomish County, 172 P. 878. 207 (Or.) Effect must be given to all terms of general statute, and where general terms in one part are inconsistent with more specific or particular provisions elsewhere, particular pro-visions will be given effect.—Barnes v. Massa-chusetts Bonding & Ins. Co., 172 P. 95.

\$\infty\$207 (Wash.) Where the enacting part of a statute is in conflict with a proviso therein, the proviso must give way.—City of Seattle v. Rothweiler, 172 P. 825.

weiter, 172 F. 525.

2207 (Wash.) Different sections or provisions of the same statute should be so construed as to harmonize and give effect to each; but, if there is irreconcilable conflict, the subsequent one prevails.—State v. Public Service Commission of Washington, 172 P. 890.

#==211 (Wash.) Language of act should be construed in view of its title and lawful purposes, since subject expressed in title fixes limit upon scope of act.—Thayer v. Snohomish Logging Co., 172 P. 552.

\$\insert 226\$ (Utah) Rule that, where a statute is adopted from another state, construction placed upon it by courts of such state prior to adoption is likewise adopted, does not go so far as to compel adoption of a construction which is inconsistent, unreasonable, and unwarranted.—

State v. De Weese, 172 P. 290.

€==228 (Wash.) Enumeration in a saving clause or construction section is made to save

clause or construction section is made to save the enumerated things, not to destroy the things not enumerated, and should not be confused with a saving clause in a repealing section, where unenumerated things are destroyed.—Walsh v. Alaska S. S. Co., 172 P. 269.

20230 (Utah) As Laws 1917, c. 115, amended Comp. Laws 1907, § 3351, so as to require service of notice in case a remittitur is sent down, legislative construction was that old statute did not require notice.—Hirsh v. Ogden Furniture & Carpet Co., 172 P. 318.

#### (B) Particular Classes of Statutes.

245 (Utah) Laws relating to taxation should be strictly construed against the taxing power.—Los Angeles & S. L. R. Co. v. Richards, 172 P. 474.

### (D) Retroactive Operation.

e=263 (Wash.) Retroactive statutes are generally regarded with disfavor; and where it does not clearly appear that such was the legislative intent, the court will not give the statute a retroactive effect, where to do so would impair existing rights.—Bruenn v. North Yakima School Dist. No. 7, Yakima County, 172 P. 569.

### STATUTES CONSTRUED.

UNITED STATES.	CALIFORNIA.	LAWS.
CONSTITUTION.	CONSTITUTION.	1901, p. 28
Amend 14 563, 962,	Art. 1, § 3	1901, p. 28 624 1911, pp. 733, 739, §§ 4, 20
986, 1050, 1152	Art. 1, \$ 7 986 Art. 2, \$ 1 986 Art. 6, \$ 41/4 158 Art. 20, \$ 18 986	1913, pp. 307-309, \$\$ 55, 62, 67
STATUTES AT LARGE.	l	62, 67
1862, July 2, ch. 130. § 4, 12 Stat. 503	CIVIL CODE. §§ 51, 52 412	Amended by Laws 1915, p. 1102 8 28
1866, July 24, ch. 230, § 1, 14 Stat. 221 902 1885, Feb. 25, ch. 149, 23	\$ 485 183 \$ 1614 881	1913, p. 469
Stat. 321	§ 1641 170	1915, p. 198, § 12, subsec.
28 Stat. 419 000	\$ 1691	1915, pp. 207, 209, 328 170
1894, Aug. 18, ch. 301, § 1, 28 Stat. 394	\$\$ 2466, 2468	1915, p. 421, art. 1, § 7 390 1915, p. 1102, § 28 611
1902, June 30, ch. 1323, 32 Stat. 500 968	\$ 3118	1917, p. 665
1902, June 30, ch. 1323, § 6, 32 Stat. 501 968	\$ 3306	COLORADO.
1903, Feb. 19, ch. 708, 32 Stat. 847 519	CODE OF CIVIL PROCE-	CONSTITUTION. •
1906, June 11, ch. 3073, 34 Stat. 232 269	DURE. § 170, subsec. 4 140	Amend. art. 21, § 2 3 Art. 20 707 Art. 20, §§ 2-4 707
1907, March 4, ch. 2907, 34 Stat. 1281	$\begin{bmatrix} \S & 187 & \dots & 170 \\ \S & 286 & \dots & 622 \end{bmatrix}$	
1908, April 22, cn. 149, 35 Stat. 65	\$ 338, subsec. 31109 \$ 339396	CODE OF CIVIL PROCE- DURE.
1908, April 22, cn. 149, 88 1, 3, 35 Stat. 65, 66 101	8 412 981	§ 841055
1908, May 27, ch. 199, 35 Stat. 312 785	\$ 437	REVISED STATUTES 1908.
1910. June 20, ch. 310. §§ 6, 11, 36 Stat. 561, 565 416	619	§ 1948 9 § 7284 6
1912, April 18, ch. 83, §§ 2, 3, 36 Stat. 86 78	8 650 et seq. Amended by Laws 1915, p. 207 170	MILLS' ANNOTATED CODE.
REVISED STATUTES.	§ 657, subsec. 1 140 § 657, subsec. 7 598	\$ 221 9
§§ 5263-5269 902	\$ 659	MILLS' ANNOTATED STAT- UTES 1912.
COMPILED STATUTES 1916.	\$ 939	§ 2075 9
§ 4876 416	\$ 941b	LAWS.
\$\$ 8597-8599	\$ 953c398, 1113, 1127 \$ 956. Amended by Laws	1897, pp. 250, 252, 254, §§ 1, 8, 16
<b>8 8659</b>	1915, p. 328 170	78 0. 0
\$\$ 8870-8877	\$ 963. Amended by Laws 1915, p. 209 170 \$\$ 1033, 1035 622	1910 (Ex. Sess.) p. 49, \$ 8
	18 1005 408	1915, p. 3361068 1915, p. 515422
ARIZONA.	\$ 1315	1010, p. 010
CONSTITUTION.	\$ 1664	KANSAS.
Art. 2, § 24	\$ 1870, subsec. 4	CONSTITUTION.
Art. 23 276	\$ 1963, subsec. 12 618   \$ 1963, subsec. 28 140	Art. 15, § 9 534  CODE OF CIVIL PROCE-
REVISED STATUTES 1887. CIVIL CODE.	\$ 2061, subsec. 3 140 \$ 2061, subsec. 5	DURE.
Par. 369 276	PENAL CODE.	\$ 17, subsec. 4
REVISED STATUTES 1913.	§ 7	\$ 265
CIVIL CODE.	\$ 193	§ 503
Par. 542	§ 311	\$ 565, 5661010 \$ 5811010, 1018
Pars. 4201, 4202 281 Par. 5284 285	\$ 950	§ 598
	\$\frac{1917}{\$\\$}, p. 665 \dots 158	GENERAL STATUTES 1915.
PENAL CODE.	1246–1247a 408	3825
§ 692 660	POLITICAL CODE. \$ 936 177	\$ 4889
LAWS. 1889. No. 42 276	§ 996. subsec. 6 177	§ 5541

172 P.—81

§ 5904 17	LAWS.	LORD'S OREGON LAWS.
\$ 5906	1915, ch. 54	\$\$ 6, 7
6907, subsec. 4	·	§ 136
694727, 1005 7163998	OKLAHOMA.	§ 733, subsec. 2 801   § 734 801
\$ 7320, 7373, 7374	CONSTITUTION. Art. 2, § 7	\$ 808, subsec. 6 648   \$ 878, subsec. 2 114
\$\frac{1421}{8} \frac{7421}{7469}, \frac{7470}{7470}	Art. 3, § 1, 78	\$ 1996
7502	Art. 5, § 3	\$ 6588 97 \$ 6595, subsec. 7 97
88 8815-8895		\$ 6617
\$ 11115, subsec. 21004 \$ 113491011	REVISED LAWS 1910.	CITY CHARTERS.
LAWS. 1911, ch. 175, § 2	§ 941, subsec. 5 55 § 988 940	Marshfield, §§ 49, 50 488
1917, ch. 265, §§ 6, 14 997	\$ 1005452, 798, 1086 \$\$ 1043, 1052, 1056 780	LAWS.
MONTANA.	§ 1154	1913, p. 251 126
REVISED CODES.	\$ 1435	UTAH.
\$\$ 371, 372, 3309 134 \$\$ 5918-5920, 5935 324	\$ 2403	CONSTITUTION.
\$\$ 6501-6506 1030 \$ 6549 330	\$ 2883	Art. 1, §§ 1, 71050
\$ 6794	\$ 3402	COMPILED LAWS 1907. § 205. Amended by Laws
<b>§§</b> 7098, 7203 540 <b>§</b> 7309(8) 330	\$ 3864	1911, ch. 125, § 1 286 § 215. Amended by Laws
\$ 8021 132 \$\$ 8042, 8043 329	\$\$ 4066, 4078	1911, ch. 125
\$ 8249	§§ 4174, 4175 942 § 4655, subsec. 4 783	1917, ch. 44 701
LAWS.	§ 4660	\$ 456x. Amended by Laws
1913, ch. 89, § 14 541	§ 4738 85	1913, ch. 74 689 §§ 511x22, 511x24, 511x27. Amended by Laws 1911,
NEVADA.	\$ 4771 1091 \$ 4907 964	ch. 119 474 § 686x13
CONSTITUTION.	\$\frac{4}{5}\$ 4958, 4959	§ 972 686   § 1212. Amended by Laws
Art. 2, § 3	\$ 5043	\$\ \begin{aligned} 1909, ch. 109, \\$ \dag{4}
REVISED LAWS.	\$ 5267, subsec. 3 952 \$ 5456 52	§ 1544
<b>\$\$</b> 5325, 5330, 5346, 5358 378	§§ 5738, 5739 92 §§ 5746, 5747	\$\ 2501, 2505, 2506, 2515, 2516, 2545
\$ 6266	\$ 5812	\$ 2593. Amended by Laws 1915, ch. 111
LAWS.	\$ 6003	\$\$ 2613, 2677
1899, ch. 94. Repealed by Laws 1913, ch. 284 375	\$\ 6025-6048	\$ 3046
1913, ch. 284. 375 1915, ch. 184. 367 1917, ch. 76. 367	§§ 6777, 6778 796	§ 3285 672
1917, ch. 197 375	\$\frac{96}{8} 7177, 7186, 7187	\$ 3301
NEW MEXICO.	MANSFIELD'S DIGEST.	§ 3351
CONSTITUTION.	§§ 2522–2545 1083	\$ 3769 678
Art. 2, § 14 196	LAWS.	\$ 3956
CODE 1915. § 391189	1907-08, ch. 49, art. 2 962 1910-11, ch. 18438, 440	LAWS.
\$ 39	1910-11, ch. 1201088 1913, ch. 157, § 241094 1913, ch. 210, § 1436	1909, ch. 109, § 4 722
\$ 2180	1915, ch. 74	1911, ch. 119
\$ 3591		1911, ch. 125, § 216 701 1913, ch. 42 721
4291	OREGON.	1913, ch. 74
\$ 4872	CONSTITUTION, Art. 4, § 1a 122	1917, ch. 2286, 1050 1917, ch. 2, §§ 2, 3, 6-9,
	Art. 7, § 3	26

1917, ch. 47, art. 5, § 34 479 1917, ch. 100, § 53 301 1917, ch. 100, § 53, subsec. 3	§§ 1104–1109 863	\$\\\ 6604-2, 6604-3\\ 902 \\\ 6604-5d\\ 830 \\\ 6604-5f\\ 343 \\\ 6604-20\\ 830 \\\ 7507\\ 890 \\\\ 8005, 8010-8\\ 243 \\\\\ 8731, 8732\\ 552 \\\\\ 8745\\ 251 \\\\\ 8746\\ 251\\ 894
WASHINGTON.	<b>1330</b> , 1331	8771 894
CONSTITUTION.	\$ 1472–1479 873 \$ 1671. Repealed by Laws	9249 224
Art. 1	1917. p. 642. 257 \$\$ 1718, 1719. 860 \$ 1721 345 \$ 1722 873 \$ 1734 860	LAWS.  1903, p. 332
REMINGTON & BALLING- ER'S CODE.	\$ 1739	1911, p. 260, § 180
\$\$ 1159, 1161. Amended by Laws 1915, ch. 28 868 \$\$ 9257, 9267 226 \$ 9314 899	§ 2055, subsec. 2	53
REMINGTON'S CODE 1915. 46	\$ 2181	1915, p. 227
\$ 172	\$ 2601	1917, p. 421
\$ 284       912         \$ 303       336, 338         \$ 307       881         \$ 375       201	\$\$ 3925, 3975	1917, p. 674, § 116 919  WYOMING.
\$ 398	§ 5623—1 et seq 254	CONSTITUTION.
§ 402 915	\$\ 5623-2, 5627, 5633 254 \$\ 5917 251	Art. 5, § 11 136
<b>§ 464</b>	\$\ 5919, 5925	COMPILED STATUTES 1910.
\$ 464 et seq	6059-34	§ 912

### STEALING.

See Larceny.

### STIPULATIONS.

See Appeal and Error, \$\sim 539, 564.

4(12) (Cal.) Statement by plaintiff's attorney, that if the complaint did not state a cause of action the easiest way to test it was by mo-tion for judgment on the pleadings, did not constitute a stipulation for such judgment.—Stow v. Superior Court of California in and for Alameda County, 172 P. 598.

⇒18(3) (Cal.) Defendant in suit on claim and 4 18(3) (Cal.) Defendant in suit on claim and delivery held precluded by stipulation from raising question whether cross-complaint, in action on claim and delivery, is improper.—Ackerman v. Schultz, 172 P. 609.

18(4) (Cal.) Trial court should not pass on issue withdrawn from consideration as immaterial by agreement of parties accepted by court.—In re Lowe's Estate, 172 P. 583.

### STOCK.

See Banks and Banking, \$==40; Corporations,

### STOLEN GOODS.

See Receiving Stolen Goods.

### STORAGE.

See Warehousemen.

### STREET RAILROADS.

See Railroads, == 224.

### II. REGULATION AND OPERATION.

(Wash.) Under Public Service Commission Law, § 53, where the income of a street railroad, operating under franchise granted under Enabling Act prior to the Public Service Commission Law, is not sufficient to pay a rea-sonable return and provide an adequate and sufficient service, commission has no power to relieve street railroad from its franchise provisions.—State v. Public Service Commission of Washington, 172 P. 890.

103(3) (Cal.App.) Where motorman slowed down, thinking plaintiff's truck was going to cross the tracks, but speeded up when he saw the truck slow down, assuming that it would stop before it reached the track, the last clear chance doctrine did not apply; actu-al knowledge of plaintiff's danger being nec-essary.—Lobbett & Dean v. Oakland, A. & E. essary.—Lobbett & Ry., 172 P. 1123.

### STREETS.

See Highways.

### STRIKING OUT.

See Criminal Law, 4=696.

### SUBROGATION.

(Or.) Subrogation is not a matter of strict right, nor does it necessarily rest on contract, but is purely equitable; and, since it is a creature of equity, it will not be enforced where working injustice to those having equal equities.—Wasco County v. New England Equitable Ins. Co., 172 P. 126.

6 (Or.) A paid surety may claim benefits of subrogation.—Wasco County v. New England Equitable Ins. Co., 172 P. 126.

Equitable Ins. Co., 172 P. 120.

277(2) (Or.) As between a defaulting county contractor's surety and a bank to which he had assigned in consideration of a loan money retained by the county until completion and acceptance of work, as per contract pursuant to Laws 1913, p. 251, held that the surety was entitled to be subrogated to the rights of the county in the funds reserved.—Wasco County v. New England Equitable Ins. Co., 172 P. 126. v. New England Equitable Ins. Co., 172 P. 126.

7(8) (Okl.) Where surety on redelivery bond in replevin did not procure or consent to the giving of a supersedeas bond and stay of execution on appeal, sureties on supersedeas bond, judgment in replevin suit against defendant having been modified and affirmed, were primarily liable, and surety on redelivery bond on payment of judgment is entitled to subrogation to rights of judgment creditor against sureties on supersedeas bond.—Southwestern Surety Ins. Co. v. King, 172 P. 74.

€==8 (Or.) As between a contractor's surety, the contractor, and a county employing him, the surety paying claims against the contractor in default may claim subrogation, because it has paid debts due to third persons acting on compulsion, and not as a volunteer.—Wasco County v. New England Equitable Ins. Co., 172 P. 126.

### SUBSCRIPTIONS.

See Corporations, \$\infty 77; Wills, \$\infty 119.

### SUICIDE.

See Insurance, \$\$\=659, 665.

### SUIT.

See Account Stated, =12.

### SUMMARY REMEDIES.

See Appeal and Error, \$\sim 1239, 1244.

### SUMMONS.

See Process.

### SUPERSEDEAS.

See Criminal Law, \$\sim 1084.

### SUPPLEMENTAL PLEADING.

See Pleading, \$\sim 279.

### SUPPORT.

See Contracts, 54.

### SUPPRESSING EVIDENCE.

See New Trial, \$\sim 28.

### SUPREME COURTS.

See Courts, \$\sim 204-207.

### SURCHARGING.

Sec Account Stated.

### SURETY COMPANIES.

See Principal and Surety, 55.

### SURETYSHIP.

See Principal and Surety.

### SURFACE WATERS.

See Waters and Water Courses, 24, 126.

### SURPLUSAGE.

See Indictment and Information, == 119.

### SURPRISE.

See Criminal Law, 599.

### SWINDLING.

See False Pretenses.

### TAXATION.

See Counties, \$\sim 113; Judgment, \$\sim 720; Licenses; Statutes, \$\sim 141, 245; Vendor and Purchaser, \$\sim 198.

### I. NATURE AND EXTENT OF POWER IN GENERAL.

e=4 (Utah) Right of one state to tax property in its jurisdiction does not depend on action of taxing power of any other state.—In re Thourot's Estate, 172 P. 697.

Thourot's Estate, 172 P. 697.

6—6 (Wash.) Conceding that a telegraph company is agent of United States, under Act Cong. July 24, 1866, the Industrial Insurance Act, requiring employers to pay premiums for compensation insurance, as applied to such company by providing for employes injured in construction of telegraph system in the state, is not invalid as a tax.—State v. Postal Telegraph. (Sale Co. of Washington 172 P. 902 graph-Cable Co. of Washington, 172 P. 902.

## HI. LIABILITY OF PERSONS AND PROPERTY.

### (A) Private Persons and Property in General.

€ Wash.) The property of persons laboring under a disability is subject to taxation as is other property, unless it is exempted by statute.—Whitaker v. Ellis, 172 P. 881.

statute.—Wnitaker v. Ellis, 172 P. 881.

\$\infty\$=\textit{98}\$ (Utah) The fiction of law that all intangible property is presumed to have its situs at domicile of owner must give way, in face of contrary facts.—In re Thourot's Estate, 172 P. 697. Under Comp. Laws 1907, \$\frac{3}{5}\$ 2501, 2505, 2506, 2515, 2516, 2545, 2613, 2677, property of estate of nonresident testator, while in hands of a resident executor having absolute and exclusive control, is within jurisdiction of state for purposes of taxation.—Id.

## (B) Corporations and Corporate Stock and Property.

€==168 (Kan.) Annual state tax of 2 per cent. on premiums received by foreign insurance companies, imposed by Gen. St. 1915, \$\$ 5177, 5467, 5468, should be computed on total amount of collected premiums devoted to business of companies, excluding premiums returned to policy holders by way of abatement or dividends.—State v. Wilson, 172 P. 41.

### (D) Exemptions.

&=245 (Kan.) A mausoleum, erected and used exclusively as a place for the permanent interment of the dead, is exempt from taxation under Gen. St. 1915, § 11151, subd. 2, exempting all lands used exclusively as graveyards.—Gray v. Craig, 172 P. 1004.

### V. LEVY AND ASSESSMENT.

### (A) Levy and Apportionment.

@=301(1) (Utah) In view of Comp. Laws 1907, §§ 511x22, 511x24, 511x27, as amended by Laws 1911, c. 119, and Comp. Laws 1907, § 2593, as amended by Laws 1915, c. 111, a separate levy for road tax which, together with levy for general county purposes, did not exceed statutory limit of general purpose levy held not invalid.—Los Angeles & S. L. R. Co. v. Richards, 172 P. 474.

### (C) Mode of Assessment in General.

€=345 (Utah) That property of a nonresident testator was assessed to estate and not to executor is immaterial, where executor had notice of assessment, in view of Comp. Laws 1907, §§ 2613, 3956.—In re Thourot's Estate, 172 P. 697.

697.

©348 (Wash.) If tidelands have a large value by reason of the fact that the owner can force the upland owner to pay a great price for it, there is no such taxable value where the tideland and upland are owned by the same person.—East Aberdeen Land Co. v. Grays Harbor County, 172 P. 876.

The law will not tolerate for taxation of lands a valuation fixed by comparisons, where the testimony overwhelms that the particular tracts in controversy have no such value.—Id.

tracts in controversy have no such value.--Id.

### (G) Review, Correction, or Setting Aside of Assessment.

€=3499 (Wash.) In action to compel county to accept tender of taxes, evidence held to show that valuation of tideland as fixed by assessor was excessive.—East Aberdeen Land Co. ▼. Grays Harbor County, 172 P. 876.

## VII. PAYMENT AND REFUNDING OR RECOVERY OF TAX PAID.

539 (Wash.) Grantee of Indian homesteader, or his heirs, could not recover back money, voluntarily paid for taxes assessed on land under mistake of law by county acting under claim of right, and without fraud.—Robinson v. Kittitas County, 172 P. 553.

# VIII. COLLECTION AND ENFORCE-MENT AGAINST PERSONS OR PERSONAL PROPERTY.

#### (B) Summary Remedies and Actions

\$\insigma\_581\$ (Wash.) Rem. Code 1915, \$ 9249, reposes a large discretion in county treasurer to determine when assessed property is dissipated or about to be dissipated, and his judgment cannot be disturbed, unless a clear showing of abuse is shown.—Hughes v. Carr, 172 P. 224.

### (C) Remedies for Wrongful Enforcement.

€==613 (Wash.) The moving of assessed saloon when the storeroom to a warehouse when the prohibition law went into effect was not a "dissipation" of such property, within Rem. Code 1915, § 9249, and distrainment and sale of such property entitled taxpayer to damages.—Hughes v. Carr, 172 P. 224.

### IX. SALE OF LAND FOR NONPAY-MENT OF TAX.

\$\circ\$=642 (Wash.) Under Rem. & Bal. Code, \$\frac{9}{257}\$, description in published summons of realty to foreclose tax lien on which county brought action held fatally defective and summons void.

-Moller v. Graham, 172 P. 226.

—Molier V. Granam, 1/2 P. 220.

3—693 (Okl.) Where parties agree that real property has been sold for taxes, and a certificate issued by county treasurer, it will be assumed that the sale was valid, and certificate regular, and that sale was for amount lawfully due, and no more.—State v. Baker, 172 P. 1088.

### XI. TAX TITLES.

### (A) Title and Rights of Purchaser at Tax Sale.

6-743 (Wash.) A brother-in-law and friend of a purchaser from an incompetent, knowing the whole situation and that the purchaser was bound to pay taxes, and who purchased from tax sale purchaser for inadequate consideration, was not a good-faith purchaser.—Whitaker v. Ellis, 172 P. 881.

### (B) Tax Deeds.

789(2) (Wash.) Rem. & Bal. Code, § 9267, providing any judgment for deed to realty sold See Schools and School Districts, 121.

for delinquent taxes shall estop all parties from raising any objections thereto, or tax title based thereon, which existed at rendition of judgment and could have been presented as defense to ap-plication for it, etc., is not applicable to fore-closure of tax lien wherein published summons was void as describing land differently from description on assessment rolls.—Moller v. Graham, 172 P. 226.

### (C) Actions to Confirm or Try Title.

€==800(1) (Wash.) One attacking county's proceeding for foreclosure of tax lien is required, as condition precedent to relief, to tender purchaser amount he paid for property at tax sale, with interest to tender.—Moller v. Graham, 172 P. 226.

€=816 (Wash.) Where acquaintance of mental incompetent who owned land and had agreed tal incompetent who owned land and had agreed to convey it to friend, purchased from tax sale purchaser for inadequate consideration, having knowledge of all the facts and that the incompetent would thereby be defrauded, and then sued to quiet title, asking equitable relief, he was entitled to recover the amount due for taxes, but not to have his title quieted, and the incompetent should be allowed opportunity to redeem.—Whitaker v. Ellis, 172 P. 881.

#### XII. FORFEITURES AND PENALTIES.

836 (Okl.) Laws 1910-11, c. 120, prescribing penalty for nonpayment of taxes, enacted after adjournment of an extraordinary session convened January, 1910. was not repealed or superseded by any provision of Rev. Laws 1910, known as the Harris-Day Code.—State v. Baker, 172 P. 1088.

er, 172 P. 1088.

32840 (Okl.) If notice of delinquent taxes was not given by mail, as required by Laws 1910-11, c. 120, penalty thereby prescribed for delinquency did not attach on failure to pay taxes within time provided therein.—State v. Baker, 172 P. 1088.

Proviso of Laws 1910-11, c. 120, requiring county treasurer to notify taxpayer of amount of his taxes, qualifies only the preceding matter relating to penalty on delinquent taxes, unpaid taxes becoming delinquent at time prescribed by act, though notice required by proscribed by act, though notice required by pro-

viso was not given.—Id.

\$\$\iff 8\$\iff 845\$ (Okl.) Where, by reason of failure to give notice, no penalty for delinquent taxes atgive notice, no penalty for delinquent taxes attaches, it will not be presumed that such penalty was included in the amount recited in the tax sale certificate.—State v. Baker, 172 P. 1088.

## XIII. LEGACY, INHERITANCE, AND TRANSFER TAXES.

\$376(6) (Cal.) Foreign charitable corporations were exempt from inheritance tax under Inheritance Tax Law 1915, art. 1, § 7. exempting charitable corporations.—In re Fiske's Estate, 172 P. 390.

### TAXATION OF COSTS.

See Costs, \$\sim 203, 220.

### TAX TITLES.

See Taxation, €==743-816.

### TEACHERS.

See Schools and School Districts, \$==135-144.

### TECHNICAL ERRORS.

See Appeal and Error, \$=1170.

### TEETER BOARD.



### TELEGRAPHS AND TELEPHONES.

See Commerce, \$\infty 28; Constitutional Law, \$\infty 135; Taxation, \$\infty 6.

## I. ESTABLISHMENT, CONSTRUCTION, AND MAINTENANCE.

\$\instructure 10(8)\$ (Wash.) Under Rem. & Bal. Code, \$\\$ 9314, providing telephone companies shall obtain the consent of the city council to construct and maintain city lines, the city may contract for a minimum monthly charge to users within the city as a condition for a franchise.—State v. Home Telephone & Telegraph Co. of Spokane, 172 P. 899.

#### II. REGULATION AND OPERATION.

\$\insigma 33(1)\$ (Wash.) If the Public Service Comsion can change the minimum rate to users of telephones as fixed by the franchise ordinance,

sion can change the minimum rate to users of telephones as fixed by the franchise ordinance, the franchise rate must remain until the commission has acted, and cannot be terminated by the telephone company filing a schedule with the commission.—State v. Home Telephone & Telegraph Co. of Spokane, 172 P. 899.

An action to compel a telephone company to render service to plaintiff at the minimum rate provided in the franchise ordinance, where the Public Service Commission has not acted, involves a contract, and not the reasonableness of the rate, and plaintiff's remedy was in the courts, and not in the commission.—Id.

70(1) (Wash.) Telegraph company, responsible for negligent mistake as to price perbox in message from shipper of apples to consignee, held liable to shipper, for difference between price received by him, on completed sale when consignee received altered message, and fair market value of apples.—Bentley v. Western Union Telegraph Co., 172 P. 1172. Where telegram was negligently altered in transmission to state price for apples of \$1.08 a box instead of \$1.80, telegraph company, responsible for alteration, by procuring consignee to make, and consignee by making, ex post facto offer to pay \$1.50 a box, could not deprive shipper of any part of his damages.—Id.

79 (Ariz.) Pen. Code 1913, § 692, prohibiting wire tapping, held not to apply to act of

e=79 (Ariz.) Pen. Code 1913, § 692, prohibiting wire tapping, held not to apply to act of placing a dictograph over the transom of a hotel room to overhear messages sent from a telephone transmitter in the room.—State v. Behringer, 172 P. 660.

### TENDER.

(Mont.) Provision of Rev. Codes, § 5918, that if instrument is by its terms payable at special place and maker is able and willing to pay it there at maturity, it is equivalent to tender of payment upon his part, can have no application to demand note.—United States Nat. Bank of Red Lodge v. Shupak, 172 P. 324.

### TENURE.

See Officers, \$\sim 55.

### TERRITORIES.

18 (Wash.) The federal Employers' Liability Act June 11, 1906, applies to injuries to employes of carriers within the territories, although such carriers are engaged in interstate commerce.—Walsh v. Alaska S. S. Co., 172 P.

Federal Employers' Liability Act April 22, 1908, does not repeal that of June 11, 1906, so far as it relates to carriers within the District of Columbia or the territories .- Id.

### THEATERS AND SHOWS.

See Fixtures, €==15, 27, 28; Torts, €==8.

### THEFT.

See Larceny.

### THREATS.

See Extortion.

Emi(1) (Cal.) Threatening to accuse and prosecute a thief unless he pays value of property stolen, and which he pays by reason of fear induced thereby, is, without reference to good faith in exacting the amount justly due, extortion, within Pen. Code, § 418.—People v. Beggs, 172 P. 152.

627 (Cgl.) In a prosecution of attorney for extortion by threatening to accuse and prosecute a thief, testimony as to value of articles admittedly stolen held material, as tending to prove fear.—People v. Beggs, 172 P. 152.

### TIMBER.

See Logs and Logging.

### TIME.

See Appeal and Error, \$\iff 230, 334, 339-356, 564, 567, 620, 628; Contracts, \$\iff 270; Costs, \$\iff 19; Criminal Law, \$\iff 693, 951, 974; Indictment and Information, \$\iff 176; Insurance, \$\iff 354; New Trial, \$\iff 117, 119, 150; Parties, \$\iff 93; Pleading, \$\iff 258; Wills, \$\iff 259, 461.

(Wash.) Under Laws 1913, pp. 386, 387, §§ 1-3, where official court reporter of superior court, in response to request of presiding judge, was in attendance during morning session, he was entitled to per diem named and not only one-half thereof.—State v. Hurn, 172 P. 1147.

### TITLE.

See Adverse Possession; Insurance, 389.

### TORTS.

E-8 (Kan.) Exhibition in moving picture of photograph of plaintiff taken in defendant's store without her consent to exploit defendant's dry goods business is a violation of the right of privacy entitling her to recover without proof of special damages.—Kunz v. Allen, 172 P. 532.

### TOWNS.

See Counties; Municipal Corporations.

### TRANSFER OF CAUSES.

See Appeal and Error, \$\infty 338-430; Courts, \$\infty 485-488; Criminal Law, \$\infty 1081-1084.

### TREBLE DAMAGES.

See Trespass, 5-61.

### TREES.

See Logs and Logging.

### TRESPASS.

See Animals, \$==90; False Imprisonment.

### II. ACTIONS.

(D) Damages.

6361 (Okl.) Where one willfully and without authority enters upon another's land and cuts

and removes timber, the measure of damages under Rev. Laws 1910, § 2883, is three times what would compensate owner for actual injury.—Kilgore v. Rowland, 172 P. 43.

#### (E) Trial, Judgment, and Review.

6.367 (Okl.) In an action for damages for the wrongful cutting of timber on plaintiff's land, held, that court properly overruled demurrer to plaintiff's evidence.—Kilgore v. Rowland, 172 P.

### TRIAL.

See Continuance; Costs; Courts, \$\inspec 202; Jury; New Trial; Stipulations; Venue. For trial of particular actions or proceedings, see also the various specific topics.

For review of rulings at trial, see Appeal and

## I. NOTICE OF TRIAL AND PRELIMI-NARY PROCEEDINGS.

©=5 (Okl.) Where one defendant joined issue and other appeared at a term and adopted the answer of his codefendant on condition that case immediately proceed to trial, it was reversible error, in view of Rev. Laws 1910, \$5043, to overrule plaintiffs' motion to strike case from trial docket and to compel them to go to trial over their objection.—Harn v. Interstate Ruilding & Loan Co. 172 P. 1081. state Building & Loan Co., 172 P. 1081.

## III. COURSE AND CONDUCT OF TRIAL IN GENERAL.

6-21 (Okl.) When cause is regularly set for trial, it is not duty of court to call counsel when absent, and it is no abuse of discretion to proceed to trial when cause is reached, where no postponement has been taken, and no leave of absence has been granted to parties or their absence has been granted to parties or their counsel.—North v. Hocker, 172 P. 77.

€==25(4) (Cal.App.) In action for commission for furnishing one ready to exchange land, affirmative allegations in answer that exchange was not "consummated," that defendant was at all times ready to exchange, and failure was not his fault, and that deal fell through because of misrepresentations of broker, did not amount to traverse of anything averred in complaint, and defendant was properly required to open with his affirmative defense.—Turner v. Watkins, 172

### IV. RECEPTION OF EVIDENCE. (A) Introduction, Offer, and Admission of Evidence in General.

\$\insertage = 39\$ (Wash.) Plaintiff, in action on insurance policy, offering in evidence only part of the contract between the company and the soliciting agent, it is properly rejected; the powers of the agent being determinable only from the entire contract.—Gibson v. New York Life Ins. (O., 172 P. 920.

€=45(3) (Mont.) The rule requiring an offer of proof does not apply to cross-examination nor to direct examination where the questions them selves indicate clearly the evidence intended to be elicited.—Herzig v. Sandberg, 172 P. 132.

## (B) Order of Proof, Rebuttal, and Re-opening Case.

€=63(1) (Wash.) Where plaintiff had an interest in an option contract, and testified that he was fraudulently induced to settle his interest by reason of false statement of defendant that person going to renew the option had re-fused to sign a letter agreement, and defend-ant testified that he showed to plaintiff the letdefinition that the showed to planting the retresting and by such person, there was no prejudicial error in sustaining objection to evidence in rebuttal that plaintiff did not see such letter until a certain time after the settlement.—Brown v. Jamison, 172 P. 853.

they had rested and plaintiffs had introduced their evidence in rebuttal, was properly excluded.—Roberts v. Oechsli, 172 P. 1037.

### (C) Objections, Motions to Strike Out, and Exceptions.

e=75 (Cal.) Appellants claiming that a decedent was a member of their family could not object to his declarations on the ground that they were inadmissible because he was not a member of their family.—In re Friedman's Estate, 172 P. 140.

tion to offer in evidence of assignment executed by receivers, court remarked objection would be overruled unless directed to authentication of the assignment, and counsel made no further objection, necessity of proving genuineness of signatures was waived.—Island Gun Club v. National Surety Co., 172 P. 209.

#### V. ARGUMENTS AND CONDUCT OF COUNSEL.

\$\inser\ \text{129}\$ (Wash.) In an action for injuries to store customer by falling into elevator shaft, where defendant's counsel stated that failure where defendant's counsel stated that failure to prove efforts to compromise showed that plaintiff had been satisfied with settlement made, he could not complain of argument by plaintiff's counsel that it was not competent to show efforts to compromise; that the jury did not know what had taken place between the parties, and, if it did know, the case might assume a different aspect.—Rust v. Washington Tool & Hardware Co., 172 P. 846.

### VI. TAKING CASE OR QUESTION FROM JURY.

### (A) Questions of Law or of Fact in General.

(Cal.App.) Motion for nonsuit will not be granted when there is any substantial evidence which, with aid of all legitimate inferences favorable to plaintiff, would support verdict or finding that material allegations of complaint are true.-Long v. John Breuner Co., 172 P. 1132.

140(1) (Utah) The truth of testimony is for the jury.—Barker v. Savas, 172 P. 672.

e=141 (Okl.) In action involving title to realty where uncontradicted evidence shows the legal and equitable title in plaintiffs and defendant offers no evidence to show a superior title in himself or any defense, it is not error to instruct a verdict for plaintiff.—Longest v. Langford, 172 P. 927.

S=141 (Or.) Where there is no conflict in evidence as to an issue, court is justified in charging jury to find as alleged in pleadings of one of parties.—Montana Coal & Iron Co. v. Hoskins, 172 P. 118.

\$\operation{\operation} \text{43}\$ (Okl.) Questions raised between allegations in original petition and testimony denying or explaining allegations is one of fact for the jury.—Letcher v. Maloney, 172 P.

### (B) Demurrer to Evidence.

\$\insigma 150\$ (Kan.) Demurrer to plaintiff's evidence should not be sustained unless there is entire absence of proof tending to show right to recover.—Mentze v. Rice, 172 P. 516.

\$\insigm 156(2)\$ (Okl.) In considering demurrer to evidence, trial court may disregard incompetent testimony admitted over proper objections.

-Fuss v. Cocannouer, 172 P. 1077.

Brown v. Jamison, 172 P. 853.

6-67 (Mont.) Evidence, part of defendants' case in chief, attempted to be introduced after and admits, not only truth of facts directly

proven, but also all proper inferences therefrom.

--Mentse v. Rice, 172 P. 516.

On demurrer to plaintiff's evidence, court must view the evidence in the light most favorable to plaintiff, and allow all reasonable in-ferences in his favor.—Id.

€=156(3) (Okl.) A demurrer to plaintiff's evidence admits for the purpose of the demurrer all the material facts in evidence, including legal presumptions and admissions, either in the pleadings or otherwise in the most favorable light to the plaintiff.—Bean v. Rumrill, 172 P. 452.

#### (C) Dismissal or Nonsult.

e=165 (Cal.) On motion for nonsuit, the plaintiff is entitled to the most favorable consideration of every piece of evidence tending to sustain his averments.—Anderson v. Wickliffe, 172 P. 381.

### (D) Direction of Verdict.

6=170 (Okl.) Where demurrer to plaintiff's evidence was properly overruled and defendant failed to introduce new evidence, a verdict was properly directed for plaintiff.—Kilgore v. Rowland, 172 P. 43.

5002, it is error for the trial court, of its own motion, to direct a verdict for the plaintiff before the defendant has rested his case.—Williamson v. Holloway, 172 P. 44.

177 (Wash.) Where both parties to an action tried before a jury move for a directed verdict, thereby waiving their right to have a question of fact passed on by the jury, they admit that the evidence is free from conflict, and submit the cause for determination by trial court.

Sever v. Hopkins, 172 P. 550.

Sever v. Hopkins, 172 P. 550.

178 (Okl.) Where, admitting the truth of all plaintiff's evidence and the inferences and conclusions therefrom, it is insufficient to sustain a verdict in his favor, a directed verdict for him is error.—Wichita Falls & N. W. Ry. Co. v. D. Cawley Co., 172 P. 70.

178 (Okl.) Question presented on motion to direct verdict is whether, admitting the truth of all the evidence in favor of party against whom motion is directed, and the reasonable inferences and conclusions, there is enough competent evidence to sustain verdict.

-Gwinnup v. Walton Trust Co., 172 P. 936.

### VII. INSTRUCTIONS TO JURY.

### (A) Province of Court and Jury in General.

€=191(4) (Cal.App.) In wife's action against sheriff for conversion of personalty under execution against husband, instructions held objectionable in assuming property was separate estate of wife, the issue for jury.—Jolly v. McCoy, 172 P. 618.

6-194(11) (Cal.) In an action for damages for breach of contract to convey real estate in which damages for bad faith were claimed under Civ. ('ode, § 3306, an instruction defining bad faith as a matter of law held erroneous.—Hamaker v. Bryan, 172 P. 391.

#### (B) Necessity and Subject-Matter.

e=208 (Or.) In action under federal Employers' Liability Act for death of section man refusal to instruct jury to disregard plaintiff's evidence as to defendant's practice to run its work train upon passing track held not error. —Stool v. Southern Pac. Co., 172 P. 101.

= \$1001 v. Southern 1 ac. Co., 112 F. 101. = \$214 (Okl.) In an action for damages to interstate shipment of live stock, where defendant offered a contract making notice of a claim a condition precedent to recovery, failure to give requested instruction on such provision was error.—St. Louis & S. F. R. Co. v. Whitefield, 179 b 627 172 P. 637.

#### (C) Form, Requisites, and Sufficiency.

e=228(1) (Wash.) Where an instruction, though capable of condensation, properly stated the law as applied to varying conditions of the evidence, it could not be held error as unnecessary repetition.—Rust v. Washington Tool & Hardware Co., 172 P. 846.

ance business alleged misrepresentation as to "net income," and testimony referred principally to "income," instruction dealing with "net income" was not erroneous.—Stanton v. Zercher, 172 P. 559.

er, 172 P. 559.

233(3) (Cal.App.) A direction to render a verdict for plaintiff if the jury found certain facts from admissions of the pleadings and evidence did not impose on the jury the responsibility of construing the pleadings when the court had already informed the jury what facts were admitted therein.—Piluso v. Spencer, 172 P. 412.

e=238 (Cal.) Court properly instructed jury that, while they were authorized to determine facts, they must take law governing same from instructions given to them by court.—Sharpless v. Pantages, 172 P. 384.

242 (Colo.) An instruction which determines a question of law which had been erroneously left to the jury by a previous instruction tends to confuse the jury, and is improper.—Trimble v. Collins, 172 P. 421.

### (D) Applicability to Pleadings and Evidence.

\$\rightarrow\$251(8) (Wash.) Where contributory negligence was not pleaded, it was not incumbent on the court to submit such issue to the jury, although plaintiff testified to acts showing contributory negligence.—Bruenn v. North Takima School Dist. No. 7, Yakima County, 172 P. 569. 251(9) (Wash.) In action for price of insurance business, where defendants counterclaimed for misrepresentations as to value of business, seeking damages, including difference between business as represented and as it actually was, and the value of the good will, instructions of-fered on theory that the business purchased in-cluded only the amount of renewals for one year, and not the good will, were properly re-fused.—Stanton v. Zercher, 172 P. 559.

4=252(1) (Or.) An instruction framed on theory of facts of which there is no evidence is properly refused.—Haines v. First Nat. Bank, 172 P. 505.

Sank, 1/2 r. 500.

22253(4) (Wash.) In action for injuries to passenger on jitney bus, instructions authorizing recovery for negligence of the driver if "the accident resulted because of that fact" and "solely because of the negligence" were not objectionable as permitting recovery regardless of whether negligence was proximate cause of the injuries.—McDorman v. Dunn, 172 P. 244. \$\iff 253(9)\$ (Or.) In action under federal Employers' Liability Act for death of section man, refusal of instruction that he must have been engaged in interstate commerce at moment of accident held too narrow as ignoring condition that he might have been on his way to work.—Stool v. Southern Pac. Co., 172 P. 101.

### (E) Requests or Prayers

260(1) (Cal.) Court need not give requested instructions covered by those given, or to amplify unnecessarily upon propositions which to jury of ordinary intelligence would be apparent from instructions given.—Sharpless v. Pantages, 172 P. 384.

Fantages, 172 F. 359.

200(1) (Cal.) Where instructions given fully and fairly informed jury as to legal rights and duties of respective parties and embodied defendants' theory, it was not error to refuse defendants' requested instructions thereon.—Gerardi v. Bonoff, 172 P. 596.

€=260(1) (Cal.) The refusal of instructions is | €=296(3) (Cal.) Error in instructing that a not error, where the subject-matter was sufficiently covered by the instructions given.—Gumpel v. San Diego Electric Ry. Co., 172 P. 605. \$\insert \cdot \text{Sol}\$ (Colo.) Refusal of requested instructions is not error, where their substance is covered by instructions given.—Western Investment & Land Co. v. First Nat. Bank, 172

€==260(1) (Colo.) Where instruction added to a requested instruction what in effect would have been added by giving other re-quested instructions, there is nothing to complain of.—Denver Tramway Co. v. Orbach, 172 P. 1063.

e=260(1) (Kan.) The refusal of requested instructions is not error, where those that are proper were given in substance by the court.—Berry v. Dewey, 172 P. 27.

⇒260(3) (Wash.) In prosecution to condemn land for an alley which would divide defendant's property, an instruction that in determining damages to land not taken the jury should not consider the future construction of overhead bridges or underground conduits to connect the two tracts held not covered by instructions given.—City of Seattle v. Washington Refining Co., 172 P. 1161.

e=260(6) (Cal.App.) In an action under Civ. Code, §§ 51, 52, for causing removal from a hotel, a statement in a refused instruction held covered by a part of the charge.—Piluso v. Spencer, 172 P. 412.

260(6) (Cal. App.) In wife's action against sheriff for conversion of personalty under execution against husband, where court instructed that under evidence insurance money with which property was purchased was plaintiff's separate property, she could not ask for more as to such feature of case, and her proposed instruction could not have benefited her.—Jolly v. McCoy, 172 P. 618.

€==260(8) (Or.) In action for death of section man killed by work train, refusal of instruction on assumption of risk, including risk of defendant's habitual negligence, held not error, in view of the instructions given.-Stool v. Southern Pac. Co., 172 P. 101.

**267**(3) (Or.) In action for death of section man, modification of requested instruction as to contributory negligence correctly stating that as matter of law deceased was guilty of some degree of negligence in walking on the track, not substantially differing from request. held not error.—Stool v. Southern Pac. Co., 172 P. 101.

### (F) Objections and Exceptions.

€==281 (Utah) Where first paragraph correctly stated law, an exception taken to whole in-struction was insufficient and will be disregard-ed on appeal.—Rampton v. Cole, 172 P. 477.

### (G) Construction and Operation.

295(2) (Wash.) Instructions must be considered as a whole, and, although a portion if alone is technically erroneous or misleading, it is not prejudicial if, taken with other instructions, the jury could not have been misled.—McDorman v. Dunn, 172 P. 244.

295(8) (Wash.) Instruction that 295(8) (Wash.) Instruction that the purchasers had the burden of showing alleged falsity of representations, and that, if they failed so to prove their allegations, the verdict must be for the seller, "unless false representations were made in other respects," while misleading, if alone, was not erroneous, where the court fully instructed the jury as to all the issues of fact.—
Stanton v. Zercher, 172 P. 559.

296(1) (Ariz.) An instruction that ignores the principle that notice to an agent is notice to the principal held no error, where instructions as a whole fairly and accurately presentthe principal held no error, where instruc-tions as a whole fairly and accurately present-ed the law applicable to the case.—Ellis v. First Nat. Bank, 172 P. 281.

3. (Ariz.) Under Civil Code 1913. par. 542, as to submitting to jury questions of fact in equitable actions, in action for accounting as to mining claims held in trust by defendant

master must furnish track and locomotives in reasonably safe condition was not harmful, where further instructions properly held the master to exercise ordinary care to furnish reasonably safe track and locomotives.—Neale v. Atchison, T. & S. F. Ry. Co., 172 P. 1105. v. Atchison, T. & S. F. Ry. Co., 172 P. 1105.
2296(3) (Wash.) In action for injuries to passenger in jitney in collision, instruction exacting highest degree of care from driver of jitney was not erroneous, where other instructions clearly required only the highest degree of care compatible with the practical operation of the jitney at the time and place of collision.

McDorman v. Dunn, 172 P. 244.
2296(4, 5) (Wash.) In an action for personal injury to a pedestrian struck by an automobile while crossing a street in front of a moving street car, an instruction as to contributory negligence held proper in view of other instructions.—Johnson v. Bloedel, 172 P. 1171.
2296(8) (Ariz.) Instruction that puffing

e==296(8) (Ariz.) Instruction that puffing statements made by promoters or agents selling stock as to the value of the stock as an investment would not constitute a defense held not on the weight of the evidence, in view of other instructions defining false and fraudulent representations.—Ellis v. First Nat. Bank, 172

2016 (11) (Utah) Although statement in charge authorizing consideration of question whether injury had affected plaintiff's past earnings was not supported by pleadings or proof, where jury was instructed that they must be guided by evidence alone defendant was not prejudiced.—Kuchenmeister v. Los Angeles & S. L. R. Co., 172 P. 725.

### IX. VERDICT. (A) Gentral Verdict.

€=318 (Cal.App.) General verdict not being determinative of issues made by pleadings and developed by evidence, judgment is without sufficient support.—A. P. Hotaling & Co. v. Hamilton, 172 P. 393.

Ramitton, 112 F. 595.

\$\equiv 3945 (Ariz.) In consolidated actions on notes transferred to plaintiff as collateral for another note larger in amount than any of the notes sued on, it being stipulated that, if plaintiff was entitled to recover, the amount due should be shown by the face of the notes in suit, defendant's objection that the jury in its verdict for plaintiff failed to find the amount due on the collateral notes was untenable. due on the collateral notes was untenable.— Ellis v. First Nat. Bank, 172 P. 281.

€=345 (Cal.) In an action wherein defendant filed cross-complaint against plaintiff and another, defendant waived defects in a verdict which did not mention the cross-defendant, and was in improper form as to an item, where defects were not called to attention of the court before the jury was discharged as authorized by Code Civ. Proc. § 619.—Asebez v. Bliss, 172 P. 595.

(B) Special Interrogatories and Findings. \$\sim\_359(1)\$ (Cal.App.) A general verdict and special findings should be reconciled, if possible, and no specific finding should overthrow the general verdict, unless entirely inconsistent and irreconcilable thereto.—Drouillard v. Southern Pac. Co., 172 P. 405.

### X. TRIAL BY COURT.

€368 (Colo.) In suit tried on agreed statement of facts, if one of the parties desired to rely on a contract, it should have set out the contract in the statement, or the evidence from which it could be determined that the contract existed.—First Nat. Bank of Ft. Collins v. Shafer, 172 P. 1; Same v. Daniels Mercantile Co., Id. 3.

executrix's decedent for ancestor of plaintiff heirs at law, held that the court should have submitted question as to existence of trust as to a claim on which evidence was conflicting.-Costello v. Cunningham, 172 P. 664.

\$\insertain 391\$ (Cal.App.) Where issue whether plaintiff, riding motorcycle, was contributorily negligent in collision with defendant's automobile, was presented by evidence both pro and con, court was required to make distinct find-(Cal.App.) Where issue on such issue.—Huntington v. Vavra, 172

r. 100. \$\inspec 395(8)\$ (Cal.App.) Code Civ. Proc. \$ 634, providing that court, where it directs party to prepare findings, shall not sign same prior expiration of 5 days from service of copy on all parties, is directory only.—Amundson v. Shafer, 172 P. 173.

= 396(4) (Cal.) Although court found existence of facts warranting setting aside judgment for fraud, where plaintiff failed to offer any evidence in support of certain material allegations, decree for plaintiff cannot be sustained.—Clarkin v. Morris, 172 P. 981.

404(1) (Cal.App.) In action for injuries in collision between motorcycle and automobile, finding that plaintiff was unable to avoid collision and defendant's acts were proximate cause of injuries, does not inferentially determine question of plaintiff's contributory negligence.—Huntington v. Vavra, 172 P. 166.

### TRIAL DE NOVO.

See Appeal and Error, \$\sim 895-898; Justices of the Peace, \$\sim 174.

### TROVER AND CONVERSION.

See Carriers, 6-42, 91,

# L ACTS CONSTITUTING CONVERSION AND LIABILITY THEREFOR.

(Nev.) Generally it is conversion to receive property from one wrongfully in possession, and thereafter to exercise control against wish of person entitled.—Dixon v. Southern Pac. Co., 172 P. 368.

€-4 (Wash.) To constitute conversion, there must be some assertion of right or title that is hostile to true owner.—Clark v. Groger, 172 P. 1164.

Plaintiff who, while operating at sufferance plant of a corporation, was notified by trustees that corporation was to take possession and directed to remove his property, cannot hold trustees individually liable for damages for conversion, where he failed to remove his property in obedience to demand.—Id.

### II. ACTIONS.

### (A) Right of Action and Defenses

===23 (Colo.) Where stolen ore is sold and delivered to smelting company, and converted by company to its own use, fact that sellers may sue company for proceeds is no defense in action against company for conversion.— American Smelting & Reining Co. v. Hicks, 172 P. 1055.

### (B) Jurisdiction, Parties, Preliminary Proceedings, and Pleading.

€=30 (Colo.) Where smelting company sued for value of stolen ore converted, it is unnecessary to make persons who stole ore and sold and delivered it to company joint defendants.—American Smelting & Refining Co. v. Hicks, 172 P. 1055. Where person in possession of ore through

contractual relations with owner wrongfully sells such ore, owner cannot sue buyer for conversion of ore without making seller joint defendant.—Id.

### (D) Damages.

44 (Nev.) Damages for conversion property is value at time of conversion, with interest from date to that of rendering judgment.—Dixon v. Southern Pac. Co., 172 P. 368.

#### (E) Trial. Judgment. and Review.

66 (Kan.) In suit to recover for conversion of certain wheat received for storage, plaintiff's evidence held to entitle him to go to jury.—Mentze v. Rice, 172 P. 516.

### TRUST DEEDS.

See Mortgages.

### TRUSTS.

See Assignments for Benefit of Creditors; Charities; Limitation of Actions, \$\infty\$102, 103.

#### I. CREATION, EXISTENCE, AND VA-LIDITY.

### (A) Express Trusts.

6-17, 18(1) (Wash.) An express trust must be evidenced in writing.—Lanigan v. Miles, 172

P. 894.

229 (Wash.) A deed executed by mother to son in full confidence that on her death son would make proper adjustment of her relations to other children, but leaving such adjustment solely to such son did not evidence an express trust.—Lanigan v. Miles, 172 P. 894.

335(3) (Wash.) Where an heir let another heir keep his share of an estate under an agreement that the latter should will him the entire estate, if there was any trust at all, it was an express trust, and not an implied, constructive, or resulting trust.—Parkes v. Burkhart, 172 P. 908.

334(1) (Cal.App.) Trust in personalty may

43(1) (Cal.App.) Trust in personalty may be established by parol.—Souza v. First Nat. Bank, 172 P. 175.

6.334(1) (Cal.App.) Evidence held insufficient to show creation of valid parol trust in money on deposit in defendant bank; proportion which children were to have and duration of trust not being sufficiently definite.—Souza v. First Nat. Bank, 172 P. 175.

w. First Nat. Dank, 112 F. 115.

= 44(2) (Ariz.) In action for accounting by heirs against executrix of decedent with respect to mining claims alleged to have been held in trust by executrix's decedent for heirs' decedent, evidence held to support finding trust existed with respect to certain claims.—Costello v. Cunningham, 172 P. 664.

8=344(2) (Cal.) With a mother's testimony that deed of gift of son to her was not on a trust, her statements and conduct, shown by her testimony, consistent with a maternal desire to hold and administer the property for his benefit and protection as his mother, is not inconsistent.—Citizens' Trust & Savings Bank v. Tuffree, 172 P. 586.

44(3) (Ariz.) Proof of a consummated partnership which would have the effect of establishing a trust relation ought to be as clear and satisfactory as is required to prove the trust relation direct.—Costello v. Gleeson, 172 P. 730.

8-344(3) (Wash.) An express trust will not be declared as against a deed absolute, unless intention of grantor is clear and interest of one claiming as cestui is made to appear with reasonable certainty.—Lanigan v. Miles, 172 P. 894.

### (B) Resulting Trusts.

€=62 (Wash.) A resulting trust can never arise from any contract or agreement of parties, but is one which the law presumes from their acts.—Parkes v. Burkhart, 172 P. 908. 66 (Wash.) An implied trust arises only from the language of the parties, where no

For cases in Dec. Dig. & Am. Dig. Key No. Series & Indexes see same topic and KEY-NUMBER

express trust is declared, but words are used from which the courts infer or imply a trust was intended.—Parkes v. Burkhart, 172 P. 908. €=70 (Wash.) Where an heir let another heir keep his share of an estate under an oral agreement that the latter should will him the entire estate. if there was any trust at all, it was an express, and not a resulting, trust. Parkes v. Burkhart, 172 P. 908.

#### (C) Constructive Trusts.

©=91 (Wash.) A constructive trust, sometimes called a trust ex maleficio, only arises where one clothed with some fiduciary or like character, by fraud or otherwise gains some advantage to himself which the law will not permit him to retain.—Parkes v. Burkhart, 172 P. 908.

6. 303. (Okl.) A parol contract by an agent for the purchase of real estate for another in his own name with his own money, conveyance later to be made to the principal, is not within the statute of frauds (Rev. Laws 1910, § 941, par. 5), in view of section 6659.—Powell v. Adler, 172 P. 55.

€==96 (Wash.) Where an heir let another heir keep his share of an estate under an oral agreement that the latter should will him the entire estate. if there was any trust at all, it was an express, and not a constructive, trust.

—Parkes v. Burkhart. 172 P. 908.

em104 (Kan.) Creditor in garnishment, coming into possession of proceeds of insurance policy already assigned to other creditors, holds as trustee for the other creditors, and in a proper action a judgment may be entered against him in favor of other creditors.—Rich v. Roberts, 172 P. 996.

## II. CONSTRUCTION AND OPERA-

#### (A) In General.

emili2 (Or.) Trustor's intention should be determined from entire language of conveyance.—Crown Co. v. Cohn, 172 P. 804.

If words of trust deed are plain and unambiguous, there is no necessity for judicial inter-

pretation.—Id.

### (B) Estate or Interest of Trustee and of Cestui Que Trust.

135 (Or.) Deed granting to trustees possession of premises and imposing upon them session or premises and imposing upon them performance of active duties relating to control and management of estate contemplated that legal title should vest in trustees until contingency terminating trust arrived in view of L. O. L. § 7103.—Crown Co. v. Cohn, 172 P. 804.

## IV. MANAGEMENT AND DISPOSAL OF TRUST PROPERTY.

191(2) (Or.) Under trust deed by mother to sons and daughters, giving them express power to sell realty for support of mother during her lifetime when realty should be held in trust for said children, held children trustees had implied power after death of mother, to sell realty to repay advances made on taxes and municipal assessments, where income was insufficient to meet the same.—Crown Co. v. Cohn, 172 P. 804.

v. Cohn, 172 P. 804.

23191(3) (Or.) Where trust estate comprises a single parcel though consisting of more than one lot, and best interests of estate will be subserved by sale in solidum, such disposition will be upheld, if fairly conducted.—Crown (°o. v. Cohn, 172 P. 804.

Under trust deed held trustees had power, in consideration of lessee's covenant to place buildings on land, to give option to purchase.

trust estate, no action of court is necessary to affect proper execution of power conferred.—Id. 202 (Or.) Where deed imposes upon truetees duty of selling land and reinvesting proceeds, purchaser of land is under no obligation to see to application of purchase money.

—Crown Co. v. Cohn, 172 P. 804.

—Crown Co. v. Cohn, 172 P. 804.

205 (Or.) When trustee who has possession of lands belonging to trust estate is charged with payment of debts, but has no power of sale, he has implied authority to lease.—Crown Co. v. Cohn, 172 P. 804.

Although trust was limited to life of survivor of trustees and youngest trustee had expectancy of 28.18 years, lease for 30 years would not be void, where surviving trustee was authorized to execute all powers conferred.

Id

### V. EXECUTION OF TRUST BY TRUS-TEE OR BY COURT.

283(2) (Or.) Principle that deed from cestui to trustee will be upheld only when former has acted under independent advice applies only where by ill health, mental infirmity, immaturity, or otherwise party whose deed is attacked is not likely to act wisely without disinterested advice.—Rowe v. Freeman, 172 P. 503.

## VII. ESTABLISHMENT AND EN-FORCEMENT OF TRUST.

### (A) Rights of Cestui Que Trust as against Trustee.

e=346 (Okl.) A guardian of four minors, who by mistake in petition obtained order for purchase of land for one ward with funds of the others, could not maintain action to declare resulting trust in land in favor of other wards, in order to relieve himself of his mistake.—Pace v. Pace, 172 P. 1075.

#### (C) Actions.

e=365(3) (Wash.) Where trustees asserted their adverse claim over 10 years ago to knowledge of cestui, who thereupon began to assert her claims, and litigated them to decisive and final judgment, action to establish the trust is barred by laches as well as limitations.

—Hotchkin v. McNaught-Collins Improvement Co., 172 P. 864.

### TRUTH.

See Libel and Slander, 54.

### ULTRA VIRES.

See Corporations, \$\sim 385.

### UNDERTAKINGS.

See Appeal and Error, \$373.

### UNDISCLOSED AGENCY.

See Principal and Agent, 4=146.

### UNDUE INFLUENCE.

See Deeds, \$==72, 196, 211.

### UNITED STATES.

See Courts, 597; Indians; Territories.

### UNLAWFUL DETAINER.

See Forcible Entry and Detainer.

### USURY.

See Bills and Notes, \$376; Judgment, \$

## I. USURIOUS CONTRACTS AND TRANSACTIONS.

#### (A) Nature and Validity.

Where trust deed expressly or impliedly au- thorizes trustee to sell realty belonging to agent to make loans, and agent procured a con-



der guise of a commission, the entire contract was usurious.—Bean v. Rumrill, 172 P. 452. s=75 (Okl.) When a contract is originally usurious, the taint of usury attaches to all subsequent transactions in connection therewith.—Bean v. Rumrill, 172 P. 452.

#### (B) Rights and Remedies of Parties.

• 101 (Okl.) If usurious interest has been paid, it cannot be set up as a defense in an action to recover the debt, but can only be recovered in separate action brought therefor within two years under Rev. Laws 1910, \$ 1005.—Daniels v. Bunch, 172 P. 1086.

107 (Okl.) When a contract is originally usurious, the taint of usury attaches to a judg-

ment founded upon such usurious transaction.

Bean v. Rumrill, 172 P. 452.

### II. PENALTIES AND FORFEITURES.

was kept alive by the execution and delivery of renewal notes after Rev. Laws 1910, § 1005, went into effect, the statute was applicable.—
(Callaham v. Thurmond, 172 P. 798.

\$\insigma 139\$ (Okl.) That usurious interest was paid by sale of the borrower's property under a mortgage foreclosure does not prevent borrower from thereafter maintaining an action to recover twice the usurious interest paid.—Bean v. Rumrill, 172 P. 452.

may be pleaded as a set-off in an action to recover debt.—Daniels v. Bunch, 172 P. 1086.

### VACANCY.

See Officers, 555.

### VACATION.

VALUE.

See Fraud. ==11.

### VARIANCE.

See Pleading. 430.

VEHICLES.

See Licenses.

### VENDOR AND PURCHASER.

See Exchange of Property; Frauds. Statute of, \$\sim 56, 71; Sales; Specific Performance.

## I. REQUISITES AND VALIDITY OF CONTRACT.

€=36(2) (Cal.) Representations amounting to a promise that a water company by means of its improved facilities could and would furnish venders agreed quantity of water, held not a mere opinion.—Cooper v. Huntington, 172 P.

tract by which borrower was to pay 10 per ened mental capacity, evidence held to warrant cent. per annum, and an additional amount una finding that plaintiff's decedent was mentally der guise of a commission, the entire contract capable of so conducting the transaction as to protect his own interests.—Haight v. Stewart, 172 P. 769.

In a suit to set aside a contract for the exchange of lands made by plaintiff's decedent on the ground that defendant fraudulently repre-sented his interest in land, evidence held to warrant finding that such representations were not false .-- Id.

In a suit to set aside a contract made by plaintiff's decedent for the exchange of lands for corporation bonds on the ground of false representation that they were worth \$600 apiece, evidence held to warrant a finding for defendant that no such representation was made.-Id.

In a suit to set aside a contract made by plaintiff's decedent for the exchange of lands for corporation bonds alleged to be worthless, evidence held to warrant a finding that the bonds had a "speculative or trading value."—Id.

## III. MODIFICATION OR RESCISSION OF CONTRACT.

#### (A) By Agreement of Parties.

€=82 (Wash.) In an action to recover earnest money paid on the purchase of land on ac-count of failure to furnish good title, evidence held not to warrant finding that vendee agreed to extend time within which such title should be furnished.—Flood v. Von Marcard, 172 P.

**87** (Wash.) Purchaser of land on installment payments *held* not entitled to benefit of a extension agreement.-Edwards proposed extension Heaton, 172 P. 839.

#### (C) Rescission by Purchaser.

e=109 (Cal.) Where a flood had washed away a substantial portion of land before partial consummation of contract of purchase by payment of any of purchase price, vendees could withdraw from a supplemental contract settling a suit for rescission of the original contract for false representations, though they had taken possession.—Cooper v. Huntington, 172 P. 591. e=119 (Cal.) Vendor who, by holding out promises, induced vendees to postpone any efforts to rescind, cannot insist on laches as a bar to rescission.—Cooper v. Huntington, 172 P. 591. \*\*Esson:—Cooper V. Huntington, 172 F. 391.

\*\*E=119 (Cal.App.) Where purchaser of land was told number of times by his tenants as to character of soil and continued to make payments for 20 months, and, after examination by himself, attempted for month to sell before offering to rescind, he was guilty of laches.—Greene v. Locke-Paddon Co., 172 P. 168.

### IV. PERFORMANCE OF CONTRACT.

### (A) Title and Estate of Vendor.

€=130(1) (Wash.) Title which insurance company refused to guaranty held doubtful and not merchantable.—Flood v. Von Marcard, 172

F. 304.

\$\instructer=130(2)\$ (Wash.) A purchaser is entitled to a merchantable title—a marketable title—such as will bring in the market as high a price with as without the objection to its sufficiency.— Flood v. Von Marcard, 172 P. 884.

While law will not countenance scruples of one interested in withholding purchase money, it will not compel one who seems to be acting in good faith to accent a title if there be rea-

in good faith to accept a title, if there be reasonable probability of a lawsuit to convince a purchaser on resale or to quiet title.—Id.

mere opinion.—Cooper v. Huntington, 172 P. 591.

—44 (Cal.App.) In suit to set aside an exchange of lands by plaintiff's decedent on the ground of fraudulent representations and weak-like to depended on a question of descent, turning on the open question as to whether the state law or the law of Germany controlled, was insufficient as against an objection that a merchant-

#### (B) Conveyance.

145 (Wash.) Where buyer of land under contract after paying a certain part had option of demanding a deed for a proportionate amount of land, to be conveyed after five years, and gave notice of such election, fact that he remained on land and tilled entire amount and paid vendor for caring for trees after expiration of five-year period was not an abandonment of his right to a deed for the smaller amount.

—Pratt v. Arcadia Orchards Co., 172 P. 918. 147 (Wash.) Under a contract for sale of land, providing that where buyer has paid onefourth or more of purchase price, he can, after five years, demand a deed for a proportional amount of land, a notice by letter before the ex-piration of the five-year period that he desired a deed for a proportional part was sufficient notice of election, although it also suggested that he be given a deed of the entire tract, and be allowed to give a mortgage for the purchase price.—Pratt v. Arcadia Orchards Co., 172 P. 918.

#### (D) Payment of Purchase Money.

6 168 (Wash.) A contract for sale of land, which provided that on payment of one-fourth of price the purchaser could demand a deed for such an amount of land as the amount paid for such an amount of land as the amount paid shall bear to the purchase price and accrued interest at the end of five years, the amount necessary to be paid to demand, a deed need be only one-fourth of the purchase price without interest, although the land received might be less than that proportion.—Pratt v. Arcadia Orchards Co., 172 P. 918.

## V. RIGHTS AND LIABILITIES OF PARTIES.

#### (A) As to Each Other.

198 (Kan.) Where purchaser of farm, under contract of September 23, 1913, after down payment was put into possession, and deed was deposited for delivery on payment of balance on March 1, 1914, and there was no express agreement as to payment of taxes due in November, 1913, purchaser was liable therefor under Gen. St. 1915, § 11349.—Gault v. Hurd, 172 P. 1011. 172 P. 1011.

### (C) Bona Fide Purchasers.

233 (Okl.) Under Rev. Laws 1910, § 1154 an agricultural lease not accompanied by actual possession was invalid as against subsequent grantees, unless acknowledged and recorded as provided therein.—Sargent v. Shaver, 172 P.

### VII. REMEDIES OF PURCHASER.

### (B) Actions for Breach of Contract.

(B) Actions for Breach of Contract.

351(1) (Cal.) In an action for breach of contract to convey real estate, it was not bad faith, under Civ. Code, § 3306, relating to damages in case of bad faith of vendor, for the vendors to enter into the contract after having made arrangements to secure title to the land they agreed to convey.—Hamaker v. Bryan, 172 P. 301.

In an action for breach of contract to convey real estate, a few days' delay by the vendors in securing title to the land does not constitute bad faith, within Civ. Code, § 3306, relating to measure of damages in case of bad faith of vendor.—Id.

faith of vendor .- Id.

### VENUE.

See Criminal Law, \$=106, 145.

### I. NATURE OR SUBJECT OF ACTION.

€5(1) (Kan.) Gen. St. 1915, § 6938, relates only to actions in which determination of in- | See Guardian and Ward.

able title had been offered.—Flood v. Von terest in realty is sought by means operating Marcard, 172 P. 884. directly upon property, and does not apply to those by which defendant's conduct is sought to be controlled, though title may be affected thereby.—Zane v. Vawter, 172 P. 37.

thereby.—Zane v. Vawter, 172 P. 37.

53(3) (Kan.) Action to compel defendant to reconvey land claimed by him under deed alleged to have been procured through his fraud is transitory and not local, and may be brought in any county where personal service can be had upon him.—Zane v. Vawter, 172 P. 37.

537 (Mont.) Under Rev. Codes, §§ 6501-6506, plaintiff had right to have action on contract tried in county where contract was made and plaintiff had right to have action on contract tried in county where contract was made and was to be performed, although defendant resided in another county.—State v. District Court of First Judicial Dist. in and for Lewis and Clark County, 172 P. 1030.

Term "contract," as used in Rev. Codes, \$ 6504, providing that action may be tried in county where contract was to be performed, includes contracts of all kinds whether express or implied—Id.

or implied.-Id.

## III. CHANGE OF VENUE OR PLACE OF TRIAL.

e=4! (Cal.) In suit by wife against husband and others for support and to remove a cloud, it was error to refuse change of venue to husband, a nonresident of the county, where complaint stated no cause of action against his codefendants, who were residents.—Garrett v. Garrett, 172 P. 587.

272 P. 587.

2368 (Mont.) Since by Rev. Codes, § 6504, plaintiff is entitled to bring action in county where contract was to be performed, he is also entitled where place of performance does not appear from his complaint to defeat defendant's motion to transfer by showing place of performance by affidavits.—State v. District Court of First Judicial Dist. in and for Lewis and Clark County, 172 P. 1030.

### VERDICT.

See Appeal and Error, \$\infty\$000-1005, 1070; Criminal Law, \$\infty\$1144, 1159; New Trial, \$\infty\$71; Trial, \$\infty\$318-359.

### VERIFICATION.

See Appeal and Error, \$= 916.

### VETERINARY SURGEONS.

See Damages, 4=131.

### VICE PRINCIPALS.

See Master and Servant, 4=180.

### **VOTERS.**

See Elections.

### WADING POOL.

See Municipal Corporations, \$\sim 736.

### WAGES.

See Master and Servant, \$\sim 80.

### WAIVER.

See Abatement and Revival, \$\sim 84\; Appeal and Brror, \$\sim 1078\; Costs, \$\sim 220\; Estoppel\; Indictment and Information, \$\sim 198\, 198\; Insurance, \$\sim 388\; Pleading, \$\sim 406-430\; Sales, \$\sim 288\; Witnesses, \$\sim 219\.

### WARDS.



### WAREHOUSEMEN.

See Carriers, \$== 140, 146.

(Colo.) A warehouseman, authorized to ship goods in the owner's name, has the authority to make a statement as to the value of the goods.—Denver & R. G. R. Co. v. Teufel, 172 P. 1060.

### WARRANTY.

See Insurance, \$\\_723; Sales, \$\\_274-288.

### WATER RIGHTS.

See Eminent Domain, \$\sim 84.

### WATERS AND WATER COURSES.

See Eminent Domain, 4 84.

### II. NATURAL WATER COURSES. (A) Riparian Rights in General.

€=38 (Kan.) A depression in plaintiff's land lower than a depression in defendant's land and into which waters from defendant's depression flow after heavy rains was not necessarily a "natural water course" into which defendant might drain waters under Laws 1911, c. 175, § 2.—Evans v. Diehl, 172 P. 17.

A depression into which surface and standing waters may be drained is not necessarily a natural water course into thick the surface and standing waters may be drained in the surface and standing water water and standing water wat ral water course into which one may lawfully drain waters under Laws 1911, c. 175, § 2, merely because flood waters from river find their way into depression.—Id.

### V. SURFACE WATERS.

e=124 (Kan.) Defendant's drain in natural course of drainage towards plaintiff's land, which discharged their waters into lower depression on plaintiff's land which was not a natural water course, was not authorized by Laws 1911, c. 175, § 2, or otherwise, hence was properly enjoined.—Evans v. Diehl, 172 P. 17. 26(3) (Kan.) Findings of fact upon which a judgment enjoining the maintenance of a drain and ditch was based held not substantially conflicting.—Evans v. Diehl, 172 P. 17.

#### VI. APPROPRIATION AND PRE-SCRIPTION.

e=133 (Or.) L. O. L. § 6595, subd. 7, providing against avoidance of attempted appropriation of water because of insufficiency of notice, applies water because of insufficiency of notice, applies only where there was mistake, and not where notice expressed intention.—In re Waters of I'matilla River, 172 P. 97.

135 (Colo.) Whether land was brought under irrigation with reasonable diligence under a conditional water adjudication decree must be determined by the positively of the province of the conditional water adjudication decree must be

determined by the particular circumstances and facts in the particular case, and not by other adjudications.—Schwartz v. King, 172 P. 1054. © 135 (Or.) Right of United States under L. O. L. § 6588, to all unappropriated waters, held not affected by lack of diligence in completing project, or by all the water not being needed by it.—In re Waters of Umatilla River, 172 P. 97. \*\*Example 1. The example of Umatilla River, 172 P. 97.

\*\*Example 138 (Wash.) There can be no title by prescription to a water right, where there has been no adverse or hostile assertion of right.—City of Raymond v. Willapa Power Co., 172 P. 1176.

(Or.) Priorities of persons supplied with water by water company depend not on dates of their contracts, but on priority of use of wa-ter on the lands.—In re Waters of Umatilla River, 172 P. 97.

e=144 (Or.) Waters appropriated for use of certain lands can be used for others only where intention to do so becomes fixed before first in-tention is abandoned.—In re Waters of Umatilla River, 172 P. 97.

151 (Colo.) Ten years' failure to use the allotments of water conditional, under a water adjudication decree, upon the irrigation of certain land, with reasonable diligence, is not an abandonment of the rights under such decree as to person who does not start appropriating such water until persons entitled thereto start irrigating the land.—Schwartz v., King, 172 P. 1074

specific testimony thereof.—In re Waters of Umatilla River, 172 P. 97.

€=152(11) (Or.) Provision of decree in proceeding for adjudication of rights of users of water ing for adjudication of rights of users of water of stream, that specification in findings of definite amount of water per acre are mere guide for water master, held improper, leaving parties rights undetermined, and being out of harmony with his powers under L. O. L. § 6617.—In re Waters of Umatilla River, 172 P. 97.

152(12) (Or.) Supreme Court cannot, on appeal in proceeding for determination of water rights, review decree as to questions not involved in appeal, at instance of a nonappealing party.—In re Waters of Umatilla River, 172 P. 97.

## VII. CONVEYANCES AND CONTRACTS.

(Wash.) A deed to a city of the right to appropriate water flowing into a river over certain described real estate, with right

over certain described real estate, with right to enter land to construct flumes and to overflow same, held to convey an ensement merely, and not title to the water itself.—City of Raymond v. Willapa Power Co., 172 P. 1176.

Where a deed conferring on a city the power to appropriate the waters of a river on a tract of land conveyed an easement merely, the owner of the servient estate may make such use of his estate as is not inconsistent with the easement—Id the easement.-Id.

# II. ARTIFICIAL PONDS, RESER-VOIRS, AND CHANNELS, DAMS, AND FLOWAGE.

63164 (Wash.) Maintenance by defendant and tis grantors continuously for more than ten years of a sawmill dam across a creek held to give defendant prescriptive right to maintain dam to certain height.—McInnis v. Day Lumber Co., 172 P. 844.

Where defendant's prescriptive right to maintain sawmill dam at a certain height was perfected, that he thereafter recognized plaintiff's right to have dam discontinued would not deprive defendant of right to maintain dam.—Id.

### IX. PUBLIC WATER SUPPLY.

(A) Domestic and Municipal Purposes.

203(12) (Cal.) Where meters were installed water company in new houses and were installed by water company in new houses and were not revenue producing, and there was nothing to show that they would be in use within the year, they were properly not considered in ar-riving at valuation for purpose of rate making for year.—Union Hollywood Water Co. v. City of Los Angeles, 172 P. 983.

Where court gave greater valuation to meters for which it gave water company credit, in action involving reasonableness of rates, than water company gave for all meters in its verified statement, or in its evidence, it cannot com-plain that the court refused to consider certain meters.—Id.

meters.—Id.

In action involving reasonableness of water rates, held under evidence, that there was no abuse of discretion in not considering unused emergency plant such essential part of system as to justify an increased rate.—Id.

In ascertaining value of property of water company for purpose of fixing rates, court could fix valuation of water-bearing land from which nercolating water was obtained, without con-

percolating water was obtained, without con-

sidering value of water separate from land, by comparing it with similar water-bearing land in same locality.-Id.

### (B) Irrigation and Other Agricultural Purposes.

Purposes.

242 (Wash.) Right of way for irrigation ditch being an easement, "ownership." as used in contract and decree, affecting rights in irrigation ditch and water, means ownership of the easement, but not of the subservient land.—Little-Wetzel Co. v. Lincoln, 172 P. 746. Since the dominant owner cannot enlarge the easement so as to impose additional burdens on the servient estate, the part owner of an irrigation ditch across lands of the other part owner thereof cannot admit water thereto from new sources without consent of the latter.—Id.

new sources without consent of the latter.-Id.

Part owner of irrigation ditch across lands of other part owner thereof cannot admit water thereto from new sources, without the latter's consent, on the theory of cotenancy, without giving the latter an equal right in such water.—Id.

Where the part owner of an irrigation ditch across lands of the other part owner thereof admitted water thereto from new sources, he could not recover damages from the other own-er for the latter's use of such water, having himself commingled the waters.—Id.

### WAYS.

See Highways.

### WEIGHTS AND MEASURES.

emil (Okl.) A dealer or speculator in cot-(Okl.) A dealer or speculator in cotton, who weighs cotton for the public and makes a charge, is Hable to public weigher of county, or his deputy, for penalty provided in Rev. Lews 1910, §§ 1745-1747, 1749, recoverable in civil action in any court of competent jurisdiction.—Snyder Co-op. Ass'n v. Brown, 172

In action by public weigher of county under Rev. Laws 1910, §§ 1745-1747, 1749, for penalty, evidence held to support finding and judgment against defendant corporation.—Id.

### WIDOWS.

See Dower.

### WILLS.

See Charities; Courts, \$\sim 202\$; Descent and Distribution; Executors and Administrators; Trusts.

# I. NATURE AND EXTENT OF TESTA-MENTARY POWER.

(Cal.) Under trust in realty established by decree of distribution of testator's estate. where there was never any agreement between devisee children to dispose of trust realty during life of son of testator, held, that son's wife never acquired any interest, though son devised to her.—Sweinhart v. Plant Inv. Co., 172 P. 386.

## III. CONTRACTS TO DEVISE OR BE-QUEATH.

e=58(2) (Kan.) In action for specific performance of a contract to make plaintiff an heir, evidence held not to prove the contract.—Mc-Keown v. Carroll, 172 P. 525.

### IV. REQUISITES AND VALIDITY.

### (A) Nature and Essentials of Testamentary Dispositions.

#### (C) Execution.

(Wash.) A witness must sign animo attestandi.—In re Jones' Estate, 172 P. 206. \$\insigma 123(5)\$ (Wash.) Act of signing by subscribing witness must be within scope of testator's vision from his actual position.—In re Jones' Estate, 172 P. 206.

#### (D) Holographic Wills.

130 (Wash.) The Legislature having enacted laws providing for the kind of wills which may be executed and the manner of execution, holographic wills good at common law, not being provided for, are not recognized as valid in this state.—In re Brown's Estate, 172 P. 247.

### (E) Nuncupative Wills.

== 144 (Wash.) A nuncupative will not executed in presence of witnesses, as required by Rem. Code 1915, § 1380, is invalid.—In re Brown's Estate, 172 P. 247.

### V. PROBATE, ESTABLISHMENT, AND ANNULMENT.

### (E) Jurisdiction, Limitations, and Laches.

\$\\_259 (Wash.) A nuncupative will not offered for probate within six months, as required by Rem. Code 1915, \{ 1331, is invalid.—In re Brown's Estate, 172 P. 247.

#### (H) Evidence.

\$\limes\_302(1)\$ (Wash.) Evidence held insufficient to show execution of will, within Laws 1917, c. 156, \\$ 25, requiring will to be attested by "two" or more competent witnesses subscribing their names "in the presence of the testator" by his direction or request.—In re Jones' Estate, 172 P. 206.

4-302(2) (Cal.) Evidence held sufficient to sustain finding of the court that an alleged will was in the handwriting of, and signed by, the deceased.—In re Jepson's Estate, 172 P. 1107. \$\insigma 303(4)\$ (Cal.) Code Civ. Proc. \$\insigma 1315, does not require that both witnesses to an olographic will be produced.—In re Jepson's Estate, 172 P. 1107.

### VI. CONSTRUCTION.

### (A) General Rules.

\$\infty\$=439 (Or.) In the construction of a will the purpose is to discover the intention of the testator.—Tyler v. Bier, 172 P. 112.

439 (Wash.) When testator's wishes are ascertained and found to be legal, it is duty of court to carry them out regardless of reasonableness of conditions imposed.—In re Nichols' Estate, 172 P. 1146.

ols' Estate, 172 P. 1146.

23440 (Wash.) The testator's intention must be gathered from the language of the will, construing all of its provisions together.—In re Peters' Estate, 172 P. 870.

A court is bound to give that construction to a will which will effectuate the intention of the testator if such intention can be gathered from the terms of the will itself, from everything within the four corners of the instrument.—Id. \$\iff 48\$ (Wash.) The right to dispose of one's property by will is a valuable right, and will be sustained when possible.—In re l'eters' Estate, 172 P. 870.

e=449 (Wash.) In the absence of residuary clause and where the testator's intention can be gathered from the will, a construction causing partial intestacy should not be given to the will.—In re Peters' Estate, 172 P. 870.

6-462 (Wash.) Omitted words will be supplied in a will where it is evident the testator has not expressed himself as he intended.—In re Peters' Estate, 172 P. 870.

838(1) (('al.) Probate of paper offered by widow as her husband's will, which, on its face, purported to be mere agreement between husband and wife for support of latter, held properly refused.—In re Lowe's Estate, 172 P. 583.

the proviso was intended to refer to the whole general provision.—In re Bovier's Estate, 172 P. 683.

€-481 (Wash.) A will speaks as of the date of testator's death.—In re Nichols' Estate, 172

### (B) Designation of Devisees, and Lega-tees and Their Respective Shares.

em527 (Utah) A provision in a will for the pro rata distribution of the residuary estate held not limited by a proviso that devise to testator's nephew should remain unchanged.—In re Bovier's Estate, 172 P. 683.

### (D) Description of Property.

€=561(1) (Wash.) Where testator owned quarter section, on the southeast quarter of which his house was located, his will granting 40 acres between his northeast corner and the south line of an adjacent section to the north

south line of an adjacent section to the north should be construed to grant the northeast quarter of the quarter section owned by testator.— In re Peters' Estate, 172 P. 870.

Devise of 40 acres "between my northeast corner and south line of" other owner, "also all property on east side of N. W. ½" and of southwest quarter, and "also all left of N. W. ½"," held to devise all of northwest quarter and northeast quarter east of diagonal road across section, and southwest quarter with all of section, and southwest quarter with a northwest quarter west of such road.—Id.

### (E) Nature of Estates and Interests Created.

601(1) (Cal.) Where absolute property in estate is devised, or where unrestrained power of sale is given devisees, limitation over to another is void as inconsistent.—Sweinhart v. Plant Inv. Co., 172 P. 386.

#### (G) Conditions and Restrictions.

6-547 (Wash.) Will bequeathing to legatee named sum, provided she is legally divorced from her husband and still bears his name, imposed a "condition precedent" which is not in restraint of marriage or an inducement to obtain a divorce.—In re Nichols' Estate, 172 P. 1146.

## BIGHTS AND LIABILITIES OP DEVISEES AND LEGATEES.

### (A) Nature of Title and Rights in General.

eral. (Wash.) Where will provided for payment of all debts and gave a legacy to a creditor, no presumption necessarily arose that the bequest was in payment of the debt, and the presumption that it was could not be indulged where the legacy was less than the debt, nor could it be aided by fact that creditor was named as a residuary legatee, where the residuum was uncertain in amount or time of payment.—Olsen v. Hagan, 172 P. 1173.

### (C) Advancements, Ademption, Satisfaction, and Lapse.

e-776 (Wash.) Under will bequeathing a named sum, provided legatee is legally divorced from her husband and still bears his name, where legatee had not been divorced at death of testator, legacy lapsed, and a subsequent divorce was unavailing.—In re Nichols' Estate, 172 P. 1146.

#### (D) Election.

40-781 (Wash.) One cannot take under a will and at the same time set up a claim to the entire estate on the ground that the testator agreed to will him the entire estate.—Parkes v. Burkhart, 172 P. 908.

### WIRE TAPPING.

See Telegraphs and Telephones, 279.

### WITHDRAWAL.

See Criminal Law, 274.

### WITNESSES.

See Appeal and Error, \$\sim 1048; Criminal Law, \$\sim 507, 543, 553, 594, 595, 785, 829, 919, 1036, 1170½; Depositions, \$\sim 12; Evidence, \$\sim 502; Perjury; Trial, \$\sim 45; Wills, \$\sim 119, 144, 303.

### II. COMPETENCY.

#### (A) Capacity and Qualifications in General.

40(2) (Ariz.) Admission of testimony of Indian boy of 13, objected to because of witness youth and inability to understand obligation of an oath, was discretionary.—Sheek v. State, 172

(C) Testimony of Parties or Persons Interested, for or against Representatives, Survivors, or Successors in Title or Interest of Persons Deceased or Incompetent.

\$\(\sigma\) = 159(8) (Okl.) Under Rev. Laws 1910, \$\(\sigma\)
5049, party to civil action against administrator is incompetent to testify, in his own behalf, to facts which will raise implied contract between party and decedent.—Fuss v. Cocannouer, 172 P. 1077.

### (D) Confidential Relations and Privileged Communications.

€==219(3) (Or.) In a depositor's action against a bank to recover a deposit, a letter written by him to an attorney held not privileged as one between attorney and client under L. O. L. § 733, subd. 2, in view of section 734, where plaintiff had testified on the same subject.—McNamee v. First Nat. Bank, 172 P. 801.

### III. EXAMINATION.

### (B) Cross-Examination and Re-Examina-

269(15) (Ariz.) Cross-examination of plaintiff's witness to develop a matter of defense set up in the answer, and which defendant is required to bring out as a part of his own case, is properly excluded.—Ellis v. First Nat, Bank. 172 P. 281.

6-276 (Colo.) If defendant, called by plaintiff for examination under Rev. St. 1908, § 7284, had suffered default, he was no longer adverse party, but his testimony might be properly admitted, in view of notice of cross-examination.

—Western Investment & Land Co. v. First Nat. Bank, 172 P. 6.

Bank, 172 P. 0.

237(3) (Cal.App.) Where, upon cross-examination of yietim of assault with intent to kill who had stated at trial that he could not recall incidents, it developed that before grand jury he attempted to give some details of shooting, it was proper on redirect examination to ask how he came to give such testimony before grand jury.—People v. Shaw, 172 P. 401.

# IV. CREDIBILITY, IMPEACHMENT, CONTRADICTION, AND CORROBORATION.

#### (A) In General.

\$\ightharpoonup 317(3)\$ (Cal.) Under Code Civ. Proc. \$ 2061, subd. 3, the court, if a witness willfully swears falsely to a material fact, is justified in rejecting his whole testimony.—In re Friedman's Estate, 172 P. 140.

\$\colon=327\$ (Mont.) In action for injuries to pedestrian when struck by automobile on highway, evidence that he was then intoxicated was admissible under the general denials of the answer, as challenging credibility of his testimony as to speed of the automobile.—Herzig v. Sandberg, 172 P. 132.

(B) Character and Conduct of Witness. €=352 (Ariz.) Where accused's witness, called to testify as to general reputation of a state's witness for truth and veracity, not understanding what general reputation meant, persisted in stating his own opinion of state witness' truth and veracity, disclosing personal enmity towards him, his testimony was properly excluded.—Sheek v. State, 172 P. 662.

\$\iff \sim 354\$ (Colo.) Defendant tried for larceny of beef animal cannot be impeached on immaterial matter of his ever having killed any beef.—King v. People, 172 P. 8.

### (C) Interest and Bias of Witness.

⇒369 (Wash.) In action for injuries, where defendant set up release given to indemuity company by plaintiff, it was competent to show that a witness for defendant who procured the release was the agent of the indemnity company for the purpose of showing his credibility.

Rust v. Washington Tool & Hardware Co., 172 P. 846.

\$\infty\$370(1) (Cal.App.) Conceding arresting ofto his credibility, but did not conclusively show that his testimony or that of witnesses secured by him was false.—People v. Fraysier, 172 P. 1126.

(D) Inconsistent Statements by Witness. \$\inc\$380(5) (N.M.) Under Code 1915, \$ 2180, proof of prior contradictory statements of party's own witness, is admissible only where witness has given affirmative testimony hostile to party calling him.—State v. Hite, 172 P. 419. Under Code 1915, \$ 2180, that one's own witness has failed to testify as expected does not warrant his impeachment by proof of prior statements in conformity to what he was expected to testify—Id

pected to testify.-Id.

@=382 (N.M.) Under Code 1915, \$ 2180, proof of prior contradictory statements of party's own witness, must be confined to contradictions of injurious testimony.—State v. Hite, 172 P. 419.

€=383 (Utah) A witness cannot be impeached as to immaterial statements.—Kuchenmeister v. Los Angeles & S. L. R. Co., 172 P. 725. 397 (Wash.) That witnesses in police court testified contrary to their testimony in the civil suit went to the weight and credibility and not the competency of their testimony.—McDorman v. Dunn, 172 P. 244.

### WOMEN.

See Jury, \$39.

### WORDS AND PHRASES.

"Abutting upon street."—Chicago, M. & St. P. Ry. Co. v. Poland (Mont.) 172 P. 541.
"Accomplice."—People v. Beggs (Cal.) 172 P. 152; State v. McCurtain (Utah) 172 P. 481.
"Acquire."—Jolly v. McCoy (Cal. App.) 172 P.

"Actionable negligence."—Lusk v. Wilkes (Okl.) 172 P. 929.

"Actionable per se."—Ecuyer v. New York Life Ins. Co. (Wash.) 172 P. 359.

"Action for determination of interest in real property."—Zane v. Vawter (Kan.) 172 P. 37.

"Admission."-State v. Duncan (Wash.) 172

"Admission. —State v. Daniel, P. 915.

"Alibi."—Azbill v. State (Ariz.) 172 P. 658.

"Alienation."—Worthington v. Tipton (N. M.) 172 P. 1048.

"Also."—Lindsley v. City and County of Denver (Colo.) 172 P. 707.

"Amendment."—Maclean v. Brodigan (Nev.) 172 P. 375.

172 P. 375.

"Any cause."-Hoglan v. Geddes (Wyo.) 172 P.

"Appeal."—State v. Superior Court of King County (Wash.) 172 P. 257.

"Appurtenance."—One Cadillac Automobile v. State (Okl.) 172 P. 62; Lebrecht v. Same, Id. 65; One Moon Automobile v. Same, Id. 66; State v. One Packard Automobile, Id. "Arising in course of employment."—Moore & Scott Iron Works v. Industrial Accident Commission (Cal. App.) 172 P. 1114.

"Assault with intent to rape."—State v. Duckett (N. M.) 172 P. 189.

"Assumption of risk."—Kuchenmeister v. Los Angeles & S. L. R. Co. (Utah) 172 P. 725.

"Attempt to collect."—Northern Pac. Ry. Co. v. Snohomish County (Wash.) 172 P. 878.

"Attestation."—In re Jones' Estate (Wash.) 172 P. 206.

P. 206.

"Bad faith."-Hamaker v. Bryan (Cal.) 172 P. 391

"Benefit."—Bundy v. Petroleum Products Co. (Kan.) 172 P. 1020.
"Benevolence."—Susman v. Young Men's Christian Ass'n of Seuttle (Wash.) 172 P. 554.
"Bins."—In ro Friedman's Estate (Cal.) 172 P.

140.

"Bitulithic."—Washburn v. Board of ('om'rs of Shawnee County (Kan.) 172 P. 997.

"Bitumen."—Washburn v. Board of Com'rs of Shawnee County (Kan.) 172 P. 997.

"Bituminous macadam."—Washburn v. Board of Com'rs of Shawnee County (Kan.) 172 P. 997.

"Blind."—Industrial Commission of Colorado v. Johnson (Colo.) 172 P. 422.

"Bona fide purchaser."—Berry v. Tolleson (Okl.) 172 P. 630.

"Brought."—Bruenn v. North Yakima School Dist. No. 7, Yakima County (Wash.) 172 P. 569.

"Carrier."-Cushing v. White (Wash.) 172 P.

Carrier.—Cusning v. White (Wash.) 172 P.
229.

"Cases at law."—City of Reno v. Dixon (Nev.)
172 P. 367.

"Certiorari."—Lanterman v. Anderson (Cal.
App.) 172 P. 625.

"Charity."—Susman v. Young Men's Christian
Ass'n of Seattle (Wash.) 172 P. 554.

"Citizen."—Rentie v. Rentie (Okl.) 172 P. 1083.

"Colorable transaction."—Osborn v. Osborn
(Kan.) 172 P. 23.

"Common carrier."—Cushing v. White (Wash.)
172 P. 229.

"Company."—Knights and Ladies of Security v.
Grey (Okl.) 172 P. 933.

"Condition precedent."—In re Nichols' Estate,
(Wash.) 172 P. 1146.

"Constructive trust."—Powell v. Adler (Okl.)
172 P. 55; Parkes v. Burkhart (Wash.)
172 P. 908.

"Consummate."—Turner v. Watkins (Cal. App.)
172 P. 620.

172 P. 620.
"Contract."—State v. District Court of First Judicial Dist. in and for Lewis and Clark County (Mont.) 172 P. 1030.
"Contributory negligence."—Kuchenmeister v. Los Angeles & S. L. R. Co. (Utah) 172 P.

"Conversion."—Dixon v. Southern Pac. Co. (Nev.) 172 P. 368.
"Conviction."—State v. Will (Kan.) 172 P.

1003.

"Day."-State v. Hurn (Wash.) 172 P. 1147. "Defective."-Daniels v. Bunch (Okl.) 172 P. 1086.

"Delivery."—King v. Antrim "Lumber Co. (Okl.) 172 P. 958. "Discretion."—Parker v. Industrial Insurance Department (Wash.) 172 P. 830. "Dissipated."—Hughes v. Carr (Wash.) 172 P.

"District."—State v. Balles (N. M.) 172 P. 196.
"Due process of law."—Wilhite v. Cruce (Okl.)
172 P. 962.

"Elsewhere."—Azbill v. State (Ariz.) 172 P.

"Employed in interstate commerce."—Stool v. Southern Pac. Co. (Or.) 172 P. 101.

"Equitable assignment."—Wasco County v. New England Equitable Ins. Co. (Or.) 172 P. 126. "Error in law occurring at the trial."—Stow v. Superior Court of California in and for Alameda County (Cal.) 172 P. 598. "Escrow."—Foster v. Los Angeles Trust & Savings Bank (Cal. App.) 172 P. 392. "Estoppel."—Lillard v. Board of County Com'rs of Johnson County (Kan.) 172 P. 518. "Every person."—State v. Kelly (Wash.) 172 P. 175. "Exclusive."—State v. Taylor (Wash.) 179 P. "Exclusive."-State v. Taylor (Wash.) 172 P. 217. "Expense in incurring bonded indebtedness."—
Maxey v. Board of Sup'rs of Yuma County
(Ariz.) 172 P. 285.
"Extortion."—People v. Beggs (Cal.) 172 P. 152.
"Extra."—Lantry Contracting Co. v. Atchison,
T. & S. F. Ry. Co. (Kan.) 172 P. 527. "False papers."—State v. Pierson (Wash.) 172 P. 236.
"Family."—Koehler v. Gray (Kan.) 172 P. 25.
"Fiduciary relation."—Rowe v. Freeman (Or.) 172 P. 508.
"Final order."—Miller v. Miller (Kan.) 172 P. 1010. "Force."--State v. Snyder (Nev.) 172 P. 364. "Forthwith."-State v. French (Wash.) 172 "Fraud."-Rucker v. Allendorph (Kan.) 172 P. 524. "Gain."—Stanton v. Zercher (Wash.) 172 P. "Go-devil."—Hamp v. Pend Oreille County (Wash.) 172 P. 869. "Good behavior."—Ex parte Hamm (N. M.) 172 P. 190. "Good will."-Stanton v. Zercher (Wash.) 172 P. "Graveyard."-Gray v. Craig (Kan.) 172 P. 1004. "Guest."-Piluso v. Spencer (Cal. App.) 172 P. 412. 412.

"Highway."—Hamp v. Pend Oreille County (Wash.) 172 P. 869.

"Holder in due course."—Stevens v. Keegan (Kan.) 172 P. 1025; Daniels v. Bunch (Okl.) 172 P. 1086.

"Hotel."—Piluso v. Spencer (Cal. App.) 172 P. 412. "Idling."-Stool v. Southern Pac. Co. (Or.) 172 101. "Implied trust."—Parkes v. Burkhart (Wash.) 172 P. 908. "Incited."—Piluso v. Spencer (Cal. App.) 172 P. 412. "Income."—Stanton v. Zercher (Wash.) 172 P. "Incorporeal hereditament."—Huston v. Cox (Kan.) 172 P. 992. "Incumbent."—Benton v. Hunt (Cal. App.) 172 P. 177. "Independent contractor."—Scales v. First State Bank (Or.) 172 P. 499. "Inn."—Piluso v. Spencer (Cal. App.) 172 P. 412.

"Insurance company."—Knights and Ladies of Security v. Grey (Okl.) 172 P. 933.

"Interstate commerce."—Stool v. Southern Pac. Co. (Or.) 172 P. 101; Kuchenmeister v. Los Angeles & S. L. R. Co. (Utah) 172 P. 725; State v. Postal Telegraph-Cable Co. of Washington (Wash.) 172 P. 902.

"Judgment."—Scott v. People (Colo.) 172 P. 9.

"Judgment in action or special proceeding in district court."—State v. District Court of Pourteenth Judicial District in and for Wheatland County (Mont.) 172 P. 540. 412 Wheatland County (Mont.) 172 P. 540
"Jurisdiction."—State v. Superior County "Jurisdiction."—State v. Superior Court of King County (Wash.) 172 P. 257.

"Last clear chance."—Schommers v. Great Northern Ry. Co. (Wash.) 172 P. 848.

"Law of the land."—Wilhite v. Cruce (Okl.) 172 P. 962. 540. Great

"Libelous per se."—Dawkins v. Billingsley (Okl.) 172 P. 69. "Lodger."—Piluso v. Spencer (Cal. App.) 172 P. 412. "Lot or parcel of land."—Chicago, M. & St. P. Ry. Co. v. Poland (Mont.) 172 P. 541.
"Maintain an action."—Foley v. Pierce County School Dist. No. 10 (Wash.) 172 P. 819.
"Maintained."—Bruenn v. North Yakima School Dist. No. 7, Yakima County (Wash.) 172 P. 569. "Material alteration."-Bank of Commerce of Sulphur v. Webster (Okl.) 172 P. 942.

"Maturity,"—United States Nat. Bank of Red Lodge v. Shupak (Mont.) 172 P. 324.

"May,"—State v. District Court of First Judicial Diet in and for Longing Court of First Judicial Diet in and for Longing Court of State Court of First Judicial Diet in and for Longing Court of State Cou "May."—State v. District Court of First Judicial Dist. in and for Lewis and Clark County (Mont.) 172 P. 1030.
"Merchantable title."—Flood v. Von Marcard (Wash.) 172 P. 884. "Military service."—Maclean v. Brodigan (Nev.) 172 P. 375. "Mutual combat,"-State v. Moss (N. M.) 172 P. "Natural water course."—Evans v. Diehl (Kan.) 172 P. 17. "Net proceeds."—Nathan v. Porter (Cal. App.) 172 P. 170. "Negligenc<mark>e.</mark>" "-Lusk v. Wilkes (Okl.) 172 P. 929. "New matter."—H. A. Seinsheimer & Co. v. Jacobson (N. M.) 172 P. 1042.
"New trial."—Carkonen v. Columbia & P. S. R. Co. (Wash.) 172 P. 816.
"Notice."—Mitchell v. Guaranty State Bank of Okmulgee (Okl.) 172 P. 47; Daniels v. Bunch, Id. 1086; Siegley v. Kelley (Wash.) 172 P. 203. Occupation of carrying passengers for hire."
—City of Spokane v. Knight (Wash.) 172
P. 823. "Officer." -State v. Mayor of Butte (Mont.) 172 P. 134. P. 134.

"Or any other life insurance company."—
Knights and Ladies of Security v. Grey
(Okl.) 172 P. 933.

"Or benefit."—Bundy v. Petroleum Products
Co. (Kan.) 172 P. 1020.

"Other."—Knights and Ladies of Security v.
Grey (Okl.) 172 P. 933.

"Ownership."—Little-Wetzel Co. v. Lincoln
(Wash.) 172 P. 746.

"Part performance."—Osborne v. Osborne (N.
M.) 172 P. 1039; Bowker v. Linton (Okl.) M.) 172 P. 1039; Bowker v. Linton (Okl.) 172 P. 442. "Partnership."-McNally v. Harley (Okl.) 172 "Party."—Brown v. Brown (Kan.) 172 P. 1005; Berryhill v. Jackson (Okl.) 172 P. 787. "Passenger."—Lusk v. Wilkes (Okl.) 172 P. 929. "Pawnbroker."—Provident Loan Soc. v. and County of Denver (Colo.) 172 P. 10. "Payment."—United States Nat. Bank of Red Lodge v. Shupak (Mont.) 172 P. 324. "Person."—State v. Kelly (Wash.) 172 P. 1175. "Prejudice."—In re Friedman's Estate (Cal.) 172 P. 140. (Wash.) 172 P. 915.

"Private carrier."—Cushing v. White (Wash.)

172 P. 229. "Premeditated design."-State "Private nuisance."—Winbigler v. Clift (Kan.) 172 P. 537. "Privileged communication."—Dawkins v. Billingsley (Okl.) 172 P. 69.
"Property owned or controlled."—Chicago, M. & St. P. Ry. Co. v. Poland (Mont.) 172 P. "Proviso."—In re Bovier's Estate (Utah) 172 ř. 683. "Purchaser for value."—Embagi v. Northwes-urchaser for value."—Embagi v. Northwes-tern Improvement Co. (Wash.) 172 P. 834. Ipdexes see sametopic and KEY-NUMBER

"Qualified privilege."—Ecuyer v. New York Life Ins. Co. (Wash.) 172 P. 359.

"Question of fact."—Parker v. Industrial Insurance Department (Wash.) 172 P. 830.

"Railroad."—Muskogee Electric Traction Co. v. Doering (Okl.) 172 P. 793.

"Raises."—Williamson v. Salt Lake & O. Ry. Co. (Utah) 172 P. 680.

"Res ipsa loquitur."—Williamson v. Salt Lake & O. Ry. Co. (Utah) 172 P. 680.

"Res judicata."—Northern Pac, Ry. Co. v. Snohomish County (Wash.) 172 P. 878.

"Resulting trust."—Powell v. Adler (Okl.) 172 P. 55; Parkes v. Burkhart (Wash.) 172 P. 908.

"Revision."—Maclean v. Brodigan (Nev.) 172 P. 375.

"Revision."—Maclean v. Brodigan (Nev.) 172 P. 375.

"Robbery."—State v. Snyder (Nev.) 172 P. 364.

"Signers."—Landrum v. Ramer (Colo.) 172 P. 364.

"Signers."—Landrum v. Ramer (Colo.) 172 P. 364.

"Signers."—Landrum v. Ramer (Colo.) 172 P. 364.

"Stewart (Cal. App.) 172 P. 769.

"Street railway."—Muskogee Electric Traction Co. v. Doering (Okl.) 172 P. 793.

"Subrogation."—Southwestern Surety Ins. Co. v. King (Okl.) 172 P. 74.

"Sufficient consideration."—Riddle v. Hudson (Okl.) 172 P. 921.

"Tender."—United States Nat. Bank of Red Lodge v. Shupak (Mont.) 172 P. 324.

"There be and is hereby granted."—Dallas v. Swigart (N. M.) 172 P. 416.

"30-10-5 For Case-Made."—Hoffman Bros. Inv. Co. v. Porter (Okl.) 172 P. 632.

"Tideland."—State v. Van Vlack (Wash.) 172 P. 563.

"Tort."—Calkins v. Salina Northern R. Co. (Kan.) 172 P. 20.

"Transitory action."—Zane v. Vawter (Kan.) 172 P. 20.

"Trust ex maleficio."—Parkes v. Burkhart (Wash.) 172 P. 908.

"Usury."—Bean v. Rumrill (Okl.) 172 P. 452.
"Valuable consideration."—O'Neill v. Mutual
Life Ins. Co. of New York (Utah) 172 P. 306.
"Want."—Rubens v. Rubens (Wash.) 172 P.
831.
"Willful misconduct."—Bay Shore Laundry Co.
v. Industrial Accident Commission of California (Cal. App.) 172 P. 1128.
"Without recourse."—Hammood Lumber Co. v.
Kearsley (Cal. App.) 172 P. 404.

### WORK AND LABOR.

See Mechanics' Liens.

### WORKMEN'S COMPENSATION ACTS.

See Master and Servant, =347-417.

### WRIT OF ERROR.

See Appeal and Error.

### WRITS.

See Attachment; Certiorari; Execution; Garnishment; Habeas Corpus; Injunction; Mandamus; Process; Prohibition; Quo Warranto; Replevin.

### WRITTEN ORDER.

See Contracts. == 232.

### WRONGFUL ATTACHMENT.

See Attachment, 374.

### WRONGS.

See Torts.

Y. M. C. A.

See Evidence, ==22.

For cases in Dec. Dig. & Am. Dig. Key No. Series & Indexes see same topic and KEY-NUMBER

# TABLES OF PACIFIC CASES

IN

### STATE REPORTS

### VOL. 34, CALIFORNIA APPELLATE REPORTS

Cal.		Pac.	Cal.		Pac.	Cal.		Pac.	Cal.		Pac.	Cal.		Pac.	Cal.		Pac.	Cal		Pac.
Rep.		Rep.	Rep.		Rep.	Rep	•	Rep.	Rep.		Rep.	Rep	•	Rep.	Rep		Rep.	Rep.		Rep.
Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.
	166	1023	126	166	832	239	167	178	379	167	541	512	168	141	625	168	588	716	168	699
2	166	828	129	166	1014	245	167	294	384	167	547	519	168	154	629	168	586	719	168	707
10	166	821	134	166	839	258	165	704	390	167	551	516	168	382	632	168	581	720	168	700
16	166	1031	137	166	833	263	167	194	393	167	413	519	168	143	637	168	581	724	168	703
21	166	1033	143	166	838	267	167	890	397	167	1147	521	168	147	638	167	1155	734	168	1053
24	166	861	146	166	869	269	167	181	400	167	543	524	168	155	641	168	574	737	168	1052
28	<b>166</b>	859	150	166	1037	272	167	299	411	167	703	527	168	156	642	168	577	739	168	1065
33	166	1025	153	166	867	282	167	197	420	167	900	530	168	142	644	168	590	742	168	1054
35	166	851	158	166	862	284	167	190	424	167	900	534	168	159	656	168	391	744	168	1063
87	166	856	162	166	1013	290	167	184	426	167	701	538	168	152	658	<b>168</b>	588	749	168	1062
41	166	823	164	167	177	293	167	195	431	167	902	541	168	157	660	168	595	752	168	1061
53	166	1035	168	167	182	296	167	291	433	167	895	545	167	642	675	168	578	754	168	1058
55	166	817	174	167	188	302	167	287	440	167	1143	549	168	396	676	168	584	760	168	1055
65	165	152	177	166	1024	306	167	305	442	168	23	564	168	402	681	168	576	768	169	395
66	166	864	180	167	185	309	167	806	459	167	891	567	168	371	683	168	583	771	168	1150
. 75	166	1017	184	167	162	314	167	303	471	167	899	579	168	376	686	168	578	773	169	355
76	167 166	887	193	166	1021	317	167	197	475	167	1144	571	168	372	692	168	390	776	168	1159
82	100	871	197	167	888	321	167	288	483	168	151	574	168	376	693	168	587	781	169	666
- 88 92	166 166	852 1018	197 200	167 167	890	330	169	86	487 488	168	150 30	576	170	155	695	168	574	785	168	1149
95	166	858	208	167	174 187	336 340	167	406	489	168 168	150	581	168	387	698	168	698	789	168	1162
98	166	1035	210	167	171	344	167 167	408 404	490	168	145	584 589	168 168	373 392	699	168 168	390	799 802	168 166	1161 1014
102	166	853	218	166	1019	348	167	409	495	168	160	599			701		390		168	148
107	166	1016	223	167	189	357	167	550	498	168	144	613	168 168	377 383	702 712	168 168	694 420	803 804	168	419
iii	166	849	226	167	166	360	167	552	500	168	148	615	168	385	713	168	702	804	168	1061
117	166	1027	237	167	193	365	167	554	504	168	368	621	168	388	715	168	700	OUT	TAO	1001
		~~		10.	-00		101	JU2	002	100	500	Out	100	000	110	T-00	.00			

### VOL. 34, CALIFORNIA APPELLATE REPORTS

Page	Page
A. E. Baranger & Co. v. Meyer, Cahn &	Carter v. Industrial Accident Commission
Talbott (166 P. 862)	(168 P. 1065)
Ahearn v. Lane (167 P. 303) 314	Chase v. Stevens (166 P. 1035) 98
Allen v. Chatfield (168 P. 1149) 785	Church v. Fidelity & Deposit Co. of Mary-
Anderson v. Wilstrup (168 P. 1150) 771	land (168 P. 1054)
Armstrong v. Barceloux (167 P. 895) 433	City of Oakland v. Wheeler (168 P. 23) 442
D-11 C. (105 D 400) 040	Clark, In re (167 P. 1143)
Bailey v. Security Trust Co. (167 P. 409) 348	Clark v. Forbes (168 P. 155)
Bamberger-Stern Co. v. Baer (168 P. 390)	Clemens v. Gregg (167 P. 294)
Baranger & Co. v. Meyer, Cahn & Talbott	Clemens v. Gregg (167 P. 299)
(166 P. 862)	(168 P. 588)
Barclay v. Supreme Lodge of Fraternal	Cole v. Merchants' Trust Co. (166 P.
Brotherhood (167 P. 701)	871)
Beatty v. Rianda (167 P. 185) 180	Columbia Coffee & Spice Co. v. Le Baron
Beecham v. Burns (168 P. 1058) 754	Bros. & Nelson (168 P. 700) 715
Beecham v. Burns (168 P. 1061) 804	Connely v. Superior Court (169 P. 355) 773
Bellingham Bay Lumber Co. v. Hopkins	Cople Co. v. Hindes (170 P. 155) 576
. (168 P. 159)	County of Riverside v. Alberhill Coal &
Benning v. Superior Court of Sacramento County (167 P. 291)	Clay Co. (168 P. 152)
Betkouski v. Superior Court of Los An-	Cowell Lime & Cement Co. v. Smith (166 P. 1018)
geles County (166 P. 1027)	Crittenden v. St. Hill (166 P. 1016) 107
Betts v. Orton (167 P. 1147) 397	Cruse v. Adams (168 P. 390) 701
Blanc v. De Latour (168 P. 141)	
	Carlong Iron Works v. Chico Ice & Cold
Brion v. Cahill (165 P. 704) 258	Cyclops Iron Works v. Chico Ice & Cold Storage Co. (166 P. 821)
	Storas (In-
California Savings & Commercial Bank v.	ing V. Figher (166 P. 833)
Canne (169 P. 395)	havie Dee (100 p. 55%)
Capuchino Land Co. v. Board of Trustees	nee 1011 v. Per (168 P. 004) 703) 794
Capuchino Land Co. v. Board of Trustees of City of San Bruno (167 P. 178) 239	City City Angeles (100 11 100)
172 P.	1 Lick
Α,	Cyclops Iron Works v. Chico Ice & Cold Storage Co. (166 P. 821)
``	M (a)
	,DA <sub>1</sub>

34 CAL. APP.—Continued. Pag	
Driscoll v. Myers (168 P. 145)	McKinnell v. Hansen (167 P. 887)
Easton v. Industrial Accident Commission (167 P. 288)	Martin v. Sharp & Fellows Contracting Co.
Elk Grove Union High School Dist. v. In-	Weston (168 P. 587)
dustrial Accident Commission of California (168 P. 392)	
Facundas v. Curtis (168 P. 1061)	Northern Redwood Lumber Co. v. Indus-
County (166 P. 864)	(166 P. 828)
Co. (167 P. 900)	Norton v. Lewis (168 P. 388)
rick, Inc. (168 P. 578)	
(168 P. 420)	Oliphant v. Home Builders (168 P. 700) 72 Oxford v. Imperial Southside Water Co.
cisco (166 P. 1017)	7 Parke v. Board of Trustees of Firemen's
Godsil v. San Joaquin County Bldg. Trades Council of California (166 P. 1035) 5 Gray v. Industrial Accident Commission	1025)
(168 P. 702)	People v. Billings (168 P. 396) 54 People v. California Safe Denosit & Trust
P. 197)	People v. Charne (167 P. 703)
Henry Cowell Lime & Cement Co. v. Smith (166 P. 1018)	People v. Crane (168 P. 307)
Hogan v. Anthony (166 P. 861)       2         Holt, In re (167 P. 184)       29         Hosking v. Barceloux (167 P. 895)       43	People v. Dufur (168 P. 590) 64
Houts v. First Trust & Savings Bank (168 P. 383)	-   Pannia w Wingaa (187 D 419) 90
P. 177)	People v. Gasser (168 P. 157)
Imperial Land & Stock Co. v. Oster (168 P. 1159)	7   People v. Lensen (167 P. 406)
Jacks v. Taylor (166 P. 858) 9 Jackson v. Brown (165 P. 152) 6	People v. Maljan (167 P. 547)
Jacobi v. C. A. Smith Lumber Co. (168 P. 391)	People v. Small (168 P. 581) 63
151)	People v. Warner (168 P. 419)
Kaster v. Superior Court of Sacramento County (166 P. 852)	People's Water Co. v. Perkins (168 P. 154)
hawk Mining & Leasing Co. (Clemens v. Gregg, 167 P. 294)	
Keith v. Ramsey (167 P. 408)       34         Keller v. Cliver (167 P. 551)       39         Kerner v. Spiegl (166 P. 1013)       16         Kostriken, In re (168 P. 150)       48	0 (167 P. 1144)
Kostriken, In re (168 P. 150) 48 Lillard v. Abbott Hardware Co. (168 P.	Rhoades v. Lyons (168 P. 385)
707)	1   Rowley v. Davis (167 P. 162) 18
McCord v. Martin (166 P. 1014) 12 McDonagh v. Industrial Accident Commis-	Sargent v. Corey (166 P. 1021)
sion (166 P. 1024)	7   Saxon v. Buckeye Mfg. Co. (167 P. 174) 20 1   Scott v. Woodworth (167 P. 543) 40 1   Sherwood v. Lowell (167 P. 554) 36
McGavin v. San Francisco Protestant Or- phan Asylum Soc. (167 P. 182) 16	Shuey v. Mulcrevy (166 P. 1019) 21

	_
34 CAL. APP.—Continued. Page	Page
Stapp v. Madera Canal & Irrigation Co. (166 P. 823)	Torrey v. Refrigeration Plants Mfg. Co. (168 P. 576)
Starbuck v. City of Fullerton (168 P. 583)	Transcontinental Tel. Co. v. Neylan (167
Steinbach v. Smith (167 P. 189)	P. 541)
Stephens v. Weyl-Zuckerman & Co. (167 P. 171)	Walker v. Baumeister (166 P. 1037) 150 Wallace v. Macdonough Theater Co. (168
Sterilization Co. of California v. Tucker (168 P. 372)	P. 144)
Stineman v. Gottschalk (167 P. 550) 357 Swartz v. Filipelle (168 P. 574) 695	Warman Steel Casting Co. v. Redondo Beach Chamber of Commerce (166 P.
	856)
Taft v. Haas (167 P. 306)	287)
Taylor v. Northwestern Nat. Ins. Co. (167	Wildenhayn v. Justice's Court of City and
P. 899)	
Thoits v. Byxbee (167 P. 166) 226	Wissman v. Cabaniss (168 P. 150) 487
	Wollenshlager v. MacLean (166 P. 853) 102 Woo Hah, In re (166 P. 851) 35

### VOL. 40, NEVADA REPORTS

Nev. Rep.		Pac. Rep.	Nev. Rep.		Pac. Rep.	Nev Rep		Pac. Rep.	Nev. Rep.		Pac. Rep.	Nev. Rep.		Pac. Rep.	Nev.		Pac. Rep.	Nev. Rep		Pac. Rep.
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Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.
1	160	23	89	160	811	143	161	512	228	161	737	300	161	717	345	163	731	414	165	339
ē	160	1198	103	160	793	151	161	713	241	161	741	317	161	933	351	164	351	423	165	220
•																				
9	159	1081	110	160	772	157	161	514	262	160	782	327	165	XX	361	164	645	428	165	759
20	160	18	121	161	304	163	161	510	262	161	715	329	163	245	385	160	22	435	166	927
35	160	775	131	161	306	170	161	722	281	161	717	335	163	244	385	164	644	447	153	566
55	160	253	135	161	162	170	167	324	284	161	929	338	163	246	395	164	1009	447	167	27
66	160	786	139	161	512	220	161	516	299	161	933	343	163	731	403	165	237	537	167	317

### VOL. 40, NEVADA REPORTS

	•
Aspinwall v. Aspinwall (160 P. 253) 55	Page Loose v. Larsen (161 P. 514) 157
Bailey, In re (161 P. 512)	McIntosh v. Knox (165 P. 337)
(See 165 P. xx)	McLeod v. Miller & Lux (153 P. 566; 167 P. 27)
Carey v. Clark (161 P. 713)	Miller v. Thompson (160 P. 775)
(159 P. 1081)	Nye County v. Schmidt (See 165 P. xx) 327  O'Donnell v. Sixth Judicial Dist. Court in and for Humboldt County (165 P. 759) 428
1009)	Parker v. De Bernardi (164 P. 645) 361 Phillips v. Snowden Placer Co. (160 P.
Danforth v. Danforth (166 P. 927) 435 D. C. Wheeler, Inc., v. O'Brien Bros. (165 P. 339)	786)
Dixon, In re (161 P. 737)	Ramelli v. Sorgi (161 P. 717)
Eddy v. State Board of Embalmers (163 P. 245)	Robinson Mining Co. v. Riepe (161 P. 304) 121  State v. Enkhouse (160 P. 23)
First Nat. Bank of Ely v. Meyers (161 P. 929)	State v. Hill (160 P. 772)
Gardner v. Pacific Power Co. (163 P. 731) 343 Gordon's Estate, In re (161 P. 717) 300	(161 P. 516)
Hartung's Estate, In re (160 P. 782; 161 P. 715)	State v. Wilson (161 P. 306)
Jensen v. District Court of Seventh Judicial Dist. in and for Esmeralda County (161 P. 162)	Verdi Lumber Co. v. Bartlett (161 P. 933) 317 Warren v. Glasgow & Western Exploration
Keenan v. Keenan (164 P. 351)	Co. (160 P. 793)
Leach v. Mason Valley Mines Co. (161 P. 513)	Winters, In re (163 P. 244)

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## VOL. 49, UTAH REPORTS

Uta Rep		Pac. Rep.	Uta Rep		Pac. Rep.	Uta Rep		Pac. Rep.	Utal Rep		Pac. Rep.	Utal Rep.		Pac. Rep.	Utah Rep		Pac. Rep.	Uta Rep		Pac. Rep.
Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.
ī	160	872	71	161	1124	137	161	910	227	162	616	307	164	190	390	163	1093	528	165	477
6	161	167	75	162	70	167	162	75	232	162	369	314	163	1102	405	164	484	536	165	465
9	161	1120	82	162	83	177	161	1126	243	161	1127	320	163	1104	430	164	872	541	164	878
19	161 <sup>.</sup>	677	89	162	89	181	162	366	258	162	621	336	164	253	444	164	852	548	164	1020
24	161	678	93	162	63	188	162	611	262	162	622	346	164	500	453	164	1033	555	164	1022
28	161	680	100	162	373	195	162	613	270	163	255	353	164	478	477	164	1041	567	164	877
35	161	1134	105	162	86	197	161	926	274	163	256	359	164	498	493	164	1047	569	164	856
43	161	· 922	111	162	618	200	162	375	280	163	787	368	164	480	506	164	1052	598	164	367
53	161	927	118	162	72	205	162	. 876	285	163	789	373	164	482	510	164	1026	611	165	471
58	162	79	125	162	65	221	162	614	296	163	1097	381	164	494	519	164	1029			

### VOL. 49, UTAH REPORTS

Page	Page
Baird v. Denver & R. G. R. Co. (162 P. 79)	Mallett v. Velie Motor Car Co. (164 P. 877)
Barton v. Sanpete County (162 P. 611) 188 Bastian v. Nebeker (163 P. 1092) 390	Morris v. Blunt (161 P. 1127)
Beason's Estate, In re (161 P. 678) 24	Moyle v. McKean (162 P. 63) 93
Beck v. Lewis (164 P. 480)	Murdock v. Farrell (163 P. 1102) 314
Shurtliff (164 P. 856) 569	Nelson Supply Co. v. Leary (164 P. 1047) 493
Bingham & G. R. Co. v. North Utah Min- ing Co. of Bingham (162 P. 65) 125	Ontario Silver Mining Co. v. Hixon (164
Board of Education of Salt Lake City v. Wright-Osborn Co. (164 P. 1033) 453	P. 498)
	P. A. Sorenson Co. v. Denver & R. G. R.
Callahan v. Pioneer Nurseries Co. (164 P. 878)	Co. (164 P. 1020)
Crosby v. Anderson (162 P. 75) 167	Provo City v. Provo Meat & Packing Co.
Dayton v. Free (162 P. 614) 221	
Denver & R. G. R. Co. v. Ashton-Whyte- Skillcorn Co. (162 P. 83)	Reese v. James Stewart & Co. (162 P. 373) 100   Rich v. Henderson (162 P. 621)
Dimmick v. Utah Fuel Co. (164 P. 872) 430	Richards v. Salt Lake City (161 P. 680) 28
	Roberts v. Bertram (163 P. 787) 280 Russell v. Watkins (164 P. 867) 598
Ephraim Milling & Elevator Co. v. City of Ephraim (161 P. 1124)	Salt Lake City v. Lee (161 P. 926) 197
	Salt Lake Engineering Works v. Utah Con-
Farr v. Wheelwright Const. Co. (163 P. 256)	crete Pipe Co. (161 P. 927)
Fritsch v. Hess (162 P. 70)	Schafer v. Ritchie (162 P. 618)
Geo. A. Lowe & Co. v. Leary (164 P. 1052) 506	(164 P. 1020)
Giesy-Walker Co. v. Briggs (162 P. 876) 205 Gleason v. San Pedro, L. A. & S. L. R. Co.	South High School Dist, of Summit County v. McMillan Paper & Supply Co. (164
(164 P. 484)	P. 1041)
369) 232	State v. Elmer (161 P. 167) 6
Gwilliam v. Ogden City (164 P. 1022) 555	State v. Frisby (162 P. 616)
Holland-Cook Mfg. Co. v. Consolidated	State v. Grisolio (162 P. 613)
Wagon & Mach. Co. (161 P. 922) 43 Houghton v. Barton (165 P. 471) 611	State v. Martin (164 P. 500)
Hulse v. Swicegood (162 P. 89)	State v. Williams (163 P. 1104)
I. X. L. Stores Co. v. Moon (162 P. 622) 262	Swanson v. De Vine (160 P. 872) 1
Johnson v. Geddes (161 P. 910) 137	Tanner v. Beers (165 P. 465) 536
Joseph Nelson Supply Co. v. Leary (164 P. 1047)	Town of Tremonton v. Johnston (164 P. 190)
Lowe & Co. v. Leary (164 P. 1052) 506	Utah Ass'n of Credit Men v. Jones (164 P.
•	1029)
McCarrick v. Lenox Mining Co. (164 P. 478)	
McCornick & Co. v. Bassett (164 P. 852). 444 McCornick & Co. v. National Copper Bank	Watts v. Greenwood (162 P. 72) 118 Wells v. Loofbourow (162 P. 375) 200
of Salt Lake City (163 P. 1097) 296	Wheatley v. Oregon Short Line R. Co. (162 P. 86)
McGuire v. State Bank of Tremonton (164 P. 494)	Witherow v. Mystic Toilers (161 P. 1126) 177